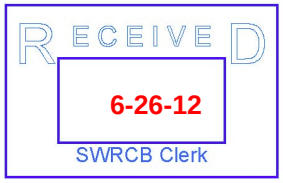

June 26, 2012

Charles R. Hoppin, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Subject: Comment Letter – Draft Caltrans MS4 Permit as Revised April 27, 2012

Dear Members of the Board:

Our organizations, representing local communities and business and labor groups who work in and around California's transportation construction industry, are writing to comment on the draft storm water MS4 permit for Caltrans under consideration by the State Water Resources Control Board (State Water Board), as most recently revised April 27, 2012 (Draft Permit). As Caltrans is a state agency with a critical mission that provides clear public benefit, it is our hope that we can continue to provide suggestions and guidance that will balance environmental benefit with the public's need for safe and well-maintained highways.

We appreciate changes made to the previous draft of August 18, 2011, including revisions that addressed certain elements of the comments submitted on September 16, 2011 (September 2011 Comments), such as improvements to monitoring requirements, and requirements for the management of agricultural run-on. Many of the changes appear to improve cost effectiveness in the Draft Permit's more detailed, prescriptive requirements, though we have not had the opportunity to see updated estimated costs of compliance with the new draft. Such a cost estimate should be carefully reviewed before the final permit is adopted.

However, there remain serious concerns, regarding the open-ended costs and litigation exposure associated with the Receiving Water Limits and Prohibitions, and regarding uncertainty and lack of consistency in requirements that will apply across the State for similar projects. We incorporate by reference our September 2011 Comments, and draw your attention to the areas of remaining concern.

Unworkable general Receiving Water Limits and Prohibitions continue to threaten perpetual litigation exposure and uncertainty.

Our September 2011 Comments explained the problems created by language prohibiting stormwater discharges that "cause or contribute to an exceedance of any applicable water quality standard" in waters receiving the discharges. "Water quality standards" refers to objectives for the streams themselves, which often are not met during storms for reasons beyond Caltrans' control or often anyone's control. Among other things, the standards were not established for storm conditions, and the State apparently has lacked the resources to fine tune them for wet weather. Even the most effective control measures cannot consistently stop "contributions" to these conditions during storms. As just one example, the Legislature has adopted a program to replace copper in brake pads over a 25 year-period but it is inevitable that urban and transportation stormwater will not achieve "parts per billion" copper standards in the interim.

The Draft Permit has not been changed to address our concern. In fact, the Response to Comments agrees that the provisions leave Caltrans in jeopardy, and indicates the State Water Board wants to leave it that way, saying,

> "The Ninth Circuit holding is consistent with the position of the State Water Board and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Boards or through a citizen suit. While the Boards have generally directed dischargers to achieve compliance by improving control measures through the iterative process, the Board retains the discretion to take other appropriate enforcement and the iterative process does not shield dischargers from citizen suits. No changes will be made to the relevant provisions of the Order in response to this comment."[1]

This response omits to mention the indisputable fact that Caltrans cannot prevent exceedances of water quality standards in streams during storms. Thus, the State Water Board, or at least its staff, proposes to deliberately leave Caltrans in continual jeopardy regardless of the effort expended on priority water quality measures throughout its system. This approach would not only impede effective budgeting, planning and response to true water quality priorities, but would also leave the entire State program exposed to the notions of NGOs who may choose to sue at any time and demand the courts to redirect priorities to the NGOs' area of choice, with attorneys' fees paid by the State.

The Response to Comments notes that this language has been standard in Phase 1 MS4 permits, based on orders the State Water Board issued beginning in 1999. Yet, case law interpreting this language has changed dramatically. Historically, this language was interpreted to allow permittees to address in-stream exceedances through continual improvements.[2] Obviously, the State Water Board can change its own standard language.

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[1] Response to Comments, p. 64, responding to Comment "ZD1" of Caltrans' letter dated September 29, 2011.

