

July 23, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Comment Letter – Second draft of Phase II Small MS4 General Permit

MEMBER AGENCIES

- City of Cloverdale
- City of Cotati
- City of Healdsburg
- City of Rohnert Park
- City of Santa Rosa
- City of Ukiah
- County of Sonoma
- Sonoma County Water Agency
- Town of Windsor

VIRGINIA PORTER
Executive Director

300 Seminary Avenue
Ukiah, CA 95482
(707) 833-2553

Dear Ms. Townsend and Members of the State Water Board:

Thank you for the opportunity to respond to the second draft of the Phase II Small MS4 General Permit. This letter is the formal comment from the Russian River Watershed Association (RRWA) to the State Water Resources Control Board on the second draft of the NPDES General Permit and Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (Draft Permit).

RRWA's nine member agencies are all affected by this permit - either as regulated Phase II agencies, or Phase I agencies with a well established and effective program which would be enhanced by regional consistency among all regulated storm water agencies in the Russian River watershed. We are invested in the outcome of this process.

RRWA provided comment on the first draft of this permit last September. While we are encouraged about some changes in this second draft, we still have significant concern about the Draft Permit regarding:

- lack of water quality nexus with most of the required tasks
- cost of implementation and lack of cost-effectiveness assessment
- exposure of permittee to third-party challenges
- technical infeasibility
- burdensome reporting, analysis and assessment requirements with no apparent water quality nexus

After the first draft received numerous and substantive comments in September 2011, we expected to see a second draft with a demonstrated water quality nexus for all tasks. After the October 6, 2011 Senate Select Committee on California Job Creation and Retention hearing on this permit, we expected to see a Draft Permit with requirements that take into consideration, and gives priority to cost effective, well proven management practices. Unfortunately this Draft Permit does not reflect these priorities advocated by the Senate Select Committee.

Fiscal Analysis

As a preface to our comments on the Draft Permit, RRWA asks the State Board to take initiative to work with the California Legislature to create opportunities for public agencies regulated by the MS4 NPDES program to raise funds to carry out the permit requirements. For most storm water programs in California, due to the constraints of Proposition 218 (constitutional initiative -1996), the city, county or district's General Fund is the only funding source for ongoing stormwater program requirements, let alone the

ability to fund the increased compliance activities required under the proposed regulations – which in our view creates an unfunded State mandate.

This Draft Permit is estimated to increase the cost of Phase II stormwater programs many fold. The City of Sonoma estimates a nearly 7 fold increase; the City of Roseville estimates a 4 fold increase in costs. The State Board suggested last September that Proposition 84 monies, or funds from Integrated Regional Water Management Plans (IRWMP) would be available to implement this permit. RRWA and its member agencies all participate in the North Coast IRWMP and have multiple projects in this Plan. Proposition 84 funds are not available for ongoing program operations, only for specific "shovel ready" projects. In addition, the odds of successfully receiving funding are low - in the North Coast IRWMP in the first round of Proposition 84 funding, only one in three projects received any funding. Proposition 84 and IRWMPs are not a realistic source for this enormous ongoing financial need.

In the Russian River watershed our Phase II agencies are small communities with limited resources coping with substantially decreased revenues, personnel layoffs, reduced hours of operation and work furloughs. Regardless of the outcome of this permit review process, the need to have dedicated storm water funds is tremendous. We need the State Board's initiative to prompt legislative action that will create mechanism to raise revenues for our storm water programs.

Comments

RRWA member agencies have collectively reviewed the Draft Permit and our comments follow below. RRWA continues to be committed to a healthy watershed and to implementing effective programs with demonstrated water quality benefits and improvement. We offer these comments in the hopes that the permit will be substantially revised to effectively achieve the water quality goals that bring about watershed health.

1. While the Draft Permit is significantly different from and inconsistent with the Phase I Permit in our region (Santa Rosa/Sonoma County Water Agency/County of Sonoma - Copermittees), it now explicitly recognizes that Phase II agencies can be issued individual permits (such as the regional Phase I permit) in lieu of this General Permit.

RRWA's comments on the first draft of this permit regarding Phase I/Phase II consistency in our region (Region 1) have been partially addressed in the Draft Permit. We appreciate the explicit language in Provision G (page 107) which confirms the Regional Water Boards authority to issue individual permits to Phase II agencies in lieu of this General Permit.

In the Russian River watershed most of the Phase I and Phase II agencies are geographically contiguous. In close coordination with the Region I Water Quality Control Board, our Phase I Copermittees have taken a regional lead in establishing stormwater resources, regulatory protocols, and outreach tools. Our Phase II agencies have worked to align with the Phase I Copermittees with regard to sharing resources and using common tools. RRWA expects that in Region 1, some of the Phase II agencies may choose to be issued individual permits consistent with the regional Phase I permit, thereby assuring regional consistency, building on existing effective programs, and maximizing resources for water quality benefits.

