



# City of Salinas

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December 17, 2004

Roger W. Briggs, Executive Director  
Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401



**Re: City of Salinas' Comments on Draft Order No. R3-2004-0135, NPDES Permit NO. CA0049981 Waste Discharge Requirements for City of Salinas Municipal Storm Water Discharges**

Dear Mr. Briggs:

The City of Salinas appreciates the opportunity to comment on the Draft NPDES Permit for the City of Salinas.

As your staff is aware, water quality is a high priority for the City of Salinas, and our City Council. The City currently budgets \$ 2.16 million annually to comply with, and enforce, its existing NPDES permit. The City fully intends to comply with any new requirements imposed by the Regional Board in this new permit. But we caution that the City is currently experiencing significant financial difficulties due to several factors beyond the City's control. For example, this month the City Council was in the unenviable position of having to vote on closing all of its libraries, reducing many other services to below maintenance levels, and laying off 70 of its staff because of financial limitations. As currently drafted, the City estimates that the proposed NPDES Permit will require an additional annual expenditure of \$ 1.3 million to implement and enforce the proposed new requirements. This is money that the City just does not have.

While the City has tried to work cooperatively with Board staff during the permit drafting process, the City has outstanding concerns--especially given the financial implications of this new permit. The City is concerned that the new permit as drafted imposes requirements that go beyond the Board's regulatory authority. The new permit fails to characterize water quality impacts from the City's storm water discharges, and lacks adequate analysis of how the requirements in the new permit will reduce these impacts to desired levels. The draft permit imposes generic requirements developed for other regions, but does not state why the Board believes those generic requirements are appropriate for the City of Salinas. Further, the City is concerned that these generic requirements obligate the City to expend financial resources far in excess of what is required to remediate actual water quality impacts from dischargers that are within the City's regulatory authority. Because of the use of these generic requirements, the City does not believe that the Board has satisfied its obligation to establish a nexus between the City's impact on water quality, and the new permit's regulatory requirements.

Item No. 26, Attachment No. 4  
February 11, 2005 Meeting  
City of Salinas Municipal Separate  
Storm Sewer System

This comment letter will initially provide general comments regarding the Draft Permit, and then will provide comments on specific provisions within the Draft Permit. This comment letter will also include comments on the November 24, 2004 staff report.

## **1. Lack of Proper Findings.**

The Draft Permit does not contain findings that specifically address conditions in the City of Salinas, nor does it address how those conditions affect water quality. For example, Findings 13-15 purport to address discharge characteristics in Salinas, but rather they are generic findings that fail to properly characterize the City's discharge. Finding 14 provides a laundry list of urban pollutants of concern, but does not characterize to what extent a particular pollutant is of concern in the City. Finding 15 makes generic statements regarding imperviousness, and cites to several studies in support of these generic statements. But none of these studies is specific to, or even include, Salinas, the Salinas Valley, or Monterey County. Therefore, these studies provide little support for Finding 15 as applied to the City.

The lack of proper findings is significant for several reasons. There may be jurisdiction-specific conditions that affect which BMPs are appropriate for implementation in the City. Further, jurisdiction-specific conditions may determine which private developments should be properly subject to the permit. For example, the draft permit does not take into account precipitation, soil composition, receiving water quality, or sources of pollutants not under the City's control. This is important because, as discussed more fully below, there needs to be a nexus between the impact a particular project will place on water quality, and the BMPs that the City is going to require the project owner to incorporate into the project design, otherwise the City could face a legal challenge.

## **2. Lack of Nexus in Permit**

It is incumbent on regulatory agencies to characterize and quantify a project's impacts, and to impose permit conditions that will mitigate those impacts without requiring the permittee to mitigate more than its share of total impacts. As discussed above, the draft permit does not attempt to characterize the impacts from Salinas' stormwater discharge. So it is impossible for the Regional Board to come to any conclusion that the permit conditions imposed will result in mitigation. Simply finding that the permit conditions could reduce runoff, and consequently, could result in an improvement to water quality, is not sufficient. Further, the permit makes no attempt to demonstrate how the permit conditions will result in advancing the goals of the Regional Board's Basin Plan. The draft permit merely assumes that these regulatory requirements will result in water quality improvements. Given the results of the City's monitoring program, (which show that of the water sites sampled, the City had either maintained or improved water quality for 61% of the creek reaches within City limits over the past five years), the scope of the requirements proposed go far beyond what is required to address impacts on water quality from dischargers under the City's jurisdiction.

