

State Board Order Draft (11/21/14) Re: LA MS4 Permit – Order No. R4-2012-0175

Presentation on behalf of the Cities of Duarte;
Huntington Park; Pico Rivera; Pomona; Signal Hill

By:

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State Board Draft Order -11/21/14 – Areas of Fundamental Agreement

- ▶ *“The WMP/EWMP is subject to an **adaptive management process**. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the **Annual Report**.”* (p. 34.)
- ▶ Cities **agree with the “WMP/EWMP”** concept as the means of reducing pollutants from MS4s.
- ▶ Cities **agree with use of the “adaptive management process”** to continue to improve the WMP process.
- ▶ Cities **agree the “Annual Report”** is the optimal time for plan modifications pursuant to adaptive management.
- ▶ Cities **agree** “[c]ompliance with water quality standards is and should remain **the ultimate goal** of any MS4 permit” (p. 14), but **disagree** the “goal” may/should be enforced as a strict numeric legal requirement.

State Board Draft Order -11/21/14 – Fundamental Issue

- ▶ “[T]he fundamental issue *for review before us in this matter is whether the Los Angeles MS4 Order’s WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations [and TMDLs].*” (Order, p. 15.)
- ▶ ***As written***, the WMP/EWMP provisions are: (1) ***not in compliance with State law***; and (2) ***require technical and practical modifications/improvements***.
- ▶ The WMP/EWMP provisions ***should be revised*** to comply with State law and to address technical and practical problems.

State Law - The Porter-Cologne Act

- ▶ **CWC § 13000** requires the “highest water quality which is *reasonable* considering all demands being made and to be made on those waters *and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.*”

State Law - The Porter-Cologne Act

- ▶ **CWC § 13263**: “(a) The regional board ... shall prescribe requirements as to the nature of any proposed discharge The requirements shall implement any relevant water quality control plans that have been adopted, and ***shall take into consideration*** the beneficial uses to be protected, ***the water quality objectives reasonably required*** for that purpose, other waste discharges, the need to prevent nuisance, and ***the provisions of Section 13241.***”

State Law - The Porter-Cologne Act

- ▶ **CWC § 13241** requires the establishment of standards to ensure the “***reasonable protection*** of beneficial uses,” allowing changes to objectives “***without unreasonably*** affecting beneficial uses,” and requiring a ***consideration of:***
 - (a) “Past, present, and probable future beneficial uses ;”
 - (b) “***Environmental characteristics***” of the water body;”
 - (c) “Water quality conditions ***that could reasonably be achieved;***”
 - (d) “***Economic considerations;***”
 - (e) “The need for developing ***housing within the region***” and
 - (f) “The need to develop and use ***recycled water.***”

Draft Order Re Application Of CWC § 13241 to MS4 Permits

- ▶ “[W]hen implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and the regional water boards ... ***have some flexibility*** to consider other factors, ***such as economics***, when establishing the appropriate requirements.”
(p. 11.)

Cal. Supreme Court Holding Re Application of CWC § 13241 To NPDES Permits.

- ▶ “Section 13263 directs regional boards, when issuing [] discharge permits, to take into account various factors, ***including those set out in section 13241***. Listed among the section 13241 factors is ***“[e]conomic considerations.”***”
- ▶ So long as federal law does not require the effluent limit: ***“The plain language of sections 13263 and 13241*** indicates the Legislature’s intent in 1969, when these statutes were enacted, ***that a regional board consider the cost of compliance when setting effluent limitations*** in a wastewater discharge permit.”

(*Burbank v. State Board* (2005) 35 Cal.4th 613, 625.)

The WMP/EWMP Process Was Not Adopted Pursuant to CWC § 13241

- ▶ Permit terms requiring ***strict compliance with final numeric WQBELs*** were not developed in accordance with CWC §13241.
- ▶ Permit terms requiring a ***“reasonable assurance analysis”*** to show WMP/EWMP will meet numeric limits were not developed in accordance with CWC §13241.
- ▶ No findings or other indication these terms were developed considering: **(1) “*economics*,” (2) whether the desired condition “*could reasonably be achieved*,” (3) the “*environmental characteristics*”** of the water bodies in issue; **(4) other 13241 factors.**
- ▶ Example: What “reasonable assurance analysis” can realistically be provided to show Permittees will meet the ***wet weather LA River Bacteria TMDL limits***, and how are these limits “economically” or “reasonably achievable” where LA Bd estimated cost is \$5.4 billion?

