



CITY OF SIGNAL HILL



2175 Cherry Avenue ♦ Signal Hill, California 90755-3799

13 November 2012

Via Electronic Mail

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Subject: Comment Letter – Receiving Water Limitations Language Workshop**

Dear Ms. Townsend and Members of the Board:

I am writing on behalf of the City of Signal Hill to provide comments on the receiving water limitations (RWL) language used in municipal storm water permits. We appreciate that your Board will hold a stakeholder workshop on November 20, 2012 to hear public comments and concerns with current RWL language and to consider alternatives to the current language. We plan to attend.

As staff stated in the notice for the November 20, 2012 workshop, the current receiving water limitations language in NPDES permits for MS4s issued by the State and Regional Water Boards is derived from precedential State Water Board Orders No. WQ 99-05 and 2001-15. In precedential Order 99-05, the State Water Board substituted EPA receiving water limitations language for language that the State Water Board had included in Order 98-01, to which EPA objected when the language was used in permits issued by the San Francisco Bay and San Diego Regional Water Boards.

As the City of Signal Hill and others have previously stated, the receiving water limitations language currently in MS4 Permits creates an unnecessary and counter-productive liability for municipalities. This situation is compounded by the joint and several liability language in TMDLs that assigns joint responsibility to groups of permittees when discharges are or may be comingled in the MS4 prior to discharge to the receiving waters subject to the TMDLs.

Order 99-05 clearly states:

“The Permittees shall comply with Discharge Prohibitions [ ]<sup>3</sup> and Receiving Water Limitations [ ] 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 permit including any modifications.”

Footnote 3 directed that appropriate numbers for prohibitions and limitations that implement water quality objectives and water quality standards be inserted in the [ ]. The Order goes on to say:

“If exceedances of water quality objectives and water quality standards (collectively, WQS) persist notwithstanding implementation of the SWMP and other requirements of this permit, the permittees shall assure compliance with Discharge Prohibitions [ ] and Receiving Water Limitations by complying with the following procedure: “...”

The specified procedure has become known as the iterative process.

Permits issued by at least the Los Angeles Regional Water Board are inconsistent with Order 99-05 in that the iterative process has only been included in the receiving water limitations parts of the permits instead of being included in both the discharge prohibitions and the receiving water limitations parts of the permits. This situation could be partially corrected by directing that all MS4 permits include iterative process language in all discharge prohibition, receiving water limitations, and cause or contribute provisions. In addition, the iterative process should apply to compliance with water quality-based effluent limitations included in permits to be consistent with the requirements and assumptions of TMDLs.

Inclusion of such language will foster implementation of the adaptive management process. Further, it will reduce the vulnerability of permittees to enforcement actions and third-party lawsuits while they are engaged in an iterative (adaptive management) process to address exceedances of water quality standards in a prioritized, systematic manner, as the Los Angeles Regional Water Board is encouraging with the incorporation of the Watershed Management Program provisions into the recently adopted Waste Discharge Requirements for Municipal Separate Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Discharges Originating from the City of Long Beach.

### **Comments on RWL Issue Paper**

We appreciate the comment in the State Water Board’s Municipal Storm Water Permit Receiving Water Limitations Issue Paper that,

“...consistent with federal law, the State Water Board has found it appropriate to implement Best Management Practices (BMPs) in lieu of numeric water quality-based effluent limitations to meet water quality standards. Additionally, in lieu of ‘strict compliance’ with water quality standards, the State Water Board has

prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements..." (Issue Paper, p. 1-2)

The use of an iterative BMP implementation process is the most appropriate approach for meeting water quality standards. It allows permittees to devise strategies they believe will best fit their needs, and then to make adjustments, if necessary, based on the results from the BMPs they have used. It allows for a degree of flexibility that is critical to permittees' abilities to achieve their water quality goals and reflects the reality inherent in all environmental programs that one may not fully understand a situation before attempting to address it. The best solution to a given storm water quality issue may sometimes only be discovered through trial and error – and, most importantly, correction of that error.

While we appreciate that the Water Boards have, "as a matter of practice, declined to initiate enforcement actions against MS4 permittees who have been actively engaged in the iterative process," (Issue Paper, p. 2) the City believes that the letter of the law should better reflect its spirit; active engagement in an iterative process to meet water quality standards should indeed offer permittees protection from enforcement actions and litigation.

As acknowledged in the Issue Paper, the path to compliance with water quality standards can take years of technical efforts to correct – particularly for wet weather discharges. MS4 vulnerability to third-party lawsuits and/or Water Board enforcement while engaging in the iterative process is a legitimate concern. Municipalities face extreme budget shortfalls to which the environmental community is not subject. Water quality – and meeting water quality standards – is a high priority for the City of Signal Hill, and we continue to focus resources and expertise toward that end. However, the application of numeric water quality objectives in MS4 permits is extremely prescriptive and impractical. Water quality management is a highly dynamic arena; permittees need the ability to modify their approaches, as necessary. If our scarce funds are tied up in defending our City from a third-party lawsuit – even as we are engaged in the ongoing implementation of stormwater BMPs, evaluating their effectiveness, and making adjustments, as necessary – that further strains our already critically strained budgets. Money spent on legal proceedings cannot be spent on stormwater quality improvement – nor on other vital public services.

