

July 6, 2009



HAND DELIVERED

Catherine E. Kuhlman, Executive Officer
North Coast Regional Water Quality Control Board
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UTILITIES DEPARTMENT

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**CITY OF SANTA ROSA COMMENTS ON ORDER NO. R1-2009-0050 -DRAFT NPDES
MUNICIPAL SEPARATE STORM SEWER SYSTEM DISCHARGE PERMIT**

Dear Ms. Kuhlman:

On May 22, 2009 Order No. R1-2009-0050, NPDES No. CA0025054, Second Draft Storm Water Permit (Draft Permit), for County of Sonoma, City of Santa Rosa (City) and the Sonoma County Water Agency (Permittees) was issued. The City appreciates the changes made to the Draft Permit which addressed some of our concerns and which moved the program toward improved effectiveness and cost efficiency. However, the City continues to be very concerned with the permit approach and the ability to maintain compliance with its extensive provisions which will result in having to cut effective and established water quality programs. The Draft Permit language remains quite different from what was submitted as part of the initial proposed Term 3 Storm Water Management Plan (SWMP) and contains a substantial increase in requirements and an apparent disregard for many of the proposed/existing management practices developed with the region's unique basin conditions and needs in mind.

Please be advised that it remains the City's intent to continue implementation of a comprehensive, cost-effective storm water pollution control program to protect and improve water quality in Sonoma County. Yet, the City takes exception to the prescriptive nature and lack of flexibility in the Draft Permit as it is currently written. Also of concern is lack of clarity regarding which provisions are applicable to each Permittee as well as the associated potential liability risks for each Permittee.

Existing Storm Water Management Program

The City has continuously developed its SWMP to improve water quality since 1996. During the November 2007 inspection conducted by US EPA, several program elements were praised as "model" program elements. Programmatic enhancements were recommended in only three of the seven program elements reviewed and the City proposed changes to address all of these in the initial Term 3 SWMP. The City's existing SWMP features many beneficial elements beyond those required by the current NPDES storm water permit. These have included funding of the Creek Stewardship program, an Environmental Crimes Detective who aids in the investigation/enforcement of illicit discharges, the High School Bioassessment program, the annual six month Down the Drain storm water exhibit at Spring Lake's Environmental Discovery Center, numerous creek restoration activities as well as the award winning Summer 2008 Storm Water & Creek Program Summary. Many of these existing program elements may need to be curtailed to comply with the prescriptive nature of the draft permit.



Receiving Water Limitations Are Not Consistent With The Clean Water Act

The City appreciates the Regional Water Board's modification of the Receiving Water Limitation language in the revised Tentative Order, at section B.4., in response to prior comments made by the City, which requested the Regional Board implement the State Water Resources Control Board's (State Water Board) precedential decision, Order WQ 99-05, that prescribes the specific receiving water limitation language to be included in municipal storm water permits. However, the Regional Water Board's revised language does not completely implement the language required by the State Water Board, and changes a critical aspect of the recommended language.

Specifically, State Water Board Order 99-05 prescribes the following language as the concluding paragraph:

"So long as the permittees have complied with the procedures set forth above and are implementing the revised SWMP, the permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develop additional BMPs."

See State Water Board Order WQ 99-05 at page 3. While the Regional Water Board can modify the State Water Board's required language to reflect site-specific differences, such as the appropriate moniker of the respective management plan, the Regional Water Board is to adhere to the prescribed language above. Recent storm water permits issued by other regions have implemented the State Water Board's language (see, e.g., R5-2007-0173).

Nonetheless, the concluding paragraph in the Receiving Water Limitation section of the revised Tentative Order states as follows:

"The Co-Permittee(s) will have to implement alternative BMPs or combinations of BMPs and will repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same WQS unless directed otherwise by the Regional Water Board Executive Officer. The Co-Permittees shall not be expected to continue the same specific BMPs repetitively if they have been shown to be ineffective."

See Tentative Order at page 16, Receiving Water Limitation B.4. The language in the Tentative Order is fundamentally different than that prescribed by the State Water Board, and the City has serious concerns regarding the implementation and enforcement of the proposed language. The City again requests that the Regional Water Board implement the language required by the State Water Board. The City also requests the Regional Water Board remove related language in the Tentative Order, such as the language in Part 3, section 3(a)(1), (page 27 of the Tentative Order) that states, "Likewise, for those BMPs that are not adequate to achieve WQS...".

