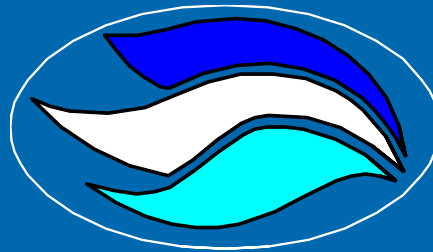


# State Board Workshop



Carson, Compton, Gardena,  
Irwindale, Lawndale,  
West Covina

# State Board Workshop on Draft Order

- Draft Order, in response to petitions challenging the L.A. MS4 permit --
  - Affirms Water Quality Order 99-05 -- but does not make it clear that the implementation of the Stormwater Management Program (SWMP) and iterative process (IP) complies with Receiving Water Limitations (RWLs)
  - Though the L.A. Permit complies with 99-05, through Part V.A., the Regional Board “switched-off” the SWMP and iterative process to spur permittees into complying with the more complicated and costly WMP and EWMP alternatives
  - Despite Part V.A., Regional Board staff said that if you opt for the SWMP you must meet TMDL numeric targets at the outfall and in the receiving water or be in violation

# State Board Workshop on Draft Order

- WMP and EWMP apparently are exempt from 99-05's receiving water limitation (RWL) requirement
  - Draft Order says that the MS4 permit allows the WMP and EWMP as compliance pathways in lieu of meeting receiving water limitations
  - Problem: This violates 99-05's RWL requirement, which must be in all MS4 permits – regardless if they use SWMPs, Watershed Improvement Programs, Drainage Area Management Program plans, or WMP/EWMPs – they all have to comply with RWLs
  - Permittees that voluntarily opt for the WMP/EWMP risk being in violation
  - Recommendation: Amend 99-05 to include WMP and EWMP options or direct Regional Board to include them into MS4 permit, under V.A., Receiving Water Limitations

# State Board Workshop on Draft Order

- What Are RWLs?
  - In the L.A. Permit, RWL requirements are contained in Part V.A.
  - V.A.1 says stormwater discharges from the MS4 shall not cause or contribute to a violation of receiving water limitations
  - V.A.2 says that stormwater and non-stormwater discharges from the MS4 of storm water cause or contribute to a condition of nuisance
  - But V.A.3 says Permittees can comply with V.A.1 and 2 (to avoid violations) through the timely implementation of actions contained in a stormwater management program [(core program elements required of 40 CFR 122.26(d)(2)(iv)] -- If RWL exceedances persist, despite SWMP implementation, a procedure (the iterative process) described in V.A.3 must be implemented (includes submitting a monitoring report to the Regional Board describing BMPs and actions that have been taken and proposing revised BMPs prevent future exceedances)

# State Board Workshop on Draft Order

- Draft Order appears unclear about the Iterative Process
  - Says that neither a safe harbor nor iterative process can forgive RWL violations – reflecting what the 9<sup>th</sup> Circuit Court held in NRDC v. LACFCD
  - Says that a good faith engagement of the iterative process can't forgive violations – in response permittees who proposed this compliance option during RWL policy discussions which began two years ago
  - These references are unnecessary and contribute to the impression that the iterative process is no longer valid
    - Draft Order should delete them and make clear that the SWMP/IP prevents rather than avoids or forgives violations

# State Board Workshop on Draft Order

- Draft Order disagrees with Permittees view that the iterative process does or should constitute compliance with receiving water limitations
  - Must be mistake – this sentence is located in a paragraph that affirms that the good faith engagement of the iterative process cannot forgive violations
  - Perhaps it meant to say that Permittees should not conclude that the good faith implementation of the iterative process does not constitute compliance with RWLs
  - To conclude otherwise would contradict 99-05 – and WQ 2001-15, which clarifies 99-05 -- and would place every MS4 permit in State – including Caltrans – in non-compliance

# State Board Workshop on Draft Order

- Here's what WQ 2001-15 says:

*This Board {State Board} has already considered and upheld the requirement that municipal storm water discharges must not **cause or contribute to exceedances** of water quality objectives in the receiving water. We adopted **an iterative procedure** for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters*

