

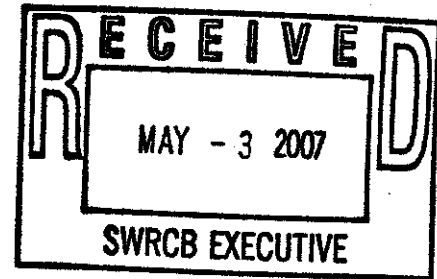


Los Angeles Area  
Chamber of Commerce

Construction General  
Permit - Stormwater  
Deadline: 5/4/07 5pm

May 4, 2007

Ms. Song Her  
Clerk to the Board  
California State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



Re: Comment Letter - Draft Construction General Permit

The Los Angeles Area Chamber of Commerce (the "Chamber") appreciates this opportunity to comment on the preliminary draft National Pollutant Discharge Elimination System General Permit for Discharges of Storm Water Associated with Construction Activities ("Preliminary Draft CGP" or "Preliminary Draft") issued by the State Water Resources Control Board ("State Board") on March 2, 2007.

The Chamber's members include over 1,350 businesses in the Los Angeles area, including many non-governmental parties regulated by the Construction General Permit (the "CGP") program. Our vision is to serve as a trustee for the current and future welfare of the region, promoting economic prosperity and quality of life. We seek to maximize economic opportunity offered by growing businesses while minimizing environmental impacts from business activity. An important objective of the Chamber is to ensure that the laws and rules relating to stormwater, construction site runoff, and surface water and ocean water quality are based upon good science and sound economic analyses so that our society can continue to enjoy economic prosperity based upon the prudent protection, use and enjoyment of these water resources and to sustain the quality of life benefits that result from maintaining high quality waters of the State for the range of beneficial uses. Accordingly, the Chamber has a very strong interest in encouraging reasonable and cost-effective approaches to controlling stormwater discharges from construction sites. We appreciate the work of the State Board and believe the Preliminary Draft can provide a point of departure for further investigation of ways to improve the existing program for regulating stormwater from construction sites. Nevertheless, we believe the Preliminary Draft has some significant shortcomings that the Board should recognize and take into account as it moves forward.

In particular, we are concerned that the Preliminary Draft will result in significant and unwarranted delays in the construction of private and public projects throughout the Los Angeles area, including the many major infrastructure improvements planned and needed for the region, without any commensurate benefit to water quality. By requiring public review of Stormwater Pollution Prevention Plans ("SWPPPs"), and possible SWPPP hearings, the Preliminary Draft

invites a burgeoning bureaucracy, increased red tape without any apparent justification, introducing substantial uncertainty into project planning, and risking substantial delays not warranted by any real risk to water quality. We request the State Board to maintain an efficient program that protects water quality and provides ample opportunity for regulators and advocates to monitor and enforce stormwater compliance; the Preliminary Draft does not constitute such a program. Adjustments to the existing approach, such as electronic posting on the agency's web site of SWPPPs before construction can commence, and requiring that only qualified persons can prepare SWPPPs, should address any perceived shortcomings of the existing program. Additional reasonable specificity that the State Board likely will require of all SWPPPs in the revised permit program also will help to achieve the transparency and consistency apparently sought by the Board.

**I. THE EXISTING CONSTRUCTION GENERAL PERMIT PROCESS PROVIDES ADMINISTRATIVE OVERSIGHT AND OPPORTUNITY FOR PUBLIC PARTICIPATION, WHICH COULD BE ENHANCED THROUGH CERTAIN REASONABLE ADJUSTMENTS.**

As drafted, Preliminary Draft overhauls a permit application process that has, since its adoption in 1999, worked well for stakeholders including the state and regional water boards, businesses, advocates and the general public, and, instead, proposes an unduly burdensome and potentially costly administrative process without tangible benefit. Under the current permitting program, a CGP applicant may receive a permit after the State Board has processed the application and Notice of Intent. The State Board typically mails the applicant a Notice of Intent receipt letter within two weeks and posts a copy of the letter on the State Board web page within 24 hours of processing.<sup>1</sup> The applicant subsequently plans for construction and develops a SWPPP before construction commences. Coverage under the CGP does not begin until the applicant has developed the SWPPP.<sup>2</sup>

