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

California Regional Water Quality Control Board
Central Coast Region

Linda Adams
Agency Secretary

Internet Address: http://www.waterboards.ca.gov/centralcoast
895 Aerovista Place, Suite 101, San Luis Obispo, California 93401-7906
Phone (805) 549-3147 • FAX (805) 543-0397

Arnold Schwarzenegger
Governor

June 24, 2009

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

Comment Letter: Draft Construction General Permit

Thank you for the opportunity to review the subject document. The Central Coast Regional Water Quality Control Board recognizes the hard work State Board has conducted with the stakeholders to craft the Draft General Permit. As an agency that will need to implement the new General Permit we provide the following comments for the new Order and Fact Sheet.

ORDER

Cover Page: Add "With" between "Associated" and "Construction" in the title.

Page 1: Change title to match cover page. Page 1 says "...Discharges of Storm Water Runoff Associated with Construction Activity". The Cover Page says "Storm Water Discharges Associated [With (needs to be added per above)] Construction and Land Disturbance Activities". We recommend using the title from the cover page. This is consistent with the description of federal statutes and construction activity in Finding 1, and Finding 17. Furthermore, the general public (including those in the construction industry and local government planning) may understand the term "construction" as not including land disturbance activities that are not directly associated with constructing something (such as grading or stockpiling sediment). Therefore, we believe that it is important to clearly include "land disturbance" activities in the title to help prevent such projects with these activities from progressing without General Permit coverage and subsequently causing water quality degradation and beneficial use impacts, as we have experienced in our region. We have seen water quality impacts from soil deposition that may have been avoided if land disturbance projects were required to enroll in the General Permit. This seems an easy way to advertise that land disturbance is the primary concern, while not abandoning the fact that construction activities encompass many of the instances where these concerns apply. This would also be useful in alerting our various county planning and development departments of the broader application of the General Permit.

Page 1: Check General Permit number, which now reads "CAR000002" instead of "CAS..."

Page 2, Finding 7 and throughout: References to CWA 402 should include the U.S. Code Title 33 equivalent in parentheses, since the latter reflects the contemporary legal reference. Some sections of the draft do this, but others don't. This practice should be used throughout the document. Alternatively, these references could be included in an appendix.

Page 3, Finding 11, second sentence: Please match verb tense to "Excess sediment can..." That is, "Excess sediment can...clog...smother...impede", removing the "s" from each of the three verbs.

Page 6, Finding 38: For consistency with Discharge Prohibition III.B, replace the first sentence with "All discharges are prohibited except for the storm water and non-storm water discharges specifically authorized by this General Permit or another NPDES permit." Similarly for the Fact Sheet, such as on page 12, Section E of that document.

Page 10, Finding 56: This finding notes that numeric effluent limit exceedances are violations of the General Permit, but does not discuss the application of mandatory minimum penalties per Water Code 13385(h) and (i). We recommend incorporating that discussion here, adding it in another finding immediately following 56, or clarifying that it doesn't apply and on what basis (the latter may require revising Water Code section 13385 to exempt storm water discharges regulated by the General Permit).

Page 12, Finding 72: The General Permit recommends requiring two complete copies of the SWPPP at the site, one being available for water board staff to keep for review. We would prefer the the General Permit require the discharger provide electronic MS Word or Acrobat Reader versions on CD or DVD for staff review.

Page 13: Revise the "It is hereby ordered" paragraph to cite the Water Code as follows, "IT IS HEREBY ORDERED pursuant to Division 7, Chapter 5.5 of the California Water Code that all dischargers..." This enhances enforceability by clearly stating the basis of the State Board's issuance of the permit, which then ties to Water Code section 13385(a)(2), stating, "Any person who violates...any waste discharge requirements...permit issued pursuant to this chapter...[shall be liable civilly]". This is also consistent with Finding 8, which states the Regional Boards shall enforce the permit. As a statewide permit enacting federal law, the permit should reflect authority pursuant to state law.

Page 13, B.1., Obtaining Permit Coverage Traditional Construction Projects: Please add "in which case" before "the lessee is responsible..."

Page 14, B.2., Obtaining Permit Coverage Traditional Construction Projects: Please specify CWA section 301 and Water Code section 13376.

Page 20, III. E., Discharge Prohibitions: The soil contamination paragraph is not phrased as a prohibition. As written, this appears better placed as a provision (possibly

as Special Provision U). Even if this was amended to add a statement that the discharge of contaminated soil is prohibited, it would still imply that the discharge of uncontaminated soil is not.

Page 38, XVI. A: Misspelled "requirements" in section title.

Page 38, XVI. A. Annual Reporting Requirements: This section states "All dischargers shall prepare and electronically submit an Annual Report no later than September 1 of each year." This section must reference a new finding that discusses the applicability of mandatory penalties pursuant to CWC Section 13399 for failure to submit Annual Reports in a timely manner, the potential applicability of mandatory penalties pursuant to CWC Section 13385(h) if the discharger is subject to numeric effluent limitations (see also 13385.1), and the optional applicability of civil liability pursuant to 13385(a)(2) and/or (3) at the Water Board's discretion.

