

**Legal and Policy Comments on: 2009 Draft
National Pollutant
Discharge Elimination System
(NPDES) General Permit No. CAR000002
Waste Discharge Requirements for
Discharges of Storm Water Runoff
Associated with Construction Activity**

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

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

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TABLE OF CONTENTS

I.	Preliminary Statement.....	1
	A. Commenting Parties.....	1
	B. Procedural Issues	2
II.	Executive Summary and Recommendations	4
	A. Executive Summary	4
	1. Overview of SWRCB action.....	4
	2. Key legal and policy concerns with the 2009 DCGP	5
	B. Recommendations.....	6
III.	Discussion.....	7
	A. Uncritical, Statewide Numeric Effluent Limits (NELs) Are Legally Improper—Both as Proposed and More Generally—and Should Be Removed from the Final CGP.....	7
	1. The proposed NELs conflict with the federal Clean Water Act’s overarching objective to maintain the natural integrity of the nation’s waters.....	9
	2. The imposition of single, statewide turbidity NEL, notwithstanding knowledge of substantial variation within the State in natural background turbidity and pH levels, would result in “pollution” as defined by the CWA.....	11
	3. The SWRCB has failed to consider causation and its legal obligation to allow natural levels of sediment in discharges from construction sites.....	12
	4. Regarding the turbidity NEL in particular, the SWRCB itself has acknowledged the great importance maintaining natural loads of sediment in waterways.....	14
	5. The CBIA Bridge Approach recommended by the Commenting Parties best conforms to the natural variability of storm water discharges.....	15
	6. The 2009 DCGP contains “stealth” NELs for debris and sediment that are utterly lacking in any evidentiary support, technical	

justification or legal authority meriting their inclusion in the 2009 DCGP.....	16
7. The NEL for pH is both unjustifiably vague and overly broad.	18
8. The SWRCB has failed to conduct a proper analysis of federally mandated factors required for consideration of the proposed NELs; the feeble discussion of economic issues fails to provide any meaningful deliberation.	19
9. Recommendations.....	21
B. Although the Commenting Parties Fundamentally Do Not Object to the Concept of Numeric Actions Levels (NALs), the NALs Proposed by the 2009 DCGP Lack Sufficient Justification.....	23
1. The 2009 DCGP improperly implies that exceedances of NALs would equate to permit violations.....	25
2. Without a design storm component applicable to the NALs, the values will be exceeded in many storm events leading to misleading NAL exceedance reports and potentially inappropriate enforcement actions.	26
3. Recommendations.....	26
C. The 2009 DCGP Must be Revised to Consider the Balancing Factors Codified in the California Water Code.....	28
1. The 2009 DCGP continues to attempt to avoid application of California law.....	28
2. The California Water Code requires the SWRCB consider certain factors in setting permit requirements.....	29
3. The CGP is a joint federal/state permit subject to federal and state laws despite references in the 2009 DCGP purporting to avoid application of state law.	30
4. The 2009 DCGP exceeds federal minimum requirements; and the SWRCB should therefore consider and reconcile the State Factors when reissuing the CGP.....	32
5. Federal law permits the State, when acting as the EPA Administrator's authorized surrogate, to consider any and all factors that are compelled by state law.....	34

6.	The State Board's failure to consider the State Factors will cause potentially disastrous results.	36
7.	Recommendations.....	37
D.	The 2009 DCGP's Monitoring Requirements Must Be Revised to Correct Technical Deficiencies and to Present Scientifically-Defensible, Reasonable, and Feasible Requirements.....	38
1.	Effluent monitoring requirements suffer from technical problems and a lack of proper justification.....	39
2.	The receiving water monitoring program is burdensome, unreasonable, will not produce scientifically useful data, and must be stricken.....	39
3.	Recommendations.....	40
E.	The Post-Construction Requirements Represent an Improper Extension of RWQCB Authority and Must Be Removed from the Final CGP, Allowing Appropriate Regulatory Programs to Address the SWRCB's Concerns.	40
1.	The SWRCB is exceeding its authority to require post-construction controls in a storm water permit for construction site discharges.....	41
2.	Despite statements to the contrary in the DCGP, the post-construction requirements of the DCGP do apply to areas governed by MS4 permits.....	43
3.	The post-construction requirements in the 2009 DCGP conflict with the powers of lead agencies under the California Environmental Quality Act.....	44
4.	Recommendations.....	45
F.	The 2009 DCGP Confers Unprecedented and Excessive Power in the RWQCBs.	45
1.	The 2009 DCGP vest undue power in the Regional Boards to terminate permit coverage.....	46
2.	The 2009 DCGP grants Regional Boards powers to modify the CGP's terms without notice or due process.....	47
3.	Notwithstanding that the post-construction control requirements should not be included in the Final CGP, the Regional Board must not have powers to modify the design of projects already entitled.....	48

4.	Recommendations.....	49
G.	The 2009 DCGP Inappropriately Exempts Certain Projects, Thus Failing to Serve as a Proper General Permit.....	49
1.	Recommendations.....	50
H.	Other Concerns with the 2009 DCGP.....	50
IV.	Conclusion	52

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 April 22, 2009 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 ("2009 DCGP"), as augmented by an errata dated June 10, 2009. 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, we 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 1,600 member companies with more than 100,000 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”). CICWQ’s membership, 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

The Commenting Parties have submitted comments and other materials related to the two prior drafts of the 2009 DCGP, namely the DCGP issued by the SWRCB in March of 2008 and the Preliminary DCGP issued in March of 2007. By these prior comments, as well as those we submit herein on the 2009 DCGP, the Commenting Parties have sought and continue to 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 April 22, 2009 version, as revised, of the 2009 DCGP that currently is under review.

In 2008, the SWRCB staff took the position that information submitted to the State Board during the 2007 PCGP process would not be part of the official record of the Final CGP when it is adopted. (Statements by Greg Gearheart, SWRCB Staff, SWRCB Workshops on 2009 DCGP, May 7 & 21, 2008 (collectively the “May 2008 Workshops”).) The Commenting Parties continue to object to this position. Although we recognize the 2007 process was an informal one, many interested parties expended substantial effort responding to the State Board’s request for information. To ignore that entire process, or suggest that those comments have not informed the development of the instant proposal, would be unreasonable.

This year, State Board staff has confirmed that information submitted to the State Board during the 2008 DCGP process will be a part of the official record. (Email from Annalisa Kihara, SWRCB Staff, to Sandy Mathews, dated June 11, 2009 (attached to these comments).)¹ While the Commenting Parties are pleased that the 2008 record will be a part of the official record for the Final CGP, we are concerned that the material from 2007 and 2008 will not be reviewed carefully.

Because the Commenting Parties believe that many of the concerns raised in 2007 and 2008 remain valid today, the Commenting Parties hereby incorporate by reference several comment letters submitted by others on the PCGP and 2008 DCGP which contain comments that are still relevant to 2009 DCGP requirements. In addition, we are resubmitting materials we provided to the SWRCB throughout the CGP draft process. Specifically, the Commenting Parties are resubmitting the following documents fully incorporated by reference herein:

- June 11, 2008 CBIA letter commenting on the 2008 DCGP; the Commenting Parties’ associated June 11, 2008 Legal and Policy Comments document with all

¹ Pursuant to applicable state and federal law, the State Board is required to include in the administrative record for the Final CGP, the entire administrative record for all draft CGPs inclusive of all comments received, transcripts of hearings, responses to comments, and documents supporting the drafts of the CGP. (Cal. Water Code § 13377; 40 C.F.R. § 124.18(b))

attachments and references; and the associated June 11, 2008 Technical Issues Memorandum with all attachments and references.

- FlowScience Incorporated for the Commenting Parties, General Construction Permit: Action Levels and Numeric Effluent Limits Analysis Recommendation of Alternatives, dated March 31, 2008 (included in the Commenting Parties' 2008 Comment Package).
- GeoSyntec Consultants for the Commenting Parties, Evaluation of Post-Construction Hydromodification Requirements Contained in the Preliminary Draft General Construction Permit, dated March 2008 (included in the Commenting Parties' 2008 Comment Package).
- GeoSyntec Consultants for the Commenting Parties, Evaluation of Active Treatment Systems (ATS) for Construction Site Runoff dated April 11, 2008 (included in the Commenting Parties' 2008 Comment Package).
- Berkeley Economic Consulting for the Commenting Parties, Economic Analysis of the SWRCB Proposed General Construction Permit, dated April 2, 2008 (included in the Commenting Parties' 2008 Comment Package).
- URS Corporation for the Commenting Parties, Analysis of Draft General Construction Permit Risk Factors, dated June 9, 2008 (included in the Commenting Parties' 2008 Comment Package).
- California Building Industry Association, Proposed Risk-Based Proactive BMP Approach to Water Quality Regulation of Construction Sites (With Exhibits), dated August 28, 2007 ("CBIA's Bridge Approach").
- FlowScience Incorporated for the Commenting Parties, Analysis of Data Requirements Necessary to Establish Action Levels for pH and Sediment in Storm Runoff from Construction Sites, dated August 2007.
- May 4, 2007 CBIA letter commenting on the 2007 PCGP; the Commenting Parties' associated May 8, 2007 Legal and Policy Comments document with all attachments and references; and the Commenting Parties' associated May 8, 2007 Technical Issues Memorandum with all attachments and references.

To facilitate the State Board's review of these materials, the documents incorporated herein are listed in the Index submitted concurrently herewith and enclosed with this comment package. We have also highlighted relevant portions of these materials in the comments discussed below in order to better guide the State Board and its staff to those sections of the Commenting Parties' prior submittals that bear the most relevance to the 2009 DCGP. The Commenting Parties maintain that all of the information submitted in 2007 and 2008 constitutes 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).)

We understand that the State Board staff will be preparing responses to comments for those comments submitted on the 2009 DCGP. Because the State Board purports to issue a Final CGP in compliance with the NPDES program and the federal Clean Water Act, the State Board must abide by all EPA regulations applicable to adoption of NPDES permits. (Cal. Water Code § 13377.) Pursuant to applicable federal regulations, the State Board must include in the administrative record for the Final CGP, responses to all significant comments on the draft permit. (40 C.F.R. § 124.17(a)(2); *see also Reyblatt v. U.S. Nuclear Regulatory Commission* (1997) 105 F.3d 715 (failure of an administrative agency implementing federal laws to cogently explain why the agency exercises discretion in a certain way renders a decision arbitrary and capricious).) Because there have been two formal and one preliminary draft of the CGP, we assert that the SWRCB must respond to “all significant comments raised” regarding each of the prior drafts of the CGP (meaning the 2009 DCGP, the 2008 DCGP, and the 2007 PCGP). Because we are incorporating our submittals from 2007 and 2008, and especially for those discussions in prior submittals highlighted and referenced in our comments on the 2009 DCGP below, the Commenting Parties insist that the SWRCB staff prepare responses to all the significant relevant comments from the Commenting Parties—those on the 2009 DCGP as well as those submitted to the State Board on the prior drafts of the CGP submitted in 2008 and 2007—for such prior comments by the Commenting Parties are incorporated by reference as if fully set forth herein.

II. EXECUTIVE SUMMARY AND RECOMMENDATIONS

A. Executive Summary

1. *Overview of SWRCB action*

From a legal and policy perspective, the 2009 DCGP does not differ substantially from the DCGP issued by the SWRCB in 2008. Several of the central concepts that were set forth in prior drafts and to which the Commenting Parties objected continue to appear in the 2009 DCGP, including unsupported and legally deficient numeric effluent limitations (“NELs”), deficient numeric action levels (“NALs”), overly-burdensome monitoring requirements, inappropriate post-construction controls, etc. Thus, the Commenting Parties legal and policy comments concerning the 2009 DCGP carry forward many of the concepts, arguments, and discussions already provided to the SWRCB in comment packages and other supporting information the Commenting Parties have provided during 2007 and 2008.

Overall, the Commenting Parties are extremely concerned that the 2009 DCGP departs radically from the U.S. Environmental Protection SWRCB (“EPA”) federal storm water general permit as well as the existing California General Construction Storm Water Permit (“Current CGP”).² Both current permits (the EPA’s permit and the current CGP) rely on the case-by-case preparation of a Storm Water Pollution Prevention Plan (“SWPPP”), setting forth Best Management Practices (“BMPs”) tailored to the specific construction site, weather and activities, and inspection and maintenance requirements, enhanced by monitoring, sampling and analysis

² 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*.

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 2009 DCGP reflects a combination of control strategies never before seen in a storm water construction general permit issued by EPA or any state administering a federally authorized state program. The 2009 DCGP's proposed combination of controls includes:

- Both NALs and NELs set at levels that virtually insure countless projects throughout the state will routinely exceed the limitations/levels,
- Extensive monitoring and analysis requirements that may not be feasible to accomplish or produce scientifically-useful data,
- “One-size-fits-all” provisions for post-construction runoff reduction/flow control that take aim at local land use control, and
- Unprecedented discretion to the Regional Boards to halt projects mid-stream.

2. *Key legal and policy concerns with the 2009 DCGP*

The discussion in section III, below, provides detailed comments related to the Commenting Parties' legal and policy concerns. In particular, the Commenting Parties have several key concerns with the 2009 DCGP, as follows:

- NELs—The proposed statewide, “one-size-fits-all” NELs have not been developed in keeping with federal or state law. Specifically, they were developed without consideration of certain factors required to be assessed under the respective legal regime (federal or state) before establishing NELs. Furthermore, the administrative record for the 2009 DCGP contains insufficient justification for the establishment of the particular NELs contained in the 2009 DCGP.
- NALs—Although the Commenting Parties are not wholly opposed to the use of NALs as analytical tools to improve BMPs, we believe the current NALs have not been properly developed in light of the lack of sufficient supporting data.
- 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 or even relevant data being generated, (iii) contain numerous technical deficiencies, and (iv) in the case of receiving water monitoring, is likely to be infeasible to implement along with being overly burdensome.
- Post-construction Controls—The post-construction control requirements are inappropriate for inclusion in the CGP program because: 1) the CGP is an industrial-phase permit, 2) and there are appropriate regulatory alternatives already at the State Board's disposal that allow the SWRCB to achieve its goals of addressing hydrologic issues to control flow from new developments and redevelopment projects.

- Exemption from CGP Coverage—In a thinly-veiled attempt to avoid having to follow certain provisions of California State Water law, the 2009 DCGP seeks to limit its jurisdiction to only U.S. jurisdictional waters, which will undermine the basic utility of the CGP as thousands of projects throughout the state are forced to obtain individual permits. Moreover, through its attempts at making the Final CGP a “federal only NPDES permit” the SWRCB attempts to avoid having to consider certain factors contained in California Water Code sections 13000, 13241, and 13263. The failure to consider these factors is unlawful; and the 2009 DCGP will not be legally adequate until a meaningful review of these factors is included in the administrative record.
- Inappropriate Discretion Given to the Regional Water Quality Control Boards (“RWQCBs” or “Regional Boards”)—The DCGP gives unfettered discretion to the RWQCBs to terminate general permit coverage precipitously after construction is underway pursuant to obtaining coverage. This goes against the policy behind establishing general permits and could potentially cause a regulatory backlog of immense proportions and create unnecessary uncertainty on the part of permittees once obtaining coverage under the Final CGP.

B. Recommendations

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

- Remove NELs from the CGP until sufficient data can be generated and studied and NELs can be established consistent with federal and state statutes and regulations.
- Clarify NAL-related statements to ensure NALs are only used as analytic tools to gauge BMP performance; and revise NALs to: 1) prevent their over-application, and 2) correct technical deficiencies.
- Replace burdensome effluent and receiving water monitoring and data collection requirements with a permittee-funded, scientific, third-party data collection effort during the CGP term, using the collected data to assist in the refinement of NALs. At a minimum, remove receiving water monitoring requirements from the Final CGP.
- 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 analysis.
- Issue the Final CGP as a joint NPDES permit/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. Apply the factors from California Water

Code sections 13000, 13241, and 13263 to the 2009 DCGP's proposed requirements and revise the proposals accordingly after consideration of the statutory factors.