If the Regional Water Board retains the proposed language over the City's objection, the City requests that prior to the revised Tentative Order being presented to the Regional Water Board for adoption, Regional Water Board staff first review the Water Quality Control Plan for the North Coast Region ("Basin Plan") and revise, where appropriate, water quality objectives which may

apply, or are to be applied, to storm water and urban runoff in accordance with Cal. Water Code sections 13000 and 13241, and adopt the requisite corresponding implementation plan for compliance pursuant to Cal. Water Code section 13242. Cal. Water Code §§ 13000, 13240 - 13242; see also *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.*, Orange County Superior Court Case No. 06CC02974 (Nov. 10, 2008). The City is not aware that the Regional Water Board previously considered the factors set forth in Cal. Water Code section 13000 and 13241 when adopting the Basin Plan's existing water quality objectives, with respect to application of those objectives to storm water and urban runoff, as contemplated in the Tentative Order. Similarly, the City believes that the Regional Board has not yet adopted an implementation plan for the application of the Basin Plan water quality objectives, as required by Cal. Water Code section 13242.

Inclusion of 1995 Waste Reduction Strategy for the Laguna de Santa Rosa

For the first time, the Tentative Order purports to apply the 1995 Waste Reduction Strategy for the Laguna de Santa Rosa. See Tentative Order at section C., pages 16-17. This action is unreasonable, and contrary to state and federal law governing the preparation and implementation of Total Maximum Daily Loads ("TMDL") for the reasons set forth below.

When the City's NPDES permit for its treated wastewater discharge from the Laguna Subregional Water Reclamation System to the Laguna de Santa Rosa was renewed in 2006, Regional Water Board staff agreed that a valid TMDL for the Laguna de Santa Rosa did not exist, and for that reason, controversial "zero, or no net loading" final water quality-based limitations were adopted for nitrogen and phosphorous until such time as a TMDL for the Laguna de Santa Rosa is complete. See Regional Water Board Order No. R1-2006-0045 ("Discharge Order") at IV.A.1.g., page 13. To that end, the Discharge Order states,

"g. Effluent Limitations for Biostimulatory Substances for Compliance with Narrative Objective. The Regional Board plans to develop and adopt total maximum daily loads (TMDLs) for nitrogen and phosphorus which will specify wasteload allocations (WLAs) for point sources and load allocations (LA) for non-point sources, as appropriate. Following the adoption of these TMDLs by the Regional Water Board, this Order will be issued with final WQBELs based on applicable WLAs. Alternatively, in the absence of a TMDL at the end of the compliance schedule authorized by this Order [Nov. 9, 2011], the final effluent limitation for nitrogen and phosphorus will be zero, or no net loading."

Additionally, the Discharge Order Fact Sheet states,

"ii. Biostimulatory Substances. On June 5 and July 25, 2003, the USEPA modified and approved the list of impaired water bodies, prepared by the State Water Board pursuant to Section 303 (d) of the CWA – water bodies which are not expected to meet applicable water quality standards after implementation of technology-based effluent limitations for point sources. The 303 (d) list includes the Laguna de Santa Rosa within the Middle Russian River Hydrologic Area as impaired by low dissolved oxygen, nitrogen, phosphorous, sedimentation/siltation, and temperature. The CWA requires the Regional Water Board to establish, in accordance with a priority ranking for 303 (d) listed waters, TMDLs for each impairing pollutant – the maximum amount (including a margin of safety) of each pollutant that a water body can receive and still meet water

quality standards, and an allocation of that amount to the pollutant's point and nonpoint sources. ***On October 27, 1994, the Regional Water Board approved a "TMDL" approach for the Laguna de Santa Rosa to satisfy Section 303(d) requirements [reference to the final March 1, 1995 Waste Reduction Strategy], but this approach was subsequently found not to contain the minimum elements of a TMDL. For example, follow-up compliance monitoring, a critical element for TMDLs, was not continued.***

See Discharge Order, Fact Sheet, at IV.C.3.a.ii., page F-22 (emphasis added). At the September 20, 2006 hearing, U.S. EPA, Region 9, agreed with the Regional Water Board's approach regarding imposition of the "zero, or no net loading" final water-quality based effluent limitations in the absence of a valid TMDL. See Sept. 2006 testimony of Doug Eberhart, U.S. EPA, Region 9.

At the time the Discharge Order was being renewed, Regional Water Board planning staff were in the process of preparing a TMDL to address the current 303(d) listings for the Laguna de Santa Rosa (low dissolved oxygen, nitrogen, phosphorous, sedimentation/siltation, and temperature), and the City understands those staff are still in the process of developing that complex TMDL.

