

February 29, 2008

**TO:** Bruce Wolfe, Executive Officer  
California Regional Water Quality Control Board,  
San Francisco Bay Region

**FROM:** Gary J. Grimm

**RE:** **Tentative Order for the Municipal Regional Stormwater NPDES  
Permit for Discharges from Municipal Phase I Permittees  
Legal Comments on the Tentative Order**

These comments and recommendations are submitted on behalf of the Alameda Countywide Clean Water Program (“Program”) and are intended to address legal and regulatory concerns relating to the Tentative Order for the Municipal Regional Stormwater NPDES Permit (“MRSP”).

**1. Monitoring and Reporting Requirements Proposed in the MRSP Significantly Exceed Those Required by Law**

The Tentative Order specifies detailed and extensive monitoring requirements for the MRSP that include the following: San Francisco Estuary Receiving Water Monitoring (Provision C.8.b); Status Monitoring/Rotating Watersheds (C.8.c); Long-Term Trends Monitoring (C.8.d); Status & Trends Follow-up Analysis and Actions (Attachment G); Monitoring Projects (C.8.e); Pollutants of Concern Monitoring (C.8.f); Citizen Monitoring and Participation (C.8.g); Reporting (C.8.h); Standard Monitoring Provisions (Attachment H); and numerous other monitoring and reporting requirements contained in many provisions of the MRSP.

Federal regulations require that all permits shall specify required monitoring including “type, intervals, and frequency sufficient to yield data which are representative of the monitored activity.” 40 CFR §122.48(b). This is the federal legal guidance for the scope of required monitoring requirements for NPDES permits in general and, other than US EPA-issued municipal stormwater permits themselves, there is no specific regulatory guidance on how this should be applied in the context of municipal stormwater permitting.

Water Board staff in the Fact Sheet/Rationale Technical Report specifies the legal, technical and policy rationale for the MRSP provisions set forth in the Tentative Order. The rationale given in the Fact Sheet for the very detailed monitoring provisions of the proposed permit is essentially as follows: Water quality monitoring requirements in previous permits were less detailed than the requirements in this Permit; and under previous permits, each program could design its own monitoring program with few permit guidelines. The Fact Sheet then cites the case of *San Francisco Baykeeper vs. Regional Water Quality Control Board*, Consolidated Case No. 500527 (November 14, 2003) for the proposition that monitoring programs in the MRSP must be detailed and extensive. In the *Baykeeper* case, the trial court found that the monitoring programs in that case, which were essentially non-existent as the permits at issue only contained a directive for the Permittee to design its own monitoring program, did not sufficiently specify the type, intervals, and frequency sufficient to yield data that are representative of the monitoring activity. That decision was decided on the specific facts before the court. It is important to note that trial court decisions such as the *Baykeeper* case do not serve as precedent as do cases decided by the Courts of Appeal and the Supreme Court.

The Fact Sheet fails to both acknowledge the non-precedential character of the trial court decision in the *Baykeeper* case and to discuss or disclose the more recent appellate case of *Divers' Environmental Conservation Organization v. SWRCB* decided by the California Court of Appeal, Fourth District that does serve as precedent. See 145 Cal.App.4<sup>th</sup> 246. In that case the appellate court carefully analyzed the Clean Water Act requirements for municipal and 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, in contrast to the trial court's opinion in *Baykeeper*, 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.

Neither the *Baykeeper* opinion nor the *Divers'* case requires the extensive monitoring provisions proposed by staff for the MRSP. To the contrary - as a matter of law, the *Divers'* appellate decision provides Permittees and the Water Board extremely broad discretion in formulating monitoring programs, and the staff proposal in the Tentative Order goes considerably beyond the very general federal regulatory requirement of providing for monitoring that would include the type, intervals, and frequency sufficient to yield data which are representative of the monitored activity. In fact, as detailed in comments by other Bay Area stormwater programs and Permittees, the staff proposal imposes a substantial additional resource burden on the permittees beyond that required by law. The result is an overly detailed, unduly burdensome, and highly prescriptive monitoring program that is unaffordable, impracticable, goes beyond assuring water quality improvement/protection and is destined to create much data that will serve little useful purpose.

Meaningful compliance data can be provided by the Permittees that satisfies federal regulations with a much less prescriptive and less detailed monitoring program than that indicated in the Tentative Order.

**Recommended Action:** We request that a more reasonable monitoring program for the MRSP as has been set forth in comments submitted by the Program be included in the MRSP.

