



CITY of NAPA

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November 13, 2012

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



**Subject: Comment Letter – Receiving Water Limitations Language Workshop**

Dear Ms. Townsend:

The City of Napa appreciates the opportunity to provide comment on the issue of receiving water limitations (RWL) language in municipal stormwater permits, which is the subject of a State Water Board workshop to be held on November 20, 2012. Our concern is first and foremost the specific language in the Draft Phase II Municipal Separate Sewer Stormdrain System (MS4) NPDES Permit (Draft Permit), however we are generally concerned about RWL language in all municipal NPDES permits statewide.

We reiterate the comment in our July 20, 2012 letter to the State Water Board that requested revision of the RWL language in the Draft Permit because of the way such language was recently interpreted in the 9<sup>th</sup> Circuit Court of Appeals decision in the 2011 Los Angeles County vs. NRDC case (wherein the Court determined that a municipality is **strictly liable** for violations of its permit if its discharges cause or contribute to an exceedance of a water quality standard in the receiving waters<sup>1</sup>). We are extremely concerned that should the State Water Board not modify the RWL language in the Draft Permit, Napa will be vulnerable to third-party lawsuits; such as has been the case with the City of Stockton.

The City of Napa has been actively implementing its Phase II stormwater quality program since 2003. To date, we estimate general fund expenditures in excess of **\$2,500,000** to comply with our current MS4 Permit obligations. In addition, the City, in partnership with the Napa County Flood Control and Water Conservation District and the U.S. Army Corps of Engineers, has undertaken a major flood protection and water quality

<sup>1</sup> NRDC v. County of LA (9th Cir., July 13, 2011, No. 10-56017) 2011 U.S. App. LEXIS 14443\*1.

enhancement project for the Napa River. The award-winning *Napa River/Napa Creek Flood Protection Project*, with costs to date in excess of **\$600,000,000**, is at the vanguard of environmentally responsible flood protection initiatives and represents our community's extraordinary commitment to the enhancement of water quality of the Napa River and its tributaries. Through the removal of dozens of point source dischargers, the use of riverbank terracing, reconnection of the River to its historic floodplain and removing or replacing bridges that impede flood flows, flood water levels will continue to be reduced and water quality will continue to be incrementally improved over the next decade.

We have always understood our stormwater program to be one of iterative improvement whereby if receiving water issues are identified, we would work in cooperation with our Regional Water Board to identify actions and opportunities for addressing those issues<sup>2</sup>. However, the aforementioned *NRDC (2011)* case establishes legal precedent that contravenes the State Water Board's stated intent. In light of the court's decision, we are now extremely concerned that without intervention by the State Water Board to modify RWL language in the Draft Permit, Napa may be placed in a position of immediate noncompliance (and potentially subject to legal action), regardless of our good faith efforts to address these issues iteratively.

Our fear stems from the key holding from the *NRDC (2011)* case which is that implementing the iterative processes does not equate to permit compliance. In that case, the Court determined that a municipality is strictly liable for violations of its permit if its discharges cause or contribute to an exceedance of a water quality standard in the receiving waters. This liability is incurred in this instance because the Court determined that the iterative process identified in the stormwater permit did not provide "safe harbor" or protect against enforcement or third party lawsuits. This decision potentially places Napa, along with every other municipal stormwater discharger in the State, in immediate non-compliance with their NPDES permit if monitoring data show an exceedance of a water quality standard. Stormwater permits require dischargers to notify and report non-compliance events. Discharger may then be subject to enforcement actions such as Notice of Violations or Administrative Civil Liabilities from the applicable Regional Water Board. These actions from a Regional Water Board can include fines and costly remediation. Further, noncompliance events could expose a discharger to considerable liability from third parties.

