



Municipal Services Agency

Department of Water Resources

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June 23, 2008

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Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
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**Comments on Tentative Order No. R5-2008-___ to Update Order No. R5-2002-0206/
NPDES No. CAS082597; Cities of Citrus Heights, Elk Grove, Folsom, Galt, Rancho
Cordova, Sacramento, and County of Sacramento; Storm Water Discharges from Municipal
Separate Storm Sewer System (MS4), Sacramento County**

On behalf of the permitted agencies in the Sacramento Stormwater Quality Partnership (listed above), thank you for giving us the opportunity to submit these comments on the Tentative Order published by your agency on May 16, 2008. Additionally, I would like to thank your staff, especially Mr. Greg Vaughn and Ms. Kim Schwab, for their work preparing the permit and actively seeking our input on critical issues. Overall, we believe that the permit will further our urban runoff quality management efforts in the Sacramento area.

The Permittees have been regulated under the NPDES MS4 Permit since May 1990, and have been implementing comprehensive Stormwater Quality Improvement Plans (SQIPs) that define our strategies for reducing the discharge of pollutants from the Sacramento Urbanized Area's storm drain system to the maximum extent practicable. We are proud of our many accomplishments and the contributions we have made to advance the science and understanding of stormwater management. We believe the proposed permit reflects and builds on those achievements.

In June 2007, we submitted our Report of Waste Discharge along with draft SQIPs. In November 2007, we prepared and submitted an Antidegradation Analysis. Collectively, these submittals describe the history and evolution of our program and present key findings and results that serve as the basis for proposed SQIP implementation priorities and activities. Our comments on this Order are consistent with the activities identified in the June 2007 draft SQIPs.

"Managing Tomorrow's Water Today"

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Our comments are contained in the following attachments:

- Attachment 1: Comments on Tentative Waste Discharge Requirements (WDR)
- Attachment 2: Comments on Tentative Monitoring and Reporting Program (MRP)

Thank you for considering our comments. If you have any questions on these comments, please do not hesitate to contact me at (916) 874-4681 or Sherill Huun at the City of Sacramento, at (916) 808-1455.

Sincerely,

Kerry Schmitz, P.E.
Stormwater Quality Program Manager

Attachments

Copies: Greg Vaughn, Regional Water Board
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ATTACHMENT 1

Comments on Tentative Waste Discharge Requirements (WDR) by Sacramento Stormwater Quality Partnership

In General

Typographical and grammatical errors – Need to check entire document for minor errors that can potentially change the meaning of a sentence. We have done our best to point out those we found, but there may be others.

Stormwater Quality Improvement Plan – Need to change references in entire document from “Storm Water Quality Improvement Plans” to “Stormwater Quality Improvement Plans.”

Findings

Finding 3 (p. 1) – Reference to current Order should be R5-2002-0206. The number shown is for Stockton.

Finding 23 (p. 5) – Since this finding discusses other California programs, the Washtenaw County (Michigan) reference should be deleted and replaced with a citation to support the claim about results of other programs in California. The format of this citation should also be changed to a footnote to be consistent with the other citations throughout the permit.

Finding 29 (pp. 6-8) – Unfunded Mandate

This extensive finding asserts many conclusions of law that are not appropriate. In general, findings are required to “bridge the analytical gap between raw evidence and the ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; see also *In Re Petition of the City and County of San Francisco, et al.*, SWRCB Order 95-4, 1995 WL576920 at pp. 4-5.) Finding 29 fails to meet this essential test as it reads more like a legal brief than a regulatory agency finding that bridges the Regional Water Board’s evidence to the permit provisions contained within the Tentative Order. Our specific comments on the various elements of the finding are provided here.

