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VIA EMAIL (commentletters@waterboards.ca.gov)

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

Re: Comment Letter—Draft Construction Permit

Dear Ms. Townsend, State Board Members and Staff:

Best Best & Krieger LLP represents over seventy (70) public entities throughout California in connection with storm water and waste discharge issues, including development of and compliance with applicable National Pollutant Discharge Elimination System ("NPDES") permits. The entities we represent range from cities, school districts, water districts and wastewater agencies to fire protection districts, vector control districts and resource conservation districts. While we agree with many aspects of the draft permit, particularly its site-specific, proactive approach and its heightened training and competency requirements, this comment letter provides suggestions to address our remaining concerns about the draft permit.

On May 4, 2007, Best Best & Krieger LLP submitted to the State Board written comments on the preliminary draft of the construction permit. Our comment letter outlined the many broad policy areas of concern that our public entity clients had with the preliminary draft. Most of those broad policy areas of concern regarding the permit remain. Rather than repeat those policy issues here, we incorporate those prior comments into this letter. Given the status of the State Board's consideration of the permit, we have attempted in this letter to provide more concrete recommendations regarding how we believe the permit should be revised. We have organized our comments into the fourteen (14) issue areas discussed below.

I. Timing of Permit Coverage for Public Entities

As currently drafted, Sections II and VI of the draft permit provide that new dischargers must obtain coverage under the new permit on or after permit adoption and that existing dischargers must obtain coverage under the new permit within 100 days of permit adoption. This immediate change in permit coverage for ongoing or recently approved projects will cause substantial hardship to public entities, particularly school districts, because of the many administrative and agency approvals, as well as public review, that are involved with a redesign of their projects. For example, new construction and maintenance projects at schools must be reviewed and approved by at least four (4) state agencies in order to receive the state funding upon which many school projects depend. Therefore, we recommend that Sections II and VI of the permit be revised so that the new permit coverage is phased in for public entities. Specifically, we recommend that public entities only be required to obtain coverage under the new permit for projects that do not have a certified environmental document pursuant to the California Environmental Quality Act prior to the adoption of the new permit. Projects that have a certified environmental document would be covered under the current permit.

In addition, we recommend that a new paragraph be added to Section II.A of the permit that expressly provides that permit coverage commences when the Permit Registration Documents ("PRDs") are accepted and the permit fee is received by the State Water Board. The revised language should further provide that coverage continues until the Notice of Termination is filed or until permit coverage is revoked by the State or Regional Board. These changes will alleviate the current ambiguity regarding permit coverage during the public review period, and should be carried over to Section VI of the permit.

To address these two concerns, we propose the following language:

Section II.A.3:

Permit coverage shall commence when the PRDs and associated fees are received by the State Water Resources Control Board. Coverage under the Permit shall continue until such time as the Notice of Termination is filed and accepted by the applicable Regional Water Quality Control Board or until the Permit is revoked by the State or Regional Board.

Section II.A.4:

Public entities, including but not limited to, cities, counties, water districts, transit districts, special districts and school districts shall not be required to obtain coverage under this General Permit for any projects that have received a certified environmental document pursuant to the California Environmental Quality Act prior to the adoption of this General Permit.

II. Public Comment and Regional Board Review of Coverage

Section XII.2 of the draft permit allows the public to review and comment upon new permit applications and further provides that the Regional Boards may, based upon such comments as well as Regional Board review of the permit application, rescind permit coverage, require public hearings or formal Regional Board approval or require revisions to the SWPPP and/or Monitoring Program. It is our understanding that this and other provisions in the permit are an attempt to respond to the State Board's interpretation of recent case law regarding public participation under the Clean Water Act.

However, the open ended language currently included in Section XII.2 creates an unnecessary level of uncertainty regarding permit coverage. For this reason, we recommend that Section XII.2 be revised to incorporate three changes. First, Section XII.2 should require that all public comments be submitted within thirty (30) days of the filing of the PRDs. Second, any comments should be limited to whether the PRDs comply with the technical requirements of the permit. Third, there should be no hearing on a permit if no comments are submitted within the thirty (30) day period. These changes will ensure that the public has an opportunity to comment on permit coverage, while at the same time providing a limit on the level of uncertainty faced by the permittees. Additionally, since permit coverage occurs at the end of a very long entitlement process, it is imperative that this public comment period be limited to coverage issues and not be an invitation to raise issues already addressed during the approval process.

More generally, Section XII of the permit should be revised to focus the Regional Boards' discretion on permit compliance and to avoid the potential that individual Regional Boards may create, de facto, regional construction permits by using the discretion provided by Section XII to make policy decisions regarding the permit's requirements. The simplest way to achieve this in the permit would be to delete all of Section XII other than the revised Section XII.2. A revised Section XII.2, standing alone, could establish the appropriate role for the Regional Board in reviewing permit compliance, including reviewing public comment, without creating unnecessary uncertainty regarding permit coverage and permit conditions based upon Regional Board review.

