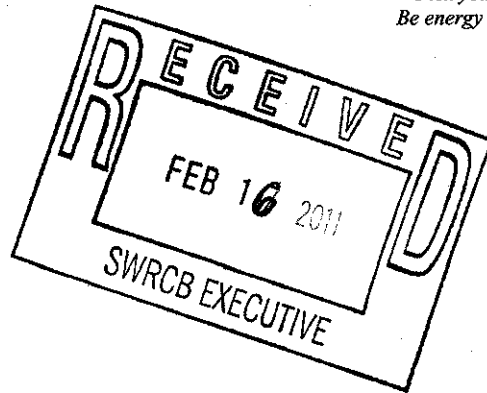


DEPARTMENT OF TRANSPORTATION
 DIVISION OF ENVIRONMENTAL ANALYSIS, MS 27
 1120 N STREET
 P. O. BOX 942874
 SACRAMENTO, CA 94274-0001
 PHONE (916) 653-7507
 FAX (916) 653-7757
 TTY (916) 653-4086

Public Comment
 North Coast—Low Threat Discharge
 Deadline: 2/16/11 by 12 noon



*Flex your power!
 Be energy efficient!*



February 16, 2011

Jeanine Townsend, Clerk to the Board
 State Water Resources Control Board
 P.O. Box 100, Sacramento, CA 95812-2000
 1001 I Street, 24th Floor, Sacramento, CA 95814
commentletters@waterboards.ca.gov

Dear Ms. Townsend:

Re: Comments on North Coast Regional Water Board Low Threat Discharge Basin Plan Amendment (BPA) to Establish Exception Criteria to the Point Source Waste Discharge Prohibitions by Revising the Action Plan for Stormwater Discharges and adding a New Action Plan for Low threat Discharges

The California Department of Transportation (Caltrans) appreciates the opportunity to comment on the North Coast Regional Water Quality Control Board (NCRWQCB) Low Threat Discharge Basin Plan Amendment (BPA). Caltrans is supportive of the North Coast Regional Water Board's efforts to modify the provisions in the current Basin Plan that now prohibit many essential discharges. We also support the goal of ensuring that a management structure is in place to ensure that the newly allowable discharges are protective of water quality. We submitted comments on January 29, 2009, when this BPA was first being considered by the NCRWQCB. Unfortunately, the changes that were made to the amendment did not address most of our concerns, which we have included with the comments below.

Our overall concern is that the proposed changes create a regulatory structure that duplicates or overlaps existing programs, such as the Caltrans NPDES Statewide Stormwater Permit and the 2009 Construction General Permit (CGP). The added requirements introduced by the Stormwater Action Plan and the Low Threat Action Plan differ in significant ways from these statewide permits and sometimes require activities that are very costly, but with limited or no environmental benefits. We understand the intent of addressing the problem with prohibitions. The resultant controls should be cost-effective, and present corresponding water quality benefits.

Following are our main concerns for your consideration:

- 1) *The prohibitions must be addressed.* Currently, many discharges that occur in the North Coast Region appear to be prohibited by the provisions in Chapter 4 of the Basin Plan. Our understanding is that these provisions were developed when stormwater was not considered a point source discharge. Stormwater discharges addressed by an NPDES permit are now point sources and subject to the prohibitions. In many cases, there is no alternative to the discharge of stormwater.
- 2) *Non-stormwater Discharges Prohibition.* In addition, non-stormwater discharges are also prohibited in many locations in the North Coast, although alternatives to discharge do not exist. These include such discharges as hillside seepage and underpass dewatering, which are relatively minor. Also chapter 4 of the Basin Plan prohibits point source discharges of waste, "one molecule rule". Seasonal discharges of uncontaminated groundwater (areas where there are no discharges to groundwater, no

industrial activity, no habitation, no structures, etc.), should not be considered a discharge of waste. These discharges facilitate slope stability and safety and are not the direct result of anthropogenic activity.

