



CITY OF
LOMPOC



December 13, 2012

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

SUBJECT: Comment Letter – Revised Draft Phase II Small MS4 Permit.

Dear Ms. Townsend:

On behalf of the City of Lompoc, we hereby submit comments on the Revised Draft Phase II Small MS4 Permit. Thank you for the opportunity to review and comment on the draft Final Order.

Fact Sheet, Page 39, Footnote 31

We were dismayed to find our timely filed and seriously considered Petition to the State Water Resources Control Board was ignored completely by Water Board Staff. The recommendation is being made to the Water Board (Fact Sheet, Page 39, Footnote 31) that no consideration be given ours or the other two validly filed Petitions of the Central Coast Regional Water Quality Control Board's (CCRWQCB) action in adopting the Joint Effort Post-Construction Requirements on September 6, 2012, now proposed as Attachment J.

Footnote 31 states: *"...Notwithstanding the petitions, for the reasons stated, the State Water Board has determined that the Central Coast-Specific Post-Construction Requirements are appropriate for adoption in this Order for all Central Coast Small MS4s. Therefore, the Central Coast-Specific Post-Construction Requirements are being adopted as State Water Board-imposed requirements specific to the Central Coast Small MS4 Permittees. As a result, the State Water Board will not take further action related to the pending petitions. As the State Water Board proceeds with the development of runoff retention and hydromodification control criteria that are keyed to watershed processes, the State Water Board expects to amend this Order to incorporate similar requirements for Permittees in the remainder of the State."*

In addition to being a flagrant violation of due process, this proposed action exposes the Water Board's "public process" for what it is, a thinly veiled lip-service attempt to appear responsive to public interests, while at the same time giving them no consideration whatsoever in State or Regional Board decision making. The inclusion of the contested Joint Effort Post-Construction requirements as Attachment J, speaks volumes regarding the pre-determination on the part of

Board staff that these requirements should be implemented without alteration or consideration of the petitioner's and other permittee's stated concerns regarding the infeasibility of the proposed requirements. While this action references "for the reasons stated", no clear reasoning or required findings are provided. Stating the Water Board is creating a reopener of this permit to later apply Attachment J to other regions in California only further exacerbates the error in the hasty approval of the Joint Effort Post-Construction Requirements found in Attachment J by the Central Coast Regional Water Quality Control Board.

Denying the Petition for Review in the Phase II Permit proceeding is inconsistent with applicable legal procedure and fundamental due process rights.

- The State Water Board may deny the petition "based upon a finding that the action or failure to act of the Central Coast Regional Board was appropriate and proper[.]"¹ Permit findings must "bridge the analytic gap between the raw evidence and the ultimate decision or order."² The findings must be supported by evidence in the record.³ The draft Phase II Permit lacks findings stating why the Post-Construction Requirements are appropriate for adoption by the State Water Board and why it is appropriate to apply one set of standards to Region 3, while another set of standards is applied to all other regions.
- Dismissing pending petitions through proceedings for adoption of a permit creates great risk of petitioners missing their opportunity to seek judicial review of the matters at issue in the pending petitions. Under Water Code section 13330(b), a petitioner may seek judicial review of the regional board's order "not later than 30 days from the date on which the state board denies review." If a petitioner does not seek judicial review within the 30-day period, the order "shall *not* be subject to review by any court."⁴ There is a great risk of circumventing or denying due process rights by creating the risk of petitions being uninformed of the dismissal. Due process requires fair, reasonable, and adequate notice of a proposed action.⁵ The opportunity to be heard is a fundamental aspect of due process and cannot be satisfied unless a party has the ability to choose whether to contest an action.⁶ If the state board does not formally deny review, and notify the petitioner of such a denial, the petitioner is thereby denied their due process rights.

¹ Cal. Code Regs., tit. 23, § 2052(a)(2)(A), emphasis added.

² *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).

³ *Id.* at 514-515.

⁴ Wat. Code, § 13330(d), emphasis added.

⁵ See *Diamond Roofing Co. v. Occupational Safety and Health Review Commission, et al.* (5th Cir. 1976) 528 F.2d 645, 649; *General Electric Co. v. U.S. Environmental Protection Agency* (D.D.C. 1995) 53 F.3d 1324, 1328; *Kempland v. Regents of University of California, et al.* (1984) 155 Cal.App.3d 644, 648; *In the Matter of the Revocation of the Grade V Wastewater Treatment Plant Operator Certificate Held by Kabine Mara*, Order No. WQC 84-5 (July 19, 1984), p. 18.

⁶ *Traverso v. People ex rel. Department of Transportation* (1993) 6 Cal.4th 1152, 1163.

