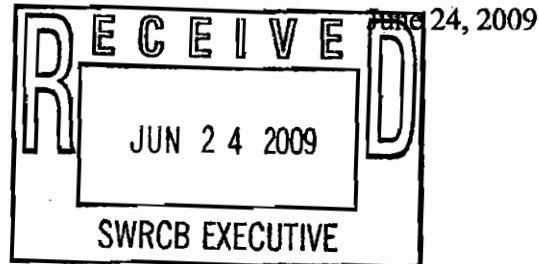




Public Comment  
Dft. Construction Gen. Permit  
Deadline: 6/24/09 by 5:00 p.m.

*Office of the City Manager*



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

**Subject: City of San José Comments on the Draft Construction General Permit**

Dear Ms. Townsend and Members of the Board,

Thank you for the opportunity to provide comments on the Draft Construction General Permit dated April 22, 2009. The City of San José serves a community of nearly one million residents in an area that is home to the largest concentration of technology expertise in the world. As the biggest builder in the community, San José strives to be a leader in demonstrating that sustainable development and environmental protection are not mutually exclusive.

San José's Green Building Policy dates back to 2001. In 2007, the City underscored its leadership in sustainable development by expanding the Green Building Policy to require LEED certification of municipal facilities. In 2008, City Council adopted green building standards for private development. Additionally, in 2007, the City Council adopted San José's Green Vision, establishing 10 bold goals for advancements in environmental protection. Green Vision Goal No. 4 specifically states that over the next 15 years, 50 million square feet of buildings developed or redeveloped in the City shall be "green". The City estimates that approximately 2 million square feet of municipal buildings will be certified green buildings by 2022. Additional Green Vision objectives are central to the Water Board's mission, including trail development and water conservation. With that vision, San José integrates environmental protection into its services and operations as a comprehensive approach to fostering sustainable development.

A core function of the City is the construction and maintenance of infrastructure and facilities. As part of this function, we build parks, libraries, community centers, fire stations, roads, sewers, and the like. With a five-year capital improvement program of approximately \$730 million, the City itself is the largest builder in the community. The Draft Construction Permit marks a substantial shift in the regulation of stormwater discharges and would have a significant impact on the City's ability to effectively manage its infrastructure.

The City has a General Plan and very progressive smart growth and environmental protection policies to drive how development proceeds in San José. The provision of affordable housing

and industry jobs, many in support of clean technology, is critical to allow the City to support the local and State economy and provide services to support our citizens, the community, and the environment. The requirements of the Draft Permit would impact this private development in cost and time, just as it would public projects.

San José appreciates that Water Board staff have worked with stakeholders, including the California Stormwater Quality Association (CASQA), to address concerns with the previous Draft Permit dated March 2008. We acknowledge considerable improvements made, which are responsive to several of our previous comments. Most notably, the revised Draft Permit successfully addresses previous concerns by incorporating the following provisions: a clearer risk level assessment process; greater flexibility for existing projects under the current Permit (automatic risk level 1 designation); removal of open-ended comment period; inclusion of a 5 year compliance storm event; numeric effluent limits (NELs) and multiple types of sampling for only the highest risk projects; a municipal repaving maintenance exemption; and clarification of Stormwater Pollution Prevention Plan (SWPPP) developer and practitioner qualifications.

However, several areas of serious concern remain. San José respectfully requests that the Water Board consider our input to help develop a Permit that is protective, practical, legally defensible, and based on technically sound data and principles. Equally important is the development of a Permit that balances benefits with cost and the ability of the discharger to practicably comply. Key concerns are briefly summarized below and more detailed comments are provided in Attachment A. We also refer the Water Board to our legal comments dated June 11, 2008 (Attachment B), especially comments related to monitoring requirements, economic analysis, and impact of the new permit on projects permitted under Order 99-08; these comments continue to apply to the revised Draft Permit. In addition, we support the comments submitted by CASQA and the Santa Clara Valley Urban Runoff Pollution Prevention Program.

