



California Stormwater Quality Association®

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

December 18, 2015

Michael Lauffer, Chief Counsel
Office of Chief Counsel
State Water Resources Control Board
Sacramento, California 95834

SUBJECT: SWRCB/OCC File A-2386 - Response to Petition of Natural Resources Defense Council, Health the Bay, and Los Angeles Waterkeeper for Review of Approval of Watershed Management Programs Pursuant to the Los Angeles Regional Water Quality Control Board Order R4-2012-0175

Dear Mr. Lauffer:

The California Stormwater Quality Association (CASQA) appreciates the opportunity to provide a response to the Petition and Addendum for Petition of Natural Resources Defense Council, Health the Bay, and Los Angeles Waterkeeper for Review of Los Angeles Regional Water Quality Control Board Executive Officer's Action to Conditionally Approve Nine WMPs Pursuant to the L.A. County MS4 Permit (respectively referred to as the NRDC Petition and Addendum).

CASQA is a nonprofit corporation with approximately 2,000 members throughout California, including hundreds of local public agencies. About 300 CASQA members hold MS4 permits issued under state and federal law (referred to as National Pollutant Discharge Elimination System or NPDES permits and waste discharge requirements). CASQA actively participated in proceedings before the State Water Resources Control Board (State Water Board) with respect to challenges associated with the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175) (LA MS4 Permit), and on behalf of its membership, continues to be very interested in proceedings related to this permit as it may guide the structure and implementation of similar provisions in other permits for the foreseeable future.

In summary, CASQA responds to the NRDC Petition allegations that the Los Angeles Regional Water Quality Control Board's (Los Angeles Water Board) Executive Officer (EO) exceeded his/her delegated authority by providing conditional approvals of nine watershed management plans (WMPs). CASQA disagrees with such allegations and encourages the State Water Board to reject these claims. With respect to allegations regarding model calibration and the lack of available monitoring data, CASQA also requests that the State Water Board reject such claims because, 1) Petitioners allegations are unsupported, and 2) acceptance of such claims would dissuade entities from doing watershed planning and limit the ability of agencies to effectively move forward with implementation while gathering data to improve the analysis.

I. Addendum for Petition Was Not Timely Filed And Must Be Denied

As a preliminary matter, CASQA contends that the Addendum was not timely filed with the State Water Board and thus must be summarily denied. According to the Addendum, the Petitioners “seeks review of the Los Angeles Regional Water Quality Control Board’s [] action on September 10, 2015 to ratify the Regional Board Executive Officer’s final approvals of three specific Watershed Management Programs (“WMPs”) prepared by dischargers [] regulated by the 2012 Los Angeles County Municipal Separate Storm Sewer System (“MS4”) Permit” (Addendum, p. 1.) Further, Petitioners’ requested relief is for the State Water Board to “invalidate the Regional Board’s action on September 10, 2015 to ratify the Executive Officer’s final approvals of the Los Angeles River Upper Reach 2, Lower San Gabriel River, and Lower Los Angeles River WMPs.” (Addendum, p. 27.) Accordingly, the Addendum challenges Regional Board actions that occurred on September 10, 2015. However, Petitioners failed to file the Addendum until October 30, 2015. By waiting 50 days to file the Addendum, Petitioners have failed to comply with the law, and allegations and challenges contained in the Addendum must be denied.

Water Code section 13320(a) clearly states that administrative review of regional board actions (or failure to act) must be filed within 30 days. (Wat. Code, § 13320(a).) This black letter law requirement is repeated in the State Water Board’s regulations, which expressly state that “Any petition by an aggrieved person to the state board for review under Water Code section 13320(a) of an action or failure to act by a regional board shall be submitted in writing and received by the state board within 30 days of any action or failure to act by a regional board.” (23 CCR, §2050(a).) As noted, the Addendum was filed 50 days after the Regional Board action. Thus, filing of the Addendum failed to comply with the law and must be dismissed.

