WEST VALLEY CLEAN WATER PROGRAM

July 19, 2012

Sent via email to: commentletters@waterboards.ca.gov

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

Subject: Comment Letter – 2nd Draft Phase II Small MS4 General Permit

I am writing on behalf of the West Valley Clean Water Program (WVCWP)[1] with respect to an issue arising from the State Board's 2nd Draft Phase II Small MS4 General Permit and the Fact Sheet circulated with it. The third paragraph of Section XI of the Fact Sheet contains unnecessary and potentially misleading language that is inaccurate and inconsistent with prior Water Board policy concerning compliance with water quality standards and how and over what time period that is to be achieved. It has never before appeared with respect to other State Water Board-issued MS4 permits, including the current draft Caltrans permit and its fact sheet. We request that it be deleted.[2]

In addition to dropping this paragraph from the Fact Sheet, the State Water Board should revise the proposed Small MS4 Permit to ***fully integrate*** the iterative process language within the Receiving Water Limitation on causing or contributing to water quality standard exceedances in the same paragraph rather than in two different ones. It ***should also require this integrated approach in all future MS4 permits.***[3]

Indeed, such a revised approach, or better yet the approach to this issue that has been suggested by CASQA, would better reflect the State Water Board's prior repeated policy pronouncements about how and over what time period compliance with water quality standards should be achieved by MS4 permittees (see precedential Orders WQ 91-03, 98-01, and 99-05). Conversely, if the current structure of the proposed Small MS4 Permit's Receiving Water Limitations and the third paragraph of Section XI of the Fact Sheet are left intact, it will represent a seismic shift in policy and undermine the core of the Water Boards' cooperative partnership with local governments – large and small – relative to stormwater management and the achievement of water quality standards.[4]

We therefore request you to direct the State Board staff to make these changes in the language of the proposed Small MS4 Permit and its Fact Sheet.

Respectfully,

Kelly Carroll
Program Manager
West Valley Clean Water Program

cc: WVCWP Municipal Representatives
SVURPPP Program Manager

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[1] The West Valley Clean Water Program (WVCWP) is an association of 4 smaller municipalities, who are permittees of the San Francisco Bay Municipal Regional Stormwater Permit.

[2] The Fact Sheet paragraph in question also mistakenly relies on the Ninth Circuit's decision in *NRDC vs. County of Los Angeles, et al.* which is now subject to review by the U.S. Supreme Court in its upcoming term.

[3] In the NRDC v. Los Angeles case, the Ninth Circuit did not reach or analyze whether an iterative process provision that was itself part and parcel of the Receiving Waters Limitation on water quality standard exceedances would form an effective safe harbor assuming that a permittee was dutifully complying with it.

[4] Since the State Board already recognizes that, under the Ninth Circuit's decision in *Defenders v. Browner*, including in an MS4 permit a requirement to go beyond Congress's maximum extent practicable standard is discretionary on its part, it necessarily follows that a Water Board-created MS4 permit provision, such as one requiring an MS4 permittee not to cause or contribute to an exceedance of an applicable water quality standard, can legally be constructed to include within it a safe harbor (or partial safe harbor) if the State so desires.

Campbell • Los Gatos • Monte Sereno • Saratoga
18041 Saratoga-Los Gatos Road • Monte Sereno, CA 95070 • Tel (408) 345-4734 • Fax (888) 545-6297