COALITION FOR PRACTICAL REGULATION

"Cities Working on Practical Solutions"

Public Comment
Dft. Construction Gen. Permit
Deadline: 6/24/09 by 5:00 p.m.

24 June 2009

Via E-mail and U.S. Mail

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Subject: Comment Letter – Draft Construction General Permit

Dear Ms. Townsend and Members of the Board:

I am writing on behalf of the Coalition for Practical Regulation (CPR) to provide comments on the revised Draft Construction General Permit (Draft Permit). CPR is an *ad-hoc* group of 39 cities within Los Angeles County that have come together to address water quality issues. As municipal permittees, our member cities are very invested in the stormwater policy and regulation process in California, and are interested in your Board's approach to improving water quality in the state. The Construction General Permit, once issued, will likely affect water quality regulation approaches in many areas, including MS4 regulations. Thank you for the opportunity to provide these comments.

First, CPR would like to thank State Board staff for improvements in the Draft Permit. We appreciate that State Board staff removed Capital Improvement Planning Language in this Draft Permit, which enhances the consistency of language in the Draft Permit. In addition, CPR thanks State Board staff for some improvements to the risk calculation procedures in this Draft Permit. We appreciate that staff seriously considered public comments regarding risk calculation and subsequently made the modifications necessary for a more equitable distribution of sediment and receiving water risks.

CPR agrees with the California Building Industry Association coalition that this Draft Permit has a more straightforward approach to the risk determination process. This April 22, 2009

revised Draft Permit utilizes risk calculation procedures that result in a more normal risk level distribution. The March 2008 Draft Permit was flawed in this respect, in that it would have resulted in many erroneous Risk Level 3 classifications. The improvement to the risk calculation process will facilitate giving focus to areas where there might be elevated risk. A recent study by URS analyzing the potential risk levels of real projects indicated that the statistical distribution of sites under the new process would better fit a normal distribution.

However, CPR continues to have concerns about several areas of the Draft Permit. We note that this Permit is not merely a significant shift in California's approach to regulating stormwater discharges, but represents a quantum leap in the methods of regulating stormwater discharged from construction sites, including municipal buildings. More work must be done in order to craft a workable Construction General Permit that both protects water quality and is feasible to implement. Cities have scarce public resources to implement construction mitigation of dubious value. Specifically, CPR is concerned with the inappropriate use of numeric effluent limits (NELs); line and grade language in the Fact Sheet; the use of a design storm that is inconsistent with the design storm in other stormwater permits; the inclusion of bioassessment monitoring and other receiving water monitoring requirements; the inclusion of the hydromodification and post-construction activities sections; the use of hydrologic sub-areas as planning areas; the broad delegation of Regional Water Board authorities with respect to the Draft Permit; and the insufficient economic analysis information in the Draft Permit.

Inappropriate Inclusion of Numeric Effluent Limits (NELs)

As we noted in our comment letter on the March 2008 Draft Permit dated June 11, 2008, CPR is concerned by the speed at which the State Board, through this Draft Construction General Permit, is proposing to move from an iterative BMP approach to a numeric effluent limit approach to regulating construction. This is premature and unnecessary. Further, as noted in our previous comment letter, the inclusion of NELs at this time, except in association with the use of Active Treatment Systems (ATS), is contrary to the recommendations of the Blue Ribbon Panel (BRP) assembled by the State Water Board to evaluate the State's stormwater program and make recommendations for its improvement. The BRP noted in its report, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities,* that for some catchments, setting numeric effluent limits "is basically not possible" (Currier et al., 2007.) It is puzzling that, despite this clear assertion and previous comments by CPR and other interested parties, State Board staff has continued to include numeric effluent limits in this Draft Permit.

