



PUBLIC WORKS DEPARTMENT
Administration Division

April 3, 2009

Mr. Bruce Wolfe
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

**SUBJECT: COMMENTS ON REVISED MUNICIPAL REGIONAL STORMWATER
NPDES PERMIT TENTATIVE ORDER**

Dear Mr. Wolfe:

These comments are filed on behalf of the City of Berkeley (City) with regard to the Revised Tentative Order for the Municipal Regional Stormwater NPDES Permit for Discharges from Municipal Phase I in the San Francisco Bay Region (Revised Tentative Order) issued on February 11, 2009. The City requests that you distribute a copy of these comments to the Regional Water Quality Control Board (Water Board) members and include the comments in the record of this administrative proceeding. The City supports and concurs with comments filed by the Alameda Countywide Clean Water Program (ACCWP), and Gary Grimm (legal counsel for the ACCWP). In addition, the City supports and concurs with the comments filed by the Bay Area Association of Stormwater Management Agencies (BASMAA).

The City appreciates many of the changes incorporated in the Revised Tentative Order, in particular: (1) the deletion of the requirement to purchase certain types of street sweepers; (2) the deletion of the requirement to conduct an impervious surface data collection pilot project; (3) the deletion of the prescriptive list of businesses requiring inspections; and, (4) the deletion of some of the prescriptive trash requirements. However, many of the City's concerns with the previous Tentative Order have not been addressed and some of the new requirements in the Revised Tentative Order are of great concern. Many of these concerns regard requirements that impose significant costs to implement without providing a commensurate improvement in water quality.

At the March 11, 2008 hearing on the draft Tentative Order, many municipal representatives testified on the difficult budget situation. Since that time, the financial situation for all agencies has deteriorated significantly, to the point that some agencies have declared or are near bankruptcy. Though not near a bankrupt condition, the City of Berkeley is now facing projected shortfalls of \$3.8 million, \$5.6 million, and \$9.6 million for fiscal years 2010, 2011, and 2012,

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respectively. The City is in the process of preparing its budget for the next 2 year budget cycle and is currently deliberating workforce reductions by eliminating 33 full-time equivalent (FTE) and 11 FTE in fiscal years 2009-10 and 2010-11, as well as increasing fees, parking fines, and seeking Federal economic stimulus funds. This is a critical time in Bay Area history where the cities and agencies cannot afford to implement costly requirements that provide little or no water quality benefits. The City hopes that the Board realizes this depressed financial situation will require many years to return to normal and that the Board will allow the permittees to work with the Board in establishing a prioritized plan to attack urban runoff pollution that accounts for the available finances.

Specific comments for many provisions of the Draft Tentative Order are included in Attachment 1 to this letter. Further, the following discussion in the body of this letter identifies issues with significant items that require discussion beyond that provided in Attachment 1.

Items Imposing Significant Cost without Commensurate Water Quality Benefit

Monitoring Provision (C.8):

Much of the monitoring provisions will be carried out at the program or regional levels. However, the costs to meet the requirements of these provisions will be borne by the City as well as all other permittees. The City believes Water Board staff has not correctly characterized the costs associated with implementing the Monitoring Provisions. Water Board staff has stated in the summary response to comments that the cost to implement the monitoring provision of the previous Tentative Order would require only 60% of the funds allocated to the 2007-2008 monitoring effort (Comments and Responses Summary, Section C.8, page 1). The summary response to comments also states that the cost to implement the monitoring requirements throughout the Region would be \$1,268,500 per year. However, no documentation of how the estimate was developed was provided. This is a gross underestimate of actual costs. The ACCWP estimates that the cost to implement the monitoring requirements for Alameda County would be approximately \$1,150,000 per year. This represents an increase of \$750,000, or a near tripling of the ACCWP's current \$400,000 per year monitoring budget. The comments submitted by the ACCWP include details for this cost estimate.

