

**Construction General
Permit - Stormwater**
Deadline: 5/4/07 5pm

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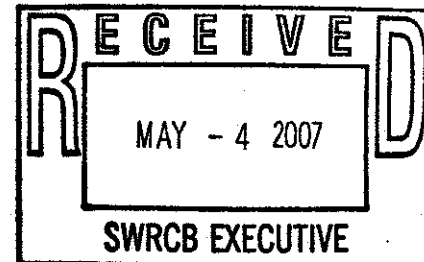
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May 4, 2007



VIA FACSIMILE AND MAIL (916) 341-5620

California State Water Resources Control Board
C/O Song Her
Clerk to the Board
1001 "T" Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter - Draft Construction Permit; State Water Resources
Control Board Order No. 2007-XX-DWQ National Pollution Discharge
Elimination System General Permit No. CAR000002

Dear Ms. Her, State Board members and staff:

Best Best & Krieger LLP, represents over seventy (70) public entities throughout California regarding all aspects of storm water, urban runoff, and waste discharge issues, including compliance with all applicable National Pollutant Discharge Elimination System ("NPDES") permits. These entities range from school districts, water districts, and wastewater agencies to vector control districts and resource conservation districts. Best Best & Krieger has routinely provided the State Water Resources Control Board ("State Board") and the individual Regional Water Quality Control Boards with comments regarding the potential impacts of their actions on these public entities.

On March 2, 2007, the State Board issued the latest "informal" draft of the General Construction Storm Water Permit (State Board Order No. 2007-XX-DWQ) (the "Permit"). The State Board's Notice of Public Workshop for the Construction General Permit states that the State Board is interested in receiving comments regarding all aspects of the Permit - especially the three main goals identified in the Notice of Public Workshop and the related, significant revisions highlighted in Section I. D. of the Fact Sheet that State Board staff prepared in support of the new Permit.

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Several aspects of the Permit raise concerns for Best Best & Krieger's public entity clients. Foremost is that the Permit includes a number of technical provisions that will substantially increase costs for public entities that engage in construction activities. When coupled with the inadequate budgets under which many public entities must operate, an increase in costs may equate to an inability to proceed with some projects, or a reduction of the much-needed public services that these entities provide. We do not believe that this is the State Board's intent.

Public agencies throughout California share the State Board's goal of protecting California's water resources. Best Best & Krieger's public entity clients support that goal, but have legitimate concerns about some of the measures the State Board is currently considering. A more thorough discussion of our comments on the Permit is set forth below. We view the comment letter process as an opportunity to bring the needs of public entities to the attention of the State Board. To that end, we trust the State Board will consider each comment in this context, and will work with public entities throughout the state to develop a Permit that both maximizes watershed protection and allows public entities the necessary flexibility to continue to operate in a highly regulated field. Best Best & Krieger is committed to working with the State Board in achieving a practical and sustainable approach to storm water compliance.

COMMENTS**I. THE STATE BOARD NEEDS TO CONSIDER THE COST AND PUBLIC SERVICE IMPLICATIONS THAT CHANGES IN, AND EXPANSIONS TO, THE CONSTRUCTION GENERAL PERMIT WILL HAVE FOR PUBLIC AGENCIES.**

As the State Board moves forward with the "formal" draft of the Permit, we respectfully request that the State Board consider the impacts that the proposed changes and upgrades will have for public entities. As California's population continues to grow, so does the cost of providing vital services to the public. Public entities, especially school districts, are extremely sensitive to any requirements that may increase costs and thereby limit their already narrow ability to engage in infrastructure upgrades and other construction activities. The State Board should, therefore, carefully consider how changes to the Construction General Permit will limit the ability of public entities to continue to do the important work that they perform.

Additionally, the Porter-Cologne Water Quality Act requires that when formulating or revising state policy for water quality control, the State Board shall consult with and carefully evaluate the recommendations of concerned federal, state, and local agencies. (Cal. Water Code § 13144.) Public entities throughout the state are concerned about the cost implications of the Construction General Permit. To the best of its ability, the State Board should limit any requirements in the Permit that may substantially increase the cost of compliance for public entities.

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II. THE STATE BOARD NEEDS TO PROVIDE A PHASE-IN PERIOD FOR COMPLIANCE WITH THE NEW CONSTRUCTION GENERAL PERMIT.

