



Environmental Services Department

July 23, 2012



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

Subject: Revised Draft Phase II Small MS4 General Permit

Dear Ms. Townsend:

The City of San José appreciates the opportunity to provide comments on the Revised Draft Phase II Small MS4 General Permit (Draft Phase II Permit). While the City will not be subject to this Permit, a key provision will likely be precedential for future permit renewals and consequently the City is compelled to comment.

The City believes that Provision D of the Draft Phase II Permit is contrary to the historical interpretation of established State Water Board policy and will create an inability for regulated entities to comply. In wet weather, multiple constituents in stormwater runoff from urban areas may exceed receiving water quality standards, creating the potential for stormwater discharges to cause or contribute to exceedances of such standards in the receiving water.

Previously, municipal stormwater permittees presumed that permit language, like that expressed in Provision D, in conjunction with Board Policy (WQ 99-05) established an iterative process as a basis for compliance with receiving water limitations. However, on July 13, 2011, the Ninth Circuit Court of Appeals in *NRDC vs. County of Los Angeles / Los Angeles County Flood Control District* determined that engagement in the iterative process does not provide a “safe harbor” against liability for violations of receiving water limitations. More recently, the City of Stockton was engaged in a good faith iterative process per the terms of its permit, but was nonetheless challenged by a third-party based on the receiving water limitations language.

If Provision D is not changed, all discharges to receiving waters will likely need to meet water quality standards to avoid being in violation of the permit. The City certainly recognizes the importance of attaining water quality standards, and is committed to making continued progress toward that goal. At the same time, however, no one reasonably expects any Phase II or indeed Phase I entity to realize this goal immediately following permit adoption. Indeed, this reality is reflected by the hundreds of TMDLs across the State that specifically recognize that current water quality standards cannot be easily attained and can

only be addressed by regulation that supports compliance through an iterative, adaptive approach.

The City recognizes the need to continue to make significant progress toward attainment of water quality standards. However, it also believes that no regulatory benefit accrues from the establishment of permit provisions, such as Provision D, that result in the potential for immediate non-compliance for Permittees. For these reasons, the City respectfully requests that Provision D be revised to incorporate the Receiving Water Limitations language proposed by the California Stormwater Quality Association (attached). The City strongly supports this language because it will enable regulated entities to focus and prioritize their resources on critical water quality issues and achieve environmental outcomes that are meaningful to the communities we serve. Importantly, it will also help ensure that good faith compliance is not the subject of significant unnecessary legal liability and lawsuits.

Please direct any questions regarding this letter to Elaine Marshall, Stormwater Program Manager, at (408) 793-5355 or [elaine.marshall@sanjoseca.gov](mailto:elaine.marshall@sanjoseca.gov).

Sincerely,

A handwritten signature in cursive script, appearing to read "Kerrie Romanow for".

Kerrie Romanow  
Director, Environmental Services Department (Acting)  
City of San José

Attachment



## California Stormwater Quality Association

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

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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

- 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.