



City Council
311 Vernon Street
Roseville, California 95678

August 14, 2013

Emel G. Wadhvani
Senior Staff Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

SENT BY E-MAIL

Re: SWRCB/OCC File A-2236(a) Through (kk)

Dear Ms. Wadhvani:

The City of Roseville (“City” or “Roseville”) is pleased to submit these comments on the State Water Resources Control Board’s (“State Board”) current receiving water limitations (“RWL”) language and the two questions the State Board has posed regarding how the Los Angeles County MS4 Permit (“LA Permit”) addresses the issue. As the State Board well knows from the recently completed Phase II Permit renewal process, reforming the RWL language is of vital importance to Roseville and to the Statewide Stormwater Coalition (“SSC”) of which Roseville is a founding member. The City is encouraged that the State Board is soliciting public comment on these questions and it looks forward to the fall workshop on the issue.

This letter first attempts to explain why the current RWL language is a concern to Roseville. It then discusses why the State Board can and should revise the current language. Finally, the letter specifically answers the two questions posed by the State Board regarding the LA Permit’s approach to the issue. Roseville hopes that these comments will help the State Board understand the importance of the issue to municipalities, including Phase II permittees. Roseville encourages the State Board to make meaningful reform to the current RWL language and, more specifically, to reopen the Phase II Permit to incorporate such reforms into the structure of that Permit. Revisions to the current RWL language are particularly important in light of the 9th Circuit Court of Appeals’ decision issued August 8, 2013¹, which is more fully discussed below.

I. Why the Current RWL Language is a Concern to Roseville

Roseville is located in Placer County along the eastern edge of the Sacramento Valley, at the base of the Sierra Nevada foothills. The City has a population of approximately 122,000 residents. Roseville contains two distinct watersheds, the Pleasant Grove Watershed in the northwest part of the City and the Dry Creek Watershed. Each of these watersheds face different water quality challenges that required unique, collaborative approaches to address.

As with many cities in California, Roseville faced significant fiscal challenges during the great recession and continues to struggle with its ability to fund all essential governmental services, including water quality programs. Between 2007 and 2011, the City’s revenue fell by over \$20.2 million. The City Council had to address these short-falls through employee layoffs, early retirements, salary reductions and community service level reductions. To maintain the quality of services and quality of life its residents demand, Roseville must carefully balance all of its funding decisions. The City Council, as the caretaker of scarce public resources, must therefore demand that its programs be operated efficiently and produce the most return on the investment made in the programs.

¹ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. August 8, 2013) ____ F.3d ____ [Dock. No. 10-56017].

The current RWL language, as interpreted by the 9th Circuit Court of Appeals,² upsets the City's careful balancing of its limited resources by forcing the City to chase all pollutants, at all times, in all receiving waters, regardless of the relative water quality benefits of such efforts. This is not good policy, either from a fiscal or from a water quality perspective. The City needs the freedom to spend its limited resources on water quality programs that will result in the greatest water quality improvements. The current RWL language does not afford the City that freedom, and should therefore be modified.

Roseville is also presented with unique water quality challenges that the current RWL language makes difficult to solve. Specifically, as mentioned above, Roseville's boundaries include two distinct watersheds, the Pleasant Grove Watershed and the Dry Creek Watershed. Each watershed presents different issues and requires different approaches. Each watershed also covers many jurisdictional boundaries in addition to Roseville's. Thus, a regional, watershed approach is the only way to truly address the water quality problems each watershed faces. However, the current RWL language makes such a regional, watershed approach more difficult to achieve. The current RWL language, which has been interpreted to impose strict liability for "causing or contributing" to *any* water quality violation, forces municipalities to focus more narrowly on their own jurisdiction and discharges, even when that approach will not attack the root cause of the problems.³

Under the current RWL language, therefore, the City is presented with a difficult choice – divert scarce resources to regional, watershed programs or focus more narrowly on its own jurisdiction to best comply with the current RWL requirements. Although the regional, watershed approaches would likely result in the most meaningful water quality benefits, implementing those approaches would not always place the City in a position of compliance under the current RWL language. It is difficult for elected officials charged with the prudent care of the City's fiscal condition to spend scarce resources on regional, watershed projects without any offsetting compliance benefits to the City. From the City's perspective, therefore, the current RWL language presents real challenges and drives decisions that inhibit the achievement of superior water quality results.

II. Why the Receiving Water Limitations Language Can and Should be Revised

The current RWL language thus presents both fiscal and water quality challenges for the City. Revising the RWL language could alleviate the fiscal challenges by allowing the City to focus its resources on the highest water quality benefits. It would also empower the City to tackle its water quality challenges through collaborative, watershed approaches. Of course, the City must still be held accountable through specific, enforceable requirements and the City is not looking for a free pass. The State Board should use this opportunity to make meaningful revisions to the RWL language that continue to hold dischargers accountable for their actions but also allow for a broader, more integrated approach to solving water quality problems.