The WMP/EWMP Process Was Not Adopted Pursuant to CWC § 13241

- ▶ “[W]e find that municipal storm water dischargers ***may not be able to achieve water quality standards in the near term*** and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows ***MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance*** with the receiving water limitations.” (Draft Order, p. 72, Concl. 2.)

The WMP/EWMP Process Was Not Adopted Pursuant to CWC § 13241

- ▶ “The WMP/EWMP provisions ***are ambitious, yet achievable***, and include clear and enforceable deadlines for the achievement of receiving water limitations and a ***rigorous ... process*** for development and implementation of WMPs/EWMPs.” (Draft Order, p. 72, Concl. 3.)

The WMP/EWMP Process Was Not Adopted Pursuant to CWC § 13241

- ▶ “We find that the ***storm water retention*** approach ***is a promising approach*** to achieving receiving water limitations, ***but also find that the Administrative Record does not support a finding*** that the approach will necessarily lead to ***achievement of water quality standards*** in all cases.” (Draft Order, p. 73, Concl. 10.)

Proposed Alternative: WMP/EWMP Process With BMP-based WQBELs

- ▶ “We find that the Los Angeles Water Board’s choice of ***BMP-based WQBELs*** to be proposed by the Permittees in the WMP/EWMP to address USEPA-established TMDLs was ***reasonable.***” (Draft Order, p. 74, Concl. 14.)
- ▶ Recommendation: For all Water Quality Standards; TMDL WLAs; and Other Numeric limits – Require ***BMP-based WQBEL WMP/EWMPs*** that are subject to an ***Adaptive Management Process.***
- ▶ Recommendation: Permittees to be ***deemed in compliance***: **(1)** if implementing approved BMP-based WMP/EWMP; and **(2)** complying with Adaptive Management Process.

Procedural Objection to Draft Order

- ▶ State Board should consider the ***actual experiences*** of the Permittees and the LA Bd in working with the WMP/EWMP process ***before establishing State-wide policy.***
- ▶ “In addition, ***we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations,*** including the Receiving Water Limitations Issue Paper and comments by interested persons into our record for the petitions on the Los Angeles MS4 Order.” (Draft Order, p. 6.)
- ▶ “With regard to factual evidence regarding actions taken by Permittees to comply with the LA MS4 Order after it was adopted, ***we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order.***” (Id. at pp. 6-7.)
- ▶ Draft Order recognizes ***State-wide importance*** of the policy it will be adopting, but is unwilling to consider the only real-time application of the WMP/EWMP process before finalizing its policy.

Improving the WMP/EWMP Process

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Uncertainty of the WMPs/EWMPs

- ▶ Uncertainty of BMP performance
 - ▶ What happens if the BMP does not work?
 - ▶ What happens if there is no practical solution?
 - ▶ The design problems of numeric limits
- ▶ Uncertainty of Implementation Funding
 - ▶ How will communities afford the hundreds of millions of dollars to implement their watershed plans?
 - ▶ How will California's Disadvantage Communities afford these plans?
 - ▶ The lack of an economic protocol in the WMPs/EWMPs

