



Ventura Countywide Stormwater Quality Management Program

Participating Agencies November 13, 2012

Camarillo
County of Ventura

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

Fillmore

**Subject: COMMENT LETTER RECEIVING WATER LIMITATIONS
LANGUAGE WORKSHOP**

Moorpark

Dear Ms. Townsend:

Ojai

Oxnard

Port Hueneme

The Ventura Countywide Stormwater Quality Management Program (Ventura Stormwater Program) appreciates the opportunity to provide comments on the subject workshop and corresponding Issue Paper provided in an October 10, 2012 Lyris announcement. The Program includes the cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, Ventura, Santa Paula, Simi Valley, Thousand Oaks, the County of Ventura, and the Ventura County Watershed Protection District who are under a Municipal Separate Storm Sewer System (MS4) Permit issued by the Los Angeles Regional Water Quality Control Board (Regional Water Board).

San Buenaventura

Santa Paula

Simi Valley

The Program believes it is imperative that the workshop result in the development of a constructive and pragmatic approach for addressing water quality issues associated with stormwater discharges while providing a realistic opportunity for dischargers to maintain permit compliance. This letter highlights our concerns regarding the current liability exposure to municipal stormwater agencies (i.e., Permittees) given the current receiving water limitation provisions being used within stormwater permits, including the Ventura Countywide Stormwater Permit (Permit).

Thousand Oaks

Basis of Liability Exposure

Ventura County Watershed Protection District

As stated above the Ventura Stormwater Program is regulated by Los Angeles Regional Water Quality Control Board. It was a permit issued by this LA Regional Board that the 9th Circuit Court of Appeals in a recent decision¹ determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard, regardless of good-faith efforts such as the well-established iterative process to address the exceedance are taken by the Permittees.

¹ *NRDC v. County of LA* (9th Cir. 2011) 673 F.3d 880.



This liability is incurred because the court determined that the “iterative process” language as identified and provided for in the Los Angeles Stormwater Permit did not provide for a “safe harbor,” in that each permit provision is individually enforceable. The receiving water limitation permit language in question was developed by the State Water Board in 1999, and was set forth by the State Water Board in Order WQ 99-05. In subsequent decisions challenging the 1999 receiving water permit language, the State Water Board stated that this language did not require strict compliance with water quality standards.² While the Issues Paper notes, nonetheless, that it was not the Water Board’s intention to create a safe harbor, it needs to be acknowledged that the 9th Circuit decision was taken by the regulated community to be a fundamentally different interpretation of this language.

In light of the 9th Circuit Court of Appeals’ decision and based on the monitoring efforts conducted to date by the Program, we expect municipal stormwater permittees will face non-compliance with their NPDES stormwater permits where monitoring data indicates an exceedance of a water quality standard for aluminum and bacteria during storm events.

Please note Ventura County’s beach water quality is the best in southern California when measured for bacteria. However, the unacceptable reality is that MS4s monitoring results will provide evidence of wet weather exceedances given the current receiving water limitations. Additionally, municipal stormwater permittees will be exposed to considerable liability from the State in the form of Notice of Violations or Administrative Civil Liabilities. There is also a liability from interested third parties with very costly lawsuits that direct resources away from efforts to improve water quality.

Principles of the RWL Provision

State Water Board staff, in the October 10, 2012 Issue Paper, identified five alternatives that individually or in combination would address concerns with the receiving water limitation provision. While we appreciate Board staff’s efforts to develop a range of alternatives, we believe it important to establish the fundamental principles that should ultimately guide the Board and its decision in crafting receiving water limitations language. We also believe that there that there is an extensive body of literature to guide the linkage of established best management practices with quality systems and related programs of iterative improvement. The Ventura Stormwater Program therefore offers the following principles to guide the development and selection of a revised receiving water limitations provision:

The Receiving Water Language Provision must:

- Provide enough specificity and accountability so municipalities understand their responsibility,
- Acknowledge that all pollutants cannot be addressed equally
 - Pollutants in stormwater discharges that are subject to TMDLs must be prioritized

² See *In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn.*, Order WQ 2001-15 (Nov. 15, 2001).

over pollutants that have sporadic and/or minimal impacts on receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner. All our Permittees face a liability from aluminum based on basin plan objectives for municipal water supply. Even in a watershed that is less than three percent developed, this objective is consistently exceeded in the receiving water due to natural sources.

- Permittees are under constant pressure to prioritize their resources to address water quality issues. Thus, a city cannot afford, financially or politically, to address all stormwater issues simultaneously. Prioritization is required.
- Guide Regional Water Board staff (and others) to assess whether the Permittees are in good faith implementing their permit and the iterative process, and,
 - 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.
- Establish a mechanism to ensure progress will be made in addressing problematic discharges and protecting water quality.

The Permittees must have assurances that good faith efforts to actively implement the iterative process will be rewarded and that they are not subject to enforcement action and third party litigation for extremely challenging or uncontrollable problems.

The Ventura Stormwater Program appreciates the State Water Board for its consideration of this critical issue, and believes that the existing receiving water limitations provision found in our permit needs to be modified. The creation of a basis for compliance that provides sufficient rigor in the iterative process, but also allows the Permittees to truly operate in good faith with the iterative process without fear of unwarranted third party action is needed. To that end, we respectfully request the Board direct staff to work with Permittees to develop receiving water limitation language that meets the objectives outlined above. We look forward to working with the State Water Board to develop such a language.

Sincerely,



Gerhardt Hubner
*On Behalf of the Entire
Ventura Countywide Stormwater Quality Management Program*

Cc: Ventura Countywide Stormwater Quality Management Program Management Committee