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November 13, 2012

VIA ELECTRONIC MAIL

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Subject: Comment Letter – Receiving Water Limitations Language Workshop – City of Irvine

Dear Ms. Townsend:

The City of Irvine (City) appreciates the opportunity to provide these written comments in connection with the upcoming public workshop on Municipal Stormwater Permits – Receiving Water Limitations (RWL) language. The City has reviewed the State Water Board's Issue Paper, along with the Agenda for the Public Workshop, and given careful consideration to these important issues and their potential impacts on the residents of the City in preparing these comments. Accordingly, with this letter, the City is proposing an alternative RWL iterative process, as provided for in the attached Alternative 6 RWL proposal. The City believes the language within its Alternative 6 is consistent with the California Stormwater Quality Association's (CASQA) principle concern, as stated in its November 2, 2012 Comment Letter, that: "*The receiving water limitations language must provide permittees assurances that they are not subject to enforcement action and third party litigation if they, in good faith, actively implement the iterative process.*"

The Alternative the City is proposing is also consistent with what the City believes is existing State Board policy. To be specific, over the years the State Board has issued numerous precedential orders confirming its policy of allowing compliance with water quality standards and discharge prohibitions through the implementation of best management practices ("BMPs") rather than through strict compliance with numeric water quality based effluent limits. (*See* State Bd Order No. 98-01, p. 12. ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limits."]; State Board Order No. 91-03 ["We ... conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions,

source control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law."]; State Bd. Order No. 91-04, p. 14 ["There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; State Board Order No. 96-13, p. 6) ["We ... conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law."]; State Bd Order, 2000-11, p. 3. ["In prior Orders, the Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."]; and State Order No. 2001-12 DWQ, [General Aquatic Pesticides NPDES Permit] p. 9 ["A discharger will not be in violation of receiving water limitation f.2 as long as the discharger has implemented the BMPs required by this general permit and the following procedure is followed: ...."].)

It is thus apparent from the numerous State Board Orders that existing State Policy is to require compliance with receiving water limitations through iterative BMPs, in lieu of numeric limits. From a very practical prospective, it is also evident that there is no other means by which a city has to comply with a water quality standard or a numeric effluent limit, other than through a deemed compliance approach as a result of following the iterative process. For example, in a Report prepared by a panel of experts appointed by the State Board and entitled "*The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater*" (June 19, 2006), the Expert Panel concluded in part as follows:

> "Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value. In a similar circumstance, there are a number of storms each year that are sufficiently large in volume and/or intensity, to exceed the design capacity volume or flow rates of most BMPs...
>
> Even for conventional pollutants, there is presently no protocol that enables an engineer to design with certainty a BMP that will produce the desired outflow concentration for a constituent of concern.
> * * *
>
> It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and, in particular, urban dischargers."

(*Storm Water Panel Recommendations to the California State Water Resources Control Board*, June 19, 2006, p. 6 & 8.) Similarly, the National Academy of Sciences in their 2008 report entitled "*Urban Stormwater Management in the United States*" concluded that, when it comes to municipalities complying with precise numeric limits: "The uncertainties and variability surrounding both the nature of the stormwater discharges and the capabilities of various pollutant controls ... make it more difficult to set precise limits in advance for stormwater sources." (p. 84)

In the State Board's Issue Paper, the iterative process described in Alternative 4 appears only to have application to wet weather discharges, and specifically appears to exclude the application of the iterative process as a means of being in compliance with dry weather standards or effluent limits. Yet, it should be recognized that although wet whether discharges in California present even greater water quality compliance challenges than do most dry weather discharges, the variability in the pollutants and sources exist whether the pollutants are contained in dry weather or wet weather runoff. For example, in State Board Order 2001-15 (referenced in the background section of the Notice of Public Workshop as being one of two precedential orders establishing the present RWL language), the State Board did not distinguish between dry weather and wet weather when discussing the iterative process, and instead indicated the process was to be used to address "urban runoff":

> **Urban runoff** is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where **urban runoff** is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.
>
> While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. **We will generally not require "strict compliance" with water quality standards through numeric effluent limits and we will continue to follow a iterative approach, which seeks compliance over time.** The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems.

