# COALITION FOR PRACTICAL REGULATION

"Cities Working on Practical Solutions"

Public Comment
**Draft Construction Permit**
Deadline: 6/11/08 by 12 p.m.

Via Fax

June 11, 2008



Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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Sacramento, CA 95814
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Subject: Comment Letter – March 2008 Draft Construction Permit

Dear Ms. Townsend and Members of the Board:

I am writing on behalf of the Coalition for Practical Regulation (CPR) to provide comments on the Draft Construction General Permit. CPR is an *ad-hoc* group of more than 40 cities within Los Angeles County that have come together to address water quality issues. As municipal permittees, our member cities are very interested in the Draft Permit and in your Board's proposed approach to improving water quality policy through the reissuance of the statewide Construction General Permit. New approaches reflected in this Permit will likely have repercussions throughout the stormwater program, including MS4 permit implementation. In this letter, I would like to reiterate and build upon comments made by Richard Watson at the June 4, 2008 hearing in Sacramento. Thank you for the opportunity to provide these comments.

CPR appreciates several elements of the March 2008 proposed Draft Construction General Permit. We agree with the goal of creating a risk-based Permit that allocates responsibilities with respect to anticipated risk to water quality. Also, we support the objective of better performance measures. In addition, CPR appreciates several of the improvements that staff has made to this Draft Construction General Permit. We agree with comments made by the California Stormwater Quality Association (CASQA) that the following areas have been improved since the Preliminary Draft Permit:

- Clarifications of when Permit coverage begins following submission of Permit Registration Documents (PRDs);
- Improved timing for submittal of PRDs;
- Allowances for emergency construction and maintenance projects;

ARCADIA
ARTESIA
BALDWIN PARK
BELL
BELL GARDENS
BELLFLOWER
CARSON
CERRITOS
COMMERCE
COVINA
DIAMOND BAR
DOWNEY
GARDENA
HAWAIIAN GARDENS
INDUSTRY
IRWINDALE
LA CAÑADA FLINTRIDGE
LA MIRADA
LAKEWOOD
LAWNDALE
MONROVIA
MONTEREY PARK
NORWALK
PALOS VERDES ESTATES
PARAMOUNT
PICO RIVERA
POMONA
RANCHO PALOS VERDES
ROSEMEAD
SANTA FE SPRINGS
SAN GABRIEL
SIERRA MADRE
SIGNAL HILL
SOUTH EL MONTE
SOUTH GATE
SOUTH PASADENA
VERNON
WALNUT
WEST COVINA
WHITTIER

- Rain Event Action Plans; and
- Active Treatment Systems

However, we have concerns about the proposed implementation of numerous elements in the Draft Permit. CPR agrees with CASQA's assertion that this Permit represents a significant shift in California's approach to regulating stormwater discharges, and that more work needs to be done in order to craft a construction stormwater permit that protects water quality and is workable for construction operations. Specifically, CPR is concerned about the inappropriate use of numeric effluent limits (NELs); Capital Improvement Plan language and line and grade language in the Fact Sheet; the lack of a defined design storm; inclusion of the hydromodification and post-construction activities sections; and the broad delegation of Regional Water Board authorities with respect to the Construction General Permit.

**Inappropriate Inclusion of Numeric Effluent Limits (NELs)**

CPR is concerned by the speed at which the State Board, with this Draft Permit, is jumping from an iterative to a numeric effluent limit approach to regulating construction. This represents a complete change in regulatory approach for construction activity. We agree with CASQA that the inclusion of numeric effluent limits (NELs) in this Construction General Permit is premature and unnecessary. Furthermore, the inclusion of NELs at this time, except in association with the use of Active Treatment Systems (ATS), is contrary to the recommendations of the Blue Ribbon Panel (BRP), a group of experts assembled by the State Water Board to evaluate the State's stormwater program and make recommendations for its improvement.

The Blue Ribbon Panel noted in its report, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* that, for some catchments, setting numeric effluent limits "is basically not possible" (Currier et al., 2007.) However, despite this finding by the BRP, State Board staff has continued to include numeric effluent limits in this Draft Construction General Permit.