Under the current CGP, the SWPPP must include a site description, descriptions of Best Management Practices ("BMPs") for erosion and sediment controls, BMPs for construction waste handling and disposal, implementation of approved local plans, proposed post-construction site controls, and non-stormwater management.<sup>3</sup> SWPPPs are publicly available under Section 308(b) of the Clean Water Act ("CWA") and are made available by the applicable regional water

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<sup>1</sup> California State Water Resources Control Board, National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity (General Permit) Water Quality Order 99-08-DWQ (Aug. 27, 2004) ("Aug. 2004 General Permit Order"), Checklist for Submitting a Notice of Intent, available at <http://www.waterboards.ca.gov/stormwtr/docs/finalconstpermit.pdf> (last visited May 1, 2007).

<sup>2</sup> Aug. 2004 General Permit Order, Fact Sheet for Water Quality Order at 3, available at <http://www.waterboards.ca.gov/stormwtr/docs/finalconstpermit.pdf> (last visited May 1, 2007).

<sup>3</sup> *Id.* at 6.

board upon request.<sup>4</sup> Additional SWPPP requirements are proposed in the March 2 Preliminary Draft, making the SWPPP an even more transparent statement of what BMPs are to be employed at any particular site.

The efficient and effective means of processing permit applications under the existing program allows applicants to prepare for construction in a timely manner, but also ensures that interested parties have sufficient recourse for enforcing SWPPP requirements. The State Board may issue comments on SWPPPs, and the Water Boards may impose additional requirements, request meetings with dischargers, mandate revisions to SWPPPs, conduct inspections, and initiate enforcement actions.<sup>5</sup> Both state and federal administrative processes offer a number of avenues for public participation. As noted above, Notices of Intent and SWPPPs are available for public review and action. Parties aggrieved by a Regional Board's permitting action may file a petition for review with the State Board,<sup>6</sup> and request a stay of the effect of the Regional Board's action, or non-action.<sup>7</sup> Members of the public may seek recourse directly by bringing a citizen suit

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<sup>4</sup> *Id.* See also 33 U.S.C. § 1318(b) ("Any records, reports or information obtained under this section . . . shall be available to the public . . .").

<sup>5</sup> Aug. 2004 General Permit Order, Waste Discharge Requirements (WDRS) for Discharges of Storm Water Runoff Associated With Construction Activity, at 7, available at <http://www.waterboards.ca.gov/stormwtr/docs/finalconstpermit.pdf> (last visited May 1, 2007).

<sup>6</sup> See 23 Cal. Water Code § 13320(a) (Within 30 days of any action or failure to act by a regional board . . . any aggrieved person may petition the state board to review that action or failure to act."); 23 C.C.R. § 2050(a) ("Any petition by an aggrieved person to the state board for review under Water Code section 13320(a) of an action or failure to act by a regional board shall be submitted in writing and received by the state board within 30 days of any action or failure to act by a regional board."). See also California State Water Resources Control Board, Instructions for Filing Water Quality Petitions, at [http://www.swrcb.ca.gov/wqpetitions/wqpetition\\_instr.html](http://www.swrcb.ca.gov/wqpetitions/wqpetition_instr.html) (last visited May 1, 2007) ("Any person who is aggrieved by an action, or a failure to act, by a Regional Water Quality Control Board (Regional Water Board) may be able to file a petition for review with the State Water Resources Control Board (State Water Board) . . . The Regional Water Board must have acted, or failed to act, in matters [including] . . . national pollutant discharge elimination system (NPDES) permits (Water Code section 13370 and following) . . .").

