City of Temecula

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November 9, 2012

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

Re: Written Comments of the City of Temecula Regarding Receiving Water Limitations Language in Municipal Separate Storm Sewer System (MS4) Permits

Dear Honorable Board Members and Ms. Townsend:

I am the Director of Public Works for the City of Temecula ("City") and am writing this letter on behalf of the City regarding the State Water Resources Control Board's consideration of Receiving Water Limitations ("RWL") language in MS4 permits. This review was triggered by a decision of the Ninth Circuit United States Court of Appeals in *Natural Resources Defense Council v. County of Los Angeles.* This letter is being submitted in advance of the State Board's November 20, 2012 workshop on reform of RWL language to be incorporated into MS4 permits as a matter of statewide policy.

The City strongly supports reform of the RWL language to make clear the State Board's often-expressed intention that compliance with the RWL language should be effectuated through an iterative process. Under the Ninth Circuit's interpretation, however, any discharge that causes or contributes to an exceedance of a water quality standard in a Receiving Water subjects the MS4 Permittee to civil penalty liability, injunctive relief and the payment of attorneys' fees in an action brought by a citizen plaintiff. This may occur even where a Permittee is implementing programs in full compliance with its MS4 Permit. The City has particular concerns regarding such lawsuits, since it is a Permittee under Order No. R9-2010-0016.

The City supports and incorporates the more detailed comments by the Riverside County Flood Control and Water Conservation District (District), which is the principal Permittee for the City's MS4 Permit. The City also has these additional thoughts for the State Board's consideration. We believe that they are best expressed in terms of correcting three misperceptions regarding the current RWL language, as interpreted by the Ninth Circuit.

**Misperception Number One: Strict compliance with water quality standards is required of MS4 Permittees by the Clean Water Act.**

This is not correct, as the Ninth Circuit, in *Browner v. Defenders of Wildlife*, a 1999 case, determined that municipalities with MS4 permits are not required to achieve strict compliance with water quality standards in Receiving Waters. The State Board's own precedential Order No. 2001-15 recognizes this fact.

The State Board is free to adopt new RWL language that effectuates its desire to have a truly iterative process in place for MS4 Permittees to address MS4 discharges that may be found to cause, or contribute to, exceedances of water quality standards in Receiving Waters.

**Misperception Number Two: The MS4 Permittees are seeking a "safe harbor" that would insulate them from responsibility under the Clean Water Act.**

While State Board staff's "Issue Paper" uses the term "safe harbor" in describing the iterative process, the City believes that this is fundamentally misleading. Even a cursory review of the terms of a typical MS4 permit in California reveals that it is full of compliance points. In the words of the District's comment letter, "nearly every sentence of the permit is a separate point of compliance". There is no "safe harbor" from liability under the Clean Water Act for any Permittee that fails to follow the detailed and prescriptive requirements of its MS4 Permit.

Nevertheless, there is a fundamental difference between fully complying with activities within the control and responsibility of the Permittees, such as the conduct of monitoring, implementing BMPs and the performance of other programmatic requirements of the MS4 Permit and guaranteeing that MS4 discharges will not cause, or contribute to, exceedances of water quality standards in Receiving Waters, a guarantee that the Permittees have no ability to make.

What the City and municipalities across California instead seek is relief from "guaranteed non-compliance" that if even isolated exceedances of a water quality standard in a Receiving Water show up in monitoring, and it is demonstrated that discharges from a Permittee's MS4 were responsible for, or even just contributed to such exceedances, the Permittee is liable for potentially millions of dollars in legal costs, penalties and other expenses. We note that the City of Malibu, a city smaller than the City, recently spent more than $2 million defending against a citizen suit filed with respect to its MS4 Permit, and more than $6 million to settle the case, including payment of $750,000 in attorney fees to the plaintiffs. Given the tremendous financial challenges faced by every California municipality, the diversion of resources that otherwise would be aimed at clean water programs or other vital municipal programs demanded by the citizens of the State is a poor policy choice, especially as the Clean Water Act does not require strict compliance with water quality standards by MS4 Permittees. We believe that as interpreted by the Ninth Circuit, the current RWL language creates a "safe harbor" only for the bank accounts of attorneys who litigate against municipalities based on this language.

The City recognizes that citizen suits are authorized under the Clean Water Act, and that such suits may be an appropriate remedy where there has been a failure of government enforcement, especially where a Permittee has failed to comply with the programmatic requirements of its MS4 Permit. Where, however, the Permittees are complying with those requirements but still, due to circumstances beyond their control, find that the MS4 discharge causes, or contributes to, water quality standard exceedances, a citizen suit based on those exceedances potentially throws away the work done by the Permittees and the Water Boards under the MS4 Permit, as discussed below.