The cost to ameliorate Napa's potentially new-found strict liability from non-compliance events is staggering. We estimate the initial capital cost to prevent every possible exceedance of every TMDL and water quality standard in the San Francisco Bay (of which the Napa River is a tributary) at **\$160,000,000**, with an annual operating costs of 80,000,000 thereafter; or per capita cost of approximately \$2,100 and \$1,050 respectively. Stormwater purity standards such as this can only be achieved by installing small-scale wastewater treatment devices at each of our 160 storm drain outfalls; the cost of which we estimate to be \$1,000,000 at each location. However, the Napa River is

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<sup>2</sup> State Board Order WQ 2001-15 (interpreting the State Boards' mandatory receiving water limitations language in State Board Order WQ 99-05.)

subject to tidal influences and while this solution might assuage potential liability from exceedance caused by discharges from our stormdrain outfalls, it would not address liability from pollutants that come from upstream or downstream sources. Napa should not be placed in position where it might face potential legal exposure over receiving water conditions it cannot control.

Notably, unlike with other NPDES permits, the Federal Clean Water Act does not require MS4 discharge strictly comply with water quality standards in the receiving water. Congress recognized the difficulties presented by the management of stormwater, and therefore created a special standard for MS4 discharges that does not require strict compliance with water quality standards. Instead, the Federal Clean Water Act allows permitting agencies such as the State Water Board to decide how and when compliance with water quality standards is to be achieved.

To address this issue, MS4 permits in California include a RWL provision. This provision, although worded slightly different in the various municipal permits, requires that municipal stormwater dischargers shall not “cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxic Rule (CTR), or in the applicable Regional Water Board Basin Plan”, in the receiving water. While the State thus requires compliance with water quality standards, prior decision of the State Board have made it clear that strict compliance is not required. Instead, compliance is to be achieved over time, through an iterative process. Unfortunately, as noted above, the holdings in *NRDC (2011)* (i.e. “strict compliance”) sets precedent for future interpretations of RWL language in a way that conflicts with the State Water Board’s stated policy (“iterative process”) for achieving compliance. Fortunately, the Court recognized the Boards authority to achieve its stated policy (“iterative process”) and the revisions needed to RWL language to achieve this policy in light of the *NRDC (2011)* decision are straight forward.

We respectfully request the State Board reaffirm its policy to allow municipal permittees to comply with water quality standards over time by using best management practices supplemented by the iterative process, and revise the existing receiving water limitations language consistent with an “iterative process” approach. We believe the first step to developing revised language is to first develop guiding principles for the language. These guiding principles would work to align the receiving water limitations language with the Board’s accepted iterative process policy, and as well provide assurance to the Board and interested third parties that agency actions to address water quality issues are effective and timely. We therefore support the guiding principles that are being suggested by the California Stormwater Quality Association. These include the following:

**The RWL language must identify an iterative process that:**

- Provides enough specificity and accountability so the Municipalities understand their responsibility.

- Acknowledges that all pollutants cannot be addressed equally.
  - Pollutants in stormwater discharges that are subject to TMDLs must be prioritized over pollutants that have sporadic and minimal impacts on receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner.
  - Municipalities are under constant pressure to prioritize their resources, and to obtain the most “bang for the buck.” This pressure is evident in practically all aspects of public service, from police to fire to the environment. Thus, a city cannot afford, financially or politically, to address all stormwater issues simultaneously.
  
- Guides regional board staff (and others) to assess whether the permittees are in good faith implementing the iterative process.
  
- Given the wide diversity and complexity of pollutants, sources and BMPs, the process must provide a mechanism for the MS4 and the State to agree on a practical implementation plan to satisfy the Permit provision.
  
- Establishes enough rigor to assure that progress will be made in addressing problematic discharges and protecting water quality.

**The RWL language must provide permittees assurances that they are not subject to enforcement action and third party litigation if they, in good faith, actively implement the iterative process.**

In closing, we believe that the State Water Board can address this untenable vulnerability that we are facing and we are greatly appreciative of your efforts to do so. Without your action to change the current language, agencies such as ours and others across the state will find themselves defending law suits as opposed to protecting and enhancing water quality.

Sincerely,



Jacques R. LaRoche, P.E., P.L.S.  
Public Works Director  
City of Napa