The Panel was asked to answer a number of questions, including: whether or not it was technically feasible to establish numeric effluent limitations or some other quantifiable limit for inclusion in storm water permits, how such limitations or criteria would be established, and what information or data would be required. During the June 4, 2008 hearing on the Construction General Permit, Eric Strecker, a member of the Blue Ribbon Panel, presented to the State Water Board his interpretation of the Panel's recommendations with respect to construction. This presentation highlighted a number of findings, conclusions, reservations and concerns, and a summary comparing the Draft Construction General Permit to the Blue Ribbon Panel's recommendations. CPR asks that the State Water Board members give careful consideration to Dr. Strecker's presentation, especially his summary statement that,

"with exception of the use of ATS, [the] panel found NELs not technically feasible at this time for construction sites."

Dr. Strecker noted that the Blue Ribbon Panel found that sites using traditional erosion controls produce highly variable runoff data. Since neither the science nor the data are sufficient at the moment to support inclusion of NELs in the Construction General Permit at this time, CPR requests that the State Water Board direct staff to remove NELs from this Permit and institute a research program to develop the defensible, sound data to support inclusion of appropriate NELs in a future Construction General Permit. The use of numeric-based effluent limits at this time, in addition to being counter to the findings of the Blue Ribbon Panel, is inconsistent with the iterative process described in State Water Board Order 99-05. The shift from an iterative approach to a numeric one must be a tiered process in order to be effective and consistent with current policy.

**Mandatory Minimum Penalties**

CPR supports CASQA's comment that "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." The proposed monitoring program in the Draft Construction General Permit could easily result in four violations occurring during the six-month period that determines a chronic violation. In fact, four violations could occur during a single storm event since the Permit calls for the assessment of NEL violations based on a single grab sample. Risk Level 2 and 3 sites are particularly susceptible to receiving assessments of chronic violation since these sites are required to take multiple grab samples during storm events from each discharge location, and are likely to have multiple discharge locations. Further, once a NEL is exceeded, Risk Level 3 sites are required to implement continuous monitoring, although the Draft Permit does not specify how this monitoring will be assessed for NEL compliance.

In addition to removing NELs from the Draft Construction General Permit to be consistent with the findings of the Blue Ribbon Panel, CPR recommends changing the monitoring program so that single grab samples would not be used to determine a violation. Sample results during a storm should be averaged to give a better estimate of overall site BMP performance.

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

The Blue Ribbon Panel defined the concept of an Action Level as follows:

> "...the approach of setting an 'upset' value, which is clearly above the normal observed variability, may be an interim approach which would allow 'bad actor' catchments to receive additional attention. For the purposes of this document, we are calling this 'upset' value an Action Level because the water

> quality discharge from such locations are enough of a concern that most all could agree that some actions could be taken..."

CPR supports the development and use of numeric action levels (NALs) as a logical modification of the iterative process contained in the existing Construction General Permit adopted by the State Water Board Order 99-08, as amended. The use of NALs as recommended by the BRP would provide a numeric upset value to assist permittees in assessing the effectiveness of best management practices (BMPs) and assist the Regional Water Boards in identifying "bad actors." CPR agrees with the comment made by CASQA that a properly set NAL will enhance transparency and simplicity for dischargers and regulators.

As noted in Finding 14, the Draft Construction General Permit establishes turbidity NALs based on a project's site-specific characteristics. The stated purpose of the NALs requirements is to provide operational information on BMP performance and to protect beneficial uses in receiving waters. One use of the NALs not addressed in Finding 14 is the collection of data and performance information to help the State Water Board establish technically valid numeric effluent limits in future Construction General Permits.

