



July 18, 2011

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



RE: COMMENT LETTER – PHASE II SMALL MS4 GENERAL PERMIT

Dear Ms. Townsend:

Thank you for the opportunity to provide comments on the Draft General National Pollutant Discharge Elimination System (NDPES) permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) (Permit). The Permit is largely different from the existing Small Municipal Phase II Permit (Order No.2003-005-DWQ) in that it very prescriptive, is not Storm Water Management Plan (SWMP) based, and **does not allow municipalities the flexibility** to tailor their storm water programs in a manner that is cost efficient and effective.

The draft Permit **does not embrace the existing framework established by the Clean Water Act (CWA)** for evaluating, protecting and regulating water quality. **Water Quality Standards and Beneficial Uses** are the foundation of the water-quality based control program mandated by the CWA. Water quality standards define the goals for a waterbody by designating its uses, setting criteria to protect those uses, and establishing provisions to protect water quality from pollutants. The draft Permit does not embrace this existing framework but rather relies upon many prescriptive requirements and the establishment of a postconstruction water quality program based upon an undefined “numeric criteria” that may or may not have a nexus to the quality of the discharger’s receiving waterbody.

Prescriptive requirements that are not directly linked to the determination of water quality impairment or the evaluation of water quality under California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) expose Permittees to litigation, does not provide a framework by which to substantiate compliance with the Maximum Extent Practicable (MEP) standard, and will be costly to implement with an unknown expected benefit to water quality. Additionally, many dischargers are subject to Total Maximum Daily Load (TMDLs) and as such their **mandated storm water programs should compliment the TMDL process**. The draft Permit, as written, does not compliment the TMDL process and does not provide a measurable and defensible standard for substantiating compliance with MEP.

It is recommended that the Permit be re-written to incorporate the CWA’s existing framework for evaluating, protecting and regulating water quality to establish a foundation on which Permit compliance can be substantiated. Additionally, the Permit should allow

dischargers the flexibility to develop storm water programs that leverage existing business practices and policies. Specific comments are below:

Comment 1 Finding 37, Pages 10 and 11

Finding 37 requires MS4 owners to reduce pollutant discharges from MS4s to the maximum extent practicable (MEP). It then states that the MEP standard requires the implementation of best management practices (BMPs) that are effective in reducing or eliminating the discharge of pollutants to waters of the U.S and that MEP emphasizes pollutant reduction and source control BMPs to prevent pollutants from entering storm water runoff.

Although it is effective to reduce or eliminate the discharge of pollutants to waters of the US through the implementation of pollutant reduction and/or source control BMPs it is not appropriate to define MEP, in part, by the requirement for implementation of source control or pollutant reduction BMPs. Source control and pollution reduction BMPs are just two types of BMPs within the commonly accepted suite of effective BMPs implemented by dischargers. Specifically requiring two types of BMPs is contradictory to the underlying foundation of MEP which defines MEP as a flexible standard that allows municipalities to choose from a suite of BMPs to address pollutant discharges. If State Water Resources Control Board (State Board) staff would emphasize specific BMPs when considering the entire suite of acceptable BMPs, the requirement should be included in Sections E.9 Pollution Prevention/Good Housekeeping for Permittee Operations Program, E.11 Industrial/Commercial Facility Runoff Control Program, and E.12 Post Construction Storm Water Program.

Recommendation - It is recommended that the following sentence be stricken from Finding 37: "MEP emphasizes pollutant reduction and source control BMPs to prevent pollutants from entering storm water runoff".

Comment 2 B. Discharge Prohibitions, 4. Discharges of Incidental Runoff

Section B.4 requires Small MS4s to require parties responsible for incidental runoff to control incidental runoff in accordance with the requirements listed in Sections B.4.a-e. Section B-4.a requires parties to "Detect leaks (for example, from broken sprinkler heads) and correct the leaks either within 72 hours or learning of the leak, or prior to the release of 1,000 gallons, whichever occurs first. Although we agree that leaking sprinklers is not a good idea it is not appropriate to prohibit leaking sprinklers in a NPDES Permit unless the link has the potential to result in a nonstorm water discharge. A leaking sprinkler by itself does not necessarily constitute a threat to the quality of any specific receiving waterbody. There are many private residences that could have a leaking sprinkler that would never result in a nonstorm water discharge to a storm drainage system or a water of the U.S. Therefore it is inappropriate for the Permit to require water conservation practices on private property when such requirement does not have an apparent nexus to water quality.

Recommendation - It is recommended that Section B.4.a be revised to the following: "Detect leaks (for example, from broken sprinkler heads) and correct the leaks either within 72 hours of learning of the leak, or prior to the release of 1,000 gallons, whichever occurs first, if there is a

potential the leak will result in a nonstorm water discharge to a storm drainage system or to a water of the U.S”.