CPR would like to again ask State Board staff to review and carefully consider comments given by Dr. Eric Strecker during the June 4, 2008 State Board hearing on the Construction General Permit. Dr. Strecker, a member of the Blue Ribbon Panel,

presented his interpretation of the BRP's findings with respect to construction. His presentation highlighted numerous findings, conclusions, reservations and concerns, and a summary comparing the Draft Construction General Permit to the Blue Ribbon Panel's recommendations. In his summary statement, Dr. Strecker concluded, "with the exception of the use of ATS, [the] panel found NELs not technically feasible at this time for construction sites."

In its technical review of this Draft Permit, Flow Science notes the following concerns regarding the use of an NEL for pH of 6.0-9.0:

- The proposed NEL is not "clearly above the normal observed variability" as the Blue Ribbon Panel recommended;
- The proposed NEL does not take into account regional variability; and
- The pH of rainfall falls outside the proposed NEL.

Flow Science also notes that that there is not enough information presented in the Draft Permit to establish how State Water Board staff developed the NEL value for turbidity.

As supported by the findings of the State Board-assembled Blue Ribbon Panel, neither the science nor the data is sufficient at this time for inclusion of NELs in the Draft Construction General Permit. The current inclusion of NELs, in addition to being counter to the findings of the Blue Ribbon Panel, is inconsistent with the iterative process described in State Water Board Order 99-05. CPR again requests that the State Board direct staff to remove NELs from the Permit and institute a research program to develop the defensible, sound data required to support inclusion of appropriate NELs in a future Construction General Permit. CPR encourages State Board staff to institute a new monitoring program consistent with Porter-Cologne (California Water Code Sections 13225 and 13267) to gather the requisite data for potential future use of NELs, if and when the science and available data support such use.

Although CPR strongly recommends that State Board staff revise the Draft Permit to eliminate NELs altogether, in the event that the State Board chooses to include NELs in the Final Permit, CPR urges the Board to use the turbidity NEL of 1000 NTU included in the March 2008 draft. The NEL in the current draft is 50% lower than the NEL in the 2008 draft, with no technical justification provided. In certain areas of the state, the 500 NTU limit in the Draft Permit would guarantee that many projects exceeded the NEL. As noted in the Fact Sheet, available data indicates that an appropriate turbidity NEL may fall in the range of 500-1650 NTU. CPR asserts that it is not appropriate to establish a NEL at the bottom of a broad range. If a NEL were to be used, a mid-range value such as 1000 NTU would be more appropriate.

The California Building Industry Association coalition, in its comments on this Draft Permit, expresses the opinion that State Board staff has never demonstrated sufficient data to develop a NEL that accounts for natural variability; nor have they accurately

related stormwater discharges from construction sites to highly variable and site specific background receiving water conditions. CPR concurs.

Also, as noted in the Fact Sheet, the equipment commonly used for field measurement generally has an effective range from 0-1000 NTU; this indicates that a mid-range value could be measured accurately in the field. Therefore, an NEL of 1000 NTU would be more appropriate than an NEL of 500 NTU. If it is not deleted, the NEL section of this Draft Permit should be thoroughly reconsidered.

Numeric Action Levels (NALs) Should Be Used as an Interim Approach

As stated in our June 2008 letter, the Blue Ribbon Panel defined the concept of an Action Level as follows:

> "…the approach of setting an 'upset' value, which is clearly above the normal observed variability, may be an interim approach which would allow 'bad actor' catchments to receive additional attention. For the purposes of this document, we are calling this 'upset' value an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some actions could be taken."

CPR continues to support the development and use of numeric action levels (NALs) for Risk Level 3 projects as a logical component of the iterative process in the existing Construction General Permit. The use of NALs as recommended by the Blue Ribbon Panel would provide a numeric upset value to assist permittees in assessing the effectiveness of best management practices (BMPs) and assist the Regional Water Boards in identifying "bad actors." However, NALs need to account for natural variability. CPR shares the concerns of Flow Science that the NALs for both pH and turbidity are problematic in that regard. In the case of the NALs for pH, due to the plus/minus one standard deviation from the mean, Flow Science notes that 31.8% of all available data would trigger a NAL exceedance and require subsequent action. This does not take into account natural variability and is incongruent with the findings of the Blue Ribbon Panel. In the case of the NAL for turbidity, Flow Science states that the origin of the proposed NAL of 250 NTU is unclear, since values significantly higher can be considered "clearly within range of normal variability." A 250 NTU NAL is too low to account for natural variability. As noted above in our comments on the use of NELs, 500-1000 NTU is a more appropriate number.