The State Board has the power to make such changes, and should do so through a state-wide precedential order. The legal support for the revisions to the RWL language is briefly set forth below.

A. Initial Development of the RWL Language

The current RWL language was originally developed based on what case law has subsequently made clear was a misunderstanding of requirements of the Clean Water Act. In 1991, the State Board concluded that Section 402(p)(3)(B) of the Act required that MS4 permits contain effluent limitations

² *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011), 673 F.3d 880, *rev'd on other grounds by* 133 S.Ct. 710 (2013).

³ This problem has been made worse by the 9th Circuit's August 8, 2013 decision. That decision appears to suggest that dischargers may be held jointly liable for receiving water exceedances, even without specific evidence that the individual discharger actually discharged the pollutants causing or contributing to the exceedance. To avoid such liability without evidence, dischargers will be compelled to turn inward and focus only on their discharges.

based on water quality standards in accordance with Section 301 of the Act.⁴ The State Board reasoned that the maximum extent practicable (“MEP”) requirements of Section 402(p)(3)(B) of the Act only modified the technology-based requirements of Section 301, and left in place the water quality-based requirements of Section 301, even if those requirements were more stringent than MEP.

Subsequent State Board decisions expressly confirmed that the State Board intended the RWL language to implement the requirement of Section 301(b)(1)(C) that, in addition to technology-based requirements, NPDES permits include more stringent effluent limitations necessary to meet water quality standards.⁵ Based on this misinterpretation of the Act, the State Board promulgated “the strongest and clearest possible language to protect water quality.” In 1999, the State Board refined its approach and issued the RWL language that currently applies to all MS4 permits.⁶

The confusion about whether Section 301 applied to Section 402(p)(3)(B) was understandable prior to 1999 because no precedential legal decision had yet addressed the question. In 1999, however, the 9th Circuit Court of Appeals unequivocally resolved this question.⁷ The 9th Circuit held that Section 402(p)(3)(B) was unambiguous and *completely replaced* the requirements of Section 301 for MS4 permits. Therefore, neither the technology-based nor water quality-based requirements of Section 301 applied to MS4 permits. In other words, the legal premise on which the State Board’s RWL language was based was wrong.

B. Clarification in the State Board’s 2001 BIA Order

In 2001, the State Board had the opportunity to clarify its RWL language in light of the 9th Circuit’s decision in *Browner*.⁸ As the State Board acknowledged, it had not previously addressed the implications of *Browner* and the holding that MS4 permits did not need to require strict compliance with water quality standards. The State Board then properly interpreted its RWL language in a manner consistent with *Browner* and found that the language “does not require strict compliance with water quality standards.” Rather, compliance with water quality standards “is to be achieved over time, through an iterative approach requiring improved BMPs.”

It is true that the State Board declined to eliminate, as it could have done under *Browner*, the need to address water quality standards at all in MS4 permits in California. The State Board found that a technology-based standard alone would ignore the impacts urban runoff was having on receiving waters. The State Board thus pursued a middle course in which strict compliance with water quality standards would not generally be required, but where water quality standards would still be addressed through an iterative approach, which seeks compliance over time. This approach, the State Board found, “is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.”

The State Board’s 2001 precedential interpretation of the RWL language remains the State Board’s last precedential order on the subject. Had the iterative approach as articulated in the State Board’s 2001 Order been uniformly applied, many of the City’s current concerns would have been ameliorated. Such an iterative approach establishes a high bar—the ultimate achievement of water quality standards—but also recognizes the difficulties faced by MS4s in achieving those standards because of the open nature of MS4 systems, significant variability in rainfall and technical and financial feasibility.

⁴ State Board Order No. WQ 91-03.

⁵ State Board Order No. WQ 98-01.

⁶ State Board Order No. 99-05.

⁷ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

⁸ State Board Order No. 2001-15.

C. The NRDC Case

In 2011, the 9th Circuit Court of Appeals issued an opinion that interprets the State Board's RWL language to require strict compliance with water quality standards, uncoupled from the iterative process as expressed in the State Board's 2001 Order.⁹ The 9th Circuit's opinion appears to turn the State Board's 2001 precedential decision on its head. Rather than finding the iterative process to be an integral part of the State's effort to achieve compliance with water quality standards over time through improved BMPs, the 9th Circuit held that strict compliance with water quality standards was required and was subject to strict enforcement separate from the iterative process.