<sup>7</sup> See 23 Cal. Water Code § 13321(a) ("In the case of a review by the state board under Section 13320, the state board, upon notice and a hearing, may stay in whole or in part the effect of the decision and order of a regional board or of the state board."); 23 C.C.R. § 2053(a) ("A stay of the effect of an action of a regional board shall be granted only if petitioner alleges facts and produces proof of all of the following: (1) substantial harm to petitioner or to the public interest if a stay is not granted, (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted and (3) substantial questions of fact or law regarding the disputed action."). See also California State Water Resources Control Board, Instructions for Requesting Stays in Water Quality Petitions, at [http://www.swrcb.ca.gov/wqpetitions/stayrequest\\_instr.html](http://www.swrcb.ca.gov/wqpetitions/stayrequest_instr.html) (last visited May 1, 2007)

under section 505 of the Clean Water Act, as is frequently done in the State of California, and pursuant to which advocates have resolved various matters with enforceable consent decrees requiring various requirements for stormwater controls at construction sites, and netting such plaintiffs hundreds of thousands of dollars.<sup>8</sup> There also is the opportunity for productive outcomes from informal discussions and dialogue with the dischargers before resorting to legal processes. Collectively, agency enforcement, citizen suits, and informal dispute resolution have long served as powerful, effective, and efficient means for challenging substandard SWPPPs.

This past history may be rendered more effective by making certain reasonable adjustments to the current program. Electronic posting of SWPPPs on the agency's web site should help to resolve concerns from time to time expressed by advocates that SWPPPs are not available quickly enough. Requiring only qualified persons to prepare SWPPPs is another reasonable adjustment, and will codify a best practice, that we believe already is the norm, not the exception. Additional reasonable detail in SWPPPs under a revised permit will facilitate further program objectives and the quality of SWPPPs.

## **II. THE PERMITTING PROCESS PROPOSED IN THE PRELIMINARY DRAFT LIKELY WILL IMPEDE CONSTRUCTION AND CREATE UNNECESSARY BUREAUCRACY, WITHOUT FOSTERING TANGIBLE WATER QUALITY BENEFITS.**

The Preliminary Draft would require an applicant to submit a completed SWPPP with the permit application and Notice of Intent, would direct the Regional Boards to post publicly the SWPPP, and would implement a formal 90-day public review period.<sup>9</sup> The Preliminary Draft also provides for a vague, undefined hearing and approval process *following* the public review period:

Based upon the public comments and Regional Water Board review of the permit application submittal, Regional Water Boards may take actions that include, but are not limited to: rescinding permit coverage, requiring public hearings or formal Regional Water

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("A person who files a petition for review of an action by a Regional Water Quality Control Board (Regional Water Board) may request a stay of the effect of that action. The stay request should be filed as part of the petition.").

<sup>8</sup> See 33 U.S.C. § 1365(b) requiring a citizen to give sixty days' notice of his intention to sue to the alleged violator, the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), the Regional Administrator of the EPA, and the Executive Officer of the governing water pollution control board.

<sup>9</sup> California State Water Board, National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction and Land Disturbance Activities (Mar. 2, 2007) ("Preliminary Draft"), at Section XIII.2., available at [http://www.waterboards.ca.gov/stormwtr/docs/constpermits/order\\_permitwattach.pdf](http://www.waterboards.ca.gov/stormwtr/docs/constpermits/order_permitwattach.pdf) (last visited May 2, 2007) ("Regional Water Boards shall review comments provided from the public on new permit applications within the 90-day public review period.").

Board permit approvals, requesting discharges to revise their SWPPP and Monitoring Programs within a specified time period, or take no action.<sup>10</sup>

The Chamber supports an open and transparent permitting process, with adequate safeguards for regional water quality. As discussed above, the Chamber recognizes the need for timely public access to the permit documents, and does not oppose the Preliminary Draft's provisions for submitting SWPPPs to Regional Boards, or mandating the public posting of SWPPPs. Web site posting of SWPPPs will provide an immediate opportunity for advocates to access and review the SWPPPs and, therefore, will facilitate existing, and fully adequate, avenues for SWPPP enforcement. We are concerned, however, that implementing a formal 90-day waiting period and creating the opportunity for subsequent SWPPP hearings, which may not occur for many months after the 90-day period runs, will create unnecessary obstacles and construction delays. An approval process of this nature seems illogical and unproductive, given the technical nature of a SWPPP, over which there certainly may be some disagreement among engineers and other experts as to which BMPs should be deployed at a particular site for a specific condition. However, such fact-specific, engineering issues lend themselves to a workout among agency staff, the engineers and planners for the project, and qualified persons retained by advocates – and should not be elevated to board hearings, or subject to lock-step administrative process.