CPR supports statements in the Draft Permit comment letter by CBIA et al. that "establishing relevant and meaningful numeric performance measurements requires good data collected thoughtfully and consistently." A through understanding of regional natural variation in California is a vital part of collecting data "thoughtfully and

consistently." CPR reiterates that additional monitoring, consistent with California Water Code Sections 13225 and 13267, is necessary to firmly establish the scientific rationale behind permit requirements, including numeric action levels.

Routine Maintenance to Maintain Original Line and Grade

CPR is concerned that Section II.C. of the Fact Sheet, Construction Activities Not Covered, still contains language describing the application of the term "routine maintenance." The Draft Permit says, "routine maintenance only applies to road shoulder work, dirt or gravel road re-grading, or ditch clean outs. For municipal operators, repaving of asphalt roads is routine maintenance except where the underlying and/or surrounding soil is cleared, graded, or excavated as part of the repaving operation." As stated in CPR's June 2008 letter, the phrase "only applies to" should be replaced with "includes" in the sentence referring to shoulder work, etc. In addition, repaving of roads should not be restricted to municipal operators since gated neighborhoods often have privately owned and maintained streets. Repaving should not be restricted to asphalt; it is sometimes possible to remove sections of concrete or pavers without grading or excavating underlying and/or surrounding soil. Furthermore, parking lot maintenance should also be included as routine maintenance to maintain original line and grade.

Design Storm

CPR is pleased to see that State Board staff has included a design storm in this revised Draft Permit. However, the Draft Permit specifies a five-year/24-hour storm, which is both excessive and inconsistent with the design storm being used in most new municipal permits. CPR encourages State Board staff to specify an 85th percentile/24-hour storm event, the size around which permits are beginning to coalesce. Use of an 85th percentile/24-hour storm event as the design storm would contribute to statewide consistency among permits for this permit cycle. Additional monitoring, consistent with California Water Code Sections 13225 and 13267, would give State Board staff more information that would help determine whether or not the design storm should be modified. If it were to become necessary to change the design storm, that modification could be made in the next permit cycle. For the near term, however, starting with use of the 85th percentile/24-hour storm event - apart from being an appropriate size - would be a positive step toward unifying regulatory approaches in California.

Bioassessment Monitoring

CPR requests that State Board staff remove the requirements for bioassessment monitoring from the Draft General Construction Permit. Most construction projects are of limited duration. In addition, runoff from most construction projects discharges through municipal storm sewer systems and becomes commingled with other runoff, so bioassessment monitoring to determine impacts from a construction site would not

generally produce meaningful results. CPR supports the assertion made by Flow Science that, "it is unlikely that the bioassessment could differentiate an impact of a construction project from an impact of natural variability…A single bioassessment at a project site before and after the construction could not evaluate whether the difference was within or out of natural temporal variation unless long-term bioassessment data already exist for the site." Bioassessment monitoring is an unnecessary requirement in the Construction General Permit because of the generally short duration of construction project activity and the shared transport mechanism for runoff from construction sites.

In fact, CPR requests that State Board staff remove any requirements for receiving water monitoring in the Draft Permit. Such monitoring does not make sense unless a project is directly connected to the receiving waters in question and, for most construction projects, that is not the case.

