

PORT OF STOCKTON

Phone: (209) 946-0246



Fax: (209) 465-7244

July 23, 2012

Via Email to commentletters@waterboards.ca.gov

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



Subject: Comment letter – 2nd Draft Phase II Small MS4 General Permit

Dear Board Members and Ms. Townsend:

The Port of Stockton (Port) provides the following comments on the 2nd Draft Phase II Small MS4 General Permit (Draft Phase II Permit). Although other ports in California are subject to the current Phase II Permit, the Port has its own quasi-MS4 permit. The Port worked closely with the Regional Water Quality Control Board for the Central Valley to address the issue of Receiving Water Limitations as all of us were well aware of the court cases going on over the Los Angeles County MS4 permit and wanted to avoid extended litigation over the meaning of the permit, and wanted to work on improving water quality instead of fighting citizen suits over compliance. For these reasons, the Port has a unique perspective on the issues facing the State Water Resources Control Board as it adopts a new Phase II Permit.

The currently proposed Provision D of the Draft Phase II Permit ignores precedential case law and the long history of established State Water Board policies that would allow permittees to comply with standards over time through the implementation of increasingly more complex and effective Best Management Practices (BMPs) if exceedances of pollutants were seen in the receiving waters. Without an express recognition of the difficulties of stormwater regulation and control, and a corresponding regulatory program that takes into account these difficulties, a permit will be adopted that dooms regulated entities to failure and may force them into a consistent state of non-compliance.

The Port believes that an iterative management approach represents the soundest basis for compliance. Thus, a new paradigm is needed to address the July 13, 2011 holding by the Ninth Circuit Court of Appeals in *NRDC vs. County of Los Angeles*, which determined

that the defendants had caused or contributed to an exceedance of a water quality standard and, therefore, violated the Receiving Water Limitations, irrespective of their implementation of the iterative process. Other municipal entities, including the cities of Malibu and Stockton and the County of San Joaquin, notwithstanding their implementation of a good faith iterative process per the terms of their respective permits, have been challenged in expensive litigation under the Clean Water Act by third-party plaintiffs on the basis of the Receiving Water Limitations language. Scarce municipal dollars would be better spent on on-the-ground watershed improvement projects than on paying hundreds of thousands of dollars in plaintiff's attorneys fees in these cases.

If a strict interpretation of Provision D is maintained, as was seen in the *NRDC v. LA County* case, all stormwater discharges will likely need to meet water quality standards at the point of discharge to avoid being in violation of the permit. The State Water Board's own blue ribbon panel has recognized the difficulty of meeting standards end of pipe and, therefore, did not recommend the adoption of numeric effluent limitations. However, a strict interpretation of Provision D is really no different than a numeric effluent limit and suffers from the same logistical and feasibility challenges. While local governments recognize the importance of attaining water quality standards, these standards were never intended to apply directly to stormwater. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999)(The Court held that the provisions of CWA Section 402(p)(B)(3) for municipal storm water permits replaced the requirements under CWA Section 301(b)(1)(C)(otherwise requiring WQBELs)); *see also In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*, SWRCB Order No. WQ 2001-15, 2001 WL 1651932, at *2 (Nov. 15, 2001).) Instead, Congress adopted a standard that municipal stormwater dischargers "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 State determines appropriate for the control of such pollutants." (33 U.S.C. §1342(p)(3)(B)(i)-(iii)(emphasis added).)

Where receiving waters are not attaining water quality standards, the appropriate action is to adopt a Total Maximum Daily Load (TMDL), which specifically recognizes that current water quality standards are not being attained and will be addressed by regulation that supports implementation of an adaptive program over an extended period of time. Requiring immediate compliance with water quality standards for a non-continuous discharge from water draining hundreds, if not thousands, of acres of land is not required by any law and represents bad public policy that could force more public entities into bankruptcy.

No regulatory benefit accrues from a State policy that establishes permit provisions, such as Provision D, that place Permittees in immediate non-compliance. For these reasons, the Port requests substantial revision of Provision D to incorporate either the language proposed by California Stormwater Quality Association (CASQA), or set forth in the attachment to this letter that tracks the Port's current permit (Order No. R5-2011-0005), which was adopted last year without adverse comment or objection by U.S. EPA. We strongly support this type of permit language because it better enables regulated entities to focus and prioritize their limited financial resources on the most critical water quality

issues, thereby achieving positive environmental outcomes. Importantly, clarifying language changes will also help avoid unnecessary legal liability and lawsuits.

Please direct any questions regarding this letter to Jeff Wingfield at 209- 946-0246.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeff Wingfield', with a long horizontal flourish extending to the right.

