



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

SEP 08 2011

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-2000



Re: Draft Phase II Small MS4 General Permit

Dear Ms. Townsend:

The following are EPA Region 9's comments on the draft general NPDES permit for Phase II small municipal separate storm sewer systems (MS4s) located within the State of California, which the State Board released for public comment on June 7, 2011. In a letter to the State Board dated March 24, 2011, Region 9 provided comments on an earlier, pre-public notice version of the draft permit dated February 22, 2011. We believe that the June 7, 2011 permit constitutes an improvement over the earlier version, and we appreciate the efforts of State Board staff in this regard. Nevertheless, we still have concerns regarding the June 7, 2011 draft permit as discussed below:

**A. *Low Impact Development (LID) Requirements***

In our March 24, 2011 comments, we expressed concern that the February 22, 2011 draft permit incorporated post-construction requirements modeled after the requirements of the 2009 California construction general permit (CGP). We noted our disagreement with the CGP's use of a "pre-project" water balance for post-construction controls. This approach is less protective than the post-construction requirements in nine Phase I MS4 permits recently adopted by the Regional Water Quality Control Boards. To provide for increased protection of water quality and for consistency among all California MS4 permits (Phase I and II), we recommended that this approach be replaced with quantitative Low Impact Development (LID) requirements comparable to those incorporated into recent California Phase I MS4 permits. Since mid-2009, the following Regional Water Quality Control Boards have issued the nine listed Phase I MS4 permits containing generally consistent post-construction requirements:

Santa Ana Regional Board – Orange County, Riverside County, San Bernardino County  
San Diego Regional Board – Orange County, Riverside County  
Los Angeles Regional Board – Ventura County  
San Francisco Bay Regional Board – Municipal Regional Permit  
North Coast Regional Board – City of Santa Rosa and Sonoma County  
Central Valley Regional Board – East Contra Costa County.

The June 7, 2011 Phase II permit (section E.12) includes six compliance tiers with differing requirements for MS4s within different population categories and based on several other specified criteria. Some of these compliance tiers require post-constructive controls consistent with those in the nine aforementioned renewed Phase I MS4 permits (addressing the 85<sup>th</sup> percentile storm event). This is a significant improvement over the February 22, 2011 draft permit. However, other tiers continue to apply the CGP's "pre-project" water balance approach as the post-construction requirement. We've concluded that the many compliance tiers and differing requirements will prove awkward and confusing to both the regulated community and the Regional Board staff overseeing the implementation of this permit. In addition, as drafted the June 7, 2011 permit will not maximize the use of LID within the Phase II communities. As a result, the full water quality benefits which would otherwise accrue from LID will likely not be achieved and this could conflict with the requirement of the Clean Water Act to reduce pollutants to the maximum extent practicable. We recommend eliminating the compliance tiers, and instead establishing one set of post-construction requirements pursuant to section E.12.b.3 (addressing the 85<sup>th</sup> percentile storm event). This would result in consistent post-construction controls between this new Phase II MS4 permit and the Regional Boards' recently renewed Phase I MS4 permits.

Please note that Section E.12 uses the undefined term "urban land uses" in the context of compliance tiers. Again, we'd recommend that the compliance tiers be eliminated, thus obviating the need to define this term, but if our comment is not incorporated "urban land uses" must be defined.

Section E.12.b.3 (second sentence, first paragraph) should be clarified by adding the words "due to technical infeasibility" after the word "cannot" as follows: "Runoff from the 85<sup>th</sup> percentile storm that, due to technical infeasibility, cannot be captured..." We'd also suggest the permit require that any determinations of technical infeasibility be supported by rigorous feasibility analyses, submitted to the MS4. Determinations of infeasibility must be endorsed by a professional engineer, certified engineering geologist or other appropriate state-certified professional.

