

Response to Comments for the Statewide NDPEs Construction Stormwater General Permit

Public Comment Period: July 22, 2022 to August 23, 2022

Introduction

On July 22, 2022, the State Water Board issued a Public Notice and the proposed National Pollutant Discharge Elimination System (NPDES) Statewide Construction Stormwater General Permit for a 30-day limited scope, written comment period. Written comments are limited to the revisions to the antidegradation findings set forth in the Fact Sheet, Section I.H.2.

The written comment period was from July 22, 2022, to August 23, 2022. The State Water Board received four written comment letters from the following interested parties:

Commenter	Representative(s)
California Department of Transportation	Shaila Chowdhury
Associated General Contractors of California	Brian Mello
Exponent, Inc. on behalf of the: <ul style="list-style-type: none"> • California Building Industry Association; • Building Industry Association of Southern California; • Building Industry Legal Defense Foundation; and • Construction Industry Coalition on Water Quality 	Lily Momper Susan Paulsen
California Coastkeeper Alliance, Los Angeles Waterkeeper, and Heal the Bay	Cody Phillips Benjamin Harris Annelisa Moe

The following responses pertain only to comments received that are within the limited scope of the public written comment period, as identified in the July 22, 2022 public notice. Responses are not provided for comments that do not clearly relate to the Fact Sheet revisions regarding the antidegradation findings.¹ Commenters should generally refer to the State Water Board's July 22, 2022 and March 30, 2022 response to comments documents. The response to comments documents are available on the State Water Board's website at:

https://www.waterboards.ca.gov/water_issues/programs/stormwater/construction/general_permit_reissuance.html.

If you would like to request a copy of the written public comments submitted to the Board, please send a request to commentletters@waterboards.ca.gov, identifying the Construction Stormwater General Permit.

¹ Comments received by the Department of Transportation are outside the scope of this public written comment period; the Department's comments are similar to comments received in previous public comment periods.

Response to Comments

Comment ²	State Water Board Response
<p><u>Associated General Contractors of California</u></p> <p>The Associated General Contractors of California supports the antidegradation findings in the Fact Sheet, specifically regarding compliance with federal and state anti-degradation policies. The Associated General Contractors recognize that discharges authorized in the permit must meet water quality standards that provide the maximum benefit to the people of the State of California.</p>	<p>The commenter’s concurrence with the antidegradation findings is noted.</p>
<p><u>Exponent, Inc.</u></p> <p>Exponent, Inc. supports the findings in the July 2022 proposed permit regarding compliance with state and federal antidegradation policies, particularly the recognition that discharges authorized under the permit are necessary for, and consistent with, requirements that water quality regulations provide the maximum benefit to the people of the State. As set forth in the findings, the July 2022 proposed permit includes measures to maintain and protect existing beneficial uses. The requirements of the July 2022 proposed permit apply to impaired waters and high quality waters and are designed to prevent further degradation of water quality.</p> <p>The State anti-degradation policy allows discharges that may degrade high quality waters only if the lowering of water quality is found to be to the maximum benefit of the people of the State. The proposed permit requires the application of best management practices (BMPs), monitoring, and the application of additional BMPs where warranted via an iterative process.</p> <p>Exponent, Inc. concurs with the State Water Board’s analysis of Alternatives 2 and 3, which finds that the prohibitions on construction activity and widespread implementation of numeric effluent limitations would be impractical and inappropriate, and that requiring extensive and costly treatment measures would exacerbate affordability problems for</p>	<p>The commenter’s concurrence with the antidegradation findings is noted.</p> <p>An antidegradation analysis includes a determination of whether other cost-effective alternatives are available that eliminate or reduce the degradation in water quality. An antidegradation analysis is different from the required analysis to establish permit requirements that are consistent with the assumptions and requirements of applicable waste load allocations in Total Maximum Daily Loads (TMDL) approved by the United States Environmental Protection Agency (U.S. EPA).</p>

² The comments have been edited for clarity. Copies of the original comments are available upon request.

