



## THE CITY OF SAN DIEGO

November 9, 2012



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

Electronic Submission: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Subject: Comment Letter – Receiving Water Limitations Language Workshop

Dear Ms. Townsend:

The City of San Diego appreciates the opportunity to provide comments on the State Water Resources Control Board's receiving water limitations provisions of NPDES permits for storm water discharges from MS4s. As you know, the San Diego Regional Water Quality Control Board (Regional Board) is in the process of developing a regional MS4 permit (MS4 Permit) for San Diego, Orange, and Riverside counties. The City applauds the Regional Board staff's intent to draft a watershed-based MS4 Permit that supports adaptive management and allows permittees to establish priorities in each watershed to ensure their limited resources may be used to maximize water quality benefits. The Regional Board held a series of focused meetings to discuss the draft MS4 Permit, allowing stakeholders the opportunity to gain an understanding of one another's perspective and provide a forum for Regional Board staff to express the intent behind the draft MS4 permit language. Over the course of these focused meetings, the discharge prohibitions and receiving water limitations have been the *highest priority topic* for the San Diego County permittees, and thus the State Board's receiving water limitations (RWLs) workshop and issue paper are timely and appreciated.

The City would like to take this opportunity to present our perspective on the State Water Board's issue paper. The City fully supports the "guiding principles" and specific RWL language proposed by the California Stormwater Quality Association (CASQA). We consider Alternative 5 to be appropriate for MS4 programs engaged in a good faith effort to implement scientifically-based BMP programs expected to result in attainment of RWLs. The watershed-based Water Quality Improvement Plan in the draft MS4 Permit, which mandates the implementation and iterative improvement of BMP programs designed to achieve water quality outcomes, represents an example of a BMP program that should represent compliance if implemented in good faith. Detailed comments are presented in Attachment A, and summarized as follows:

### Transportation & Storm Water Department

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- (1) The City prefers the term “BMP-based compliance” over “safe harbor” because it better reflects the requirements and significant level of effort that must be met for an MS4 to remain compliant.
- (2) BMP-based compliance provisions better reflect the reality and practice of storm water management.
- (3) BMP-based compliance provisions can improve the ability of MS4s to clearly articulate funding needed to implement water quality projects/BMPs.
- (4) Stakeholders may be able to find common ground on RWL provisions if [1] permits include an *optional* BMP-based “compliance path”; and [2] for MS4s that choose the BMP-based compliance path, quantitative analyses (e.g., BMP modeling) are required to provide reasonable assurance that implemented BMPs will result in RWL attainment.
- (5) The BMP-based compliance process should be applied to both storm water and non-storm water discharge prohibitions.
- (6) RWLs must be linked to TMDL compliance schedules to avoid conflicting and illogical compliance requirements.

The City looks forward to the November 20<sup>th</sup> workshop, and appreciates the effort by the State Water Board to facilitate the November workshop, develop the issue paper, and solicit input on CASQA’s proposed RWL language.

If you have questions regarding the City’s comments, please contact Ruth Kolb at (858) 541-4328 or at [rkolb@sandiego.gov](mailto:rkolb@sandiego.gov).

Sincerely,



Kris McFadden  
Deputy Director

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Enclosure: Attachment A: Detailed Comments on the RWL Provisions

cc: Almis Udrys, Deputy Director, Office of the Mayor  
Garth K. Sturdevan, Director, Transportation & Storm Water Department  
Ruth Kolb, Program Manager, Transportation & Storm Water Department  
Heather Stroud, Deputy City Attorney, City Attorney’s Office  
Drew Kleis, Program Manager, Transportation & Storm Water Department

**ATTACHMENT A: Detailed Comments on RWL Provisions**  
City of San Diego Transportation & Storm Water Department

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The following comments describe the experience and perspective of the City's storm water program with RWL issues, with a focus on technical elements and implications of RWLs on storm water program implementation.

