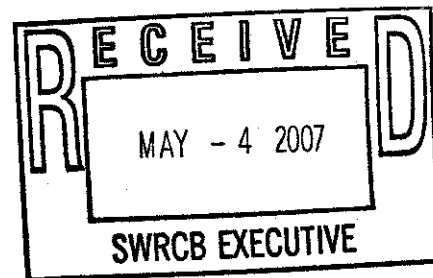


May 4, 2007

VIA EMAIL (commentletters@waterboards.ca.gov) AND
FACSIMILE (916) 341-5543)



California State Water Resources Control Board
Attn: Ms. Song Her, Clerk to the Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comment Letter – Preliminary Draft Construction General Permit

Ms. Her:

The Orange County Business Council (“OCBC”) appreciates this opportunity to comment on the State Water Resources Control Board’s (“SWRCB” or “Board”) Preliminary Draft Construction General Permit (the “Preliminary Draft”), dated March 2, 2007.

OCBC represents and promotes the business community, working with government and academia, to enhance Orange County’s economic development and prosperity in order to preserve a high quality of life. One of OCBC’s key policy objectives is to improve and sustain ocean water quality using comprehensive, watershed-based and science-based approaches that reduce contaminants from point and non-point sources in a cost effective and sustainable manner. We support science-based programs and projects to manage urban runoff and stormwater in a cost-effective and sustainable manner. Accordingly, OCBC has a very strong interest in encouraging reasonable and cost-effective approaches to control of stormwater discharges from construction sites.

I. EXECUTIVE SUMMARY

The CGP governs water quality at all major construction sites throughout the State of California and, therefore, has the potential to impose significant burdens on new projects, development and infrastructure. The existing CGP issued in 1999 has proven to be protective of water quality when implemented properly and was upheld by Judge Lloyd Connelly in a June 2005 decision resolving litigation against the Board brought by various environmental groups.¹ The March 2 Preliminary Draft proposes to reverse some of the core underpinnings of the 1999 CGP, which the Board vigorously defended in litigation, placing a material burden on the agency to explain why these reversals in policy are warranted, how these reversals will result in water quality benefits, and how those benefits are commensurate with the increased burdens

¹ San Francisco Baykeeper, et al. v. California State Water Resources Board, Case No. 99CS01929, Ruling on Submitted Matter (Cal. Super. Ct. Sac. Div. May 18, 2005) (hereinafter, the “Connelly case”).

on the regulated community, including not only the private sector, but the public sector and major public works projects.

The March 2 Preliminary Draft proposes to increase regulation of construction sites dramatically, through a variety of new permit provisions that are not present in any construction stormwater permit anywhere in the Nation. The Board should navigate such uncharted territory carefully, subjecting the permit to the scrutiny called for by such novel initiatives, and providing material justification as to the need for, and possible efficacy (if any) of, these proposed measures.

At this early stage, we mark the following points² for the Board's consideration as it revises the permit and plans for future formal proceedings on the permit:

- (1) *The Board Should Confirm the Informal Nature of the CGP Proceedings to Date.* As a preliminary matter, the Board should confirm, as expeditiously as possible, the informal nature of the CGP proceedings to date. We understand the Board has opted to take an informal approach, intended to help the agency develop a formal draft permit which the agency will release in the future, at which time formal permit proceedings will commence. As such, in this letter we focus on certain overarching issues more from a policy and implementation perspective, than from a legal perspective, in the spirit of assisting the Board with the development of a formal draft permit.
- (2) *The Preliminary Draft Suggests that the Regulation of Stormwater from Construction Sites Has Been a Failure, When the Reality Is One of Notable Success.* There are many examples of excellent stormwater management at California construction sites. The challenge for the State Board is to bring about more uniform performance of existing best practices – not to scrap the current program which has proven effective when implemented properly. The Board should not rely on last year's Storm Water Panel Report³ to conclude that Best Management Practices ("BMPs") cannot be used to effectively manage stormwater at construction sites. That report contained unsolicited and unfounded expressions of opinion critical of the State's current stormwater program. Those observations were not based on a survey of actual practices, or any field work whatsoever, and strayed from the Panel's charge. The Panel Report made no mention of the many fine examples of effective stormwater management under the current CGP, nor does the Report mention the California Environmental Quality Act, through which water quality mitigation has been occurring throughout the State for many years. These

² These points are further articulated in a separately submitted letter from the California Chamber of Commerce, which letter we incorporate by reference as if fully set forth herein.

