

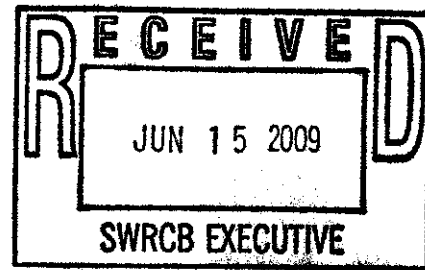


CALIFORNIA RETAILERS ASSOCIATION

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June 12, 2009

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



Re: Comment Letter—Draft Construction General Permit

The California Retailers Association (“CRA”) appreciates the opportunity to submit to the California State Water Resources Control Board (the “Board”) the following comments to the Draft Construction General Permit (“Draft Permit”). The purpose of our comments is to address the permitting of shopping center or similar developments (“**Joint Development Projects**”) where an original owner and developer sells individual parcels to retail or other developers but retains an ownership interest such as an easement or license for part or all of the development and agrees to perform certain sitework for the development typically consisting of clearing, grading, building pad preparation, utility installation, roadway improvements, parking area construction and landscaping (the “Sitework”). More specifically, CRA urges the Board to consider and adopt an “**Expanded Landowner Permitting Model**” to address the following two common fact patterns encountered at Joint Development Projects:

1. Where a developer owns an entire multi-parcel development, begins construction of Sitework, then sells all or a part of the development while still completing the Sitework; and
2. Where a developer owns part of a multi-parcel development and constructs the Sitework on parcels owned by multiple parties.

The Draft Permit carries over from the currently effective construction general permit (the “Current Permit”) the general requirement that the “landowner” file Permit Registration Documents (“PRDs”) and become the permittee. However, while the Current Permit contains language allowing a party to serve as permittee for work on easements or on nearby property by agreement—which various regional water boards have relied upon to allow developers to act as the sole storm water permittee for Joint Development Projects—the Draft Permit significantly

narrows this flexibility and will complicate storm water compliance for future shopping center projects.¹

For several reasons discussed here, CRA proposes the Board revise the Draft Permit and Fact Sheet to adopt an Expanded Landowner Permitting Model and to clarify that under certain circumstances, for the purpose of determining who may be a permittee, "landowners" may include parties holding property interests less than fee title, such as easement holders or licensees. CRA respectfully submits this approach to storm water permitting for Joint Development Projects would allow for significantly streamlined permitting and improved coordination of compliance obligations, and would promote several important public policy objectives discussed in greater detail in Section II below.

I. Consequences Of Strict "Landowner" Permitting At Joint Development Projects

CRA's members build dozens of new stores each year at sites across the country requiring permit coverage under the applicable NPDES Storm Water Construction General Permit, including in California. Many of these projects are part of shopping center Joint Development Projects where the developer performs certain Sitework, often speculatively, in order to better market the project, and where CRA's members only construct a store. In fact, for financial reasons many developers insist on performing Sitework at Joint Development Projects

¹ The Draft Permit provides:

The landowner must obtain coverage under this General Permit, except where there is a lease of a mineral estate (oil, gas, geothermal, aggregate, precious metals, and/or industrial metals), the lessee is responsible for obtaining coverage under the General Permit.

To obtain coverage, the landowner or other party described above must file Permit Registration Documents (PRDs) prior to the commencement of construction activity.

Draft Permit at 13-14. This permitting framework is further clarified in the Draft Fact Sheet for the Draft Permit, which provides, in relevant part, the following:

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and will not allow CRA's members to participate in such projects unless the developer can perform the Sitework.

In a typical Joint Development Project, a developer owns a large piece of land and proposes to develop a shopping center with several anchor retail stores including members of CRA who already own or will purchase from the developer small portions of the overall shopping center. Often the remainder of the shopping center will include other retail stores, banks and restaurants, among other things. Two primary ownership scenarios commonly arise in Joint Development Projects, each presenting unique storm water permitting challenges under the Draft Permit:

Under **Scenario One**, the developer owns the entire property, *e.g.*, 100 acres, and obtains a permit for the entire property in order to begin construction of certain Sitework. In the midst of this construction work, a retail developer such as one of CRA's members purchases one parcel, *e.g.*, 20 acres (the "Retail Parcel"), for future development of its store, but grants an easement or license back to the developer to complete the Sitework. As the new "landowner" of the Retail Parcel, the Draft Permit will require that CRA's member file PRDs and become a permittee for the Sitework performed by the developer on easements or by agreement on the Retail Parcel. Further, the developer will be required to file a change of information to carve the Retail Parcel out of its permit.

