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SUBJECT: SWRCB/OCC File A-2455 (A thru M); Petitions of City of Alameda, et al., (Waste Discharge Requirements Order No. R2-2015-0049 [NPDES Permit CAS612008], Municipal Regional Stormwater NPDES Permit for Municipalities within the Counties of Alameda, Contra Costa, Santa Clara, and San Mateo, the Cities of Fairfield, Suisun City and Vallejo, and Vallejo Sanitation and Flood Control District) San Francisco Bay Regional Water Quality Control Board

Dear Mr. Mallory-Jones:

The California Stormwater Quality Association (CASQA) appreciates the opportunity to respond to the Petition filed by the San Francisco Baykeeper (Baykeeper) challenging the San Francisco Bay Regional Water Quality Control Board's (San Francisco Bay Regional Water Board) adoption of a Municipal Regional Stormwater NPDES Permit for Municipalities within the Counties of Alameda, Contra Costa, Santa Clara, and San Mateo, the Cities of Fairfield, Suisun City and Vallejo, and Vallejo Sanitation and Flood Control District) (Bay Area Permit).

CASQA is a nonprofit corporation with approximately 2,000 members throughout California, including hundreds of local public agencies. About 300 CASQA members hold Municipal Separate Storm Sewer Systems (MS4) permits issued under state and federal law (referred to as National Pollutant Discharge Elimination System or NPDES permits and waste discharge requirements). CASQA has been an active participant in past proceedings before the State Water Resources Control Board (State Water Board) with respect to challenges associated with the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175), which resulted in the adoption of State Water Board Order WQ 2015-0075.[1] On behalf of its membership, CASQA continues to be very interested in proceedings related to the issues addressed in Order WQ 2015-0075 as they are applied in other MS4 permits, including the Bay Area Permit at issue in this proceeding.

[1] *In the Matter of Review of Order No. R5-2012-0175, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except from Long Beach* (Order WQ 2015-0075).

In summary, CASQA responds to Baykeeper's allegations that certain requirements in the Bay Area Permit violate federal anti-backsliding requirements, are inconsistent with State Water Board Order WQ 2015-0075, and fail to include monitoring requirements that assure compliance with permit limitations. CASQA disagrees with such allegations and encourages the State Water Board to reject these claims. CASQA also provides specific comments regarding how the trash monitoring requirements in the Bay Area Permit are consistent with the Statewide Trash Amendments,[2] which were approved by the Office of Administrative Law and United States Environmental Protection Agency (EPA) after adoption of the Bay Area Permit.

I. Baykeeper Mischaracterizes Application of Water Quality Standards (WQS) to Municipal Stormwater Discharges

As a preliminary matter, CASQA finds it necessary to first respond to an incorrect characterization of the law included in the legal background section of Baykeeper's petition. Specifically, Baykeeper states, "[l]ike all NPDES permits, MS4 permits must ensure that discharges from storm drains do not cause or contribute to a violation of WQSs." This statement fails to consider the words of the Clean Water Act (CWA) and long established law with respect to this issue. In the context of NPDES permits, the CWA does not strictly impose the WQS requirement on MS4 discharges.

Specifically, the CWA instead treats municipal stormwater discharges differently from other discharges.[3] It requires permits for municipal storm sewers to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(iii).) In establishing this requirement, Congress intentionally exempted MS4 discharges from strict compliance with WQS. (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164.) While MS4s are required to reduce pollutants in the discharge to the maximum extent practicable (MEP), the water quality-based effluent limitations in section 301(b)(1)(C) of the CWA do not apply to MS4 permits. (*See Id*.) Rather, the permitting agency, i.e., the State Water Board and the regional water quality control boards (collectively, Water Boards), have the discretion, if they choose to exercise it, to impose requirements to meet WQS. (33 U.S.C. § 1342(p); *Defenders of Wildlife* at p. 1159.) And with that discretion, comes the discretion of which tools they choose to use to address WQSs (if at all) and the timetables on which they choose to use them. In accordance with this federal scheme, therefore, only the discretionary requirements imposed by the Water Boards to address WQS apply to MS4 dischargers and those may be limited in kind and timing.

[2] Amendment to the Water Quality Control Plan for the Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries of California (Statewide Trash Amendments).

