



County of San Diego



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January 21, 2015

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor (95814)
P.O. Box 100
Sacramento, CA 95812-0100

Electronic Submission: commentletters@waterboards.ca.gov

COMMENTS TO A-2236(a)-(kk) – COMMENTS ON PROPOSED ORDER IN RE PETITIONS
CHALLENGING 2012 LOS ANGELES MUNICIPAL SEPARATE STORM SEWER SYSTEM
PERMIT (ORDER NO. R4- 2012 -0175)

Dear Ms. Townsend:

The County of San Diego (County) appreciates the opportunity to comment on the State Water Resources Control Board's (State Board) Proposed Order *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except those Discharges Originating from the City of Long Beach MS4 (Proposed Order)*. The Proposed Order is critically important to regions throughout the state since it provides guidance to all regional water quality control boards regarding compliance with receiving water limitation language in MS4 permits.

Receiving Water Limitations Provisions

The County of San Diego respectfully requests that the State Board modify its determination that what is generically referred to as "receiving water limitations provisions" should continue to be included in regional MS4 permits. The Proposed Order provides an accurate and well-reasoned analysis of the history and discretionary authority of the State Board on this issue, including affirming the conclusion that, "We have the flexibility to reverse our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to

constitute such compliance.” (Footnotes omitted).¹ Unfortunately, the Proposed Order concludes that the State Board will decline, as a policy matter, to reverse course and not include receiving water limitations provisions in MS4 permits.

The County respectfully submits that this is not a sound policy decision. While eventual achievement of water quality standards is an appropriate permitting goal, the inherent logical inconsistency of a policy creating permits that simultaneously absolutely prohibit what they are intended to authorize should be evident. This is brushed off with the broad conclusion that “the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards.”² To the contrary, significant advances in reducing pollutants in receiving waters have been made and will continue as science and technology improve and watershed management approaches are implemented.

Prior to the most recent generation of permit renewals, MS4 permits have essentially been prescriptive regulatory “do’s and don’ts” for copermitees that have not encouraged the sort of analysis and comprehensive watershed planning and evolutionary efforts that will come with the latest iterations of permits in, for instance, the Los Angeles and San Diego regions. The weakness of your policy is to believe that it is somehow more productive to have public entities staring up at the Swords of Damocles held by third parties as result of receiving water limitations provisions. To the contrary, it forces conservative thinking and action focused on litigation risk and defense, rather than the trial and error efforts envisioned by our San Diego Regional Board staff in implementing our latest permit.

The RWL decision in the Proposed Order ignores the clear policy of Congress in enacting §402(p) of the Clean Water Act. It ignores your former Chief Counsel’s 1993 Memorandum explaining the rationale for the separate Maximum Extent Practicable (MEP) standard for MS4 systems, and Congress’ recognition that the unique challenges of an open system largely unable to completely control sources of pollution would require something less than an absolute discharge prohibition.³

The decision in the Proposed Order affirms the State Board’s discretion to not include these provisions, but ignores Porter-Cologne’s directive to consider several factors, including economic factors, in setting water quality standards (and, by implication, requiring immediate compliance). Clean Water Act §402(p)(3)(B)(iii) does not prescribe water quality-based requirements for municipal stormwater, hence the discretionary decision under Porter-Cologne to include such provisions must come with the kind of analysis prescribed by Ca. Water Code §§13263 and 13241.⁴

For example, the Board’s Caltrans Permit (Order 2012-0011 DWQ) contains language that would more appropriately comport with Clean Water Act §402(p).⁵ It further recognizes the

¹ Proposed Order, pp. 13-14

² Proposed Order, p. 14

³ 1993 Memorandum of Chief Counsel, p. 2

⁴ City of Burbank v. State Water Resources Control Board. 35 Cal.4th 613, 625(2005).

⁵ Order 2012-0011 DWQ, Finding 20, p. 11; Provision A.1., p. 18.

infeasibility of setting numeric effluent criteria for municipal BMPs and urban discharges.⁶ Setting a policy consistent with these realities, and using language that reflects the appropriate MEP standard and iterative process would advance improvement of water quality by creating a climate of cooperation and innovative solutions as opposed to the specter of costly, unproductive litigation.

In the event that the State Board elects not to remove or significantly modify those provisions, the County supports an alternative compliance pathway to the current MS4 permit language, which requires strict and immediate compliance with receiving water limitations. The County recognizes and appreciates the important steps that the State Board has taken with the Proposed Order. Because the Proposed Order largely supports the incorporation of an alternative compliance pathway into the adopted Los Angeles MS4 Permit, it supports an alternative compliance pathway that will provide local governments with appropriate time to obtain compliance with receiving water limitations, without being in violation of the permit. This will allow local governments to continue implementing the robust stormwater management programs called for in recent MS4 permits.