Under **Scenario Two**, the developer owns a majority of the site, *e.g.*, 80 acres, and a retail developer such as one of CRA's members owns one large parcel, *e.g.*, 20 acres (the "Retail Parcel"). CRA's member will grant an easement or license to the developer, and will enter an agreement for the developer to construct Sitework on both parcels. Even though the developer alone will be constructing the Sitework, as the underlying "landowner" of the Retail Parcel, the Draft Permit will require that CRA's member file PRDs and become a permittee for the Sitework performed by the developer on easements or by agreement on the Retail Parcel.

Under both scenarios, it is common practice for CRA's members and any other individual parcel developers within the Joint Development Project to enter into separate development agreements with the shopping center developer for performance of the Sitework. Under these agreements, the parties each give the developer some form of property interest, *e.g.*, an easement or license, on their properties so that the developer can perform the Sitework, including storm water permitting and compliance to address the impacts of all development at the Project. The parties agree to reimburse the developer for the Sitework on some form of pro rata basis. The developer, in turn, always maintains an ownership interest in the entire center for purposes of performing the Sitework, even though fee title of individual parcels may be held by other individual parcel developers.

Unlike the Current Permit, the Draft Permit does not appear to recognize these less-than-fee property interests within the meaning of "landowner." Therefore, each parcel owner under these scenarios would be required to hold a permit even where at the time they become landowners they have had no involvement in Sitework-related construction activities or storm water compliance, or where the parties agree storm water compliance could be achieved and maintained more effectively by coordinating and agreeing that the developer should retain primary responsibility for such compliance. In either instance, the more restrictive approach to landowner permitting proposed in the Draft Permit unfairly forces CRA's members to bear the risk of permit non-compliance despite having no control over construction activities or storm water compliance on the site, and limits CRA's members ability to coordinate storm water compliance.

CRA respectfully submits that a more equitable, efficient, and effective approach would be to allow the developer or the developer's general contractor performing the Sitework on parcels owned by CRA's members to hold the permit for the entire shopping center development. This makes sense because under this approach the developer and its contractor would be the parties responsible pursuant to a carefully negotiated development agreement for constructing the Sitework and for compliance with storm water permit requirements.²

II. Policy Reasons For Allowing More Flexible Permitting Of Joint Development Projects

Many reasons support the adoption of the Expanded Landowner Permitting Model proposed by CRA, including:

- Achieving administrative efficiency inasmuch as the Regional Boards would be obligated to track fewer permits;
- Improving storm water compliance inasmuch as allowing parties at a Joint Development Project to coordinate permit compliance and to select one permittee for an entire Shopping Center will reduce non- and mis-communication on compliance matters and will clearly identify one point of contact and responsible party for all compliance matters;
- Facilitating shopping center project lending which may be contingent, in part, on signing anchor retail projects by removing any disincentive (*i.e.*, fear of storm water permitting liability for Sitework underway at the time of closing or for which the retail owner will have no control or responsibility) for the owners of such projects to close and take fee title to property until completion of all Sitework;
- Protecting property rights by removing what would effectively be a "veto" held by the underlying landowner who could refuse to sign and submit a storm water permit for work proposed by an easement or license holder;

² We understand that the landowner ultimately bears some degree of potential liability for permit non-compliance, but we believe the permitting scheme should allow the party with control over construction and storm water compliance to be the permittee and therefore the primary target of any potential enforcement action.

- Encouraging parties to Joint Development Projects to discuss and coordinate storm water compliance in advance of construction, enabling parties to share a clear, common view of these requirements which would allow for internalization of these risks and obligations in well-written contracts;
- Avoiding the situation where a fee owner is required to file for permit coverage merely to become a paper permittee despite having no presence on the site and having an agreement in place in which the developer agrees to perform all site work and assume operational control on all tracts. CRA respectfully submits this situation creates an unnecessary and impractical administrative burden while providing no benefit to storm water compliance;
- Avoiding the unfairness of imposing potential penalty liabilities on a fee owner who may be unable to contract for indemnity for such penalties; and,
- Aligning with the compliance framework established in the USEPA Permit and with the permits in other states such as Colorado, Michigan and Indiana.