- Appropriately restrict the powers of the RWQCBs, after coverage under the Final CGP has been obtained, to enforcing the Final CGP and ensuring compliance with its terms.

III. DISCUSSION

A. Uncritical, Statewide Numeric Effluent Limits (NELs) Are Legally Improper—Both as Proposed and More Generally—and Should Be Removed from the Final CGP.

From a legal and policy perspective, there appears to be very little difference between the proposals for NELs contained in the 2009 DCGP and those proposed in the 2008 DCGP. The SWRCB continues to propose NELs for pH and turbidity. The State Board's present proposal reflects mere modification of the target values that it would require of permittees, clarification of the proposed application of those NELs to specific classes of permittees and time frames for application, and the addition of a design storm component.³ However, the 2009 DCGP and its Fact Sheet, like their precursors, still reflect negligible support or justifications for the proposed NELs.

The Commenting Parties maintain that it is premature at best for the SWRCB to mandate construction site compliance with any NELs, even those established with much greater attention to context. Moreover, the NELs included in the 2009 DCGP amount to industry-wide, statewide (*i.e.*, one-size-fits-all) control measures. Consequently, the proposed NELs (i) are overly broad, (ii) do not take into account important technical constraints with respect to implementation, and (iii) require additional analysis to determine appropriately tailored numeric values based on both known and reasonably foreseeable contextual differences. As proposed, the NELs are therefore improper. We urge the SWRCB, in lieu of NELs, to rely instead on NALs, properly established consistent with the State Board's Blue Ribbon Panel recommendations, which that will guide and enhance analytical BMP implementation along with an appropriately strong emphasis on BMPs, which is already contained in the 2009 DCGP. (*See further*, the Commenting Parties technical comments submitted concurrently as well as CBIA's Bridge Approach submitted to the SWRCB in 2008.)

In addition to the comments discussed below, we direct your attention to our comments previously submitted regarding the imposition of NELs in the CGP. Those comments, which were submitted in connection with prior drafts of the CGP, are equally applicable to the 2009 DCGP, and are submitted concurrently herein. In particular, we highlight the following issues raised in previously submitted materials regarding the insufficiency of the proposed NELs:

³ Technical concerns with all these elements of the NELs are contained in the Commenting Parties technical comments submitted concurrently herewith.

- Commenting Parties, Legal and Policy Comments on the 2008 DCGP, inclusive of sections III.B.1 through III.B.5 and III.C (on pages 9–28) discussing how:
 - The SWRCB has not yet justified reversing its prior determination that NELs are inappropriate for inclusion in the CGP;
 - How construction site storm water runoff is not suitable for regulation through NELs;
 - How the SWRCB cannot justify the NELs using federal Best Professional Judgment standard as is claimed by the SWRCB,
 - How the NELs must be established using the mandated federal process for establishing effluent limitation guidelines under the Best Available Pollutant Control Technology and Best Conventional Pollutant Control Technology standards (“BAT/BCT standards”) and the SWRCB has not gone through such process in proposing the NELs;
 - How the proposed NELs go beyond the federal NPDES program requirements and, as such, must also consider factors under sections 13000, 13241, and 13263 and the SWRCB has not fully considered such factors in proposing the NELs; and
 - How the proposed NELs would be considered invalid if all required federal and state statutorily mandated factors are considered, as the NELs lack proper evidentiary foundation, including sufficient data sets.

- Sunding, Economic Analysis of the 2008 DCGP, which includes compliance costs for meeting NELs.

- Commenting Parties, Technical Comments on the 2008 DCGP, inclusive of pages 5–6, 18–31, discussing how:
 - The proposed NELs do not follow BAT/BCT⁴ requirements;
 - The NELs lack a correlation to receiving water quality;
 - The pH NELs have several technical deficiencies related to the data allegedly supporting the NELs, the time frames for NEL applicability, and the fact that natural conditions may exceed the NELs the data set supporting the NALs is not fully representative of statewide conditions;
 - The turbidity NELs have several technical deficiencies including a lack of evidentiary support, the fact that natural conditions will often exceed the NELs, the timing of the NEL application, the correlation between BMPs and the proposed NELs, and specific concerns related to the NELs for Active Treatment Systems.

- FlowScience, NALs and NELs Analysis for the 2008 DCGP, providing detailed technical analyses of the fallacies of the proposed NELs and recommendations for improving the State Board’s proposals.

⁴ Best Conventional Pollutant Control Technology (“BCT”) and Best Available Technology Economically Achievable (“BAT”)

- Commenting Parties, Legal and Policy comments on the 2007 PCGP: inclusive of sections II.A.2 (regarding control measures), III.C (regarding technical considerations for the NELs), and IV.C (regarding policy concerns with the NELs) (on pages 3–8, 29–37, and 58–59).
- Commenting Parties, Technical Issues Memorandum on the 2007 PCGP: inclusive of pages 8–13 (regarding technical concerns with NELs).
- CBIA’s Bridge Approach.

In addition to our earlier comments, we respectfully submit the following:

1. *The proposed NELs conflict with the federal Clean Water Act’s overarching objective to maintain the natural integrity of the nation’s waters.*

The express, principal policy objective of the federal Clean Water Act (“CWA”) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (CWA § 101(a); 33 U.S.C. § 1251(a).) Without question, Congress intended this principal objective to be understood as the restoration and maintenance of the *natural* integrity of the waters.⁵ The principal objective has been described at the “guiding star” of the CWA: “All issues must be viewed in light of that intent.” (*American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1028 (10th Cir. 1976).) “Undeniably, Congress’ strong statement of its objective must color EPA’s and [the court’s] interpretation of the [CWA].” (*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177-78 (D.C. Cir. 1982).)

The NEL proposals in the 2009 DCGP betray the fact that the SWRCB ignored the CWA’s principal objective when proposing NELs that do not properly account for the vast spatial and temporal differences in *natural* levels of the sediment/turbidity and pH targeted by the NELs. Concerning the 2009 DCGP’s treatment of sediment/turbidity and pH from construction activities, the SWRCB is dealing with neither (i) strictly man-made or man-induced pollutants such as dioxin, nor (ii) industrial wastes amassed in and issued from a discrete plant process. Instead, the SWRCB is dealing with sediment/turbidity and pH, which are conventional pollutants that are *naturally* present and *naturally variable* in amount and concentration in different waterways and under different natural conditions. Most importantly, during significant storm events, sediment/turbidity is naturally dislodged and discharged in varying concentrations from parcels of land even in the absence of any construction activities.

As is explained in greater detail in the Commenting Parties technical comments submitted concurrently, adherence to the turbidity and pH NELs proposed in the 2009 DCGP

⁵ See S. Rep. No. 92-414, 92 Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News 72 3668, 3674: *The Committee believes the restoration of the natural chemical, physical, and biological integrity of the Nation’s waters is essential.* To achieve this objective, the Committee recommends that the following be adopted as national policy:

The discharge of pollutants into the navigable waters be eliminated by 1985;
 —An interim goal of water quality be achieved by 1981 to provide for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water;
 —The discharge of toxic pollutants in toxic amounts be prohibited.... (Emphasis added.)

will permit many construction site operators to discharge only water that has been unnaturally stripped of sediment and turbidity to levels of clarity that would not occur in nature. For example, SWRCB expects construction site operators to discharge storm water limited to a maximum turbidity of 500 NTU (turbidity units), even though the data contained in the 2009 DCGP's Fact Sheet demonstrates that roughly 42 percent of the state has *median* levels of turbidity in excess (sometimes far in excess) of the 500 NTU figure. (See 2009 DCGP Fact Sheet, Table 2, p. 16.) The State Board's proposed NELs therefore ignore the known and/or reasonably foreseeable natural levels of turbidity in storm flows in different regions throughout the state.

Rather, the turbidity NEL, in particular, appears to have been calculated using 1) a data set demonstrating that only 58 percent of the state has background receiving waters that are known to be less (in some circumstances—but perhaps not during all storm events) than the proposed turbidity level for the NEL, 2) four administrative civil liability complaint files from one area of the state, all of which show discharge levels far in excess of 500 NTU, and 3) a claim by the SWRCB staffers that field turbidity measurement tools have a measurement limit of 1000 NTU. (2009 DCGP Fact Sheet, p. 17.) Therefore, far from supporting a 500 statewide NTU NEL, the information cited by the SWRCB would support the establishment of (assuming arguments that any turbidity NELs would be appropriate) substantially *higher* turbidity NELs—but, even then, only context-specific ones that account for known and reasonably foreseeable or ascertainable differences in background levels of turbidity.

Despite the State Board's knowledge of the natural background levels of sediment and the varying levels of pH in the waterways of the state,⁶ the SWRCB made no meaningful effort to address and account for the *natural* loading of sediment and turbidity or the natural levels of pH in the waters where flows from construction sites may enter. Had the SWRCB done so, it would have seen that the proposed NELs are out of touch with natural loads of sediment and natural levels of pH. (See further the Commenting Parties technical comments.)

For two reasons, the Commenting Parties believe that it was legal error for the SWRCB to pursue uncritically its proposed statewide NELs with respect to constituents that are:

- (i) *naturally* present in the waters,
- (ii) *naturally* variable in their concentration, and
- (iii) discharged into the waters *naturally* (i.e., without anthropogenic impetus) in addition to the amounts discharged due to anthropogenic activities.

Specifically, such statewide NELs would effectively mandate heroic expenditures to reduce the turbidity of storm water discharges: 1) for the end of altering their natural characteristics (and therefore knowingly and purposefully causing "pollution") and 2) regardless of any showing or consideration of proximate causation. Each of these reasons is addressed, in turn, below.

⁶ For example, the SWRCB acknowledges in the 2009 DCGP Fact Sheet that most of the water quality objectives throughout the state for turbidity are based upon background conditions (Fact Sheet p. 15), yet the SWRCB completely ignores this relationship to natural conditions when establishing the turbidity NEL.

2. *The imposition of single, statewide turbidity NEL, notwithstanding knowledge of substantial variation within the State in natural background turbidity and pH levels, would result in "pollution" as defined by the CWA.*

First, the uncritical pursuit of the NELs has led the SWRCB to ignore and overshoot the CWA's principal objective, which is to restore and maintain the natural integrity (i.e., natural structure and function) of the waters, including the natural variability of those conditions. Here, the SWRCB put on blinders and set NELs that do not consider natural loading despite clear evidence that natural loads in California vary widely by region and routinely exceed the proposed NELs.

Rather than ignore the known, reasonably foreseeable, or ascertainable natural qualities of the receiving waters at issue, particularly close attention should be paid to them.

Importantly, the 2009 DCGP proposes permit conditions that are purported to be technology based effluent limits ("TBELs") established in accordance with federal law (specifically, established pursuant to 33 U.S.C. § 1314). (*See*, 2009 DCGP, § I.H. ¶ 52, p. 9.) Pursuant to federal law, TBELs should be established by the EPA Administrator without any view to the "assimilative capacities" of receiving waters.⁷ It is one thing to disregard the assimilative capacities of receiving waters when establishing TBELs (as Congress intended when it enacted the CWA). It is quite another thing, however, to disregard *known natural conditions* of the receiving waters when establishing effluent limits. The latter (disregarding known natural conditions) can result in permit conditions that mandate the actual *pollution* of receiving waters, at tremendous expense, as the 2009 DCGP proves.

For example, among the various constituents defined by Congress as "pollutants" in the CWA is "heat ... discharged into water." (CWA § 502(6): 33 U.S.C. § 1362(6).) If considering an NEL for any discharge of heat into receiving waters, it would be absurd for the SWRCB to fail to take into account the known temperature characteristics of receiving waters and the natural variability thereof. To ignore the qualities of the receiving waters could lead the SWRCB to find that it is technically and economically feasible for industries to discharge nearly ice cold water into receiving waters—irrespective of the natural and variable temperatures of the receiving waters.

An uncritically fixed effluent limitation for heat would be analogous to limiting storm water discharges from construction sites to a relatively clarified 500 NTU turbidity limit when data contained in the 2009 DCGP's fact sheet shows average turbidity levels during relatively small storm events for more than 42 percent of the state exceed 500 NTU (from 510 to 1,716.7 NTU in ecoregions 6 and 14 per Table 2 in the 2009 DCGP Fact Sheet and applying the conversion factor used by the SWRCB), and when natural turbidity readings might be vastly higher during storm events approaching the 5-year design storm event contained in the 2009 DCGP.⁸ Indeed, the proposed NELs (particularly for turbidity) not only overshoot the CWA's

⁷ *See, e.g.*, "the conference substitute specifically bans pollution dilution as an alternative to waste treatment." S. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. (1972), reprinted in 2 U.S.C.C.A.N. 3778 (1972).

⁸ Along with this comment letter, the Commenting Parties are providing the SWRCB with a report entitled *Assessment of Water Quality Concentrations and Loads from Natural Landscapes* (Stein and Yoon, 2007) and

“restore and maintain” principal objective, but also result in “pollution” as defined by the CWA by *altering* the natural integrity of the receiving waters. Fixing such a single limit would also impose unnecessary costs on any discharger who is forced to pay to do that which is unnatural and absurd—all to no good end. Therefore, rather than impose a requirement to meet any unnatural and arbitrary limits, the SWRCB should give careful consideration in the regulatory decision making to the known, or reasonably foreseeable and ascertainable, natural qualities of the receiving waters; and the SWRCB should revise its proposals in the 2009 DCGP accordingly. The federal “arbitrary and capricious” standard of judicial review—a deferential standard—is relevant here by analogy: A federal court:

may reverse the decision as arbitrary or capricious only if the agency relied on factors Congress did not intend it to consider, *entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency*, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

(*Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007) (citation omitted; emphasis added).) Should the SWRCB persist in its pursuit of the proposed NELs, its decision is likely to be considered arbitrary and capricious by a reviewing court.

3. *The SWRCB has failed to consider causation and its legal obligation to allow natural levels of sediment in discharges from construction sites.*

Apart from the problem that the State Board’s proposed NELs conflict with and overshoot the CWA’s principal objective and effectively mandates pollution, there is a second, equally important legal reason for not ignoring natural conditions in the receiving waters—namely, that the discharge of naturally-occurring constituents such as pH and sediment/turbidity, to the extent that they are partly natural in amount (i.e., neither man-made nor man-induced), would not constitute an anthropogenic “addition” of a pollutant to water, and thus would not constitute the “discharge of a pollutant” as defined in the CWA. (CWA § 502(12); 33 U.S.C. § 1362(12).) Accordingly, the owner or operator of a construction site has no legal responsibility under the CWA for such discharges or their treatment. (*See, e.g., American Iron and Steel Institute v. EPA*, 526 F.3d 1027, 1055-56 (3rd Cir. 1975) (“due process” concerns require a net-gross adjustment if a plant could be subjected to heavy penalties because of circumstances beyond its control); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) (“Industry is ...required [by EPA] to treat and reduce pollutants *other than those added by the plant process*. This we are of opinion is beyond the scope of EPA’s authority.”) (emphasis added); *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003) (“but for” causation was sufficient to show that alteration of water quality was “man-induced,” and thus pollution subject to the CWA).)

Appendix VIII thereto, found respectively at:

ftp://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/500_natural_loading.pdf and
ftp://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/500_NL_APPENDIX_VIII.pdf. Page 9 of Appendix VIII shows a natural landscape sediment load reading of 4,689.18 mg/L total suspended solids for Christianitos Creek, over 3 times higher than the State Board’s proposed NTU limit (converted to total suspended solids using the State Board’s conversion factor).

