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June 23, 2009

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

Subject: Comments on the April 22, 2009 Draft Construction Stormwater Permit and June 10, 2009 errata sheet

Submitted via email commentletters@waterboards.ca.gov

Dear Ms Townsend and Members of the Board:

On behalf of the Engineering and Utility Contractors Association (EUCA), thank you for the opportunity to provide comments on the April 2009 Draft Construction General Permit. EUCA appreciates this opportunity to comment on this draft permit especially as it potentially represents a significant shift in California's approach to regulating stormwater discharges.

EUCA serves 400 union-affiliated contractors and vendor firms working in California, Nevada, Utah, Hawaii and other areas of the United States, employing over 25,000 workers. The association is the most prominent and influential union contractors association in the Western United States.

EUCA remains concerned about several elements of the revised draft permit dated April 22, 2009.

Some of EUCA's more significant concerns include the change in regulatory approach for stormwater discharges from the iterative BMP-based approach to a numeric effluent limit-based approach. Incorporating numeric limits (both effluent and action levels) should not be included without addressing the concerns for the use of these numeric limits expressed by the Blue Ribbon Panel (BRP) Report on *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (Currier et al., 2007). Additional significant concerns include:

- Establishing numeric effluent limits without developing a scientifically sound and defensible methodology that is in accordance with USEPA protocols.

17 Crow Canyon Court, Suite 100 ♦ San Ramon, CA 94583 ♦ 925/855-7900 ♦ FAX 925/855-7909
www.euca.com ♦ e-mail address: eucaxinfo@euca.com

- Including hydromodification requirements in a construction activity permit.
- Regional Board authority to require dischargers to revise risk assessments and Storm Water Pollution Prevention Plans (SWPPPs) if deemed unacceptable by the regional board and having authority to terminate coverage.
- Requiring discharger to conduct receiving water monitoring.
- The need to revise and clarify requirements applicable to Linear Construction recognizing the differences from traditional construction.
- The lack of adequate cost analyses from the state to determine the financial impact to the State, other agencies, project owners, and contractors.

EUCA offers the attached comments and observations on the April 22, 2009 draft permit.

In closing, thank you for your consideration of our comments and for your efforts to resolve the issues raised during the process of revising Order 99-08-DWQ. EUCA recognizes the difficult technical and practical challenges of developing a permit to regulate construction stormwater runoff and hopes that the comments we are providing will assist the State Water Board in improving the permit. It must be used as a tool for construction site operators to meet their challenge of protecting water quality during construction. Given the significant issues raised by this permit and the breadth of the suggested changes, EUCA requests that the State Water Board provide and workshop a revised Tentative Order for detailed public review and comment.

Sincerely,

Tara McGovern
Director of Government Relations

EUCA ♦ 17 Crow Canyon Court, Suite 100 ♦ San Ramon, CA 94583 ♦ 925/855-7900 ♦ FAX 925/855-7909
www.euca.com ♦ e-mail address: eucaxinfo@euca.com

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Numeric Effluent Limits
EUCA understands that the State Water Board is attempting to address the recommendations of the Blue Ribbon Panel Report within the draft permit; however, the use of numeric effluent limits (NELs) is premature and unnecessary. There is currently not enough information to derive appropriate numeric effluent limits for construction dischargers. Background concentrations and loads of sediment that cause turbidity are highly variable in California, making the establishment of a single number for compliance speculative.

While NELs may be feasible for large construction sites utilizing active treatment system (ATS) because these systems reliably produce consistent discharge quality, sites where traditional erosion controls are used produce highly variable runoff quality making Numeric Limits difficult, if not impossible.

Numeric Action Levels
EUCA supports the use of NALs as a constructive next step to provide more accountability and direction to construction dischargers as they implement SWPPPs and evaluate the effectiveness of BMPs. EUCA supports the use of NALs where they are scientifically defensible and where adequate data is available to appropriately establish them. Consistent with the Blue Ribbon Panel (BRP) Report, EUCA supports the use of NALs that are designed and selected to identify upset conditions. Action levels provide a quantitative measure of performance and a solid measure for improving site practices for construction site operators. .EUCA is in agreement that compliance with NALs should be based on daily averages, not single samples.

The parameters pH and turbidity are well selected to target common construction site pollutants and allow dischargers to use commonly available field meters to make in-field assessments of BMP performance and implement immediate responses to field measurements. However, the CGP must still identify appropriate statistics to be used to establish corresponding NALs, and the statistical analyses need to be provided in supporting technical documents for review.

EUCA supports the California Building Industry Association (CBIA) proposal based on a bridge approach to setting Action Levels. This approach will provide a bridge between the next two generations of construction stormwater permits, an NAL data collection program should be conducted during the upcoming permit cycle to provide critically needed information to aid the State Water Board in determining what provisions should be included in the subsequent permit.