Jeff Wingfield
Environmental Manager
Port of Stockton

Attachment 1 – Alternate Receiving Water Limitations Language

1268653.1

Receiving Water Limitations

1. Receiving water limitations are site-specific interpretations of water quality standards from applicable water quality control plans. As such, they are required to be addressed as part of the permit. However, a receiving water condition not in conformance with the limitation is not necessarily a violation of this Order. The Water Board may require an investigation to determine cause and culpability prior to asserting a violation has occurred.

2. The discharge shall not cause or contribute to an exceedance of any applicable water quality standards.

3. The Permittee shall comply with Discharge Prohibition[s] and Receiving Water Limitations C.1 and C.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SWMP and other requirements of this Order, including any modifications. The SWMP shall be designed to achieve compliance with the above mentioned Discharge Prohibition[s] and Receiving Water Limitations C.1 and C.2. If exceedance(s) of WQS persist notwithstanding implementation of the SWMP and other requirements of this Order, the Permittee shall assure compliance with Discharge Prohibition[s] and Receiving Water Limitations C.1 and C.2 by complying with the following procedure:

a. The Permittee shall prepare Notification of Water Quality Exceedances (“NWQE”) pursuant to notification requirements set forth in the Monitoring and Reporting Program of this Order.

b. The Permittee shall submit a Report of Water Quality Exceedance (“RWQE”) annually to the Executive Officer for reporting discharges that cause or contribute to an exceedance of applicable water quality standards. The RWQE shall describe BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants in the Permittee’s discharge that are demonstrated to be causing or contributing to the exceedance of WQSs. The RWQE shall be incorporated in the Annual Report. The report shall include proposed revisions to the SWMP and an implementation schedule containing milestones and performance standards for new or improved BMPs, if applicable. The RWQE shall also include a monitoring program and the rationale for new or improved BMPs, including a discussion of expected pollutant reductions and how implementation of additional BMPs will prevent future exceedance of WQSs. The Central Valley Water Board may require modifications to the RWQE.

c. Within **30 days** following approval of the RWQE by the Executive Officer, the Permittee shall revise the SWMP and monitoring program to

incorporate the approved modified BMPs that have been and will be implemented, implementation schedule, and any additional monitoring required.

d. The Permittee shall implement the revised SWMP and monitoring program in accordance with the approved schedule after Central Valley Water Board approval of the revised SWMP.

If the Permittee has complied with the procedures set forth above and is implementing the revised SWMP, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Executive Officer to develop additional BMPs.¹⁶

[16 State Water Resource Control Board Order WQ 99-05, *SWRCB/OCC File A-1041*]

4. If the Permittee is found to have discharges notwithstanding the prohibitions in Provision A, or discharges causing or contributing to an exceedance of an applicable benchmark value, water quality objective, waste/wasteload allocation, or receiving water limitation in Provision B, the Port will not be determined to be in violation of this Order unless it fails to comply with the requirement to report such discharge (Provision C.3.a.), and revise its BMPs to include additional and more effective BMPs, and to implement the same (Provision C.3.b-d). Further, the Port may demonstrate in its SWMP that the use of particular benchmark values are not appropriate (e.g., aluminum, electrical conductivity) due to local ambient conditions or other environmental studies (e.g., Water Effect Ratios).

Provisions

1. Compliance with Discharge Prohibitions and Receiving Water Limitations
As reflected in the findings, the effect of the Port's storm water discharges on receiving water quality is highly variable. For this reason, this Order requires that, within its geographic jurisdiction, the Permittee shall design its storm water program to achieve compliance with water quality standards over time through compliance with the following, which reflects an iterative approach:

a. Comply with the requirements of this Order, the SWMP, any modifications to the SWMP, and directives of the Executive Officer concerning this Order;

b. Facilitate the implementation of the requirements of the SWMP applicable to such Permittee in an efficient and cost-effective manner;

c. Prepare an annual fiscal analysis identifying the expenditures for the storm water management program. This summary shall identify the storm water budget for the following year, using estimated percentages and written explanations where necessary, for the specific categories noted below:

- i. Program management (administrative costs)
- ii. SWMP Development
 - a) Construction Element
 - b) Commercial/Industrial Element
 - c) Municipal Operations and Facilities Element
 - Maintenance of Structural BMPs and Treatment Control BMPs
 - d) Illicit Discharge and Detection Elimination Element
 - e) Public Outreach Element
 - f) Performance and Effectiveness Evaluations
- iii. Planning and Land Development
- iv. Monitoring Program
- v. Water Quality Based Programs
- vi. Training
- vii. Other Services and Expenses