California Council for Environmental and Economic Balance

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Construction General Permit – Stormwater
Deadline: 5/4/07 5pm

May 4, 2007

Ms. Song Her, Clerk of the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter – Preliminary Draft Construction Storm Water General Permit

Dear Members of the Board:

Thank you for the opportunity to comment on the Preliminary Draft Construction Permit. The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit organization of business, labor and community leaders that seeks to achieve the State's environmental goals in a manner consistent with a sound economy. As such CCEEB has taken an active role in working with the State Water Resources Control Board (SWRCB) to address proposed policies and permits that affect the construction, operation and maintenance of linear facilities, such as those used by CCEEB members' companies providing essential public services like natural gas, electricity and communications. CCEEB is writing this letter to provide SWRCB with comments on the Preliminary Draft Construction Storm Water General Permit (Permit).

This Permit would renew and significantly revise SWRCB's existing Construction Storm Water General Permit (Order 99-08). CCEEB supports SWRCB's efforts toward the goal of improving water quality, but is concerned about certain new and revised provisions proposed in the Permit and, in particular, the economic impact the Permit would have on linear projects that have five or more acres of soil disturbance.

CCEEB successfully worked with SWRCB staff in 2003 to develop Order No. 2003-0007, a construction storm water general permit for linear projects (Linear Permit). This resulted in a two-tiered permitting framework for linear projects. Small linear projects were permitted pursuant to the Linear Permit and large linear projects were permitted pursuant to the Construction Storm Water General Permit Order No. 99-08. Based on the new and revised provisions included in the Draft Permit that are more applicable to fixed land development projects than linear projects, the General Construction Permit as proposed is a not a good fit for linear projects.

CCEEB supports the SWRCB in its efforts to improve water quality in California, and we recognize and appreciate the trouble taken by the SWRCB to issue this Preliminary Draft Permit and thereby provide an additional comment period. Many of the changes contained in the Draft Permit, often based on the recommendations of the Blue Ribbon Panel, will have a positive effect on the quality of construction discharges. However, there are some details and outcomes that CCEEB would like to point out that may not have been anticipated by the SWRCB while the Draft Permit was being written. This letter includes comments on the provisions that are of particular concern for linear projects and also provides comments in general on the new and revised provisions in the permit.

1. Applicability of Preliminary Draft Construction Permit to Linear Projects

The Preliminary Draft Permit as written is clearly intended to manage conventional footprint construction projects. There are fundamental problems with the proposed Permit as it applies to linear utility projects greater than five acres, which are common for electricity, telecom, natural gas, and other utility construction projects. The existing Short Linear Utility Permit (SLUP), Order No. 2003-0007-DWQ recognizes that linear projects are different from traditional construction projects, however the Preliminary Draft Permit does not make allowances for the recognized differences between linear and traditional construction projects.

Long linear construction projects are typically of short duration, and are placed in existing easements and rights-of-way, with little to no control over the co-mingled run-on and resulting discharges associated with the site. This makes effluent monitoring highly problematic as the operator has little control over the discharge parameters. Additionally, long linear projects rarely change the slope of the existing terrain and involve minimal grading and clearing. A simplified method for estimating disturbed area on linear projects is to assume approximately one acre of disturbed land per mile of construction. A single project may extend for 20 miles, with only a small portion of the project exposed at any one time as the active part of the trench incrementally advances, closes, and is stabilized behind it.

The proposed risk assessment scheme would result in most linear projects being classified as medium or high risk, a result that misrepresents the actual minimal environmental impacts of these projects. For this and other reasons, the Preliminary Draft Permit as written is an ineffective tool for managing these unique projects. It is believed that numerous unintended consequences will result from the inclusion of long linear projects under this Permit.

2. Permit Complexity/Compliance Issues

The June 2006 Blue Ribbon Panel report on the Feasibility of Incorporating Numeric Effluent Limits into Storm Water Permits states that non-governmental organizations (NGOs) and the regulated community both believe that permitting has become overly and unnecessarily complex. This statement was made before the issuance of the Draft NPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit). However, the Draft General Permit as written is *more* complex than any previous General Permit. This will have two outcomes. First, we believe the complexity will place a burden on Regional Water Quality

Control Board (Regional Board) staff to oversee compliance with these requirements, and will hamper its ability to review and approve the many Permit-related and mandated documents in a timely manner. Second, the far-reaching requirements of the Permit will be burdensome for dischargers to implement; it is our opinion that many construction sites that would have been in compliance with the current Construction General Permit will not be able to comply with the new Permit.

