

MONTEREY COUNTY MAYORS' ASSOCIATION



August 10, 2011

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: New Draft General NPDES Permit for Small MS4s (Phase II permit)

Dear Members of the State Water Resources Control Board:

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We, the Mayors of Monterey County, are concerned about (1) the costs to implement the mandates in the new draft Phase II MS4 General Permit (Permit); (2) the enforcement of State programs becoming the responsibility of local municipalities and other dischargers; (3) the prescriptive language in the new draft Permit, and (4) the Regional Board's authority to require implementation of current program elements that are above and beyond those required in the new draft Permit. We address these concerns in greater detail below.

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Given the lack of adequate funding from the State to fulfill these new additional regulatory requirements, the permit requirements are unfunded mandates. According to the California Government Code, Article XIII B, Section 6, which is intended to prevent the state from shifting responsibility to local governments without providing funding, whenever "any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service...". In addition, the Commission on State Mandates has determined that an unfunded mandate exists when: a) the state imposes a new program or higher level of service that is mandated by state law not federal law; and b) when the local government lacks adequate fee authority to pay for the new program or higher level of service.

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We are all concerned by the continued increase in regulations pertaining to Stormwater management. Throughout the new draft permit, local agencies are being required to implement new programs and activities as well as assume responsibility for oversight and enforcement of programs that are technically the State's responsibility (e. g., Industrial and Construction General Permit oversight). Additionally, local agencies are also being required to implement many "higher levels of service" that go above and beyond the federally mandated six minimum control measures in the EPA Phase II regulations. Examples of these "higher levels of service" are GIS mapping of all outfalls, analytical monitoring of illicit discharges, inventorying all construction sites, increasing site inspection frequencies, and prioritizing all catch basins, etc.

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We believe legislation and regulations adopted by the State Board need to be more realistic, streamlining requirements to focus on what is absolutely necessary to protect

water quality. Future regulations should be based on best management practices as established by scientific panels. For some parameters the technology to achieve compliance does not exist. We believe the costs will far outweigh any potential benefits to the environment. → The receiving monitoring program outlined in the new draft Phase II MS4 permit is excessive for small MS4s. Any receiving water monitoring should be the responsibility of the State; the State should determine if its water bodies are being degraded and then create policy to address those areas, instead of creating blanket monitoring programs that are not designed to address any specific water quality issue.

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→ Many local agencies do not have adequate fee authority to pay for these additional state mandates. Due to Proposition 218, a local agency has no authority to impose a fee without the consent of the voters or property owners. Considering the current economic climate of the State, creating fees through voter consent is highly unlikely and quite an expensive effort to undertake. The County of Los Angeles is currently going through the Prop 218 process at a cost of \$4 million. Small MS4 agencies do not have the resources to carry out a Prop 218 process to fund Stormwater programs, especially given the competing needs of other critical services. The recently passed Proposition 26 further limits the ability of local agencies to charge user fees to fund the development of hydromodification and low impact development requirements in the permit. The ability of a local agency to charge an inspection fee for a permit for which the permittees already pay a fee to the state is very problematic.

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→ The unfunded state mandates law is a constitutional requirement imposed on the state to fund programs that it requires local agencies to implement. If the state does not provide the funding to implement the mandates, these mandates should not be included in the new permit. Section 13360(a) of the Water Code states that “no waste discharge requirement or other order of the regional board or state board or decree of court issued under this division shall specify the design, location, type of construction, or *particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.*” The new draft permit is very prescriptive, outlining exactly how a local agency must comply instead of allowing agencies to comply with the permit in any lawful manner they determine. According to the Water Code, a state board may develop guidance on how to comply, but including this guidance as a requirement in an enforceable permit violates this section of the Water Code.

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It is clear that there are huge expenses associated with the new draft Phase II MS4 permit, most of which will have to be borne by the dischargers, many of which are small communities that are already struggling with extreme economic challenges. Because of these budgetary impacts, imposing these requirements could lead to cutbacks in other vital public services that are currently provided to the residents of these communities. We believe compliance will be prohibitively expensive and not within the means of most dischargers. → Additionally, the Permit contains a footnote that allows Regional Board staff to require implementation of requirements above and beyond the new draft Permit. This is discriminatory and results in inequitable stormwater program requirements throughout the state.

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→ The SWRCB has an obligation to the residents of California to assess both the cost and the benefit of the requirements it imposes on them. The State has tried to provide an “estimate” of the costs associated with the new draft Phase II MS4 permit; however, we believe the corresponding “value” of the benefit to be achieved from the new “higher levels

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of service” required in the new permit have not been evaluated. This is due to the fact that it is not possible to determine whether *any* benefit will be achieved in terms of appreciable water quality improvement. It is not reasonable for the SWRCB to impose such requirements without first having a firm scientific basis to conclude that doing so will improve water quality to such a high degree as to justify those expenditures.

98.13 → We support the detailed comments and recommendations being sent under separate cover by the Monterey Regional Storm Water Group as well as the comments/recommendations being submitted by CASQA and the Phase 2 Coalition. We request that the State withdraw the current draft Permit and prepare a new draft with the above issues in mind. The language must also be drafted to eliminate all ambiguity or misleading language.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Pendergrass".

Honorable David Pendergrass, Chair
Monterey County Mayors' Association
Mayor, City of Sand City

cc: Brian Ogg, State Water Board
Charles Hoppin, Chair, State Water Board
Tam Doduc, State Water Board member
Tom Howard, Executive Director, State Water Board
Jonathan Bishop, Chief Deputy Director, State Water Board
Vicky Whitney, Deputy Director, State Water Board
Bruce Fujimoto, Chief – Stormwater State Water Board
Assemblyman Bill Monning, 27th Assembly District
Senator Sam Blakeslee, 15th District