



THE CITY OF SAN DIEGO

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Subject: Los Angeles MS4 Permit Petitions (SWRCB/OCC File A-2236(a) through (kk))

Dear Ms. Wadhvani:

The City of San Diego appreciates the opportunity to comment on the receiving water limitations compliance provisions of the Los Angeles Municipal Separate Storm Sewer Permit (Los Angeles MS4 Permit). The City recognizes that the State Board's decision on the pending petitions may result in new state-wide precedential language.

This issue is vitally important to the City. As you may know, the San Diego Regional Water Quality Control Board recently issued a regional MS4 permit (San Diego MS4 Permit) that imposes significant watershed planning requirements. Unlike the Los Angeles MS4 Permit, however, the San Diego MS4 Permit's watershed planning requirements are mandatory and have no relationship to compliance with receiving water limitations. Instead, the San Diego MS4 Permit imposes strict liability, irrespective of the good faith actions taken to reduce pollutants in MS4 discharges. Imposing strict liability for MS4 discharges is not appropriate, given the variability of potential sources of pollutants in urban runoff and the unpredictable Southern California climate. The City strongly encourages the State Board to adopt precedential receiving water limitations language that allows MS4 permittees to comply with receiving water limitations through alternative compliance pathways such as those included in the Los Angeles MS4 Permit. The City adopts the term "strategic compliance programs," coined by the California Stormwater Quality Association (CASQA), to describe these alternative compliance pathways.

Your letter dated July 8, 2013, poses two specific questions: (1) whether the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 Permit is an appropriate approach to revising the receiving water limitations in MS4 permits; and (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.

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The City responds: (1) the watershed/enhanced watershed management program is an appropriate approach to receiving water limitations compliance; and (2) alternative strategic compliance programs with the same core features, for example, CASQA's proposal, also would be appropriate.

## **ANSWERS TO STATE BOARD QUESTIONS**

### **I. The Strategic Compliance Program in the Los Angeles MS4 Permit is An Appropriate Approach to Revising the Receiving Water Limitations in MS4 Permits**

The Los Angeles MS4 Permit includes a strategic compliance program that gives permittees the option to prepare a watershed management program or enhanced watershed management program to prioritize actions to be taken to reduce pollutants in MS4 discharges. If a permittee elects to prepare a watershed management program or enhanced watershed management program, then "full compliance with all requirements and dates for their achievement" in the approved program "shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the specific water body-pollutant combinations addressed." Los Angeles MS4 Permit § VI.C.2.b.

The City identifies the following core elements of an appropriate strategic compliance program, all of which are included in the Los Angeles MS4 Permit:

- Voluntary participation by MS4 permittees (§ VI.C.1.b)
- Strategic compliance plans may be prepared on watershed or jurisdictional basis (§ VI.C.1.e)
- Best Management Practice (BMP)-based compliance with numeric water quality standards (§§ VI.C.2.b; VI.C.3.a)
- Ability to prioritize pollutant-water body combinations (§ VI.C.1.f.i)
- Schedules for meeting interim milestones and final targets for priority pollutant-water body combinations (§ VI.C.1.d)
- Analytic rigor to ensure that progress will occur in addressing problematic MS4 discharges (§§ VI.C.1.f.iv; VI.C.1.g)
- Adaptive management to allow for adjustment of BMPs as necessary (§ VI.C.1.f.iv)
- Stakeholder process (§ VI.C.1.f.v)
- Good faith compliance with strategic compliance program constitutes compliance with receiving water limitations and discharge prohibitions (§ VI.C.2.b)
- Compliance determinations based on strategic compliance program begin upon notification of intent to participate (§ VI.C.2.d; § VI.C.3.b)

The City would welcome the opportunity to participate in a strategic compliance program like the one in the Los Angeles MS4 Permit. Strategic compliance programs that provide for BMP-based compliance better reflect the reality and practice of storm water management. Moreover, strategic compliance programs are more likely to result in water quality improvements than the status quo receiving water limitations language because they encourage collaboration between

permittees to implement regional projects that cross jurisdictional boundaries. Strategic compliance programs would improve the ability of municipal storm water program staff to obtain the funding needed to implement water quality projects and BMPs. It is more palatable to elected officials and taxpayers to spend millions of dollars on water quality improvement projects where implementing those projects will achieve permit compliance. The Los Angeles MS4 permit contains the core elements of an appropriate strategic compliance program, and is therefore an appropriate approach to revising the receiving water limitations provisions in MS4 permits.

**A. The Strategic Compliance Program in the Los Angeles MS4 Permit Places Appropriate Liability on MS4 Permittees for Receiving Water Exceedances**

The strategic compliance program in the Los Angeles MS4 Permit is an appropriate response to the strict liability created by *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011), *rev'd on other grounds by* 133 S. Ct. 710 (2013).