³ Storm Water Panel Recommendations to the California State Water Resources Control Board: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated With Municipal, Industrial, and Construction Activities (June 19, 2006) (hereinafter, the "Panel," and the "Panel Report").

omissions, and the continued absence of any survey of actual practices, should lead the Board to be skeptical of the Report's unfounded opinions on the current program's effectiveness.

- (3) *The Preliminary Draft Provides No Basis for the Board to Reverse Its Prior Finding that Numeric Effluent Limits at Construction Sites Are Infeasible.* From 1999 to 2005, the Board vigorously defended its 1999 determination that numeric limits at construction sites are infeasible -- a determination upheld in the Connelly case. Now, the Board proposes to reverse its own finding, apparently on the basis of the 2006 Panel Report, which was principally a literature survey, and no substitute for the technical studies necessary to support technology-based numeric limits. The Board should consult the well-established pattern and practice of the United States Environmental Protection Agency ("EPA") to inform the development of any such limits, and the determination of their feasibility. For example, when developing technology-based numeric limits, EPA goes to great lengths to conduct an in-depth study of the industry, makes case studies of selected sites in the industrial category, committing substantial resources to field evaluation, and testing, of actual performance. In contrast, the Board has undertaken no analogous efforts to support the numeric limits proposed in the Preliminary Draft.
- (4) *Numeric Effluent Limits Are Not Required By The Clean Water Act, Technically Feasible, Or Cost-Justified.* EPA is the nation's leader in setting numeric limits, having developed, during the course of the past three decades, over 50 national, technology-based, numeric effluent limit guidelines for various industries. EPA also has many years of experience with evaluating the feasibility of numeric limits for stormwater discharges, and has opted to impose such limits only in very limited and discrete contexts. Accordingly, when EPA expresses a clear preference for *non*-numeric effluent limits in stormwater permitting, the Board should pay close attention. The March 2 permit documents make no attempt to address the myriad factors that have prevented EPA from setting numeric stormwater limits for construction sites; the Preliminary Draft is inconsistent with the results of EPA's many years of expert deliberation on the subject. Numeric stormwater limits are not required by the federal Clean Water Act; and the Board has not made the case that they are technically feasible or cost-justified.
- (5) *The Board Previously Rejected Dramatically Expanded Stormwater Sampling and Analysis at Construction Sites as Not Required by Law and Unlikely to Yield Useful Information; the March 2 Permit Documents Call for Such Expansive Monitoring but Provide No Basis for the Board to Reverse Its Prior, Judicially Upheld Findings.* Despite the fact that the Board in the Connelly case argued with success that extensive stormwater sampling and analysis is not required by the federal Clean Water Act, the Board now proposes a dramatic expansion of such monitoring. On the basis that stormwater quality is so highly and inherently variable, the Board previously determined that such monitoring, especially at construction sites with ever-changing conditions, is unlikely to yield useful information. While field testing for bulk parameters can have utility in spotting problem conditions, and thus may be worth the cost and effort, the comprehensive monitoring proposed in the Preliminary Draft is not a productive use of

resources, and, according to the Board's own prior findings, is unlikely to produce useful information or commensurate water quality benefits.

