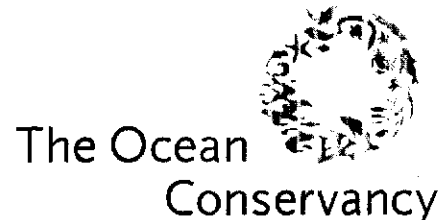


December 23, 2004

Jeffrey Young, Chair  
Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401



Dear Chairman Young and Members of the Board:

On behalf of The Ocean Conservancy and its more than 25,000 California members as well as the Natural Resources Defense Council and its more than 100,000 in California, we submit the following comments on the Proposed NPDES Municipal Storm Water Permit (Waste Discharge Requirements Order No. R3-2004-0135) for the City of Salinas ("Permit").

Stormwater is the most significant source of water pollution in California. In the words of the U.S. EPA, it has become an "increasingly important contributor[] of use impairment as discharges of industrial process wastewaters and municipal sewage plants come under increased control. . ."<sup>1</sup> Stormwater harms surface waters in part because it contains most, if not all, of the pollutants of greatest concern.<sup>2</sup> Because of the seriousness of the threat to water quality from stormwater, the renewal of this permit provides an important opportunity for the Regional Board to protect inland and coastal waters in this region.

Our review of the permit suggests both strengths and weaknesses. Among its strengths, the Permit contains a prohibition against "[d]ischarges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives)."<sup>3</sup> The California Court of Appeal recently, among other things, approved this standard and upheld one of the strongest municipal permits in California in its decision in *Building Industry Association of San Diego County v. State Water Resources Control Board*.<sup>4</sup> We agree that the permit must require compliance with water quality standards in receiving waters—beyond the Maximum Extent Practicable standard—especially in light of the serious threats posed by municipal stormwater runoff. Among its weaknesses, the Regional Board has not provided the public with the proposed ROWD. In addition, the Permit findings, definitions, and all program requirements should be modified to be consistent with other Phase I permits—in particular, the recently upheld San Diego Permit in *Building Industry Association*.

<sup>1</sup> 55 Fed. Reg. 47990 (November 11, 1990).

<sup>2</sup> *The Quality of Our Nations Water: 1994 Report to Congress* (Washington: U.S. EPA, 1995) at 25.

<sup>3</sup> State Water Resources Control Board Central Coast Region, Order No. R3-2004-0135, NPDES Permit No. CA0049981, Waste Discharge Requirements for City of Salinas Municipal Storm Water Discharges (Draft for Meeting of February 11, 2005) ("Permit") at C.1.

<sup>4</sup> Fourth Appellate District, Division One, Super. Ct. No. GIC 780263 (December 7, 2004).

We outline our objections to the Permit below:

### Monitoring Requirements

The permit contains a proposed monitoring and reporting program ("MRP"), as required under the Clean Water Act regulations.<sup>5</sup> The MRP states that its purpose is "ensure the Permittee (the City of Salinas, or "the City") is in compliance with requirements and provisions contained in Order R3-2004-0135."<sup>6</sup> Although confirming compliance with the permit is an important goal, the broader purpose of a MRP for a municipal stormwater permit is in fact much broader: to ensure that water quality is protected by the permit. The MRP is clearer about this more critical objective later.<sup>7</sup> However, it is an important point to make initially and unambiguously, as it highlights the need for adaptive changes to the permit if monitoring results demonstrate inadequacies in the protections provided in the permit.

The MRP states that it is designed to be complementary with the Monitoring and Reporting Program requirements for all dischargers enrolled under Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, Order No. R3-2004-0117 (Agriculture Waiver Program).<sup>8</sup> We agree that coordination between the MRP and the Agriculture Waiver Program would be both logical and efficient. However, we are concerned that the MRP fails to take advantage of all the opportunities for coordination where they exist. Specifically, the MRP provides for less frequent monitoring of fewer constituents than the Agriculture Waiver Program. In fact, the only clear instance in which the MRP provides for coordination is where it proposes the use of data from the Agriculture Waiver Program in lieu of collecting additional data in certain locations.<sup>9</sup>

Indeed, the diminution in the number of sites sampled under the MRP since the last permit is worrisome. The 1999 MRP provided for monitoring at 21 sites, whereas the 2004 MRP provides for monitoring at 4. There is little explanation for this reduction in either the permit or the staff report, although the staff report notes – incredibly – that "the current sampling program has not been successful in identifying pollutant sources or trends over time."<sup>10</sup> It is difficult to imagine how implementation of a less comprehensive monitoring program will result in a better characterization of pollutant sources and trends over time, but in any case, the MRP should contain an explanation for this determination.