We ask that the authorities of Provision G be also referenced in Provision A (page 13) with clear direction as to how the permittee carries out the application process when the intent of the permittee is to be issued an individual permit (in our case consistent with our regional Phase I permit).

2. The Draft Permit requires the permittee to adopt authorities that are beyond the scope of the MS4 program, which create exposure to third party challenges, and which may not be legally viable.

The Draft Permit requires the permittee to adopt regulatory mechanisms to meet all the permit requirements (p.19). The Draft Permit has numerous areas of broad and open-ended language which would result in exposure to the permittee for third-party challenges when coupled with a requirement to have authority to meet all permit requirements. In some cases these broad authorities relate to enforcement responsibilities that belong to other State agencies or regulatory functions.

The following Draft Permit provisions illustrate a few of the numerous areas of concern related to the obligation to adopt authorities to meet all requirements of the permit:

- Section E.6.a (ii) (a) and (b) require the permittee to *"prohibit and eliminate"* all non-stormwater discharges and all illicit discharges/illegal connections. While a permittee can prohibit, elimination is likely not possible regardless of authority. This is an exposure to the permittee.
- Section E.6.a (ii) (g) requires the permittee to have the authority to *"require information pursuant to local development policy or public health regulations, and other information deemed necessary to assess compliance with this Order."* This language is very broad and open to interpretation, which is both unclear to the permittee and an exposure to the permittee. A permittee cannot assume authority to regulate the actions of State and local public agencies as implied by this provision.
- Section E.6.a (ii) (h) requires the permittee to have the authority to *"enter private property for the purpose of inspecting, at reasonable times, any facilities, equipment, practices or operations for active or potential stormwater discharges, or non-compliance with local ordinances/standards or requirements of this Order."* This language essentially expands the permittee's obligation to have authorities to have right of entry to inspect for non-compliance with local ordinances/standards beyond those required by this Order. The exposure to permittee is tremendous with this language. It is questionable whether the permittee can legally adopt right-of-entry authority for any inspection.
- Section E.11.j.(ii)(b)(2)(h) requires authority to prohibit application of pesticides, herbicides and fertilizers within a certain distance from a storm drain or water body. The California Department of Pesticide Regulations is the appropriate authority to regulate pesticide application.
- Section E.12.j (i) requires the permittee to modify general plans, specific plans, zoning, codes, standards, etc to ensure watershed protection. These land use authorities are beyond the scope of the permittee. While land use policy is key in assuring water quality, asking the stormwater entity to adopt this broad authority is not the appropriate mechanism to carry this out.

3. The Draft Permit requires excessive and burdensome reporting and documentation without an apparent water quality nexus.

The Draft Permit has reporting requirements throughout that require a level of detail and data gathering that is burdensome and excessive, with no direct benefit to water quality. There are 39 specific "Reporting" sections within the body of the permit as it applies to traditional Phase II permittees. The amount of time and resources that would be necessary to comply with the reporting and documentation requirements would drain resources from tasks that have demonstrable water quality benefits in our current programs and in proposed expanded programs. The following examples are provided for illustration only; they are a small fraction of the reporting and documentation requirements.

- On page 31 of the Draft Permit, the permittee is required to create an inventory which is reported annually of five data fields for each commercial/industrial facility within the permittee's jurisdiction that could conceivably discharge pollutants into stormwater.
- On pages 54-55 of the Draft Permit, the permittee is required to report annually on at least 14 different data fields for each project that is regulated by the Low Impact Development standards.
- On page 60 of the Draft Permit, the permittee is required to report annually on 7 data fields for each project with Low Impact Development measures installed - this is a cumulative inventory so the report grows annually.

While some of the data required in this reporting section may be available on projects, the burden of creating a report record for compliance with the Draft Permit is excessive and without demonstrable water quality benefits. This is particularly problematic given the limited resources available to implement stormwater programs in California.

RRWA asks the State Board to look carefully at these time consuming tasks with no water quality nexus throughout the permit and to minimize or eliminate reporting provisions so resources can be focused on activities that have known water quality benefits.

4. The Draft Permit requires excessive monitoring, inspection and assessment without demonstrated water quality benefit.

The Draft Permit requires monitoring, inspection, assessment and other oversight functions at a level that is excessive and has no demonstrated water quality benefit. The following examples are provided for illustration only; they are a small fraction of the monitoring, inspection and assessment requirements in the Draft Permit.

- Section E.9.c (i) requires the permittee to sample any outfalls that are flowing more than 72 hours after the last rain event. It is questionable whether this is physically possible due to the number and location of outfalls; access and safety issues; and instantaneous staffing resources. In addition, many outfalls run year round due to groundwater infiltration and would need to be monitored continuously. In addition to being impractical, there is no demonstrated water quality benefit to this resource intensive requirement.
- Section E.11.f addresses storm drain assessment and maintenance. The Draft Permit requires two years of prioritization and assessment before implementing

actual storm drain maintenance- i.e. cleaning the storm drains. Water quality will be improved with cleaning - and priorities will be developed over time as cleaning is carried out.