Uncertainty of the WMP/EWMP

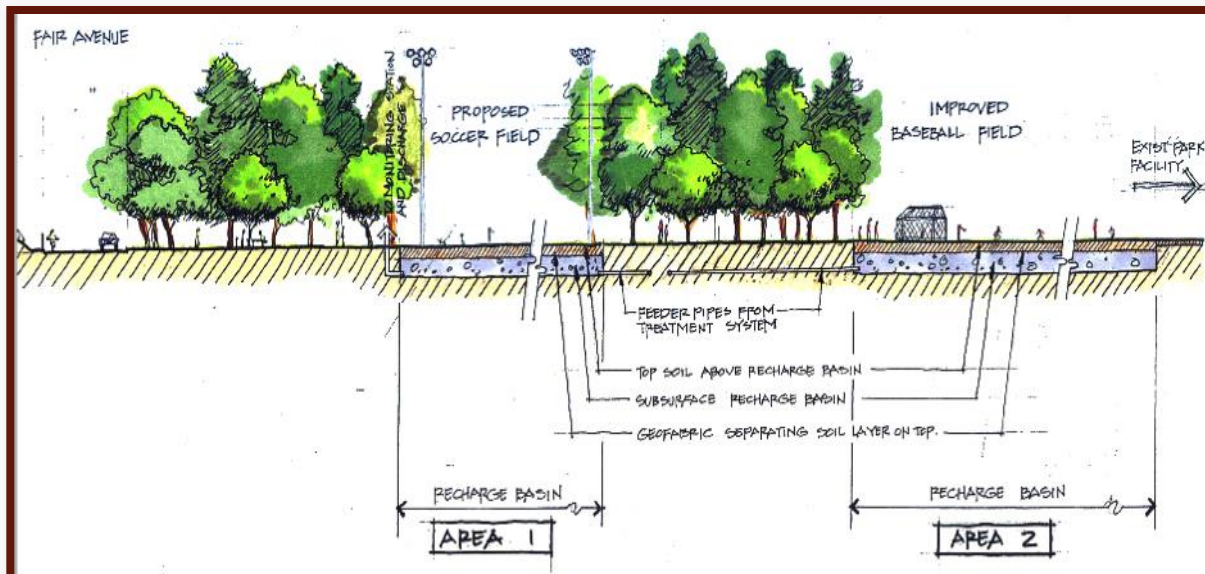
- ▶ The Uncertainty of Watershed Partnerships
 - ▶ Public acceptance of sending local tax money to fund a project in another community?
 - ▶ How will the costs be divided among the communities?
 - ▶ What happens if a disadvantaged community cannot afford the regional project?
 - ▶ What happens if the city can only afford the regional BMP, but has water quality problems in their own community?
 - ▶ Will the WMPs/EWMPS result in litigation (City vs. City, County vs. City)?
 - ▶ Can we really prioritize watershed projects?

Lessons Learned from California's Affordable Housing Policy

- ▶ State faces difficult and complex housing affordability problems
- ▶ The economic well being of the State rests in part on providing affordable housing
- ▶ Affordable housing laws require numeric limits and time schedules
- ▶ Many housing factors are out of the direct control of the cities
- ▶ Regulators and Legislature have resorted to punishments
- ▶ State has removed almost all financial support
- ▶ Endless “loop” of housing element revisions
- ▶ Litigation by housing advocates
- ▶ Eroding public support when decision forced on the community ¹⁷

Resolving Compliance Uncertainty – The Deemed Compliant Pathway

- ▶ Tentative Order recognizes that stormwater is complex and difficult
- ▶ Will require innovation and significant investments
- ▶ Low impact, green infrastructure, infiltration approaches
- ▶ Reuse of stormwater is promising long term approach
- ▶ Designing, funding and constructing multi-benefit, green infrastructure projects is complicated
- ▶ The urban environment is complex



The Success of the Los Angeles River Trash TMDL

- ▶ Paradigm shift to viewing stormwater as a resource
- ▶ Deemed compliant BMP pathway will provide local government with certainty necessary to make the large public investments in capture and use
- ▶ Practical value of a deemed compliant BMP pathway is found in the Los Angeles River Trash TMDL
- ▶ TMDL encouraged BMP designs
- ▶ BMPs certified by Regional Board as equivalent to numeric limits
- ▶ Deemed compliant BMP approach resulted in benefits to the environment, to the cities, to the water board and was cost effective
- ▶ No litigation

Resolving the Financial Uncertainties

- ▶ Recent examples illustrate the difficulty of seeking voter approval of stormwater taxes and fees
- ▶ Stormwater Funding Options – Providing Sustainable Water Quality Funding in Los Angeles County (October 2014) – highlights the difficulties of funding and outlines the opportunities
- ▶ Securing sustainable funding will take time, effort and collaboration
- ▶ WMP/EWMP process needs to recognize funding complexities
- ▶ Standardized and independent financial review planning review process with WMP/EWMP
- ▶ Based on CWA, EPA affordability and other socio-economic factors
- ▶ Examine future costs and financial capability of the watershed's communities
- ▶ Special emphasis on assisting the disadvantaged communities

Resolving the Watershed Partnership Uncertainties

- ▶ Relying on the adaptive management process, with deemed compliant BMPs
- ▶ Cities will be able to plan, construct and test regional BMPS absent the “fear of failure”
- ▶ Financial capability analysis will assist in prioritizing improvements
- ▶ Focus on most-environmentally beneficial and least costly projects to the watershed’s taxpayers

