CITY OF NEWARK, CALIFORNIA

37101 Newark Boulevard • Newark, California 94560-3796 • (510) 793-1400 • FAX (510) 794-2306

April 2, 2009

Via E-mail (MRP@waterboards.ca.gov)
and Overnight Delivery

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

RE: COMMENTS ON REVISED MUNICIPAL REGIONAL STORMWATER NPDES PERMIT TENTATIVE ORDER

Dear Mr. Wolfe:

The City of Newark is submitting these comments with regard to the Revised Tentative Order for the San Francisco Bay Region Municipal Regional Stormwater NPDES Permit (MRP) issued on February 11, 2009. This detailed comment letter is in addition to and is referenced by the March 26, 2009 letter signed by Mayor David W. Smith on behalf of the City Council of the City of Newark. We request that you distribute a copy of these comments to the Regional Water Quality Control Board members and include the comments in the record of this administrative proceeding.

In addition, we support the comments filed by the Alameda Countywide Clean Water Program (ACCWP), the Bay Area Association of Stormwater Management Agencies (BASMAA), and the legal comments filed by Mr. Gary Grimm on behalf of the ACCWP. Newark also supports the letter from Alameda County City Manager's Association requesting a three-year extension of the current permit.

The City of Newark is appreciative of many of the changes incorporated in the Revised Tentative Order, including: (1) the deletion of the requirement to purchase certain types of street sweepers as well as deletion of prescriptive street sweeping and catch basin cleaning requirements; (2) the deletion of the requirement to install treatment systems for road reconstruction and rehabilitation projects within the existing footprint; (3) the deletion of the requirement to conduct an impervious surface data collection pilot project; (4) the deletion of the prescriptive list of businesses requiring inspections; and, (5) the deletion of some of the prescriptive trash reduction requirements. Regional Board staff should be commended for these modifications. However, in addition to the remaining concerns with the previous Tentative Order that were not addressed,

there are many new requirements in the Revised Tentative Order that we find unacceptable. Many of these requirements impose significant cost without providing a commensurate improvement in water quality.

At the March 11, 2008 hearing on the first draft Tentative Order, many municipal representatives commented on the difficult budget situation they were in. Since that time, the financial situation has continued to deteriorate significantly for many municipalities, including the City of Newark. Newark has eliminated more than 50 positions, has initiated furloughs for non-public safety employees, and continues to face significant budget deficits due to declining revenues. The County of Alameda is projecting a 2% ($4.1 billion) reduction in the County's property tax base[1] and Newark's sales tax revenues also continue to decline. The increased costs associated with the Tentative Order and the realities of budget shortfalls continue to be minimized by Regional Board staff. Given current economic conditions, we simply cannot afford to implement costly requirements that provide little or no relative water quality benefits.

In addition to concerns over provisions that impose significant cost without the commensurate water quality benefit, we also have concerns regarding requirements that we believe fall outside the appropriate scope of a municipal stormwater discharge permit. Some of these concerns are addressed below, as well as in a letter submitted separately from the ACCWP's legal counsel. Additional detailed comments are included in Attachment 1.

Reporting and Recordkeeping Requirements (Provisions C.2.d.iii., C.3.b.v.(1), C.3.b.v.(2), C.3.c.iii., C.3.e.iv., C.3.f.iii., C.3.g.iv., C.3.h.iv., C.3.i.iii, C.4.b.ii.(6), C.4.b.iii., C.4.c.iii., C.4.d.iii., C.5.e.iii., C.5.f.ii., C.6.a.iii., C.6.e.ii.(4), C.6.e.iii., C.6.f.iii., C.7.e.iii., C.7.f.iii., C.7.g.iii., C.7.h.iii., C.9.b.iii., C.9.c.iii., C.9.d.ii., C.9.e.ii., C.10.b, C.10.d.ii-v., C.13.a.ii, C.13.b.ii., C.13.d.ii.)
There have been improvements to the reporting and recordkeeping requirements, including removal of the reporting template. However, these 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) unrealistically short timeframes 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 gathering of rainfall data is not necessary for violations that must be corrected within 10 days. For the Public Information and Outreach provision, the standard of compliance is conducting the activity. So, although we conduct effectiveness evaluations as needed to make program improvements, they are not necessary to measure compliance.

