NAHB
National Association of Home Builders

Advocacy Group
Susan Asmus
Staff Vice President

June 24, 2009

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

Re: Draft National Pollutant Discharge Elimination System General Permit for Discharges of Stormwater Associated with Construction Activities.

Dear Sir or Madam:

On behalf of the over 200,000 members of the National Association of Home Builders (NAHB), I respectfully submit comments on the California *Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges* issued (draft CGP) by the State Water Resource Control Board. NAHB is a federation of more than 800 state and local builders associations throughout the United States, including the California Building Industry Association and its regional affiliates which have over 5,000 member companies. NAHB's members consist of individuals and firms who develop land and construct homes and apartments, as well as light commercial and industrial projects. Storm water discharges associated with construction activity must be authorized by the Construction General Permit (CGP). General permits are designed to simplify the application process for the industry, provide uniform requirements across covered sites, and reduce administrative workload for the permit authorities. NAHB is concerned that California's proposed CGP, although an improvement from previous drafts, is still complicated, with numerous requirements that will burden the industry. Such complex permit requirement will be resource intensive, difficult to implement, yet not provide clear, and proven environmental benefit.

The outcome of the proposed California Draft General Permit has important implications for homebuilders. CBIA is submitting comprehensive comments on the draft permit and NAHB urges State Water Resources Control Board (SWRCB) to review these comments thoroughly and address the issues and recommendations that are presented. From a national perspective, NAHB is concerned that the onerous regulatory scheme outlined in the draft permit is not practical and will impact the recovery of the construction industry. The Draft California Permit contains the most complicated state permitting scheme that NAHB has seen[1] and it will require much time for permit applicants to analyze and fully understand its terms. There are also several areas that require further clarification. NAHB is also concerned with the cost of meeting numeric effluent limits for construction site discharge because of several factors that could lead to exceedance of limits without consequential environmental damage.

[1] NAHB has reviewed 25 State permits during the renewal of the permit or at the request of members. NAHB believes that the California Permit compared to other state permits is by far the most complicated permit in terms of the steps the permitte will have to undertake to obtain a permit, and the follow-up paper work that has to be submitted to the state.

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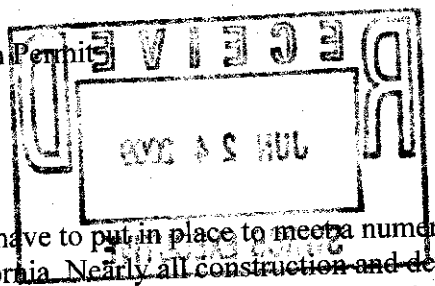

The measures a builder will have to put in place to meet a numeric limit will ultimately add to the cost of housing throughout California. Nearly all construction and development companies must pass these added costs on to homebuyers. These added costs can have a significant detrimental effect on housing affordability.

There are several issues raised in the draft CGP that pose cause for concern. Most significantly NAHB urges SWRCB to remove the Numeric Effluent Limits from this permit, clarify and simplify risk assessment and monitoring requirements and refrain from regulating post construction. SWRCB should focus on implementation of reasonable action levels and utilize existing conventional Best Management Practices (BMPs) that are practical and result in adequate protection of receiving waterbodies.

Numeric Effluent Limits

SWRCB has proposed a daily average numeric effluent limit for turbidity and pH for sites in a higher risk category. NAHB does not support Numeric Effluent Limits for construction site discharge because such discharge is highly variable due to soil, rain intensity and volume, seasonal changes, and other uncontrollable parameters which make consistent, statistically acceptable compliance with a fixed regulatory limit extremely difficult. In order to develop a numeric effluent limit for construction site discharge, SWRCB has to complete a comprehensive research study on construction site discharge and develop a limit based on a thorough analysis of data from several construction sites. This has not been done yet. The National Academy of Science study on Urban Stormwater Management also discussed the challenges of monitoring data that is variable depending on flow, season, and variability. They reiterate that regional monitoring is necessary to accurately establish benchmark numeric limits[2].

In addition to the lack of data to support any numeric effluent limit for construction site discharge, the utility of Numeric effluent limits to control construction site discharge is not supported. A few states that have considered numeric limits, have not adopted them into their final state permits due to several feasibility issues that became clear when completing their analysis. Some states have opted to adopt numeric action levels instead of absolute limits as a first step. Like those states before it, the SWRCB is strongly urged to avoid implementing numeric effluent limits in the final permit.

NAHB is also concerned that the adoption of numeric effluent limits will create a difficult stormwater management paradigm for the industry. An exceedance of a numeric compliance limit constitutes a regulatory violation and the potential for a fine or other enforcement action. Clearly, this creates unnecessary fear and liabilities that will force the regulated entity to take expensive actions to ensure consistently low sediment discharge, in many cases much lower than even ambient receiving stream sediment levels. Further, the application of a numeric limit could involve civil and possibly criminal penalties in situations where honest professional judgment can be fallible, or when site and weather conditions beyond the control of the operator can cause a violation. Additionally, the costs incurred to achieve and maintain an absolute compliance limit under such variable conditions are many times greater than those incurred to address a numeric action level. Not only is there the issue of

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[2] *NRC, 2008. National Research Council. Urban Stormwater Management in the United States. October 15, 2008. P. 238*

possible fines associated with an absolute compliance limit, but there are also administrative and legal costs, which are much more onerous for both SWRCB and the site operators when compliance is at issue. NAHB strongly urges you to review the comments of CBIA and adopt reasonable numeric action level and avoid implementing numeric effluent limit for construction site discharge.