While the County generally supports for the concept of alternative compliance, the County would like to offer the following specific suggested revisions to the Proposed Order.

It is important to use permit language to codify the alternative pathway to compliance with receiving water limitations.

Based on recent litigation, it is clear that courts view each provision of a municipal stormwater permit as independently enforceable. Therefore, it is extremely important that permit language be used to codify an alternative compliance option. The permit language should incorporate specific provisions that clarify that compliance with the WMP/EWMP process constitutes compliance with receiving water limitations provisions of Part V.A. and direct other permits to similarly clearly link alternative compliance processes to receiving water limitations. Even in cases where numeric Total Maximum Daily Loads (TMDLs) have been established, with specific compliance timelines as long as 20 or 25 years, the receiving water limitations provisions remain immediately enforceable. If compliance timelines are appropriate for inclusion in TMDLs, which ostensibly reflect the Regional Water Boards' decision to prioritize a particular water quality issue with additional regulation, it makes sense that reasonable compliance timelines would be appropriate for the achievement of all receiving water limitations. However, it is unreasonable to expose local governments and taxpayers to the threat of enforcement and third-party litigation while they are engaged in good faith efforts to comply with water quality mandates. Recent lawsuits have shown that the issue of third-party liability is real.

The Proposed Order should use stronger language to direct regional water boards to include a reasonable alternative compliance option where such language does not already exist in Phase 1 MS4 permits.

Page 48 of the Proposed Order "directs all regional water boards to consider the Watershed Management Plan (WMP)/Enhanced Watershed Management Plan (EWMP) approach to receiving water limitations compliance when issuing Phase 1 MS4 permits going forward"

⁶ Order 2012-0011DWQ, Fact Sheet, p. 10.

(emphasis added). The County recommends strengthening this language from “consider” to “require” all regional water boards to include an alternative compliance pathway in Phase I municipal stormwater permits. With regard to exposure to liability for immediate non-compliance with receiving water limitations, all Phase I communities throughout the state are in a similar, if not identical, situation to Los Angeles. As such, all regional water boards should be directed to include such language in a timely manner.

The Los Angeles alternative compliance language is not contrary to the anti-backsliding or anti-degradation requirements of federal and state law. Also, building time schedules into permits themselves, as the Los Angeles MS4 Permit does, is a more appropriate approach because it allows a more efficient regulatory structure compared to issuing multiple enforcement orders. San Diego County, like Los Angeles, faces multiple, high-cost TMDLs encompassing challenging compliance end points and aggressive compliance timelines. The reasoning on pages 30-31 of the Proposed Order drafted to support the Los Angeles region’s alternative compliance option, as opposed to the enforcement order approach recommended by others, is sound and wholly applicable to San Diego County.

The Proposed Order should recognize there are circumstances where compliance with receiving water limitations may not be attainable due to technical, economic, or other constraints.

The County shares the State Board’s goal of achieving water quality standards wherever possible. However, the Proposed Order needs to balance considerations of discharger accountability with both the constraints of stormwater agencies and the scope of their authority. The language in the Proposed Order assumes that achievement of receiving water limitations is possible in all circumstances and is simply a matter of effort.

Page 32 of the Proposed Order states: *“We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.”*

There are several potential barriers to compliance with current water quality standards.

1. BMPs may not always be capable of attaining water quality standards. BMPs are subject to local and site-specific constraints, which must be evaluated before implementation. For instance, infiltration BMPs are not appropriate for areas with relatively impervious soils, shallow groundwater, steep hillsides, landslide or liquefaction risk zones, subsurface contamination, or close proximity to certain structures. Similarly, capture and use BMPs are not cost effective for areas with little available water demand or where water demand is temporally inconsistent with available supply, which is frequently the case in the southwest. Therefore many urban areas exist without

feasible or cost-effective wet weather structural BMP options available.⁷ Similar analyses by ASCE have shown that consistently and reliably attaining water quality standards under wet weather conditions may be infeasible.⁸ As discussed by representatives from Orange County at the December 16, 2014, workshop⁹ on this matter, certain BMPs (detention basins, restored channels) have been shown to serve as net sources of indicator bacteria during and after storm events, even though they have created other desirable ecological and water quality benefits during dry weather that MS4 permits throughout the state seek to promote. Additionally, there remain numerous small watershed and beach examples where exhaustive nonstructural and structural BMP efforts have been intensively applied, and significant costs expended, without the desired or initially predicted outcome of compliance.¹⁰

