



15 August 2013

VIA E-MAIL

Ms. Emel G. Wadhvani
Senior Staff Counsel
State Water Resources Control Board
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Subject: SWRCB/OCC FILE A-2236(a) THROUGH (kk) – Comment Letter Regarding
State Water Board Workshop on Receiving Water Limitations

Dear Ms. Wadhvani:

The City of Lakewood appreciates this opportunity to comment on the issue of Receiving Water Limitations (RWL) by responding to the questions posed in the State Water Board's letter of July 8, 2013. Confusion and concern has now been created by recent court rulings in the case of NRDC v. County of Los Angeles, further highlighting the importance of the State Water Board issuing a clarification of its existing RWL policy. The RWL language in the 2012 MS4 Permit for the Coastal Waters of Los Angeles County (except for discharges originating from the City of Long Beach) is almost the same as the RWL language in the 2001 MS4 Permit that led to prolonged litigation and two unfortunate opinions from the Ninth Circuit Court of Appeals, most recently on August 8, 2013. However, the 2012 Permit does provide for compliance options in the watershed management program (WMP) and enhanced watershed management program (EWMP) provisions of the Permit. These modifications to allow for compliance for certain RWL requirements (and other numeric limits) through a WMP or EWMP do not go far enough, however, toward providing municipal Permittees with real and legitimate pathways to compliance with all interim and final numeric limits. Moreover, the new RWL language must be unambiguous. The language must be amended to better reflect the episodic and variable nature of stormwater, reduce the vulnerability to third-party lawsuits, and provide alternative pathways for permit compliance. The language must preclude courts from changing the intent of the permit by separating out interrelated parts for separate review.

Your emailed letter of July 8 asked two questions:

1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?

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2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 permits?

These questions indicate a focus on either the WMP/ EWMP contained in Part VI of the 2012 Permit, or proposed modifications thereof, as the approach for revising the existing RWL language set forth in State Board Order No. 99-05 and used in Part 5A of the Permit, i.e., the language that has led to the recent troubling Ninth Circuit Court of Appeal decisions. Therefore, we will limit our comments to issues related to the two interrelated questions.

After reviewing the RWL language in both the 2001 and 2012 MS4 permits, reviewing the WMP/EWMP requirements of the 2012 Permit, and considering the comments of our staff and consultants, the City of Lakewood is of the opinion that, with appropriate revisions, the WMP/EWMP alternative in the Los Angeles MS4 Permit is conceptually a viable alternative approach to modifying receiving water limitations in MS4 permits. These revisions would have to account for differing permit provisions across the state and might need to be given a more generic name.

We are aware of the suggested RWL language revisions proposed by the California Stormwater Quality Association (CASQA) and an alternative approach being proposed by various LA Permit petitioning cities. Both have valid points. We agree strongly with CASQA's concerns with the current RWL permit language, as well as its discussion of practical impacts to municipalities and fundamental support for the concept of linking receiving water limitations and other permit requirements to compliance pathways.

Our City also agrees with much of what is contained in Attachment A to CASQA's letter on SWRCB/OCC File A-2236(a) through (kk) that has been circulated among cities for review. However, we are concerned that it lacks adequate protection for cities and believe that it must be amended. In particular, we are concerned that Section E.4.c focuses only on a Permittee's ability to comply with interim and final TMDL requirements. We believe that this section should apply more broadly to the ability to comply with applicable receiving water limitations and discharge prohibitions, as well as interim and final water quality-based effluent limitations (WQBELs) derived from waste load allocations in adopted TMDLs.

We further believe there should be a provision in Section E.5 of CASQA's suggested language that would provide that a permittee would be considered in compliance with receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs for portions of watersheds or subwatersheds served by best management practices

(BMPs) designed to retain all non-stormwater discharges and all stormwater discharges up to the 85th percentile, 24-hour design storm specified in Section E.1.e.