Board Member McGrath stated at the March 11, 2008 hearing that a first priority is TMDL pollutants. The City agrees and believes the monitoring requirements should be focused on those pollutants. Unfortunately, there are many costly requirements in the monitoring provision that relate to issues that do not conform to this priority criteria, such as: sampling for and conducting taxonomic identification of algae; sampling for silica, dry weather suspended sediment concentration, temperature, and pathogens; and, additional sediment chemistry and toxicity monitoring to evaluate ambient conditions. Many of these requirements need to be reduced, reprioritized or deferred to allow the permittees to have the resources necessary to accomplish high priority objectives such as mercury and PCB TMDL implementation and trash reduction.

In addition to the \$750,000 per year increase in monitoring costs, the ACCWP estimates that the Revised Tentative Order would require an additional \$250,000 per year to cover the mercury and PCB provisions. The ACCWP's current annual budget for the entire Program is \$1.8 million. The

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City of Berkeley cannot afford a 55% increase in their contributions to the Program to cover these additional costs. Implementing these provisions as drafted would likely force the ACCWP into an impossible situation were funds would not be available to comply with all the requirements of the Tentative Order without slashing other components, such as for pesticide and trash reduction education.

Proposed Resolution: Revise Provision C.8 as proposed by the ACCWP and described in the ACCWP's comments. Even with these proposed cost cutting measures, ACCWP's costs for implementing provision C.8 would still require an additional \$280,000 per year.

Reporting and Recordkeeping Requirements (Various Provisions):

There have been improvements to the requirements, in particular, removing the reporting template. However, the reporting and recordkeeping requirements are still onerous and many do not provide significant improvements for accountability. Examples of excessive reporting and recordkeeping requirements include: (1) for each construction site inspection, record the inches of rain since the last inspection (Provision C.6.e.ii.(4).(d)); (2) many of the Public Information and Outreach provisions include extensive reporting and evaluation requirements; (3) Provision C.15, monthly reporting on planned and unplanned potable water discharges; and (4) an unrealistically short timeframe for submitting monitoring data and reports.

The Comments and Responses Summary states that Board staff scaled back the recordkeeping and reporting requirements to what they "absolutely need to measure compliance." The examples above demonstrate that this is not the case. For construction inspections, the proposed standard is to have violations corrected within 10 days, therefore the information regarding rainfall since the last inspection would not be needed. For the Public Information and Outreach provision, the standard of compliance is conducting the activity. So, although the ACCWP conducts effectiveness evaluations as needed to improve the program, they are not necessary to measure compliance.

While these individual requirements may not seem too onerous if each is looked at separately, the cumulative burden of all the reporting requirements can be overwhelming especially when workforce reductions will likely happen. Not only are the Annual Reports very time-consuming to produce, they are also difficult to review. Some of our Annual Reports have been given very little if any timely review. In addition, the Water Board has broad authority to request additional information from specific Permittees as may be needed in specific situations.

Proposed Resolution: Revise the recordkeeping and reporting requirements as outlined in Attachment 2.

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Conditionally Exempt Discharges (C.15):

There are four primary concerns with Provision C.15: (1) individual residential car washing has not been included in the list of conditionally exempt discharges; (2) monitoring and reporting is required for discharges from crawl space pumps and footing drains; (3) Permittees are put in the position of managing potable water supply agencies; and (4) onerous monitoring and reporting requirements for sheared fire hydrants.

Individual Residential Car Washing: The Revised Tentative Order would no longer allow the discharge of individual residential car wash water. The Fact Sheet does not describe why these types of discharges should no longer be allowed. The Federal Register that adopted the stormwater permitting requirements states the following: "... in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below [list includes 'individual residential car washing'] through their municipal separate storm sewer system even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." (Vol. 55, No. 22, Friday, Nov. 16, 1990, page 47995)

Proposed Resolution: Individual residential car washing should continue to be allowed by the permit provided minimal amounts of water and pollutants are generated.

