



August 15, 2013

Via Email to: commentletters@waterboards.ca.gov, jbashaw@waterboards.ca.gov and ewadhvani@waterboards.ca.gov

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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 Contra Costa Clean Water Program (CCCWP)¹ appreciates the opportunity to provide comments to the State Water Resources Control Board (State Board) in response to the State Board's July 8, 2013 request for feedback on: (1) whether the watershed management program/enhanced watershed management program (WMP/EWMP) alternative contained in the Los Angeles MS4 Permit is an appropriate approach to revising the receiving waters limitations (RWLs) in MS4 permits; and (2) what revisions to the WMP/EWMP alternative would make the approach a viable alternative for RWLs in MS4 permits.

CCCWP provided comments to the State Board on the RWLs issue last November through the Bay Area Stormwater Management Agencies Association (BASMAA)², of which CCCWP is a member. BASMAA suggested a reserved state enforcement discretion-based approach, fully consistent with prior State Board policy and pronouncements, to address the issues that have arisen with respect to the State

¹ CCCWP consists of Contra Costa County, its nineteen (19) cities and towns, and the Contra Costa County Flood Control and Water Conservation District. All but the Cities of Antioch, Brentwood and Oakley are covered under the San Francisco Bay Water Board's Municipal Regional Stormwater NPDES Permit (MRP). The Cities of Antioch, Brentwood and Oakley, and the eastern portions of Contra Costa County and the Contra Costa County Flood Control and Water Conservation District are covered under the Central Valley Water Board's Municipal Stormwater NPDES Permit, which is essentially identical to the MRP.

² A copy of BASMAA's November 9, 2012 comment letter is enclosed with this letter.

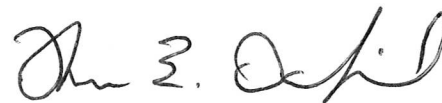
Board's prior precedent RWLs language. Having devoted considerable resources to these comments and suggestions (and an associated presentation by former State Board counsel Elizabeth Miller Jennings at the State Board's November 20, 2012 RWL Workshop), CCCWP hopes that the State Board will continue to evaluate, and ultimately adopt, the approach to the RWLs issue that BASMAA suggested.

CCCWP is also generally supportive of the comments and suggested RWLs-related language being submitted to the State Board by the California Stormwater Quality Association (CASQA)³. CASQA's approach and suggested language essentially call on the State Board to recognize needed changes in, and alternatives to, the WMP and EWMP approaches contained in the Los Angeles MS4 Permit. More specifically, it suggests that properly structured "strategic compliance programs" (whether build from the ground up or incrementally adapted from existing water quality priority-driven MS4 programs such as CCCWP and other Bay Area Phase I Stormwater Program's under the MRP can serve as useful and pragmatic alternatives to the highly problematic potential of direct third party enforcement of RWLs.

Finally, CCCWP asks the State Board *not* to further consider imposing the particular WMP/EWMP approach contained in the LA MS4 Permit as mandatory precedent on all MS4s, including as a means to resolve the RWLs issue statewide. While *principles* of watershed management and water quality problem and resource prioritization should inform future MS4 permit requirements, including by defining those that may serve as an alternative to direct third party enforcement of RWLs, a "one-size fits all" approach (including the LA MS4 Permit WMP/EWMP alternative language) makes no sense given the diversity of the State and the historical evolution and varying status of development of the MS4 programs within it.

CCCWP thanks the State Board in advance for its consideration of these comments and looks forward to a further dialogue on the RWLs issues this fall.

Sincerely,



Thomas E. Dalziel, Manager
Contra Costa Clean Water Program

TD:fv

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Enclosure

³ CCCWP is not supportive of subsection E.5.d.v in CASQA's proposed RWLs language (its Attachment A) as written and, to the extent that subsection E.5.d is retained, believes that the final sentence of E.5.d.v needs to be extended to include the following additional language: "or otherwise controlled to the satisfaction of the regional water board."