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[1] Bay Area Newspaper Group, March 11, 2009:
http://www.insidebayarea.com/search/ci_11891896?IADID=Search-www.insidebayarea.com

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 for municipalities like Newark with shrinking staff resources. Not only are the Annual Reports very time-consuming to produce, they are also difficult to review. Some of the member agencies' 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 1 of this letter and Attachment 3 of the ACCWP letter.

Provision C.2.d. Stormwater Pump Station Monitoring

We recognize that there have been rare instances in the Bay Area where discharges from pump stations have caused water quality problems. However, the monitoring and reporting requirements are more onerous than necessary and should not be applied at all for smaller facilities.

> Proposed Resolution: Change the maximum sampling required to twice per year for two years and allow an exemption from monitoring in situations where it can be demonstrated that there is no potential water quality problem.

Provision C.3.b.ii.(1). Regulated Projects - 5,000 Square Foot Treatment Threshold

Newark, along with many fellow member 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 we have 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. Considering our current fiscal situation, it is not appropriate to impose this burden on municipalities given 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.

Provision C.3.b.iii. Green Streets Pilot Project

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. Two of the ten required

pilot projects would likely be in Alameda County, but it is unclear how those projects would be allocated among the member agencies and there is uncertainty about meeting the July, 2013, deadline given the current economic climate for development. Some of the features (pedestrian and bicycle facilities, parking innovations, etc.) go beyond water quality standards, are redundant, and infringe on local planning authority. We request that the Green Streets Pilot Project requirement be eliminated altogether. However, if it is to be required, our recommended changes to the provision that would make implementation more feasible are as follows, notwithstanding the legal concerns 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.

C.3.b.iii.(2)(d) Parking Management: Off-street 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 Newark and its Co-Permittees. Unless grant funding becomes available, it will be difficult enough 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, except when required with a specific grant.

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 the 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.

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

Newark is in support Board staff's objective of promoting the use of landscape-based treatment systems. However, requiring approval from the Executive Officer

may delay development and puts municipalities at risk of not meeting their obligations to review and process permit applications under the time limits imposed by 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 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 will pose a significant problem for largely built-out cities such as Newark and is seemingly counterproductive to the encouragement of Low Impact Development, since development on infill sites or redevelopment of existing sites helps prevent urban sprawl and associated water quality impacts. The choice of appropriate treatment measures has to give more consideration to site constraints. There is no sound evidence that structural controls are not effective.

> Proposed Resolution: This provision should be deleted. Water Board staff should work with the Permittees to develop a workable policy on non-landscape-based treatment systems.

C.8. Monitoring Provision

The ACCWP provided extensive comments on the monitoring provision in the previous draft Tentative Order in the letter dated February 29, 2008. The primary concern was that the provision represented a huge increase in monitoring costs. While there have been some minor improvements to Provision C.8 in the Revised Tentative Order, additional and unnecessary requirements also have been added. In fact, the cost for implementing the monitoring provision of the Revised Tentative Order appears to be higher than that of the previous draft Tentative Order.

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 of 24). 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 this estimate was developed has been provided. This appears to be a gross underestimate of actual costs. The ACCWP has estimated that the cost to implement the monitoring requirements for Alameda County alone would be approximately $1,150,000 per year. This represents a near tripling of the current $400,000 per year monitoring budget. (A detailed cost estimate is provided in Attachment 2 of the most recent ACCWP comment letter.)

Board member McGrath stated at the March 11, 2008 hearing that his first priority is legacy and TMDL pollutants. We agree, and believe the monitoring requirements should be focused on those pollutants. Unfortunately, there are many costly requirements in the monitoring provision that relate to issues that are not a priority, 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 or deferred to allow

us 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 current annual budget for the entire Program is $1.8 million. Newark and other member agencies cannot afford a 55% increase in our respective contributions to the Program to cover these additional costs. Implementing these provisions as drafted would require reduction of all other components of our program including our public outreach campaigns for litter and pesticide reduction.

