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December 17, 2012

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

VIA E-MAIL: commentletters@waterboards.ca.gov

RE: Comment Letter – 3rd Draft Phase II Small MS4 General Permit

Dear State Water Resources Control Board:

The California Council for Environmental and Economic Balance (CCEEB) is a coalition of California business, labor and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization. On behalf of CCEEB, we want to thank the State Water Resources Control Board (SWRCB) for this opportunity to comment on the Second Revised Draft Tentative Order for the National Pollutant Discharge Elimination System (NPDES)/ Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4) (draft Permit).

CCEEB's recommendations for revisions to the draft Permit are provided below. Note that proposed revisions are identified for text within the permit. Similar revisions would also need to be made to the Fact Sheet.

Post Construction Best Management Practices (Section E.12)

As written, this Section would require projects that create and/or replace $\geq 2,500$ sq-ft of impervious surfaces to implement site design measures and projects that create and/or replace $\geq 5,000$ sq-ft of impervious surfaces to also implement source control measures, runoff reduction measures, stormwater treatment measures and baseline hydromodification management measures.

While Staff has made many changes to this section, it still imposes significant unnecessary and inappropriate requirements on linear underground/overhead projects (or "LUPs", as defined in the SWRCB's Stormwater Construction General Permit). To install new underground utilities or to maintain or replace existing underground facilities, LUPs remove and replace existing impervious surfaces (e.g., pavement, concrete) via trenching and excavation. These activities occur mainly within public rights of way (e.g., streets, parkways) or on private property (e.g., parking lots). To require implementation of the Post Construction Measures as described in Section E.12.a. et. seq. for these projects is unnecessary and inappropriate and will not lead to the improvement of water quality. Replacing existing impervious surfaces as part of a LUP does



not increase runoff or increase pollutants or pollutant loads. Requiring site design measures, source control measures, runoff reduction measures, stormwater treatment measures and baseline hydromodification management measures would significantly hinder the installation or maintenance (including replacement) of facilities that are for essential public services. As mentioned above, utilities conduct these activities in public rights of way and on private property which also complicates the placement of and ultimate responsibility for any installed post-construction facilities that may be required.

We believe that the Permit should follow the definition of “redevelopment” in the recently adopted Caltrans MS4 Permit (Order No 2012-0011-DWQ). This definition specifically excludes trenching and resurfacing associated with utility work from post-construction requirements and states:

“Redevelopment. The creation, addition, and/or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition or replacement of a structure, and creation or addition of impervious surfaces. Replacement of impervious surfaces includes any activity that removes impervious materials and exposes the underlying soil or pervious subgrade. ***Redevelopment does not include trenching and resurfacing associated with utility work; pavement grinding and resurfacing of existing roadways; construction of new sidewalks, pedestrian ramps, or bike lanes on existing roadways; or routine replacement of damaged pavement such as pothole repair or replacement of short, non-contiguous sections of roadway.*** Redevelopment does include replacement of existing roadway surfaces where the underlying soil or pervious subgrade is exposed during construction. Replaced impervious surfaces of this type shall be considered “new impervious surfaces” for purposes of determining the applicability of post-construction treatment controls as provided in provision E.2.d.2).” ***[emphasis added]*** [SWRCB Order 2012-0011-DWQ, Attachment VIII Glossary]

Further, the proposed requirements are inconsistent with existing municipal stormwater permits within California that contain the following language:

“Redevelopment does not include trenching and/or resurfacing associated with utility work; resurfacing and reconfiguring surface parking lots and existing roadways; and routine replacement of damaged pavement, such as pothole repair.” [e.g., see the definition of “Redevelopment” in the California Regional Water Quality Control Board San Diego Region Order No. R9-2007-0001 NPDES No. CAS0108758 Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (Ms4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority, p. C-7].

CCEEB understands that, for a project that creates 5,000 sq-ft of new impervious surface, the Board wants the requirements for Regulated Projects to apply. These requirements make sense on projects when all of their new impervious surfaces are located in a discrete area. However, LUPs are different from a “traditional” construction project; any new impervious surfaces are small and spread out over the length of the project. It would be unusual for a LUP to have 5,000

sq-ft or more of new impervious surface in any one location; new impervious surfaces in most all instances would generally be small sites (e.g., poles, pole foundations, utility vault access covers) that are disconnected typically by hundreds of feet and located along the length of the project.