- 3) *The amendment should not create a duplicate regulatory structure for discharges addressed under NPDES permits.* Currently Caltrans' stormwater and non-stormwater discharges are required to comply with one of the following NPDES permits: Caltrans MS4 NPDES Statewide Stormwater Permit and the CGP. These permits create an effective and consistent approach for regulating stormwater and protecting water quality, by implementation of the Stormwater Management Plan, Stormwater Pollution Prevention Plans and other permit requirements. Water Code section 13001 states that the Regional and State Water Boards shall "coordinate their respective activities so as to achieve a unified and effective water quality control program in this state." In addition, the legislature has recently indicated their interest in having regulatory agencies review their programs to identify and eliminate redundant or duplicative programs. Even at the federal level, the President issued an Executive Order in January to improve regulations by using the least burdensome tools for achieving regulatory ends.¹ With these goals in mind, Caltrans requests that the State Board exempt from the low threat discharge action plan encompassed in the BPA discharges subject to the the State Board's statewide permits.
- 4) *State liability should be minimized.* The current prohibitions on point source discharges in many areas of the Region, and during specified seasons, or on discharges exceeding 1% of stream flows could create a potentially significant liability for state facilities. The response to comments states that "such discharges would currently be considered inconsistent with the Basin Plan and could subject such discharges to potential liability." However, the proposed Stormwater Action Plan and Low Threat Action Plan appear to leave some situations where this liability is unavoidable. The proposals need to be carefully reviewed in the context of current discharges to ensure that unavoidable liability for state facilities does not remain.
- 5) *"Low threat" discharges should be managed as low threat and not mandated to have controls.* We have proposed that permitted discharges be exempt from the prohibitions and not subject to supplemental requirements imposed through the two Action Plans. However, if the Board proceeds with the Action Plan approach, the requirements should be proportional to the risk. For example, hillside seepage is common on state highways. This seepage consists of groundwater intercepted by road cuts and is directed to the storm drain system. The mandatory implementation of physical controls to minimize these flows does not normally represent a cost-effective expenditure of public funds. Theoretically, these flows could be captured by a collection system and transported to a sanitary sewer system, directed to specially constructed infiltration galleries, or disposed of by hillside sprinkling systems if land is available. While technically feasible, these measures may not result in a cost-effective benefit to the water quality, as in the case of directing clean water to sewage treatment plants. The Action Plan approach needs to be reconsidered from the standpoint of an environmentally reasonable and cost-effective relationship between mandated requirements such as flow minimization and water quality benefits.

¹ Improving Regulation and Regulatory Review - Executive Order dated 18 January 2011 supplemental to E.O. 12866 (September 30, 1993).

- 6) *Upgradient flows and associated contaminants should not become the responsibility of the state.* Caltrans is required to pass-through flows originating upgradient of Caltrans facilities, including roadways. These flows can include agricultural runoff and non-point sources that may carry pollutants. Similarly, groundwater flows may contain natural (e.g., selenium) or industrial pollutants that exceed objectives. The natural flow of these groundwaters toward streams or other waterbodies is sometimes intercepted by roadways.² Caltrans, and consequently the state, should not have to assume the responsibility for ensuring that all surface or underground upgradient flows entering the right-of-way comply with objectives.
- 7) *The Control Plans should not create operating constraints on the state highway system by requiring structural modifications for low threat discharges.* Underpasses, for example, may require frequent or constant pumping to remove stormwater or rising groundwater. Similarly, flows from retaining wall weep holes must be discharged. These are potentially low-threat discharges. Pollutants are typically at very low levels and come from natural sources.
- 8) *Non-low threat discharges need to be addressed by a basin plan amendment.* Caltrans is particularly concerned that the dry-weather and other discharge prohibitions remain in place for non-low threat discharges. We believe these remaining prohibitions may potentially apply to some essential dewatering and other operations that cannot be terminated without jeopardizing transportation and safety of the travelling public.

In summary, we believe this Amendment should not be adopted in its current form, because it creates a regulatory structure that is additive and redundant to the current NPDES permits. The compliance burden should not be increased unless an identified problem needs to be addressed. We are not aware that problems have been identified with the current low-risk discharges. Caltrans therefore requests that the State Water Board remand back the Low Threat discharges BPA to NCRWQCB for consideration of our comments.

Again, thank you for the opportunity to comment. If you have any questions, please contact Joyce Brenner of my staff at (916) 653-2512.

Sincerely,



G. SCOTT MCGOWEN
Chief Environmental Engineer

c: Joyce Brenner, Office Chief, Program Implementation
Bruce Fujimoto, SWRCB, bfujimoto@waterboards.ca.gov

Attachment:

1. Caltrans January 29, 2009 Comments Letter to NCRWQCB.
2. NCRWQCB Response to Caltrans January 29, 2009 Comments

² Since these discharges result from the construction of roadways, we assume they exhibit controllable water quality factors that are defined as "those actions, conditions, or circumstances resulting from man's activities that may influence the quality of the waters of the State and that may be reasonably controlled" (Basin Plan page 3-1.00) and therefore are regulated by this BPA. See response to comments #14.

