

*Environmental Services Department*

November 9, 2012



**Via Email to:** [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Tom Howard, Executive Director  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th floor  
Sacramento, CA 95814

**RE: State Board Workshop on Receiving Water Limitations Language**

Dear Mr. Howard:

The City of San José very much appreciates the State Water Resources Control Board (State Board) holding a workshop on November 20, 2012 concerning receiving water limitations language for municipal stormwater permits issued in California. We have reviewed the Issues Paper and Agenda developed by your staff in preparation for this workshop and complement their thorough and thoughtful efforts. We now offer the following comments for the Board and staff's further consideration.

As a result of the Ninth Circuit's decision in *NRDC vs. County of Los Angeles* and recent language included in the fact sheets of several proposed MS4 permits, we are very concerned about permit provisions related to compliance with water quality standards. Unless the State Board directs changes to the precedential language in MS4 permits, we could face third party lawsuits due to such provisions regardless of the circumstances, magnitude or duration of the event, its impact on human health or the environment, or our implementation of other program and/or BMP-specific requirements. We do not believe that the State Board in its prior precedential decisions intended municipalities to face potential third party lawsuits for exceedances of water quality standards where the municipalities have implemented the so-called "iterative process" in good faith.

While improving the iterative process language is an important issue to be considered at the workshop, we believe that preserving the intent behind its establishment (i.e., to avoid the potential diversion of resources from water quality improvement to third party litigation) is even more important. In this regard, if the provisions regarding compliance with water quality standards are to remain in California's MS4 permits, we recommend that the State Board add language clarifying that such provisions are adopted pursuant to State law and may only be enforced by the State and Regional Boards under the Water Code where extraordinary circumstances justify enforcement. We did not see this option presented as an

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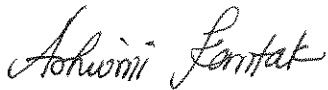
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alternative in the Issues Paper but believe the State Board should consider it along with the other alternatives.

Finally, we believe that water quality will benefit substantially from municipalities working collaboratively with Regional Board staff to implement the iterative process in those cases where exceedances of water quality standards occur and that where municipalities do not implement the iterative process in good faith, Water Board enforcement may be an appropriate alternative depending on the circumstances. We therefore endorse the approach recommended by the Bay Area Stormwater Management Agencies Association ("BASMAA") and urge the Board to amend prior precedential MS4 language consistent with BASMAA's recommendations.

Please direct any questions regarding this letter to Elaine Marshall, Stormwater Program Manager, at (408) 793-5355 or [elaine.marshall@sanjoseca.gov](mailto:elaine.marshall@sanjoseca.gov).

Sincerely,



*for* Kerrie Romanow  
Director, Environmental Services  
City of San José