III. The USEPA Permit Allows Flexible Permitting Of Joint Development Projects

USEPA has adopted a storm water permitting framework which supports the Expanded Landowner Permitting Model proposed by CRA. Under the USEPA Permit, fee ownership of property is not determinative of the responsibility to file for permit coverage. Instead, the USEPA Permit requires "operators" of construction activities to file a Notice of Intent ("NOI") to obtain coverage under the USEPA Permit. The USEPA Permit provides, "To obtain coverage under this general permit, you, the operator, must prepare and submit a complete and accurate Notice of Intent (NOI), as described in this Part." USEPA Permit, at 6. "Operator" is defined to mean one with operational control over construction plans and specifications or one with control over the day-to-day activities at the site. USEPA also specifies in its guidance that parties may structure contracts to provide that one party, such as a shopping center developer, may serve as the exclusive "operator" and obtain permit coverage and be responsible for storm water compliance for an entire shopping center. Thus, USEPA allows a developer at a Joint Development Project to serve as the exclusive "operator" and storm water permittee for the entire project.

CRA respectfully submits that USEPA's focus on operational control is much more practical than focusing on ownership in complex factual situations such as the shopping center development scenarios discussed above. While the USEPA Permit is not directly applicable in California, both the USEPA Permit and the Draft Permit implement the NPDES program mandated by the federal Clean Water Act ("CWA"). Therefore, the USEPA's interpretation of the CWA requirements, as reflected in the USEPA Permit and supporting materials, provide helpful guidance with respect to this permitting issue and support adoption of an Expanded Landowner Permitting Model.

IV. Other States Allow More Flexible Permitting Of Joint Development Projects

Several states, such as Michigan and Indiana, which base storm water permitting on property ownership implement either a form of USEPA's operational control concept or recognize a broader variety of property interests in determining who shall or may be a permittee. In addition, a few states, such as Colorado, have developed permit language or guidance which speaks directly to the permitting of Joint Development Projects. These similar state storm water permitting programs also support adoption of an Expanded Landowner Permitting Model.

A. Michigan

Michigan requires that "construction permittees" obtain permit coverage. "Construction permittee" includes persons who own or hold a recorded easement on property where a construction activity is located. *See Mich. Admin. R. § 323.2190.*

B. Indiana

Indiana requires the entity with financial control over constructions activities to hold the permit. More specifically, the Indiana permit provides that:

A person having financial responsibility or operational control for a facility, project site, or municipal separate storm sewer system area and the associated storm water discharges, that meets the applicability requirements of the general permit rule and is not covered by an existing individual NPDES permit, must submit an application under 40 C.F.R. § 122.26 as published in the Federal Register on November 16, 1990, and 327 IAC 5-3 if the operator seeks to cover the discharge under an individual permit.

327 Ind. Admin. Code § 15-2-9(d).

C. Colorado

Colorado provides that an owner or operator of a construction site must obtain permit coverage. However, Colorado has taken the extra step of providing very detailed guidance directing owners and operators how they may permit multiple-owner Joint Development Projects, and providing the flexibility proposed here by CRA. More specifically, Colorado allows the following entities to be permittees:

- **Owner or Developer.** An owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or through a contract with an entity such as a general contractor.
- **General Contractor or Subcontractor.** A contractor with contractual responsibility and operational control to address the impacts construction activities may have on stormwater quality.

- Other Designated Agents/Contractors. Other agents, such as a consultant acting as construction manager under contract with the owner or developer, with contractual responsibility and operational control to address the impacts construction activities may have on stormwater quality.
- Lessees. When dealing with leased land or facilities, the lessee is considered the "owner" for the purposes of stormwater permitting if the lessee is responsible for the activities occurring at the site.

See CDPS General Permit for Stormwater Discharges Associated with Construction Activity; CDPHE, Storm Water Fact Sheet -- Construction.

V. Conclusion

CRA respectfully submits the Board should adopt an Expanded Landowner Permitting Model and that it should revise the Draft Permit to allow the developer of a Joint Development Project to serve as the permittee for part or all of the Project, including parcels owned by retail developers, rather than having to separately permit each individual retail landowner's parcel. CRA proposes that the Board revise the Draft Permit to allow a developer who is granted and retains a property interest in part or all of a shopping center to agree by contract to serve as the exclusive operator, landowner and permittee for a Joint Development Project. This could be accomplished by clarifying in the Draft Permit and Fact Sheet that a "landowner" for permitting purposes includes a person or entity holding a property interest and having operational control and/or contractual responsibility for storm water compliance at a site.

More specifically, CRA proposes the following modifications to Section II.B. of the Draft Permit:

II. Conditions For Permit Coverage

...

B. Obtaining Permit Coverage Traditional Construction Projects

1. EXCEPT AS PROVIDED IN SECTION II.B.2. AND II.B.3., the landowner must obtain coverage under this General Permit.

2. IN THE CASE OF ~~except where there is a~~ lease of a mineral estate (oil, gas, geothermal, aggregate, precious metals, and/or industrial metals), the lessee is responsible for obtaining coverage under the General Permit.

