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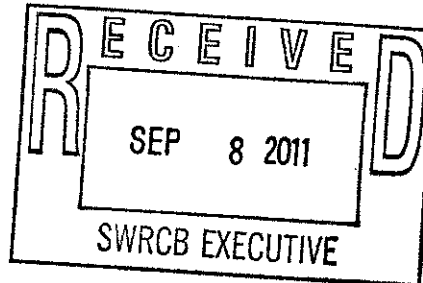
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September 2, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-200



RE: Comments on Draft Phase II Small MS4 General Permit

Dear Ms. Townsend and Members of the Board:

Thank you for the opportunity to submit comments on the State Water Resources Control Board's ("Board") draft General Permit ("Draft Permit") to regulate small municipal separate storm sewer systems ("MS4s"). The City of Turlock takes its commitment to environmental stewardship very seriously and is proud of its accomplishments in the areas of stormwater pollution prevention, water conservation, water recycling and reuse, air pollution prevention, and solid waste recycling. The City does, however, have grave concerns about the proposed Phase II MS4 permit for a number of reasons explained below and strongly opposes the implementation of the Draft Permit in its current form.

The Draft Permit needs an entire re-write through an entirely new process that engages all stakeholders. The Draft Permit is overbearing, unattainable, and doomed to failure. Why adopt a Permit that sets up the MS4s for failure and makes compliance unachievable? Like most MS4s, Turlock wants a stormwater program that allows us to comply with the federal regulations and protects water quality. Therefore, the State and the MS4s need to cooperate on a new Draft Permit that develops cost-effective programs to protect water quality. The current Draft Permit is just a laundry list of wishful thinking and unfunded mandates that goes way beyond USEPA's Stormwater Rule; the Draft Permit is unachievable in its current form.

1. The Draft Permit exceeds federal requirements

The Draft Permit exceeds the six minimum control measures in 40 CFR Part 122.34. The USEPA has determined that the six minimum control measures ("MCMs") are sufficient to reduce the discharge of stormwater-related pollutants from the MS4s to the maximum extent practicable ("MEP"). Therefore, the State has no basis to argue that the provisions of its Draft Permit are necessary to meet the MEP standard. The State has provided no evidence to indicate that implementation of the USEPA's six MCMs will not achieve state water quality

standards and that the additional control measures and programs included in the Draft Permit are necessary.

Indeed, the State has not even quantified the nature and extent of the stormwater pollution problem in California or determined how the vast array of provisions in the Draft Permit will achieve their stated aims. Specifically, the Draft Permit burdens MS4s with determining the nature and extent of stormwater pollution in California in Draft Permit Sections E13 and E14 Subpart C – these sections require receiving water monitoring and the quantification of pollutant loads. By clearly admitting that it has not quantified the problem or whether its solutions will be effective, the State has no rational basis to justify that the provisions of the Draft Permit that exceed the requirements of the federal regulations and the Clean Water Act.

The US EPA stated in guidance to the Phase II Regulations that it “strongly recommends that until the evaluation of the storm water program in 40 CFR (Section 122.37), no additional requirements beyond the minimum control measures (BMPs) be imposed on regulated MS4s without the agreement of the operator of the affected small MS4.” We ask that you respect the USEPA’s guidance in this matter.

Without justification, the State Board proposes new programs and higher levels of service in the Draft Permit compared to the existing permit.

New programs include but are not limited to:

- Requirements to regulate landscape irrigation, irrigation water, lawn watering, individual residential car washing and street wash water (Section B.3)
- Development of an Enforcement Response Plan (Section E.4.c) including oversight and enforcement of the State’s CGP and IGP
- Development of water quality runoff standards, watershed sediment budgets and hydromodification requirements (Section E. 12)
- Requirements to secure adequate resources to comply with the mandates of the Draft Permit (Section E.4.d)
- Development of a trash reduction program (Section E.10)
- Development of an industrial/commercial runoff program (Section E.11)
- Development of a receiving water monitoring program (Section E.13) including TIE and TRE if stressor pollutants are discovered
- Development of an effectiveness assessment program and pollutant loading quantification (Section E.14) using “SWAMP-comparable” data
- Incorporation of TMDLs and implementation plans (Section E.16)

Higher levels of service include but are not limited to:

- Implementation of an extensive and highly prescriptive public outreach and education program (social media, citizens advisory group, etc.) with periodic surveys to measure program effectiveness
- An update to the City's General Plan and Zoning Ordinance to implement "Watershed Process Management" (Section E. 12)
- Implementation of an Illicit Discharge Detection and Elimination ("IDDE") Program (Section E.7) that mandates field observations, field screening, analytical monitoring at specified intervals, investigating illicit discharge within 48 hours, requiring corrective actions in a very short amount of time, developing a Spill Response Plan, and filing detailed annual reports. The IDDE program also requires that a GIS map be prepared and updated – unfortunately the City has lost its GIS technician due to budget reductions!
- Implementation of the State Construction General Permit (Section E.) that mandates that all construction sites be inventoried and inspected at designated frequencies. The Draft Permit also required training of staff, educating construction site operators, and requiring staff to be certified as Qualified SWPPP Developers or Practitioners (QSD/QSP).
- Implementation of a Pollution Prevention/Good Housekeeping Program (Section E.9) that provides prescriptive O&M measures for the City's Utility Division.
- The preparation of a multitude of very detailed and time consuming reporting requirements for almost every element of the storm water program. Given recent cutbacks at the State and Regional Water Boards, the State may lack the staff resources to review these reports in any level of detail.

2. The Draft Permit contains unfunded state mandates

Article XIII B, Section 6(a) of the California Constitution ("Section 6") prevents the state government from shifting financial responsibility for carrying out governmental functions to local agencies without the state paying for them. Such "unfunded" state mandates are prohibited. As specified above, the Draft Permit clearly requires a "higher level of service" which is clearly subject to the provisions of Section 6.

The Commission on State Mandates, which has exclusive jurisdiction to whether a state law or order of a state agency constitutes an unfunded mandate, has made two recent decisions that determined that elements of stormwater permits constitute unfunded state mandates¹. Without reiterating the details, the Draft Permit contains many new programs or higher levels of service

¹ "Los Angeles Test Claim" July 31, 2009 and "San Diego Test Claim" March 26, 2010.

that the Commission has already been determined to constitute unfunded state mandates or which the Commission has suggested constitute unfunded state mandates.

Clearly, the State Legislature's appetite for spending programs is not matched by an appetite for raising adequate revenue to fund its largesse. The State Legislature has spent the past six years attempting to balance its budget by stealing revenue from local governments (vehicle license fees, redevelopment agencies, ERAF, etc.). If the State wishes to implement such an expansive and prescriptive stormwater program, it has to provide adequate revenues. Unfortunately, once again, the State has resorted to extorting local government to fund a State program. Finding #45 of the Draft Permit is illustrative: "Each Permittee is individually responsible...for allocation of funds...for expenditures necessary to implement and enforce such control measures / BMPs within the Permittee's jurisdiction. Enforcement actions concerning this Order will be pursued against the individual Permittee responsible for specific violations of this Order."

Furthermore, the State's shortest finding, #51, assures us that: "The State Water Board has considered the costs of complying with this Order." The costs for whom? Clearly, there is no cost to the State for the implementation of the Order as our NPDES permit fees have been increased substantially. With recent and proposed increases, the City's NPDES permit fees for wastewater and stormwater have increased 300% with no concomitant increased level of service from the State. Based on the requirements on the Draft Permit, the City of Turlock anticipates its storm water program costs to increase significantly to achieve compliance at the level dictated by the State Water Board.

Please be advised that the City of Turlock's 2011-12 budget reflects a \$1,605,489 reduction in General Fund expenses while still leaving a deficit in the General Fund of \$1,871,878. The City has implemented employee reductions through early retirements and layoffs, service level reductions and employee salary reductions to address ongoing and recent financial deficits. The impact of expanded and new state regulations will continue to degrade the City's ability to fund core services.

3. The Draft Permit makes MS4s responsible for the implementation of the State's Construction General Permit (CGP) and Industrial General Permit (IGP)

The Draft Permit forces MS4s to act as the implementation and enforcement arm of the state for its CGP and IGP. The CGP in Attachment A, Part L, Subsection I states: As noted in both Permits, "Regional Water Board shall administer the provisions of the General Permit." Similar language is found in the adopted IGP. Further, the draft IGP notes "Regional Water Boards shall enforce the provisions of this General Permit" [emphasis added]. The CGP, for instance, clearly states that the Regional Water Boards are responsible for "...conducting compliance inspections, gathering site information..., and taking enforcement actions." Yet the Draft Permit attempts to surreptitiously fob these State responsibilities off onto MS4s.

