

ATTACHMENT B

State Board Issue Paper
Municipal Storm Water Permit Receiving Water
Limitations Board Workshop
November 20, 2012

State Water Resources Control Board

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ISSUE:

The State Water Resources Control Board (State Water Board) has been asked, in public comments received on National Pollutant Discharge Elimination System (NPDES) permits for Municipal Separate Storm Sewer Systems (MS4s), to adopt permit provisions that create a partial or complete exemption from enforcement for violations of water quality standards while a discharger engages in an iterative process of improving controls (commonly referred to as a "safe harbor" provision). The State Water Board has scheduled a public workshop to consider the issue.

DISCUSSION:

Background:

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards. In the context of NPDES permits for MS4s, however, the Clean Water Act does not reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of reducing pollutants in the discharge to the Maximum Extent Practicable (MEP), but requirements to meet water quality standards are at the discretion of the permitting agency.¹ Further, under the Porter-Cologne Water Quality Control Act, waste discharge requirements must implement applicable water quality control plans, including water quality objectives; however, the Porter-Cologne Act also affords the State Water Board and regional water quality control boards (collectively, Water Boards) flexibility to consider other factors, such as economics, when establishing any NPDES permit requirements that are more stringent than required by the Clean Water Act.²

The State Water Board has exercised its discretion with regard to requiring compliance with water quality standards in MS4 permits by directing, in precedential orders, that MS4 permits contain provisions requiring discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters.³ However, consistent with federal

¹ 33 U.S.C. § 1342(p); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

² Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

³ SWRCB Order WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*).

law, the State Water Board has found it appropriate to implement Best Management Practices (BMPs) in lieu of numeric water quality-based effluent limitations to meet water quality standards.⁴ Additionally, in lieu of "strict compliance" with water quality standards, the State Water Board has prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements: reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs.

While the Water Boards have generally directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process, the iterative process does not provide a "safe harbor" to MS4 permittees: that is, when a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the relevant discharge prohibitions and receiving water limitations of the permit and potentially subject to enforcement by the Water Boards or through a citizen suit, even if the discharger is actively engaged in the iterative process. Despite the lack of a safe harbor provision, however, the Water Boards have, as a matter of practice, declined to initiate enforcement actions against MS4 permittees who have been actively engaged in the iterative process. The Water Boards' decisions to decline to include a safe harbor in MS4 permits have been upheld by courts of appeal.⁵

Need for and Purpose of Workshop:

The lack of a safe harbor in the iterative process was recently highlighted by the Ninth Circuit's decision in a citizen suit brought by the Natural Resources Defense Council (NRDC) against the County of Los Angeles and the Los Angeles County Flood Control District for violations of the receiving water limitations of their MS4 permit. The Ninth Circuit confirmed that, as the receiving water limitations of the Water Boards' MS4 permits are currently drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.⁶

As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that water quality standards are in fact not being met by many MS4s. MS4s accordingly assert that the receiving water limitations and iterative process provisions of the Water Boards' permits do not afford them with a viable path to compliance for these violations, which may take years of technical efforts to correct, especially for wet weather discharges. MS4s argue that they are increasingly vulnerable to citizen suits and/or Water Board enforcement. This concern has been raised by the California Stormwater Quality Association (CASQA) in comments on the proposed Phase II MS4 permit and by the California Department of Transportation (Caltrans) in comments on the Caltrans MS4 permit adopted

⁴ See SWRCB Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 98-01 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego County*); See also 40 C.F.R. § 122.44(k); Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, USEPA, September 1995. In such orders and guidance, the State Water Board and Environmental Protection Agency acknowledge that the storm water program may evolve over time to incorporate stricter limitations, including improved BMPs to meet water quality standards or numeric water quality based effluent limitations.

⁵ *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377; see also *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 897, n.7.

⁶ *Natural Resources Defense Council v. County of Los Angeles*, *supra*, 673 F.3d at p. 897. On July 13, 2012, the United States Supreme Court granted review of this case on other grounds.

September 19, 2012, as well as by numerous MS4s and interested persons in comments on both permits. The issue is additionally relevant to the Phase I MS4 permits issued by the regional water quality control boards.⁷

At the same time, the environmental community has commented that the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Environmental parties argue that direct enforcement of water quality standards is necessary to protect water quality, especially in such second- or third-generation permits where dischargers have already had a number of years to come into compliance.

Because of the broad applicability of any policy decisions regarding the receiving water limitations and iterative process provisions, the State Water Board is holding a public workshop to consider several alternatives in addressing the issue and to seek public input on these alternatives. Following the workshop, the State Water Board may propose revisions to the receiving water limitations in the Caltrans MS4 and Phase II MS4 permits, and as necessary, re-open those permits after public review and comment, to make the revisions.