The 9th Circuit's decision appears rooted in the same misunderstanding of Section 402(p)(3)(B) and Section 301 of the Act that existed at the time of the original development of the RWL language. The 9th Circuit quoted with support from non-MS4 cases that are based on the strict application of water quality standards. For example, the 9th Circuit noted that "[o]nly by enforcing the water-quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated."

The 9th Circuit rejected the notion (as it previously had supported in *Browner*) that Section 402(p)(3)(B) was a "lesser standard." The 9th Circuit reasoned that "Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their storm-water discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring MS4 operators under the NPDES-permitting system."

Although the 9th Circuit's decision was reversed by the United States Supreme Court on other grounds, its interpretation of the RWL language was not addressed by the Supreme Court. The 9th Circuit's decision can thus be interpreted as a fundamental shift away from the State Board's approach in its 2001 precedential order. To make matters worse, the 9th Circuit on August 8, 2013, on remand from the Supreme Court, reconsidered its previous opinion and again held the Los Angeles Flood Control District liable for the quality of the receiving water, even though there was no evidence of a discharge of the standard exceeding pollutants from the Flood Control District's MS4.¹⁰ The 9th Circuit's new decision emphasizes even more the need for RWL reform because it appears to hold permittees liable for the quality of the receiving waters absent any evidence of an individual contribution to the problem.

The City acknowledges that some at the State Board and at the various Regional Board may believe that the 9th Circuit's decisions are consistent with the current RWL language and do not reflect a change in approach. However, this position appears hard to reconcile with an objective comparison of the statements in the State Board's 2001 precedential order (in which the State Board stated that its RWL language does not require strict compliance with water quality standards) with the 9th Circuit's decisions (in which the Court held that the RWL language requires strict compliance with water quality standards, apparently even absent evidence of an individual discharge).

D. The Current Situation and the State Board's Authority to Revise the RWL Language

The 9th Circuit's decisions have resulted in significant concerns from municipal dischargers, who have requested that the State Board address the issue through a reconsideration of its current RWL language. The issue has been raised directly with the State Board in connection with the Caltrans Permit and the Phase II Permit. The issue was also the crucial policy issue raised in connection with the LA Permit and

⁹ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011), 673 F.3d 880, *rev'd on other grounds* by 133 S.Ct. 710 (2013).

¹⁰ In its 2011 opinion, the 9th Circuit had rejected the contention that the mass-emissions monitoring station data conclusively established the Flood Control District's liability. The 9th Circuit held that there must be some additional proof of the Flood Control District's individual contribution to the water quality exceedance. However, on August 8, 2013, the 9th Circuit reconsidered this argument and held that the monitoring data only established liability, even absent evidence of the District's individual contribution.

the San Diego Regional Permit, both of which are subject to pending petitions to the State Board. Resolution of the RWL language issue by the State Board is the most important pending MS4 policy question.

Some have asserted that the State Board lacks the legal authority to consider changes to its current RWL language. The City believes that the State Board has discretion on the question and that neither the anti-backsliding nor the anti-degradation provisions of the Act or state law preclude the State Board from addressing the RWL language, as briefly explained below.

1. Anti-Backsliding

Some have asserted that the anti-backsliding provisions of the Act and federal regulations preclude any changes to the RWL language. A careful reading of the Act and the regulations demonstrate otherwise.

Section 402(o) of the Act provides that for specific effluent limitations established on the basis of specific sections of the Act, a permit may not be renewed or reissued that contains effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. There are several reasons why Section 402(o) has no application to the RWL language.

First, the RWL language is not an “effluent limitation” as defined in the Act. An “effluent limitation” is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources* into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.”¹¹ An “effluent limitation” is thus a limit measured at the point of discharge from a point source. In contrast, the RWL language measures compliance in the receiving water.

Second, even if the RWL language could be characterized as an “effluent limitation,” it is not one developed in accordance with the specific sections listed in Section 402(o). It is not a technology-based effluent limitation established based on best professional judgment in accordance with Section 402(a)(1)(B). Rather, it derives its legal authority from Section 402(p)(3)(B). Moreover, as *Browner* makes clear, the RWL language is not (and could not be) a technology-based or water-quality based effluent limitation established on the basis of Section 301(b)(1)(c) *because Section 301 has no application to MS4 permits*. Finally, the RWL language is not an effluent limitation developed under Section 303(d) or (e), which involve the continuing planning process and TMDLs. The RWL language is, at its core, an exercise of discretion under the “such other provisions” language of Section 402(p)(3)(B)(iii) and is not subject to Section 402(o).