Crawl Spaces and Footing Drains: Provision C.15.b.i states that the Permittees must require that discharges from crawl space pumps and footing drains be monitored on the first two consecutive days of dewatering and once a month thereafter and maintain records of the monitoring data. There are presumably thousands of these discharges in the City, many from single-family residences. Requiring monitoring and reporting on these is not feasible and should be deleted.

Proposed Resolution: The Comments and Responses Summary states that new language is likely to be added to the Provision to exempt discharges from single-family homes and other small, temporary, and unpolluted discharges. We support those proposed revisions and ask that the revised language be included in a supplemental Executive Officer report.

Water Supply Agency Discharges: Provision C.15 states that the Permittees must monitor and report or require potable water dischargers to monitor and report on every planned and unplanned discharge from a potable water source. Within Alameda County, potable water suppliers are often regional entities such as East Bay Municipal Water District, and Alameda County Water District. The Permittees do not have the resources to monitor and report on all of the planned and unplanned discharges from these agencies and do not have a mechanism to require these agencies to report to the Water Board.

Proposed Resolution: The Water Board should regulate potable water agencies directly. The monitoring and reporting requirements water supply agency discharges should be eliminated.

Fire Hydrant Shearing: The requirements to treat, monitor, and report on fire hydrant shearing discharges are not appropriate and place an unnecessary burden on our fire fighting personnel. The requirement to treat the discharge is infeasible due to the large volume and uncontrolled nature of the discharge. If the flows are not being treated, there is no reason to monitor the

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discharge as the reason to monitor is to assess the effectiveness of the treatment. (We know that the chlorine and pH of the discharge will be typical of the potable water source.) As there should be no treatment or monitoring, there is no reason to report.

Proposed Resolution: Fire hydrant shearing should be included in Provision C.15(3) Emergency Discharge.

5,000 Square Foot Treatment Threshold (Provision C.3.b.i(1):

Many agencies provided comments on this issue during the public comment period on the previous draft Tentative Order and Board members Young, Singh, and Eliahu supported keeping the 10,000 square foot threshold. As stated previously, the costs associated with operating and maintaining small treatment devices is too high relative to the benefit. A disproportionate amount of the implementation costs would be directed at inspecting small treatment devices and conducting enforcement actions against parties that are not conducting adequate maintenance. Once these devices are installed, they would need to be inspected and maintained in perpetuity; thus, the cost of inspection and enforcement would continue to increase dramatically over time. It is inefficient and wasteful to dedicate this level of public resources toward the maintenance of small devices that would be of questionable usefulness even if they were rigorously maintained. There is also an excessive administrative burden associated with executing operations and maintenance agreements for each of these devices. Especially considering the current fiscal situation, it is not appropriate to impose this burden on municipalities considering the marginal water quality benefit that may be obtained.

Proposed Resolution: The 5,000 square foot threshold should be removed. If it is not eliminated then the requirement to establish a maintenance agreement and inspect the treatment systems should not apply to sites between 5,000 and 10,000 square feet.

Additions to the Revised Tentative Order that are of concern

Executive Officer Approval of Development Projects Using Vault Based Treatment Systems (Provision C.3.c.i.(6):

The City supports Board staff's objective of promoting the use of landscape based treatment methods. However, requiring approval from the Executive Officer for variances may delay development and puts the City at risk of not meeting its obligations to review and process the permit application under the time limits imposed by the State Permit Streamlining Act. Also, lack of flexibility in design of treatment measures and a requirement for at least 50% treatment landscape treatment measures will be difficult for infill and redevelopment projects (typical in Berkeley) to achieve, since these sites may not have land to set aside for vegetated treatment measures. As a result, some of these projects may no longer be feasible. This would seem counterproductive to the Permit's encouragement of Low Impact Development, since development on infill sites or redevelopment of existing sites helps prevent urban sprawl and associated water quality impacts.