In *Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), the appellate court wrote:

When a point source changes [the natural integrity of the waters], that point source is the cause-in-fact of the discharge of pollutants. And because the pollutants would not have entered the ... water *but for* the change caused by the point source, an addition of pollutants from a point source occurs.

(*Id.* at 1368–69 (emphasis in the original), vacated by *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).) The SWRCB has failed to consider and take into account causation in connection with either sediment-laden storm water discharges or discharges with unusually high or low levels of pH from construction sites. Correcting the failure should lead the SWRCB to modify its proposed NELs drastically, if not remove the proposed NELs altogether from the Final CGP. As is discussed in greater detail in the Commenting Parties technical comments, even during modest or moderate storms, sediment will flow *naturally* from parcels of land at which construction activities will be or are being undertaken; and pH levels will fluctuate from these parcels. The turbidity and pH readings of such natural discharges will depend on many factors, each of which is extremely difficult to predict, measure, or repeat, such as the anecdotal storm movements and dynamics, fine-scale storm intensity (especially), storm duration, storm water volume, the exact site location, geology, topography, vegetation, soil characteristics, and the like.

Given the myriad factors at play, it is virtually impossible to predict each of the two, very likely comingled components of any sediment-laden storm water discharge or discharge of water with unusually high or low pH levels from a construction site:

- (1) The *natural* component, which would occur but for (*i.e.*, even in the absence of) the construction activity, and which the CWA aims to “maintain,” and
- (2) The *anthropogenic* component, which occurs because of the construction activity, and which the CWA aims to prevent, reduce, or eliminate through technological and water quality standards.

The problem of distinguishing an anthropogenic component of a discharge of a conventional pollutant from the natural component is particularly acute at the early stages of construction activities (for example, before mass grading occurs). To be prudent, coverage under the 2009 DCGP is proposed to be required prior to the “commencement” of construction activity (2009 DCGP, § II.B.2) that is NPDES construction general permit coverage is generally required when construction activity prior to the commencement of any “construction activity, including demolition, clearing, grading, and excavation, and other land disturbance activities” (2009 DCGP, § I.A.1). Therefore, merely lifting the first few shovels full of soil will typically spur permit coverage and presumably require compliance with any applicable NELs. With particular regard to sediment, for any sites subject to NELs, the *anthropogenic* component of a sediment discharge caused by barely commencing construction is virtually nothing in comparison to the *natural* component during an appreciable storm. The CWA—read it light of its principal objective to maintain the natural integrity of waters—excuses and, moreover, seeks to maintain the latter (*i.e.*, the natural) component. The State Board’s NEL proposal makes no allowance for

this, however, and instead applies the NEL throughout the entire life of permit coverage for any implicated parcel, and along every inch of each such parcel's perimeter, as if though construction activities were completely discrete and confined like an industrial plant's closed process that can be started and stopped in binary fashion. They are not.⁹

Because a construction site operator cannot—and should not be required to—control the *natural* discharge of sediment from a parcel otherwise under development, due process considerations should operate protect the construction site operator far more than the State Board's proposed NELs reflect. "In the absence of congressional abrogation of traditional principles of causation...private parties should be held liable under [the relevant statute, even if it is a strict liability statute] *only if their...actions proximately cause* [the harm]." (*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring) (emphasis added).)

The SWRCB should recognize that during any appreciable storm a construction site will necessarily yield (i) some *naturally-occurring* sediment and pH discharges comingled with (ii) some *man-induced* pH sediment discharges (for sites were work involving potentially pH-altering activities are occurring). The CWA aims to maintain the former, but eliminate the latter. This legal tension, coupled with the endless variability of the characteristics of both parcels of land and unpredictable storm events, should rule out the establishment of a specific, statewide, NELs for conventional pollutants.

4. *Regarding the turbidity NEL in particular, the SWRCB itself has acknowledged the great importance maintaining natural loads of sediment in waterways.*

In its comments on the U.S. EPA's proposed national effluent limitation guidelines ("ELGs") for the construction and development industry, the SWRCB not only acknowledged the important role that natural levels sediment in receiving waters plays, but also urged the U.S. EPA not to impose "across the board" NELs for construction sites. In pertinent part, the SWRCB stated:

... sediment is a unique type of pollutant in that it is not always detrimental to receiving water quality (and the beneficial uses supported downstream)—sediment is a natural part of a well-functioning watershed. Whether sediment in storm water discharges is excessive depends largely on temporal and spatial circumstances, downstream conditions, type of sediment (particle size distribution, etc.) and many other factors *that a general, across-the-board approach cannot easily anticipate.*

...

⁹ Perhaps due to the State Board's refusal to consider any receiving water quality implications, the SWRCB simply ignored causation issues. It chose instead to assume that the entirety of a construction site parcel becomes an indivisible potential point source if and when construction commences, such that the entire parcel therefore must no longer be natural vis-à-vis its surroundings. The "meets and bounds" of parcels' perimeters typically have little or no bearing, however, on the natural flows of sediment-laden storm water to and from a given parcel.

We therefore strongly urge the USEPA to not mandate this numeric effluent limitation to all sites meeting the proposed criteria and specifically request that the ELGs *allow a mechanism for adjusting (upwards) or eliminating this numeric effluent limitation* in circumstances where discharges containing turbidity at or below [the proposed numeric ELG] could cause receiving water impacts.

(SWRCB, Letter to U.S. EPA regarding Docket No. EPA-HQ-OW-2008-0465 (ELGs for Construction and Development) (Feb. 26, 2009) (emphasis added).)

Having just made these comments less than two months prior to issuance of the 2009 DCGP, the SWRCB by proposing the sediment NEL, has completely reversed itself. Neither the 2009 DCGP nor its Fact Sheet gives deference to natural sediment loads acknowledged by the SWRCB to be of vital importance to the health of a “well-functioning watershed.” Moreover, the SWRCB has proposed an “across-the-board” NEL (and an across-the-board NAL as well) for turbidity which it was “strongly urging” the U.S. EPA *not* to adopt. Thus, the SWRCB is completely without justification for proposing the one-size-fits-all turbidity NEL in 2009 DCGP after having recently and publically urged a federal agency not to take such an approach.¹⁰

5. *The CBIA Bridge Approach recommended by the Commenting Parties best conforms to the natural variability of storm water discharges.*

Under the approach recommended by the Commenting Parties in the attached CBIA Bridge Approach, the use of properly derived NALs would be combined with robust application of BMPs (both NALs and BMPs are included in the 2009 DCGP although the Commenting Parties have some technical concerns with the current proposals outlined in the technical comments submitted concurrently). We believe this approach makes sense when applied to the construction industry and would sufficiently eliminate the need for the SWRCB to proceed with flawed NELs. CBIA’s Bridge Approach couples a BMP approach with NALs used to guide BMP performance assessment and serving to provide the data necessary to further evaluate potential additional numeric measures in the future.

Federal regulations concerning the BMPs, 20 C.F.R. § 122.44(k), set forth four circumstances in which application of BMPs in lieu of NELs is appropriate. The BMP approach is appropriate when:

- (1) [The practices are] [a]uthorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;
- (2) [The practices are] [a]uthorized under section 402(p) of the CWA for the control of storm water discharges;
- (3) *Numeric effluent limitations are infeasible; or*

¹⁰ The SWRCB is also going back on its prior statements that, in general, NELs are inappropriate for the CGP program. (See further Commenting Parties Legal and Policy Comments on the 2008 DCGP, § III.B.1, pp. 10–11.)

(4) *The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.*

(40 C.F.R. § 122.44(k), in relevant part (emphasis added).)

The Commenting Parties respectfully submit that the State Board's adherence to an approach not utilizing NELs but utilizing BMPs and NALs instead would be the best way to ensure continual enhancement of approaches through BMP evolution and NAL data feedback and would also prove reasonable in carrying out the purposes and intent of the CWA. In particular, this BMP/NAL approach would further the CWA's prime objective to restore and maintain the natural integrity of the waters, including the *natural variability* of the waters. Respect for the waters' natural variability and appreciation of the causation conundrum discussed above should logically preclude establishment of the turbidity and pH NELS set forth in the 2009 DCGP. They also logically preclude the establishment of *any* specific, statewide, "one-size-fits-all" numeric effluent standard for conventional pollutants such as sediment/turbidity and pH. Because nature is extremely variable in terms of these conventional constituents and the sediment and pH yielded and carried in storm water, the natural component of construction site discharges has a high likelihood of violating the NELs.

Admittedly, the CWA's principal objective poses a problem when one considers the challenge of *maintaining* natural integrity through regulations, because nature itself is highly variable. The objective is to *maintain variability*, which seems paradoxical. To illustrate the difficulty, receiving water temperature is naturally variable based on constantly shifting factors (the seasons, the weather, water depth and volume, solar influences, sediment loading, etc.). Because of this natural variability, it would be absurd if the SWRCB were to prescribe a single, statewide, year-round temperature at which anthropogenic-influenced storm water discharges must occur—whether the chosen temperature might be the ice cold water example discussed above or 70 degrees Fahrenheit. Instead, in order to maintain the water's natural integrity and its variability, one needs a tailored approach in which the known or reasonably foreseeable or estimable particulars of the anthropogenic activity and the natural characteristics and variability of the receiving waters are appropriately taken into account. Such a tailored approach is most likely an approach with BMPs at its core. Certainly, it is not a fixed numeric effluent limit.¹¹

6. *The 2009 DCGP contains "stealth" NELs for debris and sediment that are utterly lacking in any evidentiary support, technical justification or legal authority meriting their inclusion in the 2009 DCGP.*

¹¹ In *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975), the court explained the legislative history of effluent limitations, quoting in particular Senator Muskey for the proposition that "(t)he Administrator is expected to be precise in his guidelines so as to assure that *similar point sources with similar characteristics*, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." *Id.* at 709–10, fn. 99 and accompanying text (emphasis added). The infinite number and degrees of possible *dissimilarities* among both (i) different parcels of land under development, on one hand, and (ii) different storm events, on the other hand, make the construction industry the worst possible candidate for numeric effluent limitations. Instead, the myriad, inevitable dissimilarities militate strongly for retaining the BMP approach.

(a) The stealth debris NEL.

Although not defined as an NEL, the 2009 DCGP contains a stealth NEL for debris in the section on “discharge limitations” (2009 DCGP, § III.D, p. 20.) The restriction on debris completely prohibits all discharges of debris, which amounts to an NEL of “zero.” This is the first time that the CGP has ever proposed to include a zero NEL for debris, and the first time even during this draft process for the Final CGP that such a blanket prohibition on debris has been proposed by the SWRCB.

There is no information whatsoever in the administrative record for the 2009 DCGP to support the zero NEL for debris. The prohibition is not even mentioned in the 2009 DCGP Fact Sheet sections on Discharge Prohibitions (§ II.E, pp. 12–13) or Effluent Standards (§ II.F, pp. 13–18). The only other reference at all in the 2009 DCGP to the debris prohibition appears in the findings paragraph 42 stating (in its entirety):

This General Permit prohibits the discharge of any debris from construction project sites. Plastic and other trash materials can cause negative impacts to receiving water beneficial uses. The State Water Board encourages the use of more environmentally safe, biodegradable materials on construction sites to minimize the potential risk to water quality.

(2009 DCGP, § I.E.42, p. 7.) In no way does this inconsequential, dismissive mention of the debris prohibition justify a zero NEL for debris. The federal and state law requirements for establishing an NEL are discussed at length in the Commenting Parties legal and policy comments related to the 2008 DCGP on pages 14 through 22. Pursuant to applicable law, before the SWRCB can even consider adopting an NEL for debris, much less an NEL set at zero, the SWRCB must undertake a thorough analysis of the ramifications of establishing such a prohibition and must support its proposal with appropriate technical and scientific evidence in the administrative record. No such analysis or evidence exists to support the zero NEL for debris.

Moreover, the zero NEL for debris is unacceptably vague. The term “debris” is defined as “Litter, rubble, discarded refuse, and remains of something destroyed.” (2009 DCGP, p. 20 n.7.) The phrase “remains of something destroyed” can be interpreted quite broadly and presents an unacceptable level of enforcement risk to the regulated community. It is possible that such a phrase could be interpreted to include, for example, any amount of landscaping materials or natural materials loosened during landscaping processes (e.g., a grass clipping or leaf). If the SWRCB intends to have a zero NEL established for such a broad range of potential pollutants, the Commenting Parties would first challenge that such items represent “pollutants” as that term is defined in the federal Clean Water Act or “waste” as that term is defined in the California Water Code. Thus, to prohibit them via a zero NEL on debris would not comport with either the federal or state water quality control statutes. Secondly, the Commenting Parties would again raise the issue that such a broad definition of debris in a zero NEL is completely unsupported by any evidence, legal, scientific or otherwise, in the administrative record. Thus, the SWRCB is without jurisdiction to propose a zero NEL for debris and should it continue to press for the zero debris NEL in the Final CGP, the SWRCB will do so in excess of its discretionary authority. The debris NEL must be removed from the Final CGP.

(b) The stealth sediment NEL.

The 2009 DCGP also contains another stealth NEL—this one for sediment in flows from Risk 3 sites. In the attachment specific requirements for Risk 3 sites, the 2009 DCGP contains the following statement, which although not defined as an NEL acts as one: “Risk Level 3 dischargers shall ensure that the soil loss during each phase of construction is equivalent to or less than the pre-construction soil loss for the same time period.” (2009 DCGP, Attach. E, § D.4, p. 5.) This stealth NEL effectively sets a limit for sediment discharges equivalent to the numeric level of sediment loss for that site in the pre-construction condition as calculated using the RUSLE2 method (discussed in greater detail in the accompanying technical comments from the Commenting Parties).

As with the stealth NEL for debris, there is no information whatsoever in the administrative record for the 2009 DCGP to support the pre-construction sediment loss NEL. This NEL is not mentioned in the 2009 DCGP Fact Sheet sections on Discharge Prohibitions (§ II.E, pp. 12–13) or Effluent Standards (§ II.F, pp. 13–18). The only other reference at all in the 2009 DCGP to the pre-construction soil loss NEL appears in the Fact Sheet in the section regarding Risk Determination (§ J.1.e, p. 29) stating (in its entirety): “Risk Level 3 dischargers pose a higher risk to water quality and are therefore additionally required to ensure that post-construction soil loss is equivalent to or less than the pre-construction levels.”

Such an insignificant and completely unsupported reference to the restriction on soil loss cannot justify an NEL set at pre-construction levels. As discussed above regarding the debris NEL, the Commenting Parties have described the federal and state law requirements for establishing NELs—requirements that mandate thorough analysis and support of any proposed NELs with sufficient technical and scientific evidence in the administrative record. The requisite analysis has not been conducted and no supporting evidence has been provided in the 2009 DCGP’s administrative record for the proposed soil loss NEL. As such, this stealth NEL is wholly improper and must be removed from the Final CGP. Should the SWRCB fail to remove this NEL, it will step outside of its discretionary authority.

7. *The NEL for pH is both unjustifiably vague and overly broad.*

The 2009 DCGP applies NELs for pH to Risk 3 projects exhibiting a “high risk of high pH discharge” which is then further defined as “the *complete utilities phase*, the *complete vertical build phase*, and any portion of any phase where significant amounts of materials are placed directly on the land at the site in a manner that could result in significant alterations to the background pH of any discharges.” (2009 DCGP, § I.H, ¶51, p. 9 and § V.B.3.a, p. 29 (emphasis added).) The proposed NEL is overly broad and vague in that it purports to target only those “high risk of high pH” activities, yet then imposes the NEL upon entire phases of construction—the utilities and vertical build phases—without limitation.