# State Board Workshop on Draft Order

- Iterative Process cannot be abridged or voided
  - Not just a state requirement -- it is mandated under federal rules (Federal Register, Volume 61, No. 166, August 1996)
  - More recently, in Federal Register Volume 79, Number 112 (Wednesday, June 11, 2014)
    - *EPA views the MEP standard in the CWA as an iterative process.*
    - This explains why every MS4 permit in the nation has either an iterative process or adaptive management provision – includes MS4 permits that have numeric WQBELs to meet TMDLs



# State Board Workshop on Draft Order

- Draft Order also asserts that the *iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards*
  - True – iterative process has been under-utilized because it has not been correctly implemented (Lawndale Public Works Director Abassazadeh will address this shortly)

# State Board Workshop on Draft Order

## ➤ Numeric WQBELs Are Improper

- Order does not respond favorably to petitioners contention that the LA MS4 permit failed to follow federal regulations and USEPA guidance when it translated the TMDL numeric targets into numeric water quality based effluent limitations (WQBELs) and made them the same as TMDL waste load allocations
- Draft order validates the MS4 permit here by supporting the argument that the Regional Board properly set the numeric WQBELs when it established the TMDL -- says
  - At the permitting stage, the Regional Board's legal obligation was to develop WQBELs "consistent with the assumptions and requirements of any wasteload allocation" in the TMDLs and not to consider reasonable potential
  - Order is saying because the Regional Board followed the process for setting a TMDL it also met the requirement for setting numeric WQBELs

# State Board Workshop on Draft Order

- This statement is incorrect: setting TMDL WLAs and determining WQBELs to meet them are two separate issues under federal regulations
- The Regional Board's ACTUAL legal obligation was to perform a reasonable potential analysis in accordance with CFR 122.44 (d)(1)(i), which states: *Effluent limitations must be set for all pollutants that are or may be discharged at a level that have a reasonable potential to cause an in-stream excursion above a narrative or numeric water quality standard. When considering the reasonable potential to cause excursion above ambient criteria, the EPA regulations at 40 CFR 122.44 (d)(1)(ii) require the regulatory authority to consider factors such as 1) existing controls on point and non-point sources, 2) variability of the pollutant in the effluent, 3) sensitivity of the species to toxicity testing, and 4) dilution of the effluent in the receiving waters.* The administrative record or fact sheet for the L.A. MS4 permit mentions nothing about completing these tasks.
- Regional Board also failed to point to Permittee outfall monitoring data demonstrating that discharges from the MS4 exceeded ambient (dry weather) criteria for any of the TMDL pollutants.
- WQBELs by the way are applied to outfall discharges – not in the receiving water

# State Board Workshop on Draft Order

- Surprisingly the Caltrans MS4 Permit is not subject to numeric WQBELs
  - Despite the fact Caltrans is subject to the same TMDLs as LA MS4 permittees
  - State Board concluded that Caltrans need only implement BMP-WQBELs because of TMDL assumptions and requirements it said were applicable to Caltrans
    - One of its assumptions is that Caltrans had “relatively little contribution to the exceedances of those TMDLs”
  - State Board apparently is not aware that a Caltrans monitoring report indicated that it persistently exceeded TMDLs
    - Example: Its 2002-2003 annual report showed that it exceeded copper 85 out of 89 samples and 86 out 89 samples for zinc
    - Samples were based on outfall monitoring measured against CTR (ambient) standards
    - Because cities were not required to conduct outfall monitoring under the 2001 permit, few exceedances of TMDLs at outfalls have been recorded
    - There’s an obvious disparity here – what’s good for the goose should be for the gander – Permittees should be entitled to BMP-based WQBELs

# State Board Workshop on Draft Order

- Draft Order disagrees with petitioners contention that the L.A. permit should not require using the phrase ***prohibiting non-stormwater discharges through the MS4 and instead should use “to” or “into” the MS4***
  - Order says it is a distinction without difference – untrue
  - Problem with syntax and logic: the MS4 consists of streets, catch basins, storm drains, and other structures, natural or manmade that convey runoff to a receiving water
  - You don't prohibit discharges through streets, catch basins, or through storm drains – but instead ***to or into*** them
  - Using “through the MS4” will make enforcement more difficult (how can a non-permitted discharger prohibit its dischargers “through” the a street or catch basin
  - Using “through” is inconsistent with CWA section 402(p)(B)(ii) which says that MS4 permits shall *include a requirement to effectively prohibit non-stormwater discharges into the storm sewers*
  - All other MS4 permits issued in the State including the Caltrans Permit that the State Board adopted use ***to or into*** the MS4