- Basic fairness dictates that a party must have adequate notice of the procedure that determines or affects the party's legal rights.⁷

The State Water Board should separately consider and evaluate the three petitions filed, as they address the basis for, and appropriateness of, regulations which were imposed without adequate time for review or public comment.

Attachment J

While the adoption of the Joint Effort Post-construction requirements by Region 3, and their inclusion in the Statewide Small Municipal Separate Storm Sewer Systems (MS4) permit as Attachment J, is of great concern to the City of Lompoc, the City's most important objections are as follows:

The Attachment J Requirements are Infeasible

Lompoc has shown good faith in participating in the Joint Effort R3 Committee to develop the Joint Effort Post-Construction requirements and in adopting and implementing a requirement for infiltration of the 85th percentile – 24 hour storm over 95% of the impervious space to be created or replaced on a project site. Due to the fact Lompoc's soils are types C and D, projects have had great difficulty designing Low Impact Development (LID) Best Management Practices (BMPs) which can infiltrate the required 85th percentile storm. In at least one case of the eight approved projects thus far subject to this requirement, it is unlikely they will be able to meet the infiltration requirement, due to a lack of percolation. In other instances, every spare square foot of the project site has been utilized in order to infiltrate the 85th percentile storm requirement. The Attachment requirements for the City of Lompoc require infiltration of the 95th percentile storm. This is the difference between .7 inch (85th) and 1.7 inch (95th). In addition, this number is required by Attachment D of the Joint Effort requirements to be multiplied by 1.963, thereby requiring infiltration of 3.337 inches over the impervious area calculated using Attachment E of the Joint Effort Requirements. When .7 inch is not able to be consistently infiltrated, it is clear that infiltrating 3.337 inches is infeasible.

Attachment J - The Central Coast Regional Board Has Imprudently Adopted The Joint Effort Requirements (Attachment J of the Draft Final Order) Without Providing For Adequate Public Review and Comment on Their Feasibility.

Attachment J - Use of the 95th Percentile

The CCRWQCB has not shown prudence in considering the requirements they have imposed. Though Regional Board staff met with permittees prior to the release of the Draft Post-Construction requirements, the May 2012 Joint Effort Draft included a requirement to retain and infiltrate the 95th percentile, 24-hour storm. Consideration of the 95th percentile storm versus the 85th percentile storm was not discussed prior to its inclusion and release in the May Joint Effort 2012 draft. The federal law source for this requirement allows an opportunity for the applicant to show the project site would not infiltrate the 95th percentile storm in an undeveloped state, and allows for compliance through alternate infiltration of the amount of water it is calculated to have been infiltrated before any development occurred on-site. The Joint Effort Requirements

⁷ See *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 900.

did not include this reasonable and essential provision. It is unclear what additional benefit is to be gained by trying to force more infiltration on a site than occurred pre-development. Without this alternative requirement, the Joint Effort Requirements exceed the Maximum Extent Practicable (MEP) standard by going beyond what is necessary to mimic an area's specific watershed hydrology.

Attachment J - Use of The 1.963 Multiplier

The Central Coast Regional Board staff significantly revised the proposed Joint Effort requirements in the weeks directly preceding their adoption on September 6, 2012, well after the written comment period closed. During this time Regional Board staff added a 1.963 multiplying factor to the Water Quality and Retention Requirements. Infiltration of the 95th percentile x 1.963 is roughly four times the City of Lompoc's existing 85th percentile requirement. It is also the post construction requirement proposed to be applied to all other regions through E.12 of the Statewide MS4 draft Final Order. The 85th percentile storm has proven to be difficult to impossible to infiltrate in Lompoc's soils. Several permittees objected at the Central Coast Regional Board hearing, stating the proposed requirements were infeasible.

Attachment J - 10% Reduction in Retention Requirement

While this requirement reduction is only available to project sites that can show technical infeasibility in infiltrating the required 95th percentile x 1.963 storm event, once technical infeasibility has been shown, the usefulness and appropriateness of dedicating 10% of the site to retention-based Storm Water Control Measures (SCMs) becomes unclear. This is especially true in a jurisdiction such as Lompoc which discharges to a concrete-lined channel. The benefit of a 10% site SCM on a small urban site, coupled with the loss of valuable area on-site for infill or redevelopment is not clear when retention will have no impact on hydromodification, and the long-term cumulative effect will be to push development out of urbanized and developed areas.