The information contained in the 2009 DCGP’s Fact Sheet does not clarify the vagueness of the pH NEL’s application nor does it provide justification for applying the restriction to entire phases of development. For linear projects, the lack of precise limitations on the pH NEL’s application is especially troubling as many linear projects will consist entirely of “utilities” phase (e.g., projects that entail the installation of utility infrastructure) making the pH NEL applicable

during the entirety of the project's construction, regardless of the potential for high pH risk. For projects that are large and/or set to have long construction time durations, incorporating an NEL into an entire phase (particularly the vertical build phase) could result in the application of the restriction during extended time periods without any scientific or technical justification for doing so. As was discussed above, the Commenting Parties are opposed to any NELs being included in the Final CGP; however, we are especially concerned and the proposed over-application of the pH NEL. If an NEL is to be included at all in the Final CGP, the requirements in the Final CGP must be modified from the 2009 DCGP's language to more carefully tailor the pH NEL's application.

8. *The SWRCB has failed to conduct a proper analysis of federally mandated factors required for consideration of the proposed NELs; the feeble discussion of economic issues fails to provide any meaningful deliberation.*

As was discussed in detail in the Commenting Parties legal and policy comments on the NELs proposed in the 2008 DCGP, there are certain federally mandated factors that must be considered before adoption of any TBEL, such as those proposed by the SWRCB. (Commenting Parties, 2008 DCGP Legal and Policy Comments, § III.B.4, pp. 14–19.) Although the Commenting Parties argue that the federally-mandated factors should apply only to the establishment of TBELs by the EPA Administrator for nation-wide application, the Fact Sheet for the 2009 DCGP makes a very feeble attempt at considering *some* of the federally-mandated factors required by section 304 of the CWA (33 U.S.C. § 1314(b)(4)(B) (discussing factors applicable to BCT technologies); *see also* 40 C.F.R. section 125.3(d) and 33 U.S.C. § 1314(b)(2)(B) (discussing factors applicable to BAT technologies))—each related to establishment of TBELs for pollutants such as sediment/turbidity and pH. (*See* 2009 DCGP Fact Sheet, § II.F.1, pp. 14–17.) In this discussion, the SWRCB claims it has given due consideration to economic issues including “the costs for the establishment of BAT and BCT limits for pH and turbidity.” (2009 DCGP Fact Sheet, § II.F.1, p. 14.) It would appear that the discussion is meant to satisfy requirements that the NELs consider the requirement to consider “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived” (33 U.S.C. § 1314(b)(4)(B)) and the “costs of achieving such effluent reductions” (33 U.S.C. § 1314(b)(2)(B)) although the Fact Sheet fails to specifically state these are the federal factors being assessed. The State Board's economic analysis then consists *in its entirety* of the following statements:

...the additional numeric effluent limitations, compared to the existing permit's narrative effluent limitations, *do not increase compliance requirements*; rather, they simply represent a point *where one can quantitatively measure compliance with the lower end of the range of required technologies*. Therefore, the compliance costs associated with the BAT/BCT numeric effluent limitations in this permit only differ by the costs required to measure compliance with the NELs when compared to the baseline compliance costs to comply with the limitations already established through EPA regulations and the existing Construction General Permit.

The State Water Board estimates these measurement costs to be approximately \$1000 per construction site for the duration of the project. This represents the estimated cost of purchasing (or renting) monitoring equipment, in this case a turbidimeter (~\$600) and a pH meter (~\$400). In some cases the costs may be higher or lower. Costs could be lower if the discharger chooses to design and implement the project in a manner where effluent monitoring is likely to be avoided (e.g., no exposure during wet weather seasons, no discharge due to containment, etc.). Costs could be more if the project is subject to many effluent monitoring events or if the discharger exceeds NALs and/or NELs, resulting in additional monitoring requirements.

(2009 DCGP Fact Sheet, § II.F.1, p. 14.)

First of all, the fact that the excerpt above is the entire economic analysis conducted for the proposed NELs is preposterous. As a comparison, in EPA's draft ELGs for the construction industry, the economic analysis is much more thorough and examines the actual effect of compliance across the industry and across the country (logical given the ELGs national application). The EPA's economic analysis incorporates more than 250 pages of economic analysis into its proposals for the ELGs,¹² which further demonstrates that the State Board's cursory and dismissive seven-sentence discussion of cost issues is completely insufficient when it purports to establish NELs affecting nearly every construction site in the entire state.

Moreover, the State Board's rationale presented in its discussion of cost issues defies logic. As was discussed above in sections III.A.1—III.A.4, the proposed NELs present a significant change and significant increase in requirements applied to construction sites subject to the CGP over and above what the current CGP requires. This is especially true in areas where the natural conditions would have levels of sediment or pH that would exceed the proposed NELs. For projects in these areas, meeting the NELs will require application of BMPs far exceeding the BCT standards in order to purify storm flows to unnatural levels of sediment and/or pH. It is not simply the case as the State Board claims that the NELs "represent a minimum technology standard" or that the costs for implementing the NELs are merely costs to "measure compliance." Costs to implement the proposed NELs will far exceed the \$1000 estimate for monitoring equipment provided by the SWRCB. Costs for monitoring alone will exceed the \$1000 when monitoring equipment is factored into the additional costs of labor to conduct the monitoring, training costs for such individuals, transportation costs, consultant fees if outside consultants are used to conduct the monitoring, report writing, document management, records keeping, follow up activities, etc. In addition, the costs to actually meet the NELs (aside from conducting the monitoring) have not been considered by the SWRCB at all. These costs would be enormous, especially given that the proposed NELs fail to account for natural conditions, and thus would require extraordinary BMPs be employed to attempt to achieve compliance in areas where sediment loadings are naturally large.

¹² See, EPA, Economic Analysis of Proposed Effluent Limitation Guidelines and Standards for the Construction and Development Industry, Appendix to Development Document for Proposed Effluent Limitation Guidelines and Standards for the Construction and Development Industry (Nov. 14, 2008) (266 pages) (supporting EPA's proposed ELGs noticed in 73 Fed.Reg. 72,561 (Nov. 28, 2008) (available at: <http://www.epa.gov/waterscience/guide/construction/proposed/proposed-econ-20081114.pdf>).

In order for the SWRCB to truly consider the costs of the proposed NELs, a much more thorough analysis must be conducted and results included in the administrative record for the Final CGP. To date, such analysis has not occurred, and the SWRCB cannot in good faith attempt to pass off its present discussion of cost issues as meeting the federal requirements that economic issues surrounding the achievement of the effluent reductions sought be examined.

Furthermore, to the extent that the SWRCB purports to be acting pursuant to this federal statute when promulgating NELs, each of the remaining federally-mandated considerations required by section 304 of the CWA (33 U.S.C. §§ 1314(b)(2)(B) and 1314(b)(4)(B)) (e.g., the treatment processes necessary to achieve the proposed NELs, the engineering aspects of the control techniques, the industrial process changes required to implement the control measures selected, etc.) must also be examined in detail along with the economic issues. These analyses are especially necessary when the SWRCB is proposing one-size-fits-all NELs that will require treating storm water flows to unnatural conditions. Thorough analyses are not contained in the 2009 DCGP and must be conducted and released for public review prior to adopting the Final CGP.

9. Recommendations

All provisions in the 2009 DCGP related to NELs should be stricken from the Final CGP. Sections to be revised or stricken in the 2009 DCGP are listed below. The 2009 DCGP Fact Sheet should be revised to remove references to NELs in concert with the changes to the Order and its Attachments discussed below.

- Order:
 - § I.H, ¶ 50: “The State Water Board convened a blue ribbon panel of storm water experts that submitted a report entitled, “The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities,” dated June 19, 2006. The panel concluded that ~~numeric limits or action levels~~ are technically feasible to control construction storm water discharges, provided that certain conditions are considered. ~~The panel also concluded that numeric effluent limitations (NELs) are feasible for discharges from construction sites that utilize an ATS.~~ The State Water Board has incorporated the expert panel’s suggestions into this General Permit, which includes ~~both numeric action levels (NALs) and NELs for pH and turbidity, and special numeric limits for ATS discharges.~~
 - § I.H, ¶ 51—delete.
 - § I.H, ¶ 52—delete.
 - § I.H, ¶ 53—delete.
 - § I.H, ¶ 54: **Determining Compliance with Numeric Effluent Limitations**
54. This General Permit sets a pH NAL of 6.5 to 8.5, and a turbidity NAL of 250 NTU. The purpose of the NAL and its associated monitoring requirement is to provide operational information regarding the performance of the measures used at the site to minimize the discharge of pollutants and to protect beneficial uses and receiving waters from the adverse effects of construction-related storm water discharges. The NALs in this General Permit for pH and turbidity are not directly enforceable ~~and do not constitute NELs.~~

- § I.H, ¶ 56—delete.
 - § I.K, ¶ 67: If designed, operated and maintained properly an ATS can achieve very high removal rates of suspended sediment (measured as turbidity), albeit at sometimes significantly higher costs than traditional erosion/sediment control practices. ~~As a result, this General Permit establishes NELs consistent with the level of typical ATS performance.~~
 - § I.K, ¶ 68: This General Permit requires discharges of storm water associated with construction activity that undergo active treatment to comply with special operational and ~~effluent~~ limitations to ensure that these discharges do not adversely affect the beneficial uses of the receiving waters or cause degradation of their water quality.
 - § I.K, ¶ 69—delete.
 - § I.K, ¶ 70—delete.
 - III.C.6: The discharge is monitored and meets the applicable NALs ~~and NELs~~; and (Same edit to equivalent provision in Attachment A, § D.6.f)
 - § IV.M.1 (note 10 only)—delete
 - § V.B—delete.
- Attachment A:
 - § F.2—delete.
 - Tables 5 and 8: remove NEL column from the tables.
 - § I.1.b.i.2—delete.
 - § I.3.b.i.2—delete.
 - § I.4.c.ii: LUP Type 2 dischargers may monitor and report run-on from surrounding areas if there is reason to believe run-on may contribute to exceedance of NALs ~~or NELs~~. (Same edit to equivalent provision in § I.5.c.ii.)
 - § I.5, Table 6: remove reference to NELs.
 - § I.5.b.v—delete.
 - § I.5.d, Table 6: remove reference to NEL.
 - § I.5.d.i—delete.
 - § I.5.j.iii—delete.
 - § I.5.n—delete.
 - Attachment C:
 - § A.2—delete.
 - Attachment D:
 - § I.2.a: To demonstrate that the site is in compliance with the Discharge Prohibitions and applicable Numeric Action Levels (NALs) ~~Numeric Effluent Limitations (NELs)~~ of this General Permit;
 - Table 3: delete references to NELs.
 - § I.5.d: Risk Level 2 dischargers shall monitor and report site run-on from surrounding areas if there is reason to believe run-on may contribute to an exceedance of NALs ~~or NELs~~.

- Attachment E:
 - § A.2—delete.
 - § I.2.a: To demonstrate that the site is in compliance with the Discharge Prohibitions and applicable Numeric Action Levels (NALs)/~~Numeric Effluent Limitations (NELs)~~ of this General Permit;
 - § I.4.g—delete.
 - § I.4.g—delete.
 - § I.5.d: Risk Level 3 dischargers shall monitor and report site run-on from surrounding areas if there is reason to believe run-on may contribute to an exceedance of NALs ~~or NELs~~.
 - § I.10.a.iii: Risk Level 3 dischargers shall monitor and report run-on from surrounding areas if there is reason to believe run-on may contribute to an exceedance of NALs ~~or NELs~~.
 - § I.16—delete.
 - Table 3: delete references to NELs.

- Attachment F:
 - Table 1—delete.
 - § I.1: ATS effluent shall comply with all provisions and prohibitions in this General Permit, ~~specifically the NELs~~.
 - § I.2—delete.
 - § I.3—delete.
 - § I.5—delete.
 - § L.5.c—delete.

The following references to the “stealth” NELs for debris and sediment should be revised or deleted as follows:

- Order: § I.E, ¶ 42: ~~This General Permit prohibits the discharge of any debris from construction project sites.~~ Plastic and other trash materials can cause negative impacts to receiving water beneficial uses. The State Water Board encourages the use of more environmentally safe, biodegradable materials on construction sites to minimize the potential risk to water quality.

- Order: § III.D—delete.

- Attachment A, § D.9—delete.

- Attachment E, § D.4—delete.

- B. Although the Commenting Parties Fundamentally Do Not Object to the Concept of Numeric Actions Levels (NALs), the NALs Proposed by the 2009 DCGP Lack Sufficient Justification.

In addition to the comments discussed below, the Commenting Parties direct your attention to comments previously submitted regarding the imposition of NALs in the CGP.

Those comments submitted on prior drafts of the CGP are equally applicable to the 2009 DCGP and are submitted concurrently herein. Specifically, the Commenting Parties highlight the issues raised in the following previously submitted materials regarding the insufficiency of the proposed NALs:

- Commenting Parties, Legal and Policy Comments on the 2008 DCGP, inclusive of sections III.A.1 through III.A.5 and III.C (on pages 5–9 and 22–28) discussing how:
 - The NALs have not been appropriately developed, do not serve their intended purpose, and are infeasible;
 - The SWRCB has not followed its own Blue Ribbon Panel recommendations regarding the NALs;
 - The NAL values are not supported by proper evidence in the administrative record;
 - The NALs do not serve to improve implementation of construction Best Management Practices (“BMPs”);
 - The NALs are unnecessary to achieve the State Board’s goals; and
 - The SWRCB has failed to sufficiently consider certain factors from the California Water Code in its NAL proposals.
- Sunding, Economic Analysis of the 2008 DCGP, which includes compliance costs for meeting NALs.
- Commenting Parties, Technical Comments on the 2008 DCGP, inclusive of pages 4–5 and pages 13–18, discussing how:
 - The proposed NALs do not identify upset values,
 - The data set supporting the NALs is not fully representative of statewide conditions,
 - The NALs lack a correlation to receiving water quality,
 - The pH NAL has several technical deficiencies,
 - The turbidity NAL has several technical deficiencies, and
 - A design storm is lacking from the NALs proposed.
- FlowScience, NALs and NELs Analysis for the 2008 DCGP, providing detailed technical analyses of the fallacies of the proposed NALs and recommendations for improving the State Board’s proposals.
- Commenting Parties, Legal and Policy comments on the 2007 PCGP: inclusive of sections II.A.2 (regarding control measures), III.D (regarding technical considerations for the NALs), and IV.C (regarding policy concerns with the NALs) (on pages 3–8, 37–40, and 58–59).
- Commenting Parties, Technical Issues Memorandum on the 2007 PCGP: inclusive of pages 1–7 (regarding technical concerns with NALs).
- CBIA’s Bridge Approach

In addition to the comments previously submitted regarding NALs, the Commenting Parties offer the following regarding the NAL proposals in the 2009 DCGP.

