

April 3, 2009

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

Subject: City of San José Comments on the Tentative Order for the Municipal Regional Stormwater National Pollutant Discharge Elimination System Permit

Dear Mr. Wolfe,

Thank you for the opportunity to comment on the Tentative Order (TO) for a Municipal Regional Stormwater Permit (MRP) dated February 11, 2009. San José also plans to attend and testify at the May 13 public hearing for the MRP. The comments included herein have been prepared consistent with the direction of the San José City Council.

Introduction

The City of San José is a co-permittee of the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) and has had a proactive stormwater pollution prevention and control program since the first countywide municipal stormwater permit was adopted in 1990. San José has also been actively engaged in the development of a regional stormwater permit, with staff having participated in the original work groups and in various workshops.

The City of San José appreciates that the Water Board staff has worked with stakeholders including permittees to address concerns with the previous edition of the TO released in December 2007. The City acknowledges considerable improvements made to several of the permit provisions, which are responsive to our previous comments. Most notably, the requirements related to treatment measures for trails and road rehabilitation projects have been redirected in a manner that successfully addresses previous concerns. Additionally, the current TO includes greater flexibility in how permittees meet objectives for several established programs in municipal maintenance and enforcement inspection programming.

However, there remain several areas of the permit that continue to cause concern. A summary of the most significant areas of concern to San José follows. In addition to the key concerns highlighted in this letter, detailed comments on various provisions of concern are provided in Attachment A.

Maintenance and Operation of Pump Stations [Provision C.2]

This provision requires that the City augment pump station maintenance and operations activities with dry weather monitoring and post-storm inspection and cleaning activities. Corrective actions

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are required if monitoring results fall below a specified threshold. The extent of the corrective action that may be required is not presently known and may be disruptive to core operation of storm pump stations, in addition to being resource intensive to administer. As drafted in the TO, all storm pump stations are subject to this provision. In San José, there are more than 25 pump stations of varying sizes, not all of which flow to a water body.

San José requests that only pump stations that are of significant size and that discharge directly to a creek or water body be included under this provision and that the provision be revised to ensure that pump station operations are adequately supported to protect public safety.

New Development and Redevelopment [Provision C.3]

While many significant issues (such as trails and road rehabilitation projects) in this provision have been successfully addressed in the recent draft, several outstanding issues remain. Most significantly, this provision requires that the City submit information to the Water Board on certain individual development projects before final approval has been granted by the City Council. This requirement would be triggered when development projects employ mechanical devices (e.g., vaults and drain inserts) for stormwater treatment instead of landscape-based measures (e.g., swales and bioretention). In some cases, Water Board approval of the treatment measures would be needed before the City could issue approval. San José offers that this approach limits options for a project site and that the requirement for project-specific approval by the Water Board is likely to create unnecessary project delays and fundamentally encroaches upon the local municipality's land use authority.

San José requests removal of the requirement to submit individual projects for approval and recommends that project reporting be used in a manner that balances the needs of the land use decision making process with stormwater permit objectives.

Trash Reduction [Provision C.10]

Reducing the impact of trash in our creeks is an important endeavor for the environment and the community. The City has already invested significant resources to reduce the presence of trash and litter in local creeks and is aligning resources to make additional strides. The problem, however, is immensely complicated and the sources extend well beyond just the storm drain system.

The Water Board staff has modified the trash reduction provisions of the TO and revised some of the prescriptive and redundant trash solutions previously proposed. What remains, however, is still an exceptionally aggressive program to identify, assess, and clean-up specified 'Hot Spots.' Under the proposed provision, San José will be responsible for 33 Hot Spots and required to remedy the trash and litter problem in these areas within the five-year permit term. The scale of this effort is tremendous and the record is lacking in evidence that this is an appropriate requirement for the storm water program, given the significant non-stormwater sources to trash in these hotspots and the multiple pathways of trash to creeks. These factors also mean that the City's ability to remedy the trash problem at all 33 Hot Spots within five years is tenuous. While staff acknowledges that appropriate efforts will include structural controls, increased maintenance practices, and enhanced

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pollution prevention, the provision as set forth in the Permit would almost certainly result in the City falling into non-compliance during the permit cycle.

San José requests that the Trash Provision be modified to set a framework for demonstrable improvements to be made related to trash impacts in creeks, in a manner that establishes a clear and achievable path for permittee compliance. Most notably, the proposed “trash action level” should be clarified as a programmatic goal and potential trigger for follow-up actions and the expectations for follow up designated in this permit should be limited to trash conveyed through a permittee storm sewer system. Additionally, San José requests that the number of Hot Spots for San José be reduced, to provide greater opportunity to focus efforts on high value sites with demonstrable connection to the storm water system as a source of trash in the creeks. San José looks forward to working with Water Board staff and local stakeholders to advance a reasonable and successful approach to controlling trash in our creeks.

