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ADMINISTRATION

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July 20, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-200

RE: Comments on Draft Phase II Small MS4 General Permit

Dear Ms. Townsend and Members of the Board:

Thank you for the opportunity to submit comments on the State Water Resources Control Board's ("Board") draft General Permit ("Draft Permit") to regulate small municipal separate storm sewer systems ("MS4s"). The City of Turlock takes its commitment to environmental stewardship very seriously and is proud of its accomplishments in the areas of stormwater pollution prevention, water conservation, water recycling and reuse, air pollution prevention, and solid waste recycling. The City does, however, have grave concerns about the proposed Phase II MS4 permit for a number of reasons explained below and strongly opposes the implementation of the Draft Permit in its current form.

1. The Draft Permit exceeds federal requirements

The Draft Permit exceeds the six minimum control measures in 40 CFR Part 122.34. The USEPA has determined that the six minimum control measures ("MCMs") are sufficient to reduce the discharge of stormwater-related pollutants from the MS4s to the maximum extent practicable ("MEP"). Therefore, the State has no basis to argue that the provisions of its Draft Permit are necessary to meet the MEP standard. The State has provided no evidence to indicate that implementation of the USEPA's six MCMs will not achieve state water quality standards and that the additional control measures and programs included in the Draft Permit are necessary.

Indeed, the State has not even quantified the nature and extent of the stormwater pollution problem in California or determined how the vast array of provisions in the Draft Permit will achieve their stated aims. Specifically, the Draft Permit burdens MS4s with determining the nature and extent of stormwater pollution in California in Draft Permit Sections E13 and E14 – these sections require receiving water monitoring and the quantification of pollutant loads. By clearly admitting that it has not quantified the problem or whether its solutions will be effective,

the State has no rational basis to justify that the provisions of the Draft Permit should exceed the requirements of the federal regulations and the Clean Water Act.

The US EPA stated in guidance to the Phase II Regulations that it "strongly recommends that until the evaluation of the storm water program in 40 CFR (Section 122.37[1]), no additional requirements beyond the minimum control measures (BMPs) be imposed on regulated MS4s without the agreement of the operator of the affected small MS4." We ask that you respect the USEPA's guidance in this matter.

Without justification, the State Board proposes new programs and higher levels of service in the Draft Permit compared to the existing permit.

2. The Draft Permit contains unfunded state mandates

Incredibly, the SWRCB attempts to argue in the Fact Sheet that charges for stormwater costs are mere fees that the local agencies have the authority to impose. Pursuant to Article XIIID of the State Constitution, a majority vote of the public is the only means by which a stormwater charge, fee or assessment may be imposed. A local agency lacks the authority to unilaterally impose stormwater fees, charges, and assessments. In its Fact Sheet, the SWRCB incorrectly states that, "[t]he local agency permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order…The authority of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention." In reality, where each owner and occupier of a developed lot or parcel of real property is required to pay a fee for the management of storm water runoff from "impervious" areas of the parcel, such a storm water drainage fee is a fee for a property-related service and subject to Article XIIID. *Howard Jarvis Taxpayers Association v. City of Salinas* (1998) 98 Cal.App.4th 1351, 1355; 81 Ops.Cal.Atty.Gen.102 (1998). Therefore, a majority vote of the public is the only means by which a stormwater charge, fee or assessment may be imposed; a local agency lacks the authority to unilaterally impose such fees, charges, and assessments.

Article XIII B, Section 6(a) of the California Constitution ("Section 6") prevents the state government from shifting financial responsibility for carrying out governmental functions to local agencies without the state paying for them. Such "unfunded" state mandates are prohibited. As specified above, the Draft Permit clearly requires a "higher level of service" which is clearly subject to the provisions of Section 6. Indeed, the Fact Sheet notes explicitly how costs of compliance will increase under the Draft Order – "costs will be incremental in nature." Ironically, the State argues that (at $32 per household) the June 2011 Order was more expensive to implement than the May 2012 Order – yet no comparison is made with the

[1] EPA will evaluate the small MS4 regulations at §§122.32 through 122.36 and §123.35 of this chapter after December 10, 2012 and make any necessary revisions. (EPA intends to conduct an enhanced research effort and compile a comprehensive evaluation of the NPDES MS4 storm water program. EPA will re-evaluate the regulations based on data from the NPDES MS4 storm water program, from research on receiving water impacts from storm water, and the effectiveness of best management practices (BMPs), as well as other relevant information sources.)

cost of implementing the proposed Order with the current Order. Please provide an "apples-to—apples" comparison. Using the State's estimated cost of implementation of up to $32 per household, and assuming Turlock has approximately 20,000 households, our City's implementation cost could be up to $640,000.