[2] For example, a February 2002 letter to the public signed by the Chair of the Los Angeles Regional Water Quality Control Board, Fran Diamond, attached a detailed "Question and Answer" document assuring the public that Los Angeles County area permittees would not be in immediate noncompliance by exceedances of water quality standards: "A violation of the permit would occur when a municipality fails to engage in a good faith effort to implement the iterative process to correct the harm. *As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides that the Permittee is in compliance*. As discussed at the Regional Board's July 2001 workshop and the December 2001 board meeting, the presence of the iterative process language makes clear the Permittees' mechanism for compliance with receiving water language. *Even if water quality does not improve as a result of the implementation efforts, there is no violation of the permit's receiving water provision as long as a good faith effort is underway to participate in the iterative process*. The basic premise is that an

The Ninth Circuit Court of Appeals has held that one must read each separate paragraph of the permit very literally. Therefore, the State must be very clear as to what actions constitute compliance, while permittees and the Water Boards work together to pursue the goals of achieving water quality standards in the State's waters.[3] We have no objection to uniformity among similar permits, but the State Water Board simply cannot roll out the new Caltrans permit before turning to this critical task.

If the State Water Board prefers language that leaves MS4s in continual noncompliance, it must provide a complete explanation of this policy choice, including the burden it places on public resources, and justification for turning over key program decisions to the courts.

Therefore, the State Water Board should revise its standard prohibitions and receiving water limits in new clarified language for the Caltrans permit. Receiving Water Limitation D.4 requires that when exceedances of instream water quality standards are identified, Caltrans submit specified reports, including an evaluation of and schedule for adopting additional, targeted water quality improvement measures. General Discharge Prohibition A.4 and Receiving Water Limitations D.2 and D.3 must include language that makes it clear they will be satisfied by compliance with the stringent procedures in Receiving Water Limitation D.4. The additional prohibition found in the Los Angeles Region portion of the Attachment V, relating to summer dry weather flows, should also indicate it will be satisfied by compliance with the procedures in Receiving Water Limitation D.4. This will allow Caltrans to focus its efforts on clearly identified measures which will improve water quality, while reducing its risk of third party lawsuits that could induce delays and costly project impacts.

The Draft Permit should maximize opportunities for standard requirements for similar projects throughout the State and reduce uncertainty created by deferral of requirements to individual Regional Water Boards.

The Draft Permit has improved a number of areas addressing specific, overly cumbersome or inefficient requirements. However, there is greater opportunity to streamline requirements without sacrificing water quality by setting standards for Caltrans tasks that have to be performed throughout the State, with many highways crossing multiple regions. While water quality conditions may vary between locations, the Permit could provide more consistent approaches to choosing management practices, as an accepted baseline. This would also save significant resources that result from "reinventing the wheel" when each Regional Water Board starts from scratch in looking at the same type of activity.

One important area in which the State Water Board can help foster consistency is with implementation of waste load allocations for TMDLs that often have similar goals. The Response to Comments confirms that the revised TMDL provisions in the Draft permit defer to the Regional Boards to develop the detailed requirements to implement their waste load allocations. Though the State Water Board will reopen the permit to add the detailed requirements, it is not clear that the State Water Board will actively participate and seek consistency, and perform rigorous oversight. Finding 49 expressly states an intention to defer to the Regional Water Boards in establishing TMDL monitoring requirements.

The Response to Comments also indicates that the State Water Board will choose not to develop a uniform dewatering standard for Caltrans projects. It is suggested that a statewide approach would be

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incremental effort is appropriate to identify additional best management practices that will ultimately result in improved storm water quality."

[3] Debate on the detailed history of every Water Board litigation position on this language, suggested by the Response to Comments and by statements by State Water Board counsel, is immaterial. The policy choice must now be clearly explained by the State Water Board itself.

more demanding. While we appreciate that water quality conditions may vary, standardization would enhance training, budgeting, oversight, and progress in improving water quality control measures.

Clean Water Act regulations require the permit to incorporate measures to implement TMDLs. As the permitting agency, the State Water Board has the authority, and the responsibility, to take a more prominent role. One of the ways in which the State Water Board could make such a direction clear would be to adopt guidelines for TMDL implementation. This would allow the regional boards to have clearly defined parameters and Caltrans to find more consistency in permit compliance while still maintaining the same standard level of environmental protections.

Where the Draft Permit calls for decisions to be made by Regional Water Boards, it should provide a mechanism to resolve significant controversies with those boards.

