



California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

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Subject: SWRCB/OCC FILE A-2236(a) THROUGH (kk)
COMMENTS IN RESPONSE TO QUESTIONS POSED BY THE STATE WATER
RESOURCES CONTROL BOARD CONCERNING RECEIVING WATER
LIMITATIONS AS ADDRESSED IN ORDER NO. R4-2012-0175 - WASTE
DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER
SYSTEM (MS4) DISCHARGES WITHIN THE LOS ANGELES COUNTY FLOOD
CONTROL DISTRICT, INCLUDING THE COUNTY OF LOS ANGELES, AND THE
INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH

The California Stormwater Quality Association (CASQA) appreciates the opportunity to provide comments on the subject request by the State Water Resources Control Board (State Water Board) in its July 8, 2013 announcement with respect to the petitions received on the MS4 permit for discharges within Los Angeles County Flood Control District, including the County of Los Angeles, and the incorporated cities therein (LA MS4 Permit). CASQA believes that a constructive resolution of the receiving water limitation (RWL) provision is critical to the long-term success for addressing water quality issues associated with stormwater discharges while providing permittees with a reasonable opportunity for maintaining permit compliance. As outlined in our previous correspondence (December 16, 2011 letter to Chair Hoppin and November 13, 2012 letter to Jeanine Townsend), before proceeding to offer its comments addressing the State Water Board's July 8, 2013 announcement, CASQA would like to reiterate our concerns regarding potential liability exposure to municipal stormwater agencies (i.e., permittees or MS4s) given the current receiving water limitation provisions contained in California stormwater permits.

Basis of Concerns With Current RWL Permit Language

Although its decision has been displaced by the U.S. Supreme Court on other grounds, the Ninth Circuit of the U.S. Court of Appeals¹ previously found that a municipality can be sued by a third party for permit violations if its discharges cause or contribute to an exceedance of a water quality standard, regardless of whether a municipality has implemented all of its other permit requirements

¹ *NRDC v. County of LA* (9th Cir. 2011) 673 F.3d 880, referred to hereafter at the Ninth Circuit's decision.

and engaged in good-faith efforts such as the well-established iterative process to further address the exceedance.² This exposure to third party claims was incurred because the court reasoned that the “iterative process” language stood independently from other requirements in the permit and that each permit provision is individually enforceable by a third party plaintiff. The receiving water limitation permit language in question was developed by the State Water Board in 1999, and was set forth by the State Water Board in Order WQ 99-05. The 9th Circuit’s decision came as a surprise to municipalities and remains of concern to them because in subsequent decisions challenging the 1999 receiving water permit language, the State Water Board established that this language did not require strict compliance with water quality objectives.³

The unfortunate reality is that, due to the highly variable nature of pollutants in stormwater, MS4 monitoring data, required in NPDES permits, may from time to time provide evidence of exceedances, and given the current receiving water limitation provisions found in most MS4 permits, permittees may be at risk of having to face third party actions for alleged non-compliance. Such circumstances may be encountered regardless of MS4 efforts to comply with their stormwater permits in good faith and to the extent their available resources allow (including through the use of the iterative process).

In considering this issue, it is also critically important to recognize that the iterative permitting process is consistent with past State Water Board policy and the nature of the problem, which is largely outside of a municipality’s immediate control and created by consumer use of various products and the characteristics of the previously developed environment. Controlling sources of pollutants and affecting change in the built environment toward restoration of more natural hydrologic processes is tied to the development cycle and will realistically require years to complete. Thus, creating solutions to address water quality challenges require significant investments in public programs and infrastructure, which must be established, supported, and funded *over time*.

The iterative strategic compliance program approach, as set forth in the attached proposed model language, provides permittees the opportunity to comply with permit provisions, prioritize resources to address most problematic pollutants, and develop meaningful programs and projects to improve water quality. In short, a strategic compliance program is a “best fit” permitting approach for a complex non-point source problem being regulated through a point source regulatory framework. In any evaluation of the iterative process approach and how to better implement it, it is helpful to explicitly recognize its rationale.