B A S M A A

Alameda Countywide
Clean Water Program

Contra Costa
Clean Water Program

Fairfield-Suisun
Urban Runoff
Management Program

Marin County
Stormwater Pollution
Prevention Program

Napa County
Stormwater Pollution
Prevention Program

San Mateo Countywide
Water Pollution
Prevention Program

Santa Clara Valley
Urban Runoff Pollution
Prevention Program

Sonoma County
Water Agency

Vallejo Sanitation
and Flood
Control District

November 9, 2012

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

Subject: Comment Letter – Receiving Water Limitations Language Workshop

Dear Ms. Townsend:

Thank you for the opportunity for the Bay Area Stormwater Management Agencies Association (BASMAA) to file comments on this very important issue of receiving water limitations language in NPDES permits for MS4s issued by the State Water Board and the Regional Water Boards. BASMAA is a consortium of nine municipal stormwater programs in the San Francisco Bay Area, collectively representing 96 municipal agencies, including 84 cities and 7 counties.

We have reviewed the State Water Board staff's Issue Paper and applaud its thorough and thoughtful analysis. In addition to the feedback we are providing on some of the five alternatives presented on the attached, we present at your invitation another option that we ask the State Water Board to evaluate. We believe this option will provide a path forward that will address the concerns of BASMAA members in a manner consistent with the State Water Board's prior precedent decisions and prior court decisions and which respects the State and Regional Water Boards' potential discretionary enforcement authority under the California Water Code.

We appreciate the State Water Board's consideration of this option and the remainder of the attached comments and note that we have requested up to ten minutes for our principal consultant on them, Elizabeth Miller (Betsy) Jennings to discuss them at the November 20th workshop.

Sincerely,

Jim Scanlin
Chair, BASMAA Board of Directors

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cc (w/encl.): BASMAA Board of Directors

COMMENTS OF BASMAA FOR STATE WATER BOARD'S 11/20/12 WORKSHOP ON RECEIVING WATERS LIMITATIONS

The Bay Area Stormwater Management Agencies Association (BASMAA) appreciates the opportunity to comment upon the issue of receiving water limitations in storm water permits for municipal separate storm sewer systems (MS4s). The Issue Paper published by the State Water Resources Control Board (State Water Board) contains an excellent review of this issue and the various proposals presented for discussion include a number of thoughtful ideas. BASMAA recommends melding several of the options set forth in the Issue Paper.

Specifically, BASMAA recommends that the State Water Board: (1) Improve the iterative process for achieving compliance with water quality standards through improved BMPs by including additional detail on its implementation; (2) Clarify that compliance with permit provisions that implement relevant TMDLs or that are otherwise addressed to achieving compliance with a specific water quality standard constitutes compliance with the water quality standards in question; and (3) Clarify that permit provisions requiring compliance with water quality standards are adopted under state law, and are enforceable only by the State and Regional Water Boards. In order to explain more fully the position of BASMAA, we will briefly review the history of the State Water Board's positions on this issue and thus explain the basis for our recommendations.

Background of the Receiving Water Limitations Issue and the Iterative Approach in Municipal Storm Water Permits

As explained in the Background section of the Issue Paper, MS4 permit requirements in the federal Clean Water Act are unique in that dischargers are required to reduce pollutants in receiving waters to the Maximum Extent Practicable (MEP), but are not required by federal law to comply with additional requirements to achieve compliance with water quality standards.¹ While the State and Regional Water Boards are not required by federal law to include permit terms in MS4 permits that would assure compliance with water quality standards, the State Water Board has acknowledged the impacts of storm water on water quality in California, and therefore the need to include permit terms that will protect water quality.² The State Water Board has also acknowledged the unique challenges facing MS4s in controlling their discharges to receiving waters, particularly because municipal storm water discharges are made up of disparate runoff from various sources including illegal dumping, atmospheric deposition of pollutants, and illegal use of pesticides among other examples. In addition, in the semi-arid climate of California, there are long dry periods followed by heavy storms, often resulting in large and highly variable pollutant loadings over short periods of time. These weather patterns may contribute to the potential impacts of municipal storm water discharges on water quality, but also present difficulty in ensuring compliance with water quality standard-based permit requirements. Therefore, the State Water Board has long

¹ 33 U.S.C. § 1342(p); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 199 F.3d 1199.