1) *Finding 29 (1st para) asserts that the Order “does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section(6) of the California Constitution” because the Order implements “federally mandated requirements” under Section 402 of the Clean Water Act. (Order at p. 6.)*

The Permittees object to this assertion on several grounds. The Regional Water Board staff’s purpose for including this finding is suspect as it raises an issue that has recently been unsuccessfully litigated in the recent *County of Los Angeles v. Commission on State Mandates* (2007). In that case, the Court held that whether the permit obligation(s) in question constitutes a state or federal mandate is a question of fact which must be first addressed by the Commission on State Mandates. The Regional Water Board’s jurisdiction does not include decisions or determinations regarding what is, or what is not an unfunded mandate subject to subvention under

the California Constitution. The Regional Water Board's jurisdiction is limited to water quality and related functions. Determining what constitutes an unfunded mandate is the charge of the Commission on State Mandates. (Government Code §§ 17551 and 17552; *See also County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 907 ("Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under *article XIII, section 6*, is a matter of the Commission to determine in the first instance.") Thus, it is not appropriate for the Regional Water Board staff to propose a finding that attempts to make a conclusion of fact for the Commission on State Mandates.

Furthermore, even if a program is required in response to a federal mandate, a subvention of state funds may be in order. For example, Government Code § 17556(c) provides that if a requirement was mandated by federal law or regulation, but the [state] "statute or executive order mandates costs that exceed the mandate in that federal law or regulation" a subvention of funds is authorized. Also, even if the costs were mandated to implement a federal program, if the "state freely chose to impose the costs upon the local agency as a means of implementing" that federal program, "the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577-78.) The permit proposes to shift to the permittees the State's responsibility to inspect and enforce its general industrial and construction stormwater permits. (Finding 35; p. 9.) This type of shift of responsibility from the state to the local governments has been deemed to constitute a reimbursable mandate. (*County of Los Angeles, et. al., v. Commission on State Mandates* ("one of the main purposes behind the enactment of the mandate reimbursement requirements by the voters was to prevent the state from transferring the costs of government from itself to local agencies. Reimbursement is required when the state freely chooses to impose on local agencies *any* peculiarly governmental cost which they were not previously required to absorb."))

2) *Finding 29 (2nd para) asserts that the provisions in the Order to implement total maximum daily loads ("TMDLs") are also federal mandates.*

The Permittees contend that such a determination is a question of fact and not an appropriate legal conclusion in the finding. While it is true that waste load allocations (WLAs) in TMDLs must be reflected in NPDES permits as applicable, the manner in which the TMDL is implemented in the NPDES permit is not a federal mandate, but is left up to the State. (*See Pronsolino v. Marcus* (2002) 291 F.3d 1123, 1140.) Thus, as with the other aspects of the Order, implementation of applicable TMDL WLAs is not necessarily a federal mandate, immune from subvention of state funds. At most, it is a question of fact for consideration by the Commission on State Mandates, and not a conclusion of law for the Regional Water Board to assert in a finding.

3) *Finding 29 (3rd para) asserts that "costs incurred by local agencies' to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers."*

The purpose of this language appears to be to hinder future test claims to the Commission on State Mandates regarding specific provisions contained in the Order. Under the logic contained in this paragraph, the Regional Water Board would find

that as long as the requirements are placed on both government and nongovernmental dischargers, regardless of their legality, there is an over-arching regulatory scheme and therefore no cost subject to state subvention. However, this is an overbroad view regarding the over-arching regulatory scheme. In this case, the regulatory scheme is the application of municipal storm water permit requirements, which are not equally applicable to governmental and nongovernmental dischargers. Thus, the assertion as contained in the finding is misplaced and should be removed.

4) *Finding 29 (3^d and 4th paras) characterizes the regulation of municipal storm water as being more lenient than the discharge of waste from non-governmental sources.*

The paragraph that characterizes the regulation of municipal storm water as being more lenient (“less stringent”) than the regulation of discharges from non-governmental sources is inappropriate. Municipal stormwater is regulated pursuant to different standards, but simply because the standards are different does not necessarily mean that they are more lenient. Furthermore, the purpose for including this finding is vague and again fails to bridge the gap between evidence and provisions in the Order.