² On August 8, 2013, the 9th Circuit Court of Appeals issued a new opinion in this case on remand from the United States Supreme Court. (*Natural Resources Defense Council v. County of Los Angeles et al.*, Slip Opinion No. 10-56017 (filed August 8, 2013)). The decision does not replace the fact, and reiterates, that permittees may be liable for discharges that violate receiving water limitations.

³ See *In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn.*, Order WQ 2001-15 (Nov. 15, 2001).

Practical Impacts to Municipalities

The implications of the Ninth Circuit's decision with respect to the State Water Board's precedential receiving water limitations language makes municipalities more vulnerable to third party actions under the federal Clean Water Act's citizen suit provisions. Specifically, monitoring data have identified many constituents of concern from a compliance perspective, including: bacteria (which have both human and non-human sources), nitrogen, phosphorus, copper, lead, zinc, PCBs, mercury, and trash. Other constituents that have been identified that are not typically associated with human actions include aluminum, selenium, and iron. The iterative process has always provided and still can provide a means for municipalities to logically and progressively address exceedance findings while maintaining permit compliance. The iterative process works in such a way that once a permittee identifies a water quality issue – the permittee will develop and implement pollutant-specific reduction plans. Such plans are reviewed and approved by the applicable Regional Water Board. The primary approach with the iterative process is one of continuous improvement towards meeting water quality objectives. This process is one that takes time and adequate funding to accomplish.

However, in view of the Ninth Circuit's decision, the State Water Board's precedential receiving water limitations language, set forth in Orders WQ 99-05, 2001-15 and others, has become outdated and makes municipalities more vulnerable to third party lawsuits. And, as extensive outfall and receiving water monitoring is required, municipalities may be put in further jeopardy of being the target of third-party litigation. Establishing permit conditions where a municipality is in immediate non-compliance with no reasonable path to compliance is poor public policy, and inconsistent with other State and Regional Water Board permitting practices (e.g., POTW permits typically include compliance schedules to comply with permit limitations).

Principles for Compliance with the RWL Provision

The immediate issue before the State Water Board is the Los Angeles (LA) MS4 permit and its approach to addressing the receiving water limitation provision through the use of "compliance pathways." **CASQA fundamentally supports the concept of linking receiving water limitations and other permit requirements to compliance pathways.** With that concept in mind, we have used the term "strategic compliance program"⁴ as the recommended pathway for addressing the receiving water limitation provision and others. Regardless of the terminology, the following principles need to be embedded in this approach:

1. Receiving Water Limitation provisions must clearly recognize and incorporate by reference the strategic compliance program provisions to ensure that such provisions provide a means of compliance with receiving water limitations as otherwise specified.
2. Language in MS4 permits that include a strategic compliance program pathway must include the following concepts:

⁴ Strategic Compliance Program may be expressed in the form of a watershed or enhanced watershed management programs or similarly structured permit requirements.

- a. Provide enough specificity and accountability so that municipalities and Regional Boards understand their responsibilities.
 - b. Acknowledge that all pollutants cannot be addressed equally:
 - 1) Pollutants in stormwater discharges that are subject to TMDLs must be prioritized over pollutants that have sporadic and minimal impacts on the receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner.
 - 2) Municipalities in general have fiscal constraints and must balance implementation of stormwater programs against the need to protect public safety and to support other municipal programs. Further, municipalities have significant requirements associated with the public contracting and budgeting process. These fiscal constraints and practical public contracting requirements must be reflected in compliance schedules and the prioritization of water quality issues.
 - c. Provide Regional Water Board staff (and others) sufficient specificity to assess whether the permittees are in good faith implementing the strategic compliance program.
 - d. Given the wide diversity and complexity of pollutants, sources and best management practices (BMPs), the process must provide a mechanism for permittees and the Regional Water Board to agree on a practical implementation plan to satisfy the permit provision.
 - e. Establish sufficient accountability to assure that progress will be made by the permittees through the strategic compliance program in addressing problematic discharges and protecting water quality.
 - f. Provide assurances to the permittees that good faith compliance with the iterative process as reflected through development and implementation of a strategic compliance program constitutes compliance with the Receiving Water Limitations, and other provisions addressed by the program.
3. Because both Regional Water Board considerations and the status of the development of MS4 programs throughout the state vary, the State Water Board should not mandate that the watershed management/enhanced watershed management language in the LA MS4 Permit be the only approach to a strategic compliance program that may be used for alternative compliance with Receiving Waters Limitations. Further, the State Water Board should not limit a Regional Water Board's authority to find that an existing or differently structured strategic compliance program approach is appropriate as another pathway for alternative compliance with Receiving Waters Limitations. However, the State Water Board should mandate that Regional Water Boards need to provide for alternative compliance pathways for complying with receiving water limitations and other provisions.

