



CITY OF
San Fernando
Historic & Visionary

August 14, 2013

Emel G. Wadhvani
Senior Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: SWRCB/OCC File A-2236 (a) through (kk)

Dear Ms. Wadhvani:

The **City of San Fernando** (City) is pleased to respond to your invitation to comment on the current Los Angeles County Municipal Separate Storm Sewer Permit – (MS4 permit) as it relates to the watershed management programs (WMPs) and enhanced watershed management programs (EWMPs). Specifically you ask the following:

1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 permit an appropriate approach to revising the receiving water limitations in MS4 permits?
2. If not, what revisions to the watershed management program/enhanced watershed management program would make the approach a viable alternative for receiving water limitations in MS4 permits?

The City must answer “no” to question 1 and “nothing” to question 2.

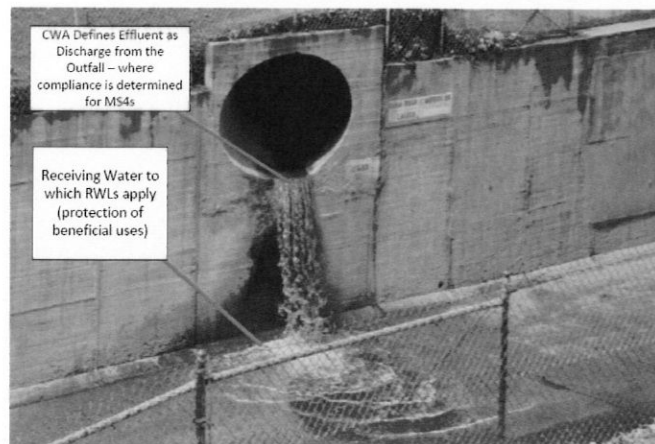
- *WMPs/EWMPs Cannot Serve as Receiving Water Limitation (RWL) Compliance Alternatives*

The City takes the position that the RWL provision of the Los Angeles MS4 permit -- and any other MS4 permit for that matter -- is the only determinant of compliance with water quality standards (WQSs) and total maximum daily loads



(TMDLs).¹ It cannot, legally at least, be abridged by a WMP or EWMP. RWL language in all California MS4 permits address MS4 permit compliance with receiving water limitations.

RWL language in the MS4 permit consists of two requirements. First, to prohibit discharges from an MS4 that cause or contribute to a violation of an RWL. An RWL consists of WQSs and TMDLs that are specified in a water quality control plan (also referred to as a basin plan) to protect the beneficial uses of a receiving water. Second, MS4 discharges and non-stormwater discharges shall not cause or contribute to a nuisance (a requirement only associated with the California Water Code²) and is not associated with receiving water beneficial use protection. The prohibition against RWL violations applies exclusively to stormwater discharges from MS4s³ (viz., an outfall and receiving water which are pictured below).



Regarding the prohibition of RWLs associated with stormwater discharges, a violation of an RWL can only arise when a permittee fails to: (1) implement a stormwater management plan (SWMP) in a complete and timely manner; and (2) respond to an exceedance of WQS/TMDL in accordance with the procedure spelled out in V.A.3.a through d. This procedure is referred to as the iterative process.

¹A water quality standard (WQS) federal stormwater term that is required to protect a beneficial use of a receiving water. A TMDL is a required when a WQS fails to attain that objective.

²"Nuisance" means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.; (3) occurs during, or as a result of, the treatment or disposal of wastes.

³Applies only to discharges from the MS4, not discharges that have entered the receiving water.

A SWMP is federally mandated in accordance with 40 CFR §122.26(d)(2)(iv) and consists of the six core programs referenced in the MS4 permit as minimum control measures (MCMs) and a monitoring program. The previous Los Angeles County MS4 permit incorporated the six core programs in the stormwater quality management program (SQMP) and relied on the County's in-stream monitoring stations and no stormwater outfall monitoring.