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<p>infrastructure and housing without providing a clear water quality benefit. Exponent, Inc. believes implementation of the numeric effluent limitations proposed in the July 2022 proposed permit are impractical and inappropriate for similar reasons.</p>	
<p><u>California Coastkeeper Alliance, Los Angeles Waterkeeper, and Heal the Bay</u></p> <p>The Antidegradation Analysis Must Address the Benefits of Maintaining High Quality Waters.³</p> <p>As acknowledged in our prior comment letter and the Board’s Fact Sheet supporting the permit, before the Board may issue a permit authorizing discharges that degrade the state’s high quality waters, the antidegradation policy mandates an explanation why that degradation is “consistent with maximum benefit to the people of the State.” This maximum benefits determination inherently requires a comparison between the benefits of the permitted projects and the benefit of maintaining high quality waters. For this reason, as the State Water Board, Administrative Procedures Update, APU 90-004, states, consideration of the maximum benefit “may best be viewed as a balancing test.”</p> <p>The purpose of this maximum benefits balancing test is to ensure that, even where projects have potentially major socioeconomic benefits, the public’s interest in clean water is not overshadowed and disregarded. The Board must explicitly state these findings in the permit and must support these findings by the weight of the evidence.</p> <p>However, in the permit’s maximum benefits balancing test, the Board has once again failed to identify the benefits of stormwater regulation and clean water. Instead, the Fact Sheet only scrutinizes the socioeconomic benefits of construction and the costs of preventing degradation to high quality waters. A California superior court has already found that this type of one-sided analysis is insufficient to support the conclusion that authorizing</p>	<p>No revisions are made to the permit in response to this comment.</p> <p>As explained in the antidegradation findings, the permit requires discharges to comply with all applicable water quality standards ensuring that all high-quality waters will continue to fully support all beneficial uses. As set forth in the description of Alternative 1, dischargers must comply with numerous requirements to protect water quality, including compliance with receiving water limitations. As the antidegradation findings conclude, compliance with the Construction Stormwater General Permit will generally not result in degradation of high-quality waters.</p> <p>If there are instances in which any degradation occurs, the commenter incorrectly assumes that the water will no longer be high-quality, which for an antidegradation analysis means that the baseline quality of a waterbody for a given constituent “exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.”</p> <p>If some degradation occurs, a water may remain high-quality. If the water quality is lowered to only meet, but not exceed, water quality objectives, the water still supports propagation of fish, shellfish, and wildlife, and recreation in and on the water. Further, any degradation</p>

³ The footnotes in the comment letter do not include separate comments that warrant responses and are therefore not included in this document.

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<p>discharges that degrade high quality waters is consistent with the maximum benefit to California residents.</p> <p>For example, Fact Sheet section I.H.2.b.iii cites numerous sources outlining the size of the construction industry, the number of laborers in the field, and the critical importance of construction projects. And, in section I.H.2.b.ii, the analysis goes into great detail on the costs of implementing best management practices (BMPs) capable of preventing degradation to high quality waters. Conversely, there is no equivalent analysis of the socioeconomic benefits of clean water. The Board merely states the unsupported assertion that “harm to the public interest associated with any degradation will also be very minor and speculative because all high quality waters will still fully support all beneficial uses.” This conclusion fails to identify the benefits of clean water and conflates two prongs of the antidegradation policy.</p> <p>The state’s antidegradation policy requires both a finding that “any change will be consistent with the maximum benefit to the people of the State,” and that those changes “will not unreasonably affect present and anticipated beneficial uses.” From these two explicit findings, the antidegradation policy envisions a scenario where the degradation of high quality waters, while not enough to affect beneficial uses, could still be inconsistent with the maximum benefit to the people of the State. As such, the Board cannot satisfy the first requirement—degradation of high quality waters is consistent with the maximum benefit to Californians—merely by stating that no present or anticipated beneficial uses will be unreasonably impacted. For this reason, the Board’s unsupported conclusion in the Fact Sheet is insufficient to satisfy the antidegradation policy, and an analysis of the benefits of clean water is necessary when conducting the maximum benefits balancing test.</p> <p>Many industries such as tourism and water recreation rely on clean waterways, and there are significant public health, environmental, and economic benefits associated with failing to maintain high quality waters. The Board’s antidegradation analysis fails to consider how preventing</p>	<p>would be temporally limited and not result in long-term deleterious effects on water quality.</p> <p>In the two examples provided in the comment, the water quality would still support tourism and water recreation. If there is a differential between enjoyment of a water that exceeds the baseline for a particular pollutant and the enjoyment of a water that meets but no longer exceeds, or exceeds to a lesser extent, the baseline for a particular pollutant, the antidegradation findings conclude that the impact on public interest would be minor. Any further analysis would require knowing the particular pollutant and the degree that water quality for that particular pollutant is affected, which is not possible without knowing project-specific details.</p> <p>Instead, the State Water Board’s antidegradation analysis focuses on the fact that the water will continue to meet water quality standards and therefore any difference would be negligible.</p>