The alternative approach suggested by the petitioning cities focuses on the addition of four subsections to Section VI.C.1 of the 2012 Permit. The first proposed new subsection describes the requirements for any watershed management program, including enhanced watershed management programs, proposed by a Permittee. It also includes a procedure for the approval of alternative BMPs by the Regional Water Board when a Permittee demonstrates, to the satisfaction of the Regional Board in a public meeting, that it is unable to develop sufficient BMPs to achieve timely compliance with one or more receiving water limitations, discharge prohibitions, interim WQBELs, or final WQBELs due to technical infeasibility or substantial hardship. The second proposed new subsection provides that, "A Permittee's compliance with an approved program, including a program utilizing alternative BMPs, shall constitute a Permittee's compliance with the receiving water limitations, Discharge Prohibitions, and TMDLs and related WQBEL provisions set forth in Parts V.A, III.A.1, and VI.E of this Order."

The third section provides a mechanism to cure failures to meet a requirement or a date for its achievement in an approved WMP/EWMP program, or, if needed, a proposed adaptive modification to a program. This section also sets out the requirements to be considered in compliance with a WMP or EWMP in cases where a Permittee has cured a compliance deficiency or is following an approved adaptive management process to cure the deficiency. The fourth suggested new subsection of Section VI.C.1 includes a process for requesting an extension of a program deadline and for approval of the request by the Regional Water Board or the Executive Officer.

The City of Lakewood finds both of these approaches to correcting the deficiencies in the receiving water limitations in the 2012 Permit potentially attractive and workable, as long as two key elements are addressed:

- The use of the watershed management program as a viable alternative to the current RWL language must apply broadly to receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs; and
- There must be a provision that compliance with an approved WMP/EWMP constitutes compliance with receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs.

Our City regards these as critical issues. The State Water Board laid out an iterative process for complying with receiving water limitations in its Order 99-05 and has reiterated, in several subsequent orders, that local agencies are to follow an iterative BMP approach to protect water quality and generally are not required to strictly comply with numeric effluent limits.

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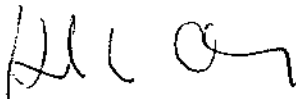
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We understand that some believe that the iterative process has not worked. We think that this is, in part, because the Regional Water Boards have not adequately implemented the process. Either the Permittee or the Regional Water Board may make a determination that discharges are causing or contributing to an exceedance of an applicable water quality standard, whereupon the Permittee is required to submit an RWL Compliance Report that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to exceedances of water quality standards. Perhaps the Los Angeles Water Board did not make the necessary determinations because it was underfunded and understaffed, or perhaps it lacked sufficient data to make such determinations. The data problem will be ameliorated by the robust monitoring and reporting requirements in the new Permit. The compliance reporting process should work better in the future, especially with modifications to the Permit to correct the deficiencies in the current RWL language based on the WMP/EWMP options in the Permit.

We look forward to the State Water Board addressing this serious issue as part of addressing the Petitions the Board has received on the Los Angeles MS4 Permit (Order No. R4-2012-0175). Resolving this issue could go a long way toward resolving many petitioners' concerns with the new Permit.

Sincerely,



Howard L. Chambers
City Manager

Attachments: Exhibit 1 (CASQA Recommended Language)
Exhibit 2 (LA Petitioning Cities' Alternative Approach)

Exhibit 1

**CASQA Recommended Language
(Attachment A to CASQA's Letter)**

Attachment A

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Part E, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Part E, discharges from the MS4 of stormwater, or non-stormwater, for which a Permittee is responsible, shall not cause a condition of nuisance.