Diversion of Dry Weather and First Flush Flows to Publicly Owned Treatment Works (POTW) [Provisions C.11 & 12]

Proposed provisions require that a feasibility study on the diversion of dry weather and first flush flows to the sanitary system be conducted and require implementation of a flow diversion pilot without regard for the results and findings of the feasibility study. It is known that any potential stormwater diversion to the sanitary system will pose significant engineering, regulatory, financial, legal, and institutional challenges. The two leading Bay Area wastewater and stormwater associations have plans to evaluate this element to gain a better understanding of the issues related to diversion of stormwater to the sanitary system.

San Jose requests that more time be allowed for coordination with POTWs on this issue, that additional time be allowed for implementation of the feasibility study, and that subsequent requirements for implementation be contingent on the findings of the feasibility study.

Exempted and Conditionally Exempted Discharges [Provision C.15]

This provision applies to various discharge types and specifies the conditions under which the discharges are allowed to go to the storm drain system. In general, San José finds this provision to be highly burdensome and prescriptive. The requirements would pose a significant impact to City operations with no need identified for departing from the current, approved BMP approach to these discharges. Two key concerns are noted below.

Permitting and monitoring of non-stormwater discharges such as pumped groundwater, foundation drains, water from crawl spaces, and footing drains to the storm drain system would be a new function of the City. Additionally, this provision includes overly prescriptive monitoring requirements that, in many cases, would be cost-prohibitive and could create a situation where more unauthorized non-stormwater discharges occur.

This provision also imposes new monitoring requirements on planned, unplanned, and emergency discharges of the potable water system. New monitoring requirements will have significant impacts on the operations of the City of San José Municipal Water System (MWS) and other water retailers

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and would require the City to monitor discharges from the system at point-of-discharge and at receiving waters. The MWS may also be at risk of exceeding the discharge benchmark for pH in some instances, due to the pH of the source water (which is from Hetch Hetchy), which can be outside the specified benchmark range. Meeting these provisions would require an investment in equipment and personnel that would have to be passed on to the MWS rate payers. Financial impacts of this provision will extend to the customers of the City's two private water retailers as well.

San José requests substantial revision to this provision emphasizing the implementation of best management practices in lieu of new regulatory programs.

Conclusion

San José remains an active steward of the environment, our local creeks, and the iconic San Francisco Bay. San José continues to advance the City Council's Green Vision, which sets forth a bold set of specific goals for advancements in environmental protection in our community. In light of San José's interest in undertaking such a bold endeavor, it is paramount that new regulatory requirements be prioritized to address identified, significant water quality problems and be phased over time, based on a realistic assessment of municipal resources.

San José is also submitting legal comments on the Tentative Order under separate cover by our City Attorney's Office. In addition, San José supports and incorporates by reference the comments submitted by the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) and the Bay Area Stormwater Management Agencies Association (BASMAA).

San José acknowledges the time and effort of the Water Board staff that went into the production of the Tentative Order. We appreciate your consideration of our comments and look forward to engaging to develop a successful regional permit for stormwater.

Sincerely,



for

JOHN STUFFLEBEAN

Director, Environmental Services

Attachment A: San José Detailed Comments on Tentative Order

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San José Detailed Comments on Municipal Regional Stormwater NPDES Permit Revised Tentative Order (February 11, 2009)