3. IN THE CASE OF A JOINT DEVELOPMENT PROJECT, WHERE THE DEVELOPER RETAINS OR IS GRANTED AN EASEMENT, LICENSE OR OTHER PROPERTY INTEREST FOR PART OR ALL OF THE DEVELOPMENT, AND EACH

INDIVIDUAL PARCEL OWNER GRANTING TO THE DEVELOPER SUCH OWNERSHIP INTEREST EXECUTES A WRITTEN AGREEMENT WITH THE DEVELOPER PROVIDING THAT THE DEVELOPER SHALL ASSUME PRIMARY RESPONSIBILITY FOR STORM WATER COMPLIANCE AT SUCH PART OR ALL OF THE DEVELOPMENT, THEN THE DEVELOPER MAY BE SOLELY RESPONSIBLE FOR OBTAINING COVERAGE UNDER THE GENERAL PERMIT FOR SUCH PART OR ALL OF THE DEVELOPMENT. ALTERNATIVELY, THE DEVELOPER AND THE OWNER OF EACH INDIVIDUAL PARCEL MAY ELECT TO BE SEPARATELY RESPONSIBLE FOR OBTAINING COVERAGE UNDER THE GENERAL PERMIT. A "JOINT DEVELOPMENT PROJECT" SHALL INCLUDE ANY PROJECT WHERE A DEVELOPER AGREES TO PERFORM CERTAIN SITEWORK FOR THE DEVELOPMENT TYPICALLY INCLUDING CLEARING, GRADING, BUILDING PAD PREPARATION, UTILITY INSTALLATION, ROADWAY IMPROVEMENTS, PARKING AREA CONSTRUCTION AND LANDSCAPING, AS IS FREQUENTLY ENCOUNTERED IN SHOPPING CENTER DEVELOPMENTS, AND THE DEVELOPER HOLDS AN OWNERSHIP INTEREST, INCLUDING BUT NOT LIMITED TO AN EASEMENT OR LICENSE, FOR PART OR ALL OF THE DEVELOPMENT WHERE THE DEVELOPER WILL PERFORM SUCH SITEWORK. NOTHING IN THIS SECTION SHALL LIMIT THE ABILITY OF THE BOARD TO PURSUE ENFORCEMENT AGAINST ANY LANDOWNER FOR VIOLATIONS OF THIS GENERAL PERMIT AT A JOINT DEVELOPMENT PROJECT; PROVIDED, HOWEVER, THAT WHERE THE PARTIES TO A JOINT DEVELOPMENT PROJECT HAVE ENTERED INTO A WRITTEN AGREEMENT ALLOCATING STORM WATER COMPLIANCE OBLIGATIONS TO A DEVELOPER, THE BOARD SHALL HONOR SUCH AGREEMENT UNLESS OR UNTIL THE DEVELOPER IS UNABLE OR REFUSES TO TAKE CORRECTIVE ACTION REQUESTED BY THE BOARD WHICH IS NECESSARY TO MAINTAIN OR ACHIEVE COMPLIANCE WITH THE GENERAL PERMIT.

42. To obtain coverage, the landowner or other entity described above must file Permit Registration Documents (PRDs) prior to the commencement of construction activity. Failure to obtain coverage under this General Permit for storm water discharges to waters of the United States is a violation of the CWA and the California Water Code.

Thank you for your consideration. If you have any questions regarding CRA's comments, please contact me at (916) 443-1975.

Best regards,

William E. Dombrowski

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President and Chief Executive Officer



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CRA's members build dozens of new stores each year at sites across the country requiring permit coverage under the applicable NPDES Storm Water Construction General Permit, including in California. Many of these projects are part of shopping center Joint Development Projects where the developer performs certain Sitework, often speculatively, in order to better market the project, and where CRA's members only construct a store. In fact, for financial reasons many developers insist on performing Sitework at Joint Development Projects

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II. Policy Reasons For Allowing More Flexible Permitting Of Joint Development Projects

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- Encouraging parties to Joint Development Projects to discuss and coordinate storm water compliance in advance of construction, enabling parties to share a clear, common view of these requirements which would allow for internalization of these risks and obligations in well-written contracts;
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- Lessees. When dealing with leased land or facilities, the lessee is considered the "owner" for the purposes of stormwater permitting if the lessee is responsible for the activities occurring at the site.

See CDPS General Permit for Stormwater Discharges Associated with Construction Activity; CDPHE, Storm Water Fact Sheet -- Construction.

