



DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 9
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Public Comment
Draft Phase II Small MS4 General Permit
Deadline: 7/23/12 by 12 noon

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July 23, 2012

Ms. Jeanine Townsend
Clerk of the Board
State Water Resources Control Board (SWRCB)
1001 I Street 24th Floor
Sacramento, CA 95814



Subject: COMMENT LETTER - 2ND DRAFT PHASE II SMALL MS4 GENERAL PERMIT.

On behalf of Rear Admiral Smith, the Department of Defense (DOD) Regional Environmental Coordinator for EPA Region IX, and the Military Services in California, I respectfully submit these comments on the second draft of the SWRCB's Phase II Small Municipal Separate Storm Sewer System (MS4) General Permit ("Permit").

We appreciate the Board's careful consideration of our comments submitted on the first draft of the Permit in September, 2011. We also thank the Board for holding public workshops and working with us to resolve our comments and concerns. Most of our comments have been addressed, and the revised Permit has greatly reduced our compliance cost and administrative burden while remaining protective of water quality. We have a few remaining technical comments which are provided in the enclosure and include our specific recommendations for revising the Permit.

The DoD requests that you consider the comments in the enclosure in the upcoming Permit revision, and are happy to meet with SWRCB staff to review and discuss the comments. The points of contact for this letter are Mr. Christopher Haynes at christopher.a.haynes@navy.mil or (619)532-2285 and Mr. Michael Huber at michael.huber@navy.mil or (619)532-2303.

Sincerely,

C. L. STATHOS

By direction

Enclosure: Phase II Small MS4 General Permit Comments of July 23, 2012

DOD COMMENTS ON SMALL MS4 PERMIT

1. Hydromodification Requirements for Phase II Non-Traditional Permittees Located Within an Phase I MS4 Permit Area

Section: Fact Sheet – Section VIII & Permit Page 94, Section F.5.g Footnote 29

“However, for consistency, where a Phase II Non Traditional Permittee is located within a Phase I MS4 permit area, the hydromodification Plan requirements of the outlying Phase I MS4 permit are implemented.”

“Permittees located within Phase I MS4 permit boundary with a Regional Water Board approved Hydromodification Plan shall implement the Hydromodification Plan requirements for region-wide hydromodification consistency. The permittee shall develop a summary report describing the strategies to implement and coordinate with the outlying Phase I MS4 Permittee Hydromodification Plan.”

Comment: The permit requires Phase IIs within Phase I boundaries to report on Hydromodification Plan implementation the first year, presuming they are already subject to this Plan. However, the DoD Phase IIs which do not discharge to the Phase I have not, thus far, been subject to the Phase I requirements where there is no discharge to the Phase I. Phase II MS4s in a Phase I MS4 boundary, that don't discharge to a Phase I MS4, should not be required to follow Phase I hydromodification requirements. To date, the Phase II MS4 requirements have been purposefully limited in scope to Phase I permittees. There has been a deliberate regulatory approach to address Phase I permittees first, and as a result, these dischargers have progressed significantly with more mature programs than Phase II dischargers. Additionally, Phase I permittees have had time to participate in a public review process to develop appropriate hydromodification requirements. Phase II permittees have not had this opportunity. Phase II permittees will require time to develop appropriate hydromodification programs that may differ from the Phase I requirements due to the differing nature of the dischargers, and as a result should be carved out from this provision.

Recommendations: Add a statement “Permittees located within a Phase I MS4 permit boundary, but do not discharge to the Phase I MS4, are not required to follow the Phase I hydromodification requirements” in the Fact Sheet and Permit.

2. Post Construction Site Design Measures

Section: Permit Page 96, Section F.5.g.2(ii)(2)

“The methods are based on the objective of achieving infiltration, evapotranspiration and/or harvesting/reuse of the 85th percentile rainfall event.”

Comment: The objective of “achieving infiltration, evapotranspiration and/or harvesting/reuse of the 85th percentile rainfall event” does not always reflect the pre-project runoff condition due to differing soil types and climate and can have unintended impacts on baseline receiving water flow, volume and aquatic habitat. For this reason, post construction storm water management should allow projects to use either a rainfall event OR preproject conditions to determine design volume for runoff infiltration and retention.

Recommendation: Add a statement, “The infiltration, evapotranspiration and/or harvesting/reuse volume may be less than the 85th percentile rainfall event where the preproject runoff conditions would retain a volume smaller than the 85th percentile event.