San José is most concerned with the following aspects of the revised Draft Permit:

- **Shift in Regulatory Approach** – The revised Draft Permit denotes a fundamental shift in regulatory approach without addressing key concerns contained in the (Blue Ribbon) Stormwater Panel Recommendations to the California State Water Resources Control Board regarding the feasibility of implementing NELs associated with construction activities. The panel's concerns that NELs may only be feasible for larger projects (that utilize active treatment systems) should be addressed. The panel stated that non-active controls produce more highly variable effluent quality, making the establishment of NELs for smaller sites not using active treatment systems difficult, if not impossible. San José is very concerned about the practicality and cost-prohibitive nature of NELs due to the smaller size and urban constraints of many projects in our community.
- **Monitoring Requirements** – The monitoring requirements, especially for risk level 3 projects, are excessive and will not likely produce water quality benefits or useful data commensurate with cost. In particular, the receiving water and bioassessment sampling requirements have limited nexus with individual project sites. These provisions do not take into account the mixing of runoff from multiple discharges and dilution of runoff in the MS4

by the time it reaches receiving waters. Nor does this provision consider receiving waters that are ephemeral or tidally-influenced. San José requests that any monitoring requirements be directly related to the construction sites.

- **Economic Analysis** – the Draft Permit continues to provide insufficient analysis of the economic impacts of the proposed regulations. San José requests that a comprehensive economic analysis be conducted so that decision makers and dischargers understand the aggregate impact of the proposed requirements. Such an analysis would include more than just the purchase cost for monitoring equipment, as provided in this Permit. The Permit should consider costs, including but not limited to: additional staff resources (for monitoring, reporting, Rain Event Action Plans, etc.); new potential contracts; macroinvertebrate bioassessments; particle size analysis for sediment basins; suspended sediment concentration analysis; laboratory services; advanced treatment systems (training, operation, monitoring, and reporting); training (for design and construction staff); mandatory minimum penalties; potential construction delays; and the escalation of construction costs as more sites concentrate activities during the dry season. Furthermore, the Permit fails to address the economic impacts unique to linear projects, including additional monitoring, sampling, documentation, and reporting of numerous potential discharge points.
- **Implementation Timeframe** – Limited grandfathering in the Draft Permit would not provide a practicable timeframe for projects to comply. Given the complexity and duration of municipal budgeting processes, San José recommends that projects with NOIs filed under Order 99-08 retain full coverage under that Order and that capital improvement projects funded within the next two years of the adopted capital budget be grandfathered, i.e., receive Permit coverage at Risk Level 1.

San José continues to advance the Green Building Policy and the Green Vision. In light of San José's interest in undertaking such bold endeavors, it is paramount that new regulatory requirements be focused to address identified, significant water quality problems and practicable for the operations to which they apply. San José acknowledges the time and effort of Water Board staff that went into the production of the Draft Permit and we appreciate your consideration of our comments. We believe that a Permit can be developed that meets Water Board goals and is mutually beneficial, acceptable, and practical. We look forward to continued cooperation toward this goal.

Sincerely,



Edward K. Shikada  
Deputy City Manager

**Attachment A  
Detailed Comments on Draft Construction General Permit**

<b>Draft Permit Element</b>	<b>Location</b>	<b>Comment</b>
Permit Implementation Timeframe	Order I.A.7 (pg 2)  Fact Sheet D. (pg 12)	<p>Limited grandfathering in the Draft Permit would create an impractical timeframe for project compliance. San José appreciates the exemption of current projects under Order 99-08 from risk determination requirements, however, we request that existing projects retain full coverage under Order 99-08.</p> <p>Given the complexity and duration of municipal budgeting processes, we request that public projects funded within the next two years of the adopted capital budget receive Permit coverage at Risk Level 1.</p> <p>Finally, San José requests that the State delay implementation of the new requirements for all projects at least until after the 2009-2010 rainy season. Implementation of new Permit requirements during the middle of a rainy season would cause significant disruption and additional unbudgeted costs, including redesigning SWPPPs, developing REAPs, qualifying staff, etc.</p>
Maintenance Exemption	Order I.C.24 (pg 5)  Fact Sheet II.C.1.b (pg 9)	<p>Routine maintenance projects receiving Permit exemption should not be limited to a limited set of pre-defined project types as described in the Draft Permit. This provision limits the maintenance exemption to road should work, dirt or gravel road re-grading, ditch clean out, and repaving of asphalt roads when no associated grading or excavation work is done. Municipalities perform many other types of routine maintenance, e.g., athletic field maintenance, that should be exempt as well, but are excluded because they are not specifically stated in the Draft Permit. We request that the Board retain the original language from current Order 00-08-DWQ regarding maintenance exemptions that was developed based on federal regulations (“Construction activity does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of the facility”).</p> <p>The revised Draft Permit does not adequately address its economic impacts as previously requested. In light of the magnitude of proposed Permit requirements, San Jose again requests comprehensive economic analysis to inform dischargers and decision makers of the Permit’s aggregate fiscal impact. While the revised Draft Permit includes cost estimates for pH and turbidity field sampling equipment, a complete economic analysis would include the cost of staffing, training, construction delays, and escalation of construction costs as more</p>
Economic Analysis	Fact Sheet F.1 (pg 14)	

