



September 8, 2011

Jeanine Townsend, Board Clerk
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812-2000
commentletters@waterboards.ca.gov
sent via electronic mail



Re: Comments on the Draft Phase II Small MS4 General Permit

Dear Ms. Townsend:

Thank you for the opportunity to comment on the Draft National Pollutant Discharge Elimination System (“NPDES”) Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (“MS4s”), referred to herein as the Draft Permit. San Francisco Baykeeper (“Baykeeper”) respectfully submits these comments on behalf of our 2,300 members that live, work, and recreate in and around the San Francisco Bay. Baykeeper is a 501(c)(3) non-profit organization with the mission of protecting and enhancing the water quality of the San Francisco Bay for the benefit of its ecosystems and surrounding communities.

123.1 → Baykeeper is generally supportive of the Draft Phase II Permit and is pleased to see that many of the components deemed necessary for a successful MS4 program have been incorporated. We support comments pertaining to post-construction stormwater management, water quality monitoring, and assessment of best management practices (“BMP”) made by the California Coastkeeper Alliance, Natural Resources Defense Council, and Heal the Bay in a separate comment letter, which we incorporate by reference. In addition, we understand that many permittees are unsatisfied with the scope and timing of the Draft Permit, yet given the lengthy compliance schedules we feel the requirements are reasonable and necessary to attain measurable improvements in stormwater quality. To date, stormwater regulations have been far too lax, and despite the enormous sums of money that have been spent, no real improvements in stormwater or receiving water quality has been observed. This Draft Permit calls for actions that will hopefully change behavior rather than rely on expensive technology – representing a more cost effective and reasonable approach to stormwater management than we have seen in the past.

123.2 → **1. The Draft Permit Must Include Requirements that Reduce the Discharge of Pollutants to the Maximum Extent Practicable.**

Section 402(p) of the Clean Water Act mandates that permits for municipal stormwater discharges include “controls to reduce the discharge of pollutants to the maximum extent practicable” (“MEP”), such as management practices, control techniques and systems, design and engineering methods, and other provisions appropriate for the control of pollutants. 33 U.S.C. § 402 (p)(3)(B)(iii). The MEP standard requires permittees to implement BMPs that



effectively reduce or eliminate the discharge of pollutants into waters of the United States. 40 C.F.R. § 122.34(a), 122.44(k).

Despite this requirement, the Draft Permit states that a regulated small MS4 “does not have to repeat the same [BMP development and reporting] procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.” Draft Permit, 17. This exemption does not satisfy the MEP standard because it allows permittees to continue to violate water quality standards without taking any action to remedy these violations. The MEP standard is intended to be a flexible, ever-evolving approach that should be revised as permittees receive new information, like a failure to comply with receiving water limitations. Instead, in the event that water quality standards are not met, the Draft Permit should require all permittees to 1) revise their existing BMPs, 2) develop additional BMPs, and 3) submit an updated management and implementation plan as described in paragraph D.1 to the appropriate Regional Board for approval every year, until exceedances no longer occur.

Also, pursuant to California’s antidegradation policy, the Draft Permit must include an antidegradation analysis since the proposed system could result in repeated violations of water quality standards. *See* Resolution No. 68-16. At a minimum, the State Water Board should conduct a thorough review of all practices presented in the Draft Permit that have the potential to result in degraded water quality standards. Ideally, the Board should provide a more complete list of all applicable water quality standards, what they each require, how activities performed pursuant to the Draft Permit’s provisions do or do not meet the relevant water quality standards, and whether each practice requires further action on behalf of the permittees.