In circumstances where it is not technically feasible to address the 85<sup>th</sup> percentile storm as stipulated in section E.12.b.3, we'd recommend that any excess volume be addressed by an offsite project within the same subwatershed or by an in-lieu fee program. We'd suggest removing the draft Permit's distinction between projects in the undefined "subwatersheds that have a high rank for groundwater recharge and discharge" and other projects.

If the previous comment is not incorporated, clarification is needed whether the flow-through device referred to in this section (bottom of page 66) must be designed to treat the entire flow from twice the 85<sup>th</sup> percentile hourly rainfall or twice the excess runoff which is not captured by LID.

If the concept of “subwatersheds that have a high rank for groundwater recharge and discharge” is retained, this concept needs to be defined. It’s our view that this concept will result in additional unnecessary complications for the implementation and oversight of this permit.

The text in section E.12.b.3.i on pages 67-69 should be streamlined and clarified. The role for treatment control systems under the permit is not clearly described. If a project is successful at capturing, infiltrating, and evapotranspiring the 85<sup>th</sup> percentile storm, is it still necessary to implement treatment control? It’s our view that the San Diego Regional Board’s Orange County MS4 permit contains a clear model for how treatment control BMPs and LID BMPs relate. Under the draft Permit, it’s not clear how the treatment thresholds in E.12.b.3.i.(a)(5) apply and will be measured. Do these thresholds apply to excess runoff which is not addressed by LID or some other volume? Do these thresholds apply to “Other Development Projects”, “Other Redevelopment Projects” and “Road Projects?” As drafted “Other Development Projects” are “held to the standards above,” which apparently include the treatment thresholds, but Other Redevelopment Projects are not. We note that the redevelopment project thresholds (greater or less than 50% of the impervious surface), and the specific exclusions for types of redevelopment projects (interior models, etc.) are each presented twice. This could be remedied by a careful redraft of this text.

Finally, in our March 24, 2011 letter we had recommended requirements aimed at replication of pre-development hydrology, rather than pre-project hydrology which may differ significantly from natural conditions when the pre-project landscape includes substantial impervious areas such as large parking lots. Section E.12.b.4 (Hydromodification Management) of the June 7, 2011 permit still indicates that the hydromodification requirements would not apply for projects where no increase in imperious surface area would result in comparison to pre-project conditions. Our March 24, 2011 letter had recommended requirements similar to the South Orange County MS4 permit (permit No. CAS0108740), in which an increase over pre-development (natural conditions) is the trigger for the hydromodification requirements, and we reiterate this recommendation.

***B. Total Maximum Daily Loads (TMDLs)***

In our March 24, 2011 letter, we had recommended that detailed requirements be included in the permit (including applicable numeric wasteload allocations (WLAs), compliance deadlines, monitoring requirements and other deliverables such as special studies) which would fully ensure consistency with the requirements of applicable TMDLs. We have reviewed Attachment G for the permit (which includes the TMDL requirements) and are pleased to see that detailed requirements, generally consistent with our recommendation, have been included for many TMDLs. Nevertheless, while we have been unable to check Attachment G for consistency with every applicable TMDL, spot checking selected TMDLs has revealed some inconsistencies which we believe will need to be addressed in the final permit. For example, in Region 2 the implementation requirements for the Napa River Sediment TMDL are missing; it also appears the WLAs for Caltrans and the

small MS4s have been reversed, i.e., the WLA for Caltrans is 600 tons/year (with 800 tons/year for the small MS4s) rather than 600 tons/year for the small MS4s. Attachment G (page 2) also includes requirements related to the Sonoma Creek Sediment TMDL, but neglects to include the permittees subject to the TMDL. Further, the deadline for the BMPs (October 31, 2014) appears to be the deadline for the Napa River Sediment TMDL rather than the Sonoma Creek Sediment TMDL, which would be June 2014.