Clearly, the State Legislature's appetite for spending programs is not matched by an appetite for raising adequate revenue to fund its largesse. The State Legislature has spent the past six years attempting to balance its budget by stealing revenue from local governments (vehicle license fees, redevelopment agencies, ERAF, etc.). If the State wishes to implement such an expansive and prescriptive stormwater program, it has to provide adequate revenues. Unfortunately, once again, the State has resorted to extorting local government to fund a State program.

With recent and proposed increases, the City's NPDES permit fees for wastewater and stormwater have increased 300% with no concomitant increased level of service from the State. Based on the requirements on the Draft Permit, the City of Turlock anticipates its storm water program costs to increase significantly to achieve compliance at the level dictated by the State Water Board.

Please be advised that the City of Turlock has been reducing General Fund expenses for a number of years and yet the 2012-13 budget still leaves a deficit in the General Fund of $2,301,739. The City has implemented employee reductions through early retirements and layoffs, service level reductions and employee salary reductions to address ongoing and recent financial deficits. The impact of expanded and new state regulations will continue to degrade the City's ability to fund core services.

3. The Draft Permit makes MS4s responsible for the implementation of the State's Construction General Permit (CGP) and Industrial General Permit (IGP) [E6c – Enforcement Measures and Tracking]

The Draft Permit forces MS4s to act as the implementation and enforcement arm of the state for its CGP and IGP. The CGP in Attachment A, Part L, Subsection I states: As noted in both Permits, "Regional Water Board shall administer the provisions of the General Permit." Similar language is found in the adopted IGP. Further, the draft IGP notes "Regional Water Boards shall enforce the provisions of this General Permit" [emphasis added]. The CGP, for instance, clearly states that the Regional Water Boards are responsible for "…conducting compliance inspections, gathering site information…,and taking enforcement actions." Yet the Draft Permit attempts to surreptitiously pass these State responsibilities onto MS4s.

As noted in the respective Orders, the implementation and enforcement of the IGP and CGP are clearly the responsibility of the State Water Board through its Regional Water Boards. Indeed, the State collects fees to implements these programs. Therefore, MS4s should not be burdened with these State obligations.

4. The Draft Permit is overreaching and overly prescriptive

The Draft Permit overreaches in a number of ways. Examples include:

- The Draft Order includes more than 100 new tasks for the City of Turlock to implement in its stormwater program.

- The City of Turlock already pays into the Surface Water Ambient Monitoring Program (SWAMP) as part of the regulatory fees for the Turlock Regional Water Quality Control Facility NPDES Permit / WDRs. The Draft Permit at Section E. 13, however, sets up a receiving water monitoring programs that appear duplicitous.

- At a minimum, the City will be required to provide storm water education to school-age children. However, local agencies have no legal authority to impose curriculum on schools. Our experience is that schools have less time for outside speakers given the abundance of State testing and the resulting State domination of the curriculum with its focus on mathematics and language arts. Further the stormwater curriculum suggested by the State includes limited, if any, direct stormwater quality educational information.

- Local agencies will be required to implement detailed Community-Based Social Marketing requirements—without regard to whether these strategies work in any particular community.

- Local agencies will be required to update their general plan, specific plans and zoning codes. This is inconsistent with California local land use authorities. Unless state law is amended to require the inclusion of certain considerations in planning, zoning and building laws, the State Board lacks legal authority to compel dischargers to amend their general plan or other planning documents in any particular way. Further, the Draft Order demands more (land extensive) bio-retention of stormwater which may conflict with other State planning goals such as increased densities, more affordable housing, preservation of farmland, etc.

- The Draft Permit contains language that sets local agencies up for third party lawsuits should its stormwater does not comply with water quality criteria, even if the agencies are fully implementing their stormwater program consistent with the Draft Permit.

Conclusion and Recommendations

The comprehensive and overreaching approach taken in the Draft Permit is of such concern that we respectfully request that new programs and higher levels of services be removed from the Draft Permit. The State Water Board should allow all Phase II MS4s to continue implementing, monitoring, and reporting their current Storm Water Management Programs which are entirely consistent wit the Clean Water Act.

Again, the City of Turlock takes its environmental stewardship role very seriously. Nevertheless, it makes no sense for the State of California to implement a burdensome and prescriptive Stormwater Program – the costs of which will be borne entirely by local government and local businesses.

Very Truly Yours,

Dan Madden
Municipal Services Director