Such a data collection program would include the following components:

- The program is a joint venture between the State Water Board and the industries regulated by the general construction stormwater permit;
- These industries would work with the State Water Board in choosing an independent contractor to conduct the program;
- Sites for data collection to be selected randomly using a defensible statistical design;

- Data to include water quality, site characteristics, BMP characteristics, storm characteristics, receiving water characteristics;
- Data to be gathered for range of representative sites (all risk categories, regions, soil types, receiving water risk);
- Work plan to be carefully designed to gather information to support the next permit (data requirements will be determined by whether NALs or NELs are the ultimate goal).

The revised permit has incorporated a compliance storm event for compliance with NELs to limit the liability of dischargers during large events. The 5-year 24 hour event has been determined to be the compliance storm event, however the Board has not provided rationale for choosing this storm event except for saying it is less than the 10 year 24 hours storm event. This compliance storm appears to be inconsistent with the design event for sediment basins in Appendix 2 of the draft permit, which uses a 2-year 24 hour event as the basis of the design. Sediment basin sizing utilizes the Modified universal Soil loss equation (MUSLE) in determining the amount of sediment that would runoff and need to be captured in the sediment basin. The basis of the turbidity numeric limits established in the permit appears to be largely based on the 1.5 year recurrence interval. The draft permit and Fact Sheet do not provide any explanation of the relationship between the numeric limits and the selected compliance event. Without additional information, given these two factors, sediment basin design, and the basis of the numeric limits, the 1.5 or 2-year recurrence event would be the more appropriate compliance event. In addition, there should be a compliance storm event for NAL assessment similar to that proposed for NELs. The compliance storm event will limit the liability of dischargers during large rain events.

New Development and Redevelopment Runoff Controls

EUCA does not believe that the General Construction Permit is the appropriate mechanism for accomplishing the goal of integrating water pollution controls into new development and re-development projects.

A phase in permit is necessary to prevent disruption of projects which are on-going and which have been designed as of the implementation date of the revised permit. It is infeasible for projects currently in construction to redesign to meet this standard. For projects, which are not yet in active construction, but have completed the design and/or have completed environmental review processes (e.g., NEPA, CEQA assessments and local planning approvals), redesign would be prohibitively costly and likely to jeopardize existing regulatory approvals.

The tentative order is unclear in delineating where the runoff reductions do not apply with regards to having a phase I or phase II SWMP or in areas where the SWMP includes a SUSMP provision. The tentative order allows publicly funded projects to apply to the Regional Board for a waiver of the post-construction standards, but the criteria for obtaining the waiver and timing to apply for the waiver are not clear. In addition, there is no rationale for allowing only publicly funded projects to apply for the waiver.

Reporting

EUCA supports the inclusion of the annual reporting requirement. More clarity from the current vague annual certification requirement will improve annual assessment by dischargers. EUCA

recommends that new permit retain the current annual reporting cycle with the annual report due in the summer, e.g., July 1, and report on the previous rain year (October through April).

A July report provides adequate time to assess the previous year and plan alterations for the coming rainy season.

EUCA recommends the elimination of the NAL exceedance reports. Inclusion of information on NAL exceedances would be better included in the annual report where the exceedance, corrective actions, and subsequent water quality monitoring can be assessed more thoroughly.

Qualified SWPPP Developers(QSD) and Qualified SWPPP Practitioners(QSP)
EUCA is concerned about the limitation of the QSD and QSP to certain professions or degrees, especially when it is not evident that the professions or degrees specified provide an adequate background in construction stormwater pollution prevention plan development. The specification of these professions and degrees will also limit the pool of otherwise qualified and experienced SWPPP developers.

The permit language should make it clear that implementation of SWPPPs on a construction site and development of SWPPP can be done by trained personnel working under the direction of a QSD or QSP provided that the QSD or QSP stamps or signs the documents. Similarly, sampling personnel following the monitoring program identified in the SWPPP should not need to be QSPs.

Additionally, we recommend that the State consider accepting the Caltrans 24 Hour SWPPP training program certification for qualification as a QSD and QSP. We believe that this program addresses the appropriate SWPPP development processes and techniques, will be less burdensome for those needing to comply, and provide additional resources which are now established and readily available.

Monitoring
Effluent Sampling
EUCA is in agreement with effluent monitoring requirements that focus on providing information to the discharger and regulator to use in the evaluation of BMP implementation. Effluent monitoring for pH and turbidity using field meters is appropriate for construction projects and are parameters well suited to quickly assess and respond to BMP performance.