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Draft Permit Element	Location	Comment
Linear projects	Order I.B – I.C (pg 3-5) Fact Sheet II.B – II.C (pg 7-11) Attachment A.1-A.2 Attachment A	<p>sites concentrate activities during the dry season.</p> <p>San Jose appreciates the differentiation between linear projects and traditional projects in the revised Draft Permit. However, the types of projects appear to be treated equally with only modest filing and reporting differences. We recommend that linear projects be assigned a specialized set of requirements representative of site-specific challenges and characteristics of LUPs.</p> <p>The following are examples which demonstrate why the current proposed requirement are uniquely impractical for linear projects:</p> <ul style="list-style-type: none"> <li>• <b>Sampling in all drainage areas:</b> A linear project could stretch over many miles and multiple drainage areas. As currently written, the Permit would require sampling at a copious number of points along the entire length of the project. Compliance would be infeasible, very costly and yield no meaningful data.</li> <li>• <b>Receiving Water Monitoring:</b> By the same token, a linear project could cross multiple watersheds and thus discharge to multiple receiving waters. As with the sampling requirement discussed above, compliance with this requirement would be impractical, very costly and yield no meaningful data.</li> <li>• <b>Run-on and NELs:</b> Most linear projects, because they consist of a narrow area of construction over a long distance, have little or no control over the site run-on and typically do not change the existing slope of the terrain. The Draft Permit indicates that the discharger is not permitted to divert and discharge run-on not meeting the NEL. It is not reasonable to assign a linear project responsibility for the quality of all run-on to the site. We request that run-on, whether meeting NELs or not, may be diverted from areas disturbed by the project and discharged from the site. Appendix A references sampling of risk level 1 LUPs while the Permit only requires sampling of risk level 2 and 3 projects. Please remove all sampling requirements for risk level 1 projects, including LUPs.</li> </ul>
Legally Responsible Person (LRP) &	Order IV.I.1 (pg 23)	Stakeholders should be provided with the opportunity to review the electronic filing requirements and provide the Board with comments and questions related to each local

**Attachment A  
Detailed Comments on Draft Construction General Permit**

<b>Draft Permit Element</b>	<b>Location</b>	<b>Comment</b>
Electronic Filing Water Board Role	Order XV. (pg 37)	agency's organizational limitations. The Draft Permit delegates enforcement to the Regional Water Quality Control Boards (RWQCB). However, the Draft Permit does not provide specific criteria, parameters, or guidelines for enforcement. In addition, the actions allowed to be taken by the RWQCB include rescinding Permit coverage, requiring individual Permit coverage, and additional monitoring and reporting. The Permit should establish RWQCB criteria for when and why a Permit should be rescinded, when a why an individual Permit is required, and when and why additional monitoring and reporting would be required.
QSD and QSP Qualifications	Order VII. (pg 32)	San Jose supports appropriate qualifications for SWPPP designers and practitioners. However, the Permit should indicate the extent of the Board-sponsored training that will be required of all QSDs within the second year of the Permit. For a large municipality, this mandatory training could result in a substantial resource need. We also request the opportunity to assess the QSD and QSP training requirements in the context of the Permit public review process.  The Draft Permit makes many references to qualified personnel, at times without specificity. The QSD and QSP titles are used frequently. Since numerous references are made to QSD and QSP roles and requirements throughout the order, fact sheet, and attachments, please consider the development of a table to illustrate all QSD and QSP roles and requirements throughout all stages of a project.  We recommend denoting that individuals meeting the qualifications for a QSD, by definition, meet the qualification requirements of a QSP (but not vice-versa).  Additionally, please clarify the responsibilities of the QSD and QSP. We recommend emphasizing that QSDs and QSPs are in responsible charge of developing and implementing SWPPPs while liability is ultimately held by the discharger.
Risk Assessment	Appendix 1	San Jose appreciates the benefits of a risk-based approach to protecting water quality and believes that the risk assessment process has been made clearer in this Draft Permit. However, San Jose requests that the risk assessment process include appropriate credit to