² SWRCB Order WQ 2000-11.

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required an approach to achieving compliance with water quality standards through implementation of BMPs in an iterative process.³

Through a number of precedent rulings, the State Water Board adopted an iterative process wherein MS4 dischargers must continually update and adopt new best management practices (BMPs) in order to achieve compliance with water quality standards over a reasonable time. In Board Order WQ 2001-15, at page 5 (emphasis added), the Board stated: "The Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. *We adopted an iterative procedure for complying with this requirement....*" In light of new sources and types of pollutants that end up in storm water, it was always assumed that the process would be dynamic, without a certain and final endpoint.

Throughout the years since these precedents were established, there have been concerns from all sides that the iterative process may be overly vague. Moreover, dischargers have argued that if they are in compliance with the iterative process, they should be deemed in compliance with all permit terms concerning water quality standard-based requirements, including receiving waters limitations. In the absence of numeric effluent limitations which the State's expert panel determined to be infeasible for MS4 permits, environmental groups have argued that dischargers should only be considered in compliance with storm water permits if water quality standards are met in the receiving waters.

The State Water Board addressed these various contentions by clarifying that the iterative process would be required in every MS4 permit, but that there would be no bar on State or Regional Water Board enforcement if water quality standards were exceeded.⁴ Thus, the State Water Board required independent provisions in MS4 permits that required compliance with water quality standards and water quality standard-related prohibitions, and compliance with BMPs. The State Water Board noted, however, its intention that the iterative approach would generally be the measure of permit compliance and that it did not expect Regional Water Boards to take enforcement actions against dischargers who were complying with the iterative process in good faith. "...[W]e continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require 'strict compliance' with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time. The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems."⁵

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

⁴ SWRCB Order WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association*).

⁵ SWRCB Order WQ 2001-15, at p.8 (footnotes omitted).

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Citizens Suit Provisions of the Clean Water Act

The federal Clean Water Act allows citizens meeting certain requirements to file actions in federal court to enforce violations of NPDES permits.⁶ This is a separate right from that of the Regional and State Water Boards to enforce the permits they adopt. Thus, MS4 dischargers are in a peculiar position in California that, while the federal law does not require that MS4 permits include provisions requiring compliance with water quality standards, as a result of the State Water Board's decision to include them, those same provisions are enforceable in federal court by citizens.

Accordingly, in the recent Ninth Circuit case,⁷ the MS4 provisions at issue regarding the iterative process and compliance with water quality standards were read to be separable and enforceable. Rather than the iterative process being a means to achieving compliance with the water quality standards requirements, the court concluded that the iterative process was essentially an *additional requirement* applicable to dischargers where water quality exceedances persist.⁸

Thus, under this interpretation, in Clean Water Act citizen suits, compliance with the iterative process is irrelevant to whether enforcement will proceed; if there is an exceedance of water quality standards, the permit has been violated, regardless of the actions that the discharger has taken to comply with standards and regardless of whether the exceedance may have been caused by unforeseen or uncontrollable factors. This is not consistent with the approach that the State Water Board envisioned or directed the Regional Water Boards to take in their actions to enforce MS4 permits.

In light of the above and the fact that the issue of water quality standards compliance for MS4s falls clearly within its discretion, it is appropriate for the State Water Board to review its prior precedential language at this time. The State Water Board carefully drafted its language to obtain a result where MS4s are pushed hard to continue to review and upgrade BMPs and to monitor the results in the receiving water. In return, the State Water Board acknowledged the difficulty of continuously eliminating all exceedance of water quality standards, especially as new sources and pollutants develop and major storm events occur. While no absolute safe harbor was adopted, the State Water Board acknowledged that such factors should inform and govern the use of enforcement authority enforcement actions. It is therefore clear from reviewing the precedent decisions and other relevant documents in context, that the State Water Board never intended compliance with water quality standards to be divorced from implementation of BMPs or the iterative process. Instead, the reverse is true -- the method for compliance with water quality standards was to be through the iterative process over time, with direct

⁶ 33 U.S.C. § 1365.

⁷ *Natural Resources Defense Council v County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, cert. granted [CITE].