1. *The 2009 DCGP improperly implies that exceedances of NALs would equate to permit violations.*

Although the Commenting Parties do not object in theory to the concept of NALs, the Commenting Parties wish to ensure that the State Board's stated intent of making the NALs "learning tools to help dischargers improve their site controls and to provide meaningful information on the effectiveness of storm water controls" (2009 DCGP Fact Sheet, § II.F.a.ii, p. 18) is followed and that excursions over the NALs are not equated with permit violations. The SWRCB does, in some respects, attempt to make clear that the NALs are tools and exceedances of the NALs are not to be considered permit violations. (*See*, 2009 DCGP Fact Sheet, § II.F.a, p. 17 ("Exceedance of an NAL does not itself constitute a violation of the General Permit.") and 2009 DCGP, § II.I.H, ¶ 54 ("The NALs in this General Permit for pH and turbidity are not directly enforceable and do not constitute NELs.")). However, there are elements of the 2009 DCGP and its Fact Sheet that cast doubt on how the NALs will be used and imply instead that excursions over the NALs will be used as evidence of non-compliance with the Final CGP. For example:

- The 2009 DCGP in introducing NALs in the findings includes them under a heading of "Determining Compliance with Numeric Effluent Limitations" which are enforceable elements of the permit. (2009 DCGP, p. 9.)
- Authorized non-storm water discharges are only permitted if they "meet the NELs and NALs." (2009 DCGP, § III.C, p. 19; 2009 DCGP Fact Sheet, § II.E, p. 13.)
- In requirements for SWPPP documentation, the 2009 DCGP links NAL exceedance reports to causing exceedances of receiving water objectives and failing to meet BAT/BCT standards (both of which would be considered permit violations) and discusses the need for corrective action, implying that excursions over NALs would, by default, require action to correct an exceedance (even if, for example, natural conditions were the cause of the NAL excursion). (2009 DCGP, §§ V.C.4.a & b, p. 30.)
- If NALs are exceeded the discharger is "trigger[ed] to take action" and if "corrective actions required by the General Permit" are not taken "that may constitute a violation." (2009 DCGP Fact Sheet, § II.F.2.a, p. 17.)
- When NALs are exceeded the 2009 DCGP requires immediate implementation of "additional BMPs" and revisions to Storm Water Pollution Prevention Plans ("SWPPPs") to "substantially reduce pollutants to levels consistently below the NALs." (2009 DCGP, § I.E, ¶ 55, p. 9.)
- The DCGP also requires immediate implementation of corrective actions when NALs are exceeded. (2009 DCGP, § V.C.3, p. 30.)

All of these examples demonstrate the implications in the 2009 DCGP and its Fact Sheet that excursions of NALs are not simply learning tools, but rather are events that require "corrective action" be taken lest failure to implement corrective action lead to enforcement. If NALs are to be learning tools, then excursions beyond the NALs do not demand corrective

action be taken in every instance. This is made especially apparent in light of the fact that: 1) the NALs do not have a design storm component as the NELs do, leading to situations where NALs are guaranteed to be exceeded during large storm events, and 2) the NALs as currently proposed do not represent true “upset values” and do not account for natural background conditions in the receiving waters. (For further discussions on these technical points, please see the Commenting Parties technical comments submitted concurrently.)

The language of the Final CGP should be conformed such that statements implying that the NALs are more than learning tools and implying that excursions beyond NALs will necessitate corrective action are stricken or substantially revised so to clearly indicate that excursions of NALs are not to be used as evidence of non-compliance with the permit.

2. *Without a design storm component applicable to the NALs, the values will be exceeded in many storm events leading to misleading NAL exceedance reports and potentially inappropriate enforcement actions.*

We appreciate the SWRCB including a design storm concept in the NEL requirements of the 2009 DCGP (although we continue to disagree that NELs should be included at all in the Final CGP). We lament, however, that the SWRCB did not add a design storm component to the NAL requirements. There is no evidence that the proposed NALs would be a useful or reliable indicator of BMP performance under all storm water flow conditions as would be required per the 2009 DCGP’s NAL proposals that apply the NALs during all flow conditions. The State Board’s 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. SWRCB, Storm Water Panel Recommendations to the SWRCB, the Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and construction Activities, p. 18 (2006) (“Blue Ribbon Panel Report”). 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 further* the Commenting Parties technical comments submitted concurrently. Should the SWRCB fail to add a design storm, the agency is virtually ensuring that all sites subject to NAL provisions will, at some point and especially in the event of larger storms, exceed the NALs without there necessarily being any defects in the choice, selection, or implementation of BMPs under the BAT and BCT standards. The Final CGP must 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 aiding in the determination of BMP effectiveness.

3. *Recommendations*

Delete or revise the following provisions as shown below and revise the Fact Sheet as necessary to conform to the changes in the Order and its Attachments:

- § I.H, ¶ 54 (Title just before the paragraph): ~~Determining Compliance with Numeric Effluent Limitations~~ Numeric Action Levels
- § III.C—delete.

- § V.C.4.a: Are related to the construction activities and whether additional or modified BMPs are warranted and if so, required to (1) meet BAT/BCT requirements; (2) reduce or prevent pollutants in storm water discharges from causing exceedances of receiving water objectives; and (3) determine what corrective action(s) were taken or will be taken and with a description of the schedule for completion.
- § V.C.4.b: Are related to the run-on associated with the construction site location and whether additional or modified BMPs measures are warranted and if so, required to (1) meet BAT/BCT requirements; (2) reduce or prevent pollutants in storm water discharges from causing exceedances of receiving water objectives; and (3) what corrective action(s) were taken or will be taken with a description of the schedule for completion.
- § I.E, ¶ 55: This General Permit requires dischargers with NAL exceedances to immediately implement additional or modified BMPs if warranted to meet receiving water limitations and discharge prohibitions of this Order and revise their Storm Water Pollution Prevention Plans (SWPPPs) accordingly to either prevent pollutants and authorized non-storm water discharges from contaminating storm water, or to substantially reduce the pollutants to levels consistently below the NALs. NAL exceedances are reported in the State Water Boards SMARTS system, and the discharger is required to provide an NAL Exceedance Report when requested by a Regional Water Board.
- § V.C.3: Whenever an analytical effluent monitoring result indicates that the discharge is below the lower NAL for pH, exceeds the upper NAL for pH, or exceeds the turbidity NAL (as listed in Table 1), the discharger shall conduct a construction site and run-on evaluation to determine whether pollutant source(s) associated with the site's construction activity may have caused or contributed to the NAL exceedance and shall immediately implement additional or modified BMPs corrective actions if they are needed.
- Fact Sheet, § II.F.2.a, first ¶: This General Permit contains technology-based NALs for pH and turbidity, and requirements for effluent monitoring at all sites. Numeric action levels are essentially numeric benchmark values for certain parameters that, if exceeded in effluent sampling, trigger the discharger to take actions. Exceedance of an NAL does not itself constitute a violation of the General Permit. If the discharger fails to take the corrective action required by the General Permit, though, that may constitute a violation.

The design storm provision discussed in section V.A.5 of the 2009 DCGP should be revised to make the provision applicable to NALs (as opposed to NELs which we recommend be deleted from the Final CGP). The revised provision, should be moved to section V.C and become subsection V.C.5. Revisions to the new section V.C.5 should be made to clarify the application to NALs, specify the application to Risk 2 and 3 sites and make additional technical changes discussed further in the the Commenting Parties' Technical Comments submitted concurrently).

Make all necessary adjustments to NALs consistent with the Commenting Parties' Technical Comments, submitted concurrently.

C. The 2009 DCGP Must be Revised to Consider the Balancing Factors Codified in the California Water Code

1. *The 2009 DCGP continues to attempt to avoid application of California law.*

The current CGP is a joint federal NPDES permit and state waste discharge requirements (“WDRs”). (SWRCB Order No. 99-08-DWQ, at 1 (title of permit and ¶ 2), § B.1, 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).) The 2009 DCGP, however, is ambiguous and self-contradictory concerning its characterization as a joint NPDES/WDRs permit. On the one hand, the 2009 DCGP contains several elements indicating that it is a joint federal NPDES permit and state WDRs. For example, the 2009 DCGP expressly identifies itself as a NPDES General Permit and WDRs on page one of the Order. (2009 DCGP, p. 1.) The 2009 DCGP also applies its provisions to non-federal waters, governed only by state law. (2009 DCGP, § VI.A, p. 31 (identifying the 2009 DCGP as WDRs and applying the 2009 DCGP receiving water limitations to groundwater.

The 2009 DCGP also indicates, however, that it is a NPDES-only permit through: 1) a reference solely to NPDES (and not WDRs) status on the title page, 2) a statement in paragraph 3 of the findings (§ I.A.3 on p. 2) that the permit covers only discharges to “waters of the United States,” and 3) a statement in paragraph 35 of the findings (§ I.A.35 on p. 6) that the permit does not apply to discharges “occurring in basins that are not tributary or hydrologically connected to waters of the United States.”

Despite the State Board’s thinly veiled attempts to remove the CGP from state law jurisdiction,¹³ it is clear that the 2009 DCGP sets forth requirements that constitute WDRs under California law:

California has adopted a plan for the issuance of NPDES permits (Cal. Water Code §§ 13370 et seq.) which has been approved by the EPA. (39 Fed.Reg. 26,061 (1973).) The California State Water Resources Control Board ... and its nine subsidiary regional boards thus have primary responsibility for the enforcement of the [federal CWA] and the effluent limitations established pursuant to it in California.

(See *Shell Oil v. Train*, 585 F.2d 408, 410 (9th Cir. 1978).) The permit requirements set forth in any NPDES permit issued in the State indisputably constitute WDRs for purposes of the California Porter-Cologne Water Quality Control Act (Cal. Water Code §§ 13000 et seq.) (“Porter-Cologne”). Porter-Cologne requires the SWRCB to consider a number of carefully prescribed balancing factors set forth in Water Code sections 13000, 13241 and 13263 (the “State Factors”) when promulgating general permit requirements.¹⁴ Rather than address these

¹³ Compare provisions from the 2007 PCGP §§ I.24 and I.33 that do not contain any proposed limitations on permit application to only “waters of the United States.”

¹⁴ 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 water board is merely meeting and not exceeding any

statutory factors, however, the State Board has sought an end run around them, hiding behind a strained suggestion of inapplicability.

Specifically, based on comments made by SWRCB staff at the May 21, 2008 workshop regarding the prior draft of the CGP, we understand that the SWRCB staff contends, for the first time, that the CGP is to be read and applied solely as a NPDES permit,¹⁵ such that the permit conditions have no relevance to California law. Such an argument is untenable in the face of applicable law, and does not withstand the barest scrutiny when the actual provisions of the 2009 DCGP are reviewed. The 2009 DCGP, if and to the extent finalized, both (i) will be a federal NPDES permit, and (ii) will set forth WDRs for State law purposes. Substantively, the 2009 DCGP exceeds any non-discretionary, federally prescribed minimum requirements. Moreover, federal law permits the SWRCB to consider the State Factors in preparing the Final CGP, as we explain below.

2. *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 Porter-Cologne regulatory framework and restated the authority of California 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 and the RWQCBs, subject to the harmonious operation of California and federal law, and subject to EPA’s reactive oversight and potential re-involvement. (See *Mianus River Preservation Committee v. Administrator, Environmental Protection Agency*, 541 F.2d 899, 906–07, n.21 (2d Cir. 1976).)

In adopting Porter-Cologne, the California Legislature expressly stated that the goal of the statute 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.*” (Cal. Water Code § 13000 (emphasis added).) Inherent in this fundamental goal is the concept of weighing pollutant control standards and measures in light of compelling, competing factors to arrive at a reasonable balance.

Section 13241 of the California Water Code prescribes in more detail how that reasonable balance must be achieved. Specifically, this section, which applies to the State Board’s general permitting activities pursuant to California Water Code section 13263, requires the State Board to consider the following list of non-exclusive balancing factors when developing WDRs:¹⁶

non-discretionary, federally-prescribed minimum requirements).

¹⁵ Statement by G. Gearhart, Chief of the Industrial/Construction Unit, at 2008 DCGP Workshop, May 21, 2008.

¹⁶ Cal. Water Code section 13241 is made applicable to the general permitting activities of the SWRCB by Cal.

- 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 constitute the California Legislature's only substantive instructions to the water boards concerning the means by which effluent limits or pollutant control measures should be adopted.¹⁷ 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 especially that the Legislature mandated consideration of the need for housing within each region. This particular factor is particularly important to establishing pollutant control standards in the CGP. Despite the clear instruction of the Legislature, the State Board has gone out of its way to avoid considering the above factors, claiming that the 2009 DCGP represents a NPDES only permit. Such efforts are misplaced and incorrect.

3. *The CGP is a joint federal/state permit subject to federal and state laws despite references in the 2009 DCGP purporting to avoid application of state law.*

The 2009 DCGP states that it "regulates pollutants in discharges of storm water associated with construction activity (storm water discharges) to *waters of the U.S.* 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." (2009 DCGP, § I.A.3, p. 2 (emphasis added).) In addition, the SWRCB states that the 2009 DCGP does not apply to projects in "basins that are not tributary or hydrologically connected to waters of the United States." (2009 DCGP, § I.C.35, p. 6; *compare*, PCGP §§ I.24, I.33).¹⁸ By these indications, it appears that the SWRCB seeks to exempt itself from considering the State Factors.

Water Code section 13263, subsections (a) and (j), the latter subsection having been added to the statute in 1995 pursuant to Chapter 421, Cal. Statutes of 1995. Notably, the Cal. EPA bill analysis that accompanied the 1995 legislation specified that the "bill would give the SWRCB the same authority now afforded the RWQCBs in issuing general WDRs...." (Cal. EPA Bill Analysis of Senate Bill No. 572 (1995) at p. 4 (dated March 24, 1995).)

¹⁷ The required considerations as set forth in Cal. Water Code section 13241 are necessary to avoid what might otherwise be an unconstitutional unbounded delegation of legislative authority to the SWRCB. (*See California Air Constituency v. California State Air Resources Bd.* 11 Cal.3d 801, 816-17 (1974) ("To avoid [an unconstitutional] delegation [of legislative power], the Legislature must provide an adequate yardstick for the guidance of the administrative body empowered to execute the law.").)

¹⁸ 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.)

The “waters of the U.S.” to which the SWRCB attempts to limit the 2009 DCGP’s application 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;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands (identified in paragraphs (1) through (6) of those section.

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.) By comparing these definitions, it is clear that groundwater, which constitutes a water of the state, does not qualify as a water of the United States.

Although the 2009 DCGP’s reference to “waters of the U.S.” precludes the regulation of discharges to land and groundwater, the SWRCB nevertheless seeks to address groundwater in the permit. (See 2009 DCGP, § VI.A, p. 31.) Specifically, the 2009 DCGP states that “[t]he discharger shall ensure that storm water discharges and authorized non-storm water discharges to any surface or ground water will not adversely affect human health or the environment.” (*Id.*) The clear discrepancy between the finding, which claims the 2009 DCGP applies only to U.S. jurisdictional surface waters, and the operative 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* 2009 DCGP, §§ I.A.3 and VI.A.) 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) and as is implied by language in the Risk Determination Worksheet (2009 DCGP, Appx. 1), then such discharges likely would encompass discharges to waters of the state. In that case, the indirect discharges also will trigger the application of WDRs and the State Factors.

4. *The 2009 DCGP exceeds federal minimum requirements; and the SWRCB should therefore consider and reconcile the State Factors when reissuing the CGP.*

Despite the best efforts of the State Board to create a NPDES-only permit, the provisions of the 2009 DCGP far exceed any applicable federal minimum requirements. For example, as we explained above, the DCGP proposes the imposition of NELs even though the State Board's failure to consider proximate causation puts the NELs well outside of the scope of the CWA. (See discussion *supra*, §III.A.3.) As a result, the 2009 DCGP is subject to the State Factors, pursuant to *City of Burbank, supra*, 35 Cal. 4th at 624–28.

Notably, if the SWRCB were to suggest that the State Factors may be ignored because the proposed WDRs are themselves mandated by federal law, the SWRCB would be unable to prove federal preemption:

[T]he 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....

(*Love v. Foster*, 100 F.3d 413, 414 (1st Cir. 1996) (emphasis added). Indeed, the Supreme Court of the United States has stated that courts should always attempt to reconcile laws to avoid finding federal preemption. (See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); see also *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (“[T]he inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes.”).)

Both state and federal courts generally recognize a presumption against finding federal preemption, even when there is express preemptive language. (See, e.g., *Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773 (1999).) In interpreting the extent of the express [federal] preemption, courts must be mindful that there is a strong presumption against preemption or displacement of state laws. Moreover, this presumption against preemption applies not only to state substantive requirements, but also to state causes of action. (*Id.* at 782, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).)

