

July 20, 2017

Public Comment
Small MS4 Permit Amendment
Deadline: 7/20/17 by 12 noon

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Small MS4 Permit Amendment

Dear Chair Marcus and Board Members:

On behalf of California Coastkeeper Alliance, which unites locally-based Waterkeeper organizations to fight for swimmable, fishable, drinkable waters for California communities and ecosystems, we appreciate the opportunity to provide comments on the State Water Resources Control Board’s (“State Water Board”) draft Small MS4 Permit Amendment (Amendment). CCKA and our network of California Waterkeepers have been actively involved in ensuring the control of stormwater pollution for twenty years. Many of our groups have reviewed, inspected, negotiated best management practices (“BMPs”) and monitored dischargers since the original stormwater permits, and have worked closely with the State Water Board to develop, adopt and implement permits that improve California’s water quality.

The Clean Water Act’s TMDL program represents the Act’s “safety net.” It is the bedrock component of the Clean Water Act, the backstop to ensure that the goals of the Act can be achieved when initial efforts fail. With over 85 TMDLs that Caltrans is a party to, it is clear that initial efforts have failed to curtail stormwater pollution from California’s roads and highways. As we have stated in previous comments, we believe California’s failure to reduce stormwater pollution, and meet water quality standards, is due in large part to the lack of numeric standards within stormwater permits – and the excessive amount of compliance “off-ramps” provided to permittees. The TMDL program is the essential means to achieving the Clean Water Act’s goal of restoring waters so that they are safe for swimming, fishing, drinking, and other “beneficial uses” that citizens enjoy, or used to be able to enjoy.

A. THE STATE WATER BOARD SHOULD REQUIRE IMMEDIATE COMPLIANCE WITH EFFLUENT LIMITATIONS SET FORTH IN THE CALIFORNIA TOXICS RULE.

Our primary concern with the Amendment is the TMDL implementation schedules for pollutants regulated under the California Toxics Rule. The CTR, which was promulgated by the U.S. EPA and incorporated into federal regulations, establishes water quality standards for priority toxic pollutants in California’s inland surface waters and enclosed bays and estuaries. (40 C.F.R. § 131.38(a).) Those toxic pollutants include compounds such as metals and polychlorinated biphenyls (PCBs). (Id. § 131.38(b)(1).) The CTR states that discharges shall comply “promptly” with effluent limitations based on the Rule. (Id. § 131.38(e)(1).)

Regardless of the TMDL’s implementation schedules, permittees are required to meet the standards set out in the California Toxics Rule (CTR). Therefore, any implementation schedules for CTR pollution that extend compliance beyond the CTR compliance schedule sunset provision is illegal. For example, the Santa Maria River Watershed Toxicity and Pesticides TMDL states that the “target date to achieve the TMDLs for pyrethroids is November 1, 2029” and the “target date to achieve the TMDLs for organochlorine pesticides (DDT, DDD, DDE, chlordane, eldrin, toxaphene, dieldrin) is November 1, 2044.” Similarly, any permit that extends existing

compliance deadlines for other pollutants based on a TMDL implementation schedule would be illegal backsliding.

States, at their discretion and subject to U.S. EPA approval, may provide for compliance schedules in their water quality standards. (See 40 C.F.R. § 131.13; see also id. § 122.47(a) [stating that permits may include compliance schedules “when appropriate” and setting forth minimum standards for such schedules].) A “schedule of compliance” is a “schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” (33 U.S.C. § 1362(17); see also 40 C.F.R. § 122.2.)

The CTR also provides that if a permittee believes it will be “infeasible” to comply promptly with a limitation under the Rule, that permittee may request a compliance schedule that extends the time for compliance for no more than five years from the date of permit issuance. (Id. § 131.38(e)(3), (e)(6).) However, these provisions authorizing compliance schedules in the CTR expired on May 18, 2005. (Id. § 131.38(e)(8).) Thus, permitting authorities may not include compliance schedules for pollutants regulated by the CTR in permits issued after May 18, 2005.