ALTERNATIVES FOR CONSIDERATION:

The State Water Board may consider the alternatives below, individually or in combination, to address concerns with the receiving water limitations in the Caltrans or Phase II MS4 permits. While the listed alternatives attempt to capture the range of alternatives before the State Water Board, the Board welcomes comments proposing other options and will not be limiting its consideration to the alternatives as listed in this issue paper.

The receiving water limitations language prescribed by State Water Board Order WQ 99-05 is attached as Attachment 1 and forms the basis of Alternative 1. CASQA has submitted specific proposed language for the Receiving Water Limitations provision of the proposed Phase II MS4 permit (CASQA Proposal). The CASQA Proposal is attached as Attachment 2 and is referenced as appropriate in the discussion of the alternatives below.

Alternative 1: Keep the status quo of no safe harbor.

This alternative makes no changes to the existing State Water Board approach or to the current language of the adopted Caltrans MS4 permit or the proposed Phase II MS4 permit. As stated previously, the current MS4 permit provisions laying out the iterative process are based on language set forth in precedential State Water Board orders. (See Attachment 1.) Alternative 1 adheres to the prescribed language. Under this alternative, the Water Boards may choose to exercise their enforcement discretion to refrain from taking action against dischargers engaged in good faith implementation of the iterative process; however, they would not be constrained from enforcing the receiving water limitations when an MS4 causes or contributes to exceedances of water quality standards. As a limitation within an NPDES permit, dischargers who cause or contribute to an exceedance of water quality standards could be subject to citizen suits.

⁷ Note that the issue is not relevant to any other NPDES permits, including permits for storm water discharges associated with industrial activity, because all other NPDES permits must include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards. (33 U.S.C. § 1311(b)(1)(C).)

Alternative 2: No safe harbor, but provide greater clarity and specificity for iterative process implementation and wet weather data analysis.

Greater clarity and specificity in the MS4 permits as to the iterative process requirements may result in increased efforts to improve controls and achieve compliance. Such clarity and specificity may include:

1. Clarification on how compliance with the relevant discharge prohibitions and receiving water limitations is determined, including type and frequency of monitoring;
2. Clarification that dischargers must begin the iterative process after documentation of violations without waiting to be directed to do so by the Water Boards;
3. Specification of the minimum efforts that will constitute meaningful compliance with the iterative process;
4. Specification of the scope of any corrective action, including whether it applies only at the location where exceedances are measured or throughout the relevant watershed;
5. Specification of additional wet weather data analysis to better define and assess the impact of municipal storm water discharges on receiving waters, as well as the efficacy of specific best management practices.

As the MS4 program continues to mature and more data becomes available, this alternative may be enhanced by the development of water quality-based effluent limitations for pollutants, as appropriate, as a means of determining compliance with receiving water limitations. In addition, the enhanced wet weather data could be used to identify surrogates that could be used as a measure of protecting beneficial uses. In time, the data could be used to develop actual wet weather water quality standards or wet weather implementation provisions for existing water quality standards that could be applied consistently on a statewide basis.

Given the nature of storm water discharges and of MS4s, questions such as where and how compliance with water quality standards should be measured and how narrowly or broadly corrective actions should be applied, pose complicated technical issues that require careful study and consideration. These challenges notwithstanding, water quality improvements are more likely to be achieved as the iterative process becomes automatic and dischargers follow clear guidelines for determining and addressing non-compliance with permit terms. Such improvements may dissuade the Water Boards and the public from bringing enforcement actions/citizen suits for all except the most egregious and repeated violations.

In addition to being a stand-alone alternative, Alternative 2 may be considered in combination with Alternatives 3 through 5. The CASQA Proposal incorporates some greater specificity in the iterative process requirements as a component of its proposed receiving water limitations.

Alternative 3: Safe harbor that applies only if a discharger is in compliance with the implementation provisions of an approved TMDL.

Under Alternative 3, the receiving water limitations would be amended to provide a safe harbor for permittees that are in compliance with the implementation provisions of a TMDL. In effect, as long as the permittee is in compliance with the TMDL (including any compliance schedule) the terms of the TMDL would replace the requirement to comply with water quality standards for the pollutants that are covered by the TMDL.

The CASQA Proposal contemplates a safe harbor for dischargers in compliance with a TMDL as a component of the receiving water limitations.

Alternative 4: Safe harbor that applies if a discharger is in compliance with the implementation provisions of an approved TMDL, as in Alternative 3, and, in addition, that applies when the discharger engages in good faith compliance with the iterative process for exceedances caused by wet weather discharges.