The current receiving water limitations language, based on State Board Order WQ-1999-05, states, "Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited." *E.g.*, Los Angeles MS4 Permit § V.A.1. This broad prohibition is standard state-wide permit language that, until 2011, was understood as a BMP-based compliance target. *E.g.*, State Board Order WQ-2001-15 at 7-8 (Nov. 15, 2001). Under State Board guidance, permittees could maintain permit compliance by implementing the iterative process of modifying BMPs in response to an exceedance:

[The receiving water limitations language] does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs . . . [T]he iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

State Board Order WQ-2001-15 at 7.

In 2011, however, the Ninth Circuit Court of Appeals ruled that compliance with the receiving water limitations provision is determined by water quality monitoring results on an outfall-by-outfall basis. *NRDC*, 673 F.3d at 883. The *NRDC* case fundamentally changed the consequence for receiving water limitations exceedances, from requiring additional BMPs to imposing strict liability.

The significance of the *NRDC* case cannot be overstated. Under *NRDC*, the current receiving water limitations provision exposes the City to a risk of liability if a discharge from any of its approximately 7,000 outfalls exceeds receiving water standards at any time. This strict liability applies irrespective of the City's good faith effort to avoid exceedances through implementing BMPs. The *NRDC* case essentially took every receiving water standard in Basin Plans, the Ocean

Plan, and any other water quality control plan, and turned those standards into de facto effluent limitations. *NRDC*, 673 F.3d at 892 (holding that the receiving water limitations provision “prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere”).

Imposing strict liability on MS4s for receiving water limitation exceedances is not appropriate because of the unique nature of urban runoff. Liability standards applicable to traditional point sources do not make sense because MS4s, unlike a factory or wastewater treatment plant, are not a closed system that can carefully control their inputs and discharges. Municipalities and flood control districts have a duty to accept and convey runoff in whatever form it comes to them, irrespective of the pollutants it may contain. *See, e.g., Arreola v. County of Monterey*, 99 Cal. App. 4th 722 (2002) (finding the county liable for inverse condemnation and nuisance for failing to properly convey flood waters). Imposing numeric end-of-pipe effluent limits for every conceivable pollutant would require a huge capital outlay of structural treatment control BMPs throughout a diffuse MS4 system -- an undertaking that is not technologically, socially, or economically practicable. Moreover, the climate and topography of Southern California mean that even where treatment control BMPs are designed for compliance with end-of-pipe numeric limits under anticipated conditions, occasional exceedances in large storms are still likely.

**B. The San Diego MS4 Permit, by Contrast, Lacks a Strategic Compliance Program and Places Inappropriate Strict Liability on Permittees**

The San Diego MS4 permit proceedings underscore the need for statewide policy guidance on this issue. In adopting an MS4 permit without a strategic compliance program, the San Diego Regional Board parted ways with its sister agency at the Los Angeles Regional Board. The San Diego MS4 Permit requires watershed plans called Water Quality Improvement Plans. Water Quality Improvement Plans are substantially similar to enhanced watershed management programs in LA MS4 Permit, except the enhanced watershed management programs are optional, include a receiving water limitations compliance component, and require retention of the 85<sup>th</sup> percentile storm.

A prior draft of the San Diego MS4 Permit included a watershed-based strategic compliance program substantially similar to the LA MS4 Permit. Copermittees would have been allowed to establish compliance with the discharge prohibitions and receiving water limitations of the San Diego MS4 Permit by preparing and implementing Water Quality Improvement Plans. San Diego Regional Water Quality Control Board Draft Tentative Order R9-2013-0001 § II.B.3.c (Mar. 27, 2013). In order to use this compliance option, copermittees would have been required to show through watershed modeling that implementation of the Water Quality Improvement Plans would achieve the watershed numeric goals within the established schedules. *Id.* § II.B.3.c(1)(b). The Environmental Protection Agency opined that the Water Quality Improvement Plan compliance option was acceptable because “it does establish a process intended to ensure that measurable water quality improvements are achieved.” Transcript vol. I, 14:16-17 (May 8, 2013). The compliance option established a high bar but at least gave copermittees a chance to comply with the San Diego MS4 Permit. The 39 copermittees under the

San Diego MS4 Permit unanimously supported the watershed-based strategic compliance program concept.