⁸ *Natural Resources Defense Council v County of Los Angeles*, *Supra*, at {insert}

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Therefore, it is BASMAA's position that while State and Regional Boards may want to reserve their enforcement authority under the Water Code should circumstances warrant its use, the permit should not open other pathways to litigation, the very process of which could unduly punish or drain resources from the MS4 that acts responsibly and in good faith. The State Water Board has, in fact, acted under this assumption in adopting its precedential orders and the State's courts have already endorsed this approach.⁹

Accordingly, since it was not identified as an alternative in the Issues Paper, BASMAA now asks the State Water Board to consider the additional option of adding language along the lines of the following to new precedent language for all MS4 permits:

“If a Permittee complies with the [TMDL and other water quality standard-specific program implementation provisions of this Permit and with its iterative process provision], the Permittee shall be in compliance with [the Permit's receiving waters limitations and water quality standard-related discharge prohibition provisions] pursuant to provisions of the CWA. The only enforcement of [the Permit's receiving waters limitations and water quality standard-related discharge prohibition provisions] in such circumstance shall be pursuant to the California Water Code.”¹⁰

Conclusion

In order to support its long-standing precedents, the State Water Board should now amend its precedential language to: 1) improve the iterative process; 2) deem compliance with an MS4 permit's TMDL implementation and other water quality standard-specific provisions compliance with their subject water quality standards; and 3) clarify that where a discharger is in compliance with the iterative process requirements, enforcement of MS4 permit receiving waters limitations and discharge prohibitions that are tied to the attainment of water quality standards shall be reserved to the State or Regional Boards, by allowing enforcement only through the California Water Code where extraordinary circumstances justify its use.

⁹ *Building Industry Association of San Diego County v. State Water Resources Control Board, et al.*, 124 Cal. App. 4th 866 (2004).

¹⁰ BASMAA further suggests substituting specific alpha-numeric permit section numbers in for the bracketed language shown in narrative form above.

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enforcement of water quality standard exceedances to be reserved by the State or Regional Boards for only unusual circumstances.

BASMAA Recommendations

1. The Iterative Process Should Include Greater Clarity and Specificity

It is in the interest of all participants – the Boards, the dischargers, the environmental groups, and the public, to amend the iterative process language to include greater clarity and specificity. BASMAA agrees with suggestions, including by the California Stormwater Quality Association, that the iterative process description in MS4 permits should be improved.

2. Where Municipal Storm Water Permits include TMDL and other water quality standard-specific implementation provisions, those Permits Should Clarify that Compliance with those Terms Constitutes Compliance with Respect to the Water Quality Standards that are Addressed by those Provisions.

TMDLs are water quality control plans which are adopted to set forth a path toward the achievement of water quality standards over time. If an MS4 is in compliance with permit provisions implementing a relevant TMDL or addressed to another specific water quality standard, then it is in compliance with the State's plan for attaining the water quality standards in question and the permit should so specify. In this regard, it is incumbent on Boards to adopt permit terms to implement TMDLs and not simply place the language of the TMDL or a generic obligation to comply with a TMDL in the permit. Where a permit requirement implements a water quality standard-specific requirement that is not covered by a TMDL, the State Water Board should clarify that compliance with such permit requirements constitute compliance with those water quality standards as well.

3. The State Water Board Should Clarify that Compliance with the Iterative Process will Constitute Compliance with the Permit under the Clean Water Act, While Preserving State and Regional Water Board Enforcement Authority Under the California Water Code.

The State Water Board has made clear its intention that for a variety of technical and policy reasons consistent with the Water Code, compliance with water quality standards should be achieved through the iterative process of improving BMPs to address water quality exceedances. While we recognize that improvements are desirable to clarify and specify the iterative process, the underlying rationale for the retaining and giving preference to the iterative process remains. MS4 discharges are made up of untreated runoff from disparate sources, many of which are not subject to the direct control of the dischargers. Moreover, as new construction, new products, and new urban land uses develop, there will be a continuing need to develop or revise BMPs. This is not to say that water quality standards can never be met or need not be met over time. Rather, it is to acknowledge that the absence of exceedances at all times is infeasible.