[3] There are strong technical reasons why stormwater is different from other discharges. Among other things: (1) it has an open and natural origin; (2) it has unpredictable, highly variable flows and volumes, which at times will exceed the size capacity of any capture, treatment, harvest, and use system; (3) the sources of potential pollutants are ubiquitous and the types of potential pollutants are infinite; (4) the concentration of potential pollutants are usually relatively low, making the removal of pollutants from stormwater very difficult; and (5) the load of a potential pollutant generally comes from the relatively high volume of stormwater rather than the concentration of the potential pollutant.

The State Water Board agreed wholeheartedly with this legal standard in Order WQ 2015-0075. (See, e.g., Order WQ 2015-0075, p. 10 ["MS4 discharges must meet technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency."].) The State Water Board further acknowledged that it has flexibility under the Porter-Cologne Water Quality Control Act (Porter-Cologne) to "decline to require strict compliance with water quality standards for MS4 discharges." (Order WQ 2015-0075, p. 11.) Consistent with this finding, the State Water Board needs to reject Baykeeper's assertion as contained in their petition.

The important take-away is that MS4 permit provisions that require compliance with WQSs (e.g., Discharge Prohibitions and Receiving Water Limitations (RWLs)) are *discretionary* provisions – i.e., they are not required by the CWA, the federal regulations, or Porter-Cologne. MS4 permits are, indeed, not subject to the same CWA requirements as other NPDES permits. Therefore, Baykeeper's characterization regarding the application of WQS is inaccurate. Furthermore, because the application of WQS to municipal stormwater is discretionary, the Water Boards have the discretion to develop permitting programs and schemes that do not require strict compliance with WQS. The compliance language at provision C.1 of the Bay Area Permit is a clear example of Water Board discretion, and is legal under the CWA, Porter-Cologne, and Order WQ 2015-0075.

II. Compliance Provisions in the Bay Area Permit Do Not Violate Federal Anti-Backsliding Provisions

A further point of Baykeeper's flawed argument is that adoption of the compliance provisions at provision C.1, et seq., in the Bay Area Permit violates federal anti-backsliding provisions. CASQA disagrees with these arguments for several reasons, including: (1) discharge prohibitions and receiving water limits are unique inventions of the State and, as such are not final effluent limitations under the CWA or permit standards or conditions within the meaning of EPA's regulations; (2) the compliance provisions that are expressly tied to provision C.1 are not more lenient permit provisions than those that previously existed and also collectively constitute a rigorous compliance alternative; and (3) new information supports the need for this approach as set forth in the Bay Area Permit. Indeed, the compliance provisions included in the Bay Area Permit are detailed pollutant-specific provisions that provide for an alternative compliance path for Discharge Prohibitions and RWLs for specific pollutant and waterbody combinations. (See Bay Area Permit, p. 6, et seq.; see also Bay Area Permit, Attachment A, pp. A-22 - A-26.) Such provisions are legal, and, contrary to Baykeeper's allegations, comply with applicable laws, regulations, and policies.

A. Federal Anti-Backsliding Provisions Do Not Apply to Discharge Prohibitions and RWLs

The federal anti-backsliding provisions are applied under section 402(o) of the CWA or the EPA's regulations; however, neither applies to Discharge Prohibitions and RWLs, which are discretionary provisions imposed by the San Francisco Regional Water Quality Control Board

(San Francisco Bay Regional Water Board). Accordingly, the Permit's compliance provisions do not violate federal anti-backsliding provisions.

1. The CWA Anti-Backsliding Provisions Do Not Apply Because Discharge Prohibitions and RWLs Are Not Effluent Limitations

Section 402(o) of the CWA (33 U.S.C. § 1342(o)) establishes anti-backsliding requirements that apply to effluent limitations. Specifically, the federal anti-backsliding provisions prohibit the reissuance or modification of a permit to include "effluent limitations" less stringent than "the comparable effluent limitations in the previous permit," unless certain exceptions are met. (33 U.S.C., § 1342(o).) The CWA anti-backsliding rules apply in two situations:

> The first situation occurs when a permittee seeks to revise a technology-based effluent limitation based on best professional judgment (BPJ) to reflect a subsequently promulgated effluent guideline that is less stringent. The second situation addressed by § 402(o) arises when a permittee seeks relaxation of an effluent limitation that is based upon a State treatment standard or water quality standard.[4]

While Baykeeper attempts to take an expansive view of the term "effluent limitations" to encompass the Discharge Prohibitions and RWLs at issue here, it is important to note the actual text of section 402(o)(1), which circumscribes the application of the statute:

> In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section [304(b)] of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section [301(b)(1)(C)] or section [303(d)] or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section [303(d)(4)] of this title. (33 U.S.C. § 1342(o)(1).)