E. STRATEGIC COMPLIANCE PROGRAM

1. General

- a. The purpose of this Part is to allow for a Strategic Compliance Program (hereafter referred to as "Program") to address and provide for compliance with the requirements of this Order. The Program may be organized on a watershed scale or other appropriate basis and shall specify implementation of customized strategies, control measures, and BMPs on an established schedule.
- b. The Program may be structured for a watershed (or subwatershed), or for a jurisdiction or collection of jurisdictions.
- c. Participation in a Program is voluntary, and allows a Permittee to progressively address the highest water quality and/or watershed priorities.
- d. Unless otherwise delineated in this Order, the Program shall include a strategy and schedule for implementing BMPs for constituents that are causing or contributing to exceedances of applicable water quality objectives, or causing a condition of nuisance in specified water bodies. The Program may include, but is not limited to, specifically identified waterbody-pollutant combinations, watershed management plans, volume based controls designed to control the volume of run-off, and multi-benefit regional projects that, wherever feasible, retain the applicable water quality design storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood management and water supply.
- e. As used herein, "design storm" shall refer to the 85th percentile, 24-hour storm event or equivalent.

2. Requirements

- a. The Program shall be designed to address (i) applicable TMDL requirements in Part ..., (ii) contributions to exceedances of water quality standards in Parts ..., and (iii) non-stormwater discharges that are to be effectively prohibited pursuant to Part The Program shall also ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP).
- b. The Program shall identify the water quality priorities and establish goals to be addressed by the Program. Interim and final goals may take a variety of forms such as TMDL established requirements (e.g., waste load allocations, water quality based effluent limits, etc.), action levels, pollutant concentration, load reductions, performance standards, impaired water bodies to be delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, runoff volume reduction, or other appropriate metrics described in the Program.

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- c. The Program shall be based on or include an evaluation of existing water quality conditions for the jurisdiction(s), watershed, sub-watershed and/or waterbody-pollutant combinations that are being addressed with the Program.
- d. Based on the evaluation of historic and existing water quality conditions, the Program shall classify water body-pollutant combinations into categories to assist in prioritizing Program efforts. Examples of categories may include: classification of water body-pollutant combinations for which wasteload allocations are established pursuant to an adopted TMDL; classification of pollutants where a TMDL has not yet been developed but where data indicate water quality impairment in the receiving water according to the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (State Listing Policy) and for which MS4 discharges are causing or contributing to the impairment; and, classification of pollutants for which there are insufficient data to indicate water quality impairment in the receiving water according to the State's Listing Policy, but which on occasion may exceed applicable receiving water limitations contained in this Order and for which MS4 discharges are causing or contributing to the exceedance.
- e. The Program shall identify potential sources within the jurisdiction or watershed for the highest priority water quality issue(s) as specified in the Program. The Program shall identify known and suspected stormwater and non-stormwater pollutant sources in discharges to the MS4 and from the MS4 to receiving waters and other stressors related to MS4 discharges associated with the water quality priorities.
- f. A customized or modified monitoring program shall be submitted as part of the Program.
- g. Based on the findings of the source assessment, the goals to be achieved within each Program area shall be prioritized and sequenced. Program priorities shall include at a minimum:
 - i. TMDLs
 - ii. Receiving waters where data indicate impairment or exceedances of receiving water limitations or violations of Discharge Prohibition, and the findings from the source assessment implicates discharges from the MS4 as a primary source of the impairment.
- h. The Program shall identify strategies, control measures, and BMPs to implement through their individual Stormwater Management Plans, and/or collectively on a jurisdictional, watershed or sub-watershed scale.
- i. The Program shall include methodology(ies) that will assess the effectiveness of implementation strategies, control measures and BMPs selected to address the priority water quality issues of concern.
- j. The Program shall incorporate compliance schedules from adopted TMDLs and, develop interim milestones and dates for their achievement in a manner that is consistent with the TMDLs. The Program shall also include compliance schedules

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and interim milestones and dates to measure progress towards addressing other water quality priorities that have been identified.

- k. The Program shall include an adaptive management process that provides for review of Program implementation at appropriate intervals. The adaptive management process must evaluate the following: 1) Progress toward achieving TMDL requirements according to established compliance schedules; 2) Progress toward achieving improved water quality in MS4 discharges and addressing Receiving Water Limitations and Discharge Prohibition; 3) Progress towards achievement of any other identified milestones; and 4) Re-evaluation of water quality priorities based on more recent water quality data. Based on the review, the Permittees shall report proposed Program modifications to the Regional Water Board in the Program's Annual Report. Such modifications shall be implemented upon Regional Water Board approval.