Finally, the MRP states that the "permittee is authorized to supplement their monitoring data with other monitoring sources outside the permit boundary, provided the monitoring conditions and sources are similar to those in the permit boundary."<sup>11</sup> It is true that the permittee should be encouraged to use whatever data are at its disposal to get the most accurate characterization of the water quality in the vicinity. However, the MRP should be clear that use of supplemental monitoring data does not relieve the permittee of any of its monitoring responsibilities under the permit.

<sup>5</sup> 40 CFR § 122.26(d)(2)(iii)(D)

<sup>6</sup> California Regional Water Quality Control Board Central Coast Region, Order No. R3-2004-0135, NPDES Permit No. CA0049981, Monitoring and Reporting Program Requirements (December 3, 2004) ("MRP") at A.1.

<sup>7</sup> *Id.* at B.1.

<sup>8</sup> *Id.* at B.1.c.

<sup>9</sup> The MRP states that "[t]he Agriculture Waiver Program monitoring will provide additional background data on Gabilan and Natividad Creeks, and the Reclamation Ditch (Alisal Creek), therefore sampling these incoming waters need not be duplicated in this monitoring program." *Id.* at B.2.b.i.

<sup>10</sup> State Water Resources Control Board Central Coast Region, Staff Report for Regular Meeting of February 8, 2005, Issuance of NPDES Municipal Storm Water Permit (Waste Discharge Requirements Order No. R3-2004-0135), City of Salinas, Monterey County (November 24, 2004) at IV.8.

<sup>11</sup> MRP at B.1.d.

### Proposed Storm Water Management Program

As part of their permit application, the permittees are required to submit a proposed SWMP under the Clean Water Act. In *Environmental Defense Center*, the Ninth Circuit emphasized that a storm water management plan, which "contain[s] the substantive information about how the operator of a [MS4] will reduce discharges" is an inherent part of the storm water permit. Under 40 C.F.R. section 122.26(d)(2) permittees must submit a detailed proposed management program. Although Attachment 4 provides the SWMP requirements, the public has not been provided a copy of the SWMP as proposed by the permittees. As such, we request that the proposed SWMP be made available to the public and we reserve our rights to submit comments on the proposed SWMP once it has been made available.

### Storm Water Management Program Revisions

The SWMP revisions provided in Attachment 4 sets forth requirements for the major programs under the permit. These revisions should be modified so that they are consistent with other Phase I permits through out California. In particular, because the California Court of Appeal has recently upheld the San Diego municipal permit, the San Diego permit serves as a model for designing this permit to effectively control polluted urban runoff.

The permit also correctly identifies the Los Angeles SUSMP as the model for the development standards in the permit. State Water Resources Control Board Order WQ 2000-11 holds that SUSMP provisions constitute MEP for new and redevelopment, and that all new municipal stormwater permits must be consistent with these SUSMP principles. Specifically, the Chief Counsel of the State Board expressly notified all Regional Board Executive Officers that:

[M]unicipal storm water permits must be consistent with the principles set forth in [Order WQ 2000-11]. The Order finds that the provisions of the SUSMPs, as revised in the Order, constitute MEP.<sup>12</sup>

However, because the Board proposes to approve the permit prior to the development of the program, it is not clear yet whether the development standards proposed will be consistent with the SUSMP provisions.

