



November 2, 2012

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



Subject: Comment Letter – Receiving Water Limitations Language Workshop

Dear Ms. Townsend:

The City of Santa Rosa appreciates the State Water Resources Control Board (State Water Board)'s intention to consider stakeholder concerns and solicit recommendations regarding current Receiving Waters Limitations Language in NPDES MS4 permits on November 20th. Comparing the 2011 Ninth Circuit Court of Appeal's decision in *NRDC v. County of Los Angeles* to the State Water Board's stated intention with current Receiving Water Limitations Language, there is a clear and apparent need to develop, adopt and revise permit provisions to exempt MS4s from enforcement actions for water quality standard violations if the MS4s are engaged in an iterative process of improving controls (i.e., establishing a "safe harbor" provision).

The City of Santa Rosa has been actively implementing our storm water quality program since 1996. To date we have spent millions of dollars in meeting our permit obligations. Over the years, Santa Rosa has worked diligently to implement a myriad of programs committed to the improvement of storm water quality and the protection and enhancement of our local creeks. Ongoing storm water permit compliance activities include a Creek Stewardship Program, Public Education and Outreach, Development Review including Low Impact Design requirements, Spill Response including Environmental Crimes investigations, Water Quality Monitoring, Storm Drain Cleaning, and Permit Administration. During a recent US EPA audit, the City's program was recognized as a model program.

Our storm water program has always been to be one of iterative improvement whereby if receiving water issues are identified we would work in cooperation with our Regional Water Board to identify actions and opportunities for addressing those issues. In light of the court's decision, we are now extremely concerned that without intervention by the State Water Board to modify permit language, any known water quality issues could lead us to a path of noncompliance and legal actions; regardless of our good faith efforts to address them.

Consistent with recommendations in CASQA's November 2, 2012 letter to the State Water Board, the City of Santa Rosa respectfully requests the State Water Board reaffirm its policy to allow municipal permittees to comply with water quality standards over time by using best management practices

supplemented by the iterative process, and revise the existing receiving water limitations language consistent with an "iterative process" approach.

The City supports CASQA's recommendation that the State Water Board first develop guiding principles for the revised language. These guiding principles would work to align the receiving water limitations language with the Board's accepted iterative process policy, and as well provide assurance to the Board and interested third parties that agency actions to address water quality issues are effective and timely. The guiding principles that are being suggested by CASQA include the following:

The receiving water limitations language must identify an iterative process that:

- Provides enough specificity and accountability so the MS4s understand their responsibility.
- Acknowledges that all pollutants cannot be addressed equally.
 - Pollutants in storm water discharges that are subject to TMDLs must be prioritized over pollutants that have sporadic and minimal impacts on receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner.
 - Municipalities are under constant pressure to prioritize their resources, and to obtain the most "bang for the buck." This pressure is evident in practically all aspects of public service, from police to fire to the environment. Thus, a city cannot afford, financially or politically, to address all storm water issues simultaneously.
- Guides regional board staff (and others) to assess whether the permittees are in good faith implementing the iterative process.
 - Given the wide diversity and complexity of pollutants, sources and BMPs, the process must provide a mechanism for the MS4 and the State to agree on a practical implementation plan to satisfy the Permit provision.
- Establishes enough rigor to assure that progress will be made in addressing problematic discharges and protecting water quality.

The receiving water limitations language must provide MS4 permittees assurances that they are not subject to enforcement action and third party litigation if they, in good faith, actively implement the iterative process.

As the State Water Board considers revising receiving water limitations language in the recent Caltrans and proposed Phase II MS4 permits, existing receiving water limitations language in the City's MS4 permit, as well as others, should also be modified to create a basis of compliance that provides sufficient rigor in the iterative process ensuring diligent progress in complying with water quality standards while allowing MS4s to operate in good faith with the iterative process without the fear of unwarranted third party action.

This issue remains critically important and the City urges the State Water Board to work together with CASQA develop language that meets the objectives outlined above. Without your action to change the current language, agencies such as ours and others across the state will find themselves defending law suits as opposed to protecting and enhancing water quality.

We greatly appreciate your efforts.