The Tentative Order and Fact Sheet do not address the technical questions regarding the validity of interpolating Suspended Sediment Concentration (SSC) concentrations as turbidity. The draft permit language should be appropriately modified to remove the requirement of the SSC analysis The discharge location for the purposes of effluent sampling needs to be better defined. For example, when read in conjunction with the SWPPP requirements a "discharge location" could be every storm drainage inlet within a project site.

"LUP Type 2 (and 3) dischargers shall collect storm water grab samples from sampling locations characterizing discharges associated with construction activity from the entire LUP disturbed area beginning the first hour of any new discharge and during the first and last hour of every day of normal operations for the duration of the discharge event. At a minimum, 3 samples shall be collected per day of discharge."

[13] A new discharge is defined here as any type of discharge of storm water that goes beyond the property boundary after at least a 48 hour period of no discharge.

These sections/tables/footnotes describe an impossible task for an LUP. First, there could literally be hundreds of sampling locations (e.g., "...any type of discharge of storm water that goes beyond the property boundary...). It is not clear if this footnote refers to both sheet flow and channelized flow or only channelized flow. Second, for all of these discharge locations, numerous qualified samplers would have to be on call for each rain event to sample each of these locations within the first hour of discharge and three times a day every single day until the discharge ends. Additionally, at least some of these sites may not be safely accessible on LUPs.

Bioassessment monitoring
EUCA recommends the deletion of the bioassessment monitoring requirement. The utility of this monitoring in the context of the construction general permit is absent. While there is no doubt that bioassessment monitoring has significant value in assessing the health of water bodies, there is limited connection of the need for this monitoring to all Risk Level 3 projects regardless of their location relative to the receiving water and the nature of the receiving waters to which the sites discharge.

Benthic macro invertebrate (BMI), can take anywhere from a minimum of four to six hours, with two or three biologists. The fees for these studies are highly variable but are both time intensive and typically very costly.

Visual Monitoring/Inspections
EUCA recommends that a full list of required inspections and visual monitoring requirements be included in a single section. According to the current draft, some sites are performing daily inspections, weekly visual observations and post-storm, pre-storm and during storm inspections.

The language in the Fact Sheet and the Order are not consistent regarding which project Risk Levels must photograph sites, frequency of photography, and when the information must be submitted.

Mandatory Minimum Penalties
Consistent with the previous discussion, EUCA recommends that NELs be eliminated from the permit. The science of stormwater quality management is not yet mature enough to establish appropriate numeric effluent limits for construction effluent. Dischargers should not be faced with mandatory penalties, where exceeding an effluent limit is through no fault of theirs, but a failure to account for some variable in setting the effluent limit.

Further, the monitoring program should be revised such that the compliance is not determined on the basis of a field measurement of a grab sample for which there is no established background number or benchmark which takes into account variations in locations throughout the state as well as time of year.. The State Water Board should develop a statistically valid number of samples upon which to make an overall compliance assessment for the discharger's construction project. The variability within a single storm event (intra-storm) and between multiple storm events (inter-storm) is such that compliance determinations based upon a single sample is not appropriate.

Risk Assessment and Risk Factor Worksheets

Since the complexity and thereby the cost of a construction project is determined by the risk level or type for linear projects, EUCA recommends that the risk assessment be performed by the owner of the project and that the risk must be included in bid documents. Currently, contractors are required to include costs for compliance with the CGP in their bids. However, to maintain fairness in the bidding process, contractors will need to know the risk in order to appropriately assess the total cost of the project. Therefore, there should be language in the CGP requiring project owners to include the risk assessment in bid documents.

In addition, testers determined that locating the appropriate data to enter into the worksheet as input parameters was very difficult. The study concluded that construction contractors attempting to determine the site risk for their project will have a great deal of difficulty using the worksheets or performing an accurate risk assessment. An inaccurate risk assessment could cause delays, possible orders to cease operations, and claims against the project owner for incorrect information used to determine the risk level.

Also, the project owner should be responsible for determining the risk level to prevent a dispute of the assessed risk level between the successful bidder and the local storm water agency. Because these local agencies have the authority to alter BMP's and shut down the project under this proposed rule, we believe that all subjectivity be assessed and dealt with during the project design between the project owner and the local storm water agency.

Finally, because the determination of the risk level will impact the cost of the bid price submitted by a contractor, it is critical to indicate the risk level with the bid documents to eliminate any uncertainty and subjectivity by the contractor. This will ensure that each bid submitted includes the contractors appropriate bid price to implement and administrate a storm water program for the indicated risk level.

Implementation of New Requirements

EUCA is concerned with the minimal time allowed for projects currently permitted to redesign their SWPPPs, develop monitoring programs, and obtain qualified personnel to develop and implement the SWPPP. EUCA strongly recommends a delay of implementation of the permit until after the 2009/2010 rainy season. In addition to allowing existing dischargers time to

redesign their compliance approach and documentation, projects that are on the cusp of going into construction that have planned for compliance with 99-08-DWQ, will be afforded similar planning time. The implementation delay would also better coincide with the QSD and QSP training under development by the State Water Board with the assistance of a stakeholder group, and with the revision of the Construction BMP Handbook, both of which will be instrumental for dischargers in complying with the new requirements.