In the absence of express federal preemptive language, the presumption against finding federal preemption is even stronger: “In the absence of express pre-emptive language, Congress’ intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation. (*Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713 (1985).)

The question of whether federal preemption exists is purely a question of law. (See, e.g., *Industrial Trucking Association v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), citing *Inland*

Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996) and *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir. 1993) (“The construction of a statute is a question of law that we review de novo.... Preemption is also a matter of law subject to de novo review.”.) It does not matter that federal preemption springs from express statutory language or from federal regulations promulgated under a statute. In either event, federal preemption is a question of law. (See *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994) (meanings of federal regulations are questions of law to be resolved by the court).)

Although both the existence and the extent of federal preemption are questions of law, the burden of demonstrating that preemption exists rests squarely with the party asserting the preemption—here, the SWRCB. “It is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating.” (*Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1088 (2008); see also *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956–57 (2004) (“The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption.”); *United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990) (stating that the burden is on the party asserting a federal preemption defense).) Therefore, if the SWRCB tries to assert that federal law preempts the consideration and application of the State Factors, it will bear the burden of demonstrating, as a matter of law, that action required of it under its enabling state law (here, consideration of the State Factors) is preempted.

The SWRCB will not be able to bear such a burden. Substantively, the 2009 DCGP contains many waste discharge requirements that are far beyond any requirements even imposed by the EPA. There are presently no federal effluent limitation guidelines for the construction industry (although EPA has issued some draft proposals). Accordingly, the attempt by the State Board to establish industry-wide NELs via the 2009 DCGP may be allowed under State law (i.e., pursuant to independent state authority, and if not an abuse of discretion), but it would represent a regulation exceeding federal minimum requirements. In light of the additional and obviously *discretionary* provisions (e.g., post-construction hydromodification controls, NELs and NALs) set forth in the 2009 DCGP, the SWRCB cannot claim that its provisions are specifically compelled by federal law, or perhaps more importantly, that consideration of the legislatively-prescribed State Factors would not result in the striking of a different and better balance.

Notably, in pleadings filed in recent litigation (which is now up on appeal), the SWRCB—in the case of *Cities of Arcadia v. SWRCB* (Superior Court of California, Orange County Case No. 06CC02974) (“the Basin Plan Case”)—effectively acknowledged that the California Water Code section 13241 balancing factors are essential to development of the 2009 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, at 28 (Nov. 26, 2007).) 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).)

Additionally, the SWRCB submitted a letter to EPA on April 23, 2008, addressing the proposed development of federal ELGs 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* Letter from Darrin Polhemus, SWRCB, to Stephen Johnson, EPA, at 1 (Apr. 23, 2008).) 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 impairment issues for our communities and watersheds.

(*Id.* at 1–2 (emphases added).) Thus, the SWRCB acknowledges that, substantively, the 2009 DCGP could in fact exceed the proposed federal minimum requirements. Accordingly, the 2009 DCGP cannot be characterized simply as *prescribed by federal law*. The 2009 DCGP requirements are much more stringent than anything required under federal law, and, therefore, the State Factors must be considered by the SWRCB prior to adoption of a Final CGP.

5. *Federal law permits the State, when acting as the EPA Administrator's authorized surrogate, to consider any and all factors that are compelled by state law.*

One section of the federal CWA, section 304 (33 U.S.C. § 1314), sets forth the federal statutory requirements for the establishment of TBELs, which are the type of WDRs the State Board purports to be establishing (*see* 2009 DCGP Fact Sheet, §II.F.1, p. 17).¹⁹ Specifically, it sets forth the manner in which TBELs are to be established for different types of pollutants (conventional, toxic, non-conventional/non-toxic, etc.). In each of the subsections of 33 U.S.C. section 1314 which prescribes the requisite considerations for the establishment of TBELs for different kinds of pollutants, the list of considerations ends ultimately with a very broad

¹⁹ Nowhere in the CWA or its regulations is a state authorized to adopt NPDES permits allowed to establish TBELs. The State Board appears to be claiming it has such authority, and it does not. Only EPA may establish federal TBELs pursuant to CWA section 304, for nationwide application. The State Board may establish effluent limitations, but the question then becomes whether the state does so under federal compulsion or under the independent authority of state law. Given the apparent misconception by the State Board that it is establishing TBELs under federal authority, we discuss further in this section how federal law does not allow for the establishment by the State Board of effluent limitations without consideration of the State Factors.

statement of additional Congressional permission: “and such other factors as the Administrator deems appropriate.”

For example, CWA section 304(b)(2)(B)—pertaining to the control of toxic and non-conventional pollutants—reads, in relevant part:

Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(33 U.S.C. § 1314(b)(2)(B) (emphasis added).) CWA section 304(b)(4)(b)—pertaining to the control of conventional pollutants—similarly reads, in relevant part:

Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(33 U.S.C. § 1314(b)(4)(b) (emphasis added).) Therefore, for each of these classifications of pollutants, the federal statute allows the consideration, along with the prescribed factors, of “such other factors as the Administrator deems appropriate.” The EPA has consistently read the ultimate (“deems appropriate”) clause of these subsections as an indication of Congress’ intent to afford substantial *discretion* in the establishment of TBELs. (*See e.g.*, Effluent Limitation Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category, 69 Fed. Reg. 51892-01, 51896 (Aug. 23, 2004) (“The factors considered in assessing BAT include...*such other factors as the Administrator deems appropriate. The Agency retains considerable discretion in assigning the weight to be accorded these factors.*” (emphasis added).))

Where a state (such as California) is authorized to implement the NPDES program within its jurisdiction, the federal regulations make it plain that the state’s authority (here, the SWRCB) possesses the same discretion as does the EPA Administrator. (*See* 40 C.F.R. § 122.2 (“Administrator means the Administrator of the United State Environmental Protection Agency, or an authorized representative. Effluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘discharged’ from ‘point sources’ into ‘waters of the United States ...’ When there is an approved State program, ‘Director’ normally means the State Director.” (emphasis added)).)

Moreover, the relevant federal regulations set forth, only in the most general and *permissive* manner, the factors that are to be considered by an authorized state authority when establishing *general* permit requirements. The federal regulations do not in any way rule out the State Board's ability to consider the State Factors in the CGP process. (See 40 C.F.R. §§ 122.28(a)(2)(i), (a)(4)(i) and (b)(i); 40 C.F.R. §§ 123.44(c)(1) and (c)(6).) Indeed the federal regulations do *not* require the SWRCB to establish TBELS *sua sponte* for any industry or category for which the EPA Administrator has not yet promulgated applicable effluent standards and limitations.²⁰

TBELS expressly provide that they apply *only* when either (i) the EPA is itself promulgating TBELS, or (ii) an authorized state is promulgating TBELS "on a case-by-case basis" (i.e., *not* pursuant to a general permit). (See 40 U.S.C. § 125.3(c)(2) (applicable only to cases where an applicant seeks a TBEL on an individual, case-by-case basis: "These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.")). Where an authorized state promulgates generally applicable TBELS, the federal regulations do not prescribe specific factors for consideration. Therefore, the State Board is free to apply the State Factors prescribed by the California Legislature.

The federal law therefore permits the SWRCB to take into account the prescribed list of *non-exclusive* State Factors (along with any other factors deemed appropriate) when proposing and promulgating permits. Federal law *allows* the SWRCB to do so, and California law *compels* it to do so. Accordingly, there is no federal preemption here. When considering the State Factors the SWRCB will need to provide an analysis of the State Factors sufficient for the courts to ascertain that the SWRCB has, in fact, complied meaningfully with its statutory mandate to do so. (See *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974).)

6. *The State Board's failure to consider the State Factors will cause potentially disastrous results.*

Practically, the effects of the State Board'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 large portion 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,

²⁰ Specifically, 40 C.F.R. sections 123.44(c)(1) and (c)(6) read together provide that when a Regional EPA Administrator objects to a state authority's proposal for a NPDES general permit "with respect to which applicable effluent standards and limitations...have not yet been promulgated by [EPA,]" the "Regional Administrator's objection to the issuance of [the] proposed permit must be based upon...best management practices under section 304(e) of the CWA." This indicates that the SWRCB: 1) is not compelled by federal law to establish effluent limits or to limit its consideration of factors if doing so, and 2) therefore may, consistent with federal law, consider the State Factors if and when choosing to establish NELs.

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. Ironically, the SWRCB itself requested the enactment (via sponsorship by State Senator David Kelley) of amendments to Calif. Water Code section 13263 in 1995 (pursuant to Senate Bill 572 (1995), Chapter 421, Cal. Statutes of 1995) specifically so that the SWRCB would have the ability to promulgate general permits affecting areas that are not covered by the federal NPDES program.²¹

Second, to the extent that any RWQCB ultimately relied upon the Final CGP, if it finalizes the current 2009 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 State Board'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 waters of the U.S. 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 are yet another unintended consequence of the State Board's efforts to avoid following the applicable State law.

Lastly, the 2009 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 2009 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.

7. *Recommendations*

Revise the 2009 DCGP provisions after conducting the required analysis of the State Factors and provide proof of such analysis in a revised Fact Sheet sufficient to confirm that the State Board has complied meaningfully with its statutory mandate to assess the State Factors.

²¹ See Analysis of Senate Bill 572 (1995) prepared for the Senate Committee on Agriculture and Water Resources, dated April 4, 1995, at p. 1 (Setting forth the need for the legislative amendments: "The [SWRCB] is authorized to issue general [NPDES] permits under the federal Clean Water Act related to discharges to surface waters. However, the [SWRCB] lacks specific authority under Porter-Cologne to prescribe general WDRs which apply to discharges to land as well as water.").

D. The 2009 DCGP's Monitoring Requirements Must Be Revised to Correct Technical Deficiencies and to Present Scientifically-Defensible, Reasonable, and Feasible Requirements

In addition to the comments discussed below, the Commenting Parties direct your attention to comments previously submitted regarding the proposed monitoring program. Those comments submitted on prior drafts of the CGP are equally applicable to the 2009 DCGP and are submitted concurrently herein. The Commenting Parties would like to highlight the following issues raised in previously submitted materials regarding the insufficiency of the proposed monitoring program:

- Commenting Parties, Legal and Policy Comments on the 2008 DCGP, inclusive of sections III.D.1 through III.D.3 (on pages 28–31) discussing how:
 - The monitoring program is not required, not cost-effective, and is unlikely to result in useable data;
 - The SWRCB is going back on its own recommendations and court rulings regarding effluent monitoring; and
 - The program for monitoring of receiving water is overly burdensome and is unlikely to produce useful data.
- Sunding, Economic Analysis of the 2008 DCGP, which includes compliance costs for adhering to monitoring program mandates.
- Commenting Parties, Technical Comments on the 2008 DCGP, inclusive of pages 7 and 42–46 discussing how:
 - The monitoring program is particularly burdensome for sites with several discharge points;
 - Elements of the monitoring program are vague;
 - Clarity is lacking in the use of receiving water monitoring data;
 - Collection of receiving water samples may be difficult or impossible to do;
 - Collected receiving water data is unlikely to prove useful; and
 - Bioassessment monitoring requirements are overly burdensome and lacking in merit.
- Commenting Parties, Legal and Policy comments on the 2007 PCGP: inclusive of sections IV.D (on pages 59–60).
- Commenting Parties, Technical Issues Memorandum on the 2007 PCGP: inclusive of pages 4–5 and 28–33.
- CBIA's Bridge Approach

1. *Effluent monitoring requirements suffer from technical problems and a lack of proper justification.*

We appreciate the State Board's efforts to provide reasonable limitations to the effluent monitoring required by the 2009 DCGP including corrections to the 2009 DCGP provided in errata that clarified such issues as the maximum number of daily samples, etc. We continue to have some concerns with effluent monitoring requirements, however. To the extent that the State Board is purporting to establish NELs that are both legally and technical deficient and NALs that are technically deficient, monitoring required related to the proposed NELs and NALs would be improperly established. As is discussed in the Commenting Parties technical comments on the 2009 DCGP (submitted concurrently), we continue to have numerous technical concerns regarding the effluent monitoring. Additionally, the purposes of the effluent monitoring appear to have no basis other than to determine compliance with NELs and to determine if NALs have been exceeded. Because of the technical problems remaining with the effluent monitoring requirements, the legal and technical deficiencies of the NELs and NALs, and due to the limited application that the monitoring will serve, we assert that the proposed effluent monitoring will exceed the scope of California Water Code section 13267 which requires that burdens of a monitoring program bear a reasonable relationship to the benefits to be obtained from the monitoring. With particular regard to cost issues, as explained above in section III.A.8, the costs for monitoring have been grossly underestimated by the SWRCB staff in the 2009 DCGP Fact Sheet. We urge the SWRCB to revisit the proposed monitoring requirements, correct technical deficiencies and perform a diligent analysis to ensure that the monitoring requirements bear a reasonable relationship to the benefits to be obtained.

2. *The receiving water monitoring program is burdensome, unreasonable, will not produce scientifically useful data, and must be stricken.*

The 2009 DCGP's requirements for receiving water monitoring suffer from greater technical and scientific problems than the effluent monitoring and are even more likely than effluent monitoring requirements to produce data that is irrelevant and unusable. (See Commenting Parties Technical Comments submitted concurrently.) Some of these concerns include ongoing problems regarding access, safety, comingling of flows; distance from sites to relevant receiving waters; cost issues; and other issues. With such a myriad of technical problems surrounding the receiving water monitoring requirements, there appears to be no way in which the requirements can be made to satisfy California Water Code section 13267 (requiring the burdens of implementing such programs bear a reasonable relationship to the benefits to be gained). Moreover, the receiving water monitoring envisioned in the 2009 DCGP is not linked to NELs or NALs and thus, cannot be justified as being mandated by federal EPA regulations. (See 40 C.F.R. § 122.44.) Thus, the receiving water requirements very clearly go far beyond federal mandates and must be sufficiently justified under all Porter-Cologne provisions inclusive of sections 13267, 13241, and 13000. There is a dearth of information in the 2009 DCGP or its administrative record that would purport to assess the receiving water quality requirements under any of the Porter-Cologne requirements much less serve to satisfy such requirements.

3. Recommendations

Delete or revise the following provisions as shown below and revise the Fact Sheet as necessary to conform to the changes in the Order and its Attachments:

- § I.J, ¶ 60: For all Risk Level 3 and for some Risk Level 2 sites, this General Permit requires effluent ~~and receiving water~~ monitoring for pH and turbidity. Sampling, analysis and monitoring requirements for effluent ~~and receiving water~~ monitoring for pH and turbidity are contained in this General Permit.
- Attachment A, § L, Table 3: remove receiving water monitoring column.
- Attachment A, § L.5.d—delete.
- Attachment A, § L.5.e—delete.
- Attachment A, § L.5.h, Table 8—delete references to bioassessment.
- Attachment D, § I, Table 2—delete references to receiving water monitoring.
- Attachment D, § I.4.h—delete.
- Attachment D, § I.4.i—delete.
- Attachment D, § I.4.j—delete.
- Attachment D, § I.5.h—delete.
- Attachment D, § I.5.i—delete.
- Attachment D, § I.5.j—delete.
- Attachment D, § I.9.e—delete.
- Attachment D, § I.17—delete.
- Appendix 5—delete.

Make all revisions to the effluent monitoring provisions of the 2009 DCGP as discussed in the Commenting Parties' Technical Comments, submitted concurrently.

E. The Post-Construction Requirements Represent an Improper Extension of RWQCB Authority and Must Be Removed from the Final CGP, Allowing Appropriate Regulatory Programs to Address the SWRCB's Concerns.