We suggest the following language for revised Section XII:

Public Comment and Regional Board Review

Regional Water Boards shall review comments provided from the public on new permit applications. All public comments on a permit application must be submitted electronically to the applicable Regional Water Board, with a copy to the permittee, within thirty (30) days of the applicant's filing of PRDs. Based upon the public comments, the Regional Water Board may hold a public hearing on the permit application, and its compliance with the technical requirements of this General Permit.

At the public hearing, the Regional Water Board may rescind permit coverage or request revisions to the applicant's SWPPP and/or Monitoring Program within a specified time period, provided that such changes are within the requirements of this General Permit. The subject matter of any public hearing held on a permit application shall be limited to whether the application and the PRDs meet the technical requirements of this General Permit. Permit coverage shall continue unless and until the permit is rescinded by the Regional Water Board after a public hearing.

In instances when no public comments are received on a permit application within thirty (30) days of the PRDs being filed, the Regional Water Board shall have no authority to hold a hearing on the permit application.

III. Linear Projects should not be Covered under this Permit

For all the reasons that have been expressed during the workshops and the June 4, 2008 hearing, linear projects should not be covered under this permit. This is particularly important to many of our special district clients who often construct large linear projects. We recommend that the permit expressly acknowledge that linear projects are not covered by the permit and that the State Board revise the small linear permit to address linear projects larger than five (5) acres.

IV. The Permit should not require Coverage for a Capital Improvement Program

On page 21 of the draft fact sheet, there is potentially confusing language regarding whether a Capital Improvement Program ("CIP") requires coverage under the permit. We recommend deletion of this language and clarification that a CIP does not require permit coverage. Each project within a CIP should be evaluated individually for coverage. To the extent projects within a CIP fall within a common plan of development, then they would be treated accordingly. The reference to CIP in the fact sheet only creates unnecessary ambiguity.

V. The Maintenance Exception, and the Fact Sheet in General, should be Clarified

Section I.32 of the draft permit appropriately exempts discharges from routine maintenance projects to maintain original line and grade, hydraulic capacity or the original purpose of the facility from permit coverage. However, page 21 of the fact sheet contains a very narrow interpretation of this exception. We recommend that the discussion in the fact sheet either be deleted or broadened so that the examples provided in the fact sheet are illustrations of when the exception might apply, not limits on when or if the exemption will apply.

This is a recurring concern with the fact sheet. For many of the permit's requirements, the fact sheet either does not support the requirement at all, or confuses it by providing unsubstantiated guidance. The fact sheet is designed to be the legal and factual basis for the permit, and should provide support for the permits requirement; it should not amend the permit. Presently, the fact sheet does not meet this standard and should be revised.

VI. The Numeric Effluent Limitations should be Deleted from the Permit

Section IV.B.1 of the draft permit establishes numeric effluent limits for turbidity and, during high risk periods, for pH. During the June 4, 2008 hearing and at the recent workshops, substantial testimony was presented that existing data does not support an NEL approach at this time. For example, Eric Strecker of GeoSyntec Consultants, a member of the Blue Ribbon Storm Water Panel on Numeric Limits, testified that numeric limits were only currently feasible for large construction sites using an Active Treatment System. To a large extent, Mr. Strecker's testimony is supported by the draft fact sheet, which acknowledges at page 29 that the State Board lacks "a comprehensive set of monitoring/measurement tools to evaluate the overall performance of the storm water program (or the whole organization, for that matter.)" Given this lack of data and existing measurement tools, the use of NELs at this time is not supported by substantial evidence.

VII. Any Numeric Action Levels should Appropriately Account for Background Levels

Section VIII and Table 1 of the draft permit set forth numeric action levels for pH and turbidity. The NALs should be expressed as being the increment above background conditions that will trigger the iterative process required by Section VIII.A.3. The background conditions should be calculated in a manner that accounts for seasonal differences in background levels of pollutants. With regard to pH, existing data or testing by the applicant could provide the information necessary to establish background levels for the NAL. For turbidity, the NAL calculator should be revised to incorporate background levels for turbidity.

VIII. A Design Storm Exception should be Included in the Permit

The permit should recognize that under certain unique storm conditions, compliance with the effluent and receiving water limitations is not feasible. An example would be a 50 year, or 100 year storm event. While most BMPs are designed to hold up under any conditions, as a practical matter unusually large rain events have the potential to overwhelm any temporary BMP no matter how it is designed. An exception for such events should be included in the permit. Indeed, because the permit requires dischargers to implement BMPs necessary to meet the BAT/BCT discharge limitation standard, such an exception is inherent in and consistent with the applicable standard. Making this exception an express provision of the permit would save time and effort for both the dischargers and the Regional Water Boards acting in an enforcement capacity.