To reduce the number of submittals to the Regional Board and simplify compliance with the Permit, it is suggested that any documents or information that are not in response to exceedances be submitted with the Storm Water Pollution Prevention Plan (SWPPP) and Permit Registration Documents (PRDs), (for example, the Rain Event Action Plan (REAP), or structural controls for volume control, but not the Action Level Exceedance Evaluation Report (ALEER), exceedance notifications, or other notifications.)

3. Hydromodification

Draft Permit, Page 3, Findings 9 and 31
The inclusion of hydromodification issues in this Permit results in double regulation, as municipal Permits also address the issue. Some mechanism for deciding which agency will regulate post-construction hydromodification should be included to avoid confusion. For example, if construction is to occur in an area with local hydromodification requirements, the local requirements should take precedence, and requirements in the Draft Permit should not apply. Because of the nature of linear projects as described above, these projects should be exempt from the hydromodification requirements in the Draft Permit.

It is infeasible for all projects (both linear and conventional) to maintain the recharge rate from the undeveloped condition. For example, projects in areas with low porosity soils are limited by soil type; projects in highly urbanized areas may be restricted from installing infiltration BMPs, and projects in areas with high water tables may also face siting constraints with respect to infiltration. In these cases, the requirement that pre-construction runoff volume must approximate post-construction runoff volume should be replaced with an alternative that is more appropriate, such as allowing pre- and post-construction runoff flow rates to be matched, or an option for exemption should be provided such as in the case of linear construction.

In some cases, exceptions to hydromodification requirements should be made based on the condition of the downstream channels. Especially in highly urbanized areas, receiving waters have been engineered through cross section modification, concrete lining, and the addition of flood control facilities. If site runoff goes to a master planned facility or engineered impervious channel, hydromodification is no longer an issue. In these cases, a site owner or operator should be exempt from the requirement to consider hydromodification.

Draft Permit, Page 24, IX.K.2
The requirement to maintain or reduce the runoff volume essentially mandates the use of infiltration. However, infiltration is not feasible on many sites; see comment above.

4. Active Treatment System

Draft Permit, Page 4, Finding 12
It is suggested that the Draft Permit recognize the EPA Phase II suggestion that sites between 1 and 5 acres pose a lesser risk to water quality. These sites should be regulated but exempt from soil testing and the requirement to install an Active Treatment System (ATS).

5. Receiving Water Monitoring

Draft Permit, Page 5, Finding 17
Finding 17 states that receiving water monitoring will be required at all high-risk sites. However, Table 1 on page 7 of the Draft Permit states that receiving water monitoring will be required at high-risk sites *only under certain conditions*, such as after exceedance of an Acton Level (AL) or Numeric Effluent Limitation (NEL). To clarify the distinction, it is recommended that the language of Finding 17 be altered to state that receiving water monitoring *may be required* for high- and medium-risk sites when certain conditions are met. This clarification will make the Finding consistent with the rest of the Permit.

Draft Permit, Page 5, Table 1
The requirement to perform receiving water monitoring is not feasible in certain areas, and also presents clear safety issues. In some areas of the state, discharge from a site can enter the storm drain and remain underground for several miles and commingling with runoff from multiple sites, eventually daylighting into a large, engineered channel. In these cases, the initial challenge will be locating the precise point where the discharge meets the receiving water. The next challenge will be accessing the receiving water for upstream and downstream sampling, which can involve getting past a locked gate and walking significant distances. Many channels in Southern California have restricted access to the water. For example, some (like the Santa Ana River and Los Angeles River) are trapezoidal channels that would require climbing down a steep slope to obtain a sample from the receiving water. Although provision is made in the Permit to remove the sampling requirement during flooding conditions, the reasons above clearly illustrate why receiving water monitoring, especially during storm events, can be logistically difficult and potentially unsafe. In addition, due to the commingling of a project's discharge with runoff from other projects, it will be impossible to determine the precise effect of one project's runoff on the receiving water.