We suggest the new finding include:
"If a discharger violates the General Permit by failing to submit the Annual Report by September 1, and the Regional Water Board issues proper notice as required by California Water Code (CWC) Section 13399.31, the Regional Water Board or State Water Board must impose civil liability under California Water Code Section 13399.33(c). If the discharger is subject to effluent limitations (i.e., for pH and turbidity), then instead of imposing liability according to Section 13399, the Regional or State Water Board must impose civil liability pursuant to 13385(h) for every complete 30-day period that the discharger fails to submit the Annual Report. Alternatively, the Regional or State Water Board, at its discretion, may impose civil liability pursuant to Water Code Section 13385(a)(2) and/or (3)."

Similar sections of the Fact Sheet should also be revised consistent with the above recommendations.

Fact Sheet

Pages 12-13, E. Discharge Prohibitions (subsequently referred on pages 18-19 G. Receiving Water Limitations): Dewatering authorized non-stormwater does not provide any volume criteria, nor does it state the discharger is allowed to discharge to surface water body. This should be clarified and also reference the potential need for an individual permit in case of contamination.

Pages 13-14, F.1.i. pH NELs: "Proper implementation of BMPs should result in discharges that are within the range of 6.0 to 8.5 pH Units." NEL standards should read 6.0 to 9.0 pH standard units.

Pages 15-17, ii. Turbidity NEL: For protection of aquatic life we have set 25 NTU as a guideline value for determining whether steelhead waters are impaired for the 303(d)/305(b) integrated report. This is based on levels that cause visual impairments

and impacts to feeding behavior. If volume of runoff from a construction site is high, a discharge limit of 500 NTU could result in the receiving water exceeding 25 NTU, resulting in potential new listings and impacts to steelhead or coho salmon, which are listed as threatened or endangered species. The argument in the fact sheet on page 16 appears to be more based on what is cost effective than on what is environmentally protective. The median Suspended Sediment Concentration (SSC) level for a 1.5 year storm in various ecoregions doesn't address whether those systems are impaired or not. Many waterways are already impaired by excessive sediment, so we are not sure that the approach used to come up with a limit is protective. We recommend that the discharge limit either be based on the median value of systems that are known to not have a sediment impairment, or that it be measured above and below the discharge in receiving water with a limit that is more protective of fish resources (for example, shall increase background concentrations no more than 25 NTU).

Page 19, I. Sampling, Monitoring, Reporting and Record Keeping, 1. Monitoring Requirements: The General Permit states "...receiving water monitoring at some Risk Level 3 sites. All sites are required to submit annual reports..." During stormwater dewatering, we require the discharger submit effluent monitoring in a more timely manner, preferably weekly during active dewatering. The General Permit must also specify more timely reporting for active dewatering.

Page 22, Table 5. Risk 2 & 3 sampling frequency language confusing. The table indicates first hour plus samples from first and last hour of every day of normal operations...minimum 3 samples per day. We feel it is better to require the discharger collect 3 samples per day during rain events equal to or exceeding ½ inch or more. This would apply to storm events that cause discharge and those discharges occurring during normal operations. Discharge periods lasting beyond one or more days must have samples collected during the first and last hour of normal operations, plus one mid-day sample.

The General Permit needs to insure samples are collected and stored without exceeding hold times or conditions. According to latest EPA guidelines, pH hold time is limited to 15-minutes; turbidity 48-hours at 4°C.

Page 22, d. Water Quality–Receiving Water: This section indicates the discharger must analyze SSC if the discharge exceeds the NEL for turbidity. However, the General Permit provides no limits or benchmarks to gauge the level or concentration of SSC in the discharge samples.

Page 23, I.d.i., Bioassessment Monitoring: We recommend that State Board stormwater staff have all bioassessment sections of this General Permit reviewed by the SWAMP Bioassessment Coordinator, Pete Ode. For example, in Section I.d.i of the Fact Sheet - Bioassessment Monitoring, it states that "Higher levels of appropriate aquatic species tend to indicate a healthy stream; whereas low levels of organisms can indicate stream degradation." Though this is approximately true, the language is

awkward. "Level" implies concentration; at a minimum this statement should be edited to say "higher numbers or percentages of appropriate aquatic species." The process of using benthic organisms to determine stream health is quite a bit more complex, and involves calculation of various metrics, combining these metrics into single scores that are used for that Ecoregion's Index of Biotic Integrity, and determining if scores are significantly different from upstream or pre-construction condition. Pete could help draft the language where bioassessment is mentioned throughout the permit. The Permit should specify the metrics that must be applied and bioassessment compliance limits. It's not clear whether the dischargers will be allowed any decline in scores from upstream to downstream, or pre- to post- construction, or how the data will be used to show accountability.