As noted in the respective Orders, the implementation and enforcement of the IGP and CGP are clearly the responsibility of the State Water Board through its Regional Water Boards. Indeed, the State collects fees to implements these programs. Therefore, MS4s should not be burdened with these State obligations.

4. The Draft Permit is overreaching

- The Draft Permit overreaches in a number of ways. Examples include:
- The City of Turlock already pays into the Surface Water Ambient Monitoring Program (SWAMP) as part of the regulatory fees for the Turlock Regional Water Quality Control Facility NPDES Permit / WDRs. The Draft Permit at Section E. 13, however, sets up a receiving water monitoring program that appears duplicitous.
- The Draft Permit requires that MS4s incorporate water quality and habitat enhancement features in flood management projects. There is no clear connection between habitat enhancement and the purposes of the Draft Permit. Indeed increased habitat could worsen water quality through the introduction of fecal coliforms, pathogens and other bacteria.
- In section E. 15, the State Water Board implements TMDL requirements that exceed requirements in the various Basin Plan Amendments.
- The Draft Permit requires MS4s to raise revenues locally to fund this State-mandated program. In essence, the Draft Permit attempts to give MS4s revenue authority that they may not have. The ability of the City to seek cost recovery and impose penalties (Sections E. 7 and E. 8) is limited by the California Constitution, state statutes, and case law. The State wholeheartedly fails to recognize that the implementation of the Draft Permit is entirely reliant on the ability of MS4s to adequately fund the lengthy laundry list of requirements and mandates that the Sate Water Board has promulgated.
- The Draft Permit contains language that is vague and open to interpretation. The recent National Resources Defense Council Decision² ("NRDC Decision") clarified that a permit is a legal document and that all permit conditions are enforceable. Therefore, only the express terms that the State Board intends to enforce should be included in the General Permit. Like the USEPA did with its Phase II regulations, the State Board should remove the broader guidance language from the draft Permit and include in a separate "guidance" document.

² NRDC v. County of Los Angeles (July 13, 2011 – Case No. 10-56017)

5. The implementation timelines are wholly unrealistic

As noted above, the Draft Permit exceeds the six minimum control measures required by 40 CFR Part 122.34 and, indeed, even the six MCMs contain many more provisions, mandates and requirements than the existing Phase II MS4 Permit. Furthermore, the Draft Permit even contains an abundance of new requirements or provisions that meet or exceed those of Phase I programs. In one permit cycle, the State Board is demanding that MS4s develop a comprehensive, demanding and costly storm water program.

Phase II MS4s do not have the funding, staffing, experience, or resources of their Phase I counterparts. Therefore, Phase II MS4s must be provided with sufficient time (multiple permit terms) to build up their program before being asked to meet the expansive and complex requirements contained in the Draft Permit.

6. The Draft Permit refers to incomplete plans, references and assessments

The City of Turlock is concerned about the number of Draft Permit references that are incomplete or in a draft format. The Draft Permit cannot be adopted or implemented when so many details are up in the air.

- Draft California Ocean Plan (E.13. Compliance Tiers)
- State Water Board's Draft Effectiveness Assessment Guidance (E.14.a.ii)
- Lake Tahoe BMP Rapid Assessment Methodology (not a fully vetted/proven methodology) (E.14.b.ii)
- Attachment G: TMDL Requirements (table incomplete)

It is entirely unfair to issue a Permit when so many important details many change. In the interest of fairness, therefore, any references that are either incomplete or in draft form should be removed from the Draft Permit.

7. The Regional Boards' authority is unclear

Section F of the Draft Permit notes that the Regional Boards will oversee, modify and enforce the Draft Permit. The Draft Permit, however, is a statewide general permit. Therefore, the City of Turlock is concerned that the individual Regional Boards will apply the provisions of the Permit in an inconsistent and unfair manner. Indeed, experience has shown us with the implementation of the Existing Permit that the Regional Boards are not consistent in their approaches. As noted above in the discussion of the NRDC Decision, the State Board should provide clarity on the enforceable terms of the Draft Permit and provide very specific guidance to the Regional Boards. Currently, the Draft Permit is very prescriptive in dictating the obligations of the Small MS4s and yet provides very broad authority to the Regional Boards. This is not a recipe for a cooperative working relationship: full compliance will be impossible. The existing Permit takes a better approach in that it establishes key provisions, but provides flexibility to the Small MS4s in how they accomplish those requirements.

