

Receiving Water Limitations Language Workshop

State Water Resources Control Board
November 20, 2012

Richard Boon / Tess Dunham / Geoff Brosseau, CASQA



Overview

- ◆ Introduction – Richard Boon
- ◆ Legal – Tess Dunham
- ◆ Technical – Geoff Brosseau
- ◆ Next Steps – Richard Boon

Setting the Legal Stage

◆ OBJECTIVES:

◆ Reaffirm the Iterative Process

- ◆ “Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.”

◆ Provide More Rigor With the Iterative Process

- ◆ Includes other compliance mechanisms (e.g., other permit provisions, watershed plans, TMDL implementation plans)

Permit Language at Issue

- ◆ Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.
- ◆ Permittees shall comply with discharge prohibitions through “timely implementation of control measures and other actions to reduce pollutants in discharges in accordance with the [storm water quality management plan].”

NRDC v. COUNTY OF LA

- ◆ “...each permit term is simply enforced as written.”
- ◆ “The plain language of the Permit countenances enforcement of the water quality standards when exceedances are detected....”
- ◆ Part 2.3 clarifies that Parts 2 and 3 of the Permit interact, but it offers *no textual support* for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.”

Receiving Water Limits Are Discretionary Provisions

- ◆ Not Required by the Clean Water Act
 - ◆ For municipal stormwater, CWA requires controls to reduce discharge of pollutants to the maximum extent practicable
 - ◆ Inclusion of water quality standards provisions are at the State Water Board's discretion
- ◆ Not Required by the Federal Regulations
- ◆ Not Required by Porter-Cologne

State Water Board Action Would Reaffirm Intent of RWL

◆ Does Not Violate Antibacksliding

- ◆ Not a Final Effluent Limitation
- ◆ Not A More Lenient Permit Condition
- ◆ New Information Supports Need for More Rigorous Iterative Approach

◆ Does Not Violate Antidegradation

- ◆ Not Permitting Increased Degradation
- ◆ Where high quality, MEP = BMPs = BPTC
- ◆ Iterative Approach is to the Maximum Benefit to People of State

California's Stormwater Program – National Leader

- ◆ Pre-empted EPA's Final Stormwater Regulations by issuing early permits in 1990
- ◆ Many California municipalities are in 4th generation permits
- ◆ California produced nine Municipal award winners and four Industrial award winners over the last 15 years of EPA's Clean Water Act Recognition Awards program, including winners in each of the last six years of the program

Stormwater ≠ Wastewater

- ◆ Stormwater = Open, natural origin; Wastewater = Closed, man-made origin
- ◆ Stormwater regulated by framework designed for a fundamentally different type of discharge
- ◆ Key distinguishing characteristics of stormwater relative to wastewater:
 - ◆ Unpredictable, highly variable flows and volumes
 - ◆ At some point, higher volumes and flows will exceed the size capacity of any capture / treatment / harvest and use system
 - ◆ Sources of potential pollutants (e.g., land, air, people, other species) are ubiquitous and types of potential pollutants are infinite
 - ◆ Concentration of a potential pollutant is usually relatively low (ppm, ppb)
 - ◆ Load of a potential pollutant generally comes from the relatively high volume of stormwater, not the concentration of the potential pollutant
 - ◆ Potential pollutants are at very low concentrations and therefore are very difficult to remove from stormwater

*Mud Creek Near Santa Paula –
Undeveloped Watershed*



Iterative Process is Fundamental

- ◆ Problem ID → Decision/Plan → Implementation → Evaluation →
- ◆ Logical
- ◆ Science-based
- ◆ Progressive management process

Iterative Process is Fundamental

- ◆ Reasonable, fundable time frame
- ◆ Mechanism for maintaining permit compliance
- ◆ Mechanism for improving water quality
- ◆ Promotes adaptive management and continuous improvement

Q1. What changes need to be made to the iterative process to promote measurable water quality improvements?

A1:

- ◆ Must provide enough specificity and accountability so stormwater quality agencies understand their responsibility
- ◆ Establish enough rigor to assure progress will be made in addressing problematic discharges and protecting water quality
- ◆ Prompt and ensure positive, timely, and responsive action focused on water quality

Q2. Should the receiving water limitations requirements be different for:

- ◆ Stormwater v. non-stormwater discharges?
- ◆ Discharges with pollutants subject to a Total Maximum Daily Load (TMDL) Waste Load Allocation and discharges not subject to a TMDL?
- ◆ Phase 1 as opposed to Phase 2 permittees?

A2: RWLs language should:

- ◆ Provide for a tiered (or priority based) approach to addressing water quality issues as all pollutants cannot be addressed simultaneously both in the context of water quality importance and time frame for addressing
- ◆ Priorities should be based on:
 - ◆ Beneficial use impacts
 - ◆ Frequency / persistence of exceedances

Q3. In the iterative process, should there be specified, enforceable time frames between iterations? Should there be an explicit compliance schedule or time limit for ultimate compliance with receiving water limitations?

A3:

- ◆ Must provide sufficient guidance to Water Board staff (and others) to assess whether the stormwater quality agencies are in good faith implementing the iterative process; enforceable mutually agreed-to timeframes between iterations would be reasonable
- ◆ Monitoring data have identified many constituents of concern from a compliance perspective – many of which are beyond the control of municipalities; compliance schedules would be impractical and unnecessary; rather there should be enforceable time frames for implementing actions, and for reviewing and revising actions as necessary

Bacteria, for example

- ◆ Stormwater is a source of bacteria indicators (e.g., fecal coliform) exceedances
- ◆ Some advances in source tracking; but still high uncertainty in correctly identifying source(s)
- ◆ Many potential sources; many of which are uncontrollable (e.g., wildlife) or return after being controlled (e.g., regrowth)
- ◆ Treatment options very limited, expensive, and have environmental consequences; retention ponds are the only BMP category with median effluent concentrations below the primary contact recreation standard

Q4. What is the most appropriate alternative? Please discuss in light of the criteria listed below.

- ◆ Water quality protection
- ◆ Practicability / Cost-effectiveness
- ◆ Clarity
- ◆ Enforceability
- ◆ Municipal resources
- ◆ Regulatory resources
- ◆ Acceptability
- ◆ Other criteria

A4: Other criteria

- ◆ Most important criterion is:
Good faith implementation and Compliance
- ◆ RWLs need to be modified to create “compliance mechanism” that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards, but also allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action

Most appropriate alternative?

- ◆ If had to choose one today: Alternative 5.
 - ◆ Water quality protection + Practicability
 - ◆ = Good faith implementation and Compliance
- ◆ Should start with developing agreed-to Guiding Principles as to the why, who, what, when, where, and how of the language, as well as the not.

Next Steps

- ◆ Identify a policy working group comprised of stakeholders
 - ◆ Develops principles to guide the Receiving Water Provision
 - ◆ Drafts RWL provision language
- ◆ Board Workshop to discuss draft language
- ◆ Board issues precedential order

Completion by July, 2013. CASQA is prepared to begin working with the State Water Board today.