- Section E.14.b requires watershed pollutant load quantification for each subwatershed for each of 11 constituents, and calculation of annual runoff, pollutant loads, and BMP removal efficiency. In addition to being burdensome without clear water quality benefit, it is not clear from the permit what is meant by of the reporting requirements such as "BMP removal efficiency."

5. The Receiving Water Limitations Language requires instantaneous compliance with non-exceedance standard.

Our Executive Director participated in the review process undertaken by the California Stormwater Quality Association (CASQA), and RRWA fully supports CASQA's position related to Provision D - Receiving Water Limitations. As currently written, Phase II permittees will not be able to comply with the Receiving Water Limitations Provision. Multiple constituents in stormwater runoff on occasion may be higher than receiving water quality standards before it is discharged into the receiving waters, and may create the potential for the runoff to cause or contribute to exceedances in the receiving water itself. We ask for modification of this provision to establish an iterative management approach as a basis for compliance.

6. The Draft Permit has numerous provisions that are technically infeasible or have vague information making permit compliance unattainable.

There are numerous provisions in the Draft Permit that require the permittee to do the impossible. A few examples are provided here which illustrate this fact.

- Section E.7.a (i) requires the permittee to *"measurably increase the knowledge of targeted communities regarding the municipal storm drain system..."* While the permittee can provide varied outreach and education opportunities (events, trainings, web sites, etc), the permittee can't control a community's knowledge.
- Section E.7.a (ii) (j) requires the permittee to *"provide storm water education to school-aged children."* The permittee has no authority to enter schools to carry out this requirement. Permittees may provide information and try to get the curriculum into schools, but this requirement is not attainable as written.
- Section E.6.c (ii) (f) requires the permittee to reduce the rate of recidivism for non-compliance with NPDES and other provisions. The permittee can take many actions to attempt to reduce recidivism but actual reduction in rate is not something that is in the permittee's control.

7. Specific language in the definition of incidental runoff (Section B.4) is inconsistent with the State Board's Recycled Water Policy.

The definition of incidental runoff in Section B.4 of the draft Phase II Small MS4 General Permit includes *"runoff from potable and recycled water use areas"*. Potable and recycled water are only two of many possible sources of irrigation supply with the potential to be a source of runoff. To the extent that the State Board considers regulation of runoff in the draft Phase II Small MS4 General Permit necessary to protect beneficial

uses, the water source is not relevant and reference thereto should be deleted. In addition, the definition of incidental runoff in the Recycled Water Policy is in a section entitled "Landscape Irrigation Projects" (Section 7), which clarifies that the definition applies to runoff from landscape irrigation projects. The applicability of the definition in the draft Phase II Small MS4 General Permit should be similarly defined.

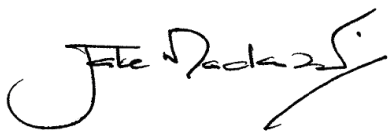
Our suggested language changes are:

- Section B. 4 - *"Incidental runoff is defined as unintended amounts (volume) of landscape irrigation runoff ~~from potable and recycled water use areas~~, such as unintended, minimal over-spray from sprinklers that escapes the area of intended use."*
- Section B.3 (n) - *"~~incidental runoff of potable or recycled water~~ from landscaped areas (as defined and in accordance with section B.4 of this Permit)."*

Conclusion

California needs a Phase II permit that permittees can comply with and that protects water quality in a responsible and cost effective manner. We believe this is possible. The RRWA member agencies want to spend financial and human resources on implementing water quality improvement measures, not on fighting third-party challenges. We ask the State Board to substantially revise the Draft Permit by making changes to: provide a clear water quality nexus for any provisions that remain part of the final order; remove requirement for non-essential authorities; modify the receiving water limitations language to allow for an iterative management process; and eliminate excessive reporting, monitoring and assessment while retaining delivery of water quality improvement actions. We also ask the State Board to work with the legislature to create a mechanism to fund stormwater programs.

Sincerely,



Jake Mackenzie
Chair, RRWA Board of Directors

Enclosure – CASQA Receiving Water Limitations Language

C: RRWA Board of Directors
Mike Thompson, US Representative
Lynn Woolsey, US Representative
Noreen Evans, California Senator
Michael Allen, California Assembly Member
Wes Chesbro, California Assembly Member
Jared Huffman, California Assembly Member
Thomas Howard, SWRCB Executive Director
Matthew St. John, RWQCB – Region 1 Executive Officer
Rebecca Winer-Skonovd, CASQA Phase II Committee Chair

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-- storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State or Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody---pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody---pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant--- specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.