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<p>degradation of high quality waters benefits Californians which is necessary to compare whether the allowed degradation of high quality waters, even if relatively minor, is consistent with maximum benefit to Californians. Without an analysis of the benefits of clean water, the public is left without an adequate understanding of the weight the Water Board assigned to maintaining high quality waters when it conducted its maximum benefit balancing test, and the Board’s antidegradation analysis amounts to nothing more than the conclusion that preventing degradation of high quality waters is costly to construction sites.</p> <p>In summary, to satisfy the antidegradation analysis, the Board must articulate the benefits of maintaining high quality waters to ensure that the public’s interest in clean water is properly analyzed—and that any degradation of high quality waters is meaningfully weighed against the benefits of construction projects—as part of the Board’s conclusion that such degradation is consistent with the maximum benefit of California residents.</p>	
<p><u>California Coastkeeper Alliance, Los Angeles Waterkeeper, and Heal the Bay</u></p> <p>The Alternatives Analysis Incorrectly Determines that the Board Lacks Sufficient BMP Performance Data Necessary to Impose Numeric Effluent Limits for Turbidity and pH.</p> <p>The state antidegradation policy requires the Board to compare its proposed permit with “alternatives that would reduce water quality impacts.” In this most recent permit, the Board expanded its comparison of alternatives that would prevent enrollees from discharging pollution that degrades high quality waters. While we are happy to see this more thorough analysis, the Board’s conclusion regarding the feasibility of one particular alternative—establishing numeric based effluent limitations statewide—is flawed.</p> <p>Under the third alternative analyzed, the Board assesses the feasibility of reducing discharges statewide by implementing numeric effluent limitations</p>	<p>No revisions are made to the permit in response to this comment.</p> <p>In promulgating <i>Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category</i> in 2014, U.S. EPA acknowledged that additional data collection would likely be necessary to inform any numeric discharge standards in the future.</p> <p>Although the State Water Board has compliance sampling data from implementing the 2009 Construction General Permit, sampling data is not the same as best management practice (BMP) performance data. Sampling data reflects the quality of stormwater discharge. Performance data reflects the quality of the stormwater entering and exiting the BMP, to determine the effective pollutant removal or other targeted</p>

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<p>for pH and turbidity. This short paragraph states that the Board lacks the BMP performance data needed to implement numeric technology based effluent limits, as required by the 2011 case, <i>California Building Industry Association v. State Water Resources Control Board</i>. In that case, the court concluded that the Board could not derive numeric effluent limits for pH or turbidity for Risk Level 3 sites unless it identified “available technologies,” and “gathered data characterizing the performance of the technologies under various site conditions,” as necessary to determine “the degree of effluent reduction attainable through the application of the best conventional pollutant control technology.”</p> <p>Through its implementation of the 2009 permit, the Board has had 13 years to collect site-specific data throughout California detailing available turbidity and pH control technologies and their effectiveness under various site conditions. Under the 2009 permit—which is still in effect today—enrollees are required to develop a stormwater pollution prevention plan which outlines the design details for BMPs necessary to control turbidity and pH. In addition, all sites categorized as Risk Level 2 or 3 are required to monitor their discharges for pH and turbidity after any storm event producing ½ inch or more of precipitation, and enrollees are required to submit annual reports which include a summary and evaluation of all sampling and analysis results. This permit structure means that, after 13 years of implementing the 2009 permit—a timeframe in which the Board has processed nearly 23,000 Notice of Intent application packages for regulatory coverage—the Board is currently in possession of voluminous data characterizing the performance of the available BMP technologies under various site conditions.</p> <p>Even putting aside the numerous existing studies on best management practices for controlling stormwater pollution from construction sites, as we detailed in previous comments on the first draft of the permit in 2021, the Board has collected all the necessary data to implement numeric effluent limits for turbidity and pH. For this reason, the statement in the revised antidegradation analysis that the Board lacks the requisite data to impose</p>	<p>stormwater management. Further, each construction site implements a different combination of BMPs. Therefore, the State Water Board needs further BMP-related information, in addition to stormwater sampling data, for further analysis. Further, in addition to sampling and BMP performance data, the factors identified in 40 CFR section 125.3 require additional categories of information that the State Water Board does not have.</p> <p>Finally, it is not clear that the imposition of a pH or turbidity numeric effluent limitation would prevent or lessen potential degradation. The State Water Board does not have statewide data identifying all high-quality waterbodies and existing levels of each pollutant for which that water was high quality. Without that data, it would not be possible to know whether the numeric effluent limitations were set at a level sufficient to prevent any degradation.</p>

Response to Comments for the Statewide NPDES Construction Stormwater General Permit
August 29, 2022

Comment²	State Water Board Response
<p>numeric effluent limits as an alternative to authorizing degradation of high quality waters is false. The Board certainly possesses that data, it simply needs to assess it in the context of available BMP technologies to determine the best conventional pollutant control technology and numeric effluent limits that are consistent with such a level of pollution control.</p> <p>Accordingly, the Board must revise its antidegradation analysis to include an assessment of data collected under the 2009 permit and adopt numeric effluent limits for turbidity and pH based on the available data.</p>	