The City challenged the "zero, or no net loading" provision before the State Water Board and in Superior Court. Before proceeding to the merits of the City's case in Superior Court, the City and Regional Water Board staff prepared the Santa Rosa Nutrient Offset Program, which was approved by the Regional Water Board in July 2008, to govern compliance with the final water quality-based effluent limitations during the time, if any, between the November 2011 effective date of the "zero, or no net loading" limitation and the adoption/approval of a valid TMDL. The approval of the Santa Rosa Nutrient Offset Program, along with other actions not relevant to the comments herein, resolved the City's challenge to the "zero or no net loading" final water quality-based effluent limitations.

For the reasons set forth above, the 1995 Waste Reduction Strategy is not a valid TMDL pursuant to 40 C.F.R. § 130.7, and should not be included in the Tentative Order. The Regional Water Board cannot ignore the findings and process applied to the City in the Discharge Order proceedings in the current proceedings, as the same facts and law are applicable to both NPDES permits.

Even if, however, the 1995 Waste Reduction Strategy were a valid TMDL, the 1995 Waste Reduction Strategy has not been adopted into the Basin Plan prior to implementation, and therefore, should not be imposed in the Tentative Order. TMDLs are not self-executing, but rather, rely upon further action to impose on individual dischargers. See *City of Arcadia v. EPA*, 265 F.Supp.2d 1142, 1144-1145 (N.D.Cal. 2003); see also www.krisweb.com/policy/tmdl_factsheet_northcoast.htm ("There are four steps to developing a TMDL ... The third step involves getting approval of the TMDL by the Regional Water Board, the State Water Resources Control Board, and the US EPA; **and thus incorporating the TMDL into the Basin Plan.**") (emphasis added). The Regional Water Board's own website states, "Currently, the Waste Reduction Strategy is scheduled for review by the Regional Water Board's

Planning Unit in an effort to adopt the Waste Reduction Strategy's seasonal waste loads and reduction strategy into the Basin Plan." See www.swrcb.ca.gov/northcoast/water_issues/programs/tmdls/laguna_de_santa_rosa/. Thus, even if the 1995 Waste Reduction Strategy were a valid TMDL, it would be premature at this point to implement the strategy in the Tentative Order.

Finally, if the 1995 Waste Reduction Strategy was a valid TMDL, and properly adopted into the Basin Plan, the Regional Water Board has failed to reasonably incorporate the 1995 Waste Reduction Strategy into the Tentative Order. Tables 2 and 3 in the Tentative Order seek to impose a net allowable load of total nitrogen and ammonia, respectively, from urban sources at four particular locations in the Laguna de Santa Rosa watershed based on the 1995 Waste Reduction Strategy, but do not accurately reflect current conditions, or take into consideration geographic limitations and/or the method for determining compliance. Imposition of the values

in Table 2 and 3 as load limits is inappropriate for the following reasons:

1. The Laguna de Santa Rosa is no longer listed as impaired for ammonia due to a variety of actions taken in the 1990s. Thus, there is no statutory or regulatory basis for inclusion of Table 3, the net loads for total ammonia.

2. Both Tables 2 and 3 describe the allowable load allocated to *all* urban sources in the Laguna de Santa Rosa watershed, but the Tentative Order regulates only some of the urban runoff sources tributary to the four compliance locations. In the case of one compliance location (Stony Point Road), none of the Co-Permittees has jurisdiction over urban areas upstream of this compliance location, so they have no ability to affect loads from urban areas that drain to the compliance location. The City should not be required to achieve the load reduction allocated to all urban areas within its jurisdiction, which represent only a portion of the urban areas that may drain to the Laguna de Santa Rosa watershed. The values in Table 2 and 3 should be modified to require the Co-Permittees to control only the portion of the total urban load originating from urban areas in their respective jurisdictions.

3. The total annual loads in the 1995 Waste Reduction Strategy (e.g., the values on which the Table 2 and 3 net annual loads are based) are based on average seasonal flows. Actual loads will fluctuate with rainfall, but the Table 2 and 3 values do not reflect this variability. The Regional Water Board recognized this flow variability issue when it approved the Santa Rosa Nutrient Offset Program in 2008, by including a three-year averaging period for compliance determination. The values in Table 2 and 3 should be modified to reflect this natural variability in loading.

For the foregoing reasons, the City requests that section C of the Tentative Order be removed.

Draft Permit Contains Numerous "Unfunded State Mandates"

Article XIII B, Section 6, of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. Known as "unfunded state mandates," the State of California can be required to provide funding to reimburse the local agency for requirements that exceed the Clean Water Act's mandates for municipal storm water discharges. The City is aware of the current Test Claims before the Commission on State Mandates involving regulation of municipal storm water discharges under the Clean Water Act and Porter-Cologne Water Quality Control Act, see, e.g., Test Claim 07-TC-09 (pertaining to

municipal storm water NPDES permit issued by the San Diego Regional Water Board to the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority, Order No. R9-2007-001), and the City incorporates by reference herein the arguments made by those permittees as to the many similar programmatic elements of the Tentative Order that the City believes far exceeds the Clean Water Act's mandates regarding storm water regulation, found at 40 C.F.R. §122.26.