IX. The Receiving Water Monitoring and Bioassessment Provisions should be Deleted

Attachment B, pages 5-6, of the draft permit set forth requirements regarding receiving water monitoring, including a pre-construction bioassessment requirement for Risk Level 3 projects. As reflected in the public comments received on June 4, 2008, most of the required receiving water monitoring will not yield site specific data and will create access and safety issues. In addition, the bioassessment requirement for Risk Level 3 projects prior to construction is not warranted. Therefore, we recommend that the receiving water monitoring and bioassessment provisions be deleted. At a minimum, the receiving water monitoring requirements should only apply when a site discharges directly into a receiving water in a manner where receiving water monitoring will actually yield site-specific data.

X. Uniform Data Monitoring

As recognized in the draft fact sheet at page 29, the State Board currently lacks a comprehensive set of monitoring/measurement tools to evaluate the overall performance of the storm water program. Many of the monitoring requirements in the draft permit appear to attempt to create such monitoring/measurement tools through the site-specific monitoring requirements in the draft permit. However, as Eric Strecker testified at the June 4, 2008 hearing, site-specific monitoring by dischargers will not likely produce credible information from which to evaluate program performance.

The current data collection model, requiring the permittees to collect and submit water quality information, is fundamentally flawed as a basis to measure program performance in that it does not result in a uniform, coherent set of water quality data. Different dischargers are prone to implementing different collection and testing techniques, and without clear direction on protocol from the State Board, the information collected is of limited use in determining program performance. It is therefore recommended that the State Board implement its own testing program that will generate credible data to measure program performance.

Instead of seeking to fill this data gap through individual monitoring, we believe that a statewide, professional monitoring approach, funded in part through permit fees, would provide more credible data and also reduce the monitoring costs for individual dischargers. Such a program could also substitute for the monitoring required in the draft permit. In the alternative, the monitoring requirements in the permit should be limited to those necessary to ensure permit compliance.

Regardless of which of these alternatives is pursued, we stress the importance of stakeholder involvement in developing the protocol for a statewide monitoring program, reviewing the data generated by such a program and disseminating such information in a useable manner. Such a statewide program will only succeed if all stakeholders concur in the protocol for gathering and using such data.

XI. Direct/Indirect Discharges

Attachment A to the draft permit contains language related to direct and indirect discharges to 303(d) listed waters. If a project will directly or indirectly discharge to a 303(d) listed water, the project is presumed to have a high risk to receiving waters. This "direct or indirect" language is unduly confusing and should be deleted. The language should merely ask whether the project will *"discharge to a 303(d)-listed waterbody impaired by sediment?"*

XII. Post-Construction Provisions

Section VII.H sets forth certain post-construction requirements for specified projects. In light of the nature and the timing of obtaining coverage under the construction permit, we recommend that these provisions be deleted. Permit coverage simply comes too late in the entitlement process to be the appropriate vehicle for these conditions. Post-construction issues are more appropriately handled through the large and small MS4 permits and through the land use approval process.

To the extent these conditions remain in the permit, they should be revised to reflect the stated intent of staff. As expressed many times during the recent workshops and at the June 4, 2008 hearing, staff's intent is to address areas of the State that do not currently have coverage under a large or small MS4 permit. To this end, Section VII.H.1 should be revised to state that *"only dischargers whose project is located in a jurisdiction that does not have coverage under either a Phase I or Phase II municipal separate storm sewer system permit or which is not subject to the Caltrans Statewide General Permit must comply with this section."*

XIII. Owner/Operator

The draft permit and the draft fact sheet require that the owner/operator be designated as the responsible party for all filings under the permit. This scheme is also used by the current permit. When it comes to public entities, this scheme is flawed. Public entities have no profit motive when they engage in construction activities, and, generally, have limited expertise in project management. Most public entities bid out their projects rather than self-performing them, and there are entire segments of the construction industry that are exclusively dedicated to building large scale public projects.

We recommend that the permit's coverage and enforcement provisions be broadened to allow public works contractors to be responsible for and to be held responsible for permit compliance on public entity projects. A public entity is not likely to engage in a large number of construction projects within any given permit term. However, the contractors and construction managers who work on public entity projects often specialize in this area, and will move from public project to another, taking their construction practices with them. Additionally, because the construction contract governing a public project will require the public entity to cede authority over the methods and means of construction to the contractor or the construction

manager, it only makes sense to hold these individuals responsible for permit compliance. We therefore recommend that the permit be revised to allow the public works contractor to be the legally responsible party for permit coverage and the subject of enforcement actions.

XIV. Move Annual Report Date

The draft permit requires that all dischargers submit an annual report no later than February 1 of each year. February 1 is during the raining season and therefore we recommend that the annual report date be moved to September 1 of each year.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP

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