

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

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File No. 93939.0005S

July 25, 2006



VIA FACSIMILE AND MAIL (916) 341-5620

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

Re: Comment Letter - Storm Water Panel Report Regarding Numeric Effluent Limitations

Dear Ms. Song:

Best Best & Krieger represents over seventy (70) public entities throughout California as to all aspects of storm water, urban runoff, and waste discharge issues, including compliance with all applicable National Pollutant Discharge Elimination System ("NPDES") permits. Further, Best Best & Krieger has previously provided the State Water Resources Control Board ("State Board") with comments regarding the potential impact that numeric effluent limitations may have on public agency compliance with storm water permitting requirements and the practical and financial burdens which will likely accompany such additional permitting requirements.

Currently, and without adequate consideration and exploration of the concerns expressed below, our public agency clients believe that alternatives to numeric effluent limitations, such as Best Management Practices ("BMP") programs, are a more appropriate course of action at this time. Nonetheless, our clients are interested in providing the State Board with comments regarding how, if at all, the State Board should implement the conclusions and findings in the State Board's expert panel (the "Panel") report (the "Report") regarding the feasibility of imposing numeric effluent limitations.

General Comments Regarding the Panel's Report

Before implementing the feasibility findings of the Panel's Report, the State Board should further explore the implications of setting baseline pollutant levels, against which numeric effluent limitations would likely be calculated. Existing pollution levels vary widely

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between each Regional Water Quality Control Board's jurisdiction, between the areas covered by each watershed, and even between each community within a given area. Given this, it seems impracticable and inequitable to impose the same effluent limitations on all NPDES Permittees. Instead, the State Board should consider how to establish a baseline that is flexible enough to accommodate these variations in existing water quality, while focusing on the unique water quality needs of each area. The Panel was similarly concerned with flexibility in that it found that water quality control methods "would need to be applied to a specific area or region to obtain an understanding of local conditions and problems." (Report, p. 6.) In addition, and similar to the Panel's suggestion, the accommodation of background and naturally occurring pollutant levels should be given careful consideration before implementing numeric effluent limitations. (See Report, p. 17.) The baseline should reflect potential nonpoint pollution sources as well as the unique characteristics of an area's soils. Given the central role that baseline values may play in the formation of numeric effluent limitations, the Permittees request that particular attention be paid to this issue prior to implementing any of the Panel's conclusions.

In addition, the State Board should consider how the violation of numeric effluent limitations would be determined where a party other than the NPDES Permittee causes the violation of a numeric effluent limitation. The Panel's Report does not speak to this issue, yet the importance of "safe harbor" provisions cannot be overstated. Frequently, polluted storm water flows from one piece of property onto a different piece of property which is subject to an NPDES permit. Before any numeric effluent limitation program is implemented, accommodation should be made for downstream property owners to assure that they are not held responsible - either as to treatment or as to enforcement - for the remediation of upstream pollution. Similarly, accommodation should provide for pollutants which are deposited on a Permittee's property by means of rain, wind, or other natural phenomena (e.g., pH pollution caused by rain, fugitive dust).

Further, and although the Report addresses BMPs and numeric effluent limitations separately, the Report does not adequately address how the implementation of BMPs would interface with the potential violation of numeric effluent limitations. Specifically, the State Board should address the situation in which a Permittee faithfully implements all required BMPs but nonetheless remains in violation of a numeric effluent limitation. Given that many public agencies have made significant financial investments in their current BMP programs, the State Board should accommodate this situation in any program to implement numeric effluent limitations.

Finally, and before implementing any numeric effluent limitations in any NPDES permits, the State Board should provide detailed guidance regarding the sampling and monitoring requirements that may accompany the imposition of numeric effluent limitations. The Panel's Report acknowledges that, in addition to other issues, "[m]onitoring for enforcement of numeric effluent limits would also be challenging," but any detailed recommendations as to sampling and monitoring requirements are overlooked. (Report, p. 6.) Before the State Board

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implements any numeric effluent limitations, monitoring and sampling issues – including the size, number, and frequency of sampling as well as the methods required for testing those sample for pollutants – need to be further discussed. Again, financial constraints experienced by a variety of public agencies will make monitoring and sampling extremely challenging.

Comments Regarding Panel's Analysis of Area-Wide Municipal Permit

With respect to the Area-Wide Municipal Permit, the Panel concludes that wide variations in landscape, existing BMPs, watershed-specific features, covered-area, and rainfall events make the imposition of numeric effluent limitations infeasible. Best Best and Krieger's public agency clients generally agree and would urge the State Board to adopt the Panel's finding in this area.

Aside from the Panel's conclusion regarding numeric effluent limitations, the Panel provided significant discussion of the current use and effectiveness of BMPs. (See Report, pp. 6-8.) The Panel suggests many BMPs are built as part of residential, commercial, or industrial projects, but are not maintained by the proponents of those projects. As such, the Panel suggests the project proponents are motivated to find *inexpensive* BMPs without having to consider the long-term *effectiveness* of those BMPs. Further, the Panel suggests that, in many instances, the entities responsible for maintaining or repairing BMPs either lack proper BMP maintenance training or do not reliably carry out routine maintenance. Finally, the Panel concludes that BMPs should be selected based on long-term effectiveness and that any economic and/or aesthetic concerns are likely secondary considerations.