The Construction General Permit includes a number of new requirements that considerably increase the responsibility of anyone engaging in construction activity. Among others, these new requirements include:

1. Implementation of technology-based numeric "Action Levels" for pH, turbidity, and total petroleum hydrocarbons (TPH);
2. Implementation of technology-based "Numeric Effluent Limitations" for pH and Active Treatment System ("ATS") discharges;
3. The requirement that permittees submit "Action Level Exceedance Evaluation Reports" if they fail to meet specified "Action Levels";
4. The new three-tiered "Risk-based Permitting Approach";
5. New project site soil characteristic monitoring and reporting requirements;
6. New ATS requirements;
7. Implementation of performance standards for hydromodification impacts in areas of new and re-development; and
8. Requirement that permittees develop and implement a "Rain Event Action Plan".

These additional requirements will be difficult for many public entities to implement immediately upon adoption of the Permit without appropriate staff training, public funds, and other resources. Rather than requiring immediate compliance, the State Board should take a phased approach and gradually require compliance with the new provisions over a two to three-year period. Such an approach will provide public entities throughout the state with the time they need to plan for, and adapt to any new compliance measures that the State Board chooses to adopt.

III. THE POST-CONSTRUCTION BEST MANAGEMENT PRACTICES ("BMPs") AND HYDROMODIFICATION PROVISIONS IN THE DRAFT CONSTRUCTION GENERAL PERMIT SHOULD BE REMOVED.

Among the new provisions in the Construction General Permit is the requirement that construction projects over one acre institute post construction BMPs and limit post-construction hydromodification. Specifically, the Permit requires that:

1. All construction projects must implement "non-structural and structural measures" to

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ensure that post development runoff volume approximates the pre-project runoff volume for areas covered with impervious surfaces;

2. Projects that disturb an area that exceeds two acres must "preserve the post-construction drainage divides for all drainage areas serving a first order stream"; and
3. Projects that disturb more than fifty (50) acres must "preserve pre-construction drainage patterns by distributing their non-structural and structural controls serving first order streams or larger".

The Construction General Permit further requires that permittees demonstrate compliance with these requirements by submitting a map and worksheets with their Notice of Termination. These requirements raise a number of issues for public entities.

Regulating the post-construction aspects of a project is beyond the scope of the Construction General Permit.

Although the previous Permit, adopted in August, 1999, included some limited post-construction BMP requirements, traditionally, the Permit has focused on regulating the storm water impacts caused directly by construction activity. The current version of the Permit proposes that the State Board abandon this traditional use of the Permit and embark on a regulatory path that is well beyond the Permit's scope. By imposing new post-construction BMPs to limit hydromodification, the Permit seeks to regulate a project's design elements. Regulation of land use and planning in this manner is better left to local municipalities and other agencies with general purpose jurisdiction that have authority over local zoning, the staff, and the expertise to adequately ensure that projects comply with applicable design specifications. The State Board should therefore exclude these requirements from the Permit.

Additionally, the Facts Sheet prepared by State Board Staff indicates that the Permit is the first of a three-step process, the second step being the re-issuance of statewide Phase II MS4 permits. The Phase II MS4 permits provide a better vehicle for imposing post-construction storm water controls. This is because the state has vested each municipality with the land use and zoning authority to regulate the design aspects of a construction project. Where a local or regional government authority is not covered by a Large MS4 permit (which for the most part require such post-construction controls), the State Board could impose these requirements with the Phase II permit. The State Board would thereby require post-construction BMPs and hydromodification measures without duplicating the efforts of numerous municipalities and local governments throughout the state.

The Construction General Permit's "One Size Fits All" approach to post-construction BMPs is inappropriate.

The post-construction and hydromodification BMP requirements currently contained in the Construction General Permit will require that: 1) post development runoff volume approximates

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the pre-project runoff volume for areas covered with impervious surfaces; 2) large construction projects preserve drainage divides; and 3) very large projects preserve pre-construction drainage patterns.

It seems inappropriate to expect these blanket, state-wide provisions to result in cleaner post-construction storm water conditions. This is because they may or may not be necessary on every project site, and they may not be the most effective manner of controlling post-construction storm water pollution. By their nature, blanket determinations are both under-inclusive, and over-inclusive. Defining terms and uses in a manner that is intended to apply equally across the state will not allow for the need to protect areas where the promulgated rule is ineffective.