5) *Finding 29 (5th para) asserts that “local agency permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order,” and that “[l]ocal agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership.”*

The language contained in this finding is misleading as it fails to consider the overlay of Proposition 218 to assessments related to storm water drainage fees. First of all, storm water drainage fees are typically applicable to developed parcels of land within a municipality’s jurisdiction and are not usually assessed based on business ownership. Thus, reliance on the California Supreme Court’s decision in *Apartment Ass’n. of Los Angeles County, Inc. v. City of Los Angeles* is misplaced as that case hinges on the Court’s finding that the relationship between the inspection fee at issue and property ownership was indirect. (*Apartment Ass’n. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 843.)

Furthermore, it has subsequently been determined that storm drainage fees are not subject to the exceptions for “sewer” and “water” service provided in article XIII D, section 6(c) of Proposition 218, and thus, such fees are subject to vote by either property owners in the affected area or voting residents. (See *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359, “We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area.”) Thus, it goes without saying that a local agency’s ability to levy storm drainage fees on its residents is restricted by the overlay of Proposition 218, which would require the agency to propose the assessment for approval by its voters before it could be assessed. The likelihood of success on such an assessment is unknown.

Because of the uncertainty associated with the Permittees’ ability to levy new or increased fees for storm water, this paragraph should be deleted from the permit. At a minimum, Paragraph 5 of this finding should be revised as shown below:

Third, the ability of a local agency to defray the cost of a program without raising taxes is relevant to the question of whether a particular cost is subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-

488.) The local agency permittees have limited authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) These fees may not exceed the reasonable cost of providing service to the payer. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866.) However, Proposition 218 prohibits a local government from imposing or increasing a fee for stormwater related services without a vote of the electorate. (Cal. Const. Art. XIID, § 6.c; *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98. Cal.App.4th 1351.)

6) Finding 29 (6th para) asserts that because the Permittees have requested best management practices ("BMPs") in lieu of a discharge prohibition or numeric restrictions it has voluntarily availed itself of the Tentative Order.

The Order attempts to argue that because the Permittees "voluntarily" chose the type of permit that is being proposed, implementation of the provisions therein are not subject to state subvention. This logic is flawed. First, as discussed above, determinations regarding state subventions are properly made by the Commission on State Mandates, not the Regional Water Board. Second, the application of state subventions is a question of fact for the Commission on State Mandates. The Regional Water Board cannot pre-determine the Commission's findings under a proper test claim by claiming that the Permittees voluntarily chose the permit in question. Thus, the assertion contained in this paragraph should be deleted.

7) Finding 29 (7th para) asserts that the Permittee's responsibility for preventing discharges predates the enactment of Article XIII B, Section (6) of the California Constitution.

This assertion attempts to put forward an argument that permit provisions as contained in this Order, and any other Order that may be issued to the Permittees in the future, are not subject to the State's constitutional provisions regarding state subvention because the Permittees had a responsibility to control discharges under state law before the constitutional provisions were adopted. We disagree with this conclusion; the Regional Water Board's adoption of each and every permit is a discrete action that may or may not include provisions that are appropriately subject to state subventions. Furthermore, such an argument is better left in a legal brief before a court. The Order is supposed to contain provisions related to the regulation of municipal stormwater, not the State's legal arguments to challenges that may or may not occur on the provisions as contained in the Order.

Finding 35 (p. 9) – Recommend deleting revision date for Industrial General Permit since 1999 reissuance of Construction General Permit is not referenced and considering the fact that both general permits are scheduled for renewal during the 5-year term of the Order. Also, the Regional Water Board was scheduled to adopt a new General Permit for dewatering and other low threat discharges at its June 12, 2008 meeting. This finding should be updated to reflect the Regional Water Board's action (e.g., new permit number?).