Further, Petitioners cannot circumvent the law’s timing requirements for filing petitions to the State Water Board by merely titling it as an “Addendum” to a previously filed petition that has been held in abeyance. Here, the claims and challenges contained in the Addendum are distinctly different from those contained in the original petition filed on May 28, 2015. Specifically, the May 28, 2015 petition challenges the EO’s action to conditionally approve nine WMPs pursuant to the terms of the LA MS4 permit. Comparatively, the Addendum challenges the substance of the finally approved WMPs. Petitioners had the opportunity to challenge the substance of the finally approved WMPs as long as their petition (or “Addendum”) was timely filed within 30 days of the Regional Board’s action. Petitioners failed to do so and thus the Addendum is not properly before the State Water Board and must be denied.

II. The Los Angeles Water Board, and its EO, has discretion to determine compliance with the MS4 permit provisions

Although the Addendum was not timely filed, it appears that the May 28, 2015 NRDC Petition was timely filed within 30 days of the EO’s action to conditionally approve nine WMPs. Accordingly, the challenges asserted within the NRDC Petition are properly before the State Water Board with respect to being raised timely. However, from a practical perspective, the allegations are moot since the WMPs have now received final approval, and Petitioners failed to timely challenge final approval, and the substance of the WMPs. (See Section 1, above.)

Nonetheless, CASQA will respond to and comment on the allegations made in the NRDC Petition in the event that the State Water Board considers these allegations as appropriate for review.

Notably, regional boards adopt numerous permits every year that include hundreds of permit provisions. It is not feasible or practical for the State Water Board, or regional boards, to oversee every decision with respect to compliance of permit provisions after a permit has been adopted. Thus, by necessity, regional boards authorize their staff to oversee permit compliance and make decisions everyday with respect to determining if a permittee's actions are in compliance with permit provisions. Such authorization is consistent with the law, which states that "[e]ach regional board may delegate any of its powers and duties vested in it by this division to its executive officer excepting only the following:" (Wat. Code, § 13223(a).) Of the five actions that are excepted from this delegation authority, determining permit compliance is not one of them.

Contrary to Petitioners allegations, the method for determining compliance with permit requirements is properly delegated to the regional board's executive officer, and establishing a method of compliance does not constitute a permit modification. (See *California Assn. of Sanitation Agencies et al., v. State Water Resources Control Board* 208 Cal.App.4th 1438, 1468; see also *Russian River Watershed Protection Committee v. Santa Rosa*, 142 F.3d 1136, 1143, ["the establishment of a method of compliance with an NPDES permit does not constitute a modification of a permit."].) Moreover, the EO's process does not constitute a permit modification, which is otherwise an action reserved for the regional board.

In this case, the MS4 Permit delegates authority to the EO to determine if a WMP (or EWMP) complies with the requirements of the permit. (LA MS4 Permit, p. 58.) In doing so, the EO here granted conditional approval of final WMPs, and directed permittees to provide revised final WMPs that satisfied the conditions set forth in the EO's conditional approval. Should such revisions not satisfy the conditions within a set period of time, the EO's conditional approval would be rescinded. Nothing in this process exceeds the EO's delegated authority to approve WMPs. Rather, this process constitutes the EO's method (or process) for determining compliance, and thus clearly falls within its generally delegated authority.

III. Issuance of a "conditional approval" is within the EO's discretion, and promotes administrative efficiency

Further, the EO's use of a conditional approval process falls within the EO's general discretion to administer the NPDES permit program in a manner that is consistent with the law. In exercising their powers under the California Water Code (including their administration of the federal NPDES program), regional boards (and therefore EOs) must administer the program in a manner that is consistent with the Legislature's express intent, which includes that water quality should be regulated to attain the highest water quality which is reasonable, "considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000; see also Wat. Code, § 13223(b).) The need to regulate to the highest level that is reasonable pertains not only to the level of water quality, but the process in administering permits designed to achieve

compliance with water quality objectives. Using a conditional approval process is reasonable as it allows for the EO to balance a number of factors in making final decisions. Also, use of a conditional approval process does not detract from or take away the regional board's responsibilities and obligations with respect to protecting water quality.