DEPARTMENT OF TRANSPORTATION
DIVISION OF ENVIRONMENTAL ANALYSIS, MS 27
1120 N STREET
P. O. BOX 942874
SACRAMENTO, CA 94274-0001
PHONE (916) 653-7507
FAX (916) 653-7757
TTY 711



*Flex your power!
Be energy efficient!*

January 29, 2009

Ms. Lauren Clyde
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403

Re: Basin Plan Amendment to Establish Exception Criteria to the Point Source Waste Discharge Prohibitions by Revising the Action Plan for Stormwater Discharges and Adding a New Action Plan for Low Threat Discharges

The California Department of Transportation (Caltrans) appreciates the opportunity to comment on the above referenced proposed Basin Plan Amendment. Caltrans stormwater discharges and non-storm water discharges are subject to a statewide MS4 permit or to the statewide General Construction Permit. These permits require Caltrans to comply with water quality standards including those established by Regional Boards. The MS4 permit currently exempts certain non-storm water discharges from regulation and conditionally exempts others. The proposed Basin Plan amendment will subject the exempt discharges to extensive regulatory burdens inconsistent with Caltrans current MS4 permit or the equally applicable statewide General Construction Permit.

With these points in mind, Caltrans offers the following suggestions:

1. Exempt storm water and non-storm water discharges, covered under an existing NPDES permit, from the Basin Plan's current prohibitions on point source discharges. Enforcement of the current NPDES permits should be sufficient to protect water quality and beneficial uses, will avoid duplicative regulatory schemes and thus further the legislative intent, as expressed in Water Code Section 13001, of a "unified and effective water quality control program in the state."
2. If the first suggestion is not possible, then seriously consider exempting certain nonstorm water discharges from the prohibition. These discharges, listed in Section B.2 of Caltrans current MS4 permit, include flows from riparian habitats or wetlands, diverted stream flows, springs, rising ground waters, and uncontaminated ground water infiltration. These discharges are exempt from the permit unless identified as sources of pollution to receiving waters. For Caltrans, examples of these discharges are:

- Hillside seepage from natural and cut slopes;
- Intermittent natural drainage through ravines and other ephemeral watercourses that may pass through right-of-way drainage facilities;
- Upgradient discharges (natural and manmade) into Caltrans facilities. For example, historical agricultural runoff is exempt from the NPDES program but may enter the roadway drainage system when these flows are located upgradient. Caltrans cannot block these flows without jeopardizing the physical integrity of the right-of-way or in many cases without violating surface water laws and incurring claims for inverse condemnation due to flooding.
- Underpasses: certain underpasses require pumping to prevent flooding during storms or due to rising groundwater. (Alternative discharge and minimization options are often limited. It is not appropriate or environmentally beneficial to direct clean groundwater to a POTW).
- Other drains to reduce hydrostatic pressure against surface and subsurface structures, for example weep holes from a retaining wall.
- Discharges by others: drinking water transport and transmission systems sometimes discharge during emergencies and for maintenance purposes within the right-of-way.

The proposed action plans will adversely impact Caltrans ability to effectively drain the highway system without unscheduled and potentially costly structural modifications to evaluate, control and or treat these naturally occurring non-storm water sources. Furthermore, these discharges are frequently not a threat to water quality, are not within the legal control of Caltrans in most cases, and are not under Caltrans physical control and yet they pose significant challenges to provide adequate and necessary drainage of the state highway system. The proposed Basin Plan amendment, requiring Caltrans to implement a general management program to eliminate or minimize non-storm water discharges into surface waters, may not be economically or technically feasible in all cases.

3. Exempt groundwater that contains high levels of naturally occurring pollutants from the prohibition. This assumes the groundwater is not contaminated with manmade substances and it should be exempt if it would otherwise enter the receiving water at the same rate of discharge and if it would only be *intercepted* by the MS4 facility. For example, an underpass drainage system will typically intercept groundwater, which is hydraulically connected and moving toward the down gradient waterway. The discharge of the intercepted flow directly to the waterway has no environmental consequence, since the groundwater would have entered the waterway regardless due to natural processes. However, if the extracted water would not otherwise enter the adjacent waterway, and if

Ms. Lauren Clyde
January 29, 2009
Page 3

the constituents are of significant concern, then site-specific risks will need to be determined.

Another issue arises when no other discharge options are available. For example, underpass dewatering often is a permanent ongoing function. Discharge could not occur based on the proposed amendments if the flow is not eligible for the low-threat exception. Permittees may be able to truck or pipe flow to a publicly owned treatment works (POTW) but at significant expense, and possibly with limited environmental benefits. Ideally, the amendments would not result in the ban of necessary discharges, and these discharges could be assessed on a site and constituent-specific basis.