3. Process for Development and Approval

- a. Permittees that elect to develop a Program or have an existing or modified program recognized as a Strategic Compliance Program shall notify the Regional Water Board and establish a mutually agreed upon schedule for development and submission of the Program or modification of an existing program.
 - i. Such notification shall specify the Permittee(s) requested submittal date. The requested submittal date should reflect the complexity associated with the Program being developed by the Permittee(s).
 - ii. As part of the notification, Permittees shall identify applicable interim and final TMDL-based requirements and their associated compliance deadlines. Permittees shall identify control measures, where possible from existing TMDL implementation plans that have been or will be implemented by participating Permittees concurrently with the development of a Program to ensure that MS4 discharges achieve compliance by applicable compliance deadlines occurring prior to approval of a Program.
- b. Until the Program is approved by the Executive Officer, Permittees that elect to pursue a submission pursuant to this Part shall:
 - i. Continue to implement control measures in their existing stormwater management Plans, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv);
 - ii. Continue to implement control measures to eliminate non-stormwater discharges through the MS4 that are a source of pollutants to receiving waters consistent with CWA section 402(p)(3)(B)(ii); and
 - iii. Implement control measures for MS4 discharges to achieve compliance with interim and final TMDL-based requirements by the applicable compliance deadlines occurring prior to approval of a Program.
 - iv. Permittees that do not submit a Program by the mutually agreed upon submittal date as set forth in provision Part E.3.a.i (unless such date has

been extended by the Executive Officer), shall be subject to the baseline requirements in Part ... and shall demonstrate compliance with receiving water limitations pursuant to Part ... and with applicable interim water quality based effluent limitations in Part

4. Implementation

- a. Each Permittee shall begin implementing the Program upon approval by the Regional Water Board or the Executive Officer on behalf of the Regional Water Board, in accordance with the schedule for implementation set forth in the Program.
- b. Permittees may request an extension of deadlines for achievement of interim milestones and final compliance dates (unless final compliance dates are specifically dictated by adopted TMDLs). Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request justification for the extension. Extensions shall be subject to approval by the Regional Water Board Executive Officer.
- c. Prior to the effective final and interim compliance dates for TMDLs, and upon a timely request from a Permittee or the Permittees, the Board shall consider the Permittees' ability to comply with the interim and final TMDL requirements and if necessary, reopen the Order or the approved TMDL. In considering the requesting Permittees' ability to comply, the Permittee shall demonstrate to the satisfaction of the Regional Water Board that it is unable to develop sufficient BMPs to timely achieve compliance with interim or final TMDL requirements because the necessary BMPs would be either technically infeasible or would otherwise result in a substantial hardship to the Permittee.

5. Compliance determination.

- a. A Permittee's compliance with an approved Program shall constitute a Permittee's compliance with requirements of this Order that the approved Program is intended to address, including the receiving water limitation provisions in Part D.
- b. If a Permittee fails to meet a requirement or date for its achievement in an approved Program, the Permittee shall be subject to the Provisions of Part D for the waterbody-pollutant combination(s) that were to be addressed by that requirement until that requirement is met.
- c. Upon notification of a Permittee's intent to submit a Program and prior to approval of the Program, a Permittee's compliance with the following shall constitute a Permittee's compliance with the receiving water limitations in Part D:
 - i. Provides timely notice of its intent to submit a Program;
 - ii. Meets all interim and final deadlines for development/modification of a Program as agreed to by the Regional Water Board's Executive Officer;
 - iii. For the area or waterbody-pollutant combination(s) covered by the Program, targets implementation of control measures in its existing stormwater management program, including watershed control measures to address non-stormwater discharges of pollutants through the MS4 to