### Other Permit Conditions

Because the receiving waters encompassed by the Permit are surface water bodies, each is subject to both federal and state anti-degradation policies.<sup>13</sup> In furtherance of these policies, the Board is required to show that the Permit will not allow a lowering of water quality from that which was achieved in 1975.<sup>14</sup> In this connection, the Permit states: "Conscientious implementation of BMPs that reduce storm water pollutants to the Maximum Extent Practicable will reduce the likelihood that discharges from MS4s will cause or contribute to unreasonable degradation of the quality of receiving waters."<sup>15</sup>

<sup>12</sup> Memorandum from Craig M. Wilson, Chief Counsel, to RWQCB Executive Officers (December 26, 2000).

<sup>13</sup> See In re: Petition of Rimmon C. Fay.

<sup>14</sup> In re: Petition of Citizens for a Better Environment, SWRCB Order No. 90-5, 1990 Cal. ENV LEXIS 26 (1990).

<sup>15</sup> Permit at 17.

This may be true, but it is a misconstruction of what is required under the anti-degradation policies. The basis for anti-degradation analysis in this case is the effect of the permit, not the effect of the BMPs. In other words, the analysis must ask whether the operation of the MS4 (with or without BMPs) will cause or contribute to unreasonable degradation of receiving waters. Instead, the Permit justifies its anti-degradation findings using a comparison between a permit with BMPs and a permit without them. The Board should insist on a proper anti-degradation analysis before approving this permit.

The Clean Water Act unequivocally requires that municipal stormwater permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."<sup>16</sup> The only exceptions to this prohibition should be discharges permitted pursuant to other NPDES permits and discharges resulting from firefighting activities.<sup>17</sup> The Permit, however, purports to allow numerous other categories of non-stormwater discharges into storm sewers. Specifically, the Permit states: "The Permittee shall prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or not prohibited in accordance with this Order." The Permit goes on to claim that some categories of discharges "need only be prohibited from entering an MS4 if such categories of discharges are identified by the Permittee as a source of pollutants to waters of the United States."<sup>18</sup>

First, this is a misapplication of the regulations. The provision of the regulations from which the permit derives these categories of discharges is concerned with the development of a program to detect and remove illicit discharges from storm sewers, not with the prohibition requirement itself. This provision states that "this program description shall address all types of illicit discharges . . ." but that some categories should be addressed by the program only if the municipality finds that they are sources of pollutants into waters of the United States.<sup>19</sup> This requirement reflects the intent that other categories of discharge should be higher priorities for the program, but does not change the clear legal requirement that all non-NPDES permitted, non-firefighting related, non-stormwater discharges should be prohibited from entering storm sewers.

Second, there are clearly categories of pollutants on the list for which the municipality has every reason to make a finding that they are sources of pollutants. For example, the list contains irrigation water among the list of discharges that it does not intend to prohibit. As this Board well knows, irrigation water is unquestionably a major source of pollutants into the waters of this Region and the State. In clear acknowledgement of the threat posed by irrigation water, the Board recently spent over 15 months pursuing a regulatory mechanism that, if properly implemented, will eventually protect the waters of the region from this source of pollutants. It is unreasonable to deny, at this stage, that irrigation water is a threat that merits the protection of the non-stormwater prohibition.

Furthermore, the permit provides that even when the permittee identifies a discharge category as a source of pollutants into waters of the state, it may choose to: "[n]ot prohibit the discharge category and implement, or require the responsible party(ies) to implement, BMPs that will reduce pollutants to the MEP." There is nothing in either the law or regulations that even hints at this type of exception.

\* \* \* \* \*

---

<sup>16</sup> CWA § 402(p)(3)(B)(ii).

<sup>17</sup> 40 CFR § 122.26(b)(2).

<sup>18</sup> Permit at A.5.

<sup>19</sup> 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

Thank you for the opportunity to review and comment upon the draft permit. As stated above, we intend to supplement these comments once we receive and review all the documents relevant to the ROWD and proposed SWMP. We look forward to your responses to these comments and to commenting on the next draft of the Permit.

Sincerely,

Sarah G. Newkirk  
California Water Quality Programs Manager  
The Ocean Conservancy

David S. Beckman  
Anjali I. Jaiswal  
Natural Resources Defense Council

Cc: Donette Dunaway