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

ENGINEERING & UTILITY CONTRACTORS ASSOCIATION

June 10, 2008

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

Subject: Comments on the March 2008 Draft Construction Stormwater Permit

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 March 2008 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 March 2008 draft permit. 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). The concerns by the BRP include:

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

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- Including hydromodification requirements in a construction activity permit.
- Lack of pre-defined processes and timelines for many critical path elements that require Regional Board approvals or processes.
- Requiring discharger conduct receiving water monitoring.

EUCA offers the attached comments and observations on the March 2008 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 Relation

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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.

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 that would allow "bad actors" to receive additional attention and use of a monitoring strategy that provides immediate feedback

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 identify appropriate statistics to be used establish corresponding NALs, and the statistical analyses need to be provided in supporting technical documents for review.

The California Building Industry Association (CBIA) has proposed the bridge approach to setting Action Levels. This approach will provide a bridge between the next two generations of construction stormwater permits, a 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;

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- 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 info to support next permit (data requirements will be determined by whether NALs or NELs are ultimate goal).

The Modified Universal Soil Loss Equation (MUSLE) equation provided for calculating a site's turbidity action level implicitly uses a 2-year, 24-hour storm. However there is no exception from the follow-up actions required if the NAL is exceeded during storm events other than this design storm. EUCA recommends that the State Water Board include provisions to relieve the discharger from filing a NAL report and conducting the site reviews in these situations.

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 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.

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.

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.

Suspended Sediment Concentration (SSC) analysis appears to be an analysis that is not generally performed commercially. The draft permit language should be appropriately modified to remove the requirement that the SSC analysis.

The draft permit specifies that Risk Level 3 projects must conduct continuous monitoring at discharge locations where there is an NEL exceedance. However no details are provided on how continuous monitoring should be evaluated for continuing compliance. Additionally, it is not clear that continuous monitoring instrumentation is readily available for field deployment on construction sites where confined runoff conveyances may not be available. EUCA recommends eliminating the requirement for continuous monitoring.

Discharge location for the purposes of effluent sampling needs to be better defined, when read in conjunction with the SWPPP requirements a "discharge location" could be every storm drainage inlet within a project site. State Water Board staff indicated effluent

sampling was at the property line. EUCA agrees with this and recommends that this interpretation be made clear in the Order, Fact Sheet, and MRP.

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 full list of required inspections be included in the summary tables for complete evaluation during the public comment period and ease of compliance during implementation.

The language in the Fact sheet, MRP, items D1, D5, D7, and Table 2 are not consistent on the timing of visual inspections. Also it is not clear as to which type of inspection is referred to in D.5 in the Monitoring Program (Attachment B) of the CGP.

The language in the Fact Sheet and the Order are not consistent regarding which project Risk Levels must photograph sites. The Fact Sheet text indicates all sites must photograph, while the Order and MRP requires this only of Risk Level 3 sites.

Mandatory Minimum Penalties

The monitoring program described in draft permit could result in four violations occurring within the rolling six month period that determines a chronic violation for category 2 pollutants. Four violations might easily occur within a single storm event since the draft permit requires the assessment of NEL violations based on a single grab sample. An assessment of a chronic violation is especially likely to occur at Risk Level 2 and Risk Level 3 sites that are obligated to take multiple grab samples during storm events from each discharge location; these sites are likely to have multiple locations. Further, Risk Level 3 site are required to implement continuous monitoring once an NEL is exceeded, however no details are provided in the draft permit on how this continuous monitoring will be assessed for compliance with the NEL. If each discrete measurement during continuous monitoring is assessed as a single grab sample, the potential for chronic violations is greatly increased.

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 single grab sample. 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

The BIA requested between 10-15 construction consultants test the risk worksheets. All of the test cases determined that the worksheets are very complex and require a great deal of time to complete. 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.

Additional guidance is needed on how to apply the risk assessment.