In addition to the safe harbor for TMDL implementation, Alternative 4 would provide a safe harbor when dischargers engage in the iterative process in good faith to address violations of permit terms caused by wet weather discharges. Thus, if a storm water discharge from an MS4 is causing or contributing to an exceedance of a water quality standard in the receiving water, the exceedance would not constitute a violation of the permit as long as the discharger was engaged in good faith efforts to address the exceedance through improved controls. Alternative 4 recognizes that wet weather discharges from MS4s frequently cause or contribute to violations of water quality standards and allows the MS4s time to address these violations by improving control measures.

However, the safe harbor would not extend to dry weather discharges. Non-storm water discharges are generally prohibited in MS4 permits and only a few categories of non-storm water discharges are exempted from the prohibition, with the condition that these exempted discharges also be prohibited if they are identified as sources of pollutants to receiving waters.

Alternative 5: Full safe harbor.

This alternative would provide a full safe harbor to dischargers complying with the implementation provisions of a TMDL or engaging in the iterative process to address exceedances caused by wet or dry weather discharges.

The CASQA Proposal attached provides for a full safe harbor.

Attachment 1:

**State Water Board Order WQ 99-05
(Prescribing language for receiving water limitations in MS4 permits)**

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 99 - 05

Own Motion Review of the Petition of
Environmental Health Coalition
to Review Waste Discharge Requirements Order No. 96-03,
NPDES Permit No. CAS0108740
for Storm Water and Urban Runoff from the
Orange County Flood Control District
and the
Incorporated Cities of Orange County
Within the San Diego Region,
Issued by the
California Regional Water Quality Control Board,
San Diego Region.

SWRCB/OCC File A-1041

BY THE BOARD:

In Order WQ 98-01, the State Water Resources Control Board (State Water Board) ordered that certain receiving water limitation language be included in future municipal storm water permits. Following inclusion of that language in permits issued by the San Francisco Bay and San Diego Regional Water Quality Control Boards (Regional Water Boards) for Vallejo and Riverside respectively, the United States Environmental Protection Agency (EPA) objected to the permits. The EPA objection was based on the receiving water limitation language. The EPA has now issued those permits itself and has included receiving water limitation language it deems appropriate.

In light of EPA's objection to the receiving water limitation language in Order WQ 98-01 and its adoption of alternative language, the State Water Board is revising its instructions regarding receiving water limitation language for municipal storm water permits. It is hereby ordered that Order WQ 98-01 will be amended to remove the receiving water limitation language contained therein and to substitute the EPA language. Based on the reasons stated here, and as a precedent decision,¹ the following receiving water limitation language shall be included in future municipal storm water permits.²

RECEIVING WATER LIMITATIONS

The permittees shall comply with Discharge Prohibitions []³ and Receiving Water Limitations [] through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SWMP and other requirements of this permit including any modifications. The SWMP shall be designed to achieve compliance with Receiving Water Limitations []. If exceedance(s) of water quality objectives or water quality standards (collectively, WQS) persist notwithstanding implementation of the SWMP and other requirements of this permit, the permittees shall assure compliance with Discharge Prohibitions [] and Receiving Water Limitations [] by complying with the following procedure:

¹ In SWRCB Order WR 96-1, the State Water Board determined that water quality orders are precedent decisions. (See Gov. Code §11425.60.)

² This language may be revised as necessary to ensure that terminology conforms with the rest of the permit.

³ Insert appropriate numbers for prohibitions and limitations that implement water quality objectives and water quality standards.

- a. Upon a determination by either the permittees or the Regional Water Board that discharges are causing or contributing to an exceedance of an applicable WQS, the permittees shall promptly notify and thereafter submit a report to the Regional Water Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of WQs. The report may be incorporated in the annual update to the SWMP unless the Regional Water Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Water Board may require modifications to the report.
- b. Submit any modifications to the report required by the Regional Water Board within 30 days of notification.
- c. Within 30 days following approval of the report described above by the Regional Water Board, the permittees shall revise the SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, implementation schedule, and any additional monitoring required.
- d. Implement the revised SWMP and monitoring program in accordance with the approved schedule.

So long as the permittees have complied with the procedures set forth above and are implementing the revised SWMP, the permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develop additional BMPs.

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ORDER

IT IS ORDERED that Order WQ 98-01 is revised as discussed above.

CERTIFICATION

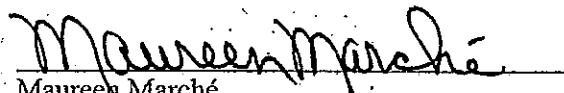
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 17, 1999.

AYE: James M. Stubchaer
Mary Jane Forster
John W. Brown
Arthur G. Baggett, Jr.

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

Attachment 2

CASQA Proposal for Receiving Water Limitations Language

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, 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 Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State or Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.