Public entities need the flexibility to design their projects according to their needs. Adding design requirements from a state agency that is not generally in the business of land use and planning regulation will only add to the cost and bureaucratic hurdles associated with public construction projects. For that reason, the State Board should avoid issuing any permit requirements that fail to provide public entities with the flexibility to design their projects according to their needs, and the specifications of the property upon which construction will take place.

This is especially true with regard to school districts, the construction and design of which is subject to the oversight of the Division of the State Architect. (Cal Edu. Code § 17280 et seq.) This oversight creates a system whereby the construction of school facilities is generally exempt from local building and zoning ordinances. (Cal. Gov. Code 53094.) In so doing, the Legislature intentionally limited the ability of other public entities to hinder school facility design and construction.

The hydromodification provisions in the Construction General Permit conflict with Large MS4 permits throughout the state.

A number of Large MS4 Permits in Southern California include major components dedicated to post-construction site design and hydromodification BMPs. For example, the recently adopted San Diego County Large MS4 Permit requires Copermittees to implement regional hydromodification management plans, and to require developers to implement extensive hydromodification and low impact development BMPs in order to obtain approval for construction projects. The current drafts of the South Orange County and Ventura County Large MS4 Permits contain similar requirements.

These permits are comprehensive and contain very specific directions to local municipalities regarding how and when to impose hydromodification BMPs. If the current round of Large MS4 renewals is any indication of future trends, the individual Regional Boards are likely to continue to impose more specific post-construction site design and hydromodification BMPs. To a large extent, these BMPs directly conflict with those contained in the Permit.

In order to avoid these conflicts, the State Board should take a hands-off approach to the post-

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construction aspects of a project, and allow the municipalities to implement their respective MS4 permits. The site design aspects included in the Large MS4 permits are both specific and flexible enough to allow for a high level of post-construction storm water protection. Accordingly, there is no reason that the State Board should add confusion to the public construction process by imposing duplicative, contradictory requirements on public entities.

This is not to suggest that the State Board should encourage an increased level of local government involvement in the design aspects of public agency construction projects. Section 53090 et seq. of the California Government Code provides a general exemption from local zoning and building ordinances for many public agencies. (Cal. Gov. Code §§ 53090(a), 53091(a).) It further allows school districts to exempt themselves from local building and zoning codes as it relates to the design and construction of school facilities. (Cal. Gov. Code § 53094(b).) The State Board should not disrupt this balance with the Construction General Permit. It should instead let the agencies that are charged with regulating the design and building aspects of public agency projects continue to implement the regulations they have developed. If the State Board feels these controls are inadequate, it should issue Phase II Permits that fit each individual agency's needs.

Hydromodification and post-construction BMP requirements are already addressed by other permits and programs.

In addition to being contradictory and duplicative of the Large MS4 permits, the Permit's post-construction and hydromodification BMP requirements are already covered by a number of other regulatory programs, such as the California Environmental Quality Act ("CEQA"), and programs established pursuant to local land use and zoning regulatory authority.

The land use elements of a project, and indeed, all of a project's environmental impacts are, with rare exception, fully analyzed pursuant to CEQA. Under CEQA, any significant environmental impacts associated with a project must be mitigated. This includes potential storm water pollution that may result from constructing a project with inappropriate post-construction BMPs. Likewise, the state has vested each municipality with the land use and zoning authority to regulate the design aspects of most construction projects (e.g. projects exempted by the California Government Code and school district projects regulated by the State Division of Architecture.) This should indicate to the State Board the appropriate vehicle for imposing post-construction and hydromodification BMP requirements.

If the State Board begins directly regulating the planning and land use elements of a project with the Construction General Permit, it will merely add to the existing burdens involved with public agency construction projects. The State Board should focus its resources on those areas that it has traditionally regulated, and leave regulation of the planning and land use elements of a project to those agencies that have been charged with it.

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The timing for certification of hydromodification and other post construction BMPs is inappropriate.