The plain language of section 402(o)(1) limits the anti-backsliding provisions to "effluent limitations" imposed under specific provisions in the CWA. Only if an "effluent limitation" is based on the specific enumerated provisions can anti-backsliding be triggered. As noted above, the Discharge Prohibitions and RWLs provision were adopted by the Water Boards within the discretion afforded to them in section 402(p) of the CWA – a provision that is *not* listed in section 402(o)(1). Accordingly, section 402(o) expressly does not apply to Discharge Prohibitions and RWLs adopted by the [San Francisco Bay] Regional Water Board within its discretion under section 402(p).

[4] EPA (1989) Memorandum on Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits by James R. Elder, Director, Office of Water Enforcement and Permits at p. 1.

The State Water Board agrees with this legal characterization of the CWA statutory anti-backsliding provisions, and stated so in Order WQ 2015-0075. "The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C), and are accordingly not subject to the anti-backsliding requirements of section 402(o)." (Order WQ 2015-0075.)

Thus, contrary to Baykeeper's arguments, the statutory anti-backsliding provisions of CWA section 402(o) do not apply to the Discharge Prohibitions and RWLs in the Bay Area Permit. Baykeeper's allegations must be rejected by the State Water Board.

2. The EPA's Regulatory Anti-Backsliding Provisions Also Do Not Apply to Discharge Prohibitions and RWLs

Baykeeper claims that even if RWLs are not "effluent limitations" under the statutory anti-backsliding provisions, the Permit's Discharge Prohibitions and RWLs provisions violate EPA's anti-backsliding regulations because they are "standards" or "conditions" within the meaning of title 40 of the Code of Federal Regulations[5] section 122.44(l). However, when this anti-backsliding regulation is read in context with other regulations in the same chapter, the meaning of "standard" and "condition" does not apply to the Discharge Prohibitions and RWLs provisions at issue here.

Baykeeper improperly characterizes section 122.44(l)(1). This provision states that, subject to paragraph (l)(2) and certain circumstantial changes, "when a permit is renewed or reissued, *interim* effluent limitations, standards, or conditions must be at least as stringent as the *final* effluent limitations, standards, or conditions in the previous permit." Setting aside the fact that Discharge Prohibitions and RWLs are not effluent limitations, standards, or conditions, it is worth noting that the provisions in question at issue here are not interim provisions. Therefore, the cited anti-backsliding regulations do not apply. Moreover, even if these regulations apply to final amended or revised standards or conditions, the RWLs do not fall within any of these categories.

Baykeeper also attempts to argue that the regulations are outdated, and accordingly cannot be relied upon. (Baykeeper Petition, p. 12:6-12.) However, the regulations are as they exist in Code of Federal Regulations, title 40, section 122.44. After the 1987 amendments were adopted, EPA revised its NPDES regulations to incorporate some of the amendments. With respect to anti-backsliding provisions, the EPA 1989 final rule implementing the 1987 CWA amendments declined to implement the new statutory prohibition of backsliding from water quality based permits. (54 Fed. Regs. 246, 251-252.) Rather, the final rule indicated that new regulations covering this specific prohibition would be forthcoming in the future. To date, no such changes have been put forward by EPA. Regardless, such changes would not be applicable to Discharge Prohibitions and RWLs imposed under 402(p)(3)(B) because such requirements are not imposed as "water quality-based permit limits."

[5] All citations in this subsection shall refer to title 40 of the Code of Federal Regulations, unless otherwise noted.

Further, as explained above, Discharge Prohibitions and RWLs are the State's invention, not federal CWA effluent limitations.[6] Additionally, Discharge Prohibitions and RWLs are not "standards" or "conditions" under EPA's regulations. Section 122.2 defines "[a]pplicable standards and limitations," limiting the term to certain categories of requirements "under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA." Throughout the remainder of the regulations in part 122, any and all references to "standards" relate back to the foregoing CWA sections. As indicated previously, the Discharge Prohibitions and RWLs at issue here were adopted under section 402(p)(3)(B) of the CWA, which is not included in section 122.2. Rather, the Permit provisions subject to 122.44(1) are applicable standards and limitations within the meaning of section 122.2. Thus, nothing in the regulations place Discharge Prohibitions and RWLs in the Bay Area Permit within the meaning of "standards."