Finding 43 (p. 11, last line) – Address typo. Phrase should read “...each Permittee’s jurisdiction”.

Finding 71 (p. 18) – We recommend a revision to the last line of this finding since the experts advise that one or more of the following three approaches should be used for addressing hydromodification impacts: 1) flow duration control, 2) LID, and 3) instream methods. Suggested revision:

Therefore, storm water treatment ~~and/or mitigation~~ in accordance with Development Standards and any other requirements of this Order must occur prior to the discharge of storm water into a water of the United States.

Finding 78 (p. 20) – Recommend revising fourth sentence to clarify that LID is not an alternative to traditional flood control facilities, but is an alternative to traditional stormwater quality facilities. Suggested revision:

LID has been a proven approach in other parts of the country and is seen in California as an alternative to traditional ~~(collection and conveyance through storm drains and pipes to detention basins or directly to waterways)~~ storm water quality management.

Finding 83 (p. 21) – Recommend revising the last line of this finding as follows, for consistency with the Permittees’ existing development standards: “To meet MEP, appropriate stormwater quality control measures are needed at RGOs”.

Receiving Water Limitations

C.1.d. Receiving Water Limit for Chlorine (p. 30) – There is no adopted water quality standard for chlorine in the Water Quality Control Plan (Basin Plan) for the Sacramento and San Joaquin River Basins. As such, it is inappropriate to impose a receiving water limit in this Order. The Basin Plan contains a *Policy for Application of Water Quality Objectives* that allows the Regional Water Board to translate narrative water quality objectives to numeric criteria to determine compliance with water quality standards. When using this Policy, the Regional Water Board is required to evaluate all relevant information and determine on a case-by-case basis if the numeric criterion applies to the discharge in question. The Tentative Order contains no information that indicates the Regional Water Board determined if it is appropriate in this situation to apply the US EPA recommended ambient water quality criteria for chlorine to municipal stormwater discharges from the urbanized areas of Sacramento County. We recommend that the receiving water limit for chlorine be removed from the Tentative Order.

Provisions

D.3.d. SQIP Modification (p. 34) – The Tentative Order indicates that all significant revisions to the SQIP would be subject to a thirty-day public notice and comment period, and that “significant” would be determined based on the “magnitude of public interest, as evidenced by public comments”. This language is confusing as it ultimately implies that ALL proposed revisions to the SQIP would be subject to a thirty-day public notice and

comment period, in order to determine significance. We suggest that minor, non-substantive changes to the SQIP are not significant and therefore should not be subject to the thirty-day public notice and comment period. The language of the Tentative Order should be revised to clearly indicate that such revisions do not require public notice and comment.

D.4.b. Legal Authority (p. 35) – Suggest revising the illegal discharge language as follows:

Effectively prohibit identified illegal non-stormwater discharges (e.g., discharges consisting of or resulting from the following: surface cleaning wastewater from gas stations and parking lots; wastewater from mobile business activities; commercial vehicle and equipment washing wastewater; pool water containing chlorine or bromine; dumping of sediment, construction debris, pet waste, vegetation or food waste; pesticide dumping and rinsate; etc.)

D.11 (p. 42) – “Illicit Discharge Program” should be boldface.

D.27.b.ii. Mercury (p. 56) – Wording is awkward. Suggest revision as follows:

For public outreach, the Permittees shall evaluate and summarize the 2004 and 2007 public awareness/opinion survey data related to mercury (e.g., fluorescent lamps disposal). In the 2008/2009 Annual Report, provide recommendations for amending Permittees’ mercury source control programs ~~in the 2008/2009 Annual Report~~, and amend the mercury source control programs in accordance with those recommendations.

ATTACHMENT 2

Comments on Tentative Monitoring and Reporting Program (MRP) by Sacramento Stormwater Quality Partnership

In General

Typographical and grammatical errors – Need to check entire document for minor errors that can potentially change the meaning of a sentence. We have done our best to point out those we found, but there may be others.