Regards,

A handwritten signature in black ink, appearing to read "Miles Ferris". The signature is written in a cursive, flowing style.

Miles Ferris
Director of Utilities

Attachment 1 – November 2, 2012 CASQA Comment Letter regarding Receiving Water Limitations
Language Workshop



November 2, 2012

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

Subject: Comment Letter – Receiving Water Limitations Language Workshop

The California Stormwater Quality Association (CASQA) would like to take the opportunity to provide comments on the subject workshop and corresponding Issue Paper provided in an October 10, 2012 Lyris announcement. As the Board members are well aware, CASQA believes this workshop is very important and it is imperative that the 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. As outlined in our December 16, 2011 letter to Chair Hoppin, CASQA would like to reiterate our concerns regarding the current liability exposure to municipal stormwater agencies (i.e., permittees or MS4s) given the current receiving water limitation provisions being used within stormwater permits.

Basis of Liability Exposure

The 9th Circuit Court of Appeals in a recent decision¹ regarding the Los Angeles County NPDES stormwater permit determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard, regardless of whether a municipality has engaged in good-faith efforts such as the well-established iterative process to address the exceedance. This liability is incurred because the court determined that the “iterative process” language as identified and provided for in the Los Angeles Stormwater Permit did not provide for a “safe harbor,” in that each permit provision is individually enforceable. The receiving water limitation permit language in question was developed by the State Water Board in 1999, and was set forth by the State Water Board in Order WQ 99-05. In subsequent decisions challenging the 1999 receiving water permit language, the State Water Board stated that this language did not require strict compliance with water quality standards.² While the Issues Paper notes, nonetheless, that it was not the Water Board’s intention to create a safe harbor, it needs to be acknowledged that the 9th Circuit decision was taken by the regulated community to be a fundamentally different interpretation of this language.

¹ *NRDC v. County of LA* (9th Cir. 2011) 673 F.3d 880.

² See *In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn.*, Order WQ 2001-15 (Nov. 15, 2001).

In light of the 9th Circuit Court of Appeals’ decision and based on the monitoring efforts conducted to date by municipal stormwater entities, we expect municipal stormwater permittees will face non-compliance with their NPDES permits where monitoring data indicate an exceedance of a water quality standard. The unacceptable reality is that MS4s monitoring results will provide evidence of exceedances and given the current receiving water limitations found in every MS4 permit in the state, permittees will be found in non-compliance. Accordingly, upon reporting of the data, municipal stormwater permittees will be exposed to considerable liability from the State in the form of Notice of Violations or Administrative Civil Liabilities or from interested third parties in the form of lawsuits, even though such municipalities have little control over the pollutants that create the liability.

These liabilities may be incurred regardless of MS4 efforts to seek to comply with their stormwater permits to reduce pollutants to the maximum extent practicable (such as through the use of the iterative process). With respect to the iterative process, it is important to recognize the iterative permitting process is consistent with past Board policy and the nature of the problem, which is largely created by the characteristic imperviousness of the developed environment. Controlling sources of pollutants and reconstructing the built environment toward restoration of more natural hydrologic processes is tied to the development cycle and will require years to complete. Further, the programs we have in place to influence public behavior also require time to reach maximum effectiveness. Thus, creating solutions to address water quality challenges requires significant investments in public programs and infrastructure that must be established and funded over time. The iterative approach allows MS4s the opportunity to comply with permit provisions and develop meaningful programs and projects to improve water quality. In essence, the iterative process is a “best fit” permitting approach for a complex non-point source problem being regulated in a point source regulatory framework. In any evaluation of the effectiveness of the iterative process approach, it is helpful to explicitly recognize its rationale.

Practical Impacts to Municipalities

As noted above the 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. Specifically, municipalities through many years of monitoring have identified that they will be hard pressed to comply with the strict reading of the receiving water limitations and specifically the provision that prohibits discharges from causing or contributing to exceedances of water quality standards. Monitoring data have identified many constituents of concern from a compliance perspective and include: bacteria (which have both human and non-human sources), nitrogen, phosphorus, copper, lead, zinc, PCBs, mercury, and trash. Other constituents that have been identified that are not typically associated with human actions include aluminum, selenium, and iron.