The hydromodification provisions in the Construction General Permit are essentially design elements that should be addressed during the project planning phase of construction. The Permit will require permittees to demonstrate compliance at the end of construction by submitting maps and worksheets with their Notice of Termination. Requiring compliance this late in the process will limit the effectiveness of the requirement. Accordingly, if the State Board requires these elements at all, it should do so at the front end of the permitting process, and then allow for alterations as a project progresses.

IV. THE CONSTRUCTION GENERAL PERMIT SHOULD NOT REQUIRE NUMERIC EFFLUENT LIMITATIONS

The Construction General Permit will require numeric effluent limitations for pH, and ATS discharges. Before imposing these numeric effluent limitations, and as explained in our July 25, 2006 comment letter to the State Board, the State Board should consider the implications of the baseline pollutant levels it has set. Given the fact that water quality, terrain, and tolerable pollutant load varies by area, it seems ineffective to apply one set of numeric effluent limitations to all permittees throughout the state. The State Board should tailor such limitations to the water quality needs of the area in which the construction will occur. The State Board should thus give careful consideration to accommodating background and naturally occurring pollutant levels before implementing specific numeric effluent limitations.

Additionally, the State Board should consider how the violation of numeric effluent limitations will be determined where a party other than the permittee causes the violation. Frequently, polluted storm water will run-on to property which is subject to a Construction General Permit. Although Permit Attachment E does allow a permittee to sample "run-on," the Permit does not preclude the possibility that such a permittee will still be held responsible for the discharge. The State Board should ensure that permittees who happen to be downstream from a pollutant source are not held responsible – either as to treatment or as to enforcement – for the remediation of upstream pollution. The State Board should likewise recognize that many pollutants can be deposited by means of rain, wind, or other natural phenomena (e.g., pH pollution caused by rain, fugitive dust).

Lastly, the State Board should address the situation in which a permittee faithfully and correctly implement all required BMPs but nonetheless remains in violation of a numeric effluent limitation. Currently there is no "Safe Harbor" provision that would prevent an enforcement action against such a permittee. Given that many public agencies have made significant financial investments in their current BMP programs, the State Board should accommodate this situation in the Construction General Permit.

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V. THE STATE BOARD SHOULD EXEMPT PUBLIC AGENCIES FROM THE CONSTRUCTION GENERAL PERMIT'S EFFLUENT MONITORING AND ACTION LEVEL TESTING REQUIREMENTS.

The Permit's effluent monitoring and "Action Level" testing and reporting requirements are problematic for public agencies. The Permit will require effluent monitoring within one business day of an initial ½ inch of precipitation, and every inch thereafter. It will additionally require permittees to draft and submit an "Action Level Exceedance Evaluation Report" whenever effluent monitoring indicates that discharges have caused or contributed to "Action Level" exceedances for the same parameter for two consecutive storm events within the same drainage area.

These requirements raise a number of issues for public agencies, especially in light of recent comments by the State Board. During the April 17, 2007 Public Workshop on the Construction General Permit, State Board staff, and at least one State Board member, indicated that these requirements were meant to erase the State Board's current lack of information on water quality and the impacts of construction activity. State Board staff additionally indicated that the State Board was considering including these requirements in the Permit because the State Board currently lacks the funding to survey water quality itself.

Our public agency clients agree that the assembly of such information might be appropriate where there is a clear scientific need for such information. Currently, however, the State Board has not clearly articulated the specific purposes for which such information is needed, or the specific scientific conclusions the State Board hopes to reach through use of the information. Our public agency clients believe that the State Board should postpone imposing the burden and expense of such information gathering onto local public agencies until a time when this information gathering is clearly supported by specific scientific goals.

Large MS4 operators throughout California already sample storm water.

All of the Large MS4 permits in Southern California, and the majority statewide currently include comprehensive water quality monitoring requirements. Large MS4 operators are thus required to conduct water quality sampling, and to provide those results to the relevant Regional Board. The data generated by these testing requirements should be sufficient to provide the State Board with the information it needs to assess water quality. This is because there will be very few geographical locations that are not subject to a Large MS4 permit, but that do have a sufficient amount of construction activity to provide an accurate depiction of the effects of construction on water quality in the area.

The State Board should not burden other public agencies with the cost of conducting research and analysis on behalf of the State Board.