Additionally, the term "conditions" is discussed in subpart C of the regulations, entitled "Permit Conditions." The conditions listed throughout the subpart have something in common – they are required conditions as described in the regulations. In contrast, the Discharge Prohibitions and RWLs provisions are *discretionary* and not required "conditions" outlined in the regulations or in the CWA.[7] Accordingly, the Discharge Prohibitions and RWLs are not a "condition" under the anti-backsliding provisions in section 122.44(l), which is also located in subpart C.

Because the RWLs are not effluent limitations, conditions, or standards, the anti-backsliding federal regulations do not apply. Further, Order WQ 2015-0075 makes no findings to dispute the arguments presented here. Rather, Order WQ 2015-0075 finds that regardless of the application or inapplicability of the regulatory anti-backsliding provisions, exceptions to the anti-backsliding requirements applied in that case. While such a circumstance is true here as well (see arguments below), CASQA continues to believe for the reasons stated that the federal regulatory anti-backsliding provisions do not apply to Discharge Prohibitions and RWLs that are included in MS4 permits. Accordingly, CASQA requests the State Water Board make such a finding in response to the Baykeeper petition so that this issue can be resolved.

3. Even if Federal Anti-Backsliding Provisions Apply, Exceptions to Anti-Backsliding Apply

Both the CWA and the federal regulations include exceptions to the anti-backsliding provisions, acknowledging that new information may lead to changed permit limitations, standards, or conditions. Thus, even if the anti-backsliding provisions could apply to the

[6] The federal regulations define effluent limitation to mean, "any restriction imposed by the Director on quantities, discharge rates and concentrations of 'pollutants,' which are 'discharged' from 'point sources' into 'waters of the United States,' . . . ." (40 C.F.R. § 122.2.) The Discharge Prohibitions and RWLs in the Bay Area Permit, and generally, are narrative statements that do not constitute an actual numeric restriction on quantity, rate and concentration of pollutants that may be discharged by the MS4.

[7] While section 122.44(k) mentions best management practices (BMPs) "to control or abate the discharge of pollutants when . . . (2) [a]uthorized under section 402(p) of the CWA for the control of storm water discharges," it does not change the analysis. CWA section 402(p)(3)(B)(iii) requires controls to reduce the discharge of pollutants to the MEP, including BMPs, but allows the state to require other provisions it determines appropriate for the control of municipal stormwater discharges. The RWLs fall within the latter discretionary provision.

Discharge Prohibitions and RWLs in the Permit and the modifications are viewed as less stringent, neither of which is true, the new information exception would save the amendments.

The CWA states that a permit may be renewed, reissued, or modified to a less stringent effluent limitation if "information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of a less stringent effluent limitation at the time of permit issuance." (33 U.S.C. § 1342(o)(2)(B)(i).) The federal regulations similarly allow less stringent conditions, standards, or limitations when new information would have justified the application of different permit conditions at the time of issuance. (40 C.F.R. §§ 122.44(l)(1), 122.62(a)(2).)

The compliance provisions were added based on new information relating to MS4s' efforts to achieve compliance with WQS over time. Due to the nature of stormwater discharges and the difficulty of removing pollutants from such discharges, alternative compliance pathways are needed to further the process towards compliance. Municipalities have compiled many years of monitoring data, and the information supports the position that significant investment and time is required to provide solutions for water quality challenges. The nature of the problem is largely created by the characteristic imperviousness of the developed environment. Controlling sources of pollutants and reconstructing the built environment towards restoration of more natural hydrologic processes is tied to the development cycle and will require years to complete. Further, for example, programs targeting public behavior modification require time to reach maximum effectiveness.

The compilation and examination of monitoring data and other information assist the ambitions and rigorous compliance provisions toward meeting WQS. The new information supports the need for the alternative compliance pathway to further improvements in water quality and ultimately meet WQS for the identified constituents in the specified waterbodies. Accordingly, even if the anti-backsliding provisions were applicable, the exception to anti-backsliding applies.