In keeping with the principles outlined here, and in response to the State Water Board's notice, CASQA provides recommended model language for the receiving water limitation provision and a strategic compliance program. (See Attachment A hereto.)

As indicated above, CASQA supports the concept of creating a viable compliance pathway to address the receiving water limitation provision. We believe such an approach is practical and workable as demonstrated in the Los Angeles Regional Water Board staff presentation of July 11, 2013 to its Regional Water Board. As a result of the LA MS4 permit and its compliance pathway approach, all but two of the 86 municipalities in Los Angeles County have agreed to participate in either the Enhanced Watershed Management Program or Watershed Management Program. Furthermore, we view the strategic compliance program to be an enhancement on the iterative process and that it will ultimately provide more transparency, accountability, and effective use of resources.

Moreover, we believe that strategic compliance program-based approach should be available for all MS4 permittees, including Phase 2 communities and other stormwater permittees (e.g., Caltrans), with appropriate modifications as required for the type of permit.

In closing, CASQA would like to thank the State Water Board for its consideration of this critical issue. As we have expressed to the State Water Board on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits must be modified to create compliance pathways with sufficient rigor to ensure diligent progress in complying with water quality objectives, but also protection to permittees from the threat of unwarranted lawsuits.

Yours truly,



Richard Boon, Chair – California Stormwater Quality Association

Enclosure: Attachment A – Recommended model language for the Receiving Water Limitation provision and a Strategic Compliance Program

cc: Exhibit A-Petitioners and Their Counsel of Record List Revised
Exhibit B-Discharger List for LA MS4 Permit Revised
CASQA Board of Directors, Executive Program Committee, and Policy & Permitting Subcommittee

Attachment A

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Part E, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Part E, discharges from the MS4 of stormwater, or non-stormwater, for which a Permittee is responsible, shall not cause a condition of nuisance.

E. STRATEGIC COMPLIANCE PROGRAM

1. General
 - a. The purpose of this Part is to allow for a Strategic Compliance Program (hereafter referred to as "Program") to address and provide for compliance with the requirements of this Order. The Program may be organized on a watershed scale or other appropriate basis and shall specify implementation of customized strategies, control measures, and BMPs on an established schedule.
 - b. The Program may be structured for a watershed (or subwatershed), or for a jurisdiction or collection of jurisdictions.
 - c. Participation in a Program is voluntary, and allows a Permittee to progressively address the highest water quality and/or watershed priorities.
 - d. Unless otherwise delineated in this Order, the Program shall include a strategy and schedule for implementing BMPs for constituents that are causing or contributing to exceedances of applicable water quality objectives, or causing a condition of nuisance in specified water bodies. The Program may include, but is not limited to, specifically identified waterbody-pollutant combinations, watershed management plans, volume based controls designed to control the volume of run-off, and multi-benefit regional projects that, wherever feasible, retain the applicable water quality design storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood management and water supply.
 - e. As used herein, "design storm" shall refer to the 85th percentile, 24-hour storm event or equivalent.
2. Requirements
 - a. The Program shall be designed to address (i) applicable TMDL requirements in Part ..., (ii) contributions to exceedances of water quality standards in Parts ..., and (iii) non-stormwater discharges that are to be effectively prohibited pursuant to Part The Program shall also ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP).
 - b. The Program shall identify the water quality priorities and establish goals to be addressed by the Program. Interim and final goals may take a variety of forms such as TMDL established requirements (e.g., waste load allocations, water quality based effluent limits, etc.), action levels, pollutant concentration, load reductions, performance standards, impaired water bodies to be delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, runoff volume reduction, or other appropriate metrics described in the Program.