**Comment 1: BMP-based compliance provisions should not be perceived as “safe” or “easy.”**

The City prefers the term “BMP-based compliance” over “safe harbor” because “safe harbor” suggests that an MS4 permittee is at rest and protected by the permitting structure. To the contrary, BMP-based compliance requires a major commitment from MS4s, requiring them to: [1] develop BMP plans tailored to local watersheds using scientifically-robust approaches; [2] expend major resources and engineering expertise to implement those plans; [3] collect and respond to monitoring and assessment information; and [4] adapt and refine BMP plans to better address new or existing water quality issues. The City has an MS4 service area across hundreds of square miles and thousands of discharge points, and is subject to five adopted Total Maximum Daily Loads (TMDLs) for pollutants ranging from sediment and bacteria to dissolved metals, as well as Areas of Special Biological Significance (ASBS) restrictions. Requirements to implement BMPs to address these issues and discharges are by no means “safe” or “easy”; instead it is a daunting challenge that tests the technical and economic capabilities of municipalities, which to date has cost over 6million dollars. It is logical and reasonable for MS4s to be in compliance with their MS4 permit if they are committed to and engaged in a scientifically-based, good faith effort to attain RWLs by implementing BMPs in an adaptive manner. The watershed-based Water Quality Improvement Plan in the draft MS4 Permit, which mandates the implementation and iterative improvement of BMP programs designed to achieve water quality outcomes, represents an example of a BMP program that should represent compliance if implemented in good faith.

**Comment 2: BMP-based compliance provisions are supported by technical experts, and better reflect the practice of storm water management.**

In order to address impaired water bodies and comply with TMDLs, the City will need to implement capital improvement projects that plan, design, and build BMPs to improve receiving water quality. However, given the State Water Board's current approach to RWL language, there is a lack of clear connection between the implementation of projects/BMPs and compliance with our MS4 permit. The City could make a good faith effort, based on best available science, to implement the number and types of storm water BMPs that are *expected* to result in attainment of RWLs, only to be found in non-compliance and subject to enforcement actions or citizen lawsuits before RWLs are attained. The potential liability is no different if no BMPs had been implemented. This paradigm sends the wrong message to MS4s who are taking the actions they expect to attain RWLs. *Expectations* are highlighted because management of storm water requires MS4s to address highly variable flows and transient pollutant sources, and thus

uncertainty is an inherent aspect of our program. Design and implementation of storm water BMPs is challenging due to the nature of storm water and the types of treatment systems that are available. The State Water Board's Blue Ribbon Panel of Experts<sup>1</sup> concluded the following:

“Even for conventional pollutants, there presently is no protocol that enables an engineer to design with certainty a BMP that will produce a desired outflow concentration...”

Beyond the uncertainty around BMP performance, it takes years to complete capital improvement projects to improve storm water quality. As such, the City has a relatively simple view of Maximum Extent Practicable: [1] use good science for BMP planning; [2] implement BMPs *expected* to attain RWLs in a timely manner; and [3] implement additional BMPs if RWLs are not attained (i.e., iterate through adaptive management). Therefore, a BMP-based compliance approach to RWLs, rather than strict enforcement of numeric RWLs, better reflects whether an MS4 has appropriately managed its storm water discharges and protected water quality. The original intent of the State Water Board in Order 99-05 was appropriate and should be clarified;<sup>2</sup> BMP-based compliance provisions are well-suited for MS4 RWLs and should be incorporated into future NPDES permits.

**Comment 3: BMP-based compliance provisions improve the ability of MS4s to clearly articulate the funding needed to implement water quality projects/BMPs.**

As stated above, the City views the watershed-based Water Quality Improvement Plan in the draft San Diego MS4 Permit, which mandates the implementation and iterative improvement of BMP programs designed to achieve water quality outcomes, as an example of a BMP program that should represent compliance if implemented in good faith. The Water Quality Improvement

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<sup>1</sup> *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and Construction Activities*, Storm Water Panel Recommendations to the State Water Board, page 6 (June 2006).

<sup>2</sup> In WQ 2001-15 (at 7), the State Water Board stated that the precedential RWL language from WQ 1999-05 does not require strict compliance with water quality standards:

“[The RWL language] does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. . . [T]he iterative approach is consistent with U.S. EPA’s general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.”

Plan would require significant increases in resource commitments from the City over time. In order for our storm water program to achieve the necessary pollutant reductions and consistently attain RWLs, we must garner broad political support for the needed projects. In our experience, this support hinges on whether tax payers and political leaders perceive projects as likely to be successful by improving water quality and *resulting in compliance*. Without the linkage between projects and compliance, major expenditures to attain RWLs are perceived as “risky”, with the risk being that once projects are funded and implemented, the City may still be out of compliance with its MS4 permit. It is estimated that compliance with adopted TMDLs is \$1.2 - \$2.4 billion dollars over the next 20 years. Availability of a BMP-based “compliance path” in MS4 permits will increase political support for funding measures to implement storm water quality BMPs/projects.