**Attachment A  
Detailed Comments on Draft Construction General Permit**

Draft Permit Element	Location	Comment
Run-on sampling and discharge	Attachment A (pg 22, 29, 36) Attachment C (pg 5) Attachment D (pg 6) Attachment E (pg 6)	<p>dischargers who implement less risky construction practices, such as assigning a setback from creeks and reducing the size of area disturbed during rainy season.</p> <p>Language in this Draft Permit places an unreasonable burden on the discharger, especially linear projects, to assume responsibility for the quality of run-on to their site. A discharger should not be responsible for quality of run-on when so many potential pollutants are beyond control of their site, including aerial deposition, shallow groundwater, Permitted discharges, natural sources, etc. This is especially true of public street projects with a copious amount of potential run-on points. As written, a street project might be expected to sample run-on from every property draining to the public street.</p> <p>Current language suggests the discharger is not permitted to divert and discharge run-on not meeting the NEL. We request that run-on, whether meeting NELs or not, may be diverted from disturbed areas and discharged from the site.</p>
Bypass	Order Section IV.L (pg 25)	<p>Additionally, the run-on provision for risk level 1 projects calls for sampling when sampling for risk level 1 projects is not specified in the order or fact sheet.</p> <p>This provision is ambiguous regarding ability of discharger to divert run on. Please clarify that run on can be bypassed.</p>
REAP Requirements	Attachment D (pg 7) Attachment E (pg 8) Appendix 3	<p>The addition of REAP templates (Appendix 3) in this Draft will make the plans more consistent and is appreciated. However, the provision to develop a new REAP 48 hours prior to every likely storm event is redundant and duplicates aspects of the pre-storm inspection. Please modify requirement so that a REAP may be prepared at the start of each phase of construction and implemented prior to likely rain events.</p>
Receiving Water Monitoring	Attachment E (pg 13)	<p>The revised Draft Permit appears to assume that construction sites discharge directly to creeks. Most construction sites in San Jose discharge to municipal systems that co-mingle flows. Those flows may not be accessible for a considerable distance downstream, by which point the total flow would not accurately represent the runoff from the site. Sampling farther downstream or at the ultimate outfall point would be meaningless in cases where other flows</p>

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<b>Draft Permit Element</b>	<b>Location</b>	<b>Comment</b>
		<p>combine with it. Results from receiving waters would be similarly if not more seriously confounded.</p> <p>The required sampling will be dangerous and expensive without a clear environmental benefit. The Draft Permit makes exceptions only in the case of dangerous weather conditions such as flooding and electrical storms. However, the collection of storm samples can be exceedingly dangerous even in non-storm conditions. Furthermore, the Draft Permit lacks accessibility exceptions. The cost and safety risks are additional reasons that receiving water monitoring is impractical for this Permit.</p> <p>San José recommends the receiving water monitoring requirements be related to construction sites that discharge directly to surface waters and that projects discharging through an MS4 be exempt. San José supports the Watershed Monitoring Option to allow relief for dischargers who are part of a qualified regional watershed-based monitoring program. However, significant details describing the Watershed Monitoring Option are lacking from the Draft Permit that should be provided for public review.</p>
Effluent Monitoring	Fact Sheet table 5 (pg 22)	<p>Effluent monitoring for all risk level 2 and 3 projects would be very costly and time consuming, particularly for linear projects. Linear projects can be very large, and may have hundreds of discharge points. Monitoring of all discharge points would be overly burdensome and so expensive that the potential water quality benefit is not commensurate. Please provide feasible guidance in the next iteration of this Draft Permit for monitoring effluent on LUPs.</p> <p>Please include clarification regarding the number of samples required. The blanket requirement of 3 samples per day is not practical for many short-term or intermittent storm events.</p> <p>Additionally, grab samples, even within a single storm event, can prove to be highly variable. This approach is not technically-defensible for measuring compliance with NELs. We recommend the incorporation of effluent sampling averages when measuring for compliance</p>