The iterative process provides a means for municipalities to logically and progressively address exceedance findings while maintaining permit compliance. The iterative process works such that once a discharger identifies a water quality issue, the discharger typically develops and implements pollutant-specific reduction plans that are reviewed and approved by the applicable Regional Water Board. The primary approach with the iterative process is one of continuous improvement in meeting water quality standards. Typically the first steps include identification

of pollutant sources along with the development and implementation of control measures necessary to address the sources and reduce pollutant loadings. In addition, special studies are conducted to assess the effectiveness of the control measures (i.e., best management practices (BMPs)) to determine if the efforts are effective or if additional measures are needed. This process is one that takes time and adequate funding to accomplish.

While the monitoring that has been conducted over the last 20+ years is now the basis of future legal liability, these same data clearly demonstrate that for the range of constituents typically present in dry and wet weather urban runoff there are degrees of actual environmental significance. Specifically, these constituents can be broadly categorized as exhibiting (1) frequent exceedances and actual beneficial use impacts, (2) frequent to infrequent exceedances but no impact on beneficial uses, and (3) sporadic exceedances with unknown impacts. However, all are treated equally in the receiving water limitations provision and consequently the regulated community addressing the legal vulnerability created by the 9th Circuit decision would necessitate all constituents being controlled in all circumstances regardless of environmental significance.

Due to the court's decision, the iterative approach to addressing and prioritizing water quality concerns becomes less meaningful because municipalities subject to NPDES permits with the receiving limitations language at issue are strictly prohibited from causing or contributing to an exceedance of a water quality standard. While State and Regional Water Board staff indicates that enforcement action is unlikely if permittees are implementing the iterative process, the harsh reality is that municipalities are immediately vulnerable to third party lawsuits. This has been the reality for the City of Stockton. The City of Stockton has been sued by a third party for violations of the cause/contribute prohibition language contained in its stormwater permit. This lawsuit occurred regardless of the fact that the City was implementing a comprehensive iterative process with specific pollutant load reduction plans approved by the Central Valley Regional Water Board.

Moreover, 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. We do not believe that this type of legal jeopardy is appropriate, and more importantly, it is a poor use of public funds. Establishing permit conditions where numerous municipalities would be in immediate non-compliance with no reasonable means for compliance is poor public policy.

Principles of the RWL Provision

State Water Board staff, in the October 10, 2012 Issue Paper, identified five alternatives that individually or in combination would address concerns with the receiving water limitation provision. While we appreciate Board staff's efforts to develop a range of alternatives, we believe it important to establish the fundamental principles that should ultimately guide the Board and its decision in crafting receiving water limitations language. We also believe that there is an extensive body of literature to guide the linkage of established best management practices with quality systems and related programs of iterative improvement. We therefore

offer the following principles to guide the development and selection of a revised receiving water limitations provision:

The provision must identify an iterative process that:

- provides enough specificity and accountability so municipalities understand their responsibility,
- acknowledges that all pollutants cannot be addressed equally,
 - Pollutants in stormwater discharges that are subject to TMDLs must be prioritized over pollutants that have sporadic and minimal impacts on receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner.
 - Municipalities are under constant pressure to prioritize their resources, and to obtain the most “bang for the buck.” This pressure is evident in practically all aspects of public service, from police to fire to the environment. Thus, a city cannot afford, financially or politically, to assign the same priority to all stormwater issues simultaneously.
- guides Regional Water Board staff (and others) to assess whether the MS4s are in good faith implementing the iterative process, and
 - Given the wide diversity and complexity of pollutants, sources and BMPs, the process must provide a mechanism for the MS4 and the State to agree on a practical implementation plan to satisfy the permit provision.
- establishes enough rigor to assure that progress will be made in addressing problematic discharges and protecting water quality.

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.

In closing, CASQA would like to thank the State Water Board for its consideration of this critical issue. As we have expressed to Board members on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits need to be modified to create a basis for compliance that 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. To that end, we respectfully request the Board direct staff to work with CASQA to develop language that meets the objectives outlined above. We look forward to working with the State Water Board to develop such language.

Sincerely,



Richard Boon, Chair - California Stormwater Quality Association