- c. The Program shall be based on or include an evaluation of existing water quality conditions for the jurisdiction(s), watershed, sub-watershed and/or waterbody-pollutant combinations that are being addressed with the Program.
- d. Based on the evaluation of historic and existing water quality conditions, the Program shall classify water body-pollutant combinations into categories to assist in prioritizing Program efforts. Examples of categories may include: classification of water body-pollutant combinations for which wasteload allocations are established pursuant to an adopted TMDL; classification of pollutants where a TMDL has not yet been developed but where data indicate water quality impairment in the receiving water according to the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (State Listing Policy) and for which MS4 discharges are causing or contributing to the impairment; and, classification of pollutants for which there are insufficient data to indicate water quality impairment in the receiving water according to the State's Listing Policy, but which on occasion may exceed applicable receiving water limitations contained in this Order and for which MS4 discharges are causing or contributing to the exceedance.
- e. The Program shall identify potential sources within the jurisdiction or watershed for the highest priority water quality issue(s) as specified in the Program. The Program shall identify known and suspected stormwater and non-stormwater pollutant sources in discharges to the MS4 and from the MS4 to receiving waters and other stressors related to MS4 discharges associated with the water quality priorities.
- f. A customized or modified monitoring program shall be submitted as part of the Program.
- g. Based on the findings of the source assessment, the goals to be achieved within each Program area shall be prioritized and sequenced. Program priorities shall include at a minimum:
 - i. TMDLs
 - ii. Receiving waters where data indicate impairment or exceedances of receiving water limitations or violations of Discharge Prohibitions, and the findings from the source assessment implicates discharges from the MS4 as a primary source of the impairment.
- h. The Program shall identify strategies, control measures, and BMPs to implement through their individual Stormwater Management Plans, and/or collectively on a jurisdictional, watershed or sub-watershed scale.
- i. The Program shall include methodology(ies) that will assess the effectiveness of implementation strategies, control measures and BMPs selected to address the priority water quality issues of concern.
- j. The Program shall incorporate compliance schedules from adopted TMDLs and, develop interim milestones and dates for their achievement in a manner that is consistent with the TMDLs. The Program shall also include compliance schedules and interim milestones and dates to measure progress towards addressing other water quality priorities that have been identified.
- k. The Program shall include an adaptive management process that provides for review of Program implementation at appropriate intervals. The adaptive management process must evaluate the following: 1) Progress toward achieving TMDL requirements according to established compliance schedules; 2) Progress toward achieving improved water quality in MS4 discharges and addressing Receiving Water Limitations and Discharge Prohibitions; 3) Progress towards

achievement of any other identified milestones; and 4) Re-evaluation of water quality priorities based on more recent water quality data. Based on the review, the Permittees shall report proposed Program modifications to the Regional Water Board in the Program's Annual Report. Such modifications shall be implemented upon Regional Water Board approval.