### **3. Draft Permit is Unlawfully Prescriptive**

California Water Code section 13360 prohibits the Regional Board from imposing waste discharge requirements that specify the design, location, type of construction, or particular manner in which compliance may be had with discharge requirements imposed through a NPDES permit. Attachment 4 to the permit, entitled "Storm Water Management Program Revision Requirements" contains extensive prescriptive requirements on the City relating to construction site management, development standards, CEQA document updates, General Plan updates, commercial/industrial facilities discharge management, municipal maintenance, illicit discharge detection and elimination, and public education and participation. It is the City's responsibility to draft a SWMP that complies with the permit. Instead the Regional Board has drafted an extensive, detailed SWMP that, somewhat confusingly, the City is then required to submit back to the Regional Board for approval. The NPDES permit sets the terms and conditions for permitting stormwater discharges; it is the City's responsibility to draft and submit a SWMP that implements the permit, and to submit that SWMP to Regional Board for approval. But with Attachment 4, the Regional Board has essentially usurped the City's drafting role, and has presented this to the City as a *fait accompli*. This violates Section 13360.

### **4. Unfunded State Mandate**

The draft permit's requirements impose an unfunded state mandate on the City in violation of the California Constitution as the State has not indicated that it will reimburse the City for this State-mandated program. See Cal. Const. Art. XIII B, sec. 6. While the Clean Water Act is a federally mandated program, case law makes clear that the prohibition on unfunded mandates applies, unless the State has "no true choice" in the manner of interpreting the federal program. See *Hayes v. Commission on State Mandates*, 11 Cal. App.4<sup>th</sup> 1564, 1593 (1992).

Here, the State, through the Regional Board, has a very real choice about whether to impose these requirements. The U.S. EPA has issued no mandate to require the specific types of new and redevelopment controls of the type set forth in Attachment 4. These controls are strictly the product of State Water Resources Control Board decisions, and therefore, are not costs mandated by the federal government as defined in Government Code section 17513. Unless the State provides funds to offset the real and significant costs associated with this Permit, the Permit constitutes an illegal unfunded mandate under State law.

The City also directs the Board's attention to the recently approved Proposition 1A, which among its provisions, requires that the state fully fund state-mandated programs. If the Legislature does not appropriate the full payable amount, the Legislature must suspend the operation of the mandate. (Article XIII B, section 6(b)(1).)

### **5. Permit Conditions in Excess of Regional Board's Jurisdiction**

On Page 12 of Attachment 4, the City is required to amend its CEQA procedures to allow consideration of potential storm water quality impacts, and to impose appropriate mitigation impacts. The Regional Board does not have the legal authority to require the City to change how it performs its CEQA reviews. The City is required to comply with the CEQA law found in the Public Resources Code, and the CEQA Guidelines drafted by the Governor's Office of Planning and

Research. The CEQA Initial Study already requires a determination whether a project will violate any water quality standards or waste discharge requirements, or otherwise substantially degrade water quality. The City may decide to adopt local thresholds of significance to guide the environmental analysis of a project's impact on water quality, but the City is not legally required to do so, nor does the Regional Board have the legal authority to force the City to do so through the NPDES permit.

Also, on the same page, the City is required to include stormwater management considerations whenever it updates certain General Plan elements. Again, this requirement is outside the Regional Board's legal authority. General Plan updates are governed by the provisions of the Planning and Zoning Law in the Government Code. As a practical matter, it is prudent that the City consider stormwater management when updating the General Plan so that it retains the legal authority to implement its stormwater ordinances and regulations. But the Regional Board lacks the legal authority to require the City to do so.

#### **6. Permit Does Not Take Into Account Cost to the City of Complying With New Requirements**

The SWRCB has recognized that compliance cost is a factor in determining what constitutes the "maximum extent practicable." In discussing the definition of MEP as used in other federal regulations, the SWRCB concluded in Order WQ 2000-11 at 20-21 that "cost is also a relevant factor" and that "In considering the costs of compliance, it is also important to consider the cost of impairment." Finding 16 discusses MEP, but does not explicitly recognize cost as a relevant factor. Further, nowhere in the permit is an explanation given as to how cost was factored into the determination that complying with the Permit would satisfy MEP. As discussed in the introduction, the City is already contributing significant resources to its stormwater program, and will have to contribute considerably more resources if this permit is approved as drafted. Given the City's dwindling resources, the Board has an obligation to consider the City's ability to fund compliance with any new requirements imposed by this permit.

The following are comments on specific provisions of the permit and Attachment 4.

#### **PERMIT:**

Finding 4: This finding incorporates Attachment 2 into the Permit. We note that no other attachment is specifically incorporated by reference into the Permit.

