



California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

June 26, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board



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

Dear Ms. Townsend:

The California Stormwater Quality Association appreciates this opportunity to comment on the subject Caltrans Municipal Separate Storm Sewer System (MS4) Permit Second Draft Tentative Order (draft Tentative Order). CASQA typically comments on individual MS4 permits only when there is an issue of potential statewide significance. Accordingly, we are compelled to comment on the Receiving Water Limitations provisions incorporated into the draft Tentative Order.

The Draft Tentative Order in Provisions A and C will expose the Department to unwarranted and immediate liability.

CASQA believes the current revision of the receiving water limitations section is contrary to established Board policy and appears to create an inability for Caltrans to comply. Multiple constituents in stormwater runoff on occasion may be higher than receiving water quality standards before it is discharged into the receiving waters, and may create the potential for the runoff to cause or contribute to exceedances in the receiving water itself. Previously, MS4s 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” now at issue in the draft Tentative Order, however, combined with General Discharge Prohibition A.4, renders the iterative process obsolete as a compliance strategy. Moreover, in the wake of the July 2011 Ninth Circuit Court of Appeal’s decision, if this language is not revised, the precedent may be set for municipal permits that create unlimited liability for government entities across the State.

As you know, on July 13, 2011, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, Los Angeles County Flood Control District, et al.* (NRDC v. County of LA). The court’s opinion addressed two key issues for California’s MS4s, one of which is directly applicable here, that being whether a permittee who is in compliance with the iterative process is nevertheless still in violation of a MS4 permit that contains language like that proposed for Caltrans.

CASQA comments on Caltrans MS4 Permit Second Revised Draft Tentative Order

Like the Caltrans draft Tentative Order, the County of Los Angeles MS4 permit includes Receiving Water Limitations language that is consistent with the language developed by the State Water Board in its Order WQ 99-05. In previous State Water Board orders, the Board indicated that the language specified in Order WQ 99-05 did not require strict compliance with water quality standards. The language in question is often referred to as the “iterative process.”

However, contrary to the State Water Board’s stated intent and the understanding of CASQA, the Ninth Circuit Court of Appeals found that, because the iterative process paragraph did not explicitly state that a party who was implementing the iterative process was not in violation of the permit, a party whose discharge “causes or contributes” to an exceedance of a water quality standard is in violation of the permit, even though that party is implementing the iterative process in good faith.

As a result of the court’s decision, if the draft language is not changed, all discharges to receiving waters must meet water quality standards to avoid being in violation of permit terms. Although an important goal, no one reasonably expects Caltrans or any other municipal permittee to be able to meet this goal now. Indeed, the impossibility of meeting this goal is reflected by the hundreds of TMDLs across the state that specifically recognize that water quality standards cannot currently be met, often for reasons beyond Caltrans or other permittees’ control, and that instead an adaptive program over a span of several years or longer is necessary.

Thus, unless this language is changed, Caltrans may be vulnerable to enforcement actions by the state and third party citizen suits alleging violations of the permit terms in question. Indeed, the liability resulting from a failure to address these provisions may be a risk to Caltrans regardless of the current or future enforcement policy of the State or Regional Water Boards. For example, the City of Stockton was engaged in the iterative process per the terms of its Permit, but was nonetheless challenged by a third-party on the basis of the Receiving Water Limitations language. There is no regulatory benefit to imposing permit provisions that result in the potential of immediate non-compliance for the Permittee.

To avoid undercutting the regulatory benefits of the State Water Board’s program for Caltrans (and other MS4s), the Receiving Water Limitations language must be revised. In an attempt to avoid this undercutting we have attached proposed language for the Receiving Water Limitation provision. CASQA believes that our suggested Receiving Water Limitations language 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 limitations (Receiving Water Limitations D.2 and D.3). Furthermore the proposed language allows the MS4s to focus and prioritize their resources on critical water quality issues that will lead to water quality improvement, such as those reflected by the TMDLs. 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 Receiving Water Limitations language for the

CASQA comments on Caltrans MS4 Permit Second Revised Draft Tentative Order

Caltrans permit. If you have any questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

A handwritten signature in black ink that reads "Richard Boon". The signature is written in a cursive, flowing style.

Richard Boon, Chair

cc: CASQA Board of Directors and Executive Program Committee

Attachment – CASQA Proposed Language for Receiving Water Limitation Provision



California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

February 21, 2012

Mr. Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Receiving Water Limitation Provision to Stormwater NPDES Permits

Dear Mr. Hoppin:

As a follow up to our December 16, 2011 letter to you and a subsequent January 25, 2012 conference call with Vice-Chair Ms. Spivy-Weber and Chief Deputy Director Jonathan Bishop, the California Stormwater Quality Association (CASQA) has developed draft language for the receiving water limitation provision found in stormwater municipal NPDES permits issued in California. This provision, poses significant challenges to our members given the recent 9th Circuit Court of Appeals decision that calls into question the relevance of the iterative process as the basis for addressing the water quality issues presented by wet weather urban runoff. As we have expressed to you and other Board Members on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits needs to be modified to create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but also allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. To that end, we have drafted the attached language in an effort to capture that intent. We ask that the Board give careful consideration to this language, and adopt it as 'model' language for use statewide.

Thank you for your consideration and we look forward to working with you and your staff on this important matter.

Yours Truly,

Richard Boon, Chair
California Stormwater Quality Association

cc: Frances Spivy-Weber, Vice-Chair – State Water Board
Tam Doduc, Board Member – State Water Board
Tom Howard, Executive Director – State Water Board
Jonathan Bishop, Chief Deputy Director – State Water Board
Alexis Strauss, Director – Water Division, EPA Region IX

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State or Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.