Proposed Resolution: This provision should be deleted. Water Board staff should work with the

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Permittees to develop a workable policy on non-landscape-based treatment systems.

Reducing the Exemption for Existing Paving Existing Streets (Provision C.3.b.ii.(3)):

The City understands that the Water Board intends to maintain in the Revised Tentative Order the existing exemption for paving work in the right-of-way. This is expressed in the Comments and Responses Summary. However, the Revised Tentative Order abbreviates the exemption language of the current permit to only “pavement resurfacing within the existing footprint”. This language is far short of the affirmative language in the current permit, which includes structural section rehabilitation and any other reconstruction.

Proposed Resolution: Replace the exemption language in the Revised Tentative Order with the language from the current permit, specifically “Excluded routine maintenance and repair includes roof or exterior surface replacement, pavement resurfacing, repaving and road pavement structural section rehabilitation, within the existing footprint, and any other reconstruction work within a public street or road right-of-way where both sides of that right-of way are developed.”

Green Streets Pilot Project (Provision C.3.b.iii):

Berkeley has been actively promoting the types of projects outlined in this provision. However, we have concerns regarding both the feasibility of implementing this requirement as well as the appropriateness of including some portions of this requirement in a stormwater permit, as some requirements go beyond water quality considerations. Below are our recommended changes to the provision that would make implementation feasible, notwithstanding legal issues. Legal concerns are covered in the letter from the ACCWP’s legal counsel.

C.3.b.iii(2): It would be nearly impossible for one project to contain all of the key elements listed. We believe it is the intent of the provision that the elements be included in the ten projects as a whole rather than in each project.

Proposed Resolution: Clarify that, as a whole, the ten projects should contain the listed elements rather than each project containing the listed elements.

Parking management is handled through land use regulation as part of an overall strategy to reduce transportation demand generated by retail, office, industrial and other land uses. It is not part of street design.

Proposed Resolution: Delete Provision C.3.b.iii(2)(d) Parking management.

Provision C.8 already places extensive monitoring requirements on the Permittees. Unless grant funding becomes available, it will not be financially possible for the Permittees to implement green streets pilot projects, plus the necessary long-term operations and maintenance and verification inspections. Monitoring water quality benefits from individual LID installations is a cumbersome and costly requirement that will not improve water quality.

Proposed Resolution: Eliminate monitoring requirement.

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Some municipalities have been aggressive in implementing green development as part of their stormwater treatment implementation and have installed projects that meet the requirements of this provision.

Proposed Resolution: Consider existing projects, which meet the treatment sizing criteria and incorporate the green street components, as counting toward the required pilot projects.

Other Concerns

Mercury and PCB Controls (Provision C.11 & C.12):

Addressing TMDL pollutants, in particular mercury and PCBs, should be a priority for this next permit term; and, we generally recognize the need for and support conducting the various types of pilot projects outlined in the Revised Tentative Order. However, differing interpretations of Provisions C.11 (Mercury Controls) and C.12 (PCB Controls) could result in requiring many more pilot projects than are feasible. It is the City's understanding that Water Board staff's intent is that many of the pilot projects in C.11 and C.12 can be completed through the same project, assuming samples are collected and analyzed for both mercury and PCBs. However, there are often slight differences in the language of the two provisions that we believe may cause some confusion.

Proposed Resolution: We request the Provisions C.11 and C.12 be combined into one provision to make it clear what is required. We also request that it be made explicit that a pilot project can be credited towards more than one provision (for example, a pump station diversion project could be credited toward both C.12.d and C.12.f.) and that ongoing projects such as the Ettie Street Project could be credited toward completion of the required pilot projects. Without clarifying the provision in this manner, it will not be feasible to meet these requirements.

