

September 2, 2011

Mayor:
CHUCK DELLA SALA

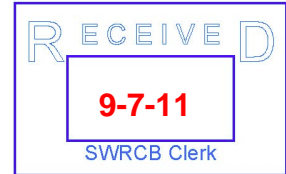
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Ms. Jeanine Townsend, Clerk to the Board
State Water Resource Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Electronic delivery to commentletters@waterboards.ca.gov

Subject: **Comment Letter – Phase II Small MS4 General Permit**



Dear Ms. Townsend and Members of the State Water Resources Control Board (SWRCB):

The City of Monterey (City) appreciates the opportunity to review and provide comment on the Draft General National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (draft Permit). We also appreciate that the SWRCB responded to the many requests to extend the review period on this important draft Permit.

That said, the City has legitimate concerns about the draft Permit as currently proposed and we ask that you carefully consider the comments and recommendations below when revising and approving the draft Permit.

Funding Scarcity

Limited funds are available to municipalities to implement local storm water management programs. With ever-decreasing budgets, the City's ability to deliver services decreases, as well. Compounding the funding issue are legal barriers such as Propositions 218 and Proposition 26 that limit local agency ability to pursue funding mechanisms for this infrastructure-related permit program. Another funding hurdle is that NPDES program activities are typically not eligible for funding through State environmental grant programs.

Nexus between Costs and Water Quality Benefit

The City is greatly concerned with the potential costs of and onerous requirements in the draft Permit. Without any demonstrated benefit, the greatly expanded cost and requirements of the draft Permit will require more staff, resources, capital improvement projects, and overall greater expenditures from small, local entities like us. Similar to the costly City of Encinitas storm water program example provided in the Draft Fact Sheet, the City of Monterey is a coastal location with a heavy reliance on tourism and a population that more than doubles during the tourist season. As such, the City of Monterey's existing storm water program costs are at the higher end of the regional cost spectrum at the detriment of decreased services elsewhere in the City. The City of Seaside, a partner agency to Monterey and others in the Monterey Regional Storm Water Management Program, performed a cost estimate of the draft Permit as compared to their existing City of Seaside program. They estimated the draft Permit may almost double the City of

Seaside's storm water program cost. Such significant increases in permit implementation without a known benefit seem careless in a time when our cost allocations must be efficient and purposeful.

The apparent program cost increases as a result of the expanded provisions of this draft Permit come without 1) a clear demonstration of effectiveness of the numerous Best Management Practices (BMPs) proposed, 2) a clear demonstration of an identified water quality problem/problem area in many instances, and, 3) a clear nexus between the provisions proposed (and funding necessary to support them) and improved water quality. Multiple sections of the California Water Code support the need for this nexus or balance to be made. *Section 13000 Legislative Findings* speaks to attaining the highest water quality that is reasonable and that considers all demands and values, including economic. *Section 13263 Requirements for Discharge* requires several considerations in prescribing requirements, including the considerations listed in *Section 13241 Water Quality Objectives*, which includes "economic consideration" among others.

The Economic Considerations section of the Draft Fact Sheet contains no cost analysis of the draft Permit. It does make two arguments to support the costly nature of municipal permits in general: 1) many activities of existing small municipal permits were performed before the permit required them and thus they're not attributable to the overall program cost, and 2) not implementing a permit program would be more costly from an economic and environmental perspective. This lack of economic consideration given to the draft Permit under consideration and the numerous and costly new provisions proposed is concerning, and doesn't appear to fulfill the intent of the economic considerations required per the California Water Code.

Retrofit Requirements

The draft Permit contains multiple "retrofit" requirements. The EPA identified retrofit requirements for discharges from developed sites as having a significant adverse economic impact on a substantial number of small entities (small businesses and small government). Consequently, and per the Small Business Regulatory Enforcement Fairness Act, the EPA was required to convene a small business panel to review the proposed provisions. Until the EPA has completed its public review and hearing process on this topic/rulemaking, we believe it would not be prudent to require such retrofit provisions of California small entities. As the Monterey County Hospitality Association has noted in their letter to you, they have great concerns related to costs and extensive modifications and retrofitting required by the draft Permit to their business operations and properties. Due to these local business concerns and EPA findings of economic impact to small entities, we recommend the State consider a cost-benefit analysis be completed to substantiate expenditures of this type statewide. Lastly, the statewide retrofit program embedded in the draft Permit has received no cumulative environmental impact review for its cumulative construction project impacts as required by the California Environmental Quality Act (CEQA), and thus should be removed from this permit at this time (see further CEQA discussion below).

Finding 49, CEQA Exemption

Prior to and at the August 17, 2011 State Water Board workshop, the City of Monterey expressed to staff and the Board a concern about the proposed CEQA status of this Permit. The City continues to have concern with Finding 49, the proposed CEQA exemption.

Although the CEQA exemption noted is applicable for use in some instances, it does not apply in all cases and it does not exempt the SWRCB from all portions of CEQA. Specifically, CEQA Section 21080.5(c) states that a regulatory program certified pursuant to this section [CEQA Section 21080.5] is exempt from Chapter 3 (commencing with Section 21100), Chapter 4 (commencing with Section 21150) and Section 21167, **except as provided in Article 2 (commencing with Section 21157) of Chapter 4.5** [bold emphasis added]. Chapter 4.5, Article 2, Section 21157(a)(3) generally states that a master environmental impact report may be prepared for a rule or regulation that will be implemented by subsequent projects.