Hydrologic Sub-areas Should Not Be the Planning Areas

CPR is concerned with the use of hydrologic sub-areas in the Draft Permit. The use of these large sub-areas increases a site's potential to be hydrologically connected to a receiving water. State Board staff does not present sufficient justification for using such an expansive contributing area when determining receiving water risk. The use of large hydrologic sub-areas could result in many construction sites being classified as Risk Level 3 sites even though they are miles from any receiving water and are unlikely to actually be high-risk sites. The use of a smaller planning area is more appropriate and will result in risk level classification that is more accurate.

The Inclusion of a Post-Construction Activities Section Is Inappropriate

CPR is concerned that the revised Draft Permit continues to foster inconsistencies in the planning and development process. Finding 12 correctly indicates that dischargers can avoid impacts on runoff, as well as sediment supply and transport characteristics of construction projects, through better site design and construction activity practices. However, the Finding and the Draft Permit still erroneously attempt to address both construction activity discharges and post-construction activity discharges. Despite the fact that post-construction requirements have been included in the Construction General Permit from the beginning, this has never made sense; regulating through Construction Permit requirements is too late in the process to affect the desired outcome. The inclusion of post-construction requirements makes even less sense in this Draft Permit since those requirements have become much more prescriptive.

Potential post-construction activities should be addressed early in the planning, approval, and design of a construction project through the municipal development approval process. As CPR has noted in the past, City Planning Commissions and City Councils should consider potential water quality impacts and mitigations for these impacts through the CEQA process. The State Water Board could assist municipalities to better consider

post-construction water quality impacts by promoting improved water quality components in the State's CEQA Guidelines and the CEQA checklist. In addition, the State Board could further assist municipalities by commenting on project environmental documents circulated by the State Clearinghouse.

CPR continues to assert that the State Water Board could and should take actions consistent with Sections 13146 and/or 13247 of the California Water Code to direct the Office of Planning and Research to amend the CEQA Guidelines and CEQA checklist to ensure that the potential impacts on water quality of all projects subject to CEQA review are considered early in the planning and development process and are appropriately mitigated. Section 13146 states, "State offices, departments and boards, in carrying out activities which affect water quality, shall comply with state policy for water quality control unless otherwise directed or authorized by statute…" Section 13247 specifies, "State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the State Board unless otherwise directed or authorized by statute…" Amending the CEQA Guidelines and Checklist to get water quality issues considered by the right parties at the right time – in the earliest stages of project planning – is the best way to affect impacts to runoff and water quality from construction practices. The State Water Board should adopt policy that would trigger Section 13146 requirements and work with the Regional Boards to get language into the Basin Plans that would trigger Section 13247. That would represent a policy paradigm shift that could actually create a significant positive impact on water quality.

Regional Board Authorities

CPR continues to be concerned about the authority given to the Regional Water Boards by the Draft Permit to re-evaluate risk levels or terminate coverage. Risk level determination is a new component of the Construction General Permit and there will be a learning curve for both the regulated community and the regulators. Section 15.A. as currently written could allow a Regional Board to act precipitously in terminating permit coverage if Regional Board staff and a discharger disagree about risk level. The section on Regional Board authorities should be revised.

Economic Analysis Is Insufficient

As noted in our 2008 comment letter, CPR member cities are concerned about the increased costs associated with the increased complexity of the Draft Permit. Public projects are particularly vulnerable to increased costs that may be imposed after projects

have been designed and funded. An increase in capital project costs results in less money being available for public services.

The economic analysis in the Draft Permit is insufficient. In the discussion of estimated measurement costs associated with effluent limitations on page 14 of the Draft Fact Sheet, State Board staff appears only to consider the cost of equipment. Of the approximately $1000 per construction site included in this estimate, staff states:

> "This represents the estimated cost of purchasing (or renting) monitoring equipment, in this case a turbidimeter (-$600) and a pH meter (-$400)."

Of additional potential costs, staff adds:

> "Costs could be more if the project is subject to many effluent monitoring events or if the discharger exceeds NALs and/or NELs, resulting in additional monitoring requirements."

