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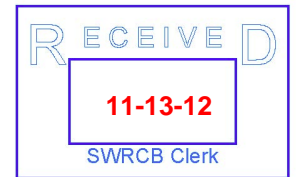
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November 13, 2012

Honorable Members of the State Water
 Resources Control Board
 c/o Ms. Jeanine Townsend
 Clerk to the Board
 State Water Resources Control Board
 1001 I Street
 Sacramento, CA 95814



Re: *Receiving Water Limitations Language Reform*

Dear Honorable Members of the State Board:

The California State Association of Counties (CSAC), the League of California Cities (League) and the Regional Council of Rural Counties (RCRC) are pleased to provide these comments to the State Water Resources Control Board (State Board) in conjunction with its consideration of new Receiving Water Limitations (RWL) language to be included in municipal stormwater permits in California.

CSAC, the League and RCRC collectively represent all cities and counties before the California Legislature, administrative agencies and the federal government. Our members bring a special expertise before the State Board because they are the ones that operate and maintain city and county municipal separate storm sewer systems (“MS4s”) and flood control facilities throughout the state. To that end, we are seeking stakeholder status at the State Board’s November 20, 2012 workshop on RWL language in order to provide the board with its members’ input on this most important issue.

CSAC, the League and RCRC strongly support reform of the current standard RWL language. Due to a recent decision by the United States Court of Appeals for the Ninth Circuit, any exceedance of a water quality standard can lead to liability for an MS4 discharger without regard to the discharger’s compliance with and reliance on the current RWL language. *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880. In addition to subjecting MS4 permittees to the risk of litigation and enforcement actions for the presence of pollutants in their MS4 discharges that are beyond the permittees’ control, this decision ignores and effectively overturns more than a decade of State Board orders providing for an iterative process for MS4 discharges into receiving waters.

CSAC, the League and RCRC believe that an iterative process approach to compliance with water quality standards is of vital importance to every city and county in California, as well as to other public agencies that are or will be subject to municipal stormwater permits. To that end, we believe that revised RWL language should reflect the following goals:

- Be specific and clear;
- Encourage watershed management planning and multi-benefit projects;
- Acknowledge that all pollutants cannot be addressed with equal priority, but that a cost-effective program must prioritize MS4 permittee efforts; and
- Encourage rather than discourage identification of sources and causes of exceedances.

The RWL Language Should Be Specific

CSAC, the League and RCRC support the approach to RWL language urged by the California Stormwater Quality Association (“CASQA”), which is to ensure that municipalities are not in automatic violation of their MS4 permits due to the imposition of immediate water quality standard compliance. Such compliance cannot always be attained due to the variability of stormwater and non-stormwater discharges. The Issue Paper prepared by State Board staff notes, accurately, that “[a]s the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that water quality standards are in fact not being met by many MS4s.” This inability to meet water quality standards in receiving waters is true both for stormwater and for non-stormwater, and reflects the basic fact that urbanized watersheds (in which the vast bulk of Californians live) generate a wide variety of pollutants from sources that are not or cannot be controlled by MS4 permittees. Also, the extreme variability of storm events in the state (ranging from light drizzle to torrential Pacific storms) adds to the difficulty in designing best management practices (“BMPs”) that will fully address pollutants discharged from the MS4s to the receiving waters.

The RWL language needs to unambiguously define a municipality’s responsibility without subjecting the municipality to obligations with which it cannot comply. To that end, CSAC, the League and RCRC submit that the Board should adopt language that clearly sets forth an iterative process pursuant to which the municipality implements programs designed to work towards meeting water quality standards in lieu of imposing permit terms that are impossible to comply with.

In this regard, our organizations respectfully disagree with the characterization of the iterative process as a “safe harbor.” Over the past decade, municipal stormwater permits have become extensively detailed. For example, the new Phase I MS4 permit proposed for Los Angeles County exceeds 100 single-line pages, not including its more than 400 pages of attachments. That proposed permit contains detailed minimum control measures, watershed managements programs, TMDL incorporation provisions, monitoring requirements and other standard provisions. Each one of these items is a compliance requirement, violation of which constitutes a violation of the permit. Other Phase I MS4 permits are similarly detailed.

