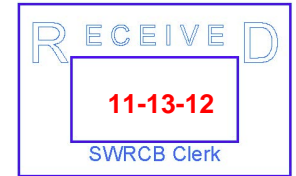




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Honorable Members of the State Water
Resources Control Board
c/o Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

November 13, 2012

Re: Receiving Water Limitations Language Reform

Dear Honorable Members of the State Board:

The County of Riverside strongly supports the California State Association of Counties ("CSAC") and the California Stormwater Quality Association ("CASQA"), comments to the State Water Resources Control Board ("State Board") in conjunction with its consideration of new Receiving Water Limitations ("RWL") language to be included in municipal stormwater permits in California.

CSAC is a statewide organization devoted to representing county governments before the California Legislature, administrative agencies and the federal government. CSAC's member counties bring a special expertise before the Board because they are the ones that operate and maintain county municipal separate storm sewer systems ("MS4s") and flood control districts throughout the state. To that end, the County of Riverside backs CSAC's request for stakeholder status at the State Board's November 20, 2012 workshop on RWL language in order to provide the board with its members' input on this most important issue.

The County of Riverside strongly supports reform of the current standard RWL language. Due to a recent decision by the United States Court of Appeals for the Ninth Circuit, any exceedance of a water quality standard can lead to liability for an MS4 discharger without regard to the discharger's compliance with and reliance on the current RWL language. *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880. In addition to subjecting MS4 permittees to the risk of litigation and enforcement actions for the presence of pollutants in their MS4 discharges that are beyond the permittees' control, this decision ignores and effectively overturns more than a decade of State Board orders providing for an iterative process for MS4 discharges into receiving waters.

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CSAC member counties including the County of Riverside believes that an iterative process approach to compliance with water quality standards is of vital importance to every county in California, as well as to cities and other public agencies that are or will be subject to municipal stormwater permits. To that end, any revised RWL language should reflect the following goals:

- Be specific and clear;
- Encourage watershed management planning and multi-benefit projects;
- Acknowledge that all pollutants cannot be addressed with equal priority, but that a cost-effective program must prioritize MS4 permittee efforts; and
- Encourage rather than discourage identification of sources and causes of exceedances.

The RWL Language Should Be Specific

The County of Riverside supports the approach to RWL language urged by CASQA, which is to ensure that municipalities are not in automatic violation of their MS4 permits due to the imposition of strict water quality standard compliance. Such compliance cannot always be attained due to the variability of stormwater and non-stormwater discharges. The Issue Paper prepared by State Board staff notes, accurately, that “[a]s 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.” This inability to meet water quality standards in receiving waters is true both for stormwater and for non-stormwater, and reflects the basic fact that urbanized watersheds (in which the vast bulk of Californians live) generate a wide variety of pollutants from sources that are not or cannot be controlled by MS4 permittees. Also, the extreme variability of storm events in the state (ranging from light drizzle to torrential Pacific storms) adds to the difficulty in designing best management practices (“BMPs”) that will fully address pollutants discharged from the MS4s to the receiving waters.

The RWL language needs to unambiguously define a municipality’s responsibility without subjecting the municipality to obligations with which it cannot comply. To that end, the County of Riverside submits that the Board should adopt language that clearly sets forth an iterative process pursuant to which the municipality implements programs designed to work towards meeting water quality standards in lieu of imposing permit terms that are impossible to comply with.

In this regard, The County of Riverside respectfully disagrees with the characterization of the iterative process as a “safe harbor.” Over the past decade, municipal stormwater permits have become extensively detailed. For example, the new Phase I MS4 permit proposed for Los Angeles County exceeds 100 single-line pages, not including its more than 400 pages of attachments. That proposed permit contains detailed minimum control measures, watershed managements programs, TMDL incorporation provisions, monitoring requirements and other

standard provisions. Each one of these items is a compliance requirement, violation of which constitutes a violation of the permit. Other Phase I MS4 permits are similarly detailed.

Thus, clarification that a permittee is not in violation of the RWL provisions if it is in good-faith compliance with the iterative process is critical to ensure that such compliance with the iterative process is not interpreted as merely relieving that permittee from permit obligations or providing relief from permit enforcement. In short, the iterative process is not a "safe harbor," *i.e.*, protection against the consequences of permit violation. Rather, it is a compliance tool for permittees to address water quality standard exceedances. It *does not* relieve permittees of their obligation to comply with any of the programmatic elements of the permit.

The RWL Language Should Encourage Watershed Management Planning and Multi-Benefit Projects, As Applicable

The current RWL language was adopted in 1999. Since that time, there have been significant changes in the approach to managing stormwater discharges. Permittees are now encouraged to address pollutants on a watershed basis and at their source, with programs that rely on active monitoring and investigation, as well as the prioritization of stormwater issues. Municipalities are also being encouraged to adopt low impact development programs that minimize stormwater discharges. Even without regard to the Ninth Circuit's decision, the current language needs revision to reflect current approaches to stormwater management, including multi-benefit projects and watershed-wide planning approaches.

Under the current language, a MS4 permittee is required to address any pollutants that are causing exceedances of water quality standards as soon as an exceedance is detected. Such an approach discourages rather than encourages a MS4 permittee from adopting a comprehensive multi-benefit approach, one which would both address multiple pollutants and reduce discharges.