On May 8, 2013, however, the San Diego Regional Board voted to remove the Water Quality Improvement Plan compliance alternative from the San Diego MS4 Permit. This vote came at the end of three days of public hearings and no less than ten stakeholder workshops, during which receiving water limitations compliance provisions were discussed extensively. After staying silent on this issue throughout the permit adoption process, San Diego Regional Board Executive Officer David Gibson recommended removal of the Water Quality Improvement Plan compliance option after the close of the public hearing. Mr. Gibson said that the strategic compliance option “is truly what I want to recommend, but I cannot do that today” because “I do not think the time itself is right now.” Transcript vol. II, 88:22-23, 25; 89:1 (May 8, 2013). While Mr. Gibson’s reasons for recommending removal of the strategic compliance option are not entirely clear, it appears that he felt the copermittees lack the commitment required to implement a strategic compliance program. Transcript vol. II, 91:24-25 (questioning the “political and social commitment” of the copermittees to pay for the strategic compliance option). In their closing remarks, three San Diego Regional Board members suggested they would have voted to keep the strategic compliance option but for Mr. Gibson’s recommendation. Transcript vol. II, 100:8-9; 101:6-7; 103:2-9. As there were only five members appointed to the San Diego Regional Board, three votes was a majority.

Without the strategic compliance option, the City is required to spend untold resources on watershed planning requirements that will have no impact on the City’s ability to comply with the receiving water limitations. In fact, San Diego Regional Board staff admitted at the permit adoption hearing that the copermittees will not be able to comply with the receiving water limitations provisions within the five-year term of the permit. The lead permit drafter testified, “We do acknowledge that [restoring the water quality standards within our receiving waters] will take some time. And we know that it’s going to take more than five years. We weren’t expecting anyone to achieve the water quality standards in five years.” Transcript vol. II, 75:15-19.

The adoption of the San Diego MS4 Permit without a strategic compliance program was an abuse of discretion for the reasons stated in the City’s petition to the State Water Board, dated June 7, 2013. This issue would be corrected by allowing the Water Quality Improvement Plans to form the basis of a strategic compliance program, as in the Los Angeles MS4 Permit.

**C. The City’s Efforts to Reduce Bacteria In Mission Bay Demonstrate Why Strategic Compliance Programs Are an Appropriate Approach to Revising Receiving Water Limitations**

The City’s Mission Bay bacteria source control program is a concrete example of how strategic planning programs improve water quality, and why strict liability for storm water exceedances is not appropriate. In 1998, Mission Bay was placed on the Clean Water Act section 303(d) list as an impaired water body for bacteria. At that time, Mission Bay had more beach postings and closures than any other beach in San Diego County. Beginning in 2001, the City undertook a targeted effort to identify and eliminate bacteria sources, implementing the “iterative process”

that the City understood at the time to be required to achieve compliance with its MS4 permit, based on State Board guidance such as State Board Order WQ-2001-15.

As a result, bacteria-related postings and closures at the beaches in Mission Bay have been reduced by over 99 percent. This success meant that the Mission Bay beaches were not included in a Total Maximum Daily Load (TMDL) order for bacteria covering twenty other beaches and creeks in the San Diego region (San Diego Regional Board Order No. R9-2010-0001).

A summary of the actions taken over the past thirteen years demonstrate the City's substantial commitment of resources to address this issue and good faith effort to comply with the receiving water limitations through the iterative process. From 2001 to 2004, the City collected weekly samples at 24 locations in Mission Bay and its tributaries. During this time period, the City and San Diego Regional Board also conducted epidemiological studies at six locations in Mission Bay to determine sources of the bacteria. From 2002 to 2003, the City studied how contaminants move in East Mission Bay under a variety of physical conditions. The City also analyzed whether the sediments in Mission Bay act as a source of bacteria to receiving waters.

In 2004, after being awarded a Proposition 13 Clean Beaches Initiative grant, the City completed a study to identify the sources of bacteria around Mission Bay and to recommend actions to eliminate those sources. The City investigated potential sources of bacteria from park restrooms, moored and anchored boats, and other potential sources in an adjacent park. Then the City identified the origin of the bacteria through Molecular Source Tracking techniques, including determining whether groundwater or park runoff was transporting bacteria to receiving waters. The study found that the primary sources in the immediate vicinity of Mission Bay were avian. The study determined that bacteria from avian sources was being transported to receiving waters in four ways: through irrigation runoff, storm drains, intertidal sediments, and the wrack line during high tide. Because avian sources themselves cannot be controlled, the City focused on eliminating bacteria concentrations in irrigation runoff, storm drains, intertidal sediments, and at the wrack line.

After identifying the primary sources in the immediate vicinity of Mission Bay, the City started to look farther upstream. From 2007 to 2010, the City assessed the Tecolote Creek watershed to identify and remediate bacteria sources upstream of Mission Bay. During the assessment, City staff monitored storm events, sampled for bacteria in Tecolote Creek, collected wet weather pollution concentrations, sampled at catch basins, residential uses, commercial uses, transit corridors, and the MS4, analyzed bacteria concentrations from various land uses, and implemented bioassessment monitoring. The City conducted a loading analysis to determine the specific sources that contribute the greatest bacteria loads during wet weather events. The study identified transportation corridors, commercial areas, and industrial land uses as the primary wet weather sources of bacteria. During dry weather conditions, residential and commercial areas are the primary sources of bacteria.