**Capital Improvement Plan Language**

As Richard Watson noted in his comments at the June 4, 2008 State Water Board hearing on the Construction General Permit, CPR is concerned about the language in the March 2008 Draft Permit Fact Sheet that relates projects that are included in Capital Improvement Project Plans to Common Plans of Development or Sale. Section II.D. of the Fact Sheet does not specifically include Capital Improvement Project Plans in the discussion of "Common Plan of Development or Sale." However, Section II.B. states, "when clearing, grading, or excavation of underlying soil takes place, permit coverage is required if more than one acre is disturbed on part of a larger plan or if the activity is part of a municipality's Capital Improvement Project Plan."

The Draft Permit itself does not address Capital Improvement Project Plans. Therefore, CPR concludes that the language in Section II.B. must be residual language from suggestions made previously by Los Angeles Regional Water Board staff. An earlier draft of the Ventura MS4 Permit contained similar language. That language was removed from the latest draft of the Ventura MS4 Permit after staff acknowledged that the Common Plan of Development or Sale language in USEPA regulations and in the previous versions of the State's Construction General Permit was intended to prevent acreage in large development projects from artificially escaping Permit requirements as explained in Section II.D. of the Fact Sheet. CPR asks that the State Water Board direct staff to remove the language in Section II. B. that indicates that projects that are part of a municipality's Capital Improvement Project Plan are covered by the General Permit even if they disturb less than one acre

of underlying soil.

**Routine Maintenance to Maintain Original Line and Grade**

A second concern that CPR has with Section II.B. of the Permit is the language describing the application of the term "routine maintenance." The Draft Permit says, "As used above, routine maintenance only applies to shoulder work, dirt or gravel road re-grading, or ditch clean outs." The discussion then goes on to state, "For municipal operators, repaving of asphalt roads is routine maintenance except when the underlying soil is cleared, graded, or excavated as part of the repaving operation." In the sentence referring to shoulder work, etc., the phrase "only applies to" should be replaced with "includes." In addition, repaving of roads should not be restricted to municipal operators since gated neighborhoods often have privately owned and maintained streets. Repaving should not be restricted to asphalt; it is sometimes possible to remove sections of concrete or pavers without clearing, grading, or excavating underlying soil. Furthermore, parking lot maintenance should also be included as routine maintenance to maintain original line and grade.

**Design Storm**

One key element missing from the Draft Construction General Permit is a design storm. To date, MS4 permits and the State's General Permits have exposed municipalities and other permittees to potential third party lawsuits and mandatory minimum penalties by not specifying a design storm. The Blue Ribbon Panel recognized this problem and stated that the concept of BMP sizing is important and that agencies (or others) should not be accountable for water quality in volumes above a set design level (see Eric Strecker's Power Point presentation to the June 4, 2008 State Water Board hearing on the Construction General Permit.) The Blue Ribbon Panel recommended that neither Numeric Limits nor Action Levels apply to storms of unusual event size and/or pattern.

The Los Angeles Regional Water Board has made some progress in addressing this issue, but has not yet arrived at an actual design storm. The Regional Board commissioned work by the Southern California Coastal Water Research Project (SCCWRP) that resulted in publication of a report entitled "Concept Development: Design Storm for Water Quality in the Los Angeles Region." During the preparation of this report SCCWRP consulted with a Design Storm Work Group that included representatives of both the environmental community and the regulated community. The analysis examined two different conceptual approaches. One approach identified target runoff volumes or pollutant loads for treatment based solely on rainfall/water quality relationships. The second approach identified target runoff volumes or pollutant loads for treatment based on effectiveness and cost of treatment technologies.

The first approach, when modeled, indicated that capturing storms of approximately

one-inch precipitation volume would treat approximately 80% of the runoff volume and 80% of the total copper load (modeled constituent of concern) over a 30-year simulation, and that capturing a minimally larger fraction of runoff or load would have required significantly larger storm events. The second approach indicated that using a design storm of 0.75 inches of rainfall volume or a 0.25 inch/hour intensity storm could effectively reduce the average annual frequency of storms that exceeded dissolved copper water quality standards to less than 5% (assuming a consistent, median level of BMP effectiveness for the three BMP designs modeled). These results indicate that a design storm equivalent to a 0.75 inch to one inch in rainfall volume is likely to be an effective water quality design storm and could reasonably be included in this iteration of the Construction General Permit for implementation during the five year permit cycle while additional design storm research is conducted.