The iterative process is triggered when an exceedance is determined either by the MS4 permittee or the Regional Board based on monitoring outfall discharges. To put it another way, a violation can only result if these procedural steps are not followed. The steps include submitting a report to the Regional Board: (1) describing the best management practices (BMPs) contained in the SWMP that are being implemented; (2) listing what additional BMPs will be implemented to address the exceedance; (3) a revision of the SWMP containing the revised BMPs; (4) a revision of the monitoring program, if necessary and (5) an implementation schedule. A violation, therefore, cannot arise when an exceedance of WQS/TMDL is detected at the outfall through sampling and lab analysis.

There has been some debate on the role of the iterative process as it relates to MS4 compliance. Most poignant is *NRDC v. County of Los Angeles* (673 F.3d 880, 886), which affirmed that the iterative process does not "forgive" violations of the discharge prohibitions.⁴ The court is absolutely right: the iterative process does not forgive violations; but it does operate to prevent violations provided that its specific steps are followed and that the MS4 permittee implements its SWMP in a timely and complete manner.⁵

This is not an unconventional reading of RWL language. It is typical, straightforward language found in California and USEPA-issued MS4 permits. RWL language in California permits is guided by State Water Resources Control Board precedential Water Quality Order 99-05 adopted in 1999. Nothing in this order references or sanctions the use of watershed management programs or plans as a means of meeting receiving water limitations.

Nevertheless, the Los Angeles MS4 permit overrides RWL language by adding WMPs and EWMPs as compliance alternatives to meeting numeric WQs and TMDL WLAs. Interestingly, the Regional Board created a stringent compliance standard for meeting WQs and TMDL WLAs through a WMP/EWMP by: (1) equating water quality based effluent limitations (WQBELs) with TMDL WLAs;

⁴The 9th Circuit confused discharge prohibitions, which relate to state law prohibiting nuisances, with receiving water limitations.

⁵This issue appears to have been rendered moot in U.S. Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council*.

and (2) creating a new definition of receiving water limitations (RWLs) to mean TMDL WLAs applied to receiving waters, which also must be complied with. By so doing, the Regional Board made it impossible to comply with the SWMP RWL compliance determinant, thereby forcing MS4 permittees to either opt for a WMP or EWMP lest they risk non-compliance.

Although the Regional Board allows compliance to be attained through the six MCMs and a monitoring program, which make up the SWMP, it also requires strict compliance in meeting outfall WQSs and TMDLs/WLAs expressed as WQBELs, and meeting WQSs and TMDL/WLAs in the receiving water through receiving water limitations (RWLs). The problem is that it is probably impossible to meet these compliance standards because federal and state law protections against having to comply strictly with WQSs and TMDL WLAs have been disabled. Further adding to the difficulty in meeting these standards is that the Los Angeles MS4 permit requires compliance with "wet weather" WQSs/TMDL WLAs in the receiving water. This is because other discharges enter a receiving water as well when it rains. They include discharges from other MS4s, non-point discharges, and discharges that are allowed separate stormwater and other permits. It should be noted that the U.S. Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* makes it very clear that outfalls rather than receiving waters is where compliance with WQSs and TMDL/WLAs is determined.

In any case, meeting WQBEL/WLAs and RWL/WLAs through the implementation of a WMP or EWMP exceeds federal law and precedential State Board orders. WQBELs are translations of WLAs into BMPs rather than being one of the same. This newly invented definition of a WQBEL essentially creates a numeric effluent limitation that requires absolute compliance by any means necessary. Nevertheless, nothing in federal stormwater regulations require compliance with numeric effluent limitations. The Regional Board's only justification for requiring WQBELs is its claim that they are consistent with the assumptions of each TMDL's waste load allocation (WLA). However, the Regional Board has failed to explain in the MS4 permit and the administrative record (which is not complete) how the WQBELs are consistent with the assumptions of each TMDL waste load allocation. In many cases, the WQBELs that the Regional Board contrived are based on TMDLs that are not 303(d) listed and are not even applicable to MS4s (e.g., non-point source TMDLs). Beyond this, the Regional Board failed to conduct a Reasonable Potential Analysis supporting the need for a WQBEL which requires a showing that excursions above a WQS have occurred. The Regional Board has not been able to comply with this requirement because no outfall monitoring has been conducted.