- (6) *The Board Should Focus on Improving the Implementation of Best Management Practices ("BMPs") through Design Standards and Maintenance Obligations.* The program for prevention and reduction of stormwater pollution at construction sites can be improved by tightening the BMP-based provisions of the existing CGP. Design standards for BMPs could be established to promote more uniform performance and to provide criteria for BMP selection, and maintenance obligations could be made clear and enforceable on a more routine basis. Such approaches will help ensure that the next CGP makes meaningful further water quality gains. By contrast, a fundamental paradigm shift in the CGP towards numeric effluent limits and untested and unwarranted technology such as Advanced Treatment Systems⁴ would be imprudent, and certainly is unwarranted based on any information provided to date by the agency.
- (7) *The Potential Impact of Construction on Downstream Channel Erosion and Scour Is a Nonpoint Source Issue that Is Ill-Suited for the CGP Program, and Is Outside Its Scope.* The March 2 permit documents indicate that the Board is concerned that stormwater volumes and velocities which occur after construction is completed will be greater than those which existed prior to construction. According to the Board, this so-called "hydromodification" may propagate downstream, altering stream channels through scour, erosion and other adverse impacts. The Board's concern is of potentially much less moment in a region like ours where many receiving waters are stabilized, and thus resilient from changes in flow regime and the potentially erosive forces of water. In addition, this is a classic nonpoint source issue, one that is ill-suited for a command and control permit like the CGP, as recognized by case law and existing California regulations placing channel erosion outside the scope of the NPDES permit program. The Board should consider leaving this issue to the land-use planners and to the area-wide drainage programs required of local jurisdictions under regional public storm drain permits, where such issues can be studied and mitigated pursuant to local land use law, regional drainage programs, and the California Environmental Quality Act, employing various approaches.
- (8) *A Formal Public Comment Period, and Potential Hearings, on Stormwater Plans Is Unnecessary, Is Not Required by Law, and Has the Potential to Disrupt Orderly Land Use Planning.* The Preliminary Draft calls for most construction site operators to prepare a Stormwater Pollution Prevention Plan, or SWPPP, satisfying various detailed, prescriptive elements specified in the permit. During these permit proceedings, the Board surely will provide the public with every opportunity to comment on the required

⁴ We also are concerned that Advanced Treatment Systems, and the Hydromodification Standards discussed in the next paragraph, will discourage and may be incompatible with regional natural treatment systems. We incorporate by reference the comment letter of Playa Capital Company which addresses these concerns.

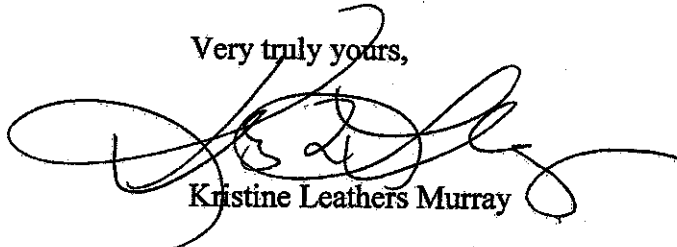
contents of the SWPPP. It is unnecessary for every SWPPP prepared pursuant to the final permit to undergo a separate and special public review process. This is an invitation for administrative gridlock and project opponent mischief as thousands of SWPPPs are prepared every year in the State; the resources to handle a public process specific to these plans are not available, nor would commitment of them to such review be a good use of these resources. Simply making the SWPPPs publicly available through electronic posting on the agency's web site prior to the beginning of construction will give all interested parties ample opportunity to raise through various existing, readily available, and effective means any concerns over the adequacy of BMPs described in any particular SWPPP.

II. CONCLUSION

We appreciate the Board's consideration of our comments, and look forward to the opportunity to further engage in the public dialogue on the CGP. In particular, we are available to work with the Board with respect to enhancements to sediment and erosion control design standards and maintenance obligations, so that best practices are more uniformly achieved and enforceable. We believe that the Board's energies would be well applied in such a direction, and that such enhancements provide great promise in effecting further water quality progress on a program that already has achieved laudable pollution reduction, and is marked by many instances of high performance. Finally, OCBC has an interest in the State Board setting forth a reasonable administrative process for permit applicants and, therefore, OCBC supports the Los Angeles Chamber of Commerce's separately submitted comments to that effect, and incorporates them by reference.

Please do not hesitate to contact the undersigned at (949) 794-7210, or Paul Singarella of Latham & Watkins LLC, who co-chairs our Legal Affairs Committee, at (714) 755-8168, should the Board have any questions whatsoever, or if we can be of any further assistance.

Very truly yours,



Kristine Leathers Murray

Vice President,
Government and Community Affairs
Orange County Business Council

cc: Lucy Dunn
Paul Singarella