Master Provision #	Detailed Provision #	2009 TO Comments
C.2	C.2.d.i (pg. 11)	To ensure consistency between Task Description and Implementation Levels, the City suggests the following: “Operation and Maintenance of Stormwater Pump Stations – Permittees shall develop and implement measures to operate, inspect, and maintain these facilities to minimize non-stormwater discharges containing pollutants, and apply corrective actions when DO levels are below limits.”
C.2	C.2.d (pg. 12)	<p>The City requests that the provision to measure DO apply only to those pump stations that discharge to a creek or waterbody and that a minimum threshold total pump station capacity of 10 CFS be applied for inspecting and collecting DO data to ensure limited resources are directed only to pump stations where the discharge could potentially cause concerns.</p> <p>The City requests that the provision clarify that the 3mg/L DO threshold is an action level.</p>
C.2	C.2.f.i (pg.13)	The City requests that the Caltrans Storm Water Quality Staff Guide is identified as a supplemental guide for developing and improving SWPPPs.
C.3	C.3.a.i.(2) (pg. 15)	The term “pre-development” appears twice and should be changed to “pre-project” to be consistent with the rest of C.3.
C.3	C.3.a.ii. (pg. 16)	The requirements in this section are sufficiently different from the current permit that all Permittees will need time to revise ordinances, policies and procedures, update handbooks and guidance materials, and educate staff and project applicants about the changes. We request that the implementation date be changed to “as soon as possible but no later than July 1, 2010.”
C.3	C.3.b.ii.(1) (pg. 17)	<p>The definition in the revised TO is unworkable because the term “final, major, staff-level discretionary review and approval” is vague and doesn’t align with common development review and entitlement process milestones. The City requests that the effective date correspond with a clear benchmark in the entitlement process, specifically the date a development application is deemed complete, per the Permit Streamlining Act.</p> <p>The list of project types in Footnote No. 2 is unworkable because it combines actions associated with pre-project land division (e.g. parcel map, tentative maps, tract map) with specific development proposals (e. g. discretionary permit, development permit). Additionally, the term “technical and or engineering review” is ambiguous and does not align with known milestones in the development review process. The City requests that this definition be removed from the provision.</p>
C.3	C.3.b.ii.(4) (pg. 19)	Bike lanes are exempt from C.3. in road widening projects, but are covered by C.3. in new road projects, which is inconsistent. The rationale on page 23 of the MRP Fact Sheet for why bike lanes are exempt from road widening projects is applicable to

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		new roads as well – they have environmental benefit for encouraging alternative modes of transportation. The city requests that bike lanes be added to the list of specific exclusions from this category.
C.3	C.3.b.ii.(4) (pg. 19)	Excluded projects should also include new sidewalks and sidewalk additions built in infill locations where adjacent vegetated non-erodible permeable areas do not exist and it is impractical to build them. Sidewalks provide an environmental benefit for encouraging alternative modes of transportation. The City requests that new sidewalks in infill locations where directing runoff to vegetated areas is infeasible be excluded from the requirements of Provision C.3.d.
C.3	C.3.b.iii. (pg. 20)	<p>The City requests the following changes to this section to facilitate implementation by the Permittees:</p> <ol style="list-style-type: none"> 1. Make the pilot projects contingent on securing funding; 2. Allow parking lots to qualify as a type of green streets project; 3. Allow green streets projects completed since February 2003, with appropriate documentation of project elements, to count toward the total of ten projects; 4. Allow new road projects and redevelopment projects to count toward the total of ten projects; 5. Delete the requirement to meet the numeric sizing criteria in C.3.d to make the redevelopment or retrofit projects feasible; 6. Make completion deadline for the ten projects July 1, 2014 to allow full permit term for achieving compliance with this provision and 7. Modify the requirement for parking management element to specify it shall be used where appropriate.
C.3	C.3.c.i.(2)(e) (pg. 23)	In the Task Description: Site Design and Stormwater Treatment Requirements, add missing words “as practicable” to first sentence to be grammatical and consistent with (f) and (g).
C.3	C.3.c.i.(4), C.3.c.i.(5), C.3.c.i.(6) (pgs. 23-24)	The requirement for Water Board staff notification/approval of projects with vault-based treatment systems is unworkable for the City. It will create unnecessary project delays, increase the work load for municipal planning staffs, and encroach on the Permittees’ land use authority. We request that this section be changed to state the goal of limiting the use of vault-based systems and request notification of the use of these systems in the Permittees’ annual reports only. Specifically, we request that provisions (5) and (6) be deleted and the threshold in (4) modified to require notification via the Annual Report if vault-based systems are used to treat more than 20% of the total runoff from the site.
C.3	C.3.e.i. (pg. 26)	The city requests that alternative compliance options should be made available to <u>all</u> development projects, <u>including new roads and road widening projects</u> . The language in the Revised Tentative Order limits the use of alternative compliance options to redevelopment projects and infill site development projects (where “infill” is strictly defined). There may be situations in which non-infill new development projects have site constraints or qualify for reduced requirements as a transit-oriented development, etc., and would be more feasible to implement via off-site alternative compliance. Road projects are one of the most likely types of projects to use the alternative