**Attachment A**  
**Detailed Comments on Draft Construction General Permit**

Draft Permit Element	Location	Comment
Turbidity Sampling	Fact Sheet II.c. (pg 22)	and clarification of sampling protocols addressing instances in which sufficient representative samples cannot be obtained.
Bioassessment	Appendix 5	Turbidity sampling in the field can be inaccurate for a number of reasons, some of which do not relate to activities on the construction site. Macroinvertebrate bioassessment is an integrative tool and may not reflect impacts due to project activity, but other stressors in the watershed. Bioassessment should be used in a watershed context in conjunction with other tools to assess the condition of a water body. Moreover, if a degraded benthic invertebrate community was found at a particular location, there is no way to assess causality since most projects would discharge to the storm sewer system which combines many flows into a single discharge point at the stream. Additionally, this requirement will multiply costs for linear construction projects due to discharges to multiple receiving waters.
ATS Toxicity Testing	Attachment F	San José continues to recommend that such monitoring be conducted outside the Permit as a comprehensive, programmatic effort. ATS use requires toxicity testing. This appears to be a poor use of resources. The Board, rather than having all dischargers in the state sample continuously, should certify coagulants as 'safe' if they have been adequately tested. Requirements for toxicity testing should be eliminated and replaced by documentation to demonstrate proper operation and maintenance of the ATS.
Watershed Monitoring Option	Attachment D (pg 17) Attachment E (pg 19)	The Permit provides no direction on how a watershed-based monitoring program would be qualified and what participation would be required. San José again recommends that this provision be clarified or addressed outside of the Permit in a comprehensive programmatic effort.
Cost of Monitoring	Fact Sheet II.F.1 (pg 14)	The Draft Permit estimates that monitoring compliance will cost approximately \$1,000 per construction site. The Permit accounts for rental or purchase of a pH meter and a turbidity meter. This is a gross underestimate because it neglects to take into account labor for effluent monitoring, receiving water monitoring, soil particle size analysis, cost for benthic macroinvertebrate analysis, back up equipment, maintenance and calibration of equipment,

**Attachment A  
Detailed Comments on Draft Construction General Permit**

Draft Permit Element	Location	Comment
NAL Exceedance Report	Attachment D (pg 19) Attachment E (pg 20)	<p>procedure development, and staff training and certification. We request that monitoring costs be considered as part of a comprehensive economic analysis of Permit impacts.</p> <p>A significant amount of information appears to be missing regarding the Board's response to an NAL exceedance. Please include this information in the Permit for appropriate public review.</p> <p>What is the purpose of submitting NAL exceedance reports? The reporting window indicates no immediate use to the Board. We suggest that this information is most efficiently included in the annual report.</p> <p>Furthermore, we request that the NAL exceedance report not require Method Detection Limit (MDL) information since it is rarely available from common field instrumentation.</p>
Numeric Effluent Limits (NELs)	Fact Sheet II.F.1 (pg 13)	<p>While the City supports the intent of enhancing stormwater quality management through new, scientifically sound methodologies, the City does not support NELs for construction site discharges as proposed in this Draft Permit. There is not sufficient and consistent data to derive and establish numeric limits for turbidity or pH.</p> <p>This revised Draft Permit does not appear to address key concerns expressed by the Stormwater Blue Ribbon Panel Recommendations to the California State Water Resources Control Board regarding the feasibility of implementing NELs associated with construction activities. The panel's concerns that NELs may only be feasible for larger projects, that utilize active treatment systems, should be reflected in this Permit. The panel stated that non-active controls produce more highly variable effluent quality, making setting NELs for smaller sites, and large sites with multiple small drainages, less feasible. San Jose is very concerned about the feasibility, practicality, and cost-prohibitive nature of NELs due to the smaller size and urban constraints of many projects in our community. Consistent with the panel's recommendations, San Jose recommends the implementation of NELs only if they are backed by data sets that are tested, scientifically-sound, and within the capacity of dischargers for all project types and sizes.</p>

