

CITY OF LAKE FOREST



July 31, 2009

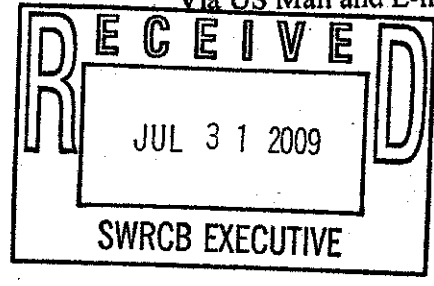
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Via US Mail and E-mail



Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Comments on Draft Order, SWRCB/OCC File A-1780; August 4, 2009 Board Meeting

Dear Ms. Townsend:

The City of Lake Forest ("City") submits this comment letter to the State Water Resources Control Board ("SWRCB") on the proposed order in SWRCB/OCC File A-1780 ("Draft Order"). As proposed, the Draft Order would affirm the incorporation of dry weather TMDLs into the municipal separate storm sewer system ("MS4") permit for the County of Los Angeles as provided in the California Regional Water Quality Control Board, Los Angeles Region (LARWQCB) Order R4-2006-0074 ("Permit"). The City is concerned about the Draft Order's analysis of the issues adjudicated. The City's comments follow.

THE CLEAN WATER ACT SUPPORTS AN ITERATIVE, BMP BASED APPROACH TO TMDLS

The Draft Order is based on the premise that federal law distinguishes between types of discharges from an MS4. To the contrary, while the Clean Water Act provides that MS4 permits effectively prohibit non-storm water discharges *into* the MS4, all discharges *from* the MS4 are subject to the maximum extent practicable (MEP) standard, regardless of the source. (33 USC § 1342(p)(3)(B).) Clean Water Act section 402(p)(B) states:

Municipal discharge. Permits for discharges from municipal storm sewers—

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges *into* the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such



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other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(33 USC § 1342(p)(3)(B) [emphasis added].)

Thus the Clean Water Act does not impose a separate standard on the discharge of non-storm water from the MS4 as compared to the discharge of storm water from the MS4. (*See id.*) The discharge of any pollutant from the MS4 is subject to the MEP standard. Indeed, the SWRCB explicitly recognized this in Order WQ 2001-15, when it directed the San Diego Regional Water Quality Control Board to revise the 2001 San Diego County Large MS4 Permit to clarify that the MEP standard only applied to discharges *from* the MS4.¹ (SWRCB Order WQ 2001-15, pages 9-10, 17.)

The Draft Order ignores this plain language of the Clean Water Act. (*See* Draft Order, page 8 [“dry weather discharges, as defined by the Permit and the TMDL, are more appropriately regarded as non-storm water discharges, which the Clean Water Act requires to be effectively prohibited”].) It differentiates between discharges of storm water and non-storm water *from* the MS4, and attempts to justify an abbreviated timeline for strict compliance with the TMDL’s numeric targets on the grounds that the Clean Water Act imposes different compliance standards on discharges of each. As described above, the Clean Water Act does not distinguish between storm water and non-storm water when regulating discharges *from* an MS4. (33 USC § 1342(p)(3)(B)(iii).) The MEP standard expressly applies to discharges of pollutants from the MS4.

Application of the MEP standard to discharges from the MS4 is important in the instant case because it dictates how and when the permittees must implement TMDLs. Both the SWRCB, and US EPA have stated on numerous occasions that an iterative, BMP based process should be employed to implement TMDLs and other numeric standards in MS4 permits. For example, in SWRCB Order WQ 2001-15, the SWRCB directed the San Diego Regional Water Quality Control Board to revise the 2001 San Diego County Large MS4 Permit:

The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges “from” the municipal sewer system.

The Draft Order ignores this precedential order, as well as other guidance from US EPA cited by the County of Los Angeles. Instead, it distinguishes these authorities on the grounds that they only apply to discharges of “storm water” from the MS4. As stated above, this is a false distinction that is contrary to the plain language of the Clean Water Act.