III. The Compliance Provisions in the Bay Area Permit Are Consistent With and Comply With Order WQ 2015-0075

Baykeeper alleges that the compliance provisions at issue in the Bay Area Permit fail to meet the principles established in Order WQ 2015-0075, and in particular, fail to comply with principle 7, which states that alternative compliance paths should "have rigor and accountability." (Order WQ 2015-0075, p. 52.) As a fundamental matter, Baykeeper does not characterize or quote Order WQ 2015-0075 correctly. Baykeeper omits essential language that clearly indicates that the State Water Board left to individual regional water boards substantial discretion with respect to adopting alternative compliance programs that are designed to address RWLs compliance. The complete language is as follows:

> We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase 1 MS4 permits going forward. *In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach*, but believe that such variations must nevertheless be guided by a few principles. We expect the regional water boards

> to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit specific reasons. (Order WQ 2015-0075, p. 51, emphasis added.)

Notably, the State Water Board's direction to the regional water boards is replete with terms that convey and maintain regional water board discretion. For example, regional water boards are to "*consider* the WMP/EWMP approach," be "*guided* by a few principles," and are expected to follow the principles *unless a given principle is not appropriate*.

Consistent with Order WQ 2015-0075, the San Francisco Bay Regional Water Board evaluated its program and compared its provisions to the principles from Order WQ 2015-0075. (See Bay Area Permit, pp. A-25 - A-26.) This comparative analysis found that certain specified requirements meet principles 1, 2, and 3 because the requirements were ambitious and rigorous, and require permittees to fully commit to and implement "challenging but achievable tasks to ultimately meet water quality standards." (Bay Area Permit, p. A-25.) Similarly, the San Francisco Bay Regional Water Board found the Bay Area Permit and its provisions to also be consistent with principles 4, 5, and 6. With respect to principle 7, Baykeeper essentially argues that the Bay Area Permit did not meet the rigor and accountability components of principle 7 because its requirements were not the same as those contained in the LA MS4 permit. This argument fails for several reasons. First, Order WQ 2015-0075 does not require or mandate that alternative compliance paths need to be the same as those approved in the LA MS4 permit. Second, Order WQ 2015-0075 does *not* state that the only path to meeting the rigor and accountability test from principle 7 is through a program that is essentially the same as that in the LA MS4 permit. Rather, Order WQ 2015-0075 requires transparency, verification of assumptions, and implementation of adaptive management. (Order WQ 2015-0075, p. 52.)

The Bay Area Permit contains significant requirements to ensure that it is consistent with principle 7. As explained in the Bay Area Permit, the pollutant-specific provisions contain "concrete milestones and deadlines and reporting requirements that provide rigor and accountability." (Bay Area Permit, p. A-26.) Further, transparency is achieved because all reports, plans, and other required submittals "will be made available to all interested parties and input and feedback from interested parties will be considered." (*Ibid*.) Thus, contrary to Baykeeper's allegations, the Bay Area Permit is fully consistent with Order WQ 2015-0075.

IV. Bay Area Permit Monitoring Requirements

The Baykeeper petition alleges that the Bay Area Permit does not include adequate receiving water monitoring provisions to determine compliance with permit terms or to yield data that are representative of the monitoring activity. In particular, Baykeeper argues that monitoring is insufficient to determine compliance with Discharge Prohibitions and RWLs. Due to this specific focus, and the fact that such provisions are aimed at identified constituents, CASQA's comments here focus on the Bay Area Permit's monitoring requirements as they relate to trash, pesticides, mercury and PCBs. CASQA also addresses Baykeeper's failed allegations regarding the lack of outfall monitoring.

A. **Trash Monitoring Requirements**

With respect to trash, besides the general comment regarding adequacy, Baykeeper makes additional arguments about the length of time afforded to permittees to develop trash-related receiving water monitoring tools and protocols as being too long ("final report by July 1, 2020") and being developed without input from the San Francisco Bay Regional Water Board and/or public; and, Baykeeper also contends that the Bay Area Permit monitoring provisions for trash are inconsistent with the Statewide Trash Amendments monitoring and report requirements.

CASQA disagrees with such allegations regarding the trash monitoring requirements and encourages the State Water Board to reject these claims for the following reasons:

1. The Bay Area Permit incorporates a robust trash load reduction program that provides compliance with the Discharge Prohibitions and RWLs, consistent with the Statewide Trash Amendments, which does not require receiving water monitoring.

2. The Bay Area Permit includes visual on-land trash assessments to validate trash load reduction program effectiveness, appropriately requires the development of receiving water monitoring tools and protocols within an appropriate timeframe to address known issues and concerns with receiving water monitoring for trash, and is consistent with the question-based monitoring approach outlined in the Statewide Trash Amendments.

3. The Bay Area Permit includes an appropriate time period and process for developing receiving water monitoring tools and protocols given the significant challenges associated with monitoring for trash in receiving waters.