**Misperception Number Three: The current RWL language is more protective of Receiving Water Quality.**

This statement is not only untrue but maintaining the current RWL language actually **impedes** efforts to protect Receiving Water quality.

As discussed above, and in greater detail in the comment letter filed by the District, the City and other municipal Permittees cannot guarantee that discharges from their MS4s will in fact, not cause, or contribute to, exceedances of water quality standards in a Receiving Water. Exceedances of Water Quality Standards in Receiving Waters are unavoidably typical for MS4 discharges around the State. The extreme variability of stormwater quality and quantity itself, combined with a multitude of potential pollutant sources beyond the City's ability to truly "control", makes it impossible for a municipality to ensure that all discharges from its MS4 will not cause, or contribute to, exceedances of Water Quality Standards for those pollutants in Receiving Waters. This was recognized by the Issue Paper released by State Board staff in preparation for the November 20th workshop, which found that as "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" ( Issue Paper, Page 2).

Thus, even if municipal Permittees, like the City, are to be held strictly liable for ensuring that all discharges from their MS4s will not cause, or contribute to, exceedances of Water Quality Standards in Receiving Waters, as the Ninth Circuit has interpreted the current RWL language, those Permittees have no ability to ensure attainment of those standards.

We understand that some stakeholders believe that there should be some Numeric Effluent Limitations contained in the MS4 permits for purposes of accountability. We note that many MS4 permits now contain Numeric Stormwater and Non-stormwater Action Levels, or other numeric targets or goals, which trigger specific compliance responses by the Permittees. It is these action levels (which were advocated by the Blue Ribbon Panel established by the State Board to investigate the appropriateness of Numeric Effluent Limits in MS4 permits) which provide such accountability.

More importantly, the current RWL language as interpreted by the Ninth Circuit actually could impede efforts by municipalities to protect water quality. First, by requiring immediate compliance, the language makes a mockery of efforts to bring water quality standard-impaired water bodies into compliance through the Total Maximum Daily Load ("TMDL") program. TMDLs are designed with the recognition that, due to the complexity of the issues which caused the water body to be impaired in the first place, meeting these requirements cannot be achieved immediately. Therefore, TMDLs include timelines to achieve such compliance over periods of years and sometimes decades.

Second, most MS4 permits have begun incorporating more sophisticated watershed management plans, which prioritize pollutants by water body and attempt, through aggressive monitoring and source identification efforts, to address the sources of those pollutants. Municipalities subject to strict RWL language will have no ability to prioritize pollutants, since they must address any pollutant that exceeds a Water Quality Standard. Moreover, these watershed management plan approaches employ cooperative monitoring and other watershed-based approaches. Permittees faced with potential liability for exceedances of Water Quality Standards from discharges of their MS4s into Receiving Waters may not wish to cooperate on any watershed-based approaches if those approaches could subject them to additional unnecessary liability.

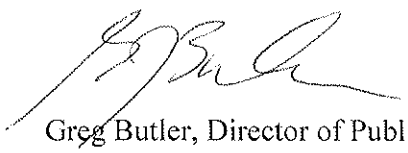
Third, because of a citizen suit brought under the Clean Water Act, a federal judge is free to impose any appropriate injunctive relief to enforce a permit (33 U.S.C. § 1365(a)). Thus, for example, a court might order municipalities to disregard the provisions of an MS4 permit in order to address Water Quality Standard exceedances in a Receiving Water. This means that the thousands of people-hours invested by the Regional Water Boards and other stakeholders in the permit's development, implementation and oversight by municipalities would be wasted.

Finally, if a municipality is unavoidably and automatically in non-compliance with the requirements of its MS4 Permit as a result of the RWL language, it will be unable to justify budgeting for water quality management programs. As a result, the municipality will receive no benefit from making compliance investments. To gain public support for water quality programs, a municipality must demonstrate to its residents that such investments will lead to compliance.

In summary, the City supports District, the California Stormwater Quality Association (CASQA), and other municipal stakeholders in advocating for a fully iterative approach to compliance with Water Quality Standards in both wet and dry weather conditions. Only when such an approach is in place and endorsed by the State Board will Permittees, including the City, feel confident that they can focus fully on efforts to address pollutants in discharges into and from their MS4s, and not on preparing for costly and pointless litigation.

We wish to thank you and State Board staff for your consideration of these comments and any further comments, written or oral, that the City may make on these important issues.

Sincerely,



Greg Butler, Director of Public Works/City Engineer