



California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

December 16, 2011

Mr. Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: State Guidance with Stormwater Management Programs

Dear Chair Hoppin:

On behalf of the California Stormwater Quality Association (CASQA) I would like to thank you for meeting with our Executive Director and other CASQA representatives on November 21, 2011. As discussed, CASQA believes that the State Water Board should address an issue that poses significant challenges to our members. The issue pertains to the 9th Circuit Court of Appeals decision with respect to the language and legal implications established with the receiving water limitations provisions in California's municipal stormwater NPDES permits. The purpose of this letter is to provide some background information regarding this issue, the practical implications associated with this issue, and our specific request to the State Water Board for addressing this statewide policy issue.

Background

The 9th Circuit Court of Appeals in a recent decision¹ regarding the Los Angeles County NPDES stormwater permit determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard, regardless of whether a municipality has engaged in the well-established iterative process to address the exceedance. This liability is incurred because the Court determined that the "iterative process" language as identified and provided for in the Los Angeles Stormwater Permit did not provide for a "safe harbor," in that each permit provision is individually enforceable. The receiving water limitations permit language in question was developed by the State Water Board in 1999, and was issued by the State Water Board in Order WQ 99-05. In subsequent decisions, the State Water Board stated that this language did not require strict compliance with water quality standards.² However, the 9th Circuit Court of Appeals interprets this language differently.

In light of the 9th Circuit Court of Appeal's decision and based on the significant monitoring efforts being conducted by municipal stormwater entities, municipal stormwater permittees will now be

¹ *NRDC v. County of LA* (9th Cir., July 13, 2011, No. 10-56017) 2011 U.S. App. LEXIS 14443*1.

² *See In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn.*, Order WQ 2001-15 (Nov. 15, 2001) (BIA Order).

CASQA request for State Water Board to address receiving water limitations

considered to be in non-compliance with their NPDES permits. Accordingly, such municipal stormwater permittees will be exposed to considerable liability, even though municipalities have little control over the pollutants that create the liability. MS4 permit holders continually seek to comply with their stormwater permits to reduce pollutants to the maximum extent practicable, which is founded on the principle of an iterative process for water quality improvement. Further, the iterative approach is consistent with the nature of the problem, which is largely created by the built environment. Specifically, the required investments in public infrastructure must be funded over time, and the programs we have in place to influence public behavior also require time to reach maximum effectiveness. The iterative approach allows this to happen.

Practical Impacts to Municipalities

The court's decision with respect to municipal stormwater permits in California has many practical implications that make municipalities vulnerable to state and federal enforcement actions, as well as to third party actions under the federal Clean Water Act's citizen suit provisions. For example, municipalities through many years of monitoring have identified that stormwater discharges cannot comply with the strict reading of the permit provision that prohibits discharges from causing or contributing to exceedances of water quality standards. Constituents of particular concern include: bacteria (which has both human and non-human sources), copper, lead, zinc, PCBs, mercury, and trash. Other pollutants that appear on the list but that are not typically associated with human actions include aluminum, selenium, and iron.

At the same time the municipalities have, once a water quality issue is identified, developed and implemented pollutant-specific reduction plans through an iterative process that seeks to identify the sources, and the control measures to address the sources. In addition, many special studies have been conducted to identify the sources and assess the effectiveness of best management practices.

Under the court's decision, this iterative approach to addressing water quality concerns becomes less meaningful because municipalities subject to NPDES permits with the receiving limitations language at issue are prohibited from causing or contributing to an exceedance of a water quality standard. While the State Board staff on occasion has noted that enforcement action is unlikely if the permittees are implementing the iterative process, the harsh reality is that municipalities are immediately vulnerable to third party lawsuits. This situation is exactly what has occurred with the City of Stockton where the City was sued by a third party for violations of the cause/contribute prohibition even though the City was implementing a comprehensive iterative process with specific pollutant load reduction plans. It is fair to say that third parties only have to collect a single wet weather discharge sample from a municipal outfall paired with a near-by receiving water to show that the municipality is in violation of its permit. We do not believe Congress envisioned this type of legal jeopardy when it adopted the Clean Water Act and ultimately is a poor use of public funds. Establishing permit conditions where a municipality is in immediate non-compliance with no foreseeable opportunity for coming into compliance is poor public policy.

CASQA request for State Water Board to address receiving water limitations

Request

The receiving water limitation provision as crafted in the contested Los Angeles permit is unique to California. Recent USEPA developed permits (e.g., Washington D.C.) do not contain similar limitations. Thus the decision to include such a provision and the structure of the provision is a State defined requirement and therefore an opportunity exists for the State Water Board to reaffirm the iterative process as the preferred approach for long term water quality improvement. Our specific request is for the State Water Board to address this critical issue and work with the discharger community to create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but at the same time allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action.

In closing, we appreciate the opportunity to submit our request to the State Water Board and look forward to further discussion on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Taylor". The signature is fluid and cursive, with a large initial "S" and a long, sweeping tail.

Scott Taylor, P.E. D. WRE
Chair, California Stormwater Quality Association

cc: Frances Spivy-Weber, Vice-Chair – State Water Board
Tam Doduc, Member – State Water Board
Tom Howard, Executive Director – State Water Board
Alexis Strauss, Director – Region 9 Water Division, USEPA