**Hydromodification**

The hydromodification requirements for new development and redevelopment have been greatly improved by language in the March 2008 Draft Construction General Permit that states that dischargers subject to active Phase I or Phase II MS4 permits are not required to comply with the requirements of Section VIII.H. However, the Permit still contains hydromodification requirements for small municipalities and builder/developers in other parts of the state that could have the unintended consequence of promoting sprawl. For example, Section VIII.H.4 requires that for projects exceeding two acres in area, dischargers "shall preserve pre-construction drainage density (miles of stream length per square mile of drainage area) for all drainage areas serving a first order stream." A first order stream is defined as "a stream with no tributaries." Would an erosion rill or a gully be counted as a stream under this definition?

Staff explained in its presentation at the June 4 State Water Board hearing that the emphasis is to be on runoff reduction, not hydromodification, and that this Permit is intended to be an interim step toward more specific hydromodification requirements. If these statements represent the State Water Board's intent, the hydromodification requirements in this Permit should be replaced by a section that addresses runoff reduction more directly and simply. The Construction General Permit should emphasize the need for low impact development (LID) rather than hydromodification. Section VIII.H and Attachment F should be deleted and replaced with material that promotes reasonable low impact development, which will be more understandable to permittees, reduce runoff, and reduce adverse post-construction hydromodification impacts.

**Post-Construction Activities**

CPR is concerned that the March 2008 Draft Construction General Permit is still inconsistent with the planning and development process. Finding 10 correctly indicates that dischargers can avoid impacts on runoff as well as sediment supply and

transport characteristics of construction projects through better site design and construction activity practices. However, the Finding and the Permit err in trying to address both construction activity discharges and post-construction activity discharges through requirements in an NPDES General Permit for Stormwater Discharges Associated with Land Disturbance Activities.

Potential post-construction activities should be addressed early in the planning, approval, and design process. City Planning Commissions and City Councils should consider potential water quality impacts and mitigations for these impacts through the California Environmental Quality Act (CEQA) process. The State Water Board could assist cities to better consider post-construction water quality impacts by promoting improved water quality components in the State's CEQA Guidelines and in the CEQA Checklist.

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

**Regional Board Authorities**

CPR, like other groups that testified at the June 4, 2008 hearing on the Construction General Permit, is concerned about the wide range of authorities delegated to the Regional Water Boards without time restrictions. The eleven authorities delegated to the Regional Water Boards in Section XII of the March 2008 Draft Construction General Permit could allow a Regional Water Board to completely rewrite the Permit for permittees at any time during the life of a construction project. Such latitude is contrary to the spirit, if not the letter, of the California Water Code that provides for the State Water Board to be the policy making body and assigns the Regional Water Boards responsibility to implement the policies adopted by the State Board.

CPR understands that the staffs and perhaps even members of the Regional Water

Boards would prefer to have the latitude to determine policy, but that is clearly not the role assigned to Regional Water Boards by Sections 13001, 13140, 13142, 13222, 13225, and 13240 or the California Water Code. We urge the State Water Board to make the necessary modifications to Permit language to clarify that the responsibility for policy implementation belongs to the Regional Water Boards, but that policy making authority is reserved for the State Water Board, as intended by the Water Code.

**Cost of Compliance**

CPR members are quite concerned about the increased costs associated with the increased complexity of the Draft Construction General Permit. Public projects, in particular, are extremely vulnerable to increased costs that are imposed after projects have been designed and funded. If the costs of capital projects increase, less money will be available for public services.

The "Economic Analysis of the SWRCB Proposed Construction General Permit" prepared by Berkeley Economic Consulting, Inc. for the California Building Industry Association sheds some light on the cost implications of the proposed Permit. As noted in the report, the Permit will impact a wide range of projects, including public projects. Staff considered only the estimated costs of field monitoring equipment, approximately $1,000.00 per construction site.