Comment 3 Section E.4.a Legal Authority

Our firm represents a Community Service District (CSD) that has coverage under the existing Phase II Permit. A CSD does not have the ability to develop an ordinance or other regulatory mechanisms to obtain the legal authority to meet the requirements of Section E.4.a.ii. As such, CSDs should not be subject to the requirements of E.4.a.

Recommendation - It is recommended that Task Description E.4.a be revised to state that entities that do not have the ability to adopt ordinances or other regulatory mechanisms are not subject to the requirements of this section.

Comment 4, Section E.4.d Adequate Resources to Comply with Order

Section E.4.d.i requires the Permittee to secure the resources necessary to meet all requirements of the Order. This requirement is not feasible during a time when many MS4s are struggling to secure funding for basic public services such as public safety and health services.

Recommendation - It is recommended that Section E.4.d be modified to read “The Permittee shall evaluate and secure resources to an appropriate level that gives consideration to the economic vitality of MS4 as a whole”.

Comment 5 Section E.5.b.ii Public Outreach and Education, Implementation Level

Section E.5.b.ii requires the Permittee to use Community Based Social Marketing (CBSM) strategies or equivalent for the implementation of a public outreach and education program. It is not appropriate for a specific marketing based model or type of model to be required by the Permit. The requirement should be performance based not prescriptive when there is no nexus that can be made between one specific marketing theory/model and water quality. Additionally, the requirements of Section E.5.b are so specific and numerous requiring a specific marketing model just adds an additional layer of confusion; especially when the people responsible for implementing the requirement may or may not have any background in marketing models or theories.

Recommendation - It is recommended that the last sentence from Section E.5.b.ii.a be stricken. It is also recommended that the reference to CBSM be stricken from Section E.5.b.c.

Comment 6 Section E.5.b.ii.i Public Education and Outreach, Implementation Level

Section E.5.b.ii.i seems to imply that Permittees are required to provide financial assistance related to storm water friendly landscaping. The footnote provides an example of the Surfrider’s ocean friendly garden program. It is unclear, but it seems that the Permit is requiring a Permittee to provide financial assistance to those entities that promote storm water friendly landscaping. It is inappropriate for the Permit to require a MS4 to financially support any private, public or non-profit entity.

Recommendation - Please provide clarification regarding this requirement or strike the requirement all together.

Comment 7 Section E.5.c Industrial/Commercial Outreach and Education Program
Section E.5.c.ii.c again requires Implementation of CBSM. Please refer to Comment 4. As state previously, it is not appropriate for a specific marketing based model or type of model to be required by the Permit. The requirement should be performance based not prescriptive when there is no nexus that can be made between one specific marketing theory/model and water quality.

Recommendation – Recommend striking all reference to CBSM.

Comment 8 Section E.5.d Construction Outreach and Education Program
Section E.5.d.ii.c again requires Implementation of CBSM. Please refer to Comment 4. As state previously, it is not appropriate for a specific marketing based model or type of model to be required by the Permit. The requirement should be performance based not prescriptive when there is no nexus that can be made between one specific marketing theory/model and water quality.

Recommendation – Recommend striking all reference to CBSM.

Comment 9 Section E.6 Public Comment and Participation Program
Section E.6.d.i requires the public participation and involvement program to encourage volunteerism, public comment and input on policy and activism. This statement is unclear and should be clarified as to what the requirement is pertaining to. Is it pertaining to Permit compliance in general, water quality, or some other unknown subject? In context of the entire Permit it could reasonably be assumed that the requirements pertains to storm water quality; however, each requirement in the Permit should stand on its own and understanding of any specific Permit requirement should not be subject to assumption of knowledge of context.

Recommendation – Clarify requirement to indicate that it pertains only to storm water quality.

Comment 10 Section E.7 Illicit Discharge Detection and Elimination System Program
Section E.7 of the Permit requires the Permittee to use the Center for Watershed Protection's guide on Illicit Discharge Detection and Elimination (IDDE) or equivalent to develop and implement an IDDE program. The IDDE guide referenced is 195 pages without counting the appendices. It is inappropriate to reference in a guidance manual in lieu of stating specific performance requirements for the program. In doing so, Permittees will be subject to the nuances of a manual that was not intended to be a legally binding document; which in turn may subject Permittees to frivolous legal action related to the implementation or lack of implementation of the ambiguous requirements included in the referenced manual.

Recommendation – It is recommended that reference to the IDDE Manual be stricken or that it is clarified that it is intended that the manual only serve as guidance and the content of the manual is not in itself a Permit requirement.