The City would like to highlight several specific instances in the Tentative Order where the City believes the Regional Water Board is far exceeding the requirements of applicable federal law, and, instead, is freely choosing to shift costs that should be incurred by the State to the City, without corresponding reimbursement. First, the Regional Water Board is requiring the City to undertake a very specific, progressive method of investigation and enforcement of industrial facilities and construction sites that are currently regulated under the State Water Board's General NPDES Permits for storm water associated with both industrial and construction activity. See Tentative Order at Part 3, section 4, page 32. These actions are required to be taken before the City can refer alleged violations of the State Water Board's General NPDES Permits, for which the City retains no authority to independently and specifically enforce, to the State Water Board or the California Attorney General's office, ostensibly so that the State Water Board does not have to expend resources to investigate and/or enforce compliance with its own General NPDES Permits. This delegation/shift of responsibility is precisely the type of action that qualifies as an unfunded state mandate, and should receive reimbursement by the State of California, if the requirements are retained in the final NPDES permit issued to the City.

Additionally, the Regional Water Board is requiring duplicative requirements and enforcement by the City for construction sites greater than 1 acre, that are already regulated by the State Water Board's General NPDES permit for storm water discharges associated with construction activity. See Tentative Order at Part 8, section 4, page 47. It is unreasonable to subject those construction sites to two separate regulatory schemes, when the State Water Board already prescribes very detailed water quality requirements to these sites, and retains staff to ensure compliance, and to take enforcement. It is even more unreasonable to require the City to expend limited local resources to regulate these sites, when the scarce local resources could be used for other regulatory activities that are not already subject to the State Water Board's jurisdiction.

In other circumstances, the Regional Water Board appears to be requiring action that far exceeds federal requirements applicable to municipal storm water discharges in order to substantially modify personal behavior by residents of the City, for which no other avenue exists for the State of California to pursue such limitations. The City should not have to bear the costs for such ambitious requirements. For example, the Tentative Order requires the City to possess the necessary legal authority to prohibit landscape irrigation overflow of potable water (e.g., runoff of potable water from residential lawns and/or other planting areas that would otherwise be unregulated); however, enforcement of such a prohibition would require most residents to completely re-landscape/modify their land. See Tentative Order at Part 2, section 1(b)(7). In order for the City to obtain authorization to allow some potable water runoff from irrigation of residential yards, the City must submit BMP plans that commit the City to micro-managing each resident's yard at a level unsustainable by the City's current resources. See Tentative Order at Section A.5., Table 1, section "Reclaimed and potable landscape irrigation runoff." The federal storm water program did not envision the Regional Water Board imposing such unreasonable requirements, and the City requests their removal.

In sum, if the Regional Water Board continues to require these actions, the City may seek a claim for reimbursement of the associated costs.

Provisions of The Draft Permit Are Not Cost-Effective At Improving Water Quality And Create A Substantial Financial Burden For The City

Many of the required provisions in the Draft Permit are considered onerous, costly and are not expected to significantly improve water quality. City staff has estimated implementation of the additional provisions in the Draft Permit would cost multiple times more than the program proposed in the Term 3 SWMP. As you are aware, the fiscal condition of the City remains a serious concern and reductions to staff and services have recently occurred and may continue. It is unfortunate and the City regrets that it does not have funding currently available for many of the provisions included in the Draft Permit. Examples of costly provisions contained in the Draft Permit are listed below:

- Requires mapping all existing connections to the storm drain system. This would require videotaping >338 miles of storm drain to identify all connections including roof and foundation drains at an estimated cost of \$4,700,000. This huge expense is certainly not commensurate with anticipated improvements to water quality. A more reasonable cost effective program would be to videotape areas with excessive flow or observed illicit discharges.
- Requires extensive additional requirements which include lower thresholds to address storm water quality/quantity impacts of New Development, Redevelopment and City Capital Improvement Program (CIP) projects. These include extended project design review time, SUSMP Guidance manual revisions, LID manual development and training, additional project tracking, inspection and potential enforcement at an estimated initial cost of \$1,065,000 and an annual cost of \$710,000.