6. Action Levels and Numeric Effluent Limits

Draft Permit, Page 11, IV.3.a
The Draft Permit requires a NEL for pH of 5.8 to 9.0 pH units at all times but does not specify where the measurement should be taken, e.g., at the end of the pipe, in the catch basin, in the mixing zone, or in the receiving water. It is suggested that the pH be measured where it leaves the site, which could be end of pipe, at a catch basin on the site, or at a location where the discharge first leaves the site.

Draft Permit, Page 16, Table 2
The methodologies listed for analysis of pH and TPH are non-EPA approved methods. Standard Provision III.B requires analyses to be conducted pursuant to approved methods contained in 40 CFR 136. Using approved methods ensures the accuracy and precision of the test results, for

both the discharger and the SWRCB. We recommend that no testing be conducted with methods that are not 40 CFR 136 approved methods. If, however, non-40 CFR 136 methods are specified in the Permit, the data resulting from these tests should not be utilized as a basis for any enforcement actions. Additionally, so that the data obtained through these methods are not misused for future analysis of overall compliance or trends, they should not be uploaded into any state database.

7. Active Treatment Systems

Draft Permit, Page 11, IV.4.a-b
These sections establish acute and chronic toxicity limits for discharges from AT Systems. Requiring toxicity testing on stormwater discharges presents a number of logistical issues, such as availability of acclimated test organisms, capacity of test laboratories, duration of testing, and applicability to what should be short-term discharges (i.e., only while the ATS is in place during construction). We recommend that toxicity limits be deleted from the permit.

Draft Permit, Page 19, IX.G.1
The Permit requires that an ATS be used at all sites where soils containing more than 10% of particles by weight are smaller than 0.02 mm. The Blue Ribbon Panel suggested that the use of an ATS is not appropriate or cost effective for sites smaller than 5 acres, and has not been widely used for these sites. The Panel also suggested that the Regional Board look into improving application of cost-effective source controls at these smaller sites. The Draft Permit should be consistent with the Blue Ribbon Panel recommendations, therefore it is suggested that the use of ATS not be required for sites less than five acres.

Draft Permit, Page 21, IX.G.5.c
The Draft Permit requires that all ATS discharges be directed through a vegetated swale or other physical filter. It is unlikely that additional polishing of effluent would be achieved through use of a swale or additional physical filter.

The use of a vegetated swale at a construction site is not appropriate in many cases. To direct flow through a swale, a swale must be present, and it is infeasible to install a swale, establish vegetation, then maintain/water the vegetation during a construction project. Swale guidelines state that the minimum length of a swale is 100 feet; many construction sites cannot accommodate such a BMP. Further, many construction sites do not have appropriate topography to support a swale. During construction, generally all land is graded, a condition that would destroy a swale. For these reasons, the installation and use of an ATS for effluent treatment should be sufficient to meet ALs and NELs and fulfill the requirement for final filtering.

Draft Permit, Page 21, IX.H.1.b
This source control option requires that the areas of active construction be limited to five acres at any one time. Linear projects typically cross many drainage areas. In addition, linear projects may be broken into different sections which may be covered by separate SWPPPs and could be under construction at the same time. Therefore, this section should clarify that the 5-acre limit is applicable to the immediate drainage basin and not the entire project.

This same comment is also applicable (i.e., in regard to linear permits) to other sections of the

permit that set requirements based on the area of construction.

Draft Permit, Page 63, Attachment E
We recommend that toxicity limits be deleted from the permit for several reasons. The monitoring and reporting section of the Permit mandates that chronic and acute toxicity testing of ATS effluent be performed for each 24 hours of ATS system operation. Based on estimates from several laboratories, a chronic toxicity test averages $1,200, and an acute toxicity test averages $175. For a weeklong rainstorm, toxicity testing alone will cost $9,625. This cost can potentially become very high over a single rainy season, especially during a wet, El Niño-type season. The Blue Ribbon Panel Report stated that, while toxicity has been observed at some ATS sites, in the vast majority of cases, toxicity has not occurred. Also, see the comments to Page 11, IV.4.a-b.