Moreover, the Clean Water Act contains “anti-backsliding” provisions that prohibit relaxation of permit terms upon renewal. The Clean Water Act requires that, for effluent limitations based on a state water quality standard, “a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit,” unless certain exceptions apply. (33 U.S.C. § 1342(o)(1), (2).) It also states that “[i]n no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of [water quality standards].” (Id. § 1342(o)(3).)

The Amendment currently contains TMDL implementation schedules for CTR pollution that extend compliance beyond the CTR compliance schedule sunset provision. Furthermore, it will constitute illegal backsliding if the Phase II Permit extends existing compliance deadlines for other pollutants based on a TMDL implementation schedule. Therefore, we request that the State Water Board require immediate compliance with effluent limitations set forth in the California Toxics Rule, and remove any compliance deadlines that extend beyond that allowed under the Rule.

B. THE STATE WATER BOARD SHOULD PROVIDE SPECIFIC MONITORING PROGRAMS – PARTICULARLY SAMPLE FREQUENCIES FOR ALL TMDLS.

The State Water Board has not properly detailed the amount of monitoring required in Attachment G. Throughout Attachment G, the State Water Board requires a monitoring program but does not specify the frequency of monitoring required. For example, the Twenty Beaches and Creeks Bacteria TMDL states:

"By [Hard Date: 3 months from adoption date] monitor discharges from their facilities including MS4 discharge locations to demonstrate progress towards compliance with final waste load allocations. The monitoring and assessment results must be submitted as part of the Annual Reports required under section E.16 of this Order."

The language in Attachment G does not get more specific than this example – and no monitoring frequencies are ever detailed. In order for permittees to understand their obligations under the Amendment, it is the responsibility of the State Water Board to describe the necessary monitoring – including sample frequency.

The State Water Board’s Fact Sheet also fails to describe the necessary monitoring frequency. Using the same example above to cross-reference the Fact Sheet, it states:

“The Bacteria I TMDL also requires Phase II dischargers to take other actions to control their risk of bacteria discharges such as monitoring...Phase II MS4s are also responsible for monitoring to identify sources that may need additional controls to reduce bacteria loads. Enrollment in this Order satisfies these monitoring obligations because all Phase II dischargers assigned a WLA in a TMDL are required to conduct the monitoring in Attachment G pursuant to Section E.13.b.”

As noted above, Attachment G fails to provide details on monitoring specifics – most importantly failing to provide a sample frequency. The State Water Boards need to ensure that all Regional Boards have provided adequate details as to the required monitoring program – and specifically to ensure all TMDLs monitoring programs have sample frequencies included.

C. THE STATE WATER BOARD SHOULD REFERENCE BOTH SECTIONS E AND F OF THE ORDER TO ENSURE BOTH TRADITIONAL AND NON-TRADITIONAL MS4S ARE COVERED UNDER ATTACHMENT G.

The State Water Board needs to clarify that Section E is also applicable to non-traditional permittees. Section E only applies to traditional small MS4s. Section E does not apply to non-traditional small MS4s – Section F of the Permit does. Attachment G lists and intends to cover non-traditional MS4s (including the Fairgrounds):

“Attachment G contains a list of TMDL-specific permit requirements, applicable to identified permittees, consistent with the assumptions and requirements of the applicable wasteload allocations of the TMDLs. Permittees shall comply with Section C.1 requirement to achieve TMDL wasteload allocations by implementing the applicable TMDL-specific permit requirements in Attachment G.”

We agree that non-traditional permittees should be covered in Attachment G. However, Attachment G only references Section E of the Permit and not both Sections E and F. If Attachment G applies to non-traditional permittees, then it needs to reference both Section E and F of the Permit. This is a statewide oversight in Attachment G that needs to be addressed.

Therefore, the State Water Board needs to reference both Sections E and F of the Order to ensure both traditional and non-traditional permittees are covered under the Amendment.

Our organization looks forward to working with you to ensure the Phase II TMDLs are amended in compliance with the Clean Water Act.

Sincerely,



Sean Bothwell
Policy Director
California Coastkeeper Alliance