LUPs do not pose the same kind of potential impacts which the proposed permit is trying to address through the requirements in Section E.12. Therefore, it is inappropriate to require the Post Construction Measures to apply to the cumulative amount of new impervious surface along the length of a LUP (i.e., if it exceeds 5,000 sq-ft) when these new small areas of impervious surfaces are located along the length (e.g., miles) of a long line as opposed to when all of the 5,000 sq-ft occurs in one location.

CCEEB requests that the proposed permit be revised to:

- Clarify that LUPs are excluded from the Post Construction Measures except for situations where a LUP has $\geq 5,000$ sq-ft of new impervious surface located in one discrete location; and
- Clarify that Post Construction Measures do not apply to trenching and/or resurfacing associated with utility work; resurfacing and reconfiguring surface parking lots and existing roadways; and routine replacement of damaged pavement, such as pothole repair.

To accomplish these changes, CCEEB requests that the language below be inserted into the following sections:

- Section E.12.b.(Site Design Measures) – Add a final paragraph to this section that states: “Site Design Measures are not applicable to LUPs, unless a discrete location on a project exceeds the site design thresholds. When a discrete location on a LUP exceeds the site design thresholds, only that specific site is subject to Section E.12.b.”
- Section E.12.c. (Regulated Projects) – Add Section E.12.c.ii.(d) and (e) that state:
“(d) Linear utility projects, unless a discrete location on a project exceeds the site Regulated Projects threshold. When a discrete location on a linear utility project exceeds the Regulated Projects threshold, only that specific site is subject to Section E.12.c.
(e) Trenching and/or resurfacing associated with utility work; resurfacing and reconfiguring surface parking lots and existing roadways; and routine replacement of damaged pavement, such as pothole repair.”

Non-Storm Water Discharges (various Sections throughout the Draft Permit)

CCEEB appreciates the revisions made by staff in this draft permit to correctly distinguish between the terms “illicit discharges” and “non-storm water discharges”. However, there appear to be a few more sections in which this distinction needs to be made. These sections, with proposed revisions are:

- Section E.6.a.ii.a.:
(a) Prohibit and eliminate ~~non-storm water~~ **illicit** discharges to through the MS4. Exceptions to this prohibition may include the non-storm water discharges in B.3, only if they are considered non-significant contributors of pollutants.
- Section F.5.a.1.ii.a.:

(a) Prohibit and eliminate ~~non-storm water~~illicit discharges to the MS4. Exceptions to this prohibition may include the non-storm water discharges from B.3 of the ~~draft~~ Order, only if they are considered non-significant contributors of pollutants.

- F.5.b.2.i.

Task Description – The Permittee shall develop and implement a comprehensive storm water public education and outreach program. The public education and outreach program shall be designed to inform the public about storm water pollution and steps that can be taken to reduce storm water pollution. The Public Education and Outreach Program shall ~~(1)~~ measurably increase the public’s knowledge regarding the storm drain system, impacts of urban runoff and ~~non-storm water~~illicit discharges on receiving waters, and potential BMP solutions for the target audiences.

- F.5.d.

The Permittee shall develop an Illicit Discharge Detection and Elimination program to detect, investigate, and eliminate ~~non-storm water~~illicit discharges, including illegal dumping, into its system or coordinate with an adjacent Phase I MS4 Permittees existing program. The existing program, at a minimum, must include the provisions in this section.

CCEEB also appreciates that staff made corrections to sections of the permit to correctly state that it is those conditionally authorized non-storm water discharges that are “significant sources of pollutants” that must be terminated or obtain a NPDES permit. However, in Finding 39 this correction was not made. For consistency with EPA regulations for small MS4s (see 40 CFR 122.34.b.3.iii.), CCEEB requests that the following revision be made to Finding 39:

Non-storm water discharges consist of all discharges from an MS4 that do not originate from precipitation events. This Order effectively prohibits non-storm water discharges through an MS4 into waters of the U.S. Certain categories of non-storm water discharges are conditionally exempt as specified at 40 Code of Federal Regulations section 122.26(d)(2)(iv)(B)(1). Non-storm water discharges that are regulated by a separate NPDES permit are not subject to the discharge prohibition. Prohibited non-storm water discharges include conditionally exempt discharges that are found to be a **significant** source of pollutants to waters of the U.S.