3. Existing Individual Storm Water Permit Coverage

Section: Permit Page 13 – Section A, Application Requirements for all Small MS4 Permittees, Attachment B, Non-Traditional Small MS4 Permittees

“Any Small MS4s designated under this Order that chooses instead to apply for an individual permit or request to join the permit of a Phase I Permittee must notify the Regional Water Board of its intent to do so within six months of the General Permit effective date.”

Comment: The statement above does not address permittees that have an existing individual NPDES permit that covers storm water discharges. DoD Installations with existing individual NPDES permits, such as those in the San Diego Metro area, that address storm water should not be covered by the small MS4 permit. We recognize that the requirements may not currently be the same, but when the individual permits come up for renewal (they are all expired in San Diego), the Regional Boards can include the Phase II Small MS4 permit requirements. This will allow facilities to only need to comply with 1 permit reducing the administrative burden.

Recommendation: Installations with individual permits currently up for renewal should be removed from Attachment B. The DoD installations that have individual permits that

address storm water discharges that should be removed from Attachment B are Naval Base San Diego, Naval Base Coronado, and Naval Base Point Loma.

4. Vandenberg Air Force Base Permit Coverage

Section: Attachment B, page 4; Permit Page 94, Section F.5.g.

Comment: The Attachment B list of non-traditional small MS4 permittees incorrectly names Vandenberg Air Force Base (AFB) as a new permittee. Vandenberg AFB should be listed as a renewal permittee because it already has an approved storm water management program under the existing Phase II general permit. Vandenberg AFB has already invested a large effort in developing post-construction storm water requirements in accordance with Central Coast Water Board guidance and should be permitted to comply with RWQCB approved, installation-specific post-construction storm water management requirements in lieu of the new permit requirements in Sections F.5.g.1 through F.5.g.3. As a non-traditional permittee, with ownership of the land surrounding areas of potential development, Vandenberg AFB has the opportunity to go beyond the project site approach to meet the objective of protecting receiving water quality.

Recommendation: Change the list in Attachment B to reflect Vandenberg AFB's status as a renewal permittee. Add a statement under "Post-Construction Treatment Measures" "Any renewal Permittee already developing and/or implementing a Regional Water Board approved post-construction storm water management program may implement that program in lieu subsection requirements if the Regional Water Board determines the Permittee's program is equally or more effective at protecting water quality than implementation of a given subsection."

5. Scope of Permit Coverage

Section: Permit Page 7, Finding 17

Comment: In DoD's comments on the June 2011 draft, we recommended stating that the permit requirements apply only to DoD Cantonment, or industrial areas, where the activities and population density resemble that of a traditional small MS4. We also recommended clarifying military training ranges remain outside the scope of this permit. Application of the myriad of requirements contained in the permit in military training areas has the potential to significantly disrupt military training and may even lead to death and serious bodily injury. For example, unexploded ordinance could be encountered and inadvertently detonated during the construction of BMPs in active

impact areas. In the SWRCB's response to comment 75.4, they stated "*Staff inadvertently removed the provision that the permit requirements apply only to Department of Defense Cantonment areas...This language will be included in the next draft order.*"

Recommendation: Add the following language to Section F.1 "For military installations, this permit applies to areas, where the activities and population density resemble that of a traditional small MS4, as defined in the permit boundary map in Section A.2.b (3)". Change the Section A.2.b (3) language to read "Permit boundary map as developed by the permittee."

6. Reporting Requirements for Pesticide, Herbicide, and Fertilizer Application and Pest Management

Section: Page 93, Section F.5.f.9

Comment: In accordance with DoD Instruction 4150.07, DoD has already used integrated pest management (IPM) techniques to reduce pesticide usage by 55% of the 1993 baseline amount. While DoD continues to look for further reduction opportunities, such opportunities may not currently exist.

Recommendation: Some flexibility should be inserted under (iii) allowing permittees to get credit for a pre-existing IPM program and, when applicable, to accept reports that further reductions are not reasonably achievable within the permitted area. For example, the following statement could be added "Permittees with a pre-existing integrated pest management program may document this program and consideration will be given for situations where the maximum reasonably achievable reductions have already been accomplished prior to coverage under this permit." In addition, the specificity required for implementing the integrated pest management program should be removed to allow flexibility.