1. The Bay Area Permit Provides a Compliance Pathway for the Trash Load Reduction Program, Thus Receiving Water Monitoring is Not Required to Demonstrate Compliance

As indicated above, the Bay Area Permit contains compliance provisions that are applicable to certain identified WQSs. The provision states, in part, the following:

> . . . Compliance with Provisions C.9 through C.12 and C.14 of this Order, which prescribe requirements and schedules for Permittees identified therein to manage their discharges that may cause or contribute to violations of water quality standards (WQS) for pesticides, trash, mercury, polychlorinated biphenyls (PCBs), and bacteria, shall constitute compliance during the term of this Order with Receiving Water Limitations B.1 and B.2 for the pollutants and the receiving waters identified in the provisions. **Compliance with Provision C.10, which prescribes requirements and schedules for Permittees to manage their discharges of trash, shall also constitute compliance with Discharge Prohibitions A.1 and A.2 during the term of this Order for discharges of trash.** (Bay Area Permit, p. 6, emphasis added.)

The Bay Area Permit also states:

> The Permittees shall demonstrate compliance with Discharge Prohibition A.1, for trash discharges, Discharge Prohibition A.2, and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems in accordance with the requirements of this provision . . . . (Bay Area Permit, p. 6.)

Thus, as long as the permittees are implementing the trash reduction program as specified within the Bay Area Permit, they are deemed to be in compliance with trash related Discharge Prohibitions and RWLs, and are not causing or contributing to trash exceedances in the receiving water. This is consistent with the Statewide Trash Amendments, which specify that, "Dischargers with NPDES permits that contain specific requirements for the control of trash that are consistent with these Trash Provisions shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements." (A. Trash, 2.a. Prohibition of Discharge, Draft text of the final Part 1 Trash Provisions proposed to Chapter IV Implementation of Water Quality Objectives, Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California). Because compliance is determined through the implementation of control measures, it is unnecessary for the permittees to conduct receiving water monitoring [for trash] in order to demonstrate compliance with the Bay Area Permit.

2. The Trash Monitoring Requirements in the Bay Area Permit are Sufficient to Determine Compliance With Permit Provisions and Appropriately Address Known Concerns with Receiving Water Monitoring

CASQA supports the existing trash monitoring protocols within the Bay Area Permit and believes they are sufficient to demonstrate compliance with permit provisions, provide a pathway for evaluating and addressing known complexities associated with developing and implementing a trash monitoring program, and are consistent with the Statewide Trash Amendments.

As noted in the previous comment, implementation of a trash load reduction program is the mechanism for determining compliance with the Discharge Prohibitions and RWLs for trash. The trash load reduction program in the Bay Area Permit includes provisions to demonstrate attainment of the requirements through specified accounting methods and visual assessments that evaluate the amount of trash generated within the management area. Using on-land accounting and assessments is directly linked to implementation of management practices and focuses implementation on areas where trash is generated and most likely to be discharged to receiving waters. The accounting methods and visual assessments in the Bay Area Permit are clear and specific and permittees are required to demonstrate the trash reductions using these methods. Implementation of the requirements in the Bay Area Permit will be sufficient to demonstrate compliance with trash permit provisions.[8]

[8] See, e.g., *California Coastkeeper Alliance v. State Water Resources Control Board*, Alameda County Superior Court, Case No. RG14724505, Statement of Decision (July 10, 2015), Receiving Water Monitoring is not required by 40 CFR 122.43(a) and 40 CFR 122.44(i) to assure compliance with RWLs, and monitoring includes inspections, monitoring and recordkeeping – not just actions identified as monitoring.

Additionally, stormwater permittees in the San Francisco Bay Area and Los Angeles region have been monitoring trash for almost ten years to meet permit and Total Maximum Daily Load (TMDL) requirements, respectively. This monitoring experience has demonstrated that trash monitoring data are highly variable and influenced by many factors outside the control of municipalities (e.g., wind events, illegal dumping, etc.). Additionally, where it has been implemented, receiving water monitoring for trash has been costly and has not been helpful for identifying trash sources, or in determining the effectiveness of trash control measures. Identifying trends in trash levels has also been difficult. Based on experience gained through Ventura County trash TMDL monitoring and evaluations conducted in the San Francisco Bay Area, on-land monitoring has been much more effective in determining where to focus trash control efforts and determine compliance for MS4s than through receiving water monitoring.

