BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

655 West Broadway, 15th Floor
San Diego, California 92101
(619) 525-1300
(619) 233-6118 Fax
BBKlaw.com

INDIAN WELLS
(760) 568-2611

IRVINE
(949) 263-2600

LOS ANGELES
(213) 617-8100

ONTARIO
(909) 989-8584

RIVERSIDE
(951) 686-1450

SACRAMENTO
(916) 325-4000

WALNUT CREEK
(925) 977-3300

J.G. Andre Monette
(619) 525-1374
Andre.Monette@bbklaw.com

June 24, 2009

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

Re: Comment Letter—Draft Construction Permit

Dear Ms. Townsend, State Board Members and Staff:

Best Best & Krieger LLP represents over seventy (70) public entities throughout California in connection with storm water and waste discharge issues, including development of and compliance with applicable National Pollutant Discharge Elimination System ("NPDES") permits. The entities we represent range from cities, school districts, water district and wastewater agencies to fire protection districts, vector control districts and resource conservation districts.

On May 4, 2007 and June 11, 2008, Best Best & Krieger submitted written comments on the preliminary drafts of the construction permit. Our comment letter outlined the many broad policy areas of concern that our public entity clients had with the drafts. Those broad policy areas of concern remain in regard to the March, 2009 draft of the permit, and rather than repeat those policy issues here, we incorporate those prior comments into this letter. Given the status of the State Board's consideration of the permit, we have attempted in this letter to provide additional recommendations regarding how we believe the permit should be revised. Our comments follow.

COMMENTS

LINEAR PROJECTS

Linear projects should not be regulated under the Permit. Attachment A (the portion of the Permit that sets forth linear project requirements) is so comprehensive that it is at this point a separate permit. To avoid confusion as to the requirements that will be imposed on linear projects, and provide the entities who will be impacted most the appropriate opportunity to comment on the requirements, the State Board should remove Attachment A from the Permit, and issue a separate draft linear projects permit. This is particularly important to special districts

who often construct large linear projects. We request that the Permit expressly acknowledge that linear projects are not covered by the Permit and that the State Board revise the small linear permit to address linear projects larger than five (5) acres, or issue a new linear projects permit.

Our comments below regarding grandfathering, numeric effluent limits, numeric action levels, and responsibility for compliance are generally applicable to the Permit's linear projects' requirements. Please consider those comments in relation to the Permit's linear projects' requirements, and the requested revisions thereto.

POST-CONSTRUCTION REQUIREMENTS

The Permit's post-construction requirements are inappropriate and should be removed. The purpose of the Permit is to prevent discharges from construction activities from impacting the waters of the State. Impacts from post construction conditions are more appropriately regulated through municipal storm water permits, individual project requirements imposed at the local level, or mitigation measures imposed through the California Environmental Quality Act approval process. Each of these regulatory schemes imposes site design requirements on large scale projects. Adding another layer of regulation will only add confusion to the process, and is unlikely to improve water quality.

While the conditional exemption for publicly funded projects provided in Permit section XIII.A.1 is a step in the right direction, it does not guarantee that a public agency project will not be subject to the Permit's post construction requirements. This is problematic for public agencies whose projects must serve specific purposes that may conflict with the Permit's post construction requirements, and/or require approvals from other state agencies that are not aware of or sympathetic to the Permit's requirements. This oversight from other state agencies creates a system under which certain types of facilities are exempt from local building and zoning ordinances. (*See e.g.* Cal. Gov. Code §§ 53091, 53094.) Where drainage requirements, such as the Permit's post-construction and site-design BMP requirements, are so comprehensive they impact the design of a project, they may conflict with this statutory scheme.

Delays caused by complying with the new requirements and coordinating with other state agencies will increase the time and cost of construction projects. The State Board should not further complicate the construction process by including post-construction site-design requirements in the Permit. It should instead let the agencies that are charged with regulating the design and construction aspects of public agency projects continue to implement the regulations they have developed.

GRANDFATHERING

Projects that are already underway should receive grandfather status. Pursuant to the current draft of the Permit, existing dischargers must obtain coverage within 100 days of the Permit's adoption. This immediate change in Permit coverage will cause substantial hardship for

public agencies, as it will impact many of the required administrative and agency approvals necessary for project construction. A change in a project to meet the Permit's requirements could jeopardize those approvals, and at the very least will cause substantial delays in project construction.

We therefore request that the Permit be revised to exempt projects that either have coverage under the existing construction general permit, or have already been approved by at least one state agency from compliance with the Permit's post construction requirements. We further request that the Permit's risk-based permitting exemption for existing projects be extended to projects that have been through the CEQA approval process. Providing an exemption will allow public agencies to proceed with existing and near term projects without costly delays.

NUMERIC EFFLUENT LIMITATIONS AND ACTION LEVELS

The Permit includes numeric effluent limits ("NELs") and numeric action levels ("NALs") for turbidity and pH. Both requirements have the potential to significantly increase the cost of compliance with questionable benefit to water quality. Neither condition is appropriate for inclusion in the Permit.

The NELs are likely to lead to significant confusion and provide a potentially false assessment of compliance. The Permit's Fact Sheet states that the NEL represents the minimal level of control and does not necessarily represent compliance with the narrative effluent limitations or the receiving water language in areas with more protective water quality objectives. The State Board has received numerous comments and testimony indicating that existing data does not support an NEL approach at this time. Given this testimony, and the overall lack of data supporting NELs, the Permit should be revised to remove the NEL provisions.

The NALs present a similar challenge. To the extent that they can be construed as effluent limits, public agencies could incur liability under Porter Cologne's mandatory minimum penalty requirements when test results exceed pre-established NALs. Additionally, at this time it is unclear whether accurate effluent limitations (or action levels) could be determined with the level of certainty necessary to justify liability. It appears that effective implementation of traditional BMPs during construction will have equivalent or superior benefits to water quality as the implementation of NALs. Compliance with the Permit's testing requirements will cost time and money that could be dedicated to implementing such BMPs at the project site. The State Board should therefore remove both the NEL and NAL requirements from the Permit.

RESPONSIBILITY FOR COMPLIANCE

The Permit holds the construction site owner responsible for compliance. This compliance scheme is flawed when applied to public agencies. Unlike home builders and other

general contractors, public agencies do not engage in large scale construction projects as their primary function. Moreover, when public agencies undertake construction projects, they are generally required to choose contractors from among the low bidders. These contractors and construction managers specialize in public agency construction projects and often move from one project to another, taking their construction practices with them.

When Permit violations occur at a construction site owned by a public agency, the public agency is held responsible. This is despite the fact that the public agency cannot dictate the means and methods of construction (including the means and methods of compliance with the Permit) to its contractor. Or the fact that during the course of construction it is very difficult for a public agency to remove a contractor from a project site, or halt construction when it appears that Permit violations are occurring. In contrast, contractors and construction managers that specialize in public agency construction take their construction practices with them when they move from one project to another. Practices that violate the Permit's requirements are carried from site to site.

A more effective means of protecting water quality, and ensuring Permit compliance would be to hold the contractor directly liable for compliance at public agency owned sites. The Permit's enforcement provisions should therefore be revised to hold the contractors and construction managers, who are in charge of construction on public agency projects, responsible for Permit compliance.

CONCLUSION

We appreciate your attention to our comments. They are intended to be a constructive part of the dialogue between the public and the State Board. This dialog is necessary for the development of an effective Construction General Permit. Our public agency clients are committed to the goal of water quality improvement, and will continue to 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.

Sincerely,

J.G. Andre Monette
for BEST BEST & KRIEGER LLP

JGM:djg