**Comment 4: The science of watershed-scale BMP planning has advanced in recent years, and quantitative analyses to provide reasonable assurance increases the acceptability of BMP-based compliance provisions.**

Traditional storm water management plans (SWMPs) – the types of SWMPs that were often developed at the time of Order 99-05 – were qualitative in nature. That is, the number, type, and location of proposed BMPs were not quantitatively linked to receiving water quality or attainment of RWLs. In recent years, however, the science of storm water BMP planning, primarily driven by TMDL requirements, has greatly advanced. Furthermore, the benefits of watershed-based approaches are becoming well understood, as highlighted by the Water Quality Improvement Plans that are an integral component of the draft San Diego MS4 Permit. Multiple modeling tools are now available to simulate watershed conditions, quantify the effect of BMPs on those conditions, and predict resultant receiving water quality after BMPs are implemented on watershed-scales. The Los Angeles Regional Water Quality Control Board has included BMP-based compliance provisions for Los Angeles County MS4 permittees in the draft Los Angeles County MS4 Permit, as long as permittees demonstrate “reasonable assurance” those BMPs will result in RWL attainment. The Los Angeles County MS4 Permit even lists specific modeling systems approved for reasonable assurance analyses. Using modeling tools to provide reasonable assurance enables MS4s to demonstrate to the Regional Board and the public that their BMP plan is *expected* to result in RWL attainment. As discussed above, from the City’s perspective, an MS4 committed to and implementing a BMP plan it expects to result in RWL attainment in a timely manner is [1] appropriately managing its storm water and protecting water quality; and [2] should be in compliance with its MS4 permit.

In response to bacteria TMDL requirements, the City is currently using watershed-scale BMP modeling systems to support the development and implementation of Comprehensive Load Reduction Plans. We have fully embraced BMP modeling as a component of our storm water program, and view reasonable assurance as an important consideration for the State Water Board’s issue paper. The City supports the comment letter submitted by CASQA and the proposed “guiding principles” for RWL language, and envisions that “practical implementation

plan[s] to satisfy the Permit provision” may take the form of watershed-based BMP plans with quantitative analyses to provide reasonable assurance that proposed BMPs will attain RWLs. Perhaps stakeholders could find common ground on RWL provisions if [1] permits include an *optional* BMP-based “compliance path”; and [2] for MS4s that choose the BMP-based compliance path, quantitative analyses (e.g., periodic BMP modeling) are required to provide reasonable assurance that implemented BMPs will result in RWL attainment.

**Comment 5: BMP-based compliance provisions should also be applied to non-storm water discharges.**

The issue paper by the State Water Board is largely focused on RWL compliance provisions for storm water discharges. The logic and support for BMP-based compliance provisions are fully applicable to non-storm water sources. Abatement of non-storm water sources is subject to similar challenges as attainment of RWLs including sources that are variable and transient, large numbers of potential discharge points that must be screened and addressed, and limited data regarding the effectiveness of potential BMPs. Furthermore, abatement of non-storm water discharges requires a comprehensive, scientifically-based planning and implementation effort that mirrors efforts to achieve RWLs discussed above. As such, from the City’s perspective, an MS4 committed to and implementing a BMP plan it expects to result in RWL attainment in a timely manner is [1] appropriately managing non-storm water discharges and protecting water quality; and [2] should be in compliance with its MS4 permit, including non-storm water discharge prohibitions.

**Comment 6: Receiving water limitations must be linked to TMDL compliance schedules.**

Regardless of the type of compliance provisions used in an MS4 permit, the applicable compliance schedules for TMDL implementation must be linked to RWLs. The visionary process of the Clean Water Act included TMDLs as the process by which RWLs would be achieved through systematic pollutant reductions. Porter-Cologne requires TMDLs to include implementation schedules for attainment of TMDL wasteload allocations. If TMDL schedules are not referenced by RWLs, then the TMDL process becomes illogically uncoupled from MS4 permitting. That is, what is the purpose of a TMDL implementation schedule if it is not coupled to RWL compliance? For example, a TMDL could be adopted for bacteria with a 20-year wet weather compliance schedule, but if the RWLs do not reference that TMDL schedule, then bacteria RWLs must be complied with immediately (with no consideration of the adopted TMDL), and the MS4 is subject to enforcement actions and citizen lawsuits. This scenario is illogical. It is critical the State Water Board direct Regional Board permitting staff to develop RWLs that are clearly linked to implementation schedules for State Water Board-approved TMDLs.