¹ Specifically, the SWRCB ordered the San Diego Regional Water Quality Control Board to remove the words “into and” from a permit requirement that formerly stated: “[d]ischarges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited.”

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The SWRCB may have the discretion, in the appropriate case, to require strict adherence to numeric standards. (*Defenders of Wildlife v. Brown* (9th Cir. 1999) 191 F.3d 1159.) However, if the SWRCB is going to require immediate compliance with numeric standards in an MS4 permit, it needs to directly address why those authorities mandating an iterative, BMP based approach to municipal storm water in general, and TMDLs in particular are not applicable. Sidestepping the issue by distinguishing them based on a misinterpretation of the Clean Water Act is insufficient. Moreover, claiming that the approach is mandated by federal law denies the public an opportunity to have an honest, open discussion about the ramifications, costs, and benefits of requiring immediate compliance with numeric standards.

For the reasons set forth above, the City requests that the Draft Order be revised to remove any reference to a federal requirement that non-storm water discharges from the MS4 are subject to a heightened compliance standard. The City further requests that the SWRCB remand the Permit to the Los Angeles Regional Water Quality Control Board with instructions to revise the LA County Large MS4 permit to include the County of Los Angeles' requested language revisions.

IMPOSING TMDLS IN MS4 PERMITS EXCEEDS THE REQUIREMENTS OF FEDERAL LAW

The SWRCB may have the discretion, in the appropriate case, to impose numeric effluent limits, and require strict adherence to numeric standards in MS4 permits. (*Defenders of Wildlife v. Brown* (9th Cir. 1999) 191 F.3d 1159.) However, imposing a standard more stringent than MEP, and/or imposing numeric TMDLs in MS4 permits exceeds the requirements of federal law, and triggers applicable state law requirements. (See 33 USC § 1303(e) [requiring TMDLs to be included in industrial permits, but not explicitly requiring inclusion in MS4 permits]; *see also City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.) For waste discharge requirements that exceed the requirements of federal law, the Water Code requires consideration of the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing in the region.
- (f) The need to develop and use recycled water.

(Cal. Water Code § 13241.)

Of the above listed factors, the economic considerations can be the most difficult to navigate. In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, the California

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Supreme Court held that where an NPDES Permit exceeds the requirements of federal law, the Regional Boards are required to consider the "economic" impacts on dischargers. The Supreme Court defined the economic impact as the "discharger's cost of compliance." (*Id.* at 618, 625.) Immediate compliance with numeric based TMDL requirements can be very expensive. In the instant case, the treatment control BMPs necessary to ensure that bacteria levels in the "wave wash" remain below the TMDL will take time and money to deploy. Before the SWRCB, or Los Angeles Regional Water Quality Control Board imposes this obligation on the County of Los Angeles, it needs to consider the economic costs involved.

Additionally, pursuant to Article XIII B, Section 6 of the California Constitution any NPDES requirements that are not explicitly required by federal law must be funded by the state. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 915-916.) Where, as here, a federal program provides discretion to the State agency to impose a local program on a municipality, such as a TMDL, the municipality is entitled to reimbursement from the state. (See *Hayes v. Commission on State Mandates* (1992) 11 Cal. App.4th 1564, 1570.)

CONCLUSION

We appreciate your attention to our comments. The City is committed to the goal of water quality improvement, and the effective deployment of resources in furtherance of that goal. We look forward to hearing the SWRCB's response to the above comments and concerns at the hearing on the Draft Order. In the meantime, if you should have any questions, please contact Devin Slaven, Water Quality Specialist, at (949) 461-3436.

Sincerely,

CITY OF LAKE FOREST



Robert L. Woodings, P.E.
Director of Public Works/City Engineer

cc: Robert C. Dunek, City Manager
Theodore G. Simon, P.E., Engineering Services Manager
Devin E. Slaven, REA, Water Quality Specialist
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