7. Legal Counsel Signature on Annual Reports

Section: Page 79, Section F.4.a(iii)

"All Permittees shall submit by the first year online Annual Report, a statement signed by both the Permittee's legal counsel and an authorized signatory certifying the Permittee has adequate legal authority in accordance with 40 CFR 122.26(d)(2)(i)(A-F) to comply with all Order requirements."

Comment: Requiring small MS4s to obtain legal counsel to sign an annual report is an undue imposition of burden on the permittee and is not typical practice. The signature of an authorized representative is sufficient certification of the legal authority.

Recommendation: Delete the requirement for legal counsel certification.

8. Military Signatory Requirements

Section: Attachment F, Page 4, Paragraph 11

“All NOIs, certifications, reports, or other information prepared in accordance with this General Permit that are submitted to State or Regional Water Boards shall be signed by either a principal executive officer, ranking elected official, or duly authorized representative. The principal executive officer of a Federal agency includes the chief executive officer of the agency or the senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrator of U.S. EPA).”

Comment: Signatory requirements should be revised to correspond with the language approved by the SWRCB in Order No. 2010-0014-DWQ.

Recommendation: Add a sentence to the end of Paragraph 11 of Attachment F that states “For the military: any military officer or Department of Defense civilian, acting in an equivalent capacity to a military officer, who has been designated.”

9. Non-Traditional Small MS4 Designation List (Attachment B)

Section: Attachment B

Comment: Non-Traditional Small MS4 permittees with population less than 5,000 should not be included in Attachment B based on criteria discussed at public workshops, and Draft Phase II Small MS4 General Permit Designation Flow Chart dated May 18, 2012. Several DoD installations included in Attachment B have populations less than 5,000. None of these installations were designated by the applicable Regional Board.

Recommendation: Delete the following DoD installations from Attachment B:

- Naval Air Station Monterey - Main Grounds (1,200)
- NWS Seal Beach (1,487)
- Miramar MCAS (2,327)
- Camp Roberts (695)
- Camp San Luis Obispo (200)
- Channel Islands Air National Guard Base (186)
- March Air Reserve Base (3,931)

10. Non-Traditional Small MS4 Designation List (Attachment B)

Section: Attachment B

Comment: Camp Pendleton was mistakenly listed on Attachment A as well as Attachment B. It is not a Traditional Small MS4 permittee so it only should be listed on Attachment B.

Recommendation: Remove Camp Pendleton from Attachment A

11. Field Sampling to Detect Illicit Discharges

Section: Page 85, Section F.5.d.1.

“(i) Task Description – While conducting the outfall inventory under Section B.4.a, the Permittee shall sample any outfalls that are flowing.”

Comment: This would require Illicit Discharge Detection and Elimination survey crews to be trained and equipped to collect samples. Permittee’s compliance staff or contractors may not have the required cross-training. There may be more cost effective methods for determining the source of the discharge which could be implemented prior to sampling. Additionally, the reference to *Section B.4.a* appears to be incorrect; it should refer to the Outfall Mapping task description, Section F.5.d(i).

Recommendation: Requirement should be removed and replaced with a process similar that uses sampling only if source of non-storm water cannot be determined. “While conducting the outfall inventory under Section F.5.d (i), the Permittee shall attempt to determine the source of non-storm water flow using established methods (as-built plan check, visual inspection, dye test, smoke test, CCTV). If the source of the flow cannot be determined using established methods, then the permittee shall sample the flow to assist in determining its source.”

12. Time Frame to Detect and Correct Leaks

Section: Page 16, Section B.4.a

“a. Detect leaks (for example, from broken sprinkler heads) and correct the leaks within 72 hours of learning of the leak”

Comment: Detecting and correcting leaks within 72 hours may be infeasible if the leak occurs during a weekend or holiday when personnel may not be able to correct it, or the problem is extensive requiring more time. Also, what if the leak cannot be corrected within the 72 hours due to problems determining the source of the leak, or obtaining parts/contractors? It can take time to accurately identify the source of some leaks, particularly when sample collection and analysis are necessary for source identification. Setting a time constraint on this requirement is infeasible and impractical unless there is a provision allowing additional time under the circumstances described above.

Recommendation: Change to “Initiate leak detection (for example, from broken sprinkler heads) and correction within 72 hours of learning of the leak unless infeasible due to timing, identification, or complexity of leak.”

