



B A S M A A



Alameda Countywide
Clean Water Program

Contra Costa
Clean Water Program

Fairfield-Suisun
Urban Runoff
Management Program

Marin County
Stormwater Pollution
Prevention Program

Napa County
Stormwater Pollution
Prevention Program

San Mateo Countywide
Water Pollution
Prevention Program

Santa Clara Valley
Urban Runoff Pollution
Prevention Program

Sonoma County
Water Agency

Vallejo Sanitation
and Flood
Control District

June 29, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board

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

I am writing with respect to an issue arising from the State Water Board's 2nd Draft Phase II Small MS4 General Permit and, more specifically, the Fact Sheet, circulated with it. The third paragraph of Section XI of the Fact Sheet contains unnecessary and potentially misleading language that is inaccurate and inconsistent with other Water Board-issued MS4 permits, including the current draft Caltrans permit and its fact sheet, and should therefore be deleted in its entirety.

The Fact Sheet misreads the Ninth Circuit's decision in *NRDC vs. County of Los Angeles, et al.* by ignoring the fact that the iterative process provision at issue there, unlike here (or in the draft Caltrans permit), was not integrated into the permit's Receiving Water Limitations. The Ninth Circuit did not analyze nor reach a decision on whether or not an iterative process provision that was part and parcel of Receiving Waters Limitation language itself, would form an effective safe harbor assuming that a permittee was dutifully complying with it.

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 maximum extent practicable 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. Although the Fact Sheet's third paragraph, if left intact, poses a significant problem in this regard, the draft permit's actual Receiving Waters Limitations language (and that in the draft Caltrans permit) currently would achieve this desirable result as drafted.

The approach recommended above is fully consistent with longstanding State Water Board policy regarding MS4 permitting, including precedential Orders WQ 91-03, 98-01, and 99-05. To the contrary, if the third paragraph of Section XI of the Fact Sheet is left intact, it will represent a seismic shift in policy, create an inconsistency issue with the Caltrans permit, and, most importantly undermine the core of the Water Boards' cooperative partnership with local governments – large and small – relative to stormwater management and the achievement of water quality standards.

We therefore request State Water Board staff be directed to make this change in the language of the Fact Sheet.

Sincerely yours,

James Scanlin, Chair – Bay Area Stormwater Management Agencies Association

Bay Area

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