Finding 6, last sentence: This sentence is not a finding. It is regulatory in nature, and should be moved into the Order portion of the permit.

Findings 13-15: These findings contain generalized and conclusory statements regarding urbanization and its effect on water quality. Only Finding 15 contains any support for its statements. But, as we noted above, the studies cited in Footnote 1 do not appear to have studied conditions in the City, the Salinas Valley, or Monterey County. So these studies' evidentiary value

as support for Finding 15 in the context of this Permit is very limited. Findings 13-15 should be removed and replaced by findings that reflect actual conditions.<sup>1</sup>

Finding 16: This finding defines MEP using a description found in the Fact Sheet for SWRCB Order No. 2003-0005-DWQ, which itself is derived from the MEP discussion in SWRCB Order WQ 2000-11. We are unclear how Finding 16 is a finding at all. If this is intended to be a definition of MEP, it should be located in the Order portion of the Permit, not in the Findings. Further, please note the discussion in Paragraph 6, above, regarding cost as a factor in MEP.

Paragraph A.5: The cross-reference should be to 7.b, not 6.b.

Paragraph A.7.b, second line: delete the comma after "implement".

Paragraph A.8, 4<sup>th</sup> line: The cross-reference should be to Paragraph A.5, not Finding 5.

Paragraph B, first sentence: Revise to eliminate the passive sentence construction, and specify where these objectives may be found.

Paragraph B, second sentence: Please see Footnote 2.

Paragraph C.3.a: This subsection needs to be limited to discharges that are under the regulatory control of the City. The City should not be made responsible for implementing additional BMPs to address discharges that it has no authority to regulate.

Paragraph D.1.a.ii and iii: These two subsections effectively impose the same coordination requirements, therefore, one or the other should be deleted.

Paragraph D.1.a.iv: The Regional Board lacks the legal authority to require the City to secure the resources necessary to meet the permit requirements. Salinas is a charter city, and the courts have held that municipal finances are a municipal affair. Cramer v. City of San Diego (1958) 164 Cal. App. 2d 168. This subsection violates Cal. Const. Art. XI, Sec. 5, as it attempts to impose a requirement on the City with respect to its management of its municipal finances. Your staff has cited to 40 CFR 122.26(d)(2)(vi) as support for the language in the draft Permit. This regulation only requires that a fiscal analysis be prepared of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program. It does not require the City to go to the next step of actually securing the resources. Therefore, federal law does not provide support for this permit requirement.

Paragraph D.2.a, last full line: The cross-reference should be revised to read Finding 16.

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<sup>1</sup> The last sentence in Finding 14 reads: "The quality and quantity of MS4 discharges may vary considerably because of the effects of hydrology, geology, land use, season, and sequence and duration of precipitation events." The City agrees with this sentence and cites it as stating the reason why generalized statements regarding discharge characteristics are improper without further findings that more specifically characterize the permittee's discharge, and the factors that govern it.

Paragraph D.2.b, first sentence: This sentence duplicates a portion of Finding 16. As discussed above, the definition of MEP should be placed in the Order portion of the Permit. Duplicating a portion of that definition in this section is not necessary

Paragraph D.2.b, second and third sentence: These sentences duplicate provisions in C.3, and therefore, should be deleted.

Paragraph D.2.e: This paragraph appears to be addressed in Section D.3, and therefore, should be deleted.

Paragraph E.2, second sentence: The City is concerned that this sentence gives the Executive Director broad authority to unilaterally revise the Salinas Monitoring and Reporting Program without notice to the City, or an opportunity for the City to object. The City requests that this sentence be deleted or, if not deleted, amended to give the City the opportunity to provide prior input, and to appeal the Executive Director's changes to the Board if necessary.

#### **ATTACHMENT 4:<sup>2</sup>**

III.c.i: This section defines significant redevelopment projects as creating or adding at least 5,000 square feet of impervious surface. There is no explanation of how the 5,000 square foot threshold was reached, or how this threshold is appropriate for Salinas.<sup>3</sup> The permit contains nothing that would support requiring projects as small as 5,000 square feet to be subject to this Permit. The City needs to have the flexibility to determine the size criteria based on anticipated water quality benefits and the MEP standard.

III.c.i.14: The City does not understand why 10 housing units is being specified as the threshold. A ten-unit single family subdivision has little relation to a ten-unit apartment building in terms of stormwater runoff. They are significantly different types of projects presenting significantly different stormwater runoff concerns. Including these two types of projects into the same category with a threshold of 10 units does not make sense. Further, the City notes that this category makes no exceptions for affordable housing, senior housing, assisted-living facilities, and similar socially desirable housing types. Requiring these projects, which typically have slim profit margins, to fully comply with stormwater BMPs will increase development costs, and discourage developers from

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<sup>2</sup> Our comments on Attachment 4 do not waive or vary the City's objections to the Attachment as discussed above.