Thus, clarification that a permittee is not in violation of the RWL provisions if it is in good-faith compliance with the iterative process is critical to ensure that such compliance with the iterative process is not interpreted as merely relieving that permittee from permit obligations or providing relief from permit enforcement. In short, the iterative process is not a “safe harbor,” *i.e.*, protection against the consequences of permit violation. Rather, it is a compliance tool for permittees to address water quality standard exceedances. It *does not* relieve permittees of their obligation to comply with any of the programmatic elements of the permit.

The RWL Language Should Encourage Watershed Management Planning and Multi-Benefit Projects, As Applicable

The current RWL language was adopted in 1999. Since that time, there have been significant changes in the approach to managing stormwater discharges. Permittees are now encouraged to address pollutants on a watershed basis and at their source, with programs that rely on active monitoring and investigation, as well as the prioritization of stormwater issues. Municipalities are also being encouraged to adopt low impact development programs that minimize stormwater discharges. Even without regard to the Ninth Circuit’s decision, the current language needs revision to reflect current approaches to stormwater management, including multi-benefit projects and watershed-wide planning approaches.

Under the current language, a MS4 permittee is required to address any pollutants that are causing exceedances of water quality standards as soon as an exceedance is detected. Such an approach discourages rather than encourages a MS4 permittee from adopting a comprehensive multi-benefit approach, one which would both address multiple pollutants and reduce discharges.

For example, a city, county or flood control district might be able to design a project, such as a park, that collects stormwater from an urbanized area and allows that water to infiltrate and replenish groundwater, utilizing natural filtration processes. This type of project has the benefit of reducing the quantity of stormwater flow and addresses all pollutants rather than one specific pollutant. It could ultimately result in reaching Total Maximum Daily Load (“TMDL”) waste load allocations earlier than more traditional TMDL compliance approaches. This and similar projects may also provide other benefits unrelated to stormwater, such as additional recreation areas or open space, increased groundwater supplies or water reuse, and they have the benefit of possibly leveraging funds from other programs.

Multi-benefit projects, however, take time to develop, including time to design, permit and build the project. Depending on the size of the project, over five years could pass from initiation to completion. If these projects are going to be built, the MS4 permit must give the permittee both the time and the incentive to develop the programs. If a permittee must expend its time and money responding to each individual exceedance, the permittee will not be able to devote those resources to planning multi-benefit projects and will have no incentive to do so.

These multi-benefit projects are the future of stormwater management. In its recent June 5, 2012, memorandum, the United States Environmental Protection Agency (EPA) specifically encourages the adoption of such approaches in municipal stormwater permits. *See* Stoner and Giles, *Integrated Municipal Stormwater and Wastewater Planning Approach Framework*, June 5, 2012, pp. 6.-7. These projects have the benefit of addressing not only water quality, but also water

conservation, recreation, open space and other community benefits. To that end, CSAC, the League and RCRC propose that parties be given the option to comply with RWL provisions through the development of watershed management programs that will encourage permittees to pursue multi-benefit and watershed-wide planning projects. As long as a MS4 permittee is in compliance with the requirements for development and implementation of those programs, however, it is vital that the permittee be considered in compliance with the receiving water limitations provisions. If a permittee must risk being found to be in violation of RWLs while the permittee is designing or implementing these projects, the permittee will have a disincentive to pursue such projects, and indeed may be required to expend the funds that would otherwise be directed towards such projects.

Acknowledgement That All Pollutants Cannot be Addressed Equally or at the Same Time

As the November 2, 2012 CASQA comment letter sets forth, monitoring undertaken by the MS4 permittees over the past 20 years demonstrates that pollutants in urban runoff that cause exceedances of water quality standards can fall into three categories: (1) pollutants that frequently exceed water quality standards and have actual impacts on beneficial uses; (2) pollutants that, while they may exceed water quality standards, have minimal impact on beneficial uses; and (3) pollutants that sporadically exceed water quality standards and have unknown impacts on beneficial uses. In light of these categories, municipalities need the ability to prioritize their MS4 programs to address the pollutants with the greatest impact on beneficial uses, a prioritization which is reflected in TMDLs and in the most recent MS4 permits.