Trash Controls (Provision C.10):

As with the TMDL pollutants, trash reduction should be a primary focus for this permit term. The City recognizes that municipalities need to play a role in reducing the amount of trash in urban runoff entering creeks and the Bay. However, this is not a problem municipalities can solve by themselves. The City agrees with the suggestion made by your board several years ago that a statewide task force including State and local representatives should be formed to address the trash problem. Increased flexibility has been incorporated in the Revised Tentative Order. The City also appreciates the reduced scope of the structural control requirements. As with other pollutants the City believes that source control is more cost effective than treatment and we appreciate the flexibility to pursue source control measures in addition to the implementation of structural controls.

Full Trash Capture Devices: As stated above, these are extremely difficult economic times for municipalities and the installation and maintenance of the required structural controls will place an economic burden on the City. The City's estimate for installing, cleaning, and maintaining simple screens as Full Trash Capture Devices to serve 30% of the commercial area over the 5 year term of this permit is \$570,000. This represents the low-end cost, if other devices beyond simple screens are needed, the cost quickly escalates to over \$1.5 million for the 5 year term of

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the permit. The size of the pilot project is excessive and can actually be considered to be premature full implementation of full trash capture. The size of the pilot project needs to be reduced from 30% to a more manageable 5% of the commercial area for each permittee. Alternatively, the pilot project can be spread over the entire region instead of overly burdening each individual permittee and eliminate duplicative pilot projects.

Proposed Resolution: The size of the pilot full trash capture needs to be reduced to a manageable level for the individual permittee. This can be accomplished by reducing the size of the pilot area from 30% to 5%, or making the pilot projects a regional responsibility effectively reducing the burden to each permittee.

Trash Action Level: We have two concerns with the Trash Action Level. The first is that we believe terminology may cause confusion between a Trash Action Level and a Municipal Action Level or a Water Quality Standard. The Trash Action Level is not intended to be either.

Proposed Resolution: To avoid this possible misinterpretation, we request that the terminology be changed to "Hot Spot Reduction Goal."

The second concern is that we do not believe that the hot spot reduction target of 100 pieces of trash per 100 feet of creek will be attainable in all cases. As an example, in 2008, the Program conducted the Rapid Trash Assessment Protocol at ten sites throughout the county. (A technical memo summarizing the results is included as Attachment 3.) At one of the sites, approximately 3,000 pieces of trash were collected from a 100-foot stretch of creek. Almost all of the pieces were very small Styrofoam pellets that had been trapped in the ivy on the banks. These pellets are trapped along the creek bank for a long distance upstream of this site as well due to an illicit discharge that has now been corrected. At this site it will be nearly impossible to meet the pieces of trash per 100 feet target for the foreseeable future.

Proposed Resolution: Express the Hot Spot Reduction Goal as "either 100 pieces per 100 feet or an 80% reduction from the baseline level."

Rapid Trash Assessment: The Revised Tentative Order would require that these assessments would be conducted at each hot spot twice per year for five years. We have two concerns with this requirement. The first is that the protocol is very labor intensive and not necessary to determine if the trash hot spot reduction target is being met. The second concern is that the protocol is still evolving and there may be more effective methods of assessing the trash.

Proposed Resolution: Revise provision to require only counting the pieces of trash rather than categorizing them, and reduce the number of assessments required to once per year.

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The City believes it is essential that the Tentative Order be further refined as outlined above and in the attachments in order for local agencies to achieve maximum water quality benefit with the resources available. These changes are necessary in order to avoid waste and reflect the realities of municipal budgets. We look forward to continuing our dialog with you and your staff on the issues described in this letter, and we request your consideration of the City's, ACCWP's and Gary Grimm's (ACCWP legal counsel) recommended changes to the Revised Tentative Order.

Sincerely,

Claudette R. Ford

Director of Public Works

cc: Jim Scanlin, ACCWP

Attachments: 1) Table of Proposed Specific Changes to Revised Tentative Order
 2) Table of Proposed Revisions to Reporting Requirements
 3) Trash Assessment Pilot Project Technical Memorandum