Finally, on a couple of procedural notes, page 11 of the Staff Report indicates Caltrans MS4 permit covers all Caltrans discharges from construction sites and indicates Caltrans is not subject to the general construction permit. In fact, Caltrans MS4 permit incorporates the substantive provisions of the general construction permit by reference. The only exception is that Caltrans is not required to file Notices of Intent to Comply with the general construction permit, but instead files Notices of Construction with the Regional Boards. Otherwise, the compliance requirements are the same.

In closing, while Caltrans appreciates the opportunity to comment on the proposed Basin Plan amendments, I would like to remind the Board of the Water Code Section 13240 requirement to "consult and consider the recommendations of affected state and local agencies" during the process of promulgating and adopting regional Basin Plans. This requirement reasonably applies to sweeping and substantive amendments to the same. I am certain the Board would extend all reasonable courtesies to another state agency and look forward to working with you and your staff to assure protection of water quality and beneficial uses. If you have any questions, please contact Joyce Brenner of my office at (916) 653-2512

Sincerely,



SCOTT McGOWEN
Chief Environmental Engineer
Division of Environmental Analysis

cc: JGrewal, JBrenner

Requested Changes to Proposed Amendment Language
Summary Comments 11 to 29

11. Summary comment:

Commenter requests exempting storm water and non-storm water discharges covered under an existing NPDES permit from the current prohibitions on point source discharges. Commenter states that enforcement of the current NPDES permits should be sufficient to protect water quality and beneficial uses, would avoid duplicative regulatory schemes and further the legislative intent, as expressed in Water Code section 13001, of a "unified and effective water quality control program in the state."
(Caltrans)

Response:

When the Regional Water Board adopted Resolution R1-2007-0073, *Policy Statement in the Matter of Recycled Water Use in the North Coast Region*, members of the Regional Water Board provided direction to staff regarding development of this low threat discharge amendment. The Resolution stated, in part, that the Regional Water Board would:

- Proceed with consideration of a Basin Plan amendment to allow discharges of small amounts of potable and treated recycled water and other low threat discharges during the dry-weather season, *if appropriate best management practices are implemented*, beneficial uses are protected, and the discharges do not contribute to water quality degradation or harm to aquatic life.
- Uphold the dry-weather discharge prohibition.

As part of the adoption hearing for Resolution R1-2007-0073, the Regional Water Board made it clear that revisions or alterations to the prohibition language itself would not be entertained by the Board. Rather staff was directed to develop an approach that would allow exceptions from the point source prohibitions if a BMP program was in place.

12. Summary comment:

If exempting NPDES permittees from the point source prohibitions are not possible, commenter requests exempting certain non-storm water discharges from the prohibition. These discharges, listed in Caltrans' current MS4 permit, include flows from riparian habitats or wetlands, diverted stream flows, springs, rising ground waters, and uncontaminated ground water infiltration. These discharges are exempt from the permit unless identified as sources of pollution to receiving waters. Examples of these discharges are:

- Hillside seepage from natural and cut slopes;
- Intermittent natural drainage that may pass through right-of-way drainage facilities;
- Up gradient discharges (natural and manmade) into Caltrans facilities.
- Underpasses: certain underpasses require pumping to prevent flooding during storms or due to rising groundwater.

- Other drains to reduce hydrostatic pressure against surface and subsurface structures, for example weep holes from a retaining wall.
- Discharges by others: drinking water transport and transmission systems sometimes discharge during emergencies and maintenance operations within the right-of-way.

(Caltrans)

Response:

An approved BMP program is a crucial element in demonstrating that a discharge will pose no more than a low threat to water quality. Each of the scenarios described above could have a suite of BMPs assigned to control the discharge to assure that the discharge met the low threat exception criteria (hereinafter exception criteria).

13. Summary comment:

The commenter states that the proposed Amendment will adversely impact Caltrans' ability to effectively drain the highway system without unscheduled and potentially costly structural modifications to evaluate, control and or treat naturally occurring non-storm water sources even if the discharges are frequently not a threat to water quality, are not within the legal control of Caltrans in most cases, and are not under Caltrans physical control and yet they pose significant challenges to provide adequate and necessary drainage of the state highway system. The proposed Amendment, requiring Caltrans to implement a general management program to eliminate or minimize non-storm water discharges into surface waters, may not be economically or technically feasible in all cases.