## **2. Provisions of the MRSP that Require Stormwater Discharge Diversions to Publicly Owned Treatment Works are Beyond the Control and Authority of the Permittees**

Provision C.11.f requires Permittees to evaluate drainage characteristics and the feasibility of diverting flows to sanitary sewers to be treated by the local Publicly Owned Treatment Works (“POTWs”). The provision then specifically requires Permittees to implement flow diversion to the sanitary sewer at five pilot pump stations without awaiting the results of the feasibility studies. Provision C.12.d requires Permittees to evaluate consideration of street flushing and capture, collection, or routing of flows to the POTWs. It then requires Permittees to implement the most potentially effective measures throughout the region. Provision C.12.f requires implementation of five pilot studies for diversion of dry weather and first flush flows to POTWs.

Examples of other flow diversion related provisions are as follows: Provision C.2.i.ii.(3) requires all municipal corporation yard vehicle and equipment wash areas to be plumbed to the sanitary sewer; Provision C.15.b.v.(c) requires new or remodeled swimming pools, hot tubs, spas and fountains to be connected to the sanitary sewer. The Tentative Order also contains many provisions that simply consider and encourage discharge to the sanitary sewers. The latter, however, which stops short of requiring discharges to POTWs, is more appropriate and would be within the legal control and authority of Permittees.

The above-mentioned provisions that require Permittees to discharge urban stormwater flows to POTWs are beyond the control and authority of the Permittees. Most Permittees lack the legal authority to discharge these described flows to POTWs without the POTWs (separate legal entities) providing their consent. POTWs may be concerned with what effect the diverted flows will have on their collection system and treatment plant capacities; how the Permittees intend to control the flows so as to prevent sanitary sewer or collection system overflows; the potential for the flows to exceed the capacity of the biological secondary treatment process and cause or contribute to “blending”; the affect the concentrations and mass loadings will have on compliance with treatment plant effluent limits and TMDL wasteload allocations; and whether acceptable TMDL mass limit offsets or other type of regulatory “credit” will be allowed by the Water Board to accommodate the increased loadings that would be discharged. Moreover, some sewer ordinances legally prohibit the discharge of flow to the sewer system other than wastewater. Even in the unusual situation where the Permittee agency implements both the stormwater program and the sanitary sewer system within the same area, each may be

separately funded, separately organized as legal entities, and have different purposes, jurisdictional limits, and objectives in their operations. These Permittee agencies would still be confronted with similar POTW concerns as noted above.

In short, the Permittees alone cannot legally make a determination to divert stormwater to a POTW – it is beyond their control and authority – and the MRSP should not contain compliance obligations requiring them to perform acts (diverting stormwater, even in pilot tests) beyond their legal capacity.

**Recommended Action:** We request that provisions in the permit requiring stormwater flow be directed or diverted to the sanitary sewer be replaced with requirements to explore the feasibility of obtaining POTW cooperation and consent for such potential flow diversions.

### **3. Discharge Prohibition A.2 and Provision C.1 Should be Revised**

Proposed Discharge Prohibition A.2 prohibits the discharge of refuse and other solid wastes into surface waters or to any place where they would eventually be transported to surface waters. Unlike Prohibition A.1, which specifically addresses how compliance is to be achieved by implementation of provisions of the permit (effectively prohibiting discharge of non-stormwater discharges), Prohibition A.2 contains no such reference to an implementation process for compliance. The Tentative Order also neglects to include references to both Prohibitions A.1 and A.2 in the first paragraph of Provision C.1, in both places where Receiving Water Limitations B.1 and B.2 are referenced. Provision C.1 provides a procedure for addressing water quality standard exceedances.

These omissions are directly contrary to State Water Resources Control Board (“State Water Board”) Order WQ 1999-05, a precedential order requiring that municipal stormwater permits tie discharge prohibitions to the implementation of control measures, by which Permittees’ compliance with the permit can be determined. The State Water Board Order specifically requires that Provision C.1 include language that permittees shall comply with discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in the discharges.

**Recommended Action:** We therefore request that reference to discharge prohibitions A.1 and A.2 be added before “receiving water limitations” in the first and third sentences of the first paragraph of Provision C.1.

In addition to this revision of Provision C.1, the language of Discharge Prohibition A.2 also needs to be revised. State Water Board Order WQ 2001-15 refines Order 1999-05 by requiring an iterative approach to compliance with water quality standards that involves ongoing assessments and revisions. The proposed language of Prohibition A.2 violates the State Water Board Order by omitting any reference to Provisions C.1 through C.17, which provides the practices by which discharge prohibitions are implemented and

evaluated. This State Water Board Order specifically rejects the discharge prohibition approach proposed in the Tentative Order for Prohibition A.2.

