

Receiving Water Limitations Language

State Water Resources Control Board Workshop
Sacramento, California – November 20, 2012

PRESENTED BY

Shawn Hagerty on behalf of the Statewide Stormwater
Coalition

Reframe The Issue

Issue: Should the State Board reiterate its policy that compliance with water quality standards is to be achieved over time, through an adaptive management approach?

Answer: Yes, the State Board should reiterate its policy through revised receiving water limitations language that addresses the 9th Circuit decision.

Issue Governed By Settled Law

- Congress intentionally exempted MS4 discharges from the requirement to strictly comply with water quality standards. (Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159, 1164.)
- Because of the unique nature of discharges from MS4s, Congress did not apply Section 301 of the Act, which requires, among other things, water quality based effluent limitations, to MS4 permits.

Prior State Board Policy Statement

- State Board Order 99-05 (Pre-Browner).
- In State Board Order 2001-15, issued after Browner, the State Board explained that “our language, similar to U.S. EPA’s permit language discussed in the Browner case, does not require strict compliance with water quality standards.”
- “Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.”

Prior State Board Policy Statement

- State Board made clear that the iterative process was linked to compliance.
- “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.”

Cases After 2001-15

- Building Industry Association of San Diego County v. State Water Resources Control Board (2004) 124 Cal.App.4th 866.
- Involves unique language of the San Diego Permit that goes beyond State Board Order 99-05.
- “[T]he Water Boards have made clear in this litigation that they envision the ongoing iteration process as the centerpiece to achieving water quality standards.”
- “Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process.”

Cases After 2001-15

- In re Los Angeles County Municipal Storm Water Permit Litigation (2005).
- Subparts 2.3 and 2.4 of the LA Permit establish the process to be followed to resolve exceedances of water quality standards.
- “The process requires cooperation from the Regional Board, State Board and local government entities and implicitly requires that all parties work together in good faith.”
- “The Court emphasizes the importance of good faith on the part of the parties in implementing Part 2.”

Cases After 2001-15

- City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region (2006)
135 Cal.App.4th 1377.
- Compliance with permit condition is compliance with Act.
- “This seems like much ado about nothing because 33 U.S.C section 1342, subdivision (K), already affords Rancho Cucamonga the protection it seeks”

9th Circuit Decision

- The 9th Circuit interpreted the State Board's language to require strict and immediate compliance with water quality standards.
- “[T]he discharge prohibitions serve as additional requirements that operate as enforceable water-quality-based performance standards required by the Regional Board.”
- Ignores the linkage with the adaptive management process and the good faith, collaborative process to achieving standards.

Need to Reiterate Policy

- Because the 9th Circuit has interpreted the State Board's language in a manner contrary to the Board's policy, the State Board should reiterate through revised language that compliance is through the adaptive management process.
- RWL language is enforceable, but compliance is achieved through implementing the process collaboratively and in good faith.

State Board Has Authority To Realign Language

- Fundamentally a policy question for the State Board.
- Consistent with other State and EPA permits.
 - Washington DC Permit and Fact Sheet.
 - DC Permit is premised upon “EPA’s longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance.”
 - “EPA is aware that many permittees . . . likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles.”

State Board has Authority to Realign the Language

- Not Backsliding.
 - Not reducing numeric effluent limitations.
 - Not changing the permit conditions, just reiterating importance of adaptive management process.
 - Continuing to strengthen the program through adaptive management process.
- Consistent with Anti-Degradation Policy.
 - Improving quality of impaired waters.

Conclusion

- State Board should direct staff to develop language that reiterates its policy that compliance with receiving water limitations/discharge prohibitions/TMDLs is to be achieved over time through an adaptive management process.