

April 2, 2009

Writer's Direct Contact
 415.268.6294
 RFalk@mofocom

By Email (MRP@waterboards.c.gov) and Overnight Delivery

MRP Tentative Order Comments
 Attn. Dale Bowyer
 S.F. Bay Water Board
 1515 Clay Street, Suite 1400
 Oakland, California 94612

**Re: Public Comment Submission Regarding Municipal Regional Stormwater
 NPDES Permit**

On behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("Santa Clara Program") and its co-permittees,¹ the following are legal comments concerning the Proposed Tentative Order ("TO") and accompanying documents (including Fact Sheet/Rationale Technical Report) for a Municipal Regional Stormwater NPDES Permit ("MRP" or "Permit") which Water Board staff released for public comment on February 11, 2009.²

OVERVIEW: The Proposed TO represents a substantial improvement over prior drafts of the MRP (especially with regard to its "core" municipal stormwater management program provisions C.2-C.7), and it largely addresses the prior legal deficiencies entailed in the Permit's Discharge Prohibitions, Receiving Water Limitations and C.1 Provision. As set forth in the non-legal comments being submitted by the Santa Clara Program, several aspects of the Proposed TO (including, but not limited to, certain aspects of the Trash, Pollutant-specific, Monitoring, and Conditionally Exempt Discharge Provisions) nevertheless continue to require additional streamlining and/or phasing into future permits in order to make the

¹ The co-permittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District. The Santa Clara Program will be submitting additional non-legal comments under its own letterhead, and many of the co-permittees may be submitting separate comments as well.

² The Santa Clara Program also supports and incorporates by reference, the legal comments being submitted by Gary Grimm on behalf of the Alameda Program.

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MRP feasible absent State-provided funding for such “add-ons,” however desirable they may arguably be from a potential water quality improvement perspective. In addition to this fundamental policy-level issue, there are also a number of wording changes the Santa Clara Program is suggesting that are needed to better clarify the scope or intent of various requirements.³

SANTA CLARA PROGRAM LEGAL COMMENT NO. 1 (Finding No. 1): The TO’s proposed Finding Number 1’s attempt to “incorporate” the entire Fact Sheet (which, among other things, is not composed entirely of subject matter appropriate for findings, will not be considered by the Water Board members in a manner enabling them to legally make findings, and which has numerous errors and omissions within it) and responses to comments into the Permit itself (as opposed incorporating these documents into the record associated with the Permit) by reference needs to be revised to avoid a potentially substantial legal procedural and significant abuse of discretion problem that could undermine adoption of the TO.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 2 (Provision C.1): The revisions to the Permit’s Discharge Prohibitions, Receiving Waters Limitations, and C.1 Provision have corrected serious potential legal deficiencies, represent substantial improvement, and are to be commended. (That said, we request clarification of the intent of the particular placement of the exemption language currently appearing in Provision C.1.a and, as shown in Attachment 1, believe it would make more sense for it to appear earlier in the same paragraph.)

SANTA CLARA PROGRAM LEGAL COMMENT NO. 3 (Provisions C.2-C.7/Core Municipal Stormwater Management Program Elements): Provisions C.2 through C.7 of the Permit have been substantially improved by reducing prescriptiveness, increasing co-permittee flexibility, and by providing for a substantial reduction of data gathering and reporting requirements (at least initially with respect to the latter – see comment concerning Provision C.16’s Annual Reporting requirements below). There are still, however, a few specific aspects of these Provisions that either exceed the Clean Water Act’s maximum extent practicable (“MEP”) standard for municipal stormwater NPDES permitting and/or go beyond the existing NPDES municipal stormwater permitting program as defined by US EPA and represent discretionarily-imposed new program elements or higher levels of service constituting State unfunded mandates.⁴

³ The Santa Clara Program’s suggested changes in the TO are attached to its non-legal comments and, since they also address many of the comments herein also are appended as Attachment 1 hereto. For convenience, in both instances, they appear in a redline/strike-out format.