8. Design Storm

Draft Permit, Page 19, IX.G.2.c
This section states: "...the cells are appropriately sized to capture and treat, within 48 hours, the range of expected site runoff from the smallest storms up to the runoff from 1.5 times the ten-year, 24-hour design storm event." In at least southern California, the requirement to size the treatment for 1.5 times the 10-year 24-hour storm is roughly equivalent to sizing the system for a 100-year 24-hour storm. It is unreasonable to have to size the system for this large of an event. In fact, the Storm Water Panel's recommendations to the SWRCB stated, "...Numeric Limits and Action Levels not apply to storms of unusual event size and/or pattern (e.g., flood events)." If the numeric limits are not applicable, the treatment system required to meet the limits should not be required.

Assuming a 10-year, 24-hour storm of 4", drainage areas of 1, 3, 5 and 8 acres, no stormwater infiltration, and a 2 ft. depth of the sediment basin located in front of the ATS, the area required for the sediment basin would be 0.25, 0.75, 1.25 and 2.0 acres, respectively. This represents 25% of the drainage area (note that this percent increases to 50% in areas where the 10-year, 24-hour storm is 8"). If Baker tanks were used for storage in place of a sediment basin, it would require 9, 27, 45 and 72 tanks respectively. Again, as the Storm Water Panel recommended, the numeric limits and action levels should not apply to storms of unusual event size and/or pattern.

9. Emergency Construction and Maintenance Projects

Draft Permit, Page 8, Finding 33
This finding identifies those discharges that are not required to obtain coverage under this permit. However, it omits two classes of activity that were previously exempted from requiring coverage under a construction stormwater permit, namely maintenance and emergency construction. The following language should be included in the findings and the permit:

> "Construction activity does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of the facility, nor does it include emergency construction activities required to protect public health and safety."

In addition, this finding (f) states that certain activities associated with oil and natural gas are not required to obtain coverage under this permit. The language used in the finding is not consistent

with that used in the federal regulation that exempts these activities from requiring a construction stormwater permit. The federal language should replace the language in this finding.

10. Regional Board Submittals

Draft Permit, Page 24, IX.K.1
The Draft Permit requires that dischargers obtain Regional Board approval for the use of any structural control measures used to comply with the pre- and post-construction volume matching requirement. The timeline and mechanism to be used for obtaining approval should be specified in the Permit.

Draft Permit, Page 28, XI.3
It would be significantly time-consuming to require the discharger to create a unique REAP for each rain event, especially during a wet year. A more efficient alternative would be a including a section of the SWPPP that addresses the actions planned for the site before a range of rain events that addresses each phase of construction. This would allow the SWPPP preparer (who should be the person most knowledgeable about the project) to prepare the REAP. While it is important to address each phase of construction due to the varied site conditions found during each phase of construction, the requirement to prepare a separate REAP for each rain event is too onerous.

Draft Permit, Page 30, XIII.2
This section specifies that there is a 90-day public review period once the PRDs are submitted. The actual period could be longer if the RWQCB determines that public hearing is required (the permit does not specify under what conditions this could occur). This unnecessarily delays projects that are needed for electric and gas infrastructure reliability and public safety, especially in regard to linear projects. Applying a CEQA type review at this stage of a project is inappropriate. Other new incorporated aspects of this permit revision such as public accessibility to the electronically submitted NOI, SWPPP and other documents and the specified submittal timeframes are sufficient for public access and review/comment to the SWRCB/RWQCB.

11. General Comments/Need for Clarity

Draft Permit, Page 4, Finding 12
Finding 12 refers to the "R Value." This quantity is also referred to in the Permit as the "R-Factor" and the "erosivity index." This term, which is used in the Revised Universal Soil Loss Equation (RUSLE), should be referred to by a single name to avoid confusion and maintain consistency throughout the document.

Draft Permit, Page 5, Finding 16
Before the Final Permit is issued, the Storm Water Annual Report Module (SWARM) should be made available for testing and comment by the public.