This will have a huge impact on applicable CIP projects that involve paving, potentially requiring acquisition of additional right of way to maintain existing streets and infrastructure. The Draft Permit requires costly storm water treatment over and beyond what is currently required as part of Capital Improvement Program projects (including street reconstruction and paving) that affect more than 10,000 square feet of existing impervious surface or undisturbed land. This requirement would add ~10% to all project costs or a total of nearly \$3,000,000 annually to City capital projects and limit the City's ability to maintain its infrastructure.

- The Draft Permit specifies typical BMPs to be implemented on construction, municipal, industrial and commercial sites. Inspections required to evaluate these BMPs will be costly (\$350,000) and some may not be effective given local conditions. According to the Draft Permit, alternative measures, which may be more effective, could only be authorized by the Regional Board instead of City field staff who would be most familiar with site conditions.

Many timeframes in the Draft Permit are unrealistic and unreasonable. Budgeting for new provisions beyond those planned and budgeted in the Term 3 SWMP will take time due to the City's budget adoption process.

Provisions Go Beyond Maximum Extent Practicable (MEP)

The Draft Permit contains numerous references for implementation of provisions to the Maximum Extent Practicable (MEP). MEP is a flexible concept requiring consideration of technical feasibility, cost and benefits derived through an iterative approach. Many provisions are not flexible and include strict prescriptive language that limits use of alternative approaches that could be more effective. Costs for many of the provisions will be extensive and associated water quality benefits limited, therefore are not considered to meet MEP.

Permit Language Is Nearly Identical To The Disputed Ventura County And Bay Area Permits

As noted above, a major concern is that the Draft Permit is not consistent with the submitted Term 3 SWMP which was developed with input from the community, stakeholders and many meetings with Regional Board staff. City staff remains concerned that implementing programs applicable to southern California or the Bay Area may not be appropriate in Sonoma County. Staff estimates that three quarters of the provisions within the Draft Permit are identical to provisions in the recently adopted Ventura County permit.

Excessive Tracking And Reporting Requirements

The Draft Permit continues to contain numerous new tracking and reporting requirements that are onerous and may not improve water quality. The Permittees have received comments from Regional Board staff recently requesting less reporting to reduce the size and content in annual reports. Therefore, the provisions requiring additional tracking/reporting of detailed fiscal expenditures, facilities that are critical sources of pollution, post-construction BMPs, grading permits, encroachment permits, demolition permits, building permits, illicit connections and illicit discharges seem unreasonable.

In Conclusion

It is noted that the Permittees were provided only 45 days to evaluate the provisions within the 237-page Draft Permit and only 14 days to evaluate the Regional Water Board's response to comments received on the first draft. Considering the length and complexity of the Draft Permit and its extensive implications on City resources, the review period granted by the Regional Water Board is considered insufficient. Given additional time, City staff would have been able to conduct a more comprehensive evaluation and provide recommendations for improvements to ensure the permit reflects the unique aspects of the Santa Rosa area. The concerns noted in this letter and attached spreadsheet represents staff's best effort to evaluate this permit within the limited review period.

The City remains very interested in improving water quality in the Santa Rosa area and in reducing/preventing storm water pollution. To accomplish this most efficiently and cost-effectively, the City asks that the Draft Permit be modified with appropriate sensitivity to local conditions including current financial constraints. The City requests that the Draft Permit be further revised to develop cost-effective provisions that will supplement our current efforts in protecting water quality from storm water pollution in Santa Rosa. Our staff would welcome the opportunity to continue working with Regional Water Board staff in this regard.

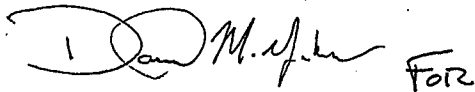
Thus said, the Regional Water Board is asked to withhold its recommendation to adopt the Draft Permit on October 1, 2009 as proposed.

7/6/2009
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Please note that I intend to testify at the upcoming public meetings scheduled for July 22-23, 2009 and October 1, 2009. My scope of testimony will include the City's extensive concerns pertaining to the Draft Permit and its legal and technical viability as well as its implications to City resources and the City's ability to maintain compliance.

Please contact Rita Miller at 543-3879 if you have any questions or need further clarification. Your consideration of these concerns is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Miles Ferris", followed by the word "For" in a similar script.

MILES FERRIS
Director of Utilities

cc: Kevin Booker, Principal Engineer, SCWA
Janice Gilligan, Stormwater Coordinator, Sonoma County PRMD
Jeff Kolin, City Manager, City of Santa Rosa
Greg Scoles, Assistant City Manager, City of Santa Rosa
Rick Moshier, Public Works Director, City of Santa Rosa
Rita Miller, Supervising Engineer, City of Santa Rosa