For example, a county or flood control district might be able to design a project, such as a park, that collects stormwater from an urbanized area and allows that water to infiltrate and replenish groundwater, utilizing natural filtration processes. This type of project has the benefit of reducing the quantity of stormwater flow and addresses all pollutants rather than one specific pollutant. It could ultimately result in reaching Total Maximum Daily Load ("TMDL") waste load allocations earlier than more traditional TMDL compliance approaches. This and similar projects may also provide other benefits unrelated to stormwater, such as additional recreation areas or open space, increased groundwater supplies or water reuse, and they have the benefit of possibly leveraging funds from other programs.

Multi-benefit projects, however, take time to develop, including time to design, permit and build the project. Depending on the size of the project, over five years could pass from initiation to completion. If these projects are going to be built, the MS4 permit must give the permittee both the time and the incentive to develop the programs. If a permittee must expend its time and money responding to each individual exceedance, the permittee will not be able to devote those resources to planning multi-benefit projects and will have no incentive to do so.

These multi-benefit projects are the future of stormwater management. In its recent June 5, 2012, memorandum, EPA specifically encourages the adoption of such approaches in municipal stormwater permits. See Stoner and Giles, *Integrated Municipal Stormwater and Wastewater Planning Approach Framework*, June 5, 2012, pp 6.-7. These projects have the benefit of addressing not only water quality, but also water conservation, recreation, open space and other community benefits. To that end, CSAC proposes that parties be given the option to comply with RWL provisions through the development of watershed management programs that will encourage permittees to pursue multi-benefit and watershed-wide planning projects. As long as a MS4 permittee is in compliance with the requirements for development and implementation of those programs, however, it is vital that the permittee be considered in compliance with the receiving water limitations provisions. If a permittee must risk being found to be in violation of RWLs while the permittee is designing or implementing these projects, the permittee will have a disincentive to pursue such projects, and indeed may be required to expend the funds that would otherwise be directed towards such projects.

Acknowledgement That All Pollutants Cannot be Addressed Equally or at the Same Time

As the November 2, 2012 CASQA comment letter sets forth, monitoring undertaken by the MS4 permittees over the past 20 years demonstrates that pollutants in urban runoff that cause exceedances of water quality standards can fall into three categories: (1) pollutants that frequently exceed water quality standards and have actual impacts on beneficial uses; (2) pollutants that, while they may exceed water quality standards, have minimal impact on beneficial uses; and (3) pollutants that sporadically exceed water quality standards and have unknown impacts on beneficial uses. In light of these categories, municipalities need the ability to prioritize their MS4 programs to address the pollutants with the greatest impact on beneficial uses, a prioritization which is reflected in TMDLs and in the most recent MS4 permits.

The Ninth Circuit's interpretation of the current RWL language, however, would require MS4 permittees to treat all pollutants equally, which hinders the ability to prioritize programs and defeats the intent of watershed management plans. It has the perverse impact of requiring permittees to direct their efforts towards those pollutants that are of lesser, rather than greater, concern. The State Board adopted the current RWL language before regional boards began to adopt TMDLs. There is now a robust TMDL program throughout the state. The pollutants of highest priority are those pollutants for which TMDLs have been adopted or are scheduled to be adopted. Presumably, those are the pollutants that permittees should attempt to address first. Those TMDLs also recognize that immediate compliance with waste load allocations is not possible and permittees are given a time period in which to meet WLAs.

Unless the RWL language is modified to more clearly provide for an iterative compliance process or to allow a permittee to address pollutants through a watershed management program that allows prioritization of the permittees efforts, permittees will be forced to devote their limited resources to all pollutants which exceed water quality standards, including in particular those pollutants and water bodies that were not listed on the section 303(d) list. This results in an inversion of priorities to the extent funds are required to be expended on those pollutants that were determined not to warrant the adoption of a TMDL, exactly the opposite of a well-designed program.

The RWL Language Should Encourage Rather Than Discourage Identification of Pollutant Sources and Causes of Exceedances

Finally, the RWL language should encourage, not discourage, the identification of sources that are causing water quality standard exceedances and should encourage the generation of information about how those exceedances should be addressed. The RWL language should encourage rather than discourage self-reporting. To do so, monitoring and reporting should be treated as they are treated in investigations where, in order to promote disclosure, results are not used as the basis for fines or penalties. Using monitoring and reporting as an enforcement tool which can lead to fines or penalties, or a costly citizen suit, can discourage permittees from proactively identifying sources and causes of the exceedances in receiving waters.

The goal is to have water bodies that meet water quality standards. To reach that goal, it is important to encourage the free flow of information as well as collaboration among permittees. If the RWL language is viewed chiefly as an enforcement tool, however, it will discourage rather than encourage self-reporting. MS4 permittees should be encouraged to proactively self-identify sources and program without the fear that such reporting could subject them to fines or penalties.

Proposed RWL Language

As set forth above, The County of Riverside submits that the RWL language in MS4 permits should be clear, should encourage watershed planning and multi-benefit projects, should allow permittees to prioritize their efforts with respect to which pollutants are addressed, and should encourage rather than discourage self-reporting and the identification of sources. All of these goals can be accomplished without sacrificing the goal of meeting water quality standards. Indeed, reflecting these goals in the RWL language will increase the likelihood of meeting those standards.

Sincerely,



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