Draft Permit, Page 13, VII.1.b and following sections
The Draft Permit requires that construction projects that began under the previous Permit be covered under the new Permit. It is not appropriate to apply the requirements of the new Permit to projects that are already covered by the previous Permit. It may be feasible for certain aspects of the new Permit to be applied, such as monitoring and reporting requirements. However, for a

site undergoing construction to include an ATS into its layout or to alter drainage design that has already been approved by local agencies in mid-project would be disruptive and burdensome. Implementation of the project should be phased to allow the design of projects to accommodate the Permit requirements.

Draft Permit, Page 18, IX.C.2
The Draft Permit requires that *all* active areas be stabilized at *all* times. This section needs more explanation that is specific to different types of active areas. The provision as written will cause continuous violations during grading operations because the requirement to stabilize is instantly applicable after grading.

In addition, it would be very expensive to stabilize active areas overnight, because the previous day's stabilization measures will be removed or destroyed during the subsequent day's grading operations.

Draft Permit, Page 19, IX.F
This section states: "On a daily basis or more frequently as necessary, the discharger shall inspect all public and private roads that receive storm water discharges from the project and sweep or vacuum roadways as necessary." This requirement should be limited to those days on which construction activity takes place. For example, construction activity may not take place on weekends and holidays. If a pre-, during- or post- construction inspection on a weekend or holiday indicates that sweeping is necessary, then sweeping could be required.

Draft Permit, Page 19, IX.G.1
The reference to source control procedures, Section VIII.G, is incorrect. The correct reference is IX.H, Page 21.

Draft Permit, Page 21, IX.H.1.b
This provision requires "Provide 100 percent soil cover for all areas of inactive construction throughout the entire time of construction, on a year-round basis." Providing 100% soil cover is too restrictive. Even to achieve EPA's final stabilization criteria only requires 70% of the original vegetative cover. This requirement would also not be practical for linear project construction in existing paved areas or on a year round basis (i.e., non-rainy season).

Draft Permit, Page 24, IX.K.1
The Draft Permit requires that post-construction runoff volume should approximate the pre-construction runoff volume. The Permit should define the term "approximate" for clarity.

Draft Permit, Page 24, IX.K.2
The section currently reads:

For projects whose disturbed project area exceeds two acres, the discharger shall preserve the post-construction drainage divides for all drainage areas serving a first-order stream or larger and ensure that post-project time of concentration is equal to or greater than post-project time of concentration.

It is believed that the text is meant to read as follows:

"For projects whose disturbed project area exceeds two acres, the discharger shall preserve the **pre**-project construction drainage divides for all drainage areas serving a first-order stream or larger and ensure that post-project time of concentration is equal to or greater than **pre**-project time of concentration."

A similar error is present in item 3 of the same section. The last portion should read: "... and ensuring that post-project time of concentration is equal to or greater than **pre**-project time of concentration."

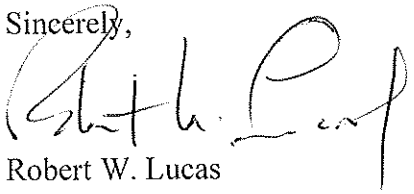
In addition, the requirement to maintain T_c does not make sense. Installation of a storm drain system on a site will reduce T_c in all cases. This Permit section effectively disallows the construction of storm drains on any new site.

Draft Permit, Page 68, Attachment E
The Permit requires a due date of January 1 for the previous year's Annual Report but does not specify the date range the report should cover. While the Annual Report would typically cover the previous calendar year, it would be infeasible to complete a full Annual Report submittal by January 1. For instance, if a storm occurred on December 31 that required testing of ATS effluent, those test results would not be available for up to a week after the due date of the Annual Report. It is suggested that the annual report be due on August 1, and should cover the period of July 1 of the previous year to June 30 of the current year. This will allow a single Annual Report to characterize the discharge from a single rainy season, as well as provide adequate time for report preparation: a month from the end of the reporting period to the report due date.

CCEEB is willing to work once again with SWRCB as we did for the Linear Permit to identify a more effective method of regulating both traditional construction projects as well as linear projects with five or more acres of disturbance.

Thank you for your consideration of our comments. If you have any questions, please contact me at 916-444-7337.

Sincerely,



Robert W. Lucas

cc: Gerald Secundy, CCEEB
Jackson Gualco, The Gualco Group