Based on the results of these studies, the City has taken a number of specific actions to reduce bacteria loading into Mission Bay. The City installed a series of low-flow diversions to effectively eliminate dry weather discharges from the MS4. The City also changed irrigation

practices, changed comfort station cleaning practices, moved and installed berms around dumpsters, removed decaying eel grass from beaches, removed bird waste from Campland beach, installed berms around RV pump stations at South Shores Park, and installed doggie-waste dispensers throughout the area. The City also has used its award-winning Think Blue program for focused public education and outreach activities.

The City's efforts have been extremely successful. As a result of the City's implementation of the source identification studies, Tecolote Creek assessment, and other initiatives to reduce bacteria concentrations in Mission Bay, the postings and closures at the 17 beaches in Mission Bay have been drastically reduced -- from 1,480 in 2000 to 7 in 2012 -- with an average yearly reduction of approximately 78 percent. While the City's targeted watershed program continues to significantly reduce the number of bacteria exceedances in Mission Bay, there are still some exceedances, and so the City continues to learn from its experience and try new ways to reduce bacteria levels in Mission Bay. The City submits that this type of adaptive management is how the iterative process was intended to work.

Is it good public policy to hold the City strictly liable for receiving water limitation exceedances under these circumstances? Unfortunately, that is exactly what the newly adopted San Diego MS4 Permit does. A strategic compliance program, on the other hand, would give the City an opportunity to show that it is taking actions expected to avoid MS4 discharges that cause or contribute to these exceedances and provide an enforceable plan of action, where the City's good faith implementation of that plan would result in compliance with its MS4 permit.

## **II. Other Strategic Compliance Programs May Also Be Appropriate**

While the Los Angeles MS4 Permit provides one example of an appropriate revision to receiving water limitations, it is not the only appropriate revision. The City encourages the State Board to adopt a precedential order that provides regional boards some flexibility in developing strategic compliance programs, in recognition that a one-size-fits-all approach is not appropriate.

The Los Angeles MS4 Permit approach may not be appropriate for state-wide application because it is more complicated than necessary and may not be the best fit for areas without many TMDLs already in place. For example, the Los Angeles MS4 Permit establishes four tiers of pollutant-water body combinations based on TMDL status: (1) those addressed by a TMDL; (2) pollutants-water body combinations on the Clean Water Act section 303(d) list that are in the same class as a pollutant addressed in a TMDL in that watershed; (3) pollutant-water body combinations on the Clean Water Act section 303(d) list that are not in the same class as a pollutant addressed in a TMDL in that watershed; and (4) pollutants for which there are exceedances in receiving water limitations but no Section 303(d) listing. Los Angeles MS4 Permit §§ VI.C.2.a; VI.C.3. The Los Angeles MS4 Permit also requires permittees to prepare a third-party TMDL under some circumstances. *Id.* § VI.C.2.a.ii(5)(b).

These provisions may make sense in the Los Angeles region, where there are dozens of TMDLs incorporated into the Los Angeles MS4 Permit, and many watersheds have multiple TMDLs. The Los Angeles Regional Board and Los Angeles MS4 permittees presumably have developed

significant technical expertise through implementing these TMDLs, some of which have been in place for more than a decade. The Los Angeles Regional Board staff also appears to be far larger than many other regional boards, providing the substantial resources necessary to implement the nuances of particular approach it has developed. A more streamlined strategic compliance program would be more appropriate in areas where storm water management is less driven by TMDLs. For example, San Diego Regional Board staff stating during the recent MS4 permit proceedings that part of the reason for their shift to a watershed planning-based permit was to achieve water quality improvements so that new TMDLs would not be necessary.

The CASQA proposal contains all of the core elements for an appropriate strategic compliance program and would be a suitable alternative to the Los Angeles MS4 Permit approach for state-wide application. The Water Quality Improvement Plan approach in the San Diego MS4 Permit would also provide an appropriate basis for a strategic compliance program, provided that minor modifications to the San Diego MS4 Permit are made to include all of the core elements listed above.

### CONCLUSION

The City respectfully requests that the State Board revise the precedential receiving water limitations language to expressly allow for strategic compliance programs. The City looks forward to the workshop, and appreciates the effort by the State Water Board to address this important issue. If you have questions regarding the City's comments, please contact Ruth Kolb, Program Manager, Transportation & Storm Water Department, at (858) 541-4328 or at [rkolb@sandiego.gov](mailto:rkolb@sandiego.gov).

Sincerely,



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cc (via email): Petitioners and Their Counsel of Record

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