123.3 → **2. The Draft Permit Must Allow for Public Review of BMP Revision Plans and SWPPPs.**

While Baykeeper supports the Draft Permit’s attempt to streamline agency review and approval, the Permit’s elimination of the requirement that each permittee develops a Storm Water Management Plan (“SWMP”) renders the Permit inadequate in two major ways. First, the iterative process set forth in the Draft Permit’s section on receiving water limitations must be subject to public review and comment. *See* Draft Permit, 17. The Draft Permit provides that, “[u]pon a determination by either the Regulated Small MS4 or the Regional Water Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Regulated Small MS4 shall promptly notify and thereafter submit a report to the Regional Water Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards.” While we disagree with this approach and strenuously believe that a single round of BMP revisions should not result in a permit to violate receiving water limits indefinitely, at a minimum, such BMP revisions and approvals must be subject to public review and comment. The Draft Permit’s laudable goal of setting forth clear and objective standards in the Permit itself, rather than in a separate document drafted by the permittee and approved by the Regional Board, breaks down through this proposed BMP revision process – the revised BMPs are what the permittee will be held to in order to comply with the Permit, making the plan containing those BMPs the only

evidence of a permittee's technological effluent limitations. See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005); *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). This request is consistent with the iterative approach adopted by the Water Board in WQ 99-05, as WQ 99-05 is premised upon the existence of a SWMP that will be revised and submitted for review and approval.

Second, the Draft Permit proposes the same flawed approach with respect to identified "hotspots," requiring each permittee to independently develop a Storm Water Pollution Prevention Plan ("SWPPP") to reduce storm water pollution from each hotspot. Draft Permit, 48. This approach allows the permittees to design pollution controls for hotspots without any input from the Board or the public, since the Draft Permit contains no specifications whatsoever as to what each SWPPP must contain. *Id.* These two approaches make the Draft Permit seriously flawed because they create a regulatory scheme for the worst stormwater contamination (discharges in violation of water quality standards, and identified hotspots) with no public review and agency oversight prior to implementation, and no clear and objective standards to provide guidance in the Draft Permit itself.

123.4 → **3. The Draft Permit Must Contain Specific Standards for Determining When a Waiver from the Permit is Appropriate.**

The Phase II regulations allow a regulated small MS4 to seek a waiver from the Draft Permit if it meets certain requirements. See 40 C.F.R. § 122.32(c)-(e). In addition to these standards, the Draft Permit requires a MS4 to "certify" that its discharges do not cause or contribute to or have the potential to cause or contribute to a water quality impairment prior to receiving a waiver. Draft Permit, 13-14. This general certification requirement is too vague. To ensure that waivers will not cause an exceedance of water quality standards, the Permit should provide specific guidance to regulated small MS4s on how to make this certification.

The Draft Permit also allows regulated small MS4s to obtain a Waiver Certification by simply posting their annual Certification on the SMARTS database, paying a fee, and receiving a waiver letter from the Regional Board. Draft Permit, 15. Instead, the Permit should provide an opportunity for public review prior to the issuance of each Waiver Certification, especially since a MS4 is automatically waived if it does not receive a certification letter within 6 months of submitting its application. See Draft Permit, 15.

123.5 → **4. All Permittees Must Implement the Draft Permit's Requirements As Soon As Possible.**

The Draft Permit contains several extended deadlines that prevent the Permit's requirements from being implemented close to the beginning of the permit cycle. For example, each permittee does not have to conduct regular inspections of all owned and operated facilities for additional pollution sources until May 15, 2016. Draft Permit, 48. Also, each renewal permittee has until May 15, 2015 to inventory and assess the condition of stormwater BMPs. Draft Permit, 88. Since the 5-year cycle for this Permit will likely end in 2017, these deadlines should be pushed up to ensure that all permittees are in compliance with the Permit well before its expiration date.

123.6 → **5. The Trash Reduction Program Lacks Specificity or a Reasonable Path to Significant Trash Load Reduction.**

Trash reduction is addressed in brief within Section E.10, calling for the adoption of a trash reduction ordinance to prevent or remove trash loads from the permittee's MS4. The requirement for an ordinance to accomplish what could be achieved through the Draft Permit appears redundant and will likely lead to inconsistencies and lengthy delays. Baykeeper urges the State Board to borrow from the Region 2 Phase I Municipal Regional Stormwater Permit with regards to trash load reduction. NPDES No. CAS612008. Provision C.10 of the Phase I Permit offers a phased solution to permittees for achieving full compliance over the course of 10 years, with the ultimate goal of eliminating 100% of the trash loads from their MS4s.