<sup>3</sup> We note that the recently approved NPDES permits for Alameda, Contra Costa, and San Mateo counties set this threshold at 10,000 square feet. We further note that if Regional Board's intent is to implement the "Bellflower" decision (Order WQ 2000-11), the definition in the draft Permit is not consistent with the definition set forth by the State Board in that Order.

<sup>4</sup> These categories follow to some extent the categories set forth by the SWRCB in the "Bellflower" decision. Bellflower arose from the municipal storm water permit issued in the Los Angeles region. It set forth definitions for various categories of new and significant redevelopment projects that would be required to comply with the stormwater mitigation plan. The "Bellflower" decision is designated as a precedential decision that Regional Boards are required to follow. But the "Bellflower" decision did leave some discretion to Regional Boards to address revisions that are appropriate to a permittee's particular circumstances. We assert that the Regional Board, here, must consider revisions as the "Bellflower" decision involved MEP in the context of Los Angeles. The MEP standard for Salinas will likely be different because of the obvious differences between Los Angeles and Salinas. Thus, specifying the same MEP standard for Salinas as was specified for Los Angeles is not appropriate.

developing these projects. The City requests the Regional Board exempt these housing types from having to comply with the Permit's BMPs.

III.c.i.2: This category needs to be revised to reflect that the City has land use authority over only private hospitals and educational facilities. The City generally does not have regulatory authority over public hospitals or schools.

III.c.i.7: This category is not included in the Bellflower decision categories. We further note that this category was removed from the Alameda, Contra Costa, and San Mateo county permits at the request of the permittees. The City requests that this category be deleted.

III.c.i.8: The Bellflower decision removed this category from the final Order as the State Board concluded that RGOs are already heavily regulated. The City requests that this category be deleted.

## **STAFF REPORT**

The City has also reviewed the staff report dated November 24, 2004 for the draft permit. But the staff report does little to address the many concerns the City has with the draft permit as discussed above. Rather, the staff report contains numerous statements and discussions with which the City strongly disagrees. The City provides the following comments on the staff report:

II.A: The first sentence reads: "The Proposed Order is modified from the existing permit, as a response to changes in the Federal storm water program, California [sic] 9<sup>th</sup> Circuit Court decisions, analysis of the past five years' sampling results, and lessons learned from implementation of the initial permit." Neither the draft permit, nor the staff report, explain what changes, analysis, and lessons learned are being referred to, nor do they explain what provisions were incorporated into the draft permit to address these changes, analysis, and lessons learned.

II.A.2, page 4: Under Background/Justification, the staff report states: "The Los Angeles SUSMP is the model for the development standards permit language." But nowhere does the draft permit or the staff report discuss why the Los Angeles SUSMP was used as a model.

Page 7: under Monitoring and Reporting Program Requirements, the staff report states: "Decisions regarding changes in the new permit were also driven by sampling results from the past permit term." It is the City's understanding that sampling analysis discussed later in the staff report was performed after the draft permit was released for public review. The City is unclear how the sampling results could have driven changes in the draft permit.

IV.4: This section states: "The City's initial Permit application identified these [residential] watersheds as being the lowest priority for sampling." This section concludes that "Thus, due to a concentration of sampling sites in residential areas, the results from the original sampling program focused on water quality in these [residential] areas, more than the industrial and commercial areas, despite the City's assertion that residential areas were lower priority." These two statements together imply that the City deliberately attempted to skew the sampling results by overemphasizing sampling in residential areas. The City strongly denies this. First, we note that Regional Board staff reviewed the City's original permit application, and apparently had no concerns that the City's proposed sampling program would not properly characterize water quality

within the City. We also note that the Board approved this sampling program with full knowledge of where the City was proposing to take samples. Further, we note that when the City (and RWQCB) first established sampling sites, land use was not the City's focus, assessing receiving water quality was. Sampling sites were therefore dedicated at various creek reaches. During this time, significant new residential construction was either underway, or recently completed, and that residential areas, unlike commercial or industrial areas, tend to be directly adjacent to City creeks. Lastly, we note that Salinas is developed as a heavily-residential city, therefore, it is not surprising that a higher percentage of sampling sites would be in residential areas. For these reasons, the City contends that the sampling program approved by the Regional Board in the City's original permit did properly characterize water quality conditions within the City.