Because of the limited ability that public entities have to raise funds, the state should not impose comprehensive programs on local public entities without providing funding. The State Board

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should likewise refrain from imposing upon other public entities storm water testing programs that it cannot afford to conduct itself. If the state agency that is charged with protecting water quality cannot afford to conduct water quality monitoring, it is doubtful that other public entities will have the budgetary capacity to do so.

The accuracy and value of testing results is limited, especially where the discharge is into an MS4 rather than directly into a water of the State.

The Permit requires effluent monitoring at construction site drainage points, and in receiving waters immediately upstream and downstream from each drainage location. This monitoring is required during rainfall events, even when the discharge is into an MS4 rather than directly into the waters of the state. Both of these conditions severely limit the value of any analysis results.

A water sample taken during a rainfall event is likely to contain any number of pollutants that the permittee did not discharge but nonetheless could contribute to an exceedance of an "Action Level" or a numeric effluent limitation. This is especially true for pH, which can fluctuate depending on the chemical composition of the water. This is also true regardless of whether the sample is taken at a discharge point, or directly in the receiving water. That is because "run-on" from neighboring properties can easily transport pollutants onto the permittee's property and thereby cause an exceedance of an "Action Level" or a numeric effluent limitation. Accordingly, the value of wet weather sampling as a compliance assessment tool is questionable.

Additionally, where the discharge is directly to an MS4, the value of receiving water sampling is also questionable. Other sources of input to the MS4 are very likely to cause the water leaving the MS4 to have a significantly different chemical composition than the water that entered the MS4 at the construction site. Such sampling is therefore incapable of providing a source of reliable construction-specific data. Because the value of effluent sampling is questionable, the State Board should exempt public entities from the Permit's effluent monitoring and "Action Level" testing and reporting requirements.

VI. THE STATE BOARD NEEDS TO REVISE THE CONSTRUCTION GENERAL PERMIT TO REFLECT THE LACK OF A PREFERENCE FOR ACTIVE TREATMENT SYSTEMS

As it is currently drafted, the Construction General Permit basically requires Active Treatment Systems for every major construction project, regardless of unique site conditions, topographic or project-related circumstances, or other considerations. Construction General Permit Section IX.H. states that for construction sites that contain 10% or more medium silt, permittees must limit the areas of active construction to under five acres at any given time, or implement an Active Treatment System. Because it is not uncommon for soils at construction sites to contain 10% or more medium silt, and most major construction projects would be impracticable if active construction was limited to five acres, the Construction General Permit basically requires Active Treatment Systems for every major construction project.

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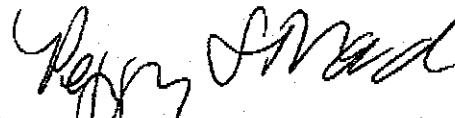
During the April 17, 2007 Public Workshop on the Construction General Permit, State Board staff, and at least one State Board member, indicated that the Construction General Permit was not intended to require Active Treatment Systems in most cases. State Board staff in fact indicated that the opposite was true and that for the majority of projects, other BMPs should be implemented. If that is the case, the State Board should ensure that this lack of a preference for Active Treatment Systems is expressed in the structure of the next draft of the Permit.

A preference for Active Treatment Systems would raise a number of issues. First, Active Treatment Systems are not necessarily more effective than other BMPs. Second, because of they tend to be expensive, a preference for Active Treatment Systems would severely hinder the ability of small public entities with limited budgets to comply with the Permit. Lastly, many Active Treatment Systems require the use of chemicals that can be toxic in high doses. This raises a special issue for a number of public entities that are sensitive to the use of toxic chemicals. This is especially with respect to school districts that are required by state law to carefully limit the use of toxic or potentially toxic chemicals at school sites.

CONCLUSION

We appreciate your attention to our comments. They are intended to be a constructive part of the ongoing, open dialogue between the public and the State Board. Such a dialog is necessary to the development of an effective and efficient Construction General Permit. Our Public entity clients are committed to the goal of water quality improvement, and will work with the State Board in developing the best means of achieving that goal. We look forward to receiving your response to the above comments and concerns. If you should have any questions about our comments, please do not hesitate to contact me or my associates Charity Schiller (at our Riverside office) or J.G. Andre Monette (at our San Diego office).

Sincerely,



Marguerite ("Peggy") Strand
of BEST BEST & KRIEGER LLP