Further, there are State Board Water Quality Orders 2000-11 and 2001-15 which affirm that numeric effluent limitations are inappropriate. WQO 2000-11 reads:

In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations. The emphasis for preventing pollution from storm water discharges is still on the development and implementation of effective BMPs, but with the expectation that the level of effort will increase over time. In its Interim Permitting Approach, the United States Environmental Protection Agency (U.S. EPA) stated that first-round permits should include BMPs, and expanded or better-tailored BMPs in subsequent permits where necessary to attain water quality standards.

WQO 2001-15 reaffirmed the State Board's policy on this issue:

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of effluent limitations, and the expectation that the level of effort to control urban runoff will increase time.

Turning to the Regional Board's other creation, RWLs as applied to compliance with WQSs and TMDL WLA's in receiving waters, the City could not find legal support for this requirement. Moreover, the Los Angeles MS4 permit defines an RWL as the following:

Any applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR § 131.38.⁶

There is nothing in this definition that even suggests that an RWL is analogous to a WQS or TMDL WLA and is applicable to a receiving water. Again, this is a new definition that Regional Board staff invented. It should also be noted that there is no federal stormwater or state requirement for complying with a WQS or TMDL WLA in the receiving water. Under Part V.A.1, RWL language makes clear that only discharges from the MS4 (outfall) that cause or contribute to the violation of receiving water limitation are prohibited (not discharges in the receiving water). Beyond this, State Water Quality Order 2001-15 points out that there is no provision in federal or state law that mandates the adoption of separate water quality standards for wet weather. This applies to outfall as well as to receiving waters. It is understood that several TMDLs adopted as basin plan amendments have been placed into the MS4 permit and are expressed as wet and dry

⁶See attachment "A" of current Los Angeles MS4 permit.

weather WLAs. The City believes that federal stormwater regulations only require attainment of WQSs and TMDL/WLAs expressed as dry weather, ambient standards based on stormwater outfall discharge monitoring.

Against this background it should be understood why an EWMP cannot be an RWL compliance alternative. Merely because an EWMP provides multiple benefits, it should not, in and of itself, place a permittee in compliance. This is especially true if the multi-benefit control is located outside the MS4, which would require compliance to be determined in the receiving water instead of the outfall – the last point of discharge for an MS4. As mentioned, RWL language in the current MS4 permit determines a violation exists if: (1) outfall monitoring reveals an exceedance of a WQS or TMDL WLA from MS4 discharges; (2) if the SWMP is fully completed in a timely manner; and (3) the iterative process is followed. Because the EWMP does not meet these three criteria, it cannot be considered compliance with RWL language in the permit and with State Board Water Quality Order 99-05. Moreover, WQO 99-05 does not contain language that would allow an EWMP to substitute for RWL compliance.

The same is true of the WMP. The WMP is a program that substitutes for RWL compliance even though it too is more stringent than the RWL in the MS4 permit. The WMP requires a plan to address WQSs and TMDL/WLAs through a customization of the MCMs (the six core programs) guided by watershed considerations. The WMP does not offer the same “safe harbor” protection of the EWMP in that no regional multi-benefit projects are required. A permittee is required to demonstrate through a reasonable assurance analysis -- which involves computer modeling -- that watershed-specific BMPs can meet WQSs/TMDL WLAs. If, however, in the final analysis outfall or receiving water monitoring does not meet these numeric targets, the permittee will be out of compliance. The Los Angeles MS4 permit’s RWL provision does not authorize this compliance option either.

- *No Revision to the WMP or EWMP Can Produce a Legally Valid RWL Alternative*

As already explained, the WMP and EWMP are incompatible with the RWL provision of the Los Angeles MS4 permit. The EWMP and WMP seek to supplant the RWL compliance approach clearly spelled-out in the permit. Once again, there is no legal justification under federal stormwater regulations, state law (viz., the water code), or precedential WQOs for creating EWMP/WMPs as an alternatives to the RWL provision of the permit.