While the Commenting Parties continue to support the State Board's limiting the application of the post-construction requirements in the 2009 DCGP to those areas outside of areas covered by municipal separate storm sewer ("MS4") permits, the CGP is simply not an appropriate regulatory vehicle to regulate land use, project design, and flow control as sought by the post-construction control requirements of the 2009 DCGP. To this end, the Commenting Parties suggest removal of the post-construction control provisions from the 2009 DCGP.

In addition to the comments presented below, the Commenting Parties direct your attention to comments previously submitted regarding the proposed post-construction controls. Those comments submitted on prior drafts of the CGP are equally applicable to the 2009 DCGP and are submitted concurrently herein. The Commenting Parties would like to highlight the following issues raised in previously submitted materials regarding the post-construction control requirements:

- Commenting Parties, Legal and Policy Comments on the 2008 DCGP, inclusive of sections III.E.2 through III.E.4 (on pages 32–38) discussing how:
 - The post-construction controls are not appropriate for inclusion in the Final CGP and how the MS4 permit program (for both small and large MS4 systems) and CEQA are the appropriate regulatory vehicles for controlling hydrologic aspects of projects once construction is complete;
 - The SWRCB must work to develop a statewide runoff policy before embarking on implementing prescriptive post-construction controls through the CGP; and
 - The post-construction controls undermine use of regional programs and wetland restoration projects.
 - Sunding, Economic Analysis of the 2008 DCGP, which includes compliance costs for adhering to post-construction control mandates.
 - Commenting Parties, Technical Comments on the 2008 DCGP, inclusive of page 8 and 47–49 discussing how:
 - Replicating pre-project flows will not necessarily improve water quality or control erosion;
 - On-site controls will not necessarily maintain pre-project runoff volumes or distributions; and
 - The information cited in the Fact Sheet supporting the post-construction controls has several technical deficiencies.
 - GeoSyntec Consultants, Evaluation of Post-Construction Hydromodification Requirements, dated March 2008 in its entirety.
 - Commenting Parties, Legal and Policy comments on the 2007 PCGP: inclusive of sections III.E (on pages 40–50) and IV.A (on pages 50–57).
 - Commenting Parties, Technical Issues Memorandum on the 2007 PCGP: inclusive of pages 5–6 and 28–33.
1. *The SWRCB is exceeding its authority to require post-construction controls in a storm water permit for construction site discharges.*

2009 DCGP provisions regarding post-construction standards have not been altered in any dramatic way from those requirements proposed in the 2008 DCGP, and thus, the Commenting Parties legal and policy comments related to the post-construction standards presented in sections III.C.2–4 of our 2008 comments are equally applicable to the 2009 DCGP. We continue to assert that the CGP is not the legally appropriate vehicle for the State Board to pursue what amount to land use and design controls on new development and redevelopment projects. The Final CGP will be a permit applicable to a category of *industrial discharger* and as such, the CGP must regulate discharges *from an industrial source*. (See e.g., 2009 DCGP § I.A, ¶1, p. (discussing the regulatory authority for the CGP and describing its application to discharges from construction activities including “demolition, clearing, grading, and excavation, and other land disturbance activities”); § I.A, ¶¶ 2 and 3, pp. 1–2 (authorizing discharges

associated with “construction activity”), and § I.B (describing activities covered by the CGP, this section does not list activities occurring outside of active construction projects (e.g., post-construction activities) as falling within the regulation of the CGP.) Post-construction discharges, by their very definition, occur after the industrial activity has ceased, thus State Board attempts to regulate discharges occurring after the Notice of Termination has been filed under the Final CGP are completely without authority. (See 2009 DCGP, Appx. 7, p. 6 (definition of Post-Construction BMPs defining such controls as those effective “after final stabilization is attained” and when “final stabilization is defined within the 2009 DCGP as occurring when there is “no potential for construction-related storm water pollutants to be discharged” (2009 DCGP § II.D.1.a, p. 17).) The distinct nature of the construction phase discharge and post-construction discharge is even recognized by the SWRCB in the 2009 DCGP Fact Sheet at section II.L (p. 35) wherein the state distinctly recognizes a construction phase and a phase existing “after all construction activities are completed.”

To further illustrate the error the SWRCB is committing by including post-construction controls in the 2009 DCGP, the proposed ELGs issued by EPA are relevant. EPA is proposing regulations that, once finalized, will apply to the entire construction and development category and will be required of all NPDES permits addressing the construction industry issued by EPA or the states under delegated authority. A thorough examination of EPA’s proposed regulation reveals that nowhere in either the proposed regulations or the voluminous development documents supporting the proposed regulations does EPA propose to regulate post-construction discharges in the manner proposed by the 2009 DCGP. (See EPA’s proposed ELGs and their development documents available at: <http://www.epa.gov/waterscience/guide/construction/>.) Certainly if it were appropriate to regulate post-construction discharges in a construction industry regulation or NPDES permit, then such regulation would have been either proposed or at least discussed by the EPA in its proposed construction and development category ELG proposal. However, such is not the case, for regulation of a non-industrial discharge is not appropriate in a NPDES permit or other regulatory program governing an industrial activity such as construction.

As we have pointed out in prior comments on the 2008 DCGP, the State Board is not without ability to address storm water discharges from new development and redevelopment projects occurring once construction is complete. Through its powers as a responsible agency under the California Environmental Quality Act (“CEQA”) the SWRCB and the RWQCBs have the ability to ensure projects do not cause the adverse flood protection, erosion control and downstream bank stability that it seeks to control through the 2009 DCGP. (See CEQA Guidelines, 14 Cal. Code Regs. §§ 15000 et seq., Appx. G (requiring projects subject to CEQA to determine if projects will cause significant impacts with regard to flooding issues as well as stream channel modification and on- and off-site erosion issues and to mitigate for such significant impacts).)

Additionally, as is already recognized in the 2009 DCGP, existing public storm drain permits have been a vehicle used by the RWQCBs and the SWRCB to address concerns regarding hydromodification and related conditions from new development and redevelopment projects. (2009 DCGP, § XIII.A, p. 35 (exempting from certain post-construction requirements in the 2009 DCGP projects that are governed by an existing public storm drain permit with an approved storm water management plan).) The small public storm drain permit, issued by the SWRCB, is a regulatory vehicle that *already* addresses post-construction flow concerns in the

areas outside of existing public storm drain coverage. Thus any SWRCB concerns are addressed and there is no reason for including post-construction controls in the 2009 DCGP.

The SWRCB staff stated in workshops regarding the 2008 DCGP that the rationale for having the post-construction controls in the CGP was to target areas of the state not currently governed by public storm drain permits, as many of these areas are perceived to have a high number of active construction sites and many of these areas may have “sensitive waters” in need of protection. However, this thinking would ignore the ability of the statewide small public storm drain permit to address post-construction flows in a more appropriate fashion than the CGP program. The state’s general permit for small public storm drain systems (SWRCB Order 2003-0005-DWQ) (“Small MS4 Permit”) governs 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 allegedly seeks to target through the 2009 DCGP’s post-construction controls. Furthermore, under the Small MS4 Permit, these areas of “high growth” that are targeted by the 2009 DCGP’s post-construction requirements are already required to obtain coverage under the Small MS4 Permit and to implement post-construction storm water management programs for new development and redevelopment areas that include controls for post-construction pollutants as well as flow rates (to control erosion and other stream channel issues). (Small MS4 Permit, Attachment 4, pp. 2–3.) When the State Board acknowledges that public storm drain permits are an appropriate regime to seek control of flows from new development and redevelopment projects and when the appropriate regulatory programs both in the existing public storm drain permits and in CEQA are already available to the SWRCB and the RWQCB, the SWRCB cannot justify post-construction controls in the Final CGP.

If however, the any post-construction provisions are to remain the Final CGP, there are several technical deficiencies presented by the 2009 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* § □, below).

2. *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 2009 DCGP claims to limit the application of its post-construction requirements to those areas covered by public storm drain permits (*see e.g.*, 2009 DCGP § XIII.A, p. 35) the 2009 DCGP contains post-construction requirements that would apply to areas already governed by public storm drain permits. Namely, sections II.D.1.a and XIII.B. Section II.D.1.a of the 2009 DCGP states that completed projects are not capable of filing notices of termination unless “the site will no pose any additional sediment discharge risk than it did prior to the commencement of construction activity.” Because of its use of “prior to commencement of construction activity” terminology, this section would imply that its requirements relate to the post-construction condition, and are not conditioned by the other 2009 DCGP permit language limiting post-construction controls to areas not already governed by public storm drain permits. (Notwithstanding the lack of an jurisdictional limitations, there are technical problems with this proposed provision discussed in greater detail in the Technical comments submitted by the

Commenting Parties in 2008 (attached).) Section II.D.1.a should be removed from the Final CGP.

Also, the 2009 DCGP in section XIII.B contains an open-ended and vague requirement for all projects regardless of public storm drain permit coverage to “implement BMPs to reduce pollutants in storm water discharges that are reasonably foreseeable after all construction phases have been completed at the site.” Not only might this requirement conflict with the specific local programs imposed on new development and redevelopment projects through their public storm drain permits, but also the requirement is unjustifiably vague. Neither the 2009 DCGP nor its Fact Sheet provide any information regarding what would be required to implement this measure, nor how such a blanket requirement is justified. (Especially in light of the discussions above in section III.E.1, this requirement is inappropriate.) Also, despite the claims by SWRCB staff that post-construction requirements in the CGP are to be limited to those areas outside of public storm drain permit coverage, the provision in section XIII.B would apply to all projects state-wide regardless of public storm drain jurisdiction. Section XIII.B should be removed from the Final CGP.

3. *The post-construction requirements in the 2009 DCGP conflict with the powers of lead agencies under the California Environmental Quality Act.*

It has long been recognized in California that “the front line role in land use planning and zoning is in the hands of the *local government*,” as opposed to the state government or the executive agencies thereof. *Building Industry Ass’n of San Diego v. Superior Ct. of San Diego County*, 211 Cal.App.3d 277, 291 (1989) (finding that State land use planning and zoning law did not invalidate municipal ordinance relating to growth control) (emphasis added). The State’s land use planning, zoning, environmental review and similar laws all leave “wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans.” *Yost v. Thomas*, 36 Cal.3d 561, 573 (1984).

By specifying in the 2009 DCGP statewide, “one-size-fits-all” post-construction controls, the SWRCB has crossed the line from a legitimate regulator of water quality to a remote and uninformed attempted usurper of local land use. The SWRCB does not have the jurisdiction, the policy expertise, or the requisite local knowledge to intrude itself so completely into the land use regime. Given that the SWRCB must be acting pursuant to State authority (if any) when regulating land use so broadly, great care should be taken to assure that the requirements put forth by the SWRCB do not conflict with the mandates of other State laws concerning land use. Unfortunately, the SWRCB took no such care in proposing the 2009 DCGP’s post-construction requirements.

In particular, the SWRCB has failed to take into account how its proposed 2009 DCGP will interplay with CEQA. Public Resources Code sections 21000 reflects the State Legislature’s intent that CEQA should operate “to control environmental pollution” “so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.” CEQA has a great advantage over the kind of “one-size-fits-all” numerical prescriptions like those proposed in the 2009 DCGP, because CEQA analysis is contextual—it requires the analysis of projects in their respective actual contexts. Therefore, under CEQA, no one would impose an arbitrary post-construction

requirement (such as those now proposed in 2009 DCGP) if close consideration of the site-specific context were to reveal an environmentally preferred alternative. Therefore, instead of dictating post-construction measures, the SWRCB should instead recommend to the public agencies throughout the State acting as the lead agencies under CEQA presumptive thresholds of environmental significance concerning the post-construction issues addressed in the 2009 DCGP.

4. *Recommendations*

All provisions related to post-construction controls should be stricken from the Final CGP. Delete or revise the following provisions as shown below and revise the Fact Sheet as necessary to conform to the changes in the Order and its Attachments:

- § I.A, ¶ 13: This General Permit recognizes ~~four~~ three distinct phases of construction activities. The phases are Grading and Land Development Phase, Streets and Utilities Phase, and Vertical Construction Phase, ~~and Post-Construction Phase~~. Each phase has activities that can result in different water quality effects from different water quality pollutants. This General Permit also recognizes inactive construction as a category of construction site type.
- § I.G, ¶ 46: Although this General Permit does not mandate specific setback distances, dischargers are encouraged to set back their construction activities from streams and wetlands whenever feasible to reduce the risk of impacting water quality (e.g., natural stream stability and habitat function). Because there is a reduced risk to receiving waters when setbacks are used, this General Permit gives credit to setbacks in the risk determination ~~and post-construction storm water performance standards~~. The risk calculation and runoff reduction mechanisms in this General Permit are expected to facilitate compliance with any Regional Water Board and local agency setback requirements, and to encourage voluntary setbacks wherever practicable.
- § I.L, ¶ 71—delete.
- § II.D.1.e—delete.
- § II.D.1.f—delete.
- § XIII—delete.
- Attachment B, § H.1—delete.
- Attachment B, § J.5—delete.
- Attachment D, § H.2: Additional Risk Level 2 Requirement: The Risk Level 2 discharger shall develop the REAPs for all phases of construction (i.e., Grading and Land Development, Streets and Utilities, Vertical Construction, ~~Post-Construction~~). Example REAP templates are included in Appendix 3. (Identical revision to similar provision in Attachment E, § H.2)
- Appendix 4—delete.
- Appendix 4.1—delete.

F. The 2009 DCGP Confers Unprecedented and Excessive Power in the RWQCBs.

The 2009 DCGP provisions would vest an unprecedented amount of unfettered discretion in the RWQCB staff—discretion that is not necessary due to the safeguards set forth in existing law providing Regional Boards with authority to enforce the requirements of the CGP. The

proposals included within the 2009 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. *The 2009 DCGP vest undue power in the Regional Boards to terminate permit coverage.*

The Commenting Parties are concerned that the 2009 DCGP would allow Regional Boards to “terminate coverage under this General Permit” if the Regional Board “does not agree with the discharger’s self-reported risk level (e.g., they determine themselves to be a Level 1 Risk when they are actually a Level 2 Risk project).” (2009 DCGP § XV.A, p. 37.) Moreover, the Regional Boards would be given the authority to “terminate coverage under this General Permit for dischargers who fail to comply with its requirements or where they determine that an individual NPDES permit is appropriate.” (2009 DCGP § XV.B.) There are a number of problems with these provisions. First, the authority that would be provided the Regional Boards under the CGP is unprecedented because it would allow the Regional Boards to terminate coverage under the CGP without notice to the discharger that the Regional Board does not agree with the discharger’s self-reported risk level. The 2009 DCGP includes no information that clarifies “when,” “how” or “why” the Regional Board could act to terminate coverage. As a practical matter, the Regional Board’s review, and termination, could occur mid-stream, when a project is already under construction. Such a result is unfair and unreasonable. Moreover, as drafted now, the termination would be a *fait accompli*, as the permittee would not be given notice and there is no provision for any due process for the permittee prior to termination.

Nowhere in the CWA, Porter-Cologne, or the federal or state regulations implementing those statutes, are Regional Boards provided such unfettered authority. For example, Porter-Cologne allows termination of WDRs *for cause* where: 1) there is a violation of any condition in the requirements, 2) when the WDRs were obtained by misrepresentation or failing to disclose all relevant facts, or 3) when there has been a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. (Cal. Water Code § 13381.) Under Porter-Cologne, any permit termination must be proven; Porter-Cologne does not give the Regional Boards the authority to terminate WDRs simply because the Regional Board *disagrees* with information provided as a part of the permit registration documents. This procedure stands in direct contrast to the unreasonable termination authority that would be allowed under the 2009 DCGP.