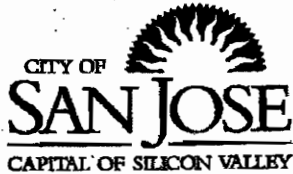
**Attachment A  
Detailed Comments on Draft Construction General Permit**

<b>Draft Permit Element</b>	<b>Location</b>	<b>Comment</b>
		<p>We request that CASQA's questions be addressed regarding the data and evaluative process used to establish NELs and lower the turbidity NEL from 1000 to 500 in this Draft Permit. Fact Sheet section II.F.ii on page 17 notes that common turbidity meters have an effective measurement range of 1-1000 NTU and that the establishment of a 500 NTU NEL was based on best professional judgment and cost consideration. However, Building Industry Association testimony at the public hearing indicated that common turbidity meters in the same price range have the ability to measure 0-4000 NTU. If feasible and achievable NELs are to be established for this Permit, please revisit the best available data to establish an NEL that is within discharger's ability to comply.</p> <p>Additionally, it appears that NALs and NELs were developed without consideration to receiving water pH. Please address how background data from streams factored into the established NALs and NELs. One challenge of establishing limits applicable statewide is that assumes limits for one site are germane for another. In reality, site specific characteristics and conditions of receiving waters should probably determine varying limits for different sites. San Jose supports the phasing in of limits in this Permit and views the implementation of NALs as an acceptable start.</p>
NEL Violation Report	Attachment E (pg 21)	<p>A significant amount of information appears to be missing regarding the Board's response to an NEL Violation Report, including any system of warnings, minimum mandatory fines, etc. Please include this information in the Permit for appropriate public review.</p> <p>Additionally, submittal of report to the Board within 5 days may be impractical, especially during the rainy season when laboratory analysis can require up to three weeks for unexpedited processing.</p>
Active Treatment System (ATS) Requirements	Attachment F	<p>In light of the Blue Ribbon Panel's strong support for ATS as effective technology, we recommend Drafting Permit language in a manner that encourages feasibility of use. ATS requirements are so stringent and costly that the use of this effective technology will be discouraged. The ATS requirements (design to capture and treat a volume equivalent to the runoff from a 10-year, 24-hour storm event in a 72-hour period with a runoff coefficient of 1.0) could be impracticable and without clear water quality benefit commensurate with the</p>

**Attachment A  
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<b>Draft Permit Element</b>	<b>Location</b>	<b>Comment</b>
Non-Stormwater Management	Attachment C C.3 (pg 4) Attachment D C.3 (pg 4) Attachment E C.3 (pg 4)	cost. In the San José area, the volume from a 10 year storm would be about 4 inches. Over a 10 acre site, this represents a volume of 3.3 ac-ft to store. An ATS system would be required to discharge at a rate of about 0.5 cfs or 250 gpm to meet the 72 hr requirement. This is a relatively high flow rate with an estimated <i>per event</i> treatment cost of about \$2,500. Additional proposed ATS provisions that we recommend streamlining to encourage use include: operator and personnel training, operation and maintenance plan, spill prevention plan, health and safety plan, jar tests, filter following coagulation, effluent monitoring/sampling, and reporting.
Conditions for Termination of Coverage	Order II.D.e (pg 17)	Insert "unauthorized" prior to "non-stormwater discharges".
Final Stabilization / Cover	Order II.D.3 (pg 18)	Please insert "if applicable" since dischargers located within an area subject to post construction standards of an MS4 Permit are exempt.  Please clarify final stabilization requirements for termination of coverage. II.D.a indicates "For purposes of final stabilization, the site will not pose any additional sediment discharge risk than it did prior to the commencement of construction activity". However the "70 percent cover method" offered as an option for final stabilization may not necessarily meet the provision noted above.

