Storm Water Panel Report
Deadline: 8/4/06 5pm

July 20, 2006

Ms. Song Her, Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comment Letter – Storm Water Panel Report

Dear Ms. Her:

The Partnership for Sound Science in Environmental Policy (PSSEP) is an association of San Francisco area and statewide public and private entities – businesses, municipal wastewater treatment agencies, trade associations and community organizations. PSSEP and its members have long been engaged in a variety of water quality and related environmental issues, and appreciates the opportunity to provide these comments in response to the State Board's request for input on the question of how the State Board can use the findings of its "Storm Water Panel of Experts" – contained in the Panel's report, "*The Feasibility of Numeric Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*," dated June 19, 2006 (Storm Water Panel Report), to improve the State's NPDES Storm Water Program.

At the outset, we note that the "Notice of Public Workshops" seeking public comment on this issue states that "specific comments on the report" will not be allowed. However, the Notice also indicates that the purpose of the workshops is "to solicit public comment from the public on how the State Board can use these findings [in the Storm Water Panel Report] to improve" the State's Storm Water program. It would seem somewhat difficult to provide comments on how the State Board can "use" the findings of the Storm Water Panel Report to improve the state's storm water program, without commenting on or referring to the Report itself. As such, PSSEP interprets the prohibitory admonition to mean that the State Board is not interested in comments on the accuracy, scope or credibility of the Report itself.

As such, PSSEP will limit these comments to policy-related issues associated with the underlying question at hand: how can the State Board use the findings of the Storm Water Panel Report to improve the state's Storm Water Program?

PSSEP
Partnership for Sound Science in Environmental Policy

Bay Area Clean Water Agencies

Bay Planning Coalition

California Association Of Sanitation Agencies

California Council for Environmental & Economic Balance

California Manufacturers & Technology Association

Chemical Industry Council

Chlorine Chemistry Council

Contra Costa Council

Tri-TAC
Sponsored by:
League of California Cities
California Association of Sanitation Agencies
California Water Environment Association

Western States Petroleum Association

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If one thing is clear from the Storm Water Panel Report, it is that imposing numeric limits in storm water permits at this time for non-conventional pollutants is premature.[1] PSSEP does not question the *legal authority* of the State or Regional Boards to impose numeric limits in storm water permits. Indeed, *Defenders of Wildlife vs. Browner* (191 F.3d 1159 (9th Cir. 1999)) clearly held that the State could, at its discretion, impose numerical compliance standards. That said, the Storm Water Panel Report findings clearly underscore the fact that it would be bad public policy to impose such numeric limits without more monitoring data, development of more effective "best management practices" for municipal, construction and industrial storm water discharges, and more importantly, a policy that fully addresses the type of storm design criteria that permittees are expected to address through implementation of their BMPs.

Monitoring Data

The experts that the State Board convened to analyze and provide recommendations on this issue were ***unanimous*** in their findings that - - with respect to all three categories of storm water - - there is simply inadequate data from which to determine whether existing BMPs can achieve compliance with numeric limits. The first step toward improving California's Storm Water Program must be to establish an appropriate monitoring program that, after a reasonable period of time, will render sufficient information that will provide the State and Regional Boards, storm water permittees, environmental non-governmental organizations and other interested parties ample data to assess what current BMPs work, why, and if not, how to improve them.

As part of this first step, PSSEP believes it is necessary to comprehensively analyze the potential resource needs for such a storm water-based monitoring program In other words, the State Board needs to assess what staff resources are currently available to work on this project, and provide a realistic recommendation to the Administration and the Legislature of what additional resources will be necessary to get the job done. Further, this State Board assessment must take into account the resource needs at all municipal, industrial and construction-related entities in order to perform the necessary monitoring that the Panel of Experts says is necessary for all three categories of storm water dischargers. After all, if the State Board is to take the significant - - and unusual - - step of rejecting the current, nationwide approach to storm water management and move toward applying numeric compliance standards, it is vitally critical that ***everyone*** knows what the costs will be.

Moreover, the State Board should provide a reasonable estimate of what outside costs (*e.g.*, technical consultants, laboratory analytical expenses, ongoing reporting costs) will be incurred by each of the storm water permittees from the municipal, industrial and construction sectors.

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[1] References to "numeric limits" throughout this letter are to non-conventional pollutants such as those so-called "priority pollutants" contained in the California Toxics Rule. PSSEP acknowledges that many individual and general permits for storm water discharges throughout the state already contain numeric limits for so-called "conventional pollutants" such as TDS, TSS, BOD and the like.

As with the need to fully assess staff resources to support this anticipated monitoring program, local governments and their taxpaying citizens, small and large businesses, and our representatives in the Legislature and Governor's Office must have a clear idea of all costs associated with this approach. In the end, all interested parties may well agree that the costs of developing and maintaining the type of monitoring program necessary are acceptable. But until those costs are more clearly defined and understood, it is unfair and unwise to simply proceed down that road.

In analyzing the potential costs and staff resource needs associated with developing the appropriate Storm Water Monitoring Program, PSSEP urges the State Board to consider closely the admonitions of the Panel of Experts in their findings (p. 6):

- "Monitoring for enforcement of numeric effluent limits would also be challenging" ... because "there is wide variation in stormwater quality from place to place, facility to facility, and storm to storm."