3. Process for Development and Approval

- a. Permittees that elect to develop a Program or have an existing or modified program recognized as a Strategic Compliance Program shall notify the Regional Water Board and establish a mutually agreed upon schedule for development and submission of the Program or modification of an existing program.
 - i. Such notification shall specify the Permittee(s) requested submittal date. The requested submittal date should reflect the complexity associated with the Program being developed by the Permittee(s).
 - ii. As part of the notification, Permittees shall identify applicable interim and final TMDL-based requirements and their associated compliance deadlines. Permittees shall identify control measures, where possible from existing TMDL implementation plans that have been or will be implemented by participating Permittees concurrently with the development of a Program to ensure that MS4 discharges achieve compliance by applicable compliance deadlines occurring prior to approval of a Program.
- b. Until the Program is approved by the Executive Officer, Permittees that elect to pursue a submission pursuant to this Part shall:
 - i. Continue to implement control measures in their existing stormwater management Plans, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv);
 - ii. Continue to implement control measures to effectively prohibit non-stormwater discharges through the MS4 that are a source of pollutants to receiving waters consistent with CWA section 402(p)(3)(B)(ii); and
 - iii. Implement control measures for MS4 discharges to achieve compliance with interim and final TMDL-based requirements by the applicable compliance deadlines occurring prior to approval of a Program.
 - iv. Permittees that do not submit a Program by the mutually agreed upon submittal date as set forth in provision Part E.3.a.i (unless such date has been extended by the Executive Officer), shall be subject to the baseline requirements in Part ... and shall demonstrate compliance with receiving water limitations pursuant to Part ... and with applicable interim water quality based effluent limitations in Part

4. Implementation

- a. Each Permittee shall begin implementing the Program upon approval by the Regional Water Board or the Executive Officer on behalf of the Regional Water Board, in accordance with the schedule for implementation set forth in the Program.
- b. Permittees may request an extension of deadlines for achievement of interim milestones and final compliance dates (unless final compliance dates are specifically

dictated by adopted TMDLs). Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request justification for the extension. Extensions shall be subject to approval by the Regional Water Board Executive Officer.

- c. Prior to the effective final and interim compliance dates for TMDLs, and upon a timely request from a Permittee or the Permittees, the Board shall consider the Permittees' ability to comply with the interim and final TMDL requirements and if necessary, reopen the Order or the approved TMDL. In considering the requesting Permittees' ability to comply, the Permittee shall demonstrate to the satisfaction of the Regional Water Board that it is unable to develop sufficient BMPs to timely achieve compliance with interim or final TMDL requirements because the necessary BMPs would be either technically infeasible or would otherwise result in a substantial hardship to the Permittee.

5. Compliance determination.

- a. A Permittee's compliance with an approved Program shall constitute a Permittee's compliance with requirements of this Order that the approved Program is intended to address, including the receiving water limitation provisions in Part D.
- b. If a Permittee fails to meet a requirement or date for its achievement in an approved Program, the Permittee shall be subject to the Provisions of Part D for the waterbody-pollutant combination(s) that were to be addressed by that requirement until that requirement is met.
- c. Upon notification of a Permittee's intent to submit a Program and prior to approval of the Program, a Permittee's compliance with the following shall constitute a Permittee's compliance with the receiving water limitations in Part D:
 - i. Provides timely notice of its intent to submit a Program;
 - ii. Meets all interim and final deadlines for development/modification of a Program as agreed to by the Regional Water Board's Executive Officer;
 - iii. For the area or waterbody-pollutant combination(s) covered by the Program, targets implementation of control measures in its existing stormwater management program, including watershed control measures to address non-stormwater discharges of pollutants through the MS4 to receiving waters, and known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations; and,
 - iv. Submits for approval its Program within the timeframe as agreed to by the Permittees and the Regional Water Board's Executive Officer.
- d. A Permittee shall be deemed in compliance with an applicable interim and final water quality-based effluent limitation and interim and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:
 - i. There are no violations of the final water quality-based effluent limitation for the pollutant at the Permittee's applicable MS4 outfall(s);
 - ii. There are no exceedances of applicable receiving water limitation for the pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);

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- iii. There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL;
- iv. The Permittee's discharge is within its waste load allocation; or
- v. At regulated development projects or multi-benefit regional projects in watersheds or subwatersheds tributary to the applicable receiving water where Permittees are implementing a Strategic Compliance Program, (i) all non-stormwater and (ii) all stormwater runoff up to and including the volume equivalent to the water quality design storm are retained.