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		compliance option, due to limited right of way for treatment controls and the piecemeal nature of road improvements (for which it is cost-effective to provide treatment at one site).
C.3	C.3.e.i.(2)(b) (pgs.28-29)	The allowance of more time to complete an Equivalent Offsite Treatment project should be contingent upon Executive Officer approval, consistent with the requirement later in this same paragraph for Regional Projects. The requirement that the Equivalent Offsite Treatment Project provide additional capacity is unreasonable and unworkable as conditions of approval and designs can not be changed after the fact, especially if the project is already under construction.
C.3	C.3.h.iii. (pg.35)	The City requests that the first sentence is revised to say that “Permittees shall <u>require</u> ” that treatment systems are properly operated and maintained for the life of the projects.
C.4	C.4.b.ii.1.g (pg. 36)	The City understands that this provision is not meant to include HVAC equipment common to commercial office buildings, as inspection of those systems would greatly increase inspection workload without a clear benefit to water quality.
C.5	C.5.a.ii.(3) (pg 43)	The City suggests the Provision is revised to read “Permittees shall have adequate legal authority to control the discharge of spills, dumping or disposal of materials other than storm water to the MS4 .”
C.6	C.6.e.ii.(4)(d) (page 50) and Fact Sheet Attachment 6.1 (pg. 90-91)	The City requests the removal of the “Inches of Rain Since Last Inspection” data requirement. The time and resources used to provide this data will not result in environmental benefit.
C.8	Table 8.1 (pg. 60) & Attachment G	Although greater flexibility has been provided by allowing a TRE process to precede a full TIE, triggered activities are still unpredictable and potentially costly, making budget planning difficult or impossible. The City recommends capping the number of toxicity-triggered projects at two.
C.8	C.8.c.i & Table 8.1 (pg. 60)	The City recommends deleting requirements for storm event sampling in keeping with modifications to the previous draft TO. Such sampling presents costly logistical challenges and significant safety concerns.
C.9	C.9.f.i (pg. 59-60)	Insert the phrase “as needed” so the sentence reads “Permittees shall maintain regular communications with county agricultural commissioners (or other appropriate State and/or local agencies) <i>as needed</i> to...”
C.9	C.9.g.i (pg. 75)	Insert the phrase “may be done jointly with other Permittees” in Task Description.
C.9	C.9.h.v. (pg. 79) New C.9.h.v. (pg. 76)	The MRP Summary Response to Comments, dated 3-18-10, page 98, bottom row, states that “Flexibility will be added in this regard. We will divide the sentence in two, require working with DPR and the Ag Commissioners, and say "may work" with respect to the others.” The revised TO does not include this change. The City requests that this change be made.

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C.10	C.10.b.i (pg. 80-81)	Requirements to “achieve Trash Action Level” by 2012 may be unachievable in many locations that are accumulation points for very large portions of the watershed which include many sources of trash from outside the MS4. The City requests language clarifying the TAL as a goal against which the effects of corrective actions can be measured be added to the provision.
C.10	C.10.c (pg. 82)	The development of a long term plan should be limited to addressing the impacts of trash transported through MS4 systems.
C.11 & 12	C.11.e.i, C.12.b.iii & C.12.e.i	The City believes that a superior approach would be to base the location and number of sample sites on more objective, science-based considerations of variability, costs, and certainty needs.
C.11 & 12	C.11.f.i & C.12.f.i	<p>Implementation of diversion must be contingent on the results of the feasibility evaluation. This provision does not follow a logical course of action and is inconsistent with TMDLs. It assumes that feasible opportunities for diversion to pump stations will be found in all counties, although we have little reason to believe that this is true. The City is committed to reducing the delivery of PCBs and Mercury to receiving waters in keeping with TMDLs, including possible diversions to the sanitary system when feasible, however we also believe that significant risk of non-compliance exists within these provisions as written if no or too few feasible diversion opportunities are found.</p> <p>The provision is inconsistent with the PCB TMDL. The TMDL states that opportunities for targeted diversions should be investigated, pilot tested and implemented where feasible, and further states under Regulatory Analysis (page 93): "No specific project to route stormwater to a wastewater treatment plant is currently required." Any such evaluation should be advanced methodically and specific requirements for diversion should be contingent on the results of the feasibility evaluation.</p>
C.12	C.12.b.ii.3&4 (pg. 90)	The City requests that this Provision be contingent on the results of the sampling and analysis efforts. If PCBs are not found in meaningful amounts in demolition wastes, this Provision should be omitted. The City requests rewording this Provision to be dependent upon the results of the sampling and analysis activities
C.12	C.12.b,c,d (pgs. 90-93)	The City requests that explicit mention of ongoing grant-funded projects by SFEI and others to address PCB BMP effectiveness and PCBs in demolition materials be made in regard to these Provisions. The City also requests that participation in these projects be considered to satisfy these requirements. If not, please explain why.
C.12	C.12.e.iii (pg. 93-94)	This requirement may conflict with results of the technical and economic feasibility assessment if assessment recommendations do not “span treatment types and drainage characteristics.” The City requests adding "as possible within the constraints of the feasibility assessment outcomes in C.12.e.i." Moreover, each county is now expected to do at least one, regardless of the outcome of the feasibility study. Requirements for implementation should be contingent upon the outcome of that study.
C.13	General	The City requests that this Provision, and all other provisions, allow for adaptive management. If it is demonstrated that a waste stream listed in Provision C.13 is not a significant source of copper to the receiving waters, Permittees should be permitted to adapt efforts to make controls commensurate with the potential water quality threat.