The need for RWL alternatives is unnecessary. The reason they were created, it seems, was to coerce permittees into choosing them on a “voluntary” basis to impose upon them additional requirements that do more to benefit organizational

interests than protect water quality. The Regional Board did so by ignoring federal stormwater regulations and state board orders that prohibit compliance with numeric effluent limitations, requiring compliance in both the outfall and receiving waters, and requiring compliance with “wet weather” WLAs instead of ambient standards. Beyond this, there is no outfall monitoring data indicating that the City and other permittees have exceeded WQS/TMDL WLAs. Before the Regional Board can justify draconian compliance requirements it must justify the need for them -- which it cannot. Many of the TMDLs for example are not valid TMDLs because they are either not on the State’s 303(d) list or are 303(d) listed but are not MS4 point sources and, therefore, inapplicable to municipal permittees. Apparently, Regional Board staff relied on its own authority – which it has yet to cite -- to attach invalid TMDLs to permittees.

This is not to suggest that a watershed approach to stormwater management is not necessary. But in order for it to work properly, true water quality problems on a watershed/sub-watershed level must first be determined. They cannot be “made up.” The surface water ambient monitoring program (SWAMP) authorized by the State Legislature is intended to determine the health of water bodies in the State. The Los Angeles SWAMP has identified water quality issues for watersheds/sub-watersheds. Its data does not suggest widespread impairments to beneficial uses of receiving waters in all Los Angeles basin watersheds. SWAMP relies on ambient monitoring – not so surprisingly – to evaluate the health of watersheds/sub-watersheds, not wet weather monitoring data. SWAMP and monitoring data generated by Southern California Coastal Waters Research Project (SCCWRP), Council for Watershed Health, and other non-profit agencies can be used to provide an accurate assessment a watershed health. Once this step is completed, the next step would be to determine if California Toxics Rule (CTR) standards (the basis for TMDLs) are being exceeded by MS4s based on outfall data – something which has not been done. Merely because permittees are located in the same sub-watershed or watershed does not mean that they share the same water quality issues.

To determine commonality requires conducting outfall monitoring of stormwater discharges from each MS4. The resulting data then needs to be measured against in-stream dry weather standards (same as SWAMP’s) to determine if exceedances have occurred. If cities within a watershed/sub-watershed commonly exceed certain pollutants (bacteria, metals, nutrients, etc.), they could collectively develop a watershed management plan (WMP) consisting of pollutant specific BMPs to address exceedances, or if no persistent exceedances are recorded, their WMP could simply rely on minimum control measures.

All of these things can be accomplished within the context of the current RWL provision of the permit. The SWMP would be the exclusively compliance determinant. The WMP plan would be a sub-set of the permittee’s SWMP.

Watershed-specific BMPs would be implemented through the six core programs. For example, the industrial/commercial inspection program could target facilities that generate a TMDL pollutant and require them to implement their own BMPs. The SWMP would include a monitoring program plan that would be implemented over the 5-year term of the permit and the continued implementation of MCMs. If the data reveals persistent exceedances, the iterative process would be triggered, which would call for "better tailored" TMDLs to be proposed in the last year of the current permit, through the next Report of Waste Discharge (ROWD). Implementation of the new BMPs would be conducted through the next MS4 permit.

The EWMP must also be treated as a sub-set of the SWMP. However, it cannot be required unless it complies with Porter-Cologne Chapter 27, *California Watershed Improvement Act of 2009* (specifically §16101, §16102, and §1610). This is necessary in order to enable a permittee to comply waste load allocations by relying on regional controls that are sited outside of its MS4.

Finally, the City appreciates the opportunity to comment on this very important matter and hopes that the State Board will take them into serious consideration when it develops revised RWL language. Should you have any questions regarding this matter please do not hesitate to call me.

Sincerely,



Ron Ruiz
Public Works Director