**Attachment B**  
**Legal Comments on Draft Construction General Permit**



*Office of the City Attorney*

RICHARD DOYLE, CITY ATTORNEY

MOLLIE J. DENT  
Sr. Deputy City Attorney  
Direct Line: (408) 535-1905

June 11, 2008  
via electronic and regular mail

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

**Subject: City of San José Legal Comments on Draft Construction General Permit**

Dear Ms. Townsend and Member of the State Water Resources Control Board:

We are submitting these comments on behalf of the City of San José to identify and summarize legal concerns that San José has with the Draft Construction General Permit. These legal comments are intended to supplement and support the technical comments on the Draft Construction General Permit Tentative Order that have been submitted on behalf of the City of San José by Edward Shikada, Deputy City Manager for the City of San José.

As indicated in San José's technical comments, San José is most concerned with the following aspects of the Draft Construction General Permit:

- Numeric limit-based approach to permitting;
- Excessive and overly prescriptive monitoring requirements;
- Lack of economic analysis for costs of compliance;
- Lack of finality of issued permit; and
- Requirement that municipal capital projects for which funding has already been approved, including projects already covered by the existing construction General Permit, obtain new permits and comply with new requirements.

## Attachment B

### Legal Comments on Draft Construction General Permit

Ms. Jeanine Townsend and SWRCB Members

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#### General Legal Concerns

As the Fact Sheet notes, "This General Permit includes many more specific requirements than the minimum requirements in USEPA's regulations and in the previous General Permit." The Fact Sheet indicates that the permitting approach reflected in the Draft Construction General Permit is based on the recommendation of the State Water Board's Office of Chief Counsel that the new General Permit address court rulings where possible. However, the Fact Sheet also recognizes that neither of the cases referenced in support of this approach are directly applicable to states implementing USEPA regulations.

While the Fact Sheet does not cite the cases on which the Office of Chief Counsel is making its recommendation, we note that one case often referenced for the proposition that monitoring programs must be detailed (*San Francisco Baykeeper vs. Regional Water Quality Control Board*, Consolidated Case No. 500527 (November 14, 2003)) is a trial court decision and thus cannot be cited as precedent as can cases decided by the Courts of Appeal and the Supreme Court. Moreover, any trial court decision is limited to the facts in that specific case, which, in the case of *Baykeeper*, included the fact that the permit in question had no monitoring requirements, only a directive that the Permittee design its own monitoring program.

Significantly, the Fact Sheet omits a discussion of *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4<sup>th</sup> 246. In that case, the appellate court carefully analyzed the Clean Water Act requirements for industrial stormwater discharges and concluded that the Act provides the permitting authority broad discretion to use BMPs for stormwater discharges and provides wide flexibility in designing stormwater controls. In addition to holding that numeric effluent limitations are not required in stormwater permits, the *Divers'* case held as a precedential matter that so long as the permit provides sufficient details and standards, management plans and monitoring plans can be developed by permittees. As the Fact Sheet points out, construction permits are a subset of the industrial permit category, and thus the *Divers* case is a precedential case directly applicable to this permit action.

The Fact Sheet also indicates that the Draft Construction General Permit is motivated out of a desire to demonstrate that "it cannot be said that dischargers subject to the General permit 'write their own permits'." This motivation, which as indicated above, is not dictated by legal requirements, has resulted in a permit that is 78 pages long and prescribes in minute detail how compliance is to be achieved. Rather than ensuring the legal compliance hoped for by the Office of Chief Counsel, this overly prescriptive approach has produced a Draft Construction General Permit that goes far beyond the "general waste discharge requirements for a category of discharges" that is contemplated by Water Code §13263, and would be invalid as overly prescriptive under Water Code §13360. The overly prescriptive nature of the Draft Construction General Permit combined with its broad application to a wide range of permittees, raises a concern that the State Board is in effect, adopting an underground rule, in violation of the Administrative Procedures Act.

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The Fact Sheet and Draft Construction General Permit also fail to establish the linkage between requirements and improvements in water quality that are required by Water Code §§13241 and 13263. The "risk" levels that drive the permit requirements do not account for sufficient variation among projects and their probable impact on water quality to allow this linkage to be established. The City's technical comments provide more details on areas where the inadequacy of this linkage is particularly evident.