V. Conclusion

CRA respectfully submits the Board should adopt an Expanded Landowner Permitting Model and that it should revise the Draft Permit to allow the developer of a Joint Development Project to serve as the permittee for part or all of the Project, including parcels owned by retail developers, rather than having to separately permit each individual retail landowner's parcel. CRA proposes that the Board revise the Draft Permit to allow a developer who is granted and retains a property interest in part or all of a shopping center to agree by contract to serve as the exclusive operator, landowner and permittee for a Joint Development Project. This could be accomplished by clarifying in the Draft Permit and Fact Sheet that a "landowner" for permitting purposes includes a person or entity holding a property interest and having operational control and/or contractual responsibility for storm water compliance at a site.

More specifically, CRA proposes the following modifications to Section II.B. of the Draft Permit:

II. Conditions For Permit Coverage

...

B. Obtaining Permit Coverage Traditional Construction Projects

1. EXCEPT AS PROVIDED IN SECTION II.B.2. AND II.B.3., the landowner must obtain coverage under this General Permit.

2. IN THE CASE OF ~~, except where there is a lease of a mineral estate (oil, gas, geothermal, aggregate, precious metals, and/or industrial metals),~~ the lessee is responsible for obtaining coverage under the General Permit.

3. IN THE CASE OF A JOINT DEVELOPMENT PROJECT, WHERE THE DEVELOPER RETAINS OR IS GRANTED AN EASEMENT, LICENSE OR OTHER PROPERTY INTEREST FOR PART OR ALL OF THE DEVELOPMENT, AND EACH

INDIVIDUAL PARCEL OWNER GRANTING TO THE DEVELOPER SUCH OWNERSHIP INTEREST EXECUTES A WRITTEN AGREEMENT WITH THE DEVELOPER PROVIDING THAT THE DEVELOPER SHALL ASSUME PRIMARY RESPONSIBILITY FOR STORM WATER COMPLIANCE AT SUCH PART OR ALL OF THE DEVELOPMENT, THEN THE DEVELOPER MAY BE SOLELY RESPONSIBLE FOR OBTAINING COVERAGE UNDER THE GENERAL PERMIT FOR SUCH PART OR ALL OF THE DEVELOPMENT. ALTERNATIVELY, THE DEVELOPER AND THE OWNER OF EACH INDIVIDUAL PARCEL MAY ELECT TO BE SEPARATELY RESPONSIBLE FOR OBTAINING COVERAGE UNDER THE GENERAL PERMIT. A "JOINT DEVELOPMENT PROJECT" SHALL INCLUDE ANY PROJECT WHERE A DEVELOPER AGREES TO PERFORM CERTAIN SITEWORK FOR THE DEVELOPMENT TYPICALLY INCLUDING CLEARING, GRADING, BUILDING PAD PREPARATION, UTILITY INSTALLATION, ROADWAY IMPROVEMENTS, PARKING AREA CONSTRUCTION AND LANDSCAPING, AS IS FREQUENTLY ENCOUNTERED IN SHOPPING CENTER DEVELOPMENTS, AND THE DEVELOPER HOLDS AN OWNERSHIP INTEREST, INCLUDING BUT NOT LIMITED TO AN EASEMENT OR LICENSE, FOR PART OR ALL OF THE DEVELOPMENT WHERE THE DEVELOPER WILL PERFORM SUCH SITEWORK. NOTHING IN THIS SECTION SHALL LIMIT THE ABILITY OF THE BOARD TO PURSUE ENFORCEMENT AGAINST ANY LANDOWNER FOR VIOLATIONS OF THIS GENERAL PERMIT AT A JOINT DEVELOPMENT PROJECT; PROVIDED, HOWEVER, THAT WHERE THE PARTIES TO A JOINT DEVELOPMENT PROJECT HAVE ENTERED INTO A WRITTEN AGREEMENT ALLOCATING STORM WATER COMPLIANCE OBLIGATIONS TO A DEVELOPER, THE BOARD SHALL HONOR SUCH AGREEMENT UNLESS OR UNTIL THE DEVELOPER IS UNABLE OR REFUSES TO TAKE CORRECTIVE ACTION REQUESTED BY THE BOARD WHICH IS NECESSARY TO MAINTAIN OR ACHIEVE COMPLIANCE WITH THE GENERAL PERMIT.

42. To obtain coverage, the landowner or other entity described above must file Permit Registration Documents (PRDs) prior to the commencement of construction activity. Failure to obtain coverage under this General Permit for storm water discharges to waters of the United States is a violation of the CWA and the California Water Code.

Thank you for your consideration. If you have any questions regarding CRA's comments, please contact me at (916) 443-1975.