Implementation of Requirements for ASBS

Attachment C.I.A.1.e.2.vii

This section provides an exception to the prohibition for discharges of non-storm water to a segment of a MS4 that has a direct discharge to an ASBS. However, this section’s placement in the permit is inconsistent with the requirements of SWRCB Resolution No. 2012-0012 (“Approving Exceptions to the California Ocean Plan for Selected Discharges into Areas of Special Biological Significance, Including Special Protections for Beneficial Uses, and Certifying a Program Environmental Impact Report” or the “Resolution”), as adopted on March 20, 2012.

As written, Attachment C.I.A.1.e.2.vii. would only authorize the discharges from vaults and underground structures if they are “...essential for emergency response purposes, structural stability, slope stability or occur naturally.” see Section I.A.1.e.2). However, this wording is inconsistent with the structure and meaning of the Resolution which does not condition these

discharges on being “essential for emergency response purposes, structural stability, slope stability or occur naturally.” CCEEB requests that the permit be revised so that Section I.A.1.e.2.vii. is not conditioned by Section I.A.1.e.2. and is consistent with the structure and meaning of the Resolution.

Attachment C.I.A.1.e.2.

This permit seeks to incorporate the requirements of the Resolution (No. 2012-0012). Consistent with the Resolution, this permit’s Finding 40 states that:

“...the NPDES permitting authority may authorize discharges of non-storm water discharges to an MS4 with a direct discharge to an ASBS to the extent the NPDES permitting authority finds that the discharge does not alter natural ocean water quality in the ASBS.”

However, Attachment C, Section I.A.1.e.2 states that:

“Additional non-storm water discharges to a segment of the MS4 with a direct discharge to an ASBS are allowed only to the extent the relevant **Regional Water Board** finds that the discharge does not alter natural ocean water quality in the ASBS.” *[emphasis added]*

This statement in Attachment C limits the ability to authorize these discharges to the Regional Boards. However, this MS4 permit is a more appropriate vehicle to make a generic finding that short duration, intermittent discharges (e.g., groundwater dewatering, potable water system flushing, hydrotest discharges, vault discharges, etc.) made pursuant to a NPDES permit are authorized to discharge to a MS4 segment that has a direct discharge to an ASBS. This would be consistent with the approach in federal regulations (see 40 CFR 122.26.d.2.iv.B. to 122.26.d.2.iv.B.1.) and in MS4 permits (including this one – see Section B.3.) that prohibits non-stormwater discharges to a MS4, except as otherwise authorized by a separate NPDES permit. That is, a discharge of non-stormwater is permitted anywhere in a MS4 where that segment of the MS4 does not have a direct discharge to an ASBS as long as the discharge is made pursuant to a NPDES permit. Therefore, authorizing the discharge of non-stormwater to a MS4 with a direct discharge to an ASBS made pursuant to a NPDES permit in this permit is no different than what is already authorized under federal regulation for discharges of non-stormwater (i.e., pursuant to a NPDES permit) to a MS4 with a direct discharge to areas other than ASBSs.

CCEEB requests that the permit be revised to add a new paragraph to the end of Attachment C.I.A.1.e.2.) that states:

“Discharges from other sources of non-stormwater to a segment of the MS4 with a direct discharge to an ASBS are permitted if such discharges are authorized by an NPDES permit. A Regional Water Board may nonetheless prohibit a specific discharge if it determines that the discharge is causing the MS4 discharge to the ASBS to alter natural ocean water quality in the ASBS.

Construction Plan Review and Approval Procedures-Implementation Level (Section E.10.b.ii.c)

This section states:

“Require that the erosion and sediment control plan list applicable permits including, but not limited to the State Water Board’s CGP, State Water Board 401 Water Quality

Certification, U.S. Army Corps 404 permit, and California Department of Fish and Game 1600 Agreement. Include as a condition of the grading permit that the operator submit evidence to the MS4 that all permits required for the project have been obtained prior to commencing soil disturbing activities.”

Since EPA’s requirements for the operator of a regulated small MS4 related to construction activity (see 40 CFR 122.34.b.4. - Construction Site Storm Water Runoff Control), do not include specific conditions on the application for or issuance of a grading permit, it appears that this requirement goes over and above what is required by federal regulations.