**Recommended Action:** Consequently, the following sentence should be added at the end of Prohibition A.2: “Compliance with this prohibition shall be demonstrated in accordance with Provisions C.1 through C.17 of this Permit.” This would also clarify what we understand to be staff’s intention regarding this issue. These two revisions, to Provision C.1 and Discharge Prohibition A.2, would accomplish compliance with the directives of the two above-mentioned State Water Board Orders. We agree with the comments submitted by Bob Falk on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program (“SCVURPPP”) on these issues.

#### **4. An Unreasonable Burden is Placed on the Permittees with regard to Review, Modification and Adoption of New Legal Authorities, Codes, Ordinances and/or Policies**

There are many new requirements in the proposed MRSP that may require significant review of, changes to or development of additional legal authority, codes, ordinances and/or policies throughout the term of the permit. This will be necessary to develop new programs or higher level of service. For example, authority will have to be developed or modified to include requiring treatment controls for previously excluded bike lanes and contiguous sidewalks (Provision C.3.b.i.(4)); to include replacement of certain arterial streets not previously included (Provision C.3.b.i.(5)); to cover previously excluded detached single-family homes that create or replace 5,000 sq.ft. or more of impervious surface and model BMPs (Provision C.3.i.i.iv); to cover and identify certain mobile industrial/commercial sources (Provision C.4.b.ii.(c)); to cover pilot enhanced trash control in certain high trash impact catchments (Provision C.10.a,b&d); to cover discharges from pools, hot tubs, spas, and fountains (Provision C.13.b. and Provision C.15.b.v.).

In addition, there are many new requirements in the proposed MRSP that are partially addressed under the current permits, and some changes to existing legal authority will undoubtedly be needed. These requirements also will require new programs or higher levels of service. Examples of these requirements include revised legal authority for reduction of the 10,000 sq.ft. new/redevelopment threshold to 5,000 sq.ft.(Provision C.3.b.i.(1)(a)); tiered enforcement programs for the results of industrial and commercial inspections (Provisions C.4.c. and C.5.b); authority for the illicit discharge detection and elimination program (Provision C.5.a.); coverage for inspection and enforcement for stormwater pollutant control on all construction sites (Provision C.6.a); development of Integrated Pest Management ordinances for some Permittees (Provision C.9.a&b); and significant modifications to conditionally exempt non-stormwater discharge requirements, control measures and monitoring (Provision C.15.b).

While it is essential for Permittees to develop and/or modify their legal authority to implement required permit provisions, the extent and burden of the effort required to clarify and/or enact all the new and more stringent requirements of the proposed MRSP is

overwhelming. The process, procedures and other legal requirements for establishing such legal authority are complex and time-consuming. The phasing of all these tasks is more appropriate for the term of the next two NPDES permits, rather than a mere 5-year permit term.

**Recommended Action:** Prioritize the tasks and requirements that are most important for inclusion in this 5-year permit cycle and defer the remaining items to the next permit.

### **5. Many Requirements of the proposed MRSP are More Stringent than Required by Federal Law and Constitute State Unfunded Mandates**

The Tentative Order imposes many obligations that both exceed those set forth in federally-issued municipal stormwater permits and that exceed those required by federal law, making them State mandates for “new programs and/or higher levels of service” intended to provide greater benefits to the public. Thus, unless state funding is provided for the implementation of these state imposed obligations by local governments for these aspects of the MRSP, they will violate Article XIII B, Section 6, of the California Constitution. Please refer to more lengthy development of this complex issue by Bob Falk that has been submitted on behalf of SCVURPPP. We concur with those comments.

Many of the new programs and higher levels of service envisioned in the Tentative Order are extremely expensive, staff intensive, or otherwise impracticable without such measures moderating their burden on local governments. These burdens have been explained at length in comments separately submitted by the Bay Area municipalities, Countywide Stormwater Programs, and the Bay Area Stormwater Management Agencies Association. In addition, Regional Board staff members have acknowledged the significant funding problems facing local governments. Consequently, to avoid contentious advocacy proceedings that may consume large amounts of resources on detailed administrative appeals and litigation that could instead be spent on water quality improvement, the Tentative Order should be revised in a manner reflecting consensus with Bay Area local governments on priorities and realistic implementation timetables (which in some cases may have to be phased into future permit terms) and/or the relevant requirements must be conditioned on the receipt of State funding guaranteed to help the municipalities staff and finance their implementation. This approach could be a significant benefit for the improvement of water quality and beneficial uses in the San Francisco Bay area.