The Ninth Circuit's interpretation of the current RWL language, however, would require MS4 permittees to treat all pollutants equally, which hinders the ability to prioritize programs and defeats the intent of watershed management plans. It has the perverse impact of requiring permittees to direct their efforts towards those pollutants that are of lesser, rather than greater, concern. The State Board adopted the current RWL language before regional boards began to adopt TMDLs. There is now a robust TMDL program throughout the state. The pollutants of highest priority are those pollutants for which TMDLs have been adopted or are scheduled to be adopted. Presumably, those are the pollutants that permittees should attempt to address first. Those TMDLs also recognize that immediate compliance with waste load allocations is not possible and permittees are given a time period in which to meet WLAs.

Unless the RWL language is modified to more clearly provide for an iterative compliance process or to allow a permittee to address pollutants through a watershed management program that allows prioritization of the permittees efforts, permittees will be forced to devote their limited resources to all pollutants which exceed water quality standards, including in particular those pollutants and water bodies that were not listed on the section 303(d) list. This results in an inversion of priorities to the extent funds are required to be expended on those pollutants that were determined not to warrant the adoption of a TMDL, exactly the opposite of a well-designed program.

The RWL Language Should Encourage Rather Than Discourage Identification of Pollutant Sources and Causes of Exceedances

Finally, the RWL language should encourage, not discourage, the identification of sources that are causing water quality standard exceedances and should encourage the generation of

information about how those exceedances should be addressed. The RWL language should encourage rather than discourage self-reporting. To do so, monitoring and reporting should be treated as they are treated in investigations where, in order to promote disclosure, results are not used as the basis for fines or penalties. Using monitoring and reporting as an enforcement tool which can lead to fines or penalties, or a costly citizen suit, can discourage permittees from proactively identifying sources and causes of the exceedances in receiving waters.

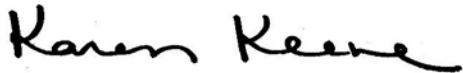
The goal is to have water bodies that meet water quality standards. To reach that goal, it is important to encourage the free flow of information as well as collaboration among permittees. If the RWL language is viewed chiefly as an enforcement tool, however, it will discourage rather than encourage self-reporting. MS4 permittees should be encouraged to proactively self-identify sources without the fear that such reporting could subject them to fines or penalties.

Proposed RWL Language

As set forth above, CSAC, the League and RCRC submit that the RWL language in MS4 permits should be clear, should encourage watershed planning and multi-benefit projects, should allow permittees to prioritize their efforts with respect to which pollutants are addressed, and should encourage rather than discourage self-reporting and the identification of sources. All of these goals can be accomplished without sacrificing the goal of meeting water quality standards. Indeed, reflecting these goals in the RWL language will increase the likelihood of meeting those standards.

Enclosed with this letter is proposed RWL language that reflects these goals. Our suggested language is based on CASQA's, but has been modified to address other issues of importance to our membership. CSAC, the League and RCRC request that the State Board adopt the enclosed, revised RWL language, or language similar to this language, that reflects these goals.

Sincerely,



Karen Keene, Senior Legislative Representative
California State Association of Counties (CSAC)



Kyra Ross, Legislative Representative
League of California Cities



Staci Heaton, Regulatory Advocate
Regional Council of Rural Counties (RCRC)

City/County Redline of proposed changes to CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, ~~and D.5~~ or D.6 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~~ or D.6 below, 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 MS4 to 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, ~~a Permittee that is in compliance with the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) is in compliance with Parts D.1 and D.2 above. 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, ~~a Permittee that is in compliance with Part D.3 is in compliance with Parts D.1 and D.2 above. the Permittees shall achieve compliance as outlined in Part D.3 of this Order.~~
5. Alternatively, a Permittee that is in compliance with Part (Development and Implementation of Watershed Management Programs (or Water Quality Improvement Plans, if applicable) is in compliance with Parts D1 and D.2 above.
56. If a Permittee is found to have discharges from ~~its~~the MS4 for which it is responsible that causes ~~causing or contributing to~~ an exceedance of an applicable water quality standard in the receiving water or causes ~~ing~~ a condition of nuisance in the receiving water, the Permittee shall be ~~deemed~~ in compliance with Parts D.1 and D.2 above, if the Permittee is in compliance with ~~unless it fails to implement the requirements provided in~~ Parts D.3, D.4, or D.5, or requirements as otherwise covered by a provision of this ~~e~~Order specifically addressing the constituent in question, as applicable.

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