Use of a conditional approval process is not unique to the Los Angeles Water Board or this permit. It is often used to conditionally approve workplans or other report requirements that are "close to compliance" but need some improvement before receiving final stamp of approval from the EO or regional board. Such a process promotes administrative efficiency, and overall provides for more efficient protection of water quality. For example, denial of a WMP here would not result in immediate improvement of water quality. Rather, it would delay and/or end collective watershed management planning efforts that are designed to improve water quality. The only result would then be immediate non-compliance for the permittees with arguably no practical path towards compliance. Such a result is not in the public's interest, or in the interest of protecting water quality.

Accordingly, CASQA requests that the State Water Board reject Petitioners allegations regarding the impropriety of using a conditional approval process here for the WMPs, or generally for the conditional approval of other types of workplans and permit submittals.

IV. The adaptive management process contained in the LA MS4 Permit is robust and the WMPs include such processes consistent with the LA MS4 Permit

To the extent that the State Water Board does not dismiss the allegations contained in the Addendum, CASQA submits the following responses in sections IV and V to certain claims made in the Addendum. First, CASQA addresses allegations challenging the adaptive management process included in the LA MS4 Permit for WMPs. Specifically, the LA MS4 Permit requires co-permittees to implement the adaptive management processes presented in each of the WMPs every two years to more effectively target control measures as additional data is collected and plans are translated into specific management actions. The Petitioners contend that WMP co-permittees will be considered in compliance with the Permit regardless of water quality conditions as long as some form of implementation effort identified in the adaptive management process is being carried out. However, contrary to such allegations, Los Angeles Water Board staff have made it abundantly clear in written responses and in various public hearings that the sub-watershed scale interim and final milestone volume retention or treatment metrics presented in the WMPs will be treated as compliance metrics for the co-permittees. In other words, Los Angeles Water Board staff will not consider "any" implementation effort as compliance.

The LA MS4 Permit approach is consistent with the iterative and adaptive management approach supported in the 2014 USEPA Memorandum on incorporation of total maximum daily loads (TMDLs) into MS4 permits¹ (USEPA 2014). As noted in that memorandum:

¹ Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Based on LAs". Memorandum to USEPA Water Division Managers Regions 1-10. November 26, 2014.

“The 2002 memorandum went on to provide guidance on using an iterative, adaptive management BMP approach” for improving stormwater management over time as permitting agencies, the regulated community, and other involved stakeholders gain more experience and knowledge. EPA continues to support use of an iterative approach, but with greater emphasis on clear, specific, and measurable permit requirements and, where feasible, numeric NPDES permit provisions, as discussed below.”

The LA MS4 Permit approach includes clear, specific and measurable permit requirements consistent with this memorandum, which were utilized to develop the adaptive management processes in the WMPs. As noted in the memorandum, this approach to regulating MS4 discharges is supported by USEPA.

Petitioners allegations also fail to recognize the complementary relationship/synergy between the WMPs and the Coordinated Integrated Monitoring Programs (CIMPs) that will be implemented in parallel to bolster and broaden existing datasets and fill critical data gaps. For example, the LA MS4 Permit allows co-permittees to revise water quality priorities and modeling efforts based on CIMP implementation to demonstrate early compliance, or to identify water quality issues that persist and additional control measures that may be necessary. This adaptive management process is essential and necessary to provide co-permittees the flexibility needed to translate planned efforts into action based on site-specific considerations. Conversely, Petitioners seek to have the State Water Board dismiss this process before it starts.

Further, Petitioners have, in many instances, expressed a desire to require the co-permittees to commit to implementation of large structural control measures in the WMPs without allowing for a technical or engineering exception that accounts for legitimate issues such as groundwater contaminant plume mobilization or geotechnical concerns. Petitioners appear to oppose the flexibility afforded by the adaptive management process because to them it is seen as a pathway for co-permittees to not implement control measures identified in the WMP. To the contrary, the Los Angeles Water Board, regardless of the adaptive management process, will expect agencies to identify and implement a suite of alternative equivalent control measures to meet the volume retention metrics presented in the WMPs.