Examples of some of the more obvious required new programs and/or higher levels of service are the following: street sweeping requirements (Provision C.2.b); catch basin/storm drain inlet inspection and cleaning (Provision C.2.f); stormwater pump stations (Provision C.2.g and Provision C.8.e.iii); rural public works (Provision C.2.h); lowering of new development threshold to 5,000 sq.ft.(Provision C.3.b); hydromodification requirement (Provision C.3.g); detailed industrial/commercial inspection requirements (Provision C.4.b.&c); and BMP/control measure requirements for non-stormwater discharges (Provision C.15.b).

**Recommended Action:** Regional Board should either (1) direct staff to revise those aspects of the MRSP that exceed federal minimum requirements in a manner reflective of a consensus with local governments concerning priority-setting and phasing over time, or (2) absent the achievement of such a consensus, condition the effectiveness of such discretionarily imposed stormwater management, monitoring, and reporting requirements on local government receipt of funding from the State.

## **6. Permittees are Significantly Restricted in Their Ability to Increase Fees for Stormwater Improvements**

Permittees are faced with significantly increased costs to local government associated with more stringent requirements anticipated by the provisions of the MRSP. Many other commentors have noted and described these consequences in their written responses to the Water Board. Permittees are significantly restricted in their ability to increase certain fees and assessments for stormwater improvement and control by the provisions of Proposition 218. In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act, which added articles XIII C & D to the California Constitution. These constitutional provisions specify various restrictions and requirements for assessments, fees, and charges that local governments impose on real property or on persons as an incident of property ownership.

As a general rule, it is no longer possible to create a new or increase an existing stormwater-specific fee without complying with Proposition 218, which, with the exception of sewer, refuse, and water service, requires voter approval (and even the latter are subject to ratepayer protest procedures). The possibility of receiving grant funding is problematic because it entails expense, and then, is not guaranteed. Not much grant funding is available and applying for grants can be very time consuming - many costs are not eligible for reimbursement; matching funding is often required; the applicant must advance funds; and there is no guarantee of receiving a grant. At the same time rate payer and political sensitivity has increased with regard to other potential forms of revenue increases. With so little funding available from grants, and general revenues constrained by competing service demands, it is increasingly difficult to fund new or increased stormwater programs.

California courts have carefully considered such fee and assessment cases before them and have very closely scrutinized proposed fee increases. In the landmark case of *Howard Jarvis Taxpayers Association v. City of Salinas*, the California Court of Appeals, Sixth Appellate District, held imposition of certain stormwater-specific fees invalid for failure to subject the fees to a vote by the property owners or the voting residents of the affected area. The Court found the fees to be property-related fees, as the provisions of Proposition 218 require liberal construction of the language to effectuate the purpose of limiting local government revenue and enhancing taxpayer consent. This decision has had considerable impact on efforts of public agencies to obtain local revenues to fund the storm water programs mandated by municipal NPDES permits.

Water Board staff have acknowledged the financial difficulties and challenges facing Permittee local government agencies. In the Staff Summary Report to the Water Board on Stormwater Management Programs – Status Report of February 13, 2008, staff recognized that Bay Area stormwater management programs are underfunded and noted the local funding constrains due to Proposition 218 and otherwise.

**Recommended Action:** Exercise discretion in light of the significant financial constraints facing Permittees in determining which, if any, requirements beyond those governing existing programs (which already address the federally mandated elements), should be included in the MRSP.

### **7. Non-Stormwater Exemptions are Overly Prescriptive, too Narrowly Described and are More Stringent than Requirements of Federal Law**

Proposed Discharge Prohibition A.1 requires that Permittees shall “effectively prohibit” the discharge of non-stormwater into the storm drain system and watercourses. This discharge prohibition is based on federal requirements that require that discharges from municipal storm sewers shall include a requirement to “effectively prohibit” non-stormwater discharges into storm sewers. Clean Water Act §402(p)(3)(B)(ii).

This does not mean that all non-stormwater discharge is prohibited. Prohibition A.1 states that Provision C.15 describes a tiered categorization of non-stormwater discharges, based on potential for pollutant content, which may be discharged upon adequate assurance that the discharge does not contain pollutants of concern at concentrations that will impact beneficial uses or cause exceedances of water quality standards. Thus, the intent is to allow certain non-stormwater discharges where water quality problems will not be created by the discharges. Federal regulations support this approach and give municipalities considerable latitude in this determination. 40 CFR 122.26(d)(2)(iv). Municipalities must implement a BMP/control measure related program where certain types of non-stormwater discharges are identified by the municipality as sources of pollutants to waters of the United States.