I. Monitoring and Reporting Program Requirements

I.B. Annual Report (1st para, last line, p. 2) – Replace “SWMP” with “SQIP”.

I.B.4 Summary of Monitoring Data (1st para, 2nd sentence) – Revise 1st paragraph as follows:

"Summary of the monitoring data and an assessment of each component of the MRP. To comply with Provisions C.1 and C.2 of the Order No. R5-2008-____ the Permittees shall first compare receiving water ~~and discharge~~ data with applicable water quality standards. The lowest applicable standard from the Basin Plan, California Toxics Rule (CTR), and California Title 22 (Title 22), and constituent specific concentrations limits (e.g., mercury) shall be used for comparison. For those constituents that exceed water quality standards in the receiving water, the Permittees shall examine urban runoff discharge data and assess the extent to which urban runoff may be contributing to the exceedance."

The revision is made to be more consistent with existing procedures and to more accurately reflect the MEP standard of the Permit. The annual RWQEs are based on a comparison of receiving water quality with water quality standards conducted by the Permittees. The RWQEs are not based on a comparison of urban discharge data to water quality standards (numeric effluent standards).

II. Monitoring Program

II.D. Water Column Toxicity (page 10 footnote) – typo "Flathead Minnow" should be "Fathead Minnow".

II.D. Water Column Toxicity (last para on p. 11) – Data and conclusions will not be available at the time the monitoring plan is submitted. Recommend revise this paragraph as follows:

The Permittees shall include a monitoring plan, which shall include a sampling and analysis plan, all data (electronic format), assessment of the data, conclusions, proposed BMPs to be implemented, program effectiveness and an implementation schedule in the SQIP for approval by the Executive Officer. Subsequent information (e.g., data (electronic format), assessment of the data, conclusions, proposed BMPs to

be implemented, and assessment of program effectiveness) shall be included in the Annual Reports as required in this MRP Order.

II.E. Sediment Monitoring – Recommend editorial changes as shown below:

1. Sediment toxicity resulting from pyrethroid pesticides was recently identified in a study performed through Statewide Ambient Monitoring Program (SWAMP) monitoring in the Sacramento area (Roseville, CA) urban tributaries. The Permittees will conduct pyrethroid sediment sampling as part of the urban tributary monitoring and as part of any bioassessment sampling. Sampling of sediment shall be consistent with SWAMP Quality Assurance Management Plan (QAMP) protocols. Specifically, **one wet season and one dry season** sample will be collected annually at least five years at each of the three urban tributaries. Reporting limits in sediment will conform to Table B. Sediment toxicity sampling is not required under this Order. These requirements may change based on an evaluation of data performed by the Permittees.
2. The Permittees shall ~~coordinate with~~ review and amend as necessary the Pesticide Plan component of the SQIP, ~~to the extent that if pesticides in sediments are identified as causing or contributing to receiving water impacts, The sediment component of t~~The Pesticide Plan shall address the following ~~criteria~~ elements:
 - a. ~~Development and adoption of policies, procedures, and/or ordinances to implement the sediment portion of the Pesticide Plan~~ Identification, development, implementation and assessment of BMPs to address controllable discharges of sediment-bound contaminants that may be linked to sediment toxicity to the MEP;
 - b. ~~Sampling of sediment consistent with SWAMP Quality Assurance Management Plan (QAMP) protocols~~ Development and adoption of policies, procedures, and/or ordinances as necessary and appropriate to implement BMPs;
 - c. ~~Identification, development, implementation and assessment of BMPs to address controllable discharges of sediment bound contaminants that may be linked to sediment toxicity to the MEP~~
 - d. ~~A time schedule for implementation and assessment.~~

Table B – List of Constituents (p. 25) – Electrical conductivity and specific conductivity are the same. Remove second occurrence "specific conductance" under "General". The units for electrical conductivity should be $\mu\text{mhos/cm}$.