The existing Bay Area Permit provisions address these known complexities by including a requirement for the permittees to develop a plan and protocols to evaluate receiving water monitoring or surrogates for receiving water monitoring. While CASQA does not generally support the requirement for MS4 permittees to conduct receiving water monitoring for trash, the questions-based approach within the Bay Area Permit appropriately provides a mechanism for the permittees to select the most relevant monitoring tools and protocols to assess the current levels of trash in receiving waters and changes in these levels over time. While MS4 permittees may want to conduct receiving water monitoring to demonstrate performance, CASQA still believes it should not be mandated in case other methods are appropriate and more directly linked to demonstrating effectiveness (e.g., pounds of trash removed through a control measure).

Finally, the question-based approach in the Bay Area Permit and the requirement to evaluate receiving water monitoring protocols is consistent with the Statewide Trash Amendments. The Statewide Trash Amendments do not include the requirement to conduct receiving water monitoring, but rather include a requirement to demonstrate that control measures are effective in removing the same amount of trash as a full capture treatment system (Full Capture System Equivalency) and optional questions to be considered when developing the monitoring program and reporting on the results. In the Draft Statewide Trash Amendments, answering the questions was required, but the final adopted requirements were modified based on comments received regarding the need for flexibility and lack of need for receiving water monitoring. The Response to Public Comments on the Draft Staff Report, Including the Draft Substitute Environmental Documentation and Draft Trash Amendments (Response to Comments) for the Statewide Trash Amendments, explains the modifications:

> . . . Similar to the Track implementation provisions, as there will be many unique implementation approaches, the monitoring and reporting approach should provide flexibility to demonstrate compliance with the prohibition of discharge for trash. However, statewide consistency in monitoring and reporting needs to be provided to permitting authorities and permittees. The balance between the need for consistency and flexibility is achieved through standardized objectives in the monitoring program . . . . Based on the comments, the proposed final Trash Amendments have been modified to make question-based approach discretionary and removed the requirement for receiving water monitoring component." (Response to Comments No. 4.6.)

The Response to Comments also stated:

> Additionally, receiving water monitoring may be a necessary component to assess compliance with the prohibition of trash and trash control effectiveness, as well as highlight additional locations where trash controls are necessary. However, receiving water monitoring is not a required component with monitoring for Track 2 or Caltrans to provide flexibility to permittees to development a strategy to demonstrate the effectiveness of trash controls and compliance with full capture system equivalency. (Response to Comments No. 73.9.)

As demonstrated by these statements, receiving water monitoring is not required for consistency with the Statewide Trash Amendments and is not necessary to determine compliance for trash load reduction programs. Rather, a monitoring program that demonstrates the effectiveness of the trash load reduction program and considers the questions outlined in the Statewide Trash Amendments is needed for consistency. While the Bay Area Permit does not specify the same questions verbatim as the Statewide Trash Amendments, the questions provided in the Bay Area Permit are consistent with those in the Statewide Trash Amendments and require consideration of whether trash discharged from its MS4s is having adverse impacts on receiving waters. Therefore, the Bay Area Permit requirement to evaluate receiving water methods and propose a plan to address specified questions is consistent with the Statewide Trash Amendments and is sufficient to demonstrate compliance with the permit provisions.

3. The Bay Area Permit Provides the Time Necessary to Develop the Receiving Water Monitoring Tools and Protocols

CASQA strongly disagrees with Baykeeper that the Bay Area Permit is allowing too much time for the development of the receiving water monitoring tools and protocols and that those tools and protocols will not be available for comment. In fact, the Bay Area Permit requires that the permittees submit a proposed monitoring plan to the Executive Officer within 18 months of the adoption of the Permit (by July 1, 2017). Additionally, permittees must also come up with a schedule for development and testing with monitoring at representative sites starting no later than October 2017. As discussed above, receiving water monitoring programs for trash to date have not been effective in providing useful information and have been costly to implement. Additionally, the receiving water management questions posed within the Bay Area Permit will be challenging for permittees to answer with a high degree of certainty. As such, it will take innovation and time in order to evaluate methods that are capable of providing the data and information necessary to address these questions. One and a half years to develop this costly plan is, if anything, not long enough.