Adding to the unreasonableness of the discretion afforded by the 2009 DCGP is that the requirements for reporting the discharger's risk level are specified in the 2009 DCGP as objective standards and risk level analysis are submitted with permit registration documents. It would appear difficult if not impossible to incorrectly determine risk level, as the risk level determinations are very formulaic, allowing no effective room for subjective interpretation. Moreover, if there is to be “disagreement” with a discharger’s self-reported risk level, this would be apparent at the time the permit registration documents, inclusive of the risk level assessment, are filed. Notwithstanding these facts, the 2009 DCGP would allow the Regional Boards to decide that it does not agree with a discharger’s risk level assessment *after* construction activities have commenced. A termination under this scheme will result in a significant increase in

construction costs, as terminated projects would be halted indefinitely while dischargers recalculate their risk level. For a Regional Board to have such discretion does not accord with the applicable statutes nor does it provide any level of fairness to the regulated community.

It is unnecessary for the 2009 DCGP to contain the RWQCB “termination” clause, because the Regional Boards already have sufficient enforcement authority to ensure compliance with CGP requirements, inclusive of the risk assessment determination. The Regional Boards are authorized to impose civil penalties for violations of permit conditions. Cal. Water Code § 13385(a). Further, if a RWQCB finds that there is a discharge of water in violation of permit conditions, it may issue a cease and desist order to direct the discharger to comply with its permit. Cal Water Code, § 13301. Thus, if a discharger obtains coverage under the CGP, and a Regional Board later believes the discharger to be in violation of the CGP, the Regional Board may send the discharger notice of such violations, demanding an immediate correction, or a Regional Board may initiate more formal enforcement proceedings including penalty actions or injunctive actions through cease and desist orders. These enforcement processes are provided for in Porter-Cologne and there are specified procedures in place to guide the RWQCBs and give a measure of due process to dischargers. The State Board should delete the RWQCB “termination” clause from the Final CGP.

2. *The 2009 DCGP grants Regional Boards powers to modify the CGP’s terms without notice or due process.*

In the same way the 2009 DCGP grants undue authority to the Regional Boards to terminate permits, the SWRCB also purports to grant the Regional Boards authority to modify the CGP’s terms without notice or any manner of process. In Attachment E, section E.8 (p. 6), the 2009 DCGP provides Regional Boards with authority to “require Risk Level 3 dischargers to implement additional site-specific sediment requirements if the implementation of the other requirements in this section are not adequately protecting the receiving waters.” This provision would allow RWQCBs to modify the CGP’s terms without provision of any notice or process to the discharger. Furthermore, this provision would appear to allow the RWQCBs to mandate specific BMPs to dischargers in violation of section 13360 of Porter-Cologne, which prohibits the RWQCBs from dictating the manner of compliance with permits. Without some limitation on the RWQCBs and without provision of some notice and due process to the dischargers, this provision would, at a minimum, violate Porter-Cologne.

Similar to the discussion above regarding the RWQCB “termination” clause, this provision giving the RWQCBs authority to dictate new BMPs is unnecessary given the enforcement powers already held by the RWQCBs. Rather than grant the RWQCBs with unfettered discretion to prescribe specific BMPs (in violation of Porter-Cologne) the RWQCBs should continue to rely instead on their extensive enforcement powers—powers that could be invoked if BMPs in place at a particular project were not meeting the technology-based requirements of the CGP (e.g., to implement BMPs meeting the BAT and BCT standards). (See 2009 DCGP, § V.A.5.2, p. 28.) The SWRCB should delete this clause from the Final CGP.

3. *Notwithstanding that the post-construction control requirements should not be included in the Final CGP, the Regional Board must not have powers to modify the design of projects already entitled.*

The 2009 DCGP requires that structural BMPs necessary to meet the post-construction control requirements water volume capture design standards be approved by the Regional Board prior to allowing such BMPs to be utilized. (2009 DCGP, § XIII.A.3, p. 35.) This particular clause presents several problems, not the least of which is that this grant of power to the RWQCBs would reach back in time to local land use planning, project design and environmental permit and approval stages of development, which typically are completed well in advance of applications for grading permits and the need to obtain coverage under the CGP. Moreover, the 2009 DCGP actually proposes that the Regional Board approval be sought “30 days prior to the *use*” of the post-construction control measure (2009 DCGP, § XIII.A.3, p. 35 (emphasis added))—meaning that it would not even be at the commencement of construction that the RWQCB would have veto power over a design aspect of a project, but at the end of the construction project when the use of the post-construction structural control is imminent.

It is conceivable that when granted the discretion to approve or disapprove of a project’s post-construction structural control measures, the Regional Boards might demand modification to such controls, long after the project has obtained all approvals and other vested rights and entitlements to develop the project. Thus, the 2009 DCGP creates the inevitable result that project design, land use planning and project land use and environmental approvals would have to be re-analyzed 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 revisiting project design and approvals at the construction stage would be substantial and would adversely affect the development industry as a whole. Moreover, because the Regional Board power to veto the post-construction controls selected would occur so late in the process (approximately 30 days prior to use of the control mechanism), the Regional Board could conceivably require demolition of an already-constructed structure and/or significantly affect countless other aspects of an already-built project. This ability to effectively cripple or destroy projects so late in the game is unconscionable, especially in light of the inappropriateness of the post-construction control requirements generally (see discussion in § E, above). If post-construction controls are to remain in the Final CGP (despite our urging to have them removed) the Regional Board must *not* have approval power over the controls chosen, so long as the design standards of the CGP are met by the selected control(s). Furthermore, the Regional Boards must be required to object (if such objection is warranted for failure to meet design standards) to any post-construction controls at the time the permit registration documents are filed.

It is conceivable that RWQCBs when granted the discretion to approve or disapprove of a project’s post-construction structural control measures might demand modification to such controls long after the project has obtained all approvals and other vested rights and entitlements to develop the project. Thus, the 2009 DCGP creates the inevitable result that project design, land use planning and project land use and environmental approvals would have to be re-analyzed 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 revisiting project design and approvals at the

construction stage would be substantial and would adversely affect the development industry as a whole. Moreover, because the Regional Board power to veto the post-construction controls selected is so late in the process (approximately 30 days prior to use of the control mechanism) the Regional Board could conceivably require demolition of an already-constructed structure and countless other aspects of an already-built project. This type of ability to destroy projects so late in the game is unconscionable, especially in light of the inappropriateness of the post-construction control requirements generally (see discussion in § E, above). If post-construction controls are to remain in the Final CGP (which we urge them not to be) the Regional Board must not have approval power over the controls chosen, so long as the design standards of the CGP are met by the selected control(s). Furthermore, the Regional Boards must be required to object (if such objection is warranted for failure to meet design standards) to any post-construction controls very early on.

4. *Recommendations*

Delete or revise the following provisions as shown below and revise the Fact Sheet as necessary to conform to the changes in the Order and its Attachments:

- § XV.A: In the case where the Regional Water Board does not agree with the discharger's self-reported risk level (e.g., they determine themselves to be a Level 1 Risk when they are actually a Level 2 Risk project), Regional Water Boards may either direct the discharger to reevaluate the Risk Level(s) for their project ~~or terminate coverage under this General Permit.~~
 - Attachment E, § E.8—delete.
- G. The 2009 DCGP Inappropriately Exempts Certain Projects, Thus Failing to Serve as a Proper General Permit.

As was discussed in detail above, in section III.C.1, the 2009 DCGP attempts to limit itself projects discharging to waters of the U.S. only. If the limitation were to remain, all construction sites discharging solely 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. Such a jurisdictional limitation on the CGP would create a regulatory morass as numerous sites would be 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.

(33 C.F.R. § 122.28(a)(2)(ii); *see also* Cal. Water Code § 13263(i) (providing nearly identical language for adoption of general WDRs under Porter-Cologne).)

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. For the SWRCB to now turn its back on the existing program and force many sites that would have otherwise been covered by the CGP into the hands of the RWQCBs is not in keeping with the CWA regulations or Porter-Cologne. Furthermore, greatly expanding the number of permits that must be issued by the RWQCBs runs counter to statements in the Fact Sheet to the 2009 DCGP itself, acknowledging that the SWRCB “has elected to adopt only one statewide General Permit at this time [as opposed to individual permits] that will apply to most storm water discharges associated with construction activity.” (2009 DCGP Fact Sheet, § I.A, p. 1; *see further Id.* (“Regulating many storm water discharges under one permit will greatly reduce the administrative burden associated with permitting individual storm water discharges.”).)As a policy matter, the SWRCB must 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.

1. Recommendations

Delete or revise the following provisions as shown below and revise the Fact Sheet as necessary to conform to the changes in the Order and its Attachments:

- Add the phrase “Waste Discharge Requirements” to the Final CGP’s title page.
- § I.A, ¶ 3: This General Permit regulates discharges of pollutants in storm water associated with construction activity (storm water discharges) to waters of the United States and waters of the State from construction projects that disturb one or more acres of land surface, or that are part of a common plan of development or sale that disturbs more than one acre of land surface.
- § I.A., ¶ 35—delete.

H. Other Concerns with the 2009 DCGP

In addition to the discussions above, the Commenting Parties have the following concerns regarding certain provisions in the 2009 DCGP:

- The 2009 DCGP purports to have a grandfather clause for projects already covered under the Current CGP, whereby such projects would be exempt from risk assessment

requirements and would proceed through completion as Risk Level 1 sites. (2009 DCGP, § II.B.4.b, p. 14). However, there are several qualifications to this grandfather clause that hinder its effectiveness. Firstly, it would not appear the clause is applicable to linear projects given the clause is located in a section only applicable to traditional construction. Also, the clause is modified by findings that temper its applicability—specifically, finding 37 (p. 6), which claims that the grandfather provision is only applicable to projects “beyond the design stages.” This qualification is problematic in that it could constrict application of the grandfather clause and also because the clause is impermissibly vague. Finally, the clause is subject to complete undermining by the Regional Boards, as the RWQCBs are granted authority to require risk analysis of grandfathered sites without justification, notice or other protections typically granted to the regulated community. For reasons discussed above regarding similar grants of authority to RWQCBs, we object to this discretionary power granted to the RWQCBs.

Recommendations: Delete the following language from finding number 37: “that are beyond the design stage.” Delete the following language from section II.B.4.b: “However, a Regional Board retains the authority to require an existing discharger to comply with the Section VIII risk determination requirements.” Modify section II.B.4.b such that it is clear the grandfather clause applies to all projects—linear and traditional—governed by the Current CGP.

- The 2009 DCGP’s risk assessment appears weighted in favor of finding high receiving water risk—thus skewing risk analyses to the high end. The risk factor worksheet contained in Appendix 1 to the 2009 DCGP requires assigning a high receiving water risk to any site that drains directly *or indirectly* to a sediment-impaired waterbody. Thus, no matter the distance, which could be exceeding long, between a site and its ultimate receiving water, despite the myriad of other flows that may comingle with a site’s discharges, and despite any existing features (e.g., dams, water quality treatment devices, etc.) that may lie between the site and the receiving water, the 2009 DCGP would still assign a high receiving water risk for sites that are indirect dischargers to sediment-impaired waters. This bias in favor of high-risk assignment is unfair and must be remedied in the Final CGP.

Recommendation: Revise the receiving water risk worksheet to assign high receiving water risk only to those sites that directly discharge to a sediment-impaired water body or within a specified small distance thereof.

- The 2009 DCGP requires projects of all three risk categories to “limit the use of plastic materials when more sustainable, environmentally friendly alternatives exist. Where plastic materials are deemed necessary, the discharger shall consider the use of plastic materials resistant to solar degradation.” (2009 DCGP, Attach. C, § D.3, p. 5; Attach. D., § D.3, p. 5; Attach. E, § D.3, p. 5.) Not only is this requirement overly broad and vague, but it also would appear to extend beyond the regulatory authority of the State Board. Moreover, there has been no showing how such a requirement would reasonably relate to the control of water quality if the materials selected for a particular site were effective at erosion control, which is the design of the proposed requirement.

Recommendation: Delete section D.3 of Attachments C, D, and E of the 2009 DCGP.

- The 2009 DCGP requirement that sites in all three risk categories “control the air deposition of site materials and from site operations.” (2009 DCGP, Attach. C., § B.6, p. 4; Attach. D, § B.6, p.4; Attach. E, § B.6, p.4.) The provision is vague and extends to issues beyond the State Board’s control—issues regulated by the air quality control boards throughout the state (e.g., via fugitive dust rules and through stationary and mobile source permit regulation). The 2009 DCGP should not contain requirements outside of the regulatory authority of the SWRCB nor should it contain vague requirement ripe for misinterpretation.

Recommendation: Delete section B.6 of Attachments C, D, and E of the 2009 DCGP.

- Errata to the 2009 DCGP create a situation with potentially multiple legally responsible parties. The concept behind naming a legally responsible party (LRP) appears to be to clarify for the agency, the public, and permittees who or what entity bears the legal liability for permit compliance. However, errata to the 2009 DCGP adding a clause to section II.C.4 on page 17 of the 2009 DCGP has created a situation where a new owner of a site would be an LRP along with the old owner and this situation would exist post-escrow closure. A simple edit to the provision would correct the problem and clarify there is to be only one LRP for a site at any one time.

Recommendation: Revise the following statement in section II.C.4 on page 17 of the 2009 DCGP: “When an LRP owns property with active General Permit and the LRP sells the property, or a parcel thereof, to another person, that person shall become ~~an~~ the LRP with respect to whatever parcel was sold.”

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 2008 DCGP AND 2009 DCGP issuance, the 2008 DCGP comment efforts and the current 2009 DCGP comment effort. 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. In addition to the comments submitted herein, we have worked diligently to provide the State Board with thoughtful and thorough comments on prior iterations of the 2009 DCGP. We regret that more of our prior suggestions have not been heeded in the 2009 DCGP. We trust that the State Board will take all our comments to heart and revise the Final CGP in order to comply with federal and state law as well as to provide scientifically defensible, feasible, and technically sound requirements. As we have stated herein, the 2009 DCGP, has several legal failings that must be corrected, represents bad policy making in several aspects, and has numerous outstanding technical and scientific deficiencies. Each of these issues must be corrected prior to adoption of a Final CGP. Should you have any questions on the comments provided herein or which to discuss any of these issues further, please contact us.

Beltran, Shanda

From: Beltran, Shanda
Sent: Monday, June 22, 2009 3:36 PM
To: Beltran, Shanda
Subject: FW: CGP - question on comments submitted on previous draft

-----Original Message-----

From: Annalisa Kihara [mailto:AKihara@waterboards.ca.gov]
Sent: Thursday, June 11, 2009 8:59 AM
To: Sandy Mathews
Cc: Greg Gearheart; Jeanine Townsend; Sarah Olinger
Subject: Fwd: CGP - question on comments submitted on previous draft

Hi Sandy,
The comments on the March 2008 draft will be in the official record.
We will not be responding to these in our next written response to
comments since the current draft (April 2009) is our "response" to those
comments.

Hope this helps.

Thanks,

Annalisa G. Kihara, P.E.
Water Resource Control Engineer
DWQ-Stormwater Unit
1001 "I" Street 15th Floor
Sacramento, CA 95814
(916) 324-6786 phone

<<<<<<> >>>>>>

>>> Jeanine Townsend 6/11/2009 8:25 AM >>>
Could one of you please respond to this person question and cc me on
the response.

Thank you,
Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street. 24th Floor
Sacramento, CA 95814
Phone: (916) 341-5600
Fax: (916) 341-5620
E-mail: jtownsend@waterboards.ca.gov

>>> "Sandy Mathews" <SandyM@lwa.com> Thursday, June 11, 2009 8:16 AM
>>>
Ms. Townsend:

Thank you for the notice regarding the extension of the comment period
on the Construction General Permit. We appreciate the additional time
to prepare our comment letters.

Are the comments that were submitted on the March 2008 draft permit

being considered part of the record? And if so will they be
addressed
by staff in the response to comments?

Thank you for your assistance.

Sandy Mathews

Senior Scientist

Larry Walker Associates

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