As discussed above, members of the public currently have a broad range of formal and informal approaches from which to choose if challenging the adequacy of an SWPPP. Indeed, the expansive number of SWPPP enforcement cases indicates that the absence of a 90-day waiting period has not encumbered advocates initiating enforcement proceedings. The proposed program would, therefore, significantly increase the permitting process from approximately one week to a matter of months or more while offering no apparent benefit to any interested party. In addition, mandatory public review with a potential SWPPP hearing thereafter at this late stage of the project, just before groundbreaking, would turn long-followed land use planning on its head, by re-covering ground already considered during project entitlement proceedings under the California Environmental Quality Act ("CEQA"), and local land use law.

Nor is the proposed 90-day review period either federally mandated or consistent with the State Board's own characterizations in the March 2 draft Fact Sheet, in which the State Board distinguished two Ninth Circuit and Second Circuit decisions from the CGP proceedings at hand.<sup>11</sup> In both cases, the courts held that certain U.S. EPA Phase II stormwater and Confined Animal Feeding Operations permit proceedings are subject to the Clean Water Act's public review and hearing processes. Explaining that federal laws do not compel the State Board to oversee a formal public review process in all permit proceedings, the State Board emphasized that "neither of these court cases is directly applicable to states who implement the USEPA regulations. Rather, they are directed at USEPA who must revise its regulations."<sup>12</sup> According

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<sup>10</sup> *Id.*

<sup>11</sup> *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832 (9th Cir. 2003); *Water Keeper Alliance v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005).

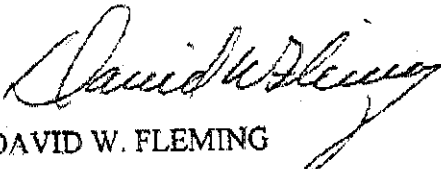
<sup>12</sup> California State Resources Control Board, Fact Sheet for Water Quality Order 2007-XX-DWQ (Mar. 2, 2007), at 6, available at

to the State Board's own rationale, neither case mandates a formal public review process for permit approvals, especially when the permits at issue contain "more specific requirements than the minimum requirements in USEPA's regulation . . . [and include, for example,] action levels (ALs), numeric effluent limitations (NELs), and very detailed management practices."<sup>13</sup> In addition, we are concerned that the unclear review process following the 90-day public comment period will create regulatory uncertainty and prohibit the applicant from developing even tentative or speculative project timelines.

State Board staff has indicated that roughly 10 percent of the applications for CGP coverage would undergo a public hearing. According to State Board data on active construction projects, we can estimate conservatively that applicants have filed more than 15,000 Notices of Intent in the last five years, including more than 4500 Notices in 2005 and 4800 Notices in 2006.<sup>14</sup> Existing agency resources simply are insufficient to handle the additional demands necessitated by indiscriminately broadening the administrative and public review and approval aspects of the permitting program. Considering the Water Boards' current authority exercised in reviewing and enforcing permits, and contemplating the variety of options available to members of the general public seeking to immediately address and enforce SWPPP requirements, we believe that the Preliminary Draft would merely broaden the bureaucratic process while neither expanding the Water Boards' oversight nor providing the public with any additional means for participation.

We appreciate the Board's consideration of these points, and are available to consult with the Board on reasonable adjustments to the current program to improve it, especially with respect to ensuring that an effective SWPPP is in place at all construction sites subject to the CGP. We believe that that objective can be achieved without unduly interfering with important construction projects and infrastructure improvements in the Los Angeles region. We look forward to the Board's response to our comments, and to continuing to work with the Board on the CGP. If the Board has any questions whatsoever, or if we can be of any further assistance, please do not hesitate to contact the undersigned at (213) 580-7525 or Paul Singarella, Esq., of Latham & Watkins, LLP, at (714) 755-8168.

Very truly yours,

  
DAVID W. FLEMING  
Chairman of the Board

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<http://www.waterboards.ca.gov/stormwtr/docs/constpermits/factsheet070302.pdf> (last visited May 1, 2007).

<sup>13</sup> *Id.*

<sup>14</sup> See Statewide Construction Storm Water Data Base, available at <http://www.waterboards.ca.gov/stormwtr/db/const.mdb> (last visited Apr. 30, 2007).