IV.6: This section provides two different analyses of sampling results. The City strongly objects to the staff report's conclusions regarding both analyses. The first analysis compared water quality parameters at a Reference Station located on Gabilan Creek outside the City with water quality parameters at a sampling site on the same creek gathered from within the City. Table 2 purports to show that water quality experienced a significant degradation when the Reference Station is compared to the in-city sampling City. The problem with Table 2, and staff's discussion, is that there is no explanation that the Reference Station is located several miles outside of Salinas. Gabilan Creek downstream from the Reference Station runs through strawberry fields and dairies before it reaches Salinas's city limits. Neither Table 2 nor the staff report acknowledges or characterizes how water quality is, or might be, affected by discharge sources between the Reference Station and the city limits. Further, Table 2 uses Gabilan Creek as the Reference Site for water quality analysis of all other water bodies with the City. This is simply faulty reasoning that leads to indefensible conclusions. Without knowing what the reference values are for the other water bodies, no meaningful comparison can be made. As such, Table 2 is misleading, and the Regional Board should disregard it.

This section acknowledges that "One Reference Station on Gabilan Creek is not a perfect background source for comparison with the entire city." The City agrees with the statement. But this section then states "From [Table 2] one might hypothesize that there are significant urban sources for the analyzed parameters." For the reasons discussed above, the City strongly disagrees that Table 2 could legitimately lead to such a hypothesis. Simply put, staff could not conclude one way or the other whether the exceedences were caused by urban or non-urban sources.<sup>5</sup> To test this "hypothesis", staff performed a trend analysis, which examined samples taken upstream within the City with those samples taken from various locations downstream. Table 3 provides the results. For the creeks examined, except for Gabilan Creek, the analysis found either a decrease in pollutants as the samples moved downstream, or that water quality conditions were being maintained.. The staff report somewhat remarkably concludes that, because of this result, the City's sampling program has not been successful in identifying pollutant sources or trends over time. This conclusion apparently reflects the staff report's post-hoc criticism of the City's sampling program set forth in Section IV.4, as discussed above.

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<sup>5</sup> We have learned from recently completed reports that increased pollutant loads are most likely caused by sources upstream from the City. In the June, 2004 Draft Technical Memorandum entitled *Evaluation of the Annual Environmental Monitoring Program Results* (prepared by Camp, Dresser and McKee) they concluded that, "When the waterways enter the City, the levels of nutrients, bacteria, and solids are already elevated and any additional loads from the City does not result in any [emphasis added] consistent change in the water quality concentrations."



The City strongly disputes this conclusion. A more reasonable conclusion is that the City's existing storm water program is, for the most part, working quite well. The trend analysis, except for Gabilan Creek, shows that urban sources are not contributing to water quality impairment as the creeks move through the City. And the same may even be true for Gabilan Creek as we note that while Table 3 shows increases for various parameters for Gabilan Creek, the staff report makes no attempt to analyze this result to determine whether these increases are statistically significant. Without this analysis, the finding of increases in certain parameters is suspect.

VIII: The second paragraph in this section states that, "The original monitoring program required sampling at prescribed sites for predetermined constituents. The results were mixed, in terms of usefulness for determining pollutant sources." The City agrees with this statement, but does not agree that this mixed result is a function of the sampling program. Staff appears to have approached this analysis with the pre-conception that the analysis would show an increase in pollutants as the creeks move through the City. When the analysis did not bear this out, staff concluded that the only explanation is that the sampling program (reviewed by Regional Board staff and approved by the Board itself) was flawed. The City strongly disagrees that this is the only possible conclusion that could be reached.

## CONCLUSION

Section VIII of the staff report discusses that the draft permit will require the City to first fully implement BMPs and pollutant source controls, and then take water quality samples. The City believes that this puts the cart before the horse. If the Regional Board is going to ignore the results of the City's sampling program, and its own analysis, then the Board has not Salinas-specific data to support imposing additional permit conditions on the City. The City proposes instead that the Regional Board delay action on this permit and direct the City and Regional Board staff to develop and implement a mutually acceptable sampling program. Based on the results of the sampling program, the City and the Regional Board will be in better position to determine what additional BMP and source control measures would be appropriate.

The City of Salinas appreciates the opportunity to comment on the draft NPDES permit. We look forward to working cooperatively with you, your staff, and the Regional Board to fashion a permit that will protect water quality and beneficial uses without imposing unnecessarily burdensome or unlawful requirements on the City.

Sincerely,



Anna Caballero, Mayor

c: City Council  
City Manager  
Deputy City Manager

City Attorney  
Maintenance Services Director  
Donette Dunaway, RWQCB—Region #3