The City of Signal Hill appreciates the fact that the State Board is considering possible alternatives to address the problems posed by the use of the current receiving water limitations language. Following are our comments on each of the proposed alternatives:

**Alternative 1: Keep the status quo of no safe harbor.**

Alternative 1 is fraught with the issues municipalities already face; although Water Boards "may choose to exercise their enforcement discretion to refrain from taking action against dischargers engaged in good faith implementation of the iterative

process," they "would not be constrained from enforcing the receiving water limitations." The lack of protection offered cities by the status quo option is problematic. The threat of third-party lawsuits is real and constraining. It is extremely difficult to proceed with an adaptive management storm water quality program while under the threat of having our progress challenged and even stopped because of litigation.

**Alternative 2: No safe harbor, but provide greater clarity and specificity for iterative process implementation and wet weather data analysis.**

Board staff states in the Issue Paper that, "Greater clarity and specificity in the MS4 permits as to the iterative process requirements may result in increased efforts to improve controls and achieve compliance." That is an interesting concept, but one that is incomplete.

Item number 1 in the list of possible ways that such clarity and specificity would be increased suggests that, "Clarifications on how compliance with the relevant discharge prohibitions and receiving water limitations is determined." This would be a positive step. Stronger clarification of how compliance is determined would make it easier for permittees to track – and therefore achieve – compliance with discharge prohibitions and receiving water limitations. In addition, item number 3 is important; specification of the minimum efforts that constitute meaningful compliance with the iterative process is another tangible piece of information that would help permittees effectively implement their storm water programs. The suggestion in item number 4 that the scope of any correction action be clearly spelled out further contributes to permittees' ability to target the actions that will make the biggest difference toward achieving compliance with requirements. Item number 5 calls for specification of additional wet weather data analysis to better define and assess the impact of MS4 discharges on receiving waters, as well as the efficacy of specific BMPs. If additional wet weather data is to be evaluated, a clear definition and impact assessment is definitely required. Would collection of this data be paid for from the monitoring surcharge that permittees currently pay, or would it be another cost imposed upon permittees?

Alternative 2 also includes the idea that enhanced wet weather data could be used to identify surrogates that could be used as a measure of protecting beneficial uses. While determination of a surrogate could be useful, the City urges the Board to consider such surrogates with caution, and to open up the question of surrogates to a stakeholder process. There are cases in some regulations in which the use of certain indicators as surrogates for human pathogens in TMDLs is problematic.

There is a further suggestion that the data could eventually be used to develop wet weather water quality standards or implementation provisions for existing water quality standards that could be applied statewide. What does this mean? If it means a thorough review of existing water quality standards in Basin Plans, it could be valuable. If it simply means additional standards, it could be counter-productive.

The City of Signal Hill appreciates the fact that your Board staff recognizes the challenges inherent in the process of complying with water quality standards. The Issue Paper states:

“Given the nature of storm water discharges and of MS4s, questions such as where and how compliance with water quality standards should be measured and how narrowly or broadly corrective actions should be applied, pose complicated technical issues that require careful study and consideration.”

The City agrees that “water quality improvements are more likely to be achieved as the iterative process becomes automatic and dischargers follow clear guidelines for determining and addressing non-compliance with permit terms.” Clear guidelines – as long as those guidelines are reasonable – are beneficial to the process. However, the follow-up comment that “such improvements may dissuade the Water Boards and the public from bringing enforcement actions/citizen suits for all except the most egregious and repeated violation” does not ameliorate the vulnerability faced by municipalities. Absent a compliance mechanism or safe harbor clause, permittees will remain vulnerable; the idea that the public and the Water Boards “may” be dissuaded from bringing enforcement actions and/or lawsuits does not offer any of the appropriate protection that should be granted to cities and other permittees who are actively engaged in an iterative implementation program.

**Alternative 3: Safe harbor that applies only if a discharger is in compliance with the implementation provisions of an approved TMDL.**

Alternative 3 states, “in effect, as long as the permittee is in compliance with the TMDL (including any compliance schedule) the terms of the TMDL would replace the requirement to comply with water quality standards for the pollutants that are covered by the TMDL.” This alternative is too limited. Permittees are dealing with water quality-based effluent limitations derived from TMDLs, receiving water limitations for 303(d) listed waters, and exceedance of receiving water limitations in waterbodies not identified as impaired on the State’s 303(d) list. The Los Angeles Regional Water Board had proposed a limited approach to addressing water quality exceedances similar to Alternative 3 for the Watershed Management Programs section in a Tentative Order for the new MS4 Permit for the Coastal Watersheds of Los Angeles County. However, in the version of the Order adopted on November 8, 2012, they included a broad approach to addressing water quality exceedances through Watershed Management Programs. Alternative 3 as written should not be adopted. Instead, a more inclusive alternative should be adopted.

