City of Mission Viejo

Public Works Department

July 16, 2012

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 Ms. Townsend:

The City of Mission Viejo appreciates the opportunity to provide comments on the subject 2nd Draft Phase II Small MS4 General Permit (Draft Phase II Permit). While the City of Mission Viejo will not be subject to this Permit, a key provision will likely be precedential for future permit renewals across the State, and consequently, we are compelled to comment on the Draft Phase II Permit.

The City of Mission Viejo believes that Provision D of the Draft Phase II Permit is contrary to the historical interpretation of established State Water Board policy and will create an inability for a regulated entity to comply. In wet weather, multiple constituents in stormwater runoff from urban areas may exceed receiving water quality standards, thereby creating the potential for stormwater discharges to cause or contribute to exceedances of standards in the receiving water itself.

Previously, municipal stormwater permittees have presumed that permit language, like that expressed in Provision D, in conjunction with Board Policy (WQ 99-05) established an iterative management approach as a basis for compliance. However, on July 13, 2011, the Ninth Circuit Court of Appeals in NRDC vs. County of Los Angeles / Los Angeles County Flood Control District found the defendants had caused or contributed to an exceedance of a water quality standard and therefore violated the Receiving Water Limitations, irrespective of the application of the iterative process. More recently, the City of Stockton was engaged in a good faith iterative process per the terms of its permit, but was nonetheless challenged by a third-party on the basis of the Receiving Water Limitations language.

If Provision D is not changed, all discharges to receiving waters will likely need to meet water quality standards to avoid being in violation of the permit. Local government certainly recognizes the importance of attaining water quality standards. At the same time, however, no one reasonably expects any Phase II or indeed Phase I entity to immediately realize this goal at the moment of permit adoption. Indeed, this reality is reflected by the hundreds of TMDLs across the State that specifically recognize that current water quality standards cannot be readily attained and can only be addressed by regulation that supports implementation of an adaptive program over an extended period of time.

The City of Mission Viejo is currently participating in the review of the draft Regional MS4 Permit for San Diego Regional Water Quality Control Board Permittees with language similar to Provision D of the Draft Phase II Permit. The review has taken the form of a series of "focused meetings" with the Regional Water Quality Control Board, South Orange County, San Diego County, and Southwest Riverside Co-Permittees, environmental groups and other non-governmental organizations, the Building Industry Association, and representatives from the Environmental Protection Agency (EPA). At our last meeting

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on July 11, 2012, EPA staff expressed the courts were misguided in deciding the iterative process was a distinct and separate requirement from the requirement for Co-Permittees not to cause or contribute to an exceedance of a water quality standard. Despite EPA's position on the matter, their position does nothing to mitigate the real threat of potential challenge to municipal dischargers by a third-party. The Co-Permittees have raised this issue as a major concern and will also comment in the same way during the issuance of the Regional MS4 Permit for the San Diego Region. Therefore, a precedence set in the Phase II Small MS4 General Permit would directly undermine our position on this issue.

The City of Mission Viejo recognizes the need to continue to make significant progress toward attainment of water quality standards. However, we also believe that no regulatory benefit accrues from the State establishing permit provisions, such as Provision D, that result in the potential of immediate non-compliance for Permittees. For these reasons, the City of Mission Viejo requests revision of Provision D to incorporate the California Stormwater Quality Association (CASQA) Receiving Water Limitations language (see Attachment 1). We strongly support this language because it will enable regulated entities to focus and prioritize their resources on critical water quality issues and achieve environmental outcomes that are meaningful to the communities we serve. Importantly, it will also help ensure that good faith compliance is not the subject of significant legal liability and lawsuits.

Please direct any questions regarding this letter to Joe Ames, Assistant City Engineer, at 949/470-8419.

Thank you in advance for your consideration of our request to have this language changed.

Regards,

Rich Schlesinger, P.E.
City Engineer

C: Mark Chagnon, Director of Public Works
Joe Ames, Assistant City Engineer
NPDES File – General Correspondence 2012

Attachment 1 – CASQA Model Receiving Water Limitations Language

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.

2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.

3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:

    a. Submit a report to the State or Regional Water Board (as applicable) that:

        i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.

        ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4to help inform Regional or State Water Board efforts to address such sources).

        iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.

        iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.

        v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.

        vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

b. Submit any modifications to the report required by the State of Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.

c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.

d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, 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 State Water Board or the Regional Water Board to develop additional BMPs.

4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.

5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.