Best regards,

William E. Dombrowski

William E. Dombrowski
President and Chief Executive Officer



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June 12, 2009

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

Re: Comment Letter—Draft Construction General Permit

The California Retailers Association (“CRA”) appreciates the opportunity to submit to the California State Water Resources Control Board (the “Board”) the following comments to the Draft Construction General Permit (“Draft Permit”). The purpose of our comments is to address the permitting of shopping center or similar developments (“**Joint Development Projects**”) where an original owner and developer sells individual parcels to retail or other developers but retains an ownership interest such as an easement or license for part or all of the development and agrees to perform certain sitework for the development typically consisting of clearing, grading, building pad preparation, utility installation, roadway improvements, parking area construction and landscaping (the “Sitework”). More specifically, CRA urges the Board to consider and adopt an “**Expanded Landowner Permitting Model**” to address the following two common fact patterns encountered at Joint Development Projects:

1. Where a developer owns an entire multi-parcel development, begins construction of Sitework, then sells all or a part of the development while still completing the Sitework; and
2. Where a developer owns part of a multi-parcel development and constructs the Sitework on parcels owned by multiple parties.

The Draft Permit carries over from the currently effective construction general permit (the “Current Permit”) the general requirement that the “landowner” file Permit Registration Documents (“PRDs”) and become the permittee. However, while the Current Permit contains language allowing a party to serve as permittee for work on easements or on nearby property by agreement—which various regional water boards have relied upon to allow developers to act as the sole storm water permittee for Joint Development Projects—the Draft Permit significantly

narrows this flexibility and will complicate storm water compliance for future shopping center projects.¹

For several reasons discussed here, CRA proposes the Board revise the Draft Permit and Fact Sheet to adopt an Expanded Landowner Permitting Model and to clarify that under certain circumstances, for the purpose of determining who may be a permittee, "landowners" may include parties holding property interests less than fee title, such as easement holders or licensees. CRA respectfully submits this approach to storm water permitting for Joint Development Projects would allow for significantly streamlined permitting and improved coordination of compliance obligations, and would promote several important public policy objectives discussed in greater detail in Section II below.

I. Consequences Of Strict "Landowner" Permitting At Joint Development Projects

CRA's members build dozens of new stores each year at sites across the country requiring permit coverage under the applicable NPDES Storm Water Construction General Permit, including in California. Many of these projects are part of shopping center Joint Development Projects where the developer performs certain Sitework, often speculatively, in order to better market the project, and where CRA's members only construct a store. In fact, for financial reasons many developers insist on performing Sitework at Joint Development Projects

¹ The Draft Permit provides:

The landowner must obtain coverage under this General Permit, except where there is a lease of a mineral estate (oil, gas, geothermal, aggregate, precious metals, and/or industrial metals), the lessee is responsible for obtaining coverage under the General Permit.

To obtain coverage, the landowner or other party described above must file Permit Registration Documents (PRDs) prior to the commencement of construction activity.

Draft Permit at 13-14. This permitting framework is further clarified in the Draft Fact Sheet for the Draft Permit, which provides, in relevant part, the following:

The landowner must obtain coverage under this General Permit, except in two limited circumstances. First, where the construction of pipelines, utility lines, fiber-optic cables, or other linear underground/overhead projects will occur across several properties, the utility company, municipality, or other public or private company or agency that owns or operates the linear underground/overhead project is responsible for obtaining coverage under the General Permit. Second, where there is a lease of a mineral estate [], the lessee is responsible for obtaining coverage under the General Permit.

Draft Fact Sheet at 11-12.

By comparison, the Current Permit provides:

For proposed construction activity conducted on easements or on nearby property by agreement or permission . . . the entity responsible for the construction activity must submit the NOI and filing fee and shall be responsible for development of the SWPPP.

Current Permit at 2.

and will not allow CRA's members to participate in such projects unless the developer can perform the Sitework.

In a typical Joint Development Project, a developer owns a large piece of land and proposes to develop a shopping center with several anchor retail stores including members of CRA who already own or will purchase from the developer small portions of the overall shopping center. Often the remainder of the shopping center will include other retail stores, banks and restaurants, among other things. Two primary ownership scenarios commonly arise in Joint Development Projects, each presenting unique storm water permitting challenges under the Draft Permit:

Under **Scenario One**, the developer owns the entire property, *e.g.*, 100 acres, and obtains a permit for the entire property in order to begin construction of certain Sitework. In the midst of this construction work, a retail developer such as one of CRA's members purchases one parcel, *e.g.*, 20 acres (the "Retail Parcel"), for future development of its store, but grants an easement or license back to the developer to complete the Sitework. As the new "landowner" of the Retail Parcel, the Draft Permit will require that CRA's member file PRDs and become a permittee for the Sitework performed by the developer on easements or by agreement on the Retail Parcel. Further, the developer will be required to file a change of information to carve the Retail Parcel out of its permit.