⁴ To the extent the Permit’s requirements (both within the core program Provisions and particularly outside of them) exceed the boundaries of the Clean Water Act, they require, but have not been given,

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In fact, among others, the following subprovisions of the Core Program Provisions are particularly subject to this legal comment and should be either be eliminated or expressly conditioned on the co-permittees' *receipt* of funding from the State:

adequate assessment as required under sections 13263 and 13241 of the State's Water Code. *See City of Burbank v. State Board*, 35 Cal.4th 613 (2005).

In addition, they are actionable as unfunded mandates. *See County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898 (2007). To the extent any aspects of the Permit may constitute an unfunded State mandate, the Santa Clara Program and its co-permittees want the record to be clear that they have not submitted a permit application that endorses such controls as fundable under local government agency stormwater control programs. They also have not, and are not here or under separate cover, submitting public comments endorsing the issuance of such requirements; are not volunteering to undertake them absent the provision of adequate funding from the State; and officially and for the record wish to state their objection to their inclusion in the Permit despite their efforts to otherwise try and cooperate with Water Board staff on finalizing an MRP and be responsive to the Water Board's desire to improve water quality in the Bay Area. The Santa Clara Program's or any of its co-permittees' prior performance of some of the requirements in question pursuant to prior NPDES permit requirements should also not be deemed to constitute voluntary action on their part, or a knowing and intentional waiver of their objections to them on this basis, given that the statute that formerly exempted Water Board-issued waste discharge requirements from the reach of the voter-adopted Unfunded Mandates Constitutional Initiative was only declared unconstitutional by the Court of Appeal subsequent to the issuance of their last NPDES permit. *See Id.* The Santa Clara Program and its co-permittees also do not concur with, and object to, the self-serving and flawed legal analysis of the MEP and unfunded mandates issues presented in the Permit's "Fact Sheet." In response to these aspects of the Fact Sheet, the Santa Clara Program's and its co-permittees' prior legal comments on these issues and a Primer on Municipal Stormwater Permitting in California that was previously prepared for the California League of Cities are hereby incorporated (and are appended as Attachments 2 and 3).

Likewise, the Santa Clara Program and its co-permittees object to the Fact Sheet's lengthy discussion about why the requirements being proposed supposedly do not go beyond MEP because, when looked at on the basis of the per capita cost they imply, the dollar number is in the two digits and in line with other jurisdictions in the State. This per capita-based cost analysis is not just mathematical slight of hand due to the very large population being covered by the MRP in the Bay Area, it is also irrelevant. *The real issue of whether the Permit's requirements are beyond MEP is whether the cost of these requirements are reasonable and practicable within the context of the existing and projected fiscal condition of the municipalities involved* as evidenced by the state of their budgets. (This is why the NPDES regulations call for the submission of such information in MS4 permit applications in the first instance – see 40 C.F.R. 122.26(d)(1)(vi) and (d)(2)(vi).) In the face of potential bankruptcies by some of the municipalities to be subjected to the requirements contained in this proposed MRP, and severe budget cuts and layoffs projected by others, the real answer here is "no, these requirements are beyond-MRP, in this place, at this time."

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- Provision C.3.b.iii (Required Municipal Implementation of State Conceived Green Streets Pilot Projects)
- Provision C.3.c (Required Municipal Implementation of State-Created Low Impact Development Mandates)⁵
- Provision C.3.h (Required Municipal Recordkeeping, Inspection and Reporting on Operation and Maintenance of Private Stormwater Treatment Systems)
- Provision C.3.i (Required Municipal Implementation of State Conceived Site Design Measures for Small Projects and Detached Single-Family Home Projects)
- Provision C.6.e (Required Highly Prescriptive Municipal Implementation of State Conceived Inspection, Notification, Recordkeeping, and Reporting Requirements related to Construction Inspections).⁶