Actual compliance costs will depend on risk level, sediment yields, and receiving water characteristics. The Berkeley Economic Consulting study estimated baseline and incremental costs for a five-acre construction site, as well as potential costs for delay and uncertainty. The costs per acre to comply with the proposed new Construction General Permit were estimated to be $10,000 for a 5-acre Risk Level 2 project and $38,400 for a 5-acre Risk Level 3 project. The Risk Level 3 costs include approximately $11,000 per acre for the use of ATS technology. These are much higher compliance costs than Cities have experienced with the current Construction General Permit, which was implemented properly and has done a great deal to prevent the discharge of sediment and other potential pollutants from construction sites. The additional benefits from the proposed new Construction General Permit do not appear to justify the additional costs.

**Response to Vice-Chair Wolff's Questions**

Finally, CPR would like to address the questions first posed by Vice Chair Wolff at a Los Angeles workshop on the Construction General Permit, and subsequently submitted via e-mail to interested parties:

1. "*The permit attempts to balance the need for simplicity and transparency with the need to sensitively address widely different physical conditions across sites. In what parts of the draft permit do you think complexity is most and least valuable?*"

The Risk Factor worksheet process and the New and Redevelopment Performance Standard Spreadsheet are excessively complex, especially for projects in built-up urban areas. Both should be greatly simplified. Perhaps the most valuable complexity is that associated with the advanced treatment systems (ATS) since these are costly, relatively new systems for broad use in California and the potential unintended consequence of their use could be significant.

2. *"Our scientific understanding of when and where a management practice is best is limited. Self-monitoring for compliance will not necessarily increase our understanding due to variations between practitioners and for other reasons. Are you interested in creating a scientifically valid database on management practice performance via rigorous third party 'random' monitoring in lieu of self-monitoring and at least partially paid for by permittees?"*

A scientifically valid database on management practice would be valuable. A rigorous third party "random" monitoring in lieu of self-monitoring could be a sound way of building such a database. Permittees could shift money that would otherwise have been spent on self-monitoring to pay part of the cost of a third party random monitoring program. In addition, it might be appropriate to use excess funds in the permit fee account to help pay for such a program. There would be a clear nexus between expenditures of fee moneys for such a program and the construction projects for which fees had been paid, especially if permittees were not also performing self-monitoring.

3. *"Ignoring the numbers and how they are calculated, do you think that the tiered compliance structure of the permit is a desirable or understandable feature? By tiered structure, we mean action levels 'backstopped' by higher numeric effluent limits that are intended to simplify enforcement against egregious violations."*

Ultimately, a tiered compliance structure in the Construction General Permit could be beneficial. However, as noted above, CPR agrees with the Blue Ribbon Panel that the use of NELs as backstops at this time is not appropriate. Inclusion of NALs in this iteration of the Construction General Permit would be a key step in working toward a future tiered compliance structure with numeric backstops.

**Conclusion and Recommendations**

Although CPR generally agrees with the goals of this Draft Construction General Permit, we are concerned that this Draft is still too complex and will be unnecessarily costly to implement. We ask that the Board give serious consideration to the unintended consequences for municipalities and other permittees if the current Draft Permit were to be adopted and implemented. We recommend that the Board direct staff to simplify this Permit by:

- Removing the proposed Numeric Effluent Limits (NELs),
- Focusing on runoff reduction and removing all remaining hydromodification requirements,
- Removing the remaining references to Capital Improvement Project Plans in the Fact Sheet and clarifying the language pertaining to maintenance of "line and grade,"
- Removing all post-construction requirements,
- Including a design storm of either 0.75 in. or one inch, and
- Limiting the delegation of authorities to the Regional Water Boards.

Thank you again for the opportunity to provide these comments.

Sincerely,

COALITION FOR PRACTICAL REGULATION

Kenneth Farfsing
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On Behalf of the Coalition for Practical Regulation (CPR)