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receiving waters, and known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations; and,

- iv. Submits for approval its Program within the timeframe as agreed to by the Permittees and the Regional Water Board's Executive Officer.
- d. A Permittee shall be deemed in compliance with an applicable interim and final water quality-based effluent limitation and interim and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:
- i. There are no violations of the final water quality-based effluent limitation for the pollutant at the Permittee's applicable MS4 outfall(s);
 - ii. There are no exceedances of applicable receiving water limitation for the pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);
 - iii. There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL;
 - iv. The Permittee's discharge is within its waste load allocation; or
 - v. At regulated development projects or multi-benefit regional projects in watersheds or subwatersheds tributary to the applicable receiving water where Permittees are implementing a Strategic Compliance Program, (i) all non-stormwater and (ii) all stormwater runoff up to and including the volume equivalent to the water quality design storm are retained.

Exhibit 2

**PROPOSED ADDITIONS/MODIFICATIONS TO
WMP/EWMP APPROACH IN LA MS4 2012
PERMIT**

AUGUST, 2013

SECTION 1: ADDITIONS TO PART VI.C.1 TO LA MS4 2012 PERMIT.

h. Any Watershed Management Program, including an EWMP (collectively, "Program") proposed by a Permittee shall describe all significant BMPs to be implemented to achieve compliance with the applicable Receiving Water Limitations, Discharge Prohibitions and interim and final WQBELs derived from waste load allocations in adopted TMDLs (collectively, "Discharge Limitations"), and shall include a schedule of compliance for the development and implementation of the proposed BMPs, as well as the projected dates for the achievement of the Discharge Limitations. Where a Permittee demonstrates to the satisfaction of the Regional Board at a public meeting that it is unable to develop sufficient BMPs to timely achieve compliance with any particular Discharge Limitation or Limitations because the necessary BMPs would be either technically infeasible or would otherwise result in a substantial hardship to the Permittee ("Infeasible BMPs"), then the Program shall include: (i) the necessary BMPs and compliance schedule for all Discharge Limitations achievable through feasible BMPs; (ii) a description of the Discharge Limitation determined by the Permittee to be unachievable and an analysis of why the necessary BMPs are considered to be Infeasible BMPs; and (iii) a description of the BMPs the Permittee is proposing to implement in place of the Infeasible BMPs ("Alternative BMPs"), along with a schedule of compliance for their implementation and a schedule by which the Alternative BMPs are projected to result in achieving the subject Discharge Limitation.

i. A Permittee's compliance with an approved Program, including a Program utilizing Alternative BMPs, shall constitute a Permittee's compliance with the Receiving Water Limitations, Discharge Prohibitions and TMDL and related WQBEL provisions set forth in Parts V.A, III.A.1 and VI.E of this Order.

j. If a Permittee fails to meet a requirement or date for its achievement in an approved Program, the Permittee shall cure the compliance deficiency as soon as reasonably possible, or if it is unable to do so, propose a modification to its Program to the Executive Officer that follows an adaptive management process to address the deficiency. So long as the Permittee has timely cured the deficiency or is otherwise developing and thereafter following an approved adaptive management process to cure the deficiency, the Permittee shall continue to be considered in compliance with the subject requirement, including where the deficiency involves an exceedance of an applicable Discharge Limitation.

k. A Permittee may request an extension of any deadline in the Program by making such a request in writing to the Executive Officer as soon as the Permittee determines an extension will be necessary. Extensions shall become effective only after approval by the Regional Water Board or the Executive Officer.

SECTION 2: FURTHER REVISIONS TO INCORPORATE LANGUAGE IN SECTION 1 INTO LA 2012 MS4 PERMIT

[The above proposed additions/revisions to the LA 2012 MS4 Permit will require additional language modifications throughout the Order to ensure internal consistencies and avoid ambiguity within the WMP/EWMP provisions on the issue of a Permittee's deemed compliance with applicable Discharge Limitations.]