Implementation of New Requirements

EUCA is concerned with the time allowed for projects currently permitted to redesign SWPPPs, monitoring programs, obtain qualified personnel to develop and implement SWPPP. Given an optimistic schedule, the permit would be adopted in the late summer, July through August 2008, and with the 100 day review period, dischargers would be faced with changing permits just as the 2008/2009 rainy season got underway. EUCA strongly recommends establishing and adopting an implementation date in the permit to coincide with 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. The state recognized that it was inappropriate to regulate linear projects under the construction general permit, and issued a permit for small linear projects. EUCA supports the utility industry's request to update the linear construction permit to include all linear construction projects.

Permit Registration Documents (PRD)

EUCA is concerned about the process for public review and how Regional Water Boards will manage comments and requests for public hearings. If the public disagrees with the risk category, BMPs selected, SWPPP or any other document prepared in compliance with the CGP, the project could be stopped and delayed until the differences are resolved. These delays will cause unquantifiable costs to projects and delays in necessary development, improvement and infrastructure. This process must be re-evaluated.

Maintenance Definition

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 other that road locations, 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 deleted.

Legally Responsible Person (LRP)
The language in Order 99-08-DWQ is derived from the Clean Water Act language that allows an owner or operator to certify permit required documents and to delegate this authority in accordance with the corporate policy or agency rules to appropriate individuals, including those individuals responsible for compliance such as a construction manager.

The revised definition presents several challenges for public and private projects, especially for projects conducted on land with long-term leases, projects conducted by municipalities, and project conducted on federal facilities, which are usually subject to long-term contracts under which the contactor is responsible. These legal relationships (contracts, leases) usually transfer compliance responsibility to the "operator" of the project and it would not be appropriate for the landowner to be involved in the certifications.

Permit for non-jurisdictional waters
It is unclear why the permit applicability has been limited to discharges to jurisdictional waters (as determined by the US Army Corps of Engineers). The Order 99-08-DWQ does not make this distinction and equally protect waters of the US and waters of the State. EUCA recommends that this statement be deleted or further explained if the intent is to only permit discharges to waters of the US.

Rain Event Action Plans (REAP)

Section X.5., of the draft permit states that "All REAPs shall be prepared and certified by a QSP." Given that the word certify has very specific meaning in context of the construction general permit, the word "certify" should be changed or further clarified in context of the REAP to indicate that an LRP or authorized individual certification is not required in this case. LRPs are unlikely to be QSPs or QSDs.

Attachment G only contained the REAP for the Grading and Land Development. The example REAPs for the other stages should be included in the draft permit.

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. Section X.1., of the draft permit states REAPs are not required for Risk Level 1 projects, however the Fact Sheet indicates all project must develop REAPs. EUCA recommends limiting the REAP to Risk Level 2 and 3 projects. Alternatively, as discussed during the stakeholder process, Risk Level 1 projects might be simply required to have REAPs and not develop full SWPPPs.

SWPPP Requirements

SWPPP amendments
Section IX.2., of the draft permit states that the SWPPP shall be written and amended, as needed, to address the specific circumstances for each construction site covered by this General Permit prior to commencement of construction activity for any stage. 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.

Site Map/Unauthorized non-stormwater discharges
Attachment H, 2.f.viii., of the draft permit indicates unauthorized non-stormwater discharges be shown on the site map. As these unauthorized discharges, are one time unexpected events it is not practical to show them on the site map.

Final Stabilization requirement

The conditions for final stabilization are unlikely to be achieved in a time period reasonable to the "end of construction activities", unless all final stabilization is achieved through the use of non-native grass sod. The build up of two-inches of plant litter will take several growing seasons and in some climates may never be achieved, e.g. desert or mountain scrub regions do not have much interplant litter. In many areas the accumulation of dead plant litter is likely to be contrary to fire prevention/control requirements, which require the removal of dead plant materials. EUCA recommends the revision of the final stabilization requirement.

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