Proposed Resolution: Revise Provision C.8 as described in Attachment 1 of this letter and Attachment 2 of the ACCWP comment letter: Proposed Revisions to and Detailed Cost Estimate for Provision C.8.

C.10 Trash Reduction

As with the TMDL pollutants, trash reduction should be a primary focus for this permit term. We recognize that local agencies need to play a role in reducing the amount of trash entering our creeks and the Bay. However, this is not a problem that Newark and other municipalities can solve on our own. We agree 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 trash reduction.

We appreciate the increased flexibility and the reduced scope of the structural control requirements provided in the Revised Tentative Order. As with other pollutants, source control is more cost effective than treatment and the increased flexibility to pursue source control measures in addition to the implementation of structural controls is a move in the right direction. However, as previously stated, these are very difficult economic times for Newark and the installation and maintenance of the required structural controls places an additional and potentially severe economic burden on the City. We are currently estimating at least $100,000 in additional annual costs to treat 30% of our commercial retail/wholesale areas within the 5-year period, assuming a significant contribution through redevelopment. There is simply no funding available given current economic conditions. We also have serious concerns regarding the impact to flood control capacity with the required installation of screening with 5-millimeter openings.

Eliminating all trash from local creeks and the Bay is a lofty, noble goal, but it is not one that can be accomplished solely be local agencies. Anti-litter efforts have been in place for decades, but have not eliminated what is a societal problem. Pilot trash assessments have indicated that trash in waterways is more often due to random, windblown littering instead of direct transport via storm drain systems. Permit compliance should not be dependent upon correction of a problem by local agencies over which they do not have full control. The C.10 provision will be very expensive and will not eliminate the problem. The Board staff acknowledges as much in the current permit under C.10.a.i. by stating:

> *"The actions required in this 5-year permit term are unlikely to eliminate the impact of trash on beneficial uses or achieve the Basin Plan water quality standard for this pollutant after five years."*

We request that the entire C.10 trash reduction requirements be deferred until this problem can be addressed on a statewide basis. However, if the Board intends to move forward with the current MRP, we have additional specific comments related to the Trash Action Level and the Rapid Trash Assessment requirements.

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."

Our 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 ACCWP conducted the Rapid Trash Assessment Protocol at ten sites throughout the Alameda County. (A technical memo summarizing the results is included as Attachment 4 in the ACCWP letter.) 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.

C.11. Mercury and C.12. PCB Controls

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 many more pilot projects required than are feasible. It is our 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 could be credited toward completion of the required pilot projects. Our estimated cost of $250,000 per year is based upon these assumptions. Without clarifying the provision in this manner, it will not be feasible to meet these requirements.

C.15. Conditionally Exempt Discharges

We have 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.

1. 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.

2. 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 or tens of thousands of these in the county, 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.

3. 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 the southern Alameda County Tri-City Area, the Alameda County Water District is the regional entity responsible for water supply and delivery. Newark and fellow Permittees do not have the resources to monitor and report on all of the planned and unplanned discharges from ACWD and other regional 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 should be eliminated.

4. 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 discharge as the reason to monitor is to assess the effectiveness of the treatment. (We know that the chorine 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.b.iii.(3) Emergency Discharge.

We believe it is essential that the Tentative Order be further refined as we have outlined above and in the attachment in order for Newark and other Permittees to achieve maximum water quality benefit with the resources available. These changes are necessary in order to avoid waste and reflect the realities of our current budget situation. 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 recommended changes to the Revised Tentative Order provided by the City of Newark, ACCWP, BASMAA, and all other ACCWP member agencies.

Sincerely,

Holly Guier
Hazardous Materials Bureau Coordinator

Soren Fajeau, P.E.
Senior Civil Engineer

Attachments: 1) Table of Proposed Specific Changes to Revised Tentative Order

cc: David W. Smith, Mayor
John Becker, City Manager