Attachment G notes that for some TMDLs (such as those in Regions 1 and 6), the permit requirements were not ready at the time of the public notice of the permit. Appropriate requirements, comparable to those for the other Regions, will need to be included in the final permit. Again, we were unable to review Attachment G for consistency with every applicable TMDL, but given the apparent inconsistencies we found for selected TMDLs, we would recommend the State Board conduct a thorough consistency review for all the TMDLs for the final permit.

### ***C. Stormwater Management Plan (SWMP) Review***

The draft fact sheet (page 8) notes that permittees are no longer required to submit their SWMPs to the appropriate Regional Board for review and approval (which proved to be a time-consuming process in the previous permit). Instead, all the effluent limits were included directly in the permit, and were available for public review at the time the draft permit was public noticed. We concur with this approach and believe it ensures an opportunity for adequate public participation regarding the effluent limits consistent with the 2005 decision by the Second Circuit Court in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, and the 2003 decision by the Ninth Circuit Court in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832.

We also understand from discussions with State Board staff that the Board still expects that MS4s would have an internal document which would guide the MS4 program and would likely be similar to the SWMPs which were previously submitted to the Regional Boards. This point may not be obvious to the MS4s and we recommend it be clarified in the final fact sheet.

### ***D. Industrial/Commercial Program***

We understand that concerns have been raised about the proposed new requirements for an outreach program to industrial/commercial businesses to facilitate and promote BMP implementation at these facilities (section E.5.c of the draft permit). We recognize that unlike the EPA regulations for Phase I MS4s, the Phase II regulations for small MS4s do not include a minimum control measure specifically for industrial/commercial facilities. Nevertheless, EPA's 2010 MS4 Permit Improvement Guide (EPA 833-R-10-001) does recommend that such requirements be considered in Phase II MS4 permits (Chapter 7 of the Guide) to better control pollutants in the discharges from the facilities. We recommend that the Board retain the proposed requirements for industrial/commercial outreach in the final

permit since these types of facilities will be located in both Phase I and II communities in California and will also likely constitute a significant risk to runoff in both large and small communities. We would also note that the current iteration of the Phase II MS4 permit only requires an outreach program to industrial/commercial businesses as opposed to the more elaborate requirements of Phase I MS4 permits; accordingly, we do not believe the permit requirements will constitute an excessive burden for permittees.

**E. MS4 Coverage and the 2010 Census**

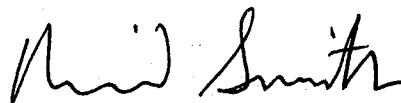
The draft fact sheet (page 13) refers to new traditional MS4s listed in Attachment B which are covered as a result of the 2010 census. In our March 24, 2011 letter, we noted that new urbanized area maps from the 2010 Census were not yet available and would probably not become available until early 2012. At this time, we do not know the names of the new traditional MS4s which will be subject to permitting as a result of the 2010 Census. We recommend the fact sheet be clarified to indicate that any new names would be included in Attachment B when the necessary data become available.

**F. Permit Waivers**

In our March 24, 2011 letter, we expressed concern that the Board's procedures in the pre-public notice draft permit for providing permit waivers were not consistent with NPDES regulations at 40 CFR 123.35(d). Specifically, for MS4s with a population between 1,000 and 10,000, the regulations intend that waivers be granted only after the State affirmatively establishes a lack of significant impacts from the discharges (64 FR 68746, December 8, 1999), and this step had been omitted in the pre-public notice draft. Our review of the June 7, 2011 draft permit shows that this issue has been appropriately addressed in the permit (section A.3.a.(2)), but the discussion in the draft fact sheet (page 16) still needs to be revised to be consistent with the permit.

We appreciate the opportunity to provide our views on the draft permit. If you would like to discuss these comments, please contact me at (415) 972-3464 or Eugene Bromley of the NPDES Permits Office at (415) 972-3510.

Sincerely,



David Smith, Manager  
NPDES Permits Office (WTR-5)

cc: Walt Shannon, Chief of the Municipal Stormwater Unit