Proposed MRSP Provision C.15.b.i-vii describes various non-stormwater “discharge types” that may be entitled to conditional exemptions from the discharge prohibition and therefore allowed to discharge to the storm drain system. The introductory paragraph provides that either 1) Permittees/Executive Officer may determine that the described types on non-stormwater discharges are not sources of pollutants to receiving waters and allow such discharges, or 2) require that appropriate BMPs/control measures be implemented in the identified types of discharges before the non-stormwater discharges are allowed (conditionally exempt from the prohibition).

However, the directives of the second alternative in the introductory paragraph of Provision C.15.b as currently drafted in the Tentative Order, where the discharges may be sources of pollutants to receiving waters, exceeds federal requirements. These conditional exemptions as set forth in Provision C.15.b.i-vii are too narrowly drawn and overly prescriptive in nature, thus, going well beyond the requirement of federal law.

The municipalities must be allowed more discretion in the determination of the applicable control measures relating to discharges that may be sources of pollutants to receiving waters as envisioned in and as intended by the federal regulations.

Provision C.15.b.i provides a good example of this overly prescriptive approach - for a very common type of non-stormwater discharge: pumped groundwater, foundation drains, water from crawl space pumps and footing drains. Regardless of the volume of the discharge or nature or magnitude of threat to water quality posed from these common discharges, unless it is made clear that municipalities have discretion in determining the extent to which they are appropriately applied to the situation, the BMPs must include 1) treatment if necessary to remove total suspended solids or silt to allowable levels (levels not specified) with methods suggested; 2) reporting of uncontaminated groundwater at flows greater than 10,000 gallons per day before discharging; 3) assurance that the discharges must meet water quality standards consistent with effluent limits in Water Board general permits; 4) required monitoring with described prescribed methods for a required duration; 5) attainment of prescribed turbidity levels; 6) attainment of prescribed pH limits; 7) dewatering discharges to be discharged to the sanitary sewer if available; 8) erosion prevention requirements; and 9) maintenance of records of the discharges, BMPs implemented and monitoring activity.

Other categories of conditionally exempted non-stormwater discharges set forth in Provision C.15.b of the permit contain similar detailed control measures and requirements. Unless modified by a grant of municipal discretion in the application of BMP/control measures, such detailed control measures are overly prescriptive, inflexible, unduly burdensome, make little sense and go beyond federal requirements.

**Recommended Action:** We request that the introductory paragraph of Provision C.15.b. be revised to read as follows:

“The following non-stormwater discharges are also exempt from Discharge Prohibition A.1 if they are either identified by the Permittees or the Executive Officer as not being sources of pollutants to receiving waters, or if they are identified as sources of pollutants to receiving waters, that BMPs/control measures are developed and implemented, as the Permittee deems appropriate to address the threat posed to water quality, including consideration of the tasks and implementation levels of each category of Provision C.15.b.i-vii below.”

## **8. Proposed Industrial Inspection Provision C.4.b Lacks Clarity**

C.4.b.i. requires inspection of all commercial and industrial facilities that could reasonably be considered to cause or contribute to pollution of stormwater runoff. C.4.b.ii.(l) applies this same criteria for updating and maintaining the list to be inspected. However, C.4.b.ii.(l)(a)-(d) then goes on to describe the types of businesses to be inspected. While the "reasonably considered" criteria are specifically stated in part of the provision, it is absent in the introductory sentence to (a)-(d). The introductory sentence to (a)-(d) simply describes the types of businesses to be inspected. Thus, it is unclear

whether all of the (a)-(d) types of businesses must be inspected, or whether the Permittee has discretion to determine which of these businesses are of the type that “could reasonably be considered to cause or contribute to pollution of stormwater runoff.” It is our understanding that the latter more accurately reflects the intent of this inspection provision. In this way, the Permittees can more effectively accomplish the purpose of the inspection requirements – to inspect those facilities that could reasonably be considered to cause or contribute to pollution of stormwater runoff - while at the same time pay primary attention to the real water quality concerns rather than simply making sure they inspect all facilities.

**Recommended Action:** We request that "reasonably considered" language be added to the introductory sentence for C.4.b.ii.(1)(a)-(d) as it is stated in the two preceding paragraphs so as to avoid misinterpretation and make this Provision more internally consistent. It would then read as follows: “Types of businesses to be inspected include the following if the Permittee finds that the facilities could reasonably be considered to cause or contribute to pollution of stormwater runoff:”

We appreciate your consideration of our comments and recommendations and specifically request your response to our comments and recommendations.

Cc ACCWP Management Committee Representatives  
Kathy Cote, Management Committee Chair  
Jim Scanlin