Protecting Alameda County Creeks, Wetlands & the Bay

cleanwater PROGRAM

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VIA EMAIL (COMMENTLETTERS@WATERBOARDS.CA.GOV)

July 20, 2012

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

Subject: Comment Letter – 2nd Draft Phase II Small MS4 General Permit

Dear Ms. Townsend:

Thank you for the opportunity to file comments on the Second Draft Phase II Small MS4 General Permit. The Alameda Countywide Clean Water Program ("Program") is a stormwater management consortium comprising the County of Alameda, the 14 cities within the County, the Alameda County Flood Control District, and the Zone 7 Water Agency.

Stormwater discharge from the MS4 permittee members of our Program are regulated by the Municipal Regional Stormwater Permit ("MRP") issued by the San Francisco Bay Regional Board. We are concerned that the State Board's decision on this General Permit for Phase II Small MS4s may set a precedent that would adversely affect our member agency permittees. More specifically, the third paragraph of Section XI of the Fact Sheet contains unnecessary and potentially misleading language that is inaccurate and inconsistent with prior State Water Board policy concerning compliance with water quality standards and how and over what time period that compliance is to be achieved. This language has never before appeared with respect to other State Water Board-issued MS4 permits, including the current draft Caltrans permit and its fact sheet, and should therefore be deleted in its entirety.

The rationale for our concern with the Fact Sheet language is effectively set forth in the BASMAA comment letter dated June 29, 2012 that was filed with the State Water Board in this matter – we will not repeat what's already stated in that letter. The Fact Sheet paragraph in question also mistakenly relies on the Ninth Circuit's decision in *NRDC v. County of Los Angeles, et al.* that is now subject to review by the U.S. Supreme Court in its upcoming term.

In addition to deleting this paragraph from the Fact Sheet, it is also essential that the State Water Board not ignore the fact that the iterative process provision at issue in the Ninth Circuit case was a separate freestanding Receiving Water Limitation that was not integrated into the subject permit's Receiving Water Limitation restricting discharges from causing or contributing to an exceedance of water quality standards. Had the two been combined into a single, fully integrated, Receiving Water Limitation – *as the State Water Board should do in revising the proposed Small MS4 Permit and should require in all future MS4 permits* – the result in the *NRDC v. County of Los Angeles* case probably would not have been the same. The Ninth Circuit did not reach or analyze whether or not an iterative process provision that was itself part and parcel of the Receiving Water Limitation on water quality standard exceedances, would form an effective safe harbor assuming that a permittee was dutifully implementing the iterative process. Indeed, such a revised approach as we suggest for the Receiving Water Limitations, or the approach to this issue that has been suggested by CASQA, would better reflect the State Water Board's prior repeated policy pronouncements about how and over what time period compliance with water quality standards should be achieved by MS4 permittees. See precedential Orders WQ 91-03, 98-01, and 99-05.

We are seriously concerned that unless the specified language of the Small MS4 Permit in the Fact Sheet is deleted and the Receiving Water Limitation revised as suggested above, it may undermine the Water Boards' cooperative partnership with local governments – large and small – relative to stormwater management and the achievement of water quality standards.

Since the State Water Board already recognizes that, under the Ninth Circuit's decision in *Defenders v. Browner,* including in an MS4 permit a requirement to go beyond Congress's MEP standard is discretionary on its part, it necessarily follows that a Water Board-created MS4 permit provision, such as one requiring an MS4 permittee not to cause or contribute to an exceedance of an applicable water quality standard, can legally be constructed to include within it a safe harbor (or partial safe harbor) if the State so desires.

We therefore request you to direct the State Water Board staff to make this deletion in the language of the Fact Sheet and revise the Receiving Water Limitation as proposed above. We thank you again for the opportunity to provide our comments and we ask that the Board carefully consider our comments. If you have any questions, please contact me at (510) 670-6548.

Sincerely,

James Scanlin

James Scanlin

cc: Member Agency Representatives