Also, though it is clear in Bioassessment Appendix 5, it is unclear in the Fact Sheet that both upstream/downstream and pre-construction/post-construction monitoring are required. We assume this means four sites in total. It should be clarified in the Fact Sheet.

Bioassessment sampling requires trained field crews who know what they are doing. Without training, the dischargers themselves are not capable of doing this monitoring successfully. Having SWAMP-trained field samplers do this work should be part of being "SWAMP Comparable" and should be a requirement of the General Permit. Another facet of SWAMP Comparability is that data be collected under a SWAMP approved Quality Assurance Program Plan (QAPP). These are non-trivial documents to develop. The Stormwater Program should either make sure that a robust template QAPP on bioassessment and other monitoring components is available online for adapting by various projects or they should encourage an approach where dischargers pay fees to Chico State (or another single entity) to do the monitoring for them under an already approved QAPP. This would result in far better quality data and in a consistent format.

Page 26, I. 3.c., Annual Report: This section indicates Construction Annual Reports will go into SWARM, which is for Industrial Annual Reports. Our understanding is that Construction Annual Report are to be entered into a new separate system called SMARTS.

Page 26, I. 3.c., Annual Report: The section should also require the discharger submit the Chain of Custody forms with lab reports.

Page 28, a., Overall Risk Determination: In later parts of the section, the Fact Sheet states "Soil loss of less than 15 tons/acre is considered low risk. Soil loss between 15 and 75 is medium risk. Soil loss over 75 acres is considered high risk." The General Permit needs to standardize the terms used to describe Risk Levels. This section uses generalized terms: low, medium and high risk. Are theses equivalent to Risk Levels 1, 2, & 3, respectively? If so, they should equate in text.

Page 28, b., Effluent Standards: This section states "All dischargers are subject to the narrative effluent limitations specified in the General Permit... Risk Level 2 dischargers that pose an intermediate risk to water quality ...." Terms like "medium risk" and "intermediate risk" should be standardized throughout the document, preferably to Risk Level 2.

Page 29, c., Good Housekeeping: The General Permit should add the need for spill protection and clean up in the SWPPP.

Page 29, d., Non-Storm Water Management: The General Permit should add a statement about dewatering non-stormwater. The General Permit also needs to include topics of washout (e.g., concrete, paint, stucco, drywall mud, plaster).

Page 29, f., Sediment Control: This section states "Sediment control BMPs should be .... The discharger is required to consider perimeter control measures such as: installing silt fences or placing hay bales or straw wattles below slopes." Using hay bales is highly likely to concentrate flows and cause erosion. Hay bales have very limited success on construction sites (e.g., back up silt fence). Hay bales should be removed from a suggested list of sedimentation BMPs. More appropriate suggestions would be: gravel bag J-hook barriers upstream of storm drain inlets, catch basin/drain inlet filters, sediment basins or traps.

Pages 31-32, 2.a., Linear Risk Determination: This section states "Both Type 2 and Type 3 LUPs require SWPPPs." However, the General Permit is vague for Type 1 LUP requirements for a SWPPP or Erosion & Sediment Control Plan, or if the discharger or its LRP needs to enroll in the General Permit. This section needs more defined responsibilities for Type 1 LUPs.

Page 34, K., ATS Requirements: This section states "(...Monitoring Requirements for Storm Water Treatment Systems that Utilize Chemical Additives to Enhance Sedimentation"), the Construction Storm Water Program at the State of Washington's Department of Ecology..." The blue highlighted Construction Storm Water Program hyperlink does not function.

Page 34, K., ATS Requirements: This section also states "Due to the potential toxicity impacts, which may be caused by the release of additives/polymers into receiving waters, this General Permit establishes residual polymer monitoring and toxicity **[testing]** requirements have been established in this General Permit for discharges from construction sites that utilize an ATS in order to protect receiving water quality and beneficial uses." The section reads better if "testing: is added after toxicity.

Page 34, K., ATS Requirements, Footnote 21: Bullock, G., V. Blazer, S. Tsukuda, and S. Summerfelt. 2000. Toxicity of acidified chitosan for cultured rainbow trout ((*Oncorhynchus mykiss*). *Aquaculture* **185**:273-280. Remove extra parenthesis.

Pages 37-38, L. Post Construction Requirements, Figure 4: The figure is somewhat misleading. It indicates the areas outside the Phase II MS4s would be covered only by post-construction requirements in the new General Permit. However, it is highly likely the Counties will require similar post construction design criteria for construction projects outside of the MS4. It would be very difficult to separate projects within and outside MS4 jurisdictions. We recommend revision of this section for better clarity.

We appreciate your consideration of our comments. If you have questions, please call **David Innis** at **(805) 549-3150**, or send an e-mail to **dbinnis@waterboards.ca.gov**.

Sincerely,

Michael J. Thomas
Assistant Executive Officer

c: Annalisa Kihara AKihara@waterboards.ca.gov

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