SANTA CLARA PROGRAM LEGAL COMMENT NO. 4 (Provision C.8/Monitoring):

Provision C.8, as currently crafted, continues to represent a vast expansion of stormwater discharge-related monitoring effort by the co-permittees, the scope of which goes far beyond that demanded by under the Clean Water Act or which appears in municipal stormwater permits US EPA has issued.⁷ The proposed expansion of the Santa Clara Program's existing monitoring program therefore represents a discretionary imposition of additional requirements by the State that needs to be scaled back or expressly conditioned on the co-

⁵ As further elaborated on in Mr. Grimm's and certain Co-Permittee comments, subprovision C.3.c.i(4)-(6) also illegally seeks to make Executive Officer approval of the use of specified types of treatment systems a prerequisite to the issuance of local land use approvals.

⁶ To illustrate at more length how many of the TO's requirements reflect discretionary choices on the Water Board's part which go beyond the federally-mandated floor for municipal stormwater permits and should be eliminated or conditioned upon the receipt of State-provided funding, Attachment 4 presents a comparison chart contrasting several of the TO's subprovisions (both within and outside of the core program Provisions) with a review of the requirements established by four US EPA-issued municipal stormwater permits from states where NPDES municipal stormwater permitting authority has not been delegated from the federal government. The US EPA-issued NPDES permits upon which that analysis is based are also appended as Attachment 5.

⁷ The Clean Water Act's regulations provide enormous flexibility in the amount and type of monitoring that must be required and, contrary to staff's interpretation of a prior San Francisco Superior Court non-precedent-setting decision, even allow (as US EPA typically does) discretion to be accorded to the co-permittees to formulate their own stormwater monitoring requirements. *See* 40 C.F.R. §122.48 (b); Divers' Environmental Conservation Organization v. State Board, 145 Cal.App.4th 246 (2006).

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permittees' *receipt* of State-provided funding for their implementation. A number of the requirements that focus on assessment of the condition of receiving waters (such as subprovision C.8.d) as opposed to the municipal stormwater discharges or their confluence with receiving waters also go beyond the Clean Water Act and represent an illegal attempt to delegate the Water Board's own data gathering and analysis responsibilities to the co-permittees without an associated advanced provision of State funding for the task to be accomplished. Further, the State's own collection of permit fees ostensibly to be used in part for purposes of funding such broad-based monitoring and subsequent attempt to require the co-permittees to again fund these efforts through the imposition of monitoring requirements in the MRP amounts to double-dipping from the same pot and adds insult to municipal injury.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 5 (Provision C.9/Pesticides): Provision C. 9 of the Permit contains at least one element (subsection C.9.e) that should be eliminated as it extends well beyond efforts contemplated under the NPDES permit program and illegally attempts to require inter-agency cooperation and compel free speech.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 6 (Provision C.10/Trash): While the Santa Clara Program and its co-permittees recognize the importance of better trash control to the Bay Area community and endorse a decision by the Water Board to make a reduction in floatables in Bay Area waters a priority, they have a number of legal concerns regarding proposed Provision C.10. First, the scope of the Provision as currently drafted extends well beyond the improved management and reduction of trash conveyed through their municipal separate storm sewer systems, which is the limit of the reach of the Clean Water Act's NPDES permit program. Management/reduction of trash that reaches Bay Area waters through other means (including, but not limited to, wind) constitutes non-point source pollution (not a control on the discharge of a pollutant from a point source).⁸ Second, to the extent the proposed requirements reach into trash that ends up in receiving waters via non-point sources, they require analysis for technical feasibility and economic reasonableness pursuant to sections 13263 and 13241 of the Water Code and constitute non-federal mandates which must be conditioned on the prior receipt of State funding.⁹ Third, there is no reason why the Water Board should impose trash pollution control requirements on some Bay Area municipalities in an NPDES permit (which, among other things is potentially enforceable via citizens suits), while other Bay Area municipalities whose occupants' activities contribute trash directly to the Bay or its tributaries have no parallel federally

⁸ Cf. S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006).