Municipalities and other permittees can likely expect compliance costs far in excess of the $1000 estimate for equipment. CPR requests that the State Board direct staff to review the "Economic Analysis of the SWRCB Proposed Construction General Permit" previously prepared by Berkeley Economic Consulting, Inc. for CBIA. Although the analysis was performed on the 2008 draft, it provides significantly greater detail on the cost implications of the proposed Permit than staff's brief comments on the cost of measurement equipment.

Actual compliance costs will depend on risk level, sediment yields, and receiving water characteristics. The Berkeley Economic Consulting study estimated baseline and incremental costs for a five-acre construction site, as well as potential costs for delay and uncertainty. The compliance costs per acre were estimated to be $10,000 for a Risk Level 2 project and $38,400 for a Risk Level 3 project. The Risk Level 3 costs include approximately $11,000 per acre for the use of ATS technology. These costs are significantly higher than the costs cities have experienced with the current Construction General Permit, which was implemented properly and has done a great deal to prevent the discharge of sediment and other potential pollutants from construction sites. The additional benefits from the proposed Draft Construction General Permit do not appear to justify the additional costs.

Additional Concerns

In addition to the concerns noted above, CPR has a few concerns related to other issues in the Draft Permit. First, CPR is concerned that Table 1 in Attachments D and E results in over-regulating relatively flat building sites. The slope percentage category 0-25% should be subdivided into 0-5% and 5-25% categories. For the 0-5% category, a sheet flow

length not to be exceeded of twenty feet is over-regulation. It could easily be safely doubled.

CPR also is concerned with Condition II.B.5 that specifies that a discharger is only covered by the Permit upon receipt of a Waste Discharger Identification (WDID) number. Condition II.B.4 requires that Permit Registration Documents (PRDs) be submitted 14 days prior to commencement of construction activities and that the appropriate annual fee be mailed no later than seven days prior to the commencement of construction activities. If a discharger has proof of compliance with these time frames, he or she should not have to wait a longer period of time in order to commence construction.

In addition, CPR continues to be concerned about requirements for the preservation of pre-construction drainage density as a means to retain pre-project time of concentration. Although this requirement does not apply to municipalities regulated under Phase I or Phase II MS4 permits, it will affect smaller municipalities throughout California. The requirement should only specify maintenance of pre-project time of concentration.

Conclusion and Recommendations

Although there have been some improvements, and CPR has generally agreed with many of the goals of the Draft Construction General Permit since reviewing the March 2008 draft, we remain concerned that this Draft Permit is still overly complex and will be unnecessarily costly to implement. We again request that the State Water Board seriously consider the potential unintended consequences for municipalities and other permittees if the current Draft Permit were adopted and implemented. We recommend that the Board direct staff to further improve this Permit by:

- Removing the proposed Numeric Effluent Limitations (NELs);
- Incorporating the use of numeric action levels (NALs) for Risk Level 3 projects;
- Clarifying the language pertaining to maintenance of line and grade;
- Using the 85th percentile/24-hour storm event as the design storm to be consistent with other stormwater permits throughout the state;
- Removing the requirements for bioassessment monitoring and other receiving water monitoring;
- Adopting the use of a planning area smaller than the hydrologic sub-areas used in this Draft Permit;
- Removing all post-construction requirements;
- Modifying the Regional Board authorities section to minimize the risk to permittees;
- Including a more complete and realistic economic analysis of the costs for compliance; and

- Addressing the regulatory and hydrologic issues detailed as "Additional Concerns" above.

In addition, State Board staff should thoroughly go through the Draft Construction General Permit and its Fact Sheet to make sure related comments are consistent. Crosschecking to ensure consistency will enhance the quality of the Draft Permit as a regulatory document.

Thank you again for the opportunity to provide these comments.

Sincerely,

Kenneth C. Farfsing
City Manager, City of Signal Hill
On Behalf of the Coalition for Practical Regulation (CPR)

cc: CPR City Managers