**Alternative 4: Safe harbor that applies if a discharger is in compliance with the implementation provisions of an approved TMDL, as in Alternative 3, and, in addition, that applies when the discharger engages in good faith compliance with the iterative process for exceedances caused by wet weather discharges.**

While the concept of Alternative 4 is a good start, the City of Signal Hill cannot fully support it. In Southern California, dry weather is what municipalities are managing for most of the year. For safe harbor to apply solely to exceedances caused by wet weather discharges is insufficient and leaves permittees vulnerable to third-party lawsuits for a majority of the program year.

**Alternative 5: Full safe harbor.**

The City of Signal Hill agrees with the California Stormwater Quality Association (CASQA) in its support of the full safe harbor option as the best and most appropriate option. As stated in the Issue Paper, "this alternative would provide a full safe harbor to dischargers complying with the implementation provisions of a TMDL or engaging in the iterative process to address exceedances caused by wet or dry weather discharges." This alternative reflects the realities faced by municipalities working to achieve compliance with storm water quality standards. However, it does not go far enough.

The City appreciates the fact that the State Board is considering the recommendations presented by CASQA in its Proposal for Receiving Water Limitation Provision and has incorporated its proposed approach into the list of alternatives in the Issue Paper. This demonstrates a willingness to take into consideration stakeholders' concerns and points-of-view. In a regulatory environment as complex as stormwater quality, a collaborative approach in which the needs of different parties are being addressed is the only way to affect real and lasting water quality improvements.

The City of Signal Hill further appreciates CASQA's work in preparing this well thought-out Proposal. In it, CASQA presents a reasoned approach to the problem of the receiving water limitations provision. It provides both the regulated community and regulators with reasonable assurances that desired water quality improvements will be worked toward and unnecessarily punitive measures will be prevented.

The CASQA Proposal states, in part:

"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:"

The procedure described involves submittal of a report to the applicable State or Regional Water Board that:

- Summarizes and evaluates water quality data in the context of applicable water quality objectives;
- Includes a work plan to identify the sources of the constituents of concern;
- Describes the strategy and schedule for implementing BMPs and other controls that will address the sources;
- Demonstrates that the selected BMPs will address the permittee's sources of constituents;
- Includes a mechanism for tracking BMP implementation;
- Outlines, if necessary, additional monitoring to evaluate water quality improvement;
- Outlines, if necessary, special studies that will be undertaken to support future management decisions; and
- Includes a methodology that will assess BMP effectiveness.

The suggested reporting steps identify a methodology for thorough investigation of an exceedance and development of a comprehensive approach for addressing it. Under this proposal, permittees will identify pollutant sources, select and implement BMPs to address them, and conduct monitoring and effectiveness assessment. This is a good illustration of the iterative process. However, it is not complete; it excludes receiving waters subject to an approved TMDL that is in effect for the constituent(s) involved. The City of Signal Hill believes that the iterative process should also apply to water quality-based effluent limits inserted into permits to be consistent with requirements and assumptions of waste load allocations in TMDLs.

#### **Alternative 6: RWL Language, Inclusive of Discharge Prohibitions and TMDLs**

The City of Signal Hill has recently become aware of comments submitted by the City of Dana Point, in which they have proposed an Alternative 6. (See Attachment). Our City supports the City of Dana Point's request "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." The City of Signal Hill agrees with the City of Dana Point 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."

The City of Signal Hill further supports the request by the City of Dana Point, "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."

The City of Signal Hill is also aware of comments submitted by CASQA on November 2, 2012. We agree with CASQA's assertion that it is "imperative that this workshop result in the development of a constructive and pragmatic approach for addressing water quality issues associated with stormwater discharges while providing opportunity to maintain permit compliance for dischargers." In addition, we support CASQA's statement that "the [9<sup>th</sup> Circuit] court's decision with respect to the receiving water limitations language will make municipalities more vulnerable to third party actions under the federal Clean Water Act's citizen suit provisions."

The City of Signal Hill also agrees with CASQA's warning that, "it is fair to say that third parties may only need to collect a single wet weather discharge sample from a municipal outfall location paired with a near-by receiving water sample or point to water quality monitoring data generated and reported by the discharger to show the municipality is in violation of its permit should water quality standards be exceeded."

The City further agrees with CASQA that principles should be applied to guide the development and selection of a revised receiving water limitations provision. We find the principles suggested by CASQA to be reasonable and appropriate.

The City further agrees 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 City of Signal Hill appreciates the work your Board is doing to collaboratively craft the receiving water limitation section to be used in new MS4 permits, including those recently adopted. These efforts, if followed through to final appropriate language adoption, will create the best environment for permittees to be able to address water quality exceedances. The receiving water limitations provisions found in most MS4 permits need to be changed to form a basis for compliance that, as stated in the CASQA comment letter, "provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards, while allowing the municipality to operate in good faith with the iterative process without fear of unwarranted third party action." We look forward to a prompt revision of standard



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permit language to ensure consistency with Order 99-05 for all prohibition and limitation provisions.

Sincerely,

CITY OF SIGNAL HILL

A handwritten signature in blue ink, appearing to read "Kenneth C. Farfsing".

Kenneth C. Farfsing  
City Manager

Attachment

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

November 12, 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.