



Protecting Alameda County Creeks, Wetlands & the Bay

VIA E-MAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

June 25, 2012

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



399 Elmhurst St.
Hayward, CA
94544
p. 510-670-5543

Subject: State of California Department of Transportation Municipal Separate Storm Sewer System (MS4) Permit Second Revised Draft Tentative Order

Dear Ms. Townsend:

Thank you for the opportunity to file comments on the Second Revised Draft Tentative Order for the State of California Department of Transportation (“Caltrans”) MS4 permit. The Alameda Countywide Clean Water Program (“Program”) is a stormwater management consortium comprising the County of Alameda, the 14 cities within the County, the Alameda County Flood Control District, and the Zone 7 Water Agency.

Stormwater discharge from the MS4 permittee members of our Program are regulated by the Municipal Regional Stormwater Permit (“MRP”) issued by the San Francisco Bay Regional Board. While the Program does not generally file comments on individual MS4 permits, we are concerned that the Board’s decision on the prohibitions and receiving water limits in the draft Caltrans permit may set a precedent that would affect our member agency permittees.

Our Program and permittee members are very concerned that the latest draft of receiving water related limitations and prohibition sections of the Caltrans MS4 permit are contrary to established State Board policy and may create allegations of non-compliance for Caltrans and could create a precedent for other MS4 dischargers throughout California, including our member agencies. Previously, we and other permittees have presumed that permit language like that expressed in Receiving Water Limitation D.4 in conjunction with Board Policy (WQ 99-05) established an iterative management approach and process as the fundamental, and technically appropriate, basis of compliance. The “iterative process language” in the revised draft Tentative Order, as combined with General Discharge Prohibition A.4, raises the question of whether implementation of the iterative process will constitute compliance. Moreover, in the wake of the July 2011 Ninth Circuit Court of Appeal’s decision (*NRDC v. County of Los Angeles*), if this language is not revised, we are concerned that a precedent may be set for MS4s and could create significant liability for government entities in the San Francisco Bay region and across the State.

The potential liability resulting from a failure to better structure these provisions may be a risk to Caltrans and other MS4s regardless of the current or future enforcement of the State or Regional Water Boards. For example, it is our

MEMBER AGENCIES:

Alameda
Albany
Berkeley
Dublin
Emeryville
Fremont
Hayward
Livermore
Newark
Oakland
Piedmont
Pleasanton
San Leandro
Union City
County of Alameda
Alameda County Flood
Control and Water
Conservation District
Zone 7 Water Agency

understanding that certain MS4s in California that were engaged in the iterative process per the terms of their permit, were nonetheless challenged by a third-party on the basis of the Receiving Water Limitations language. There appears to be little regulatory benefit to imposing permit provisions that result in the potential of immediate non-compliance for a permittee.

Section D.4 of the Caltrans MS4 Permit addresses compliance with the prohibitions and limits of Sections A.4, D.2 and D.3 of the Permit. Our Program firmly supports the linkage between the iterative process in Sections D.4 and E.2.c.6.c) of the Permit and the prohibitions and limits of Section A.4, D.2 and D.3. However, to strengthen this linkage in a crucial way, the Board should change the phrase “assure compliance with” in the last clause of Section D.4 to either “achieve compliance over time with” or “obtain compliance over time with.” The last clause would thus read as follows: “the Department shall “achieve compliance over time with” Sections A.4, D.2 and D.3 of this order by complying with the procedure specified in Section E.2.c.6.c) of this Order.” In addition, the Board should amend Section D.2 to read as follows: “Except as provided in Section D.4 below, the discharge of storm water from a facility or activity shall not cause or contribute to an exceedance of any applicable water quality standard.”

As an alternative, our Program and member agencies also believe that the CASQA suggested Receiving Water Limitations language as previously submitted to the State Board is drafted in a manner to clearly indicate that compliance with the iterative process provides effective compliance with the discharge prohibition (General Discharge Prohibition A.4), and the “shall not cause or contribute” receiving water (Receiving Water Limitations D.2 and D.3).

Use of either of the two above approaches would provide increased water quality benefits and have the water boards and municipalities working in a more collaborative manner and not expending limited resources on litigation related issues. We therefore request further consideration of this or other alternative language so as to avoid a situation where, even if Caltrans is in complete compliance with the iterative process provisions, it could be subject to significant liability and lawsuits.

We thank you again for the opportunity to provide our comments and we ask that the Board carefully consider them and our suggested language for the Caltrans permit. If you have any questions, please contact me at (510) 670-6548.

Sincerely,



James Scanlin
Program Manager

cc: Member Agency Representatives