The administrative burden for SWRCB to implement numeric limits will also be significant. The state should develop a cost estimate of administering this program prior to adoption to evaluate the workload that will be generated as a result of this rule. There will also be an impact on local governments as they may revise ordinances, programs and supporting materials and procedures of construction stormwater management as a result of this permit. There are much lower administrative burden that will be associated with an action level approach. Action levels require a much less administrative effort from the state whilst adequately protective of waterbodies.

Regulation of pH

SWRCB should not set a limit and action level for pH. High stormwater pH levels primarily occur when stormwater comes into contact with uncured concrete or concrete truck rinse waters created after delivering their concrete. The Construction General Permit (CGP) addresses these pH levels by requiring common concrete BMPs, such as scheduling work when wet concrete will not be exposed to rainfall and placing tarps or other covers on wet concrete to minimize the exposure.

Furthermore, site operators typically incorporate other measures to minimize stormwaer pH levels and its impact on water quality, *e.g.*, rinsing concrete truck chutes in designated wash areas prior to leaving job sites, to remove excess concrete. These concrete chute washwater volumes are minimal (*i.e.*, 5 – 15 gallons) and are disposed of in the building site's designated concrete washout area or held in a specifically-designed bucket attached to the concrete truck. Any other materials that may affect the pH of stormwater from residential construction sites are adequately controlled under the CGP BMPs. Hence, limits and action levels for pH are unnecessary.

Risk Based Permitting

NAHB is pleased that the risk based calculation has been simplified in this draft permit. However, there are still issues that have to be resolved as discussed in detail in the CBIA comments. For example, SWRCB is not providing credit for site practices that reduce risk such as phased disturbance and application of erosion and sediment practices. The risk determination worksheet is still highly complex and difficult to comprehend. There are also some factors, such as the LS factor, that could vary on large construction projects and this variability must be accurately captured in the worksheet.

There is room for further simplification to ensure ease of use by permittees. It takes a considerable amount of effort to calculate risk based on the spreadsheets developed. In addition, the idea of requiring some advanced BMPs on sites that pose high risk to the environment is reasonable.

However, the monitoring and reporting requirements are excessive. The risk calculation worksheet should be simplified so that significant delay and resource is not spent on determination of risk level.

Monitoring

SWRCB needs to simplify the monitoring protocols and methods to address discharge points, samples that have to be taken per day, access to location, times of collection and relationship to 'qualifying event'. SWRCB must address the issues raised by monitoring because the proposed draft raises serious questions and lacks specificity. The requirement for some sites to conduct bioassement monitoring is also difficult and not warranted. Watersheds are impacted by several factors. Depending on location, size, and proximity to natural features active construction and existing development are but two of the myriad of contributors to water quality impairment. Bioassessment monitoring is expensive and the purpose of the resulting data is not clear provided the level of effort it takes to collect such extensive data. SWRCB should eliminate the requirement for bioassessment monitoring from this permit and simplify the overall permitting regime.

Post Construction Stormwater Management

SWRCB does not have the right legal backing to regulate post construction control. The Phase I program regulates construction activities that disturb greater than or equal to five acres pursuant to CWA Section 402(p)(2) and Phase II program regulates construction activities less than five acres and greater than or equal to one acre pursuant to CWA Section 402(p)(6). While these sections have slightly different semantics regarding the authority Congress delegated to EPA, the end result is that the Agency relies on the NPDES permitting program for both Phases I and II to provide legal authority for regulating post construction stormwater discharges. Under the State Construction General NPDES permit, Once the land-disturbing construction activities are complete, the disturbed soil has been stabilized, and permit coverage has been terminated, the state lacks continued authority to control subsequent stormwater discharges unless that facility, structure or project that was constructed independently generates a regulated stormwater discharge (*i.e.,* meets the definitions of industrial activity or large, medium or small municipal separate storm sewer system).

Under the current draft permit the builder will be responsible for stormwater discharge after completion of construction. The state permit is not the right mechanism to regulate post construction because a permit holder under the state permit is responsible for site practices until final stabilization and filing of a Notice of Termination. Termination of coverage will be very difficult under the current standard forcing builders to hold on to permits and unable to move on to other projects until the post construction measures are fully functioning which can take a significant amount of time depending on various conditions. SWRCB has also not calculated the additional costs to the regulated entity of implementing post construction programs in areas that currently don't have such programs with the necessary staff to review and expedite filing of termination that is important in the construction process.

The CA draft permit is the most complex NPDES General Stormwater Permit and by having post construction requirements in this state permit further complicates and creates onerous requirements.

Conclusion

NAHB is pleased to have the opportunity to review and provide comments on this draft CGP for California. The draft California permit raises serious concerns in the requirements for numeric effluent limits, risk based permitting, and the added costs on construction projects from this regulation. We urge SWCRB to carefully consider and address all issues raised by CBIA, and ensure that the final permit is workable on the ground.

We appreciate the opportunity to submit these comments. If you have any questions about these comments, or would like to discuss any of the issues raised in more detail, please feel free to contact me or Ty Asfaw (202-266-8124 or easfaw@nahb.com).

Sincerely,

Susan Asmus
Staff Vice-President