- "Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value."

- "Even for conventional pollutants, there presently is no protocol that enables an engineer to design with certainty a BMP that will produce a desired outflow concentration for a constituent of concern."

While we recognize that the thought of describing a program that is certain to cost state and local governments, as well as small and larges businesses throughout California, hundreds of millions of dollars, may be unappealing to the State Board, we note that there is precedence for this honest and straightforward approach in the context of the State Board's recommended ambient water monitoring program. (*See*, "Proposal for a Comprehensive Ambient Surface Water Quality Monitoring Program, Report to the Legislature," November 30, 2000 at pp. 46-61.) We should add that PSSEP favored and supported the State Board's approach to describing the anticipated costs of the SWAMP program in 2000, and went so far as to work on behalf of the State Board in seeking legislative and Administration support of the funding request.

It is important to also recognize that stormwater sampling can often be, by its nature, an extremely hazardous activity. Personnel assigned such tasks are frequently required to operate vehicles in severe storms, walk in areas with slippery and unsure footing, and expose themselves to wet and sometimes cold conditions experienced only by those in jobs with the most urgent public service needs, such as power line repair personnel. While recognizing the value of increased storm water data collection, we can all agree that assuring human safety must always be a foremost consideration.

Development of "Better" BMPs

Not surprisingly, the Panel of Experts were unanimous and clear in their conclusion that there is inadequate technical guidance and direction with respect to BMPs , whether speaking of municipal, industrial or construction-related storm water runoff. If the State Board seeks to go in the direction of imposing numeric limits in storm water permits, more attention and analysis must be given to how the California BMP Handbooks can be improved, and how compliance with new or "better" BMPs can be determined.

Many PSSEP members who operate under storm water permits have long and successful histories of developing storm water BMPs that provide efficient management of storm water runoff. There is a wealth of knowledge among permittees and their technical consultants that should be harvested and made to benefit other permittees around the state. Consideration might be given to working with local governments to determine how local ordinances might be tailored to more efficiently integrate the State and Regional Boards' storm water requirements with local development guidelines and requirements in a way that maximizes implementation and maintenance of BMPs. Yet to go this route implicates the very bases of local land use and development decisionmaking, and the State Board would be wise to understand the potential political implications of essentially passing on to local governments the potential enforcement responsibilities of this kind of a storm water program.

In any event, what is clear from the Storm Water Panel Report is that the State Board needs to reassess how BMPs are identified , implemented and enforced as part of its effort to improve the state's Storm Water Program . This need applies whether or not the State Board decides to migrate towards a numerical compliance standard approach.

Storm Water Policy

Perhaps the single most significant message one can take away from the Storm Water Panel Report is that, before the State Board changes the current approach to regulating storm water discharges, it must develop an overall policy for storm water management. Many in the regulated community have been calling on the State Board for several years to develop such a policy. When the State Board adopted the State Implementation Plan to implement the California Toxics Rule in 2000, it specifically ***excluded*** storm water discharges from coverage. However, some Regional Boards (notably, Los Angeles and San Diego) have begun to, we think prematurely and unwisely, impose CTR-based numeric limits in storm water permits.

The State Board excluded storm water discharges from the SIP for a very important and practical reason, as further underscored by a Finding from the Panel of Experts:

> "It will take a substantial research effort, including gathering on well-designed BMPs, to develop design criteria for the removal of pollutants with confidence intervals that enable us to make reliable estimates of the median and variance of the effluent concentrations to be expected from the various types of BMPs. Until this is done, ***it is very difficult to assign legally enforceable numerical effluent limitations to any particular BMP.***" (Storm Water Panel Report at pp. 6-7.)

Inherent in the need for the State Board to consider development of an overall enhanced Storm Water Program and policy is a preliminary determination of the type of design storm criteria that a given set of BMPs would be required to meet. In other words, must the BMPs protect against a 10-year, 50-year, or 100-year storm in every instance? What are the water quality and other environmental benefits to be gained by requiring a "higher-level" of design storm criteria, and are these expected benefits reasonable when considering the cost to local governments and businesses of implementing, maintaining, and improving these BMPs? How is compliance or enforcement to be determined or carried out, and who is responsible for doing it? Is it reasonable to "pass on" the responsibility of compliance enforcement to local governments, and if so, what is the expected cost of that in the form of a state-imposed, unfunded mandate? If the State and Regional Boards are to retain compliance enforcement responsibility, how many new staff will be required throughout the Water Boards system?

These and many, many more technical and policy-level questions should be carefully considered by the State Board as it weighs options for improving the state's Storm Water Program. PSSEP believes, however, that simply abandoning the current (iterative BMP) approach to storm water management and embracing a numerical effluent compliance approach without considering these issues, would be a tragic mistake.

Unless the State Board is willing to embark upon, and assure resources for, the necessary analysis outlined above, it is vitally important that the State and Regional Boards refrain from imposing numeric effluent limits in any kind of storm water permits, whether municipal, industrial or construction related.

Sincerely,

Craig S.J. Johns
Program Manager