The Draft Permit provides for Regional Water Board discretion on a number of important issues affecting the public's interest in the delivery of critical statewide infrastructure quickly and affordably. Given that Caltrans is one of the only discharge permits in the unique position of working across all Regional Water Boards instead of one single jurisdiction. This can result in inconsistencies between Regional Water Boards in 404 certifications and permit enforcement that has had negative impacts on Caltrans project delivery and needlessly increased costs. These inconsistencies include, among other things, include decisions on the number and location of monitoring points, and TMDL-related requirements. We urge the State Water Board to exercise its authority to maintain oversight of these requirements, by providing a specific procedure for Caltrans to appeal to State Water Board staff for early dispute resolution. Again, the State Water Board should demonstrate leadership in its role as the primary permitting agency regulating critical statewide infrastructure.

The Draft permit remains more stringent, complex and costly than permits issued to transportation agencies by other states, continuing to far exceed the minimum federal standard of controls to the "maximum extent practicable," without clearly acknowledging and supporting the State's decision to do so.

In fact, the State's unique definition of "maximum extent practicable," which can only be seen in the separate Attachment VIII Glossary document, would require that measures be adopted unless they are "technically infeasible" or "cost prohibitive." It would require Caltrans to prove why it is not using any "applicable" BMP on that basis:

> "To achieve the MEP standard, municipalities must employ whatever BMPs are technically feasible and are not cost-prohibitive. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the costs would be prohibitive."

This language is being used in a permit demanding one hundred percent compliance, requiring extensive analysis and budgeting to guarantee adoption of all measures that are not "cost prohibitive." As noted in the Response to Comments:

> "*Compliance with the permit is not subject to the availability of funding. Adequate funding must be maintained to meet all permit requirements*." [4]

Whenever Caltrans is unable to comply with permit conditions, or simply is found not to perform every detail to the satisfaction of a third party or a Water Board, it is vulnerable to large daily penalties for each

[4] Response to Caltrans comment C63 (Response to Comments, p. 16).

alleged violation – as much as $37,500 per violation, per day. Lawsuits will inevitably be brought asserting that BMPs were not, in fact, "cost prohibitive," given the presumptively deep pockets of the State. The Draft Permit definition should be revised to eliminate the new concept that every "applicable" BMP must be adopted unless proven technically infeasible or cost prohibitive.

The Draft Permit requirement of a minimum of 100 monitoring sites is an open ended cost liability

The draft permit's requirement for a minimum of 100 monitor sites is open ended, making it impossible to estimate the costs that will be involved, though clearly they will be substantial. Section E.2.c provides that an unspecified number of sites must be monitored under "Tier 1," described simply as "all Tier 1 monitoring as required under the ASBS Special Protections, or under the adopted and approved TMDLs *without limitation*." If by some chance this does not result in at least 100 monitoring sites, more must be added simply to ensure at least 100 sites are included.[5] The number apparently could be far greater than 100, however, because after reviewing the list Caltrans must submit eight months after permit adoption, the State Water Board has unrestricted right of revision, "to reflect Regional or State Water Board priorities."

Monitoring requirements should be less expansive. At a minimum, a *maximum* number of monitoring sites should be included, rather than a minimum number with unfettered ability on the part of the Water Boards to add requirements under ASBS Special Protections, TMDLs, or Tier 2 requirements. The Draft Permit goes well beyond requirements in any other State, and seems to imply there are no limits on the State's ability to fund the monitoring program.

Once again, we appreciate the opportunity to comment on the Draft Permit and recognize that the State Water Board has worked with Caltrans and made significant changes from the initial Draft Permit. Our organizations are looking forward to the opportunity to continue to offer beneficial changes to the next draft to address these remaining concerns in a cost-effective manner that still protects our environment.

Thank you for your consideration.

Jim Earp
California Alliance for Jobs

Keith Dunn
Self Help Counties Coalition

Richard Lyon
California Building Industry Association

[5] The timing of selecting these sites is also confusing, since a list of the additional "Tier 2 sites" must be submitted within 8 months of permit adoption, when it is not clear when the number of Tier 1 sites will be known.

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ACEC California

Emily Cohen
United Contractors

Valerie Nera
California Chamber of Commerce

Kyra Ross
League of California Cities

Juanita M. Martinez
Transportation California