13. Illicit Discharge Detection and Elimination Source Investigations and Corrective Actions

Section: Page 86, Section F.5.d.2. (ii)

(ii) Implementation Level - At a minimum, the Permittee shall conduct an investigation(s) to identify and locate the source of any prohibited non-storm water discharge within 72 hours of becoming aware of the prohibited non-storm water discharge.

Comment: This section could be interpreted to mean that the investigation and source detection must be conducted (completed) within 72 hours which may not be feasible, especially if waiting for sampling results.

Recommendation: Change “conduct” to “initiate” so requirement reads “At a minimum, the Permittee shall *initiate* an investigation(s) to identify and locate the source of any prohibited non-storm water discharge within 72 hours of becoming aware of the prohibited non-storm water discharge.

14. Spill Cleanup Timeframe

Section: Page 79, Section F.5.a.1(f)(1)

(1) Effectively require the discharger to abate and clean up their discharge, spill, or pollutant release within 48 hours of notification;

Traditional MS4 Permit Language (Page 20 Section E.6.a.(ii)(i)(1)):

(1) Effectively require the discharger to abate and clean up their discharge, spill, or pollutant release within 72 hours of notification;

Comment: Clean up timeframe should match requirement for Traditional MS4s.

Recommendation: Change “48 hours” to “72 hours” in Section F.5.a.1(f)(1).

15. Permittee Operations and Maintenance Activities (O&M)

Section: Page 92, Section F.5.f.8

Comment: The O&M requirements of this section are redundant with those in Sections F.5.f.1-F.5.f.5. For example, Section F.5.f.8(1) states that “the Permittee shall assess their O&M activities for potential to discharge pollutants in storm water and inspect all BMPs on a quarterly basis.” This requirement is already covered under Section F.5.f.5

(ii)(a) which requires the permittees to “perform quarterly visual inspections in accordance with the developed standing operation procedures of all hotspot Permittee-owned or operated facilities to ensure materials and equipment are clean and orderly to minimize the potential for pollutant discharge, and to ensure implementation of BMPs.”

Recommendation: Delete Section F.5.f.8.

16. Mapping Requirements

Section: Page 84, Section F.5.d(iii) and Page 88, Section F.5.f.2

Comment: These sections provide two years to complete detailed maps of drainage facilities. Creation of a Geographic Information Systems (GIS) database and maps is a time consuming endeavor and additional time will be required in order to complete this requirement due to funding and contracting considerations.

Recommendation: Allow 4 years to complete these requirements.

17. Reporting Requirements

Section: Page 102, Section F.5.g.4(ii)(b) and Page 103, Section F.5.g.4(iii)(b)

Comment: Section F.5.g.4(ii)(b) requires coordination with the appropriate mosquito and vector control agency to establish notification protocols for newly installed treatment systems and hydromodification management controls. Requiring an additional report under Section F.5.g.4(iii)(b) is overly prescriptive and not needed given the coordination requirement above and the annual reporting requirement under Section F.5.g.4(iii)(a).

Recommendation: Remove Section F.5.g.4(iii)(b).

18. Fees

Section: N/A

Comment: US Constitutional law and federal jurisprudence only allow federal agencies to pay state imposed charges in certain limited circumstances. For a charge to be a payable fee, it must within an applicable waiver of sovereign immunity in federal law. Congressional waivers for payment of state fees do not require payment of state imposed taxes. If the use of revenue from a charge is not narrowly circumscribed and more broadly benefits the general public as a whole, then the charge qualifies as a non-payable tax. See *San Juan Cellular Tel Co. v. Public Service Comm'n of Puerto Rico* 967 F.2d 683 (1st Cir. 1992). Additionally, charges must be (1) Non-discriminatory and must apply to all regulated entities in a similar manner; (2) Fair approximation and program

revenues must match program expenditures; and (3) Not excessive and the amount of the charge must reasonably relate to the regulator's level of program effort. See *Massachusetts v. United States*, 435 U.S. 444, 464 (1978). We understand that the MS4 permit charge may be based on the facility's population. Permitting authorities may believe that the charge is a payable fee and that there is reasonable linkage between the charge and facility population. Nevertheless sufficient information supporting these conclusions must be provided before military permittees may expend federal funds to pay the charge.

Recommendation: The record should provide information and analysis to support the conclusions that the charge is a payable fee and not a non-payable tax.