(Caltrans)

Response:

It is staff's intent that each MS4 permit adopted by the State or Regional Water Board which authorizes exception criteria to the point source prohibitions would contain a storm water management program/plan (hereinafter SWMP) that described the suite of BMPs that were developed by the permittee for their site specific conditions. This would include those BMPs that are currently being implemented, along with those additional requirements deemed necessary by the Regional Water Board Executive Officer to ensure that the discharge is a "low threat" to water quality.

If a discharge is deemed to be the result of a "controllable water quality factor"¹ then implementation of a BMP program would be required under the proposed Amendment to ensure that the criteria for the exception are met.

Staff realizes that this may result in increased cost to permittees for activities in the North Coast Region. The cost of complying with the existing prohibition is likely much higher; however, because of the regulatory uncertainty that exists. Given the existence

¹ Controllable water quality factors are defined as "those actions, conditions, or circumstances resulting from man's activities that may influence the quality of the waters of the State and that may be reasonably controlled" (Basin Plan page 3-1.00).

of point source prohibitions in the North Coast Region that are unlike any other in the State, such discharges would currently be considered inconsistent with the Basin Plan and could subject such discharges to potential liability.

14. Summary comment:

Exempt groundwater that contains high levels of naturally occurring pollutants from the prohibition. This assumes the groundwater is not contaminated with manmade substances and it should be exempt if it would otherwise enter the receiving water at the same rate of discharge and if it would only be *intercepted* by the MS4 facility. For example, an underpass drainage system will typically intercept groundwater, which is hydraulically connected and moving toward the down gradient waterway. The discharge of the intercepted flow directly to the waterway has no environmental consequence, since the groundwater would have entered the waterway regardless due to natural processes. However, if the extracted water would not otherwise enter the adjacent waterway, and if the constituents are of significant concern, then site-specific risks will need to be determined.

(Caltrans)

Response:

Staff cannot support the position that groundwater containing naturally high levels of pollutants that exceed water quality objectives should be "exempted" from either the existing point source prohibitions or the proposed Amendment. Staff believes it is unlikely there would be many situations, as described above, when the discharge of groundwater intercepted by the MS4 facility (considered to be a controllable water quality factor) would be at the same rate of discharge as that without the interception by the MS4 facility. Staff believes that the inclusion of BMPs designed to prevent (where possible) and minimize (to maximum extent practicable) discharges associated with our highway system could easily be described in the SWMP.

15. Summary comment:

Commenter states that there are cases when no other discharge options are available and that discharge could not occur if the flow is not eligible for the low-threat exception. Permittees may be able to truck or pipe flow to a publicly owned treatment works but at significant expense, and possibly with limited environmental benefits. The proposed Amendment should not result in the ban of necessary discharges, and these discharges could be assessed on a site and constituent-specific basis.

(Caltrans)

Response:

Staff concurs that a ban on "necessary" discharges is not warranted. The focus of this proposed Amendment is to develop a permitting framework that will authorize these sorts of discharges to occur. Staff also concurs that discharges should be assessed and BMPs developed and implemented based on onsite and offsite conditions and water quality constituents of concern. In fact, a critical component of this proposed Amendment is the assessment, design, and implementation of BMPs based on the

permittee's extensive knowledge of on and off site conditions, water quality conditions of concern and other localized conditions.

16. Summary comment:

Page 11 of the Staff Report indicates Caltrans MS4 permit covers all Caltrans discharges from construction sites and indicates Caltrans is not subject to the general construction permit. Caltrans MS4 permit incorporates the substantive provisions of the general construction permit by reference. The only exception is that Caltrans is not required to file Notices of Intent to comply with the general construction permit, but instead files Notices of Construction with the Regional Boards.

(Caltrans)

Response:

Comment noted.

17. Summary comment:

Commenter appreciates the opportunity to comment on the proposed Amendment and reminds the Board of the Water Code section 13240 requirement to "consult and consider the recommendations of affected state and local agencies" during the Basin Plan amendment process. Commenter is certain the Board would extend all reasonable courtesies to another state agency and look forward to working with the Board and staff to assure protection of water quality and beneficial uses.

(Caltrans)

Response:

The Regional Water Board, as part of the well established Basin Plan Amendment process, and as documented, in part, in this Response to Comments document, does "consult and consider the recommendations of affected state and local agencies" as well as a myriad of other interested stakeholders. Regional Water Board staff also looks forward to continuing to work together in protecting water quality.

18. Summary comment:

This comment is not by Caltrans. All Caltrans comments are highlighted yellow.

be assessed in the discharge alone.