



County of San Diego

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November 9, 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, 24th floor
Sacramento, CA 95814

Dear Ms. Townsend:

COMMENT LETTER – RECEIVING WATER LIMITATIONS LANGUAGE WORKSHOP

On behalf of the County of San Diego (County), regulated by the San Diego Regional Water Quality Control Board (Regional Board), we are writing to share our strong concerns over the Receiving Waters Limitations (RWL) language that is proposed to be included in the San Diego Region Municipal Separate Storm Sewer System (MS4) Permit. While the County of San Diego is a strong advocate for clean water, regulated agencies are unnecessarily exposed to third-party litigation due to the RWL language included in existing and proposed municipal stormwater permits. The RWL language should be reformed to eliminate the threat of litigation when the MS4 permittee is engaged in a good faith process to achieve the Maximum Extent Practicable (MEP) standard applicable to MS4 discharges set forth in the Clean Water Act.

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.

In enacting Clean Water Act §402(p)(3)(b)(iii) Congress distinguished MS4 systems from other NPDES permit holders, in recognition of their unique challenges. The MEP standard, by its very language and nature, is distinguishable from the arena of immediate, strict, numeric discharge limitations that can readily be imposed upon single-point dischargers. The Ninth Circuit Court of Appeal found that the CWA unambiguously demonstrates that Congress did not require MS4 dischargers to strictly comply with CWA §301(b)(1)(C). The State Water Board correctly analyzed the *Browner* decision precisely this way in SWRCB Order WQ 2001-15.

As the State Water Board's issue paper acknowledges, currently used language for receiving waters limitations provisions in stormwater permits carries the risk of third-party litigation and liability for exceedance of water quality standards, even where a permittee is complying with an iterative process approach or implementing an approved TMDL provision.

A Municipal Storm Water Permit has been in place in our region for more than 20 years. The County of San Diego and other Copermitees have developed a comprehensive stormwater program that is both adaptive and proactive to manage the quality of local waters. Municipalities in San Diego County annually spend over \$100 million of taxpayer dollars to comply with the current permit; the County of San Diego alone spends approximately \$35 million a year.

The County of San Diego joins CSAC, CASQA and other regulated parties to urge the State Board to reaffirm that an iterative process approach to compliance with water quality standards is of vital importance to agencies subject to municipal stormwater permits. The County of San Diego believes 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

The County of San Diego supports CSAC and 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 strict 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, the County of San Diego supports CSAC's proposal that the State Water 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, the County of San Diego agrees with CSAC and respectfully disagrees 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 draft MS4 permit proposed for the San Diego Region is 327 pages. That proposed permit contains detailed minimum control measures, Water Quality Improvement Plans, 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 county 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, 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, the County of San Diego joins CSAC to propose that parties be given the option to comply with RWL provisions through the development of the Water Quality Improvement Plans required in the draft permit. 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 Water Quality Improvement Plans. It has the perverse impact of requiring permittees to direct their efforts towards those pollutants that are of lesser, rather than greater, concern.

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 Water Quality Improvement Plans that allows prioritization of the permittee's 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, it will discourage rather than encourage self-reporting. MS4 permittees should be encouraged to proactively self-identify sources and program without the fear that such reporting could subject them to fines or penalties.

Proposed RWL Language

As set forth above, the County of San Diego joins CSAC to 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.

In closing, we believe that the State Water Board can address this untenable vulnerability that we are facing and we are greatly appreciative of your efforts to do so. Without State Water Board action to change the current language, agencies such as ours and others across the state will find themselves using limited public funds to defend law suits as opposed to protecting and enhancing water quality.

The State Water Board has the authority to reaffirm State Water Board Orders WQ 2001-15 and 99-05, and endorse reasonable, incremental changes to water quality policy. In San Diego County, our Regional Board is proposing steps to achieve enhanced water quality through Water Quality Improvement Plans which, once approved, would define a watershed's path to compliance with water quality standards. The continuation of existing RWL language would undermine and be contrary to the very nature of that iterative approach to water quality improvement.

The U.S. Environmental Protection Agency has not included the RWL language such as reviewed by the court in the *NRDC* decision in several of the permits it either issues or approves of, indicating that EPA does not have a policy to require such language.

While the County of San Diego is committed to the goal of improving water quality and to the stormwater management programs we have developed over the last two decades, we must continue to look for ways to accomplish more using our existing resources. We look to the leadership of the State Water Board to provide statewide consistency to Regional Boards to ensure that performance standards do not unnecessarily expose local government to third-party litigation if they, in good faith, actively implement the iterative process.

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The County of San Diego urges the State Board to use its discretion at the November 20, 2012 workshop to work collaboratively with local agencies to draft permit language that makes sense from both an environmental and fiscal standpoint.

Enclosed with this letter is proposed RWL language that reflects these goals. The County of San Diego joins CSAC to request that the State Board adopt the enclosed, revised RWL language, or language similar to this language, that reflects these goals.

Feel free to contact our offices directly. For technical questions, please contact Cid Tesoro, Department of Public Works Watershed Protection Program Manager, at (858) 694-3672, or e-mail at cid.tesoro@sdcountry.ca.gov.

Sincerely,



for RICHARD E. CROMPTON, Director
Department of Public Works

REC:TB:cw

Enclosure: Proposed alternative receiving waters limitation language

cc: Cid Tesoro, DPW Watershed Protection Program Manager
Chairman Charles R. Hoppin, State Water Resources Control Board (SWRCB)
Vice Chairwoman Frances Spivy-Weber, SWRCB
Board Member Tam M. Doduc, SWRCB
Board Member Steven Moore, SWRCB
Board Member Felicia Marcus, SWRCB
Executive Director Tom Howard, SWRCB
Governor Edmund G. Brown Jr., State of California
Honorable Senator Joel Anderson
Honorable Senator Christine Kehoe
Honorable Senator Juan Vargas
Honorable Senator Mark Wyland
Honorable Assemblywoman Toni Atkins
Honorable Assemblyman Marty Block
Honorable Assemblyman Nathan Fletcher
Honorable Assemblyman Martin Garrick
Honorable Assemblyman Ben Hueso
Honorable Assemblyman Brian W. Jones
Honorable Assemblyman Kevin Jefferies
Honorable Assemblywoman Diane Harkey
Secretary Matt Rodriguez, CalEPA
Secretary, Brian P. Kelly, State Business, Transportation and Housing Agency

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 ~~it~~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.