Lastly with respect to this issue, many of the WMPs developed under the LA MS4 Permit outline a framework of control measures that will be implemented over two decades in the future to address final compliance milestones (e.g., final metals compliance by 2037). Requiring co-permittees to commit to implementation of all WMP identified control measures now without a reasonable adaptive management process that allows for consideration of future advancements in science and engineering is short sighted, does not provide for stewardship of public funds, and may prove to be a significant impediment to effective stormwater management in Los Angeles County. In summary, the adaptive management processes presented in the WMPs comply with the provisions of the LA MS4 permit and afford co-permittees with some flexibility to address volume retention compliance metrics as additional data is collected and factors influencing the relative viability of control measures evolves.

V. The level of data and resources to develop models varies by watershed, and rejecting initial WMPs based on concerns about the accuracy of modeling based on limited data would dissuade people from doing watershed planning and limit the ability of agencies to effectively move forward with implementation while gathering data to improve the analysis

In response to Petitioners substantive allegations pertaining to watershed modeling, CASQA provides these additional comments. First, watershed modeling best practices involve calibrating models to observed hydrology and water quality where monitoring data is available. Monitoring programs were not initially developed with model calibration and validation in mind. The availability of water quality monitoring data and the distribution of federal or County streamflow gages was not considered in the process of establishing watershed management groups (WMGs) to develop the WMPs – resulting in some WMGs not having access to a long-term monitoring dataset or stream gage to use in calibration and validation of their models.

The absence of site-specific data typically dictates the use of model parameters developed and calibrated to observed conditions in a similar more data rich “proxy” watershed with a broader, regional calibration. In this case, the contested WMPs used models that had been regionally calibrated through extensive and well-documented peer review processes involving a wide array of stakeholders. Los Angeles Water Board and EPA staff requests for additional model calibration beyond the regional effort were addressed through a combination of WMP revisions and extensive discussions regarding data availability. Based on these discussions, EPA and Los Angeles Water Board staff ultimately recognized and understood that significant gaps precluded a more robust calibration for some WMPs, which meant that some WMPs would need to use regionally appropriate parameters for their modeling efforts. Unfortunately, the Petitioners expect each WMP calibration to be held to a uniform standard regardless of data availability, which is unreasonable and impractical.

Considering the resource and time intensive processes associated with watershed modeling, granting Petitioners request to reverse WMP approval on these grounds could result in unintended consequences. Specifically, CASQA is concerned that reversal of WMP approval based on such allegations could prevent City and County co-permittees throughout the State from electing to develop reasonable assurance analyses (RAAs), or engage in watershed scale modeling, if their modeling efforts could be challenged and ultimately deemed insufficient based on data availability. Consequently, disapproving WMPs based on calibration modeling issues would force co-permittees to spend limited resources on more extensive data gathering. Such data gathering activities would ultimately be at the expense of funding control measures. Notably, models used to establish total maximum daily loads (TMDLs) throughout the State utilized similar methods and could be considered insufficiently calibrated for the same reasons. In other words, State Water Board acceptance of Petitioners allegations here would mean that RAA modeling is held to a higher standard than that applied to models used to develop TMDLs. More importantly, WMP rejection based on such reasoning could adversely impact the ability of co-permittees to pursue watershed management oriented compliance pathways in areas that may be data limited. For these reasons, the State Water Board must reject Petitioners allegations.

CASQA Response to Petition for Review of Approval of Watershed Management Programs

If you have questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

A handwritten signature in cursive script, reading "Gerhardt J. Hubner".

Gerhardt Hubner, Chair
California Stormwater Quality Association

cc: Ryan Mallory-Jones, State Water Board
Petitioners, Water Boards' staff, and Permittees listed in November 10, 2015 State Water Board Notice
CASQA Board of Directors and Executive Program Committee