⁹ Since it has never been done previously, before being applied to stormwater or used as the basis for the imposition of municipal stormwater permit requirements, the Basin Plan's narrative "floatables" water quality objective also needs to be assessed for technical feasibility and economic reasonableness pursuant to section 13241 of the Water Code.

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enforceable Clean Water Act permit requirements imposed on them – such practice is not just bad policy in terms of creating an unlevel playing field among Bay Area municipalities, it offends the fundamental principle of equal treatment under the law.¹⁰ Fourth, the Permit's Trash Provision goes beyond even the broadest interpretation of the legal authority conveyed to an NPDES permit writer under Clean Water Act section 402(p)(3)(B)(iii) by making receiving water conditions that are in large part beyond the permittees' control and which may be affected by other point and non-point sources of trash pollution the relevant parameter to be addressed. Fifth, Provision C.10's requirement to install full capture devices, is not only an unfunded mandate unheard of in US EPA-issued municipal stormwater permits, it illegally specifies the manner of performance in violation of Water Code section 13360. Finally, the Fact Sheet concerning this Provision confuses the concept of a trash action level ("TAL") with a numeric effluent limitation; does not explain basis for the calculation of the particular TAL proposed or contain an analysis of its feasibility or economic reasonableness; and ignores the views expressed by the panel of experts previously assembled by the State Water Board in assessing how an action level of this nature might properly be set for use in a municipal stormwater permit.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 8 (Provisions C.11 and C.12/Mercury and PCBs): Permit Provisions C.11 and C.12 contain a number of requirements that go beyond the NPDES municipal stormwater permitting program, are unfunded State mandates, and/or which represent an illegal attempt to delegate the Water Board's own assigned responsibilities to the co-permittees without providing State funding for such tasks in advance. As shown in Attachment 1, US EPA-issued municipal stormwater permits contain no requirements to study or remediate mercury, PCBs, or any other specific pollutant – indeed, unlike CERCLA, RCRA, or the Water Code's provisions concerning waste discharges to land that threaten surface or ground waters, the Clean Water Act's NPDES program is not intended to be a vehicle for effectuating corrective action/site cleanup for historical releases of hazardous substances/wastes be them from cinnabar mine tailings or fluids used in electrical transformers. Nor is there any authority under the NPDES municipal stormwater permitting program for requiring municipalities to effect abatement of mercury or PCBs on private properties (as opposed to just prohibiting the discharge into their storm sewers). Subprovisions C.11.f's and C.12.f's requirements for co-permittees to divert certain non-sanitary waste discharges to POTWs is also unprecedented in terms of US EPA's permitting practices, flies in the face of the NPDES regulations' directive for them to eliminate cross-connections between the separate stormwater and sanitary sewer systems, and specifies the manner of performance in violation of Water Code section 13360.¹¹ In

¹⁰ As an alternative, the Water Board should consider issuing, under its authorities under the Water Code, a separate set of region-wide Waste Discharge Requirements containing trash control requirements applicable to *all* Bay Area municipalities.

¹¹ This also applies with regard to subprovision C.2.d's pump station to POTW requirements.

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terms of sub-provisions C.11.h, C.12.h and C.11.j, the monitoring requirements that may be imposed through the NPDES program do not extend to conducting fate and transport studies in complex downstream waters on behalf of state agencies like the Water Board that have been assigned responsibilities for setting, evaluating, or effectuating attainment of water quality standards, including through promulgating TMDLs and devising waste load and load allocations – these tasks, as well as undertaking public health programs like those specified under subprovisions C.11.i and C.12.i for subsistence fishers, are beyond the scope of the NPDES program, US EPA’s own municipal stormwater permitting practices, and, if they are to be imposed on local governments via the Water Code, require the advanced provision of necessary funding from the State.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 7 (Provision C.13/Copper):