Linear Construction
The construction general permit is written for traditional "box" construction projects. The differences between linear and traditional construction are sufficiently great that requiring both types of projects to be covered under the same permit results in burdensome requirements and a great deal of confusion. EUCA supports the utility industry's request to update the small linear construction permit to include all linear construction projects, and eliminate the proposal to include linear project under the General Construction Permit.

Maintenance Definition
EUCA has several concerns regarding the definition of "maintenance" as it relates to exemptions from the proposed permit, which states:
Construction activity subject to this General Permit includes any construction or demolition activity, clearing, grading, grubbing, or excavation or any other activity that results in a land disturbance... As used above, 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. Where clearing, grading, or excavating of underlying soil takes place, permit coverage is required if more than one acre is disturbed or part of a larger plan or if the activity is part of more activities part of a municipality's Capital Improvement Project Plan.

The definition appears to apply several limitations on the application of the exemption:

- *Routine maintenance only applies* to road shoulder work, dirt or gravel road re-grading, or ditch clean-outs, however EUCA notes that many routine maintenance activities occur in locations other than roads.For example landscape maintenance and parking lot maintenance. These maintenance projects should not be precluded from using the exemption.
- *For municipal operators, repaving of asphalt roads is routine maintenance*, however EUCA notes that there are numerous other organizations and private entities that maintain roads as described. These entities and organizations should not be precluded from using the exemption.

Capital Improvement Plans
Included in the discussion of the routine maintenance exemption, is a reference to Capital Improvement Project Plans that is very unclear and seems out of place in the context of routine maintenance. EUCA recommends the reference be clarified or deleted.

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Rain Event Action Plans (REAP)
The draft permit states development (implementation) of REAP is needed "within 48 hours prior to any likely precipitation event", then later states 50% or greater forecast of precipitation in the project area. The term "Likely" in NOAA table is 60-70 % chance. EUCA recommends implementation of the REAP for 60-70% chance events.

The language in the Fact Sheet and order are inconsistent regarding the Risk Level of projects that must implement REAPs.

SWPPP Requirements
SWPPP amendments
It is unclear whether amendments/updates to the SWPPP trigger submittal of the revised document through the electronic system. EUCA recommends that additional guidance be provided on the level of amendment or update of a SWPPP that would trigger electronic resubmission.

Regional Board Jurisdiction
Of particular concern to EUCA is the provision of allowing regional Water Quality Board's the authority to enforce this permit. Again, the need to have the risk level assessed by the project owner is critical to avoid disputes and project delays due to disagreements of the self-assessed risk level by the contractor.

Also, requirements for Monitoring and Reporting and record retention should either be standardized across the industry via this permit, or those requirements should be included in the bid documents to ensure that the contractor has bid the appropriate amount to comply with these additional requirements.

Of concern is also the absence of direction on the authority of Regional Water Boards to terminate a permit or otherwise alter the existing SWPPP or BMP of current projects being grandfathered in by this permit revision. Their authority for this period of time (which could last years in some cases) should be limited, or additional costs incurred for changes to the existing storm water program on the project should be identified as compensable by the Regional or State Water Board.

Cost Impacts
A comprehensive cost analysis needs to be performed to discover the cost of the changes in this permit to the numerous entities that are impacted by it. The permit proposal indicates a cost impact of just a few hundred dollars per project for monitoring and testing equipment. Clearly, this completely ignores the significant additional costs that will be incurred by those subject to the permit for performing the monitoring and testing, for recording and submitting the testing results, for the additional SWPPP, BMP, and ATS requirements, for the training required to meet

the QSP and QSD standards (or the cost of hiring outside consultants with these qualifications), and many other additional procedures that will be necessary under this permit.

A cost impact study performed by Berkeley Economic Consulting, Inc. indicates that *"The PCGP will increase the cost of managing stormwater at project sites by a factor of six to eleven, relative to the current permit. For development projects, the PCGP costs are between $26,000 and $38,000 per acre, depending on the size of the project. For transportation projects, the cost of complying with the PCGP is $40,000 per acre over the cost of current regulations."*

EUCA requests that State Water Resources Control Board staff produce a comprehensive cost analysis based on additional cost per acre and in total overall dollars, and provide this to the Board prior to their consideration of this proposed regulation for a vote. It is imperative that this information be provided (and Board members should be commanding it), so that the consideration of the use of taxpayer dollars is part of the recorded decision

PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org