Comment 11 Section E.8.b Construction Plan Review and Approval Procedures

Section E.8.b requires Permittees to require each operator of a construction activity within its jurisdiction to prepare and submit an erosion and sediment control plan and only approve it if the plan contains the appropriate BMPs that meet the requirements of the sediment and erosion control ordinance. This requirement should not apply to construction activities that create 1 acre or greater of disturbed soil area and are subject to the requirements of the Construction General Permit.

Projects that are subject to the Construction General Permit are required to control storm water pollution in accordance with the Construction General Permit's extensive requirements. As such the requirement for a sediment and erosion control plan in addition to a Storm Water Pollution Prevention Plan (SWPPP) is redundant, confusing and not necessary. Control of pollution on a construction site requires modification of temporary construction site BMPs on a regular basis. As such sediment and erosion control plans are not an appropriate mechanism for MS4s to regulate construction BMP compliance. Sediment and erosion control plans typically do not reflect field conditions, are not implemented in the field, cause bidder confusion and are not necessary. Additionally construction contract documents are legally binding contracts that should not include extraneous information such as "the rationale used for selecting or rejecting BMPs, including quantifying the expected soil loss from different BMPs". The sediment and erosion control plans should only show permanent BMPs such as permanent erosion control, fiber rolls that are to be left upon the completion of construction, etc. Additionally many municipalities' requirements for sediment and erosion control plans are not consistent the Construction General Permit's requirements.

Recommendation – It is recommended that all references within Sections E.8.b and E.8.c requiring sediment and erosion control plans be stricken.

Comment 12 Section E.9.i Incorporation of Water Quality and Habitat Enhancement Features in Flood Management Facilities

Section E.9.i requires the incorporation of water quality and habitat enhancement features in flood management facilities. Although habitat enhancement features are great it is not appropriate for them to be required by a storm water Permit. There little or no nexus between general habitat enhancement and water quality unless it is clarified that the habitat enhancement requirement applies when directly connected to supporting an identified Beneficial Use for a specific receiving waterbody. The current language is vague and will be misinterpreted.

Recommendation - The requirement for habitat enhancement should be clarified to be directly connected to supporting an identified Beneficial Use or it should be stricken all together.

Comment 13 Section E.11.B Industrial/Commercial Storm Water BMPs

Section E.11.B essentially will require all industrial and commercial sites listed on the inventory required by section E.11.a to select, install, maintain and implement storm water BMPs by May 15, 2014. Section E.11.b.ii.f specifically requires industrial/commercial facilities to divert, infiltrate, reuse, contain, or otherwise reduce storm water runoff to minimize pollutants. It is not

economically feasible for all of the types of facilities listed to retrofit their facilities by May 15, 2014.

Recommendation – It is recommended that all of the BMPs listed in Section E.11.b.ii that require a permanent physical modification of a site/facility only be required when the site undergoes significant modification that would require a building or grading permit.

Comment 14 Section E.12.b.3.i Water Quality Runoff Standards

Section E.12.b.3 requires the Permittee to require all projects, that are included in one of the categories listed under the Regulated Projects list, to capture, infiltrate, and evapotranspire the runoff from the 85th percentile storm event to the maximum extent practicable. Runoff that cannot be captured, infiltrated and evapotranspired must be treated via a flow through device. It appears that the Permit requires all storm water discharges to be captured and treated even though not all storm water from the 85th percentile storm event will even discharge to a receiving waterbody if not captured and treated. If runoff generated from the design storm will not be discharged to a waterbody it should not be required to be treated. The Lahontan Regional Water Quality Control Board has embraced this concept within the Lake Tahoe Region and as such it should be implemented consistently throughout the state.

Recommendation – It is recommended that this requirement be revised to state that if storm water runoff from the 85th percentile storm event can discharge to a receiving waterbody then the runoff shall be captured, infiltrated and evapotranspired.

Comment 15 Section E.12.b.3.i.a.4 Regulated Special Project Categories

Section E.12.b.3.i.a.4 provides a provision where the treatment standards do not apply for projects listed in the Regulated Special Project Categories for which a planning application has been deemed substantially complete on or before the Permit effective date as long as the applicant is still diligently pursuing the project. The term “diligently pursuing the project” is vague and will be subject to misinterpretation.

Recommendation – It is recommended that the provision be modified to read: “For any private development project in the categories specified above for which a planning application has been deemed complete by a Permittee on or a project that a Specific Plan has been approved on or before the Permit effective date the treatment standards shall not apply”. Reference to diligent pursuit should be deleted and an Approved Specific Plan should be directly referenced.