Further, since the wording of Section is E.10.b.ii.c. is focused on the grading activity and the associated erosion and sediment control plan, it may be fair to assume that the “applicable permits” required to be listed (and obtained before initiating soil disturbance) are limited to those associated with the actual grading. However, based on the way this section is worded (“...including, but not limited to...”), it could be read to include other (if not all) permits. CCEEB is doubtful that staff intended to require all of the plumbing and electrical permits for each house in a residential subdivision be listed, or obtained before soil disturbing activities are initiated on a project. Or for that matter, that all of the ancillary permits (e.g., traffic control permits, encroachment permits) along the entire length of a linear utility project must be listed, or obtained before soil disturbing activities are initiated.

For traditional projects (e.g., those covered under the traditional portion of the Stormwater Construction General Permit), this requirement may be workable, however, for LUPs (i.e., those described by the definition of Linear Underground/ Overhead Projects in Attachment A of the Stormwater Construction General Permit) this requirement is unnecessarily burdensome.

CCEEB request that these requirements to list all permits for the project in the erosion and sediment control plan and to obtain all permits for the project prior commencing soil disturbing activities be deleted. However, assuming there is a clear federal regulatory basis for this section, CCEEB requests that this it be revised to clarify that:

- the permits to be subject to this section are only those federal and state permits directly associated with the grading activity (e.g., CGP when ≥ 1 acre of soil disturbance; 404/401 and DFG approvals when grading will impact a water of the US), not “all permits required for the project;” and
- permits need to be obtained before the specific activity that requires the permits is initiated at a particular location, not “all permits required for the project ... prior to commencing soil disturbing activities.”

Construction Site Inspections and Enforcement (Section E.10.c)

This Section includes a new paragraph which requires the Permittee to perform an inspection prior to allowing an operator to commence land disturbance during the rainy season and at the conclusion of the project and prior to the final occupancy approval. Since the State Water Board’s issuance of coverage under the Construction General Permit (CGP) authorizes the permittee to proceed with their construction activities in accordance with the terms and conditions of the CGP and the project’s Storm Water Pollution Prevention Plan which embodies the requirements of the CGP for that project, it is unreasonable to further require that the start of construction activities

be contingent upon a pre-construction inspection by the small MS4. In fact, the CGP does not contain this inspection requirement. The Small MS4s will likely be resource limited and may have difficulty responding in a timely manner, which would likely result in project crews being constrained from proceeding with soil disturbing work until the Small MS4 conducts the pre-construction inspection. This requirement will likely result in unnecessarily delaying the start of projects and increase costs. CCEEB requests that the draft permit be revised to delete this pre-construction inspection requirement.

It is also unreasonable to require all disturbed areas to reach final stabilization and all temporary control measures to be no longer needed (and have been removed), prior to the Small MS4 approving occupancy. Where revegetation is being used for final stabilization, depending on soil types and time of year, it could be months before final stabilization is achieved. It is unreasonable to delay occupancy of an otherwise habitable structure during this time period. CCEEB requests that the draft permit be revised to delete this occupancy requirement.

Watershed Management Zones (Finding 42)

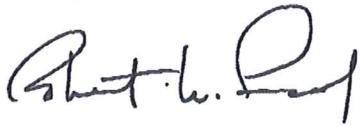
The permit proposes to implement “watershed management zones” and associated “criteria for runoff retention and hydromodification control.” However, these zones and the associated criteria are not available at this time and staff proposes to develop the zones and criteria and to incorporate them into the permit at a later time through a permit reopener. This raises the following questions:

- What criteria are to be utilized in the interim?
- How is the regulated community (MS4s and those entities subject to the permit indirectly through the MS4s) able to comment on these requirements in this permit proceeding?

CCEEB recommends that runoff retention and hydromodification control requirements be removed from this permit entirely until staff has developed and fully vetted the requirements.

Thank you for considering our comments. If you wish to discuss these comments further, please contact Bob Lucas at 916-444-7337.

Sincerely,



Robert W. Lucas
Waste & Water Quality Project Manager



Gerald D. Secundy
President

cc: Mathew Rodriguez, Secretary, California Environmental Protection Agency
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