Under **Scenario Two**, the developer owns a majority of the site, *e.g.*, 80 acres, and a retail developer such as one of CRA's members owns one large parcel, *e.g.*, 20 acres (the "Retail Parcel"). CRA's member will grant an easement or license to the developer, and will enter an agreement for the developer to construct Sitework on both parcels. Even though the developer alone will be constructing the Sitework, as the underlying "landowner" of the Retail Parcel, the Draft Permit will require that CRA's member file PRDs and become a permittee for the Sitework performed by the developer on easements or by agreement on the Retail Parcel.

Under both scenarios, it is common practice for CRA's members and any other individual parcel developers within the Joint Development Project to enter into separate development agreements with the shopping center developer for performance of the Sitework. Under these agreements, the parties each give the developer some form of property interest, *e.g.*, an easement or license, on their properties so that the developer can perform the Sitework, including storm water permitting and compliance to address the impacts of all development at the Project. The parties agree to reimburse the developer for the Sitework on some form of pro rata basis. The developer, in turn, always maintains an ownership interest in the entire center for purposes of performing the Sitework, even though fee title of individual parcels may be held by other individual parcel developers.

Unlike the Current Permit, the Draft Permit does not appear to recognize these less-than-fee property interests within the meaning of "landowner." Therefore, each parcel owner under these scenarios would be required to hold a permit even where at the time they become landowners they have had no involvement in Sitework-related construction activities or storm water compliance, or where the parties agree storm water compliance could be achieved and maintained more effectively by coordinating and agreeing that the developer should retain primary responsibility for such compliance. In either instance, the more restrictive approach to landowner permitting proposed in the Draft Permit unfairly forces CRA's members to bear the risk of permit non-compliance despite having no control over construction activities or storm water compliance on the site, and limits CRA's members ability to coordinate storm water compliance.

CRA respectfully submits that a more equitable, efficient, and effective approach would be to allow the developer or the developer's general contractor performing the Sitework on parcels owned by CRA's members to hold the permit for the entire shopping center development. This makes sense because under this approach the developer and its contractor would be the parties responsible pursuant to a carefully negotiated development agreement for constructing the Sitework and for compliance with storm water permit requirements.²

II. Policy Reasons For Allowing More Flexible Permitting Of Joint Development Projects

Many reasons support the adoption of the Expanded Landowner Permitting Model proposed by CRA, including:

- Achieving administrative efficiency inasmuch as the Regional Boards would be obligated to track fewer permits;
- Improving storm water compliance inasmuch as allowing parties at a Joint Development Project to coordinate permit compliance and to select one permittee for an entire Shopping Center will reduce non- and mis-communication on compliance matters and will clearly identify one point of contact and responsible party for all compliance matters;
- Facilitating shopping center project lending which may be contingent, in part, on signing anchor retail projects by removing any disincentive (*i.e.*, fear of storm water permitting liability for Sitework underway at the time of closing or for which the retail owner will have no control or responsibility) for the owners of such projects to close and take fee title to property until completion of all Sitework;
- Protecting property rights by removing what would effectively be a "veto" held by the underlying landowner who could refuse to sign and submit a storm water permit for work proposed by an easement or license holder;

² We understand that the landowner ultimately bears some degree of potential liability for permit non-compliance, but we believe the permitting scheme should allow the party with control over construction and storm water compliance to be the permittee and therefore the primary target of any potential enforcement action.

- Encouraging parties to Joint Development Projects to discuss and coordinate storm water compliance in advance of construction, enabling parties to share a clear, common view of these requirements which would allow for internalization of these risks and obligations in well-written contracts;
- Avoiding the situation where a fee owner is required to file for permit coverage merely to become a paper permittee despite having no presence on the site and having an agreement in place in which the developer agrees to perform all site work and assume operational control on all tracts. CRA respectfully submits this situation creates an unnecessary and impractical administrative burden while providing no benefit to storm water compliance;
- Avoiding the unfairness of imposing potential penalty liabilities on a fee owner who may be unable to contract for indemnity for such penalties; and,
- Aligning with the compliance framework established in the USEPA Permit and with the permits in other states such as Colorado, Michigan and Indiana.