# State Board Workshop on Draft Order

- Draft Order disagrees with petitioners contention that the L.A. permit cannot require compliance with dry weather non-stormwater discharges with TMDLs
  - Order and MS4 Permit do not point to state or federal law requiring Permittee compliance with non-stormwater outfall discharges measured against TMDLs
  - CWA 402(p)(B)(ii) says that non-stormwater discharges to the MS4 are prohibited; they do not require them to be controlled as does stormwater discharges per CWA 402(p)(B)(iii)
  - Federal regulations require a procedure for observing non-stormwater discharges -- at CFR 40 122.26(d)(1)(D) -- and, if detected, requires sampling the discharge to identify the pollutant and track upstream its sources (this was not required under the previous MS4 permit)
  - If the discharge is traced to a discharger, the Permittee must either prohibit the discharge through its legal authority or require the permittee to obtain a discharge permit – but not from the permittee
  - Eliminating a non-stormwater discharge to the MS4 eliminates the transport mechanism for conveying pollutants, including to TMDLs, to a receiving water

# State Board Workshop on Draft Order

- Draft Order challenges assertions made by several petitioners that federal regulations only require effluent and ambient monitoring for compliance purposes.
- Order refutes the petitioners argument by relying on 40 CFR122.44(d)(1)(vi)(C)(3), arguing that “it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent”
- Draft Order is incorrect here – the foregoing federal citation actually says: “The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards”
- This clearly applies to compliance monitoring
- The reference to applicable water quality standards means that the State has already established a water quality objective (e.g. TMDLs are ambient water quality standards) – in this case through the California Toxics Rule (CTR)
- Draft Order ignores petitioners reference to CFR 122.26 which establishes the outfall as the place where compliance with water quality standards is determined (requires identification of outfall locations for sampling)

# State Board Workshop on Draft Order

- Draft Order supports MS4 permit's requirement that compliance with wet weather TMDL waste load allocations is legal
  - State Board appears unaware of its own Order (2001-15) which says *there is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions*
  - All water quality standards, including TMDLs are ambient (dry weather standards)



# State Board Workshop on Draft Order

## ➤ Other Issues

- Draft Order applies Part V.A to the WMP/EWMP -- cannot because MS4 permit section Part V.A says it applies only to the SWMP
- Draft Order says that if a Permittee does not comply with the approved compliance schedule associated with the a WMP/EWMP, it must instead demonstrate immediately compliance with the receiving water limitations in Part V.A of the MS4 permit
- Another conflict:
  - Can't be because V.A is the SWMP/iterative process
  - Does this mean if a Permittee's WMP/EWMP does not meet its compliance schedule it will have to switch to the SWMP and its iterative process to comply with RWLs? (something is amiss here and needs to be fixed)

# State Board Workshop on Draft Order

## ➤ Other Issues

- Draft Order says that implementation of the WMP/EWMP constitutes in lieu compliance with RWLs
- This is a contradiction – throughout the draft Order there are references to the WMP/EWMP complying with Part V.A of the MS4 permit which again requires compliance with RWLs through the SWMP/Iterative Process
- If the State Board wants the WMP/EWMP to be covered under Part V.A., it needs to amend 99-05 to include these voluntary alternatives

# State Board Workshop on Draft Order

## ➤ Other Issues

- Order says that a safe harbor cannot forgive violations on the one hand but on the other says that there is a safe harbor that applies to the WMP/EWMP during the planning phase
- This conflict must be resolved

# State Board Workshop on Draft Order

## ➤ Other Issues

- WMP/EWMP Costs
  - Several cities prefer to the SWMP/Iterative process because (1) WMP/EWMP alternatives are unnecessarily costly; and (2) cannot guarantee compliance with water quality standards
  - Example of Costs - East San Gabriel River WMP Group (Claremont, La Verne, Pomona, and San Dimas)
    - Meeting 2017 milestones (\$3 to 4 million per city)
    - Meeting 2020 milestones (\$34.6 million per city)
    - Meeting 2023 milestones (\$59.8 million per city)

# State Board Workshop on Draft Order

**End Presentation**