8. The Draft Permit is overly prescriptive and is inconsistent with Water Code Section 13360

Water Code Section 13360(a) states that: "No waste discharge requirement or other order of a regional board or the state board or decree of a 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."

Clearly, the State Board's Draft Permit violates this Section of the Water Code in numerous ways, such as prescribing: who must be on a citizens' advisory committee, that an outreach program must be "multi-media," that two flood management projects must be modified, or that catch basins must be cleaned within one week after an inspection that has determined that they are at least one-third full. The State Board must rewrite the Draft Permit so that MS4s are able to comply with the terms of the Permit in any lawful manner, not in the prescriptive and arbitrary manner determined by the State Water Board.

Again, as noted above in the discussion of the NRDC Decision, the State Board must take an entirely different approach than the wholly prescriptive one it has taken with the Draft Permit.

Conclusion and Recommendations

Unfortunately, the Draft Permit is entirely unworkable in its current form. The comprehensive and overreaching approach taken in the Draft Permit is of such concern that we respectfully request that new programs and higher levels of services be removed from the Draft Permit and that the State Water Board allow the City of Turlock to continue implementing, monitoring, and reporting on our current Storm Water Management Program.

The City of Turlock has, and will continue to work with the State Water Board staff to create a program that will protect water quality in a cost effective manner consistent with the available staff and funding resources. We will also continue to work collaboratively with other Small MS4s to help define program solutions that are workable and achievable.

The following represents a summary of the City of Turlock's recommendations:

1. Rewrite the permit in its entirety using an entirely new process that engages all stakeholders.
2. Rewrite the Draft Permit so that it only addresses the 6 MCMs required by federal law.

3. Remove all unfunded mandates which include all new programs, programs that require a higher level of service, and programs that are not directly related to one of the 6 MCMs.
4. Remove all mandatory provisions, such as requiring Community Based Social Marketing, effectiveness surveys, "multi-media" outreach programs, a citizens' advisory group, and habitat restoration should be removed from the Draft Permit.
5. Eliminate the commercial and industrial runoff program.
6. Remove all retrofit requirements for the Draft Permit term. These are currently not required by USEPA, although we recognize they are considering such provisions for municipal property only in the new Stormwater Rule (which is expected to be issued November 19, 2012).
7. Remove all requirements that are clearly the obligation of the State, such as numeric criteria for watershed process management.
8. Remove sections that obligate MS4s to implement the State's IGP and CGP on the Regional Boards' behalf.
9. Provide adequate State funding for all enforceable permit conditions. New requirements should be phased in over several permit cycles all of which should include a comprehensive stakeholder involvement process.
10. Eliminate redundancy with other state and federal requirements, in particularly water quality monitoring and the SWAMP program for which the City already pays a surcharge on NPDES Permits / WDRs.
11. Remove prescriptive requirements that have no apparent nexus with water quality and instead allow Small MS4s to identify high, medium, and low priority areas based on a pre-defined set of criteria.
12. Remove any references that are either incomplete or in draft form from the Draft Permit.
13. Include only the express terms that the State Board intends to enforce in the General Permit. Remove the broader guidance language from the Draft Permit and include it in a separate "guidance" document.
14. Provide more flexibility in how the Small MS4s achieve the Permit's requirements consistent with the approach in Porter-Cologne.

15. Allow Small MS4s to continue focusing on existing storm water management programs and to make incremental improvements consistent with Federal law.

Again, the City of Turlock takes its environmental stewardship role very seriously. Therefore, it is imperative that the State Board rewrite the Permit in the manner described above so that the City of Turlock can partner with the business community and other public agencies in reducing stormwater pollution in California. Regardless of the economic climate, it makes no sense for the State of California to implement a burdensome and prescriptive Stormwater Program – the costs of which will be borne entirely by local government and local businesses.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Dan Madden', with a long horizontal flourish extending to the right.

Dan Madden
Municipal Services Director

CC State Senator Anthony Canella, District 12
Assembly Member Bill Berryhill, District 26
Sharon Silva, CEO, Turlock Chamber of Commerce
Steve Madison, Executive Officer, Building Industry Association of Central California
Tom Howard, Executive Director, State Water Board