Since Bay Area receiving waters are no longer identified under Clean Water Act section 303(d) as impaired for copper, these pollutant-specific requirements should either be eliminated or must be the manifestation of discretionary requirements based on the Water Board’s discretionary authority which necessitates the *advanced* provision of funding for them from the State. US EPA-issued municipal stormwater permits contain no parallel or broadly sweeping copper-specific requirements.¹² In addition to being beyond the NPDES scope, subprovision C.13.c’s attempt to direct the co-permittees to participate in the Brake Pad Partnership and to advocate for associated legislation illegally attempts to require inter-agency cooperation and compel free speech. Subprovision C.13.e’s command for the co-permittees to conduct studies on copper’s sediment toxicity and sub-lethal effects on salmonids is not tied to municipal stormwater or existing water quality impairment, and represents yet another beyond-NPDES attempt to delegate the Water Board’s own work or wishes to local governments without the advanced provision of State funding for the tasks involved.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 9 (Provision C.14/PBDE, Legacy Pesticides, and Selenium): This Provision should be eliminated in its entirety. Its requirements represent a beyond-NPDES attempt to delegate the Water Board’s own potential pre-303(d) listing/TMDL work to local governments without the advanced provision of State funding for the tasks involved; it illegally attempts to require inter-agency cooperation; and there is no evidence in the record that ties these pollutants to the Santa Clara Program’s co-permittees’ municipal storm sewers or reasonably related conditions of water quality impairment so as to establish a legal foundation for the imposition of these requirements under State law.

¹² Indeed, the only copper-specific requirement US EPA has ever imposed in a municipal stormwater permit to our knowledge was one for a single stormwater outfall that was specifically tied to prior elevated copper discharges in that discrete location via monitoring data contained in the record.

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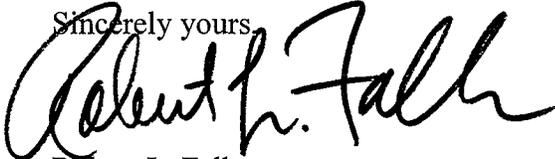
SANTA CLARA PROGRAM LEGAL COMMENT NO. 10 (Provision C.15/Conditionally Exempt Discharges): There is no evidence in the record that the Santa Clara Program's existing conditionally exempt discharge program, which was previously approved by the Water Board staff, has not achieved effective control over the discharge of pollutants in non-stormwater. US EPA's municipal stormwater permits do not contain prescriptive requirements for conditionally exempt non-stormwater discharges absent an affirmative and specific showing in the record that they have proven to be sources of pollutants at levels that affect receiving water quality. The proposed requirements of subprovisions C.15.b.1-v are therefore unnecessary, unjustified, and represent a demand by the State for a higher level of local government service than the NPDES program and its MEP standard requires and necessitate the advanced provision of State funding if they are to be imposed.

SANTA CLARA PROGRAM LEGAL COMMENT NO. 11 (Provision C.16/Annual Report): With respect to annual reports beyond that required for 2009, under both the NPDES regulations and fundamental principles of due process, the Permit may not legally command compliance with requirements to be established in the future (even if through a collaborative process) and which are not available to the Santa Clara Program and its co-permittees for review and comment in advance of the MRP's adoption. Accordingly, the Permit should include a reopener if annual reporting formats or requirements are changed in the future.

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Thank you for the opportunity to submit these comments on behalf of the Santa Clara Program and its co-permittees. We look forward to your responses and to continuing to work with the Water Board staff, including the Regional Counsel, with respect to resolving the issues we have raised.

Sincerely yours

A handwritten signature in black ink, appearing to read "Robert L. Falk". The signature is fluid and cursive, with the first name "Robert" being the most prominent.

Robert L. Falk

Attachments

cc via email:

Bruce Wolfe
Tom Mumley
Dorothy Dickey
Santa Clara Program Management Committee
BASMAA Executive Board
Adam Olivieri
Gary Grimm
Geoff Brosseau