OFFICE MEMORANDUM

TO:    Brian A. Pierik
FROM:  Rufus C. Young
DATE:  September 29, 2008
RE:    Atascadero MS4 Third-Party Memo

Issues:

(1) May an entity which has been designated as within the scope of the Phase II Small MS4 Storm Water Permit be sued by a third party?

(2) Are discharges from the City's storm water system covered by the Phase II Storm Water Permit?

Answers:

(1) Yes, under the Citizen Suit provisions of the Clean Water Act, for failure to submit a Storm Water Management Plan on a timely basis. In addition, a party damaged by a discharge in violation of a permit, or a discharge without a permit, also may have an action for trespass or nuisance, and, depending on the nature of pollutants discharged, possibly under the federal Comprehensive Environmental Response, Compensation and Liability Act.

(2) No, not until the Storm Water Management Plan is approved by the Regional Board.

Discussion:

In 1972, the Federal Water Pollution Control Act (also referred to as the Clean Water Act [CWA]) was amended to provide that the discharge of pollutants to waters of the United States from any point source is unlawful unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. In 1987, Congress amended the CWA by adding § 402(p), which established a statutory framework for regulating storm water discharges from municipal separate storm sewer systems (MS4s). In 1990, the U.S. Environmental Protection Agency (EPA) implemented § 402(p) by promulgating regulations for storm water discharges from
MS4s serving a population of 100,000 people or more. These regulations, known as the Phase I regulations, impose NPDES permit requirements on owners of medium and large MS4s. Discharge of storm water from an MS4 to waters of the United States without a NPDES permit is a violation of the CWA.

An “MS4” is a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels and storm drains designed or used for collecting or conveying storm water. 40 C.F.R. §122.26(b)(8).

On December 8, 1999, the EPA promulgated Phase II storm water regulations, subjecting owners of Small MS4s to CWA permit requirements. Federal regulations allow two options for permits for storm water discharges, individual permits and general permits. In California, the State Water Resources Control Board (SWRCB) elected to adopt a Statewide General Permit for Small MS4s in order to efficiently regulate numerous storm water dischargers under a single permit, which is regulatory in nature. SWRCB WQO No. 2003-0005.

The Small Cities General Permit regulates discharges of storm water from all “regulated Small MS4s.” The City is among many California Cities designated by the EPA and the SWRCB for coverage (regulation) under the Small Cities Permit. See SWRCB WQO No. 2003-0005, Attachment 1.

By imposing the NPDES MS4 storm water permit requirement on owners of MS4s, Congress has conscripted municipal governments in the battle against water pollution.

Therefore, the City is required to comply with the Small Cities Permit. That permit requires the City to submit a Storm Water Management Plan satisfactory to the Regional Board, in a timely manner. Coverage under the Permit commences only after: 1) Board staff has reviewed the SWMP to determine compliance with the CWA requirement to reduce the discharge of pollutants to the maximum extent practicable (“MEP”) and has recommended coverage under the Small Cities MS4 Permit, 2) the SWMP is made available for public review for a minimum of 60 days, and 3) permit coverage has been approved by either the RWQCB or its Executive Officer.

Penalties for Violations of Permit Conditions.

Section 309 of the CWA provides significant penalties for any person who violates any CWA permit condition or limitation in a permit issued under § 402. Any
person who violates any permit condition, or discharges storm water from an MS4 to waters of the United States without a permit, could be subject to a civil penalty not to exceed $27,500 per calendar day of such violation, as well as any other appropriate sanction provided by § 309 of CWA. Under California law, the Porter-Cologne Water Quality Act also provides for administrative, civil, and criminal penalties, which in some cases may be greater than those under the CWA.

**Enforcement by Third Parties.**

To supplement state and federal enforcement of the Clean Water Act, Congress empowered citizens to serve as "private attorneys general" and bring their own lawsuits to enforce the Clean Water Act. The citizen suit authority is found in Clean Water Act § 505, 33 U.S.C. § 1365. Any person or entity that either is or might be adversely affected by any CWA violation has the right to file a citizen suit to enforce the provisions of the CWA. Citizens may seek injunctive relief, civil penalties, and reimbursement of legal costs and attorneys' fees. In addition, if a regulatory agency fails to take enforcement actions against a violator of the Clean Water Act or does not get acceptable results from their enforcement actions, citizens have the right to file citizen suits against a state regulatory agency or the U.S. EPA. In California, numerous cases have been brought against local governments to enforce provisions of the CWA.

Conceptually, a third party claiming to have been damaged by a discharge which violates a permit or by a discharge without a permit also could bring an action against the discharger for trespass or nuisance and for property contamination under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq. Problems of proof and causation could make this option less attractive than an enforcement action under the CWA.

A SWRCB Fact Sheet on the Small Cities General Permit may be found at http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/final_sm_ms4_fact_order.pdf