For example, residing within E.9.i (ii) of this draft permit are components of a statewide construction effort requiring permittees to design and construct retrofit capital improvement projects for existing flood control facilities on a statewide programmatic level. This statewide directive appears to meet the intent of CEQA Section 21157(a)(3) in that the proposed regulation will be implemented by subsequent projects. In this case, the projects would be the on-the-ground construction projects and facilities, similar to those analyzed in the recent Draft ASBS General Exception DEIR. We believe an environmental review for potentially significant impacts of the draft Permit should be prepared; and, depending on the outcome, potentially a master environmental impact report or substitute environmental documentation completed to examine potential significant environmental impacts of the proposed program's reasonably foreseeable projects, or retrofit compliance measures, to meet permit requirements.

CEQA and case law support that "The Secretary of the Resources Agency is empowered to exempt only those activities which do not have a significant effect on the environment, and where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper". In the case of this permit, the various retrofit requirements and the subsequent statewide new projects and facilities to be constructed have not received such a review for potentially significant environmental impacts. We have impact concerns related to potentially significant cultural/historic/archaeological, biological, coastal, and utility/service system expansion impacts, to name a few.

City Recommendations

Regarding the existing draft Permit and potential Permit revisions, the City is providing the following comments and recommendations for State Water Board consideration:

- Examine CEQA to determine if a more extensive environmental review (or Substitute Environmental Documentation) and public review process are necessary for this draft permit as currently written.

- Provide a legal CEQA determination in writing for stakeholder understanding and transparency with this draft Permit.
- Re-engage with the regulated community to learn which BMPs have been effective throughout California at source control, pollution prevention, and protecting/improving water quality.
- Pair down and focus the draft Permit requirements to implement those activities proven to be effective at accomplishing water quality protection within the requirements of the six minimum control measures established by the federal Phase II Rule.
- Identify and remove unfunded mandates from the draft Permit.
- Identify and remove duplicative tasks from this draft Permit as compared to other, existing State Water Board Construction and Industrial permit programs.
- Remove all retrofit requirements from this draft Permit at this time. If considered in the future, the State Water Board could perform a cost-benefit analysis of retrofit provisions and subsequently perform a targeted outreach effort to educate potentially affected stakeholders (local businesses) before such a provision is considered in California.
- Accomplish monitoring through the Surface Water Ambient Monitoring Program (SWAMP) and not as a part of this draft Permit.
 - Expand SWAMP to be inclusive of all monitoring requirements coming our way, such as is being proposed in the Ocean Plan amendments, ASBS General Exception Special Protections, and those in this draft Permit. This would allow for continuity statewide in sampling and analytical methods, as well as quality assurance and quality control. It may also provide a better overall picture of statewide conditions and identify problem areas for further study.
 - When a demonstrated water quality issue is found in a particular receiving water body, then focus constituent-specific monitoring efforts there to determine the source, and utilize applicable BMPs to tackle the particular pollutant(s) of concern.
- Remove the extensive and costly watershed research of E.12 Post Construction and utilize the Regional Board's Basin Plan update processes to perform and document watershed-scale conditions/assessments desired by the State Water Board in each region.
- Collaborate with the California Department of Public Health to implement storm water inspection into existing County Health inspections of businesses and industry for inspection efficiency, and remove these costly redundancies from the draft Permit.
- Collaborate with other State agencies such as the Department of Consumer Affairs to require storm water awareness to be a required exam component for contractor, engineer, architect, landscape architect, and geologist licensure.
- Work with necessary State entities to provide grant funding for local storm water NPDES program activities.

- Perform a cost analysis of the draft Permit and include it in the Draft Fact Sheet to substantiate the economic considerations required of the State Water Board by the California Water Code when adopting such requirements. To provide transparency and understanding for stakeholders and permittees, include a discussion of benefit of the expanded provisions of the draft Permit as compared to the existing permit.

Over the last decade, the City has demonstrated our commitment to protecting the environment and its many uses. To do this, we currently expend substantial funding each year to accomplish the water quality goals and tasks set forth by the Board to perform source control, pollution prevention, and water quality protection.

We believe in protecting water quality in a reasonable and effective manner. Accordingly, we request the Board be mindful of the economic reality we and our business communities are facing locally and the financial burden that this draft Permit, as currently proposed, will place on local communities to comply. At the local level, and now more than ever, we are constantly being challenged to reduce costs and create efficiencies in our programs to accommodate reduced budgets, staffing, and workloads. With this in mind, we ask that your staff focus the permit activities on those that have been determined to be most effective at accomplishing the water quality goals and work with your regulated community to do so; we and many other communities are willing to assist you in this effort. We desire a permit program that allows us to comply and be successful in doing so, and not one that sets us up for failure due to cost and lack of focus on water quality benefit.

Thank you for your consideration of our comments. If you have any questions, please contact City Engineer Tom Reeves or myself.

Sincerely,



Chuck Della Sala
Mayor

ec: Fred Meurer, City Manager
Fred Cohn, Assistant City Manager
Chip Rerig, Director of Planning, Engineering, and Environmental Compliance
Tom Reeves, City Engineer
Tricia Wotan, Associate Planner
Sydney Moe, Junior Engineer, City of Seaside, and Chair, Monterey Regional Storm Water Management Program (MRSWMP)
Heidi Niggemeyer, Program Manager, MRSWMP