III. The USEPA Permit Allows Flexible Permitting Of Joint Development Projects

USEPA has adopted a storm water permitting framework which supports the Expanded Landowner Permitting Model proposed by CRA. Under the USEPA Permit, fee ownership of property is not determinative of the responsibility to file for permit coverage. Instead, the USEPA Permit requires "operators" of construction activities to file a Notice of Intent ("NOI") to obtain coverage under the USEPA Permit. The USEPA Permit provides, "To obtain coverage under this general permit, you, the operator, must prepare and submit a complete and accurate Notice of Intent (NOI), as described in this Part." USEPA Permit, at 6. "Operator" is defined to mean one with operational control over construction plans and specifications or one with control over the day-to-day activities at the site. USEPA also specifies in its guidance that parties may structure contracts to provide that one party, such as a shopping center developer, may serve as the exclusive "operator" and obtain permit coverage and be responsible for storm water compliance for an entire shopping center. Thus, USEPA allows a developer at a Joint Development Project to serve as the exclusive "operator" and storm water permittee for the entire project.

CRA respectfully submits that USEPA's focus on operational control is much more practical than focusing on ownership in complex factual situations such as the shopping center development scenarios discussed above. While the USEPA Permit is not directly applicable in California, both the USEPA Permit and the Draft Permit implement the NPDES program mandated by the federal Clean Water Act ("CWA"). Therefore, the USEPA's interpretation of the CWA requirements, as reflected in the USEPA Permit and supporting materials, provide helpful guidance with respect to this permitting issue and support adoption of an Expanded Landowner Permitting Model.

IV. Other States Allow More Flexible Permitting Of Joint Development Projects

Several states, such as Michigan and Indiana, which base storm water permitting on property ownership implement either a form of USEPA's operational control concept or recognize a broader variety of property interests in determining who shall or may be a permittee. In addition, a few states, such as Colorado, have developed permit language or guidance which speaks directly to the permitting of Joint Development Projects. These similar state storm water permitting programs also support adoption of an Expanded Landowner Permitting Model.

A. Michigan

Michigan requires that "construction permittees" obtain permit coverage. "Construction permittee" includes persons who own or hold a recorded easement on property where a construction activity is located. *See Mich. Admin. R. § 323.2190.*

B. Indiana

Indiana requires the entity with financial control over constructions activities to hold the permit. More specifically, the Indiana permit provides that:

A person having financial responsibility or operational control for a facility, project site, or municipal separate storm sewer system area and the associated storm water discharges, that meets the applicability requirements of the general permit rule and is not covered by an existing individual NPDES permit, must submit an application under 40 C.F.R. § 122.26 as published in the Federal Register on November 16, 1990, and 327 IAC 5-3 if the operator seeks to cover the discharge under an individual permit.

327 Ind. Admin. Code § 15-2-9(d).

C. Colorado

Colorado provides that an owner or operator of a construction site must obtain permit coverage. However, Colorado has taken the extra step of providing very detailed guidance directing owners and operators how they may permit multiple-owner Joint Development Projects, and providing the flexibility proposed here by CRA. More specifically, Colorado allows the following entities to be permittees:

- **Owner or Developer.** An owner or developer who is operating as the site manager or otherwise has supervision and control over the site, either directly or through a contract with an entity such as a general contractor.
- **General Contractor or Subcontractor.** A contractor with contractual responsibility and operational control to address the impacts construction activities may have on stormwater quality.

- Other Designated Agents/Contractors. Other agents, such as a consultant acting as construction manager under contract with the owner or developer, with contractual responsibility and operational control to address the impacts construction activities may have on stormwater quality.
- Lessees. When dealing with leased land or facilities, the lessee is considered the "owner" for the purposes of stormwater permitting if the lessee is responsible for the activities occurring at the site.

See CDPS General Permit for Stormwater Discharges Associated with Construction Activity; CDPHE, Storm Water Fact Sheet -- Construction.

V. Conclusion

CRA respectfully submits the Board should adopt an Expanded Landowner Permitting Model and that it should revise the Draft Permit to allow the developer of a Joint Development Project to serve as the permittee for part or all of the Project, including parcels owned by retail developers, rather than having to separately permit each individual retail landowner's parcel. CRA proposes that the Board revise the Draft Permit to allow a developer who is granted and retains a property interest in part or all of a shopping center to agree by contract to serve as the exclusive operator, landowner and permittee for a Joint Development Project. This could be accomplished by clarifying in the Draft Permit and Fact Sheet that a "landowner" for permitting purposes includes a person or entity holding a property interest and having operational control and/or contractual responsibility for storm water compliance at a site.

More specifically, CRA proposes the following modifications to Section II.B. of the Draft Permit:

II. Conditions For Permit Coverage

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B. Obtaining Permit Coverage Traditional Construction Projects

1. EXCEPT AS PROVIDED IN SECTION II.B.2. AND II.B.3., the landowner must obtain coverage under this General Permit.

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