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C.13	C.13.a.i (pg. 92)	The City requests removal of the requirement to adopt a separate ordinance prohibiting the discharge of washwater from copper architectural features. The City does not believe that the effort to establish and execute a new program to prohibit washwater from copper architectural features is commensurate with any water quality benefit achieved by it. Discouraging the use of architectural copper and requiring BMPs to manage this source is sufficient.
C.13	C.13.b.ii (pg. 92)	The City requests deletion of the phrase "...including connection for filter backwash..." as it conflicts with sanitary sewer ordinances prohibiting the discharge of solids/debris to the sanitary sewer.
C.14	C.14.a (pg. 100)	The City believes that pre-existing data and the monitoring requirements listed in the Water Quality Monitoring Provision (C.8) will provide sufficient data to comply with the intent of this provision. The City requests revision of this provision to clarify that data collected as part of Provision C.8 and related data previously collected by BASMAA will be sufficient to demonstrate compliance with this provision.
C.14	C.14.a (pgs. 100-101)	Since previous data have shown that selenium is not problematic in most urban creeks, the City requests that selenium be removed from this Provision.
C.14	C.14.a.v and C.14.a.vi (pg. 101)	The City requests that these provisions be modified to remain consistent with the fact sheet, which states this is primarily an information gathering exercise.
C.15	C15.b. (pg. 102)	The City recommends the use of established non-stormwater conditionally exempt discharge programs previously approved by the Executive Officer.
C.15	C15.b.i.1.(b) (pg. 103)	The City recommends conditionally exempted non-stormwater discharges (as defined in Provision C.15.b.i) greater than 10,000 gallons per day be subject to general NPDES permitting requirements as defined under order No. R2.2007-0033, NPDES No. CAG912004.
C.15	C15.b.i.1.(c) (pg. 103)	The City recommends that when a Permittee determines a proposed non-stormwater discharge (as identified in Provision C.15.b.i) of less than 10,000 gallons per day constitutes a significant source of pollutants to receiving waters, the Permittee shall require the discharge to meet water quality standards consistent with the existing effluent limitations in the Water Board's NPDES General Permit.
C.15	C15.b.iii.1.(b)(ii-iii) & C15.b.iii.1.(c) (pg 104)	<p>The City recommends reporting and monitoring requirements apply to discharges as defined in Provision C.15.b.iii.(1).(b).(i). The reporting requirements as currently proposed significantly impact operational efficiency and costs. With no volume threshold for this element, stringent and costly BMPs and control measures requiring an increased amount of resources would be needed for every instance, which is not proportionate to the potential for water quality impairment.</p> <p>The City recommends reporting be provided with the Annual Report while maintaining records for review at the request of the Board. The City also recommends removal of references to monitoring requirements at the receiving waters. The proposed monitoring requirements are problematic because any attempt to monitor receiving waters could be unsafe, would result in lengthy and unpredictable work delays, do not account for flow from multiple inputs along the stormwater system, require a considerable increase in resources and associated costs, and would provide negligible water quality benefit.</p>

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C.15	C.15.b.i.(1)g (pg.103) and C.15.b.iii.(1).c.(ii) (pg. 105)	The City recommends an upper pH benchmark of 9.5 for to accommodate the pH range commonly reported from the Hetch Hetchy water supply.
C.15	C15.b.iii.2 (pg. 105)	The City recommends a minimum threshold of 50,000 gallons or more.
C.15	C15.b.iii.2.c.i (pg. 106)	The City recommends notification within 24 hours after becoming aware of any aquatic impacts. The additional time allows resources to focus efforts on responding to potential endangerment of public health and safety.
C.15	C15.b.iii.2.c.iv (pg. 106)	The City recommends reporting be provided with the Annual Report while maintaining records for review at the request of the Board. This reduces the administrative burden for all parties and maintains consistency with reporting requirements identified throughout the TO.
C.18	C.18 (pg. 111)	The Standard Provisions included as Attachment J are not written for application to a municipality but rather a single facility discharger. The City recommends removal of this Attachment.