2. Another potential barrier is economic. MS4 and TMDL mandates are imposed without funding by the state and federal government on local communities. Because of the hurdles created by Proposition 218, there is no guarantee that a community in California will be able to generate adequate funding to support compliance with water quality mandates. Communities, both large and small, have tried and failed to levy additional fees or taxes to fund their stormwater programs. For example, the Contra Costa County Clean Water Program (CCCCWP), after a multi-year effort to analyze water quality costs and Permittees' needs, survey voters, and develop a watershed-based, three-tiered rate countywide initiative proposal, failed to get adequate voter support for a proposed fee.¹¹ In the San Diego region, the cost to comply with a single TMDL (the Bacteria TMDL for Beaches and Creeks) has been estimated to cost up to \$5.1 billion over the next 17 years.
3. Other constraints may also act as a barrier to compliance. For example, natural occurring levels of pollutants (e.g., bacteria¹, selenium and metals) may exceed the regulatory levels for compliance. Sources outside the authority of MS4 agencies are responsible for a significant source of pollutant loading. Examples of these sources include zinc in tires and dry air deposition of nitrogen from air pollution.¹² It is not within the purview of MS4 agencies to regulate automobile manufacturing, tailpipe emissions, or stationary sources of nitric oxide and nitrogen dioxide. The recent brake pad legislation is an example of an appropriate and economic way to deal with significant sources such as these, yet they are given limited emphasis in MS4 permits.

⁷ [Technical Assessment of the San Diego Beaches and Creeks Bacteria TMDL](#), Prepared by Geosyntec Consultants for the County of San Diego Dept. of Public Works, January 2013, p.20

⁸ [Pathogens in Urban Stormwater Systems](#), Prepared by Urban Water Resources Research Council, Pathogens in Wet Weather Flows Technical Committee, and Environmental and Water Resources Institute, American Society of Engineers, August 2014, p.222

⁹ http://www.waterboards.ca.gov/board_info/media/dec2014/swrcb_wrkshp121614_3.shtml (Video Link, Beginning at 1:05:40)

¹⁰ [Technical Assessment of the San Diego Beaches and Creeks Bacteria TMDL](#), Prepared by Geosyntec Consultants for the County of San Diego Dept. of Public Works, January 2013, p.21

¹¹ [Stormwater Funding Options: Providing Sustainable Water Quality Funding in Los Angeles County](#), Prepared by Ken Farsing and Richard Watson, May 21, 2014, p.39

¹² [State of California California Regional Water Quality Control Board Santa Ana Region ORDER NO. R8-2009-0030 As amended by Order No. R8-2010-0062](#), p.4 of 93

The Proposed Order is written in a way that requires receiving water limitations to be met at any cost. Public policy developed to address an issue that requires the expenditure of additional taxpayer funds should consider if the return on that investment will be beneficial. Therefore, the County suggests that the order be revised to include language giving the regional water boards the flexibility to determine when enough has been done to address a particular water quality issue. Regional water boards should be encouraged to adopt alternative compliance standards when:

- a. An out-of-date Basin Plan standard is in effect,
- b. The likelihood of achieving the existing receiving water standards is very low, or
- c. The additional effort required to achieve the standard is not worth the cost.

By putting additional flexibility in the hands of regional water boards, regulated parties can still be held accountable for progress towards compliance and will remain responsible for carrying the burden of proof to demonstrate when a receiving water limitation is not achievable.

The Proposed Order provides potential relief from immediate compliance for water body-pollutant combinations being addressed as priorities in watershed plans, but should be revised to provide relief for all water quality constituents.

Pages 16 and 17 of the Proposed Order states: "*Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP*" (emphasis added). As written, municipalities would still be exposed to enforcement and third-party liability for lower priority issues that do not represent water body-pollutant combinations being addressed by watershed plans. In San Diego County, and presumably across the state, watershed plans that are required elements of MS4 permit implementation will be focused on the water quality issues determined to be the highest priorities for action. The County very much supports prioritization as a key element in watershed planning efforts. Due to limited resources, the County cannot do everything, everywhere, all at the same time. Thus, focused planning with prioritization of scarce resources on the most important issues will be essential to effectively address priority water quality issues.

It is not logical to provide an alternative compliance pathway for priority water body-pollutant combinations, while not offering the same protection for lower priority pollutants and/or water bodies. The Proposed Order should clarify this point. For example, if an industrial chemical from a hazardous waste site leaks indefinitely into an MS4 stormwater conveyance system, should the owner of the conveyance system be responsible for clean up in the downstream water body?

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In San Diego County, the water quality improvement plans required by the MS4 permit include an adaptive management process, requiring periodic revisions and adjustments to ensure that the priorities established in the plans reflect the most recent data and information available.

These established permit provisions provide adequate protection against the concern that municipalities should be monitoring for emerging priority issues.

Thank you for your time and consideration of these comments. If you have questions, please contact me at (858) 694-3672 or via email at Todd.Snyder@sdcounty.ca.gov.

Sincerely,

A handwritten signature in blue ink that reads "Todd Snyder". The signature is written in a cursive style with a large, stylized "T" and "S".

Todd Snyder, LUEG Program Manager
Department of Public Works, Watershed Protection Program