Attachment J - Alternative Compliance Feasibility

The proposed off-site alternative compliance is not feasible. Establishing a clear nexus between a project's individual reduction in infiltration, the cost allocated for alternative compliance, and ensuring the alternative compliance will achieve the same result commensurate with infiltration on-site will be very difficult or impossible to achieve. It will require a detailed analysis of the legal nexus of the actual project impact to the amount of the fee or alternative compliance requirement levied. This is added to the complications of timing restrictions, actual implementation and a developer's ability to purchase or lease a suitable site on which to conduct alternative compliance. In areas such as Lompoc, where the MS4 permittee is built-out, alternative compliance would need to be conducted on property outside the MS4's jurisdiction and permitting and land use approvals for the alternative compliance project would be dependent upon the actions of another agency.

Inclusion of Attachment J is contrary to the State Board's Stated Goal of Consistency

The Central Coast MS4s have been "carved-out" and are required to implement post-construction standards that exceed those required for other permittees. This "carve-out" is inappropriate given the goal of general application of the permit statewide and the Water Board's stated desire for consistency between regions.

Attachment J - Unfunded Mandate

To the extent the requirements in Attachment J result in additional administrative and development costs to permittees, they constitute an unfunded mandate that is subject to reimbursement pursuant to California Government Code sections 17550 *et seq.*

Attachment J - Exceeds MEP

The draft post-construction requirements proposed in Attachment J exceed the Clean Water Act Standard (CWA) of reducing pollution to the Maximum Extent Practicable (MEP). The federal Clean Water Act (CWA) provides that National Pollutant Discharge Elimination System (NPDES) permits for Municipal Separate Storm Sewer Systems (MS4) must require municipalities to reduce pollutants in their storm water discharges to the MEP. (CWA §402(p)(3)(B).) The State Water Resources Control Board has stated that "if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive." (Order No. WQ 2000-11, at p.20.) The City of Lompoc believes the requirement to infiltrate the 95th percentile storm x 1.963 for Retention (including the 10% reduction factor) and the 85th percentile storm x 1.963 for Water Quality, without the 10% reduction factor, or any direct exception for technical infeasibility, exceeds MEP.

Attachment J - Ministerial Permits

Applying the Performance Requirements to Ministerial Permits, including building permits, grading permits and other permits that do not undergo a discretionary review process, cannot be implemented. Ministerial permits are those which are acted upon in a prescribed manner in obedience to the mandate of legal authority, without regard to, or the exercise of, personal judgment. As such, conditions cannot be applied to ministerial permits and decisions about the appropriateness of one BMP and its implementation, versus another cannot be made.

Attachment J - Economic Feasibility / Cost Benefit

The proposed use of off-site alternative compliance measures, instead of allowing exceptions for technical infeasibility to infiltration requirements, will result in infill and redevelopment projects becoming economically and physically infeasible. The time and money necessary to establish, monitor and maintain alternative compliance projects, will increase the cost and commitment required for construction beyond what the region's economy can support.

Attachment J - Unintended Consequences

The City of Lompoc believes the potential unintended consequences of adopting the requirement included in Attachment J were not made clear to the CCRWQCB by their staff, prior to their taking action in adopting the regulations. Because infiltration of the 95th percentile storm x 1.963 required for Retention and the 85th percentile storm x 1.963 required for Water Quality cannot be infiltrated in many permittees' MS4 jurisdictions, developers will choose to focus their efforts on rural areas not governed by these permit requirements. This will result in greater adverse impacts on Region 3 watersheds and the natural landscape than would limiting the infiltration requirement to the 85th percentile storm (E.12. requirements), as is proposed for all

other regions. The loss of agricultural lands and the impact on water quality of this new regulation could easily negate any intended water quality benefit. The impact on MS4s permittee agencies will be severe. With a reduction in development of infill parcels and redevelopment, struggling small local economies will further stagnate.

Therefore, we request the State Water Resources Control Board:

1. Take formal action on each of the three timely filed Petitions of the Joint Effort Post-Construction Requirements (Resolution No. R3-2012-0025), and notify the petitioners of the action, clearly stating the required findings made in determining the action taken and the decision date of the action.
2. Remove Attachment J from the Draft Final Order and apply Post-Construction Provisions (E.12.) to the Central Coast MS4s. The provisions of E.12. have been painstakingly drafted and thoroughly vetted through the public process, and then reviewed and agreed upon by permittees, environmental non-governmental organizations (NGOs), and Water Board staff. The Post-Construction requirements of E.12 are protective of watershed quality and meet MEP.
3. Direct the Central Coast Water Board to rescind the Region 3 post construction requirements (Resolution No. R3-2012-0025)

Sincerely,



Laurel M. Barcelona,
City Administrator,
City of Lompoc

C: Lompoc City Council
Laurel Barcelona, City Administrator
Teresa Gallavan, Economic & Community Development Director
California State Senator Hannah Beth Jackson
California State Assemblyman Katcho Achadjian
Santa Barbara County Supervisor Elect Peter Adam
Santa Barbara County Supervisor Doreen Farr
Interested Parties