Comment 16 Section E.12.b.3.i.a.5 Regulated Special Project Categories

Section E.12.b.3.i.a.5 requires projects to adhere to treatment thresholds. However there is not widely accepted data that supports the use of treatment thresholds. The MEP standard should apply, not treatment thresholds that are not currently supported by widely accepted scientific data. Additionally, the requirement is included under a subsection pertaining to Regulated Special Project Categories; treatment thresholds are out of context in this subsection and are not a Regulated Special Project Category.

Recommendation – Recommend deleting E.12.b.3.i.a.5. It is also recommended that project specific Treatment BMP selection be based upon identified pollutants of concern related to the project’s receiving waterbody and associated Beneficial Uses..

Comment 17 Section E.12.b.4 Interim Hydromodification Management

Section E.12.b.4 states that Permittees shall develop and implement Interim Hydromodification procedures. It then goes on to state that Hydromodification Projects are Regulated Projects that create or replace one acre or more of impervious surface. This is very confusing. It should state that Regulated Projects that create or replace one acre or more of impervious surface are subject to the following hydromodification requirements.

Recommendation – Revise language to state that Regulated Projects that create or replace one acre or more of impervious surface are subject to the following hydromodification requirements.

Comment 18 Section E.12.b.4 Interim Hydromodification Management

Requiring all Regulated Projects to comply with the interim hydromodification standards is not reasonable. Projects that discharge to a lined channel or that are located in a highly developed area should not be required to implement hydromodification requirements.

Recommendation – Revise language to include a waiver from Interim Hydromodification Management for those projects that discharge to a lined channel or are located in a highly developed area.

Comment 19 Section E.12.b.5 Long Term Watershed Process Management

Throughout this section “numeric criteria” is referred to but is not ever defined. It is unclear as to what numeric criteria should be developed.

Recommendation – Define exactly what numeric criterion is expected to be developed and implemented. This entire section is vague at best and as such will be difficult to comply with or implement.

Comment 20 Section E.12.b.5 Long-Term Watershed Process Management and Section E.12.b.6 Implementation Strategy for Watershed Process Management

Sections E.12.b.5 and E.12.b.6 outline a strategy for requiring Permittees to develop a watershed based approach for post construction water quality standards that is based on the Permittee developing “numeric criteria” that will support and protect watershed processes affected by storm water. As stated in the previous comment, the required “numeric criteria” is not defined. As such it is difficult to understand the intent of this watershed process based approach. It appears that this approach is not embracing the already established process for determining the quality of a specific waterbody which is based upon Beneficial Uses. Any post construction storm water quality requirements should be based upon the existing framework established to determine whether or not a waterbody is impaired.

It is not advantageous to develop an entirely new process for protecting water quality outside of the existing framework that is established by the CWA. The established frame work for

evaluating water quality and determining impairment of a waterbody should also be relied upon to protect water quality. To evaluate project related water quality impacts under the CEQA and NEPA it has to be determined whether or not a specific project will cause an exceedance of established water quality standards that will result in the identified Beneficial Uses to not be supported. Additionally, under section 303 (d) of the CWA, determination of impairment and the establishment of TMDLs are also based on Water Quality Standards and Beneficial Uses. Protection of Beneficial Uses is in essence a watershed based approach for regulating water quality simply in the fact that Permittees are responsible for ensuring discharges do not cause and exceedance of Water Quality Standards or impact Beneficial Uses no matter where the discharge is generated from within the watershed. Requiring the development of a post construction program that is based on a new "Watershed Based Approach" is confusing, does not embrace a comprehensive approach to protecting water quality, will make it difficult to substantiate Permit compliance and will not aid Permittees with the implementation of TMDLs.

Recommendation – It is recommended that post-construction section of the draft Permit be re-written to **embrace the existing Beneficial Use framework established by the CWA**. A comprehensive approach to for evaluating, protecting, and regulating water quality should be the foundation in which the Permit is based upon. Requiring Permittees to develop an alternative strategy that is based upon an undefined numeric criteria will not facilitate Permit compliance, is not consistent with the TMDL process, does not compliment water quality analysis under CEQA and NEPA, and will in turn not facilitate protection of water quality.

Post construction water quality should be first and foremost based upon a project's receiving waterbody. BMPs should be selected based upon identified pollutants of concern. Pollutants of concern should those pollutants and/or stressors for which water quality standards are established for supporting identified Beneficial Uses. This approach allows a measurable and defensible standard for substantiating compliance with MEP.

If you require additional information or have any questions please contact me at (916) 449-2204.

Sincerely,



Jennifer Hanson
Wood Rodgers, Inc.