Before implementing any of the Panel's suggested revisions to the current BMP programs, the State Board should consider several practical issues which confront public agencies and need to be addressed as part of any permanent solution. First, public agencies generally lack adequate funding to construct and permanently maintain the vast network of storm water improvements and infrastructure which service municipal areas. Accordingly, public agencies rely, in part, on project developers to construct the storm water improvements which will service specific projects. This is a practical issue which – despite the Panel's suggestion that public agencies "give much leeway to the developer" based on the public agency's lack of "accountability" – is based on the public agency's very real budgetary restrictions. Second, any long-term plan to increase the number and effectiveness of BMPs should account for the potential liability that those BMPs involve. The maintenance of detention/retention basins, catchments, and other BMPs come with great expense and, potentially, with great liability should injury (whether to property or person) be attributed to those BMPs. Given public agency budgetary restrictions, it is impractical from a financial standpoint to unilaterally burden public agencies with the full responsibility and liability of all BMPs within the agency's jurisdiction. This is not to say that public agencies are seeking to avoid responsibility for storm water BMPs, simply that the State Board should take into account the tremendous costs and liabilities which such responsibility brings.

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Comments Regarding Panel's Analysis of Construction General Permit

With respect to the Construction General Permit, the Panel concludes that numeric effluent limitations are feasible. (Report, p. 15.) The Panel explains that, whereas municipal permits cover large areas of varying terrain and conditions, a Construction General Permit generally involves much more limited areas and, thus provides an opportunity to "target" individual pollutants of concern.

First, and before implementing the Panel's recommendations, the State Board should again consider how the water quality needs of particular areas or particular receiving water bodies can be met by numeric effluent limitations. Given the Panel's recognition that water quality, terrain, and tolerable pollutant load varies by area, it would seem ineffective to apply one set of numeric effluent limitations on all Construction Permittees throughout the state. Instead, the State Board should consider the water quality needs of the area in which the construction will occur.

Second, it is unclear how the Panel's conclusion that numeric effluent limitations are feasible can be reconciled with the finding that "developing numeric limitations is feasible." (Report, p. 1.) The Report does not specifically speak to this issue, and the State Board should provide a clear explanation as to what changes in conditions have occurred which merit this new conclusion. Such an explanation might help both the State Board and Permittees to focus on the unique storm water issues presented by the Construction Permit and thereby allow the efficient implementation of any future program.

Third, the State Board should address issues related to smaller construction sites and how water quality pollution from these sites will be accommodated by any future numeric effluent limitation program. The Panel concluded that BMPs involving polymer matrices or chemical additions may be "cost prohibitive" for smaller construction sites. (Report, p. 16.) Citing to these economic considerations, the Panel suggests that other means of treating stormwater pollution need to be implemented and monitored. Unfortunately, the Report does not suggest what these alternatives might include. Given the large number of "small" construction sites in the state, this issue should be further addressed by the State Board before implementing the Panel's conclusions as to this issue. Perhaps exceptions for small construction sites under thirty (30) acres, for example, should be considered.

Comments Regarding the Panel's Analysis of Industrial General Permit

With respect to the Industrial General Permit, the Panel concludes that numeric effluent limitations are feasible for "some" industrial activities. (Report, p. 19.) As with the Construction General Permit, the Panel's conclusion appears to be based on the general limited scope of industrial enterprises and the Panel's conclusion that "industries have control over their facilities." (Report, p. 22.)

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Curiously, the Panel's finding that numeric effluent limitations are feasible is not explained in any detail. Further, this conclusion is not reconciled with the Industrial Permit's finding that "developing numerical effluent limitations is infeasible." (Report, p. 1.) Instead, the Panel encourages the State Board to "re-examine existing data and collect new data" regarding the stormwater management efforts being made by industrial facilities before numeric effluent limitations are established. (Report, p. 19.) Further, the Report does not analyze in any detail the reasons why numeric effluent limitations might be feasible for industrial facilities. Neither does the Report suggest any factors for distinguishing between those industrial facilities for which numeric effluent limitations would be feasible and those for which such limitations would not be feasible. Again, increasing monitoring and sampling requirements for small public agencies, such as school districts, will be cost prohibitive and essentially duplicative of the current industrial permit requirements at such sites.

Until and unless these issues are addressed and analyzed, there seems to be little in the way of the Panel's "recommendations" to implement. In view of this, the Panel's conclusion that recommendations seem premature and should not be implemented by the State Board at this time.

CONCLUSION

In conclusion, the Panel's Report regarding the feasibility of numeric effluent limitations raises many concerns from both a practical and a public policy perspective. On behalf of our public agency clients, we believe that the State Board and the nine Regional Water Quality Control Boards should consider a more effective means to mitigate storm water pollution before imposing additional time consuming and costly sampling, analysis, and treatment requirements through the imposition of numeric effluent limitations. Nonetheless, and because the State Board has specifically requested that these comments focus on how best to implement the Panel's conclusions, we have provided these comments in an effort to outline the remaining issues and concerns which should be addressed prior to any numeric effluent limitation program.

Our public agency clients trust that the State Board will carefully consider these comments and address the questions and concerns raised herein before allowing any Regional Water Quality Control Board to impose numeric effluent limitations as a condition of NPDES permit compliance. Please feel free to contact me should you require any clarification or expansion on the above concerns.

Sincerely,


Marguerita S. Strand
of BEST BEST & KRIEGER LLP