



City of Santa Rosa

Public Comment
Caltrans MS4 Permit
Deadline: 6/26/12 by 12 noon

VIA E-MAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

June 20, 2012

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



Re: Comment from the City of Santa Rosa - Caltrans MS4 Permit
Second Revised Draft Tentative Order

ERNESTO OLIVARES
Mayor

JOHN SAWYER
Vice Mayor

SCOTT BARTLEY
SUSAN GORIN
JAKE OURS
MARSHA VAS DUPRE
GARY WYSOCKY

Dear Ms. Townsend:

The City of Santa Rosa respectfully submits the following comments regarding Part D of the April 27, 2012 Caltrans MS4 Permit Second Revised Draft Tentative Order (Draft Order). Santa Rosa is a Phase I MS4 permitted community that strives to maintain and improve water quality within our local creeks through achievable and cost-effective storm water management.

The City is especially concerned about the possible precedential effects of Part D which addresses compliance with the prohibitions and limits of Parts A.4, D.2 and D.3 of the Draft Order. Although we support the linkage between the iterative process in Part E.2.c.6)c) of the Draft Order and the prohibitions and limits of Parts A.4, D.2 and D.3, the recent 9th Circuit Court of Appeals decision, NRDC v. Los Angeles County Flood Control District (9th Cir. 2011) 673 F.3d 880 calls into question the relevance of the iterative process as the basis for addressing the water quality issues presented by wet weather urban runoff. As a result, we believe that the language found in the Draft Order, as well as the existing receiving water limitation provision found in our own MS4 permit, need to be modified. We encourage the State Water Resources Control Board (State Board) to use language that would create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but also allows the MS4 to operate in good faith with the iterative process without fear of unwarranted third party action. To that end, we support the February 21, 2012 CASQA Proposal for Receiving Water Limitations (attached) that aims to capture that intent. This language was submitted by CASQA to the State Board earlier this year for consideration as model language to be used statewide. However, the language within the Draft Order is inconsistent with the CASQA recommendations.

The Fact Sheet within the Draft Order recognizes that strict compliance with water quality standards is not mandatory in a municipal NPDES permit. Rather, a permitting agency has

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the discretion to require dischargers to implement controls to meet water quality standards. (Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159, 1166). The State Board, in precedent setting orders, has stated that for municipal permits in California, compliance with water quality standards should be achieved over time through the iterative BMP process. As noted above, recent case law demonstrates that the receiving waters limitations language of MS4 permits must be carefully written to achieve the State Board's iterative BMP-based compliance goals. (NRDC v. Los Angeles County Flood Control District (9th Cir. 2011) 673 F.3d 880). If not carefully written, receiving waters limitations provisions can and have been interpreted to require strict compliance with numeric water quality objectives in a manner inconsistent with State Board established policy.

This issue is a serious concern to the City. Vague or poorly worded language exposes dischargers to strict compliance with numeric water quality standards even where such standards have not been translated into numeric water quality based effluent limitations. Such a result is not consistent with the State Board's intention in its prior precedential orders and subjects municipal dischargers to a mandate well beyond the standards established in the Clean Water Act. Further, the State Board has conceded that immediate compliance with many standards like copper and zinc are impossible for Caltrans to comply with due to the fact that these pollutants emanate from brake pad lining that are not mandated to be modified until the year 2025, or from tire wear that cannot be controlled by Caltrans. Thus, the State Board is subjecting its sister state agency to an impossible mandate that will subject it to potentially millions of dollars in penalties and attorneys' fees for non-compliance with a standard widely recognized as not immediately attainable. Such a policy decision is unjustifiable – especially at a time when state and local budgets are severely constrained.

Due to the importance of this issue and the possible precedential nature of the State Board's decision, the City requests reconsideration of Part D as specifically noted above.

Thank you for your consideration in this important matter.

Sincerely,



ERNESTO OLIVARES
Mayor

EO/sks

Attachment: February 21, 2012 CASQA letter and Proposal for Receiving
Water Limitation Provision

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California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

February 21, 2012

Mr. Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Receiving Water Limitation Provision to Stormwater NPDES Permits

Dear Mr. Hoppin:

As a follow up to our December 16, 2011 letter to you and a subsequent January 25, 2012 conference call with Vice-Chair Ms. Spivy-Weber and Chief Deputy Director Jonathan Bishop, the California Stormwater Quality Association (CASQA) has developed draft language for the receiving water limitation provision found in stormwater municipal NPDES permits issued in California. This provision, poses significant challenges to our members given the recent 9th Circuit Court of Appeals decision that calls into question the relevance of the iterative process as the basis for addressing the water quality issues presented by wet weather urban runoff. As we have expressed to you and other Board Members on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits needs 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 but also allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. To that end, we have drafted the attached language in an effort to capture that intent. We ask that the Board give careful consideration to this language, and adopt it as 'model' language for use statewide.

Thank you for your consideration and we look forward to working with you and your staff on this important matter.

Yours Truly,

Richard Boon, Chair
California Stormwater Quality Association

cc: Frances Spivy-Weber, Vice-Chair – State Water Board
Tam Doduc, Board Member – State Water Board
Tom Howard, Executive Director – State Water Board
Jonathan Bishop, Chief Deputy Director – State Water Board
Alexis Strauss, Director – Water Division, EPA Region IX

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 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, 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 or 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, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) 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, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.