

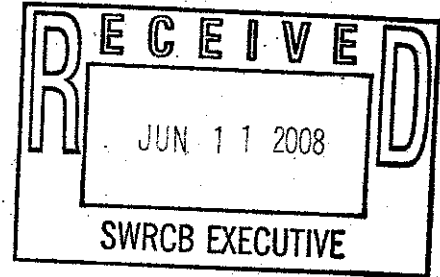
Office of the City Attorney

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, 24th 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 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.

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.4th 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.

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. 4th 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

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.

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