The federal regulations also contain anti-backsliding provisions.¹² These regulations must be addressed in NPDES permits “when applicable.” Due to the unique nature of MS4s and the special standards Congress created in Section 402(p)(3)(B) for such systems, these regulations are not “applicable” to MS4 permits. The regulations provide that interim effluent limitations, standards or conditions of renewed or reissued permits must be at least as stringent as the final effluent limitations, standards or conditions in the previous permit. For the same reasons as discussed above regarding Section 402(o), these regulations do not apply to MS4 permits. It is also commonly recognized that these regulations do not govern requirements based on state water quality standards.¹³ Because the RWL language is, at its core, intended to protect state water quality standards, these regulations have no application to the RWL language.

¹¹ 33 U.S.C. §502(11) (Emphasis added).

¹² 40 CFR § 122.44(1).

¹³ See, e.g., NPDES Permit Writers' Manual, page 7-4.

2. Anti-Degradation

EPA's regulations require that each state develop and adopt a statewide anti-degradation policy and identify the methods for implementing such policy.¹⁴ California adopted its anti-degradation policy in 1968.¹⁵ The State Board has issued guidance on its policy through Administrative Procedures Update ("APU") 90-004.

As APU 90-004 makes clear, the State's anti-degradation policy does not apply when a discharge "will not be adverse to the intent and purpose of the state and federal anti-degradation policies." Likewise, APU 90-004 provides that if there is "no reason to believe that existing water quality will be reduced due to the proposed action, no anti-degradation analysis is required." As noted above, revisions to the RWL language will allow MS4s through-out the State to better address water quality problems and will lead to better water quality outcomes. Thus, there is no reason to believe that revisions to the RWL language will reduce existing water quality. If anything, the type of approach presented in the LA Permit or the alternative put forward by CASQA present more enforceable requirements and will result in greater water quality benefits. Therefore, the anti-degradation policy does not apply.

This analysis is consistent with recent case law regarding anti-degradation. In a recent case, the court acknowledged that the anti-degradation policy might not apply if it can be shown that the discharge of waste will not degrade the quality of the receiving water.¹⁶ To support such a conclusion, a water board must ensure that the regulatory action includes sufficient requirements, including an effective monitoring program, to demonstrate that the discharge will not degrade the quality of the receiving water. MS4 permits contain such requirements, including an effective monitoring program. Therefore, the anti-degradation provisions do not apply.

III. Responses to Two Questions

With the above legal framework in mind, the City has the following responses to the two questions posed by the State Board. In the City's view, the RWL language must be amended to include a compliance program option that includes the following key elements: it must be voluntary; it must allow either a watershed or jurisdictional approach; it must permit best management practices approach; it must allow for prioritization of pollutant-water body combinations; it must permit adaptive management; and it must provide that good faith compliance with the program will constitute compliance with receiving water limitations and discharge prohibitions. The City's answers below are based on these key elements.

A. General Support for Compliance Approach in the LA Permit

The City generally supports the LA Permit's compliance approach as a good first step toward revising the RWL language. The approach is properly an optional one that allows permittees to decide whether the current language or a different approach works best for the City. It also contains sufficient rigor to provide measurable and enforceable requirements that permittees must meet. Most importantly, it provides for two different watershed or jurisdictional compliance paths that all permittees may implement. Although somewhat cumbersome, the City views the LA approach as a good first step and commends the Regional Board for its attempt to address the RWL issue. To fully address the issue, however, additional language rooted in the iterative process is required.

B. Support for CASQA's Improvements to the LA Permit's Approach

Although the City views the LA Permit's approach as a good first step, the City believes that the language requires further refinement. The City supports the RWL language put forward by CASQA in

¹⁴ 40 CFR 131.12.

¹⁵ State Board Resolution No. 68-16.

¹⁶ 210 Cal.App.4th 1255 (2012).

its response to the State Board's two questions as an additional step toward true RWL reform. CASQA's refinements to the LA approach makes the compliance program process more usable and comprehensive.

The City notes that, for Phase II programs, the CASQA approach will require further modification to fit it within the Phase II permit. Moreover, the State Board should additionally consider including in the revised RWL language a mechanism to address those situations where, despite good faith efforts, achievement of water quality standards, including interim and final wasteload allocations/effluent limitations, proves to be currently infeasible. Building such a mechanism into the RWL compliance process now will avoid future disputes and will establish a comprehensive structure through which the State and Regional Boards can work collaboratively with MS4s to achieve water quality standards.

IV. Conclusion

Roseville appreciates the opportunity to provide these comments to the State Board and looks forward to the State Board workshop on the topic. It urges the State Board to use this opportunity to make meaningful revisions to the RWL language.

Sincerely,

A handwritten signature in blue ink that reads "Susan Rohan". The signature is written in a cursive, flowing style.

Susan Rohan,
Mayor