In its current form, Section E.10 of the Draft Permit lacks prescriptive requirements for the short- and long-term. The section would greatly benefit from insertion of language adopted from the Region 2 Phase I permit. Further, the State Board may wish to evaluate financing programs for the widespread installation of trash capture devices, which have proved to be somewhat costly in Region 2, where some municipalities benefited from federal stimulus money to conduct storm drain retrofits.

123.7 → **6. Baykeeper Urges the State Board to Retain Language of Section E.11 to Improve Oversight of Industrial and Commercial Sources of Stormwater Pollution.**

Permittees have expressed dissatisfaction with requirements found in Section E.11 of the Phase II Permit, regarding requirements to maintain an active inventory and conduct inspections of industrial and commercial facilities. However, alternate proposals have not been formulated to minimize stormwater-borne pollutant discharges from industrial and commercial sites, suggesting a desire to maintain the status quo, which has failed to result in appreciable improvements to receiving water quality.

The US EPA, State Water Board and others have long recognized that the cumulative impacts of industrial facilities within the urban landscape contribute significantly to water quality impairment. Under the existing system of stormwater regulation in California, Regional Water Quality Control Boards do not have sufficient capacity to inspect and enforce the numerous stormwater violations that go unchecked throughout the state. Draft language in Section E.11 of the Phase II permit should be retained, since it rightly places the onus of enforcement and inspection not only on the Regional Boards but also on municipalities. In some circumstances this may require innovative financing of inspection and enforcement teams, or legislative action to enable such financing, but without such requirements in place municipalities will not be compelled to enforce upon facilities that are disproportionately contributing to water quality impairment.

In Region 2 we have found, based on extensive review of industrial stormwater data recently made available through the SMARTS system, that within the last 5 years, 92% of the nearly 1,400 industrial facilities in Region 2 regulated under the statewide industrial general stormwater permit have reported at least one violation of Basin Plan receiving water limitations and that 19% have exceeded a relevant receiving water limit at least 20 times. This high volume of likely

violations exceeds the enforcement capacity of all Regional Boards and cities are currently not adequately compelled to initiate their own enforcement system. Furthermore, we believe a number of facilities have unlawfully failed to file a Notice of Intent (NOI) to comply with a relevant stormwater permit. This is the situation that Section E.11 of the Phase II permit attempts to remedy, which will greatly improve California's ability to reduce stormwater-borne pollutant discharges.

Municipalities have suggested that complying with requirements of Section E.11 would be far too onerous. Yet if you take Region 2 as an example, there are few Phase II cities with greater than 25 facilities registered under the statewide industrial general permit. Of the municipalities listed under Attachment A of the draft permit, the City of Napa is that with the largest number of general permittees, with 40 registered facilities. It is likely that additional facilities not currently subject to the industrial general permit shall be subject to oversight under the Phase II Permit and that select municipalities will be subject to significantly higher standards, yet for the vast majority of permittees the volume of facilities subject to inventory is not likely to exceed their existing capacity. In the event where permittees do experience extreme hardship under these requirements we urge the State Board to advise permittees on funding solutions, which may include shifting funds away from the State Board's own enforcement program towards those of municipalities and increasing permit fees across the state.

We applaud the State Board for incorporating sound industrial and commercial stormwater control components into the Phase II permit and urge you not to weaken provisions of Section E.11, which provide important steps towards improving the oversight of industrial pollutant sources.

Thank you for considering Baykeeper's comments. If you have any questions, please feel free to contact Abigail Blodgett at (415) 856-0444, extension 109.

Sincerely,

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/s/ Ian Wren
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/s/ Abigail Blodgett
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