(State Board Order 2001-15 p. 7-8.) In light of the above, as well as the limited control municipalities have over both dry weather and wet weather discharges, compliance through an iterative process should continue to constitute compliance with both wet weather and dry weather receiving water limitations or discharge prohibition, as well as with any water quality based effluent limitations or other effluent limitations, including those developed through a total maximum daily load (TMDL).

From the City's perspective, the form of the receiving or discharge or effluent limitation does not alter the City's ability to comply with the limitation. Regardless of the form, municipalities should have the same means of meeting the limitation, *i.e.*, through the use of MEP-compliant BMPs and the iterative process.

Accordingly, the City has evaluated the suggested "safe harbor" alternatives discussed in the Issue Paper provided by the State Board, and although it believes that of the five alternatives set forth in the Issue Paper, Alternative 5 would be preferable, *i.e.*, the CASQA Alternative, the City additionally believes that the CASQA Alternative should be

expanded upon to also allow for the application of the iterative process to be used to address exceedances of an effluent limitation developed based upon a TMDL, where the TMDL Provisions in the MS4 permit are being followed but the exceedance persists.

To this end, the City is requesting that the State Board consider adopting the attached Alternative 6. This Alternative 6 uses the CASQA language as its base, but goes further to provide that MS4 permittees complying with the iterative process in good faith will be considered in compliance with not only applicable discharge prohibitions and receiving water limitations, but also other effluent limits developed based on a TMDL where an exceedance persists in spite of the permittee's compliance with the TMDL Provisions of the permit. It is the City's belief that this Alternative RWL approach is consistent with existing State Board Policy, and that it recognizes the reality that municipalities are genuinely not able to implement "impracticable" requirements, *i.e.*, requirements that go beyond the implementation of maximum extent practicable BMPs.

In sum, the City respectfully requests that the State Board consider adopting a new policy that is consistent with the enclosed Alternative 6, namely, that it adopt a policy that provides for the use of an iterative process as a means of complying with any form of water quality standard, discharge prohibition or effluent limitation. Imposing requirements that compel municipalities to strictly comply with numeric limitations will clearly not increase their ability to improve water quality, nor result in any meaningful benefit to the environment. Instead, all that is likely to be gained by including strict numeric limits in MS4 Permits will be more litigation similar to the *NRDC v. County of Los Angeles* lawsuit.

Thank you again for the opportunity to provide input into this important matter. The City stands ready to answer any questions or to provide you with any additional information you may request in this regard.

Sincerely,

Eric M. Tolles

Eric M. Tolles
Director of Community Development

Enclosure: Alternative 6

cc: Joseph Kirkpatrick, Chief Building Official
Victor Kao, Principal Engineer
Amanda Carr, Water Quality Administrator
Rich Montevideo, Esq.

ALTERNATIVE 6 – RWL Language, Inclusive of Discharge Prohibitions and TMDLs

November 13, 2012

A. DISCHARGE PROHIBITIONS AND RECEIVING WATER LIMITATIONS

The purpose of these provisions is to describe how pollutants in discharges from the MS4, whether from stormwater or non-stormwater, are to be reduced to the maximum extent practicable (MEP). This goal will be accomplished through the implementation of control measures that effectively prohibit non-storm water discharges into the MS4, and reduce pollutants in all discharges from the MS4 to the MEP standard. The effect of the Permittee's storm-water and non-stormwater discharges on receiving water quality is highly variable and intermittent. For this reason, this Order requires that the Permittee design its water quality management program to reduce the discharge of pollutants to the maximum extent practicable through the timely implementation of MEP-compliant control measures/best management practices (BMPs), which will also aid in compliance with the other water quality control requirements contained in this Order. If exceedances of water quality objectives, water quality standards or any effluent limitation or discharge prohibition persist, including any effluent limitation based on an applicable TMDL, even though the Permittee has implemented BMPs or is otherwise complying with the provisions of this Order regarding TMDLs, the Permittee shall take actions to attempt to further reduce its discharges of such pollutants over time by complying with the adaptive management procedure set forth in A.3 below, which is designed to reflect an iterative, MEP-compliant approach:

1. Discharge Prohibitions

a. Discharges from MS4s owned and operated by a Permittee in a manner causing a condition of pollution or nuisance in waters of the state are prohibited, except that such discharges are permitted and shall be considered in compliance with the terms of this Order, so long as they are being addressed by the Permittee in accordance with Provision A.3 below or are otherwise being addressed pursuant to an approved Watershed Management Program.

b. Except as otherwise provided in this Order, non-storm water discharges into MS4s are to be effectively prohibited.

2. Receiving Water Limitations

Discharges from MS4s owned and operated by a Permittee must not cause a violation of water quality standards in any receiving waters, except that such discharges are considered in compliance with the terms of this Order so long as the Permittee is timely and in good faith implementing the applicable MEP-compliant control measures established by this Order. Where the discharges involve an exceedance of a water quality standard that is the subject of a TMDL and/or involve exceedances of any effluent limitation established based on a TMDL, the Permittee shall similarly be considered in compliance with all such TMDL-related requirements, including the underlying water quality standards for such TMDL, if the Permittee is timely and in good faith implementing the applicable MEP-compliant control measures developed pursuant to the TMDL Provisions of this Order. Where exceedances of a water quality standard, or of

an effluent limitation (based on a TMDL or otherwise), persist, the discharges shall be considered in compliance with the terms of this Order, so long as the discharges are being addressed by the Permittee in accordance with Provision A.3 below or are otherwise being addressed pursuant to an approved Watershed Management Program.

3. Compliance with Discharge Prohibitions and Receiving Water Limitations

a. Each Permittee is in compliance with the discharge prohibitions (A.1), receiving water limitations (A.2) and any technology based or water quality based effluent limitation that may be required by this Order (whether based on a TMDL or otherwise), even where an exceedance of a discharge prohibition or receiving water limitation or effluent limitation persists, where the Permittee is acting in good faith and timely implementing the adaptive management process set forth below.

b. In instances where discharges from the MS4 for which the Permittee is responsible, causes an exceedance of any applicable water quality standard or effluent limitation (including effluent limitations based on TMDLs), or causes a condition of nuisance in the receiving water; and the exceedance or condition associated with the discharge persists and is not otherwise adequately being addressed by a provision of this Order (such as scheduled action in connection with the implementation of a TMDL), the Permittee shall comply with the following process:

1. Submit a report to the Executive Officer that:
    i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of the applicable water quality objective, discharge prohibition, receiving water limitation or effluent limitation including the magnitude and frequency of the exceedances.
    ii. Includes a work plan to identify the sources of the pollutant of concern (including those not associated with the MS4) to help inform Regional or State Board efforts to address such sources).
    iii. Describes the strategy and schedule for implementing MEP-compliant BMPs and other MEP-compliant controls (including those that are currently being implemented) that will address the sources of constituents that are causing the exceedances of any applicable water quality standard, discharge prohibition or effluent limitation, or that are causing a condition of nuisance, and that are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the sources of constituents over which the Permittee has control or jurisdiction to control 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 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 designed to attempt to address the exceedances.

vi. This report may be submitted in conjunction with the Annual Report unless the Executive Officer directs an earlier submittal.

2. Submit any modifications to the report that are required by the Executive Officer and that are consistent with the MEP standard within 60 days of notification from the Executive Officer. The report is deemed approved within 60 days of its submission if no response is received from the Executive Officer.

3. Implement the actions specified in the report in accordance with the acceptance or approval of the Executive Officer, including the implementation schedule.

c. Compliance with the adaptive management process set forth above for the subject pollutant(s) at issue shall constitute compliance with the applicable discharge prohibition, receiving water limitation or effluent limitation (including any effluent limitation based on an applicable TMDL), and the Permittee does not have to repeat this same procedure for continuing or recurring exceedances.