B. Pesticide Toxicity Control Monitoring

As discussed above in relationship to trash, the concept of monitoring is broad, and encompasses many different types of actions. Such actions include inspections, monitoring, sampling and recordkeeping. Accordingly, the Bay Area Permit includes many significant and robust requirements for pesticide toxicity control monitoring, which collectively help to assure compliance with Discharge Prohibitions and RWLs. For example, Provision C.9 requires, in part, for the Bay Area permittees to certify implementation of their Integrated Pest Management

(IPM) policy or ordinance, report IPM tactics and strategy, report municipal application training information, report IPM-certified contractor compliance with IPM policies, report public outreach activities, report participation in relevant pesticide regulatory process activities, and report evaluation of their assessment of IPM effort effectiveness and improvements made.

In addition to the reporting elements found in Provision C.9, Provision C.8 requires pesticide and toxicity monitoring in urban creeks, which includes both water column and sediment testing in dry weather, and pesticide and toxicity monitoring in wet weather. There are also requirements for follow up monitoring if any pesticide related pollutant is present at a concentration that exceeds the water quality objective in the Basin Plan.

Most importantly, the San Francisco Bay Regional Water Board has concluded that the monitoring requirements for pesticides and toxicity yield sufficient data to determine compliance with Discharge Prohibitions and RWLs, and which are appropriately representative.

C. Mercury and PCB Monitoring

Similar to pesticide toxicity monitoring, the Bay Area Permit includes numerous robust monitoring and reporting requirements that collectively assure compliance with the Discharge Prohibitions and RWLs. For example, the Bay Area Permit includes, in part, annual reporting for achievement of mercury and PCB TMDL allocations; mercury and PCB load reduction progress reporting; reporting of methodologies and assessment of mercury and PCB load reductions from stormwater; mercury and PCB green infrastructure reporting; reporting of information of mercury and PCB risk reduction programs; reporting requirements for PCB containing building materials; monitoring requirements for PCB use in caulks/sealants in storm drains or roadways; PCB fate and transport study reporting; and, additional mercury and PCB monitoring requirements that are part of Provision C.8.f., which articulates the requirements for pollutants of concern monitoring.

As indicated by the San Francisco Bay Regional Water Board in its Fact Sheet, the pollutant of concern monitoring in Provision C.8.f. is intended to assess inputs of pollutants of concern to the Bay from local tributaries and urban runoff. It will also provide information to support TMDL implementation, assess progress towards achieving wasteload allocations for TMDLs, and help in resolving uncertainties in loading estimates and impairments. Thus, collectively, the reporting and investigatory types of actions required in the Bay Area Permit, and the monitoring in Provision C.8.f., will yield data that is representative and will assure compliance with the Discharge Prohibitions and RWLs.

D. Outfall Monitoring

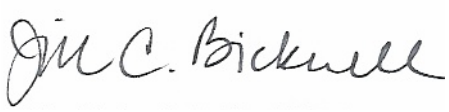
Lastly, CASQA disagrees with Baykeeper that the Bay Area Permit is defective because it does not include outfall monitoring, especially as compared to other Southern California MS4 permits. On a fundamental level, CASQA disagrees with Baykeeper's basic premise that the legality of MS4 permits and their monitoring provisions should be determined based on a comparison to other MS4 permits. This is simply not true. Each MS4 permit needs to be evaluated on its own merits. Each permit approach includes a combination of BMPs and

prohibitions along with monitoring, sampling, and reporting requirements that are unique in determining compliance. There is no one size fits all.

With respect to the specific monitoring requirements included in the Bay Area Permit, the San Francisco Bay Regional Water Board rejected the use of outfall monitoring because, based on their best professional judgment, it would not provide the appropriate information to measure progress towards meeting TMDL wasteload allocations or measure pollutant of concern mass loadings to the Bay. Rather, the San Francisco Water Board found that monitoring program as set forth in Provision C.8.f. would better provide the necessary information to determine compliance with the Bay Area permit provisions, which do not include end-of-pipe limits. Moreover, the monitoring program in the Bay Area Permit will measure the effect of discharges from multiple outfalls over multiple storm events in the receiving waters as compared to simply measuring the impact of one outfall during one limited storm event. Thus, overall, while the Bay Area monitoring program may be different, it is not flawed.

In summary, the Baykeeper petition fails to raise any legitimate claims, and it must be rejected in its entirety. CASQA would like to thank the State Water Board for the opportunity to comment on this petition. Feel free to contact me with any questions at (408) 720-8811, ext. 1.

Sincerely,



Jill Bicknell, Chair
California Stormwater Quality Association

cc: CASQA Board of Directors and Executive Program Committee