Finally, the Fact Sheet acknowledges that the requirements go beyond those required under the federal Clean Water Act, but fails to provide the economic analysis that is required when the State is going beyond federal requirements. See *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

**Numeric Limit Based Approach to Permitting**

The concerns with this approach that are reflected in the Blue Ribbon Panel recommendations are consistent with the longstanding EPA preference for BMPs in stormwater permits, rather than either technology-based or water quality-based numeric limitations. As the court stated in *Divers*, "Unlike discharges of process wastewater where numeric effluent limitations (technology-based and/or water quality-based) are typically used to control the discharge of pollutants from industrial facilities, the primary permit condition used to address discharges of pollutants in a facilities storm water is a pollution prevention plan. The development and implementation of a site-specific storm water pollution prevention plan is considered to be the most important requirement of the EPA and State issued storm water general permits. Site-specific storm water pollution prevention plans allow permittees to develop and implement 'best management practices', whether structural or non-structural, that are best suited for controlling storm water discharges from their industrial facility." *Divers*, 145 Cal App. 4<sup>th</sup> at 504. The Fact Sheet and Draft Construction General Permit simply do not provide adequate justification for rejecting this long time preference and clearly going beyond the mandates of the federal Clean Water Act.

**Excessive and Overly Prescriptive Monitoring Requirements**

In addition to clearly exceeding federal requirements without any consideration of costs, the monitoring requirements improperly place the burden for receiving water quality monitoring on construction permittees and impose on-site monitoring requirements without adequate showing of water quality benefit. As indicated above, these deficiencies render the requirements legally invalid as well as technically insupportable.

**Lack of Economic Analysis for Costs of Compliance**

The lack of an economic analysis of the cost of compliance with the Draft Construction General Permit is a serious deficiency that affects all aspects of the permit. Whereas here it is acknowledged that the permit goes beyond federal requirements, an economic analysis is required. Putting aside the issue of what level of analysis is required, depending on

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whether the permit is treated as a rule-making subject to the APA, it is clear that estimating only the cost of on-site monitoring, and proving no data to support the \$1,000 estimate for that cost, does not comply with any relevant standard for an economic analysis.

**Lack of Finality of Issued Permit**

As noted in the City's technical comments, there are substantial practical problems related to project planning with the failure to establish a timeframe for Regional Board action on permit applications and the list of actions that the Regional Board could take to delay action, or simply take no action at all. This approach is also legally deficient under the Permit Streamlining Act (Govt. Code §§65920-65960 et seq.), which establishes a thirty day time limit for determining whether an application is complete and a sixty day time limit for action by state and local agencies on applications for development permits, like the Draft Construction General Permit, which are exempt from review under the California Environmental Quality Act (CEQA) and provide for public noticing. Under Govt. Code §§65950 and 65943, an application is deemed complete if notice of insufficiency is not provided within thirty day and if the permit is not acted upon within sixty days, it is deemed approved.

**New Permit Requirement for Projects Covered by Existing Construction General Permit**

The Fact Sheet and Draft Construction General Permit contain possibly inconsistent language on the applicability of the new permit to projects which have already obtained coverage under the existing Construction General Permit. On the one hand the permit state that it will be effective 100 days after adoption, absent USEPA objection, and that it supersedes the existing Construction General Permit except for enforcement purposes. On the other hand, the Fact Sheet states that a permit shall be obtained before construction commences. We recommend that the Permit and Fact Sheet both be revised to clearly indicate that the existing Construction General Permit will apply to projects for which an NOI is filed before the effective date of the new permit. Such language would be consistent with Water Code §§13260 and 13264 which only require a new report of waste discharge to be filed for a permitted discharge where there is a "material change" to the existing permitted discharge.



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**CONCLUSION**

On behalf of the City of San José, we request revision of the Draft Construction General Permit, to address the legal deficiencies noted above as well as the technical concerns expressed in the letter from Deputy City Manager Edward Shikada.

Sincerely,

RICHARD DOYLE  
City Attorney

By: *Mollie Dent*  
MOLLIE J. DENT  
Sr. Deputy City Attorney

cc: Ed Shikada, Deputy City Manager  
John Stufflebean, Director of Environmental Services  
Melody Tovar, Division Manager Watershed Protection

