



August 15, 2013

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th floor
Sacramento, CA 95814
Via electronic mail to commentletters@waterboards.ca.gov

Re: Receiving water limitations provisions in the Los Angeles MS4 Permit (Los Angeles Water Board Order No. R4-2012-0175)

Dear Members of the Board:

On behalf of California Coastkeeper Alliance, we submit these comments on the receiving water limitations provisions in the Los Angeles MS4 Permit (Los Angeles Water Board Order No. R4-2012-0175). CCKA and our local Waterkeeper groups have long been involved in the development of storm water controls throughout California and have often defended stormwater permits and the receiving water limitations on behalf of the State Water Resources Control Board (“State Board”) and the regional water quality control boards.

These comments incorporate by reference the comments submitted by environmental groups on the October 10, 2012 Issue Paper regarding Municipal Storm Water Permit Receiving Water Limitations (“Issue Paper”). As discussed in detail in our written and oral comments on the Issue Paper, we feel that the current receiving water limitation (“RWL”) provisions contain clear, appropriate, and enforceable language that complies with the Clean Water Act and has stood the test of administrative, judicial, and enforcement challenges.¹ Municipal dischargers, however, repeatedly raise concerns about the alleged uncertainty of compliance with water quality-based RWLs in NPDES permits and have argued for unenforceably vague permit limits and/or “safe harbors.” Proposals to incorporate “safe harbor” provisions or otherwise weaken the RWL language would fail to meet minimum federal requirements, and would constitute a violation of the Clean Water Act’s anti-backsliding provisions for any permit previously incorporating the required language of Order 99-05.² Any attempt to shield permittees from enforceable requirements meant to ensure water quality standard compliance would move the state backwards in terms of water quality and discharger accountability and thus represents poor public policy.

However, **we offer potential alternative compliance determination mechanisms with respect to receiving water limitations that would both comply with the Act and provide more engineering certainty for municipal dischargers.** A workable and *legal* Receiving Water Limitation would consist of pollution control programs (or enhanced watershed management plans) designed to achieve compliance with all applicable water quality-based requirements within the 5 year life of the Permit, and

¹ “[T]he plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a ‘violation of Water Quality Standards’ [or water quality objectives].” Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4. See also, *In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 at 4-7 (L.A. Super. Ct. Mar. 24, 2005).

² 40 C.F.R. 122.44(l)(1) provides that except for a narrow set of enumerated circumstances, “when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit.”

would be assessed using pre-approved, peer reviewed computer modeling. Instead of providing the illegal “safe harbors” currently incorporated in the Permit, Time Schedule Orders (TSO) would provide time for implementation of the programs, and compliance with the TSOs would be determined based on compliance with the engineering standards in the program, and on meeting the interim and final deadlines for implementation. Ultimate compliance with WQBELs and RWLs would be determined via water quality monitoring pursuant to deadlines within the TSOs. Dischargers would thereby gain certainty during the life of the Permit, pollutant loads would be significantly reduced, and the core requirement of the Act—that ultimate compliance be determined *in the water*—would be met.

I. Proposed Alternative Compliance Determination

A program that would facilitate engineered solutions while complying with State and Federal law would consist of the following elements:

A. Where TMDLs Have Been Adopted

- 1) A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will achieve compliance with applicable Waste Load Allocations (“WLA”) where TMDLs have been adopted, including any interim limits, during the five year life of the Permit. For example, a Program implementing capture and/or infiltration of all stormwater in a sub-watershed up to the 85th percentile rain event would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance for each and every applicable WLA.
 - a) The demonstration that the program will achieve compliance with the WLAs would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
 - b) The proposed programs would be subject to public review and comment, and if requested public hearing before the Regional Board.
 - c) The program will include an enforceable schedule for implementation, including interim deadlines and interim load reductions.
 - d) The Permit would *not* deem dischargers to be in compliance during the Program development process, or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contained therein.
- 2) Where dischargers are not currently in compliance with existing WLA, interim WLAs, or WLAs with passed compliance deadlines, time for implementation of the Pollution Control Program sufficient to achieve compliance, not to exceed the five year life of the permit, could be provided via Time Schedule Orders, Cease and Desist Orders, and/or Clean Up and Abatement Orders.
- 3) Compliance with the TSO, CDO or CAO would be based on implementation of the Program, including meeting interim deadlines and interim load allocations, rather than receiving water sampling.
- 4) End of pipe and receiving water monitoring would continue for the life of the permit, and used continue to calibrate modeling, and to modify/adjust program elements where anticipated performance is not achieved.

- 5) Ultimate compliance would be determined through end of pipe and receiving water monitoring.

B. 303(d) listed Receiving Water parameters, without TMDLs

- 1) A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will achieve compliance with applicable Water Quality Standard. For example, a Program implementing capture and infiltration of all stormwater in a sub-watershed up to the 85th percentile rain event would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance for each and every applicable WQS.
 - a) The demonstration that the program will achieve compliance with the WQSs would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
 - b) The proposed programs would be subject to public review and comment, and if requested public hearing before the Regional Board.
 - c) The program will include an enforceable schedule for implementation, including interim deadlines and interim standards.
 - d) The Permit would *not* deem dischargers to be in compliance during the Program development process, or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contained therein.
- 2) Where dischargers are not currently in compliance with existing WQS, time for implementation of the Pollution Control Program sufficient to achieve compliance, not to exceed the five year life of the permit, would be provided via Time Schedule Orders, Cease and Desist Orders, and/or Clean Up and Abatement Orders.
- 3) End of pipe and receiving water monitoring for the life of the permit, used to establish compliance (discharge from MS4 Not Causing or Contributing to WQS Violations, including concentration based WQS) to calibrate modeling, and to modify/adjust program elements where anticipated performance is not achieved.
- 4) Ultimate compliance would be determined through end of pipe and receiving water monitoring.

C. For Parameters Not 303(d) listed (Anti-Degradation)

- 1) A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will for “high quality” waters protect water quality better than that minimum necessary for “fishable/swimmable” uses. For example, a Program implementing capture and infiltration of all stormwater in a sub-watershed up to the 85th percentile rain event (such as the LA County MS4 Permit) would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance with WQS, and will maintain existing water quality for higher quality waters.


- a) The demonstration that the program will achieve compliance with anti-degradation requirements would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
- b) The proposed programs would be subject to public review and comment, and if requested public hearing before the Regional Board.
- c) The program will include an enforceable schedule for implementation, including interim deadlines and interim standards.
- d) The Permit would *not* deem dischargers to be in compliance during the Program development process, or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contained therein.
- e) Ultimate compliance would be determined through end of pipe and receiving water monitoring.

II. Water Quality Protection Should Be the Driver for State Water Board Policymaking, Not Requests from the Regulated Community.

Existing MS4 permits have not reduced urban runoff impacts to water quality to the extent that the public deserves and the law requires under existing MS4 Permits. CCKA agrees that the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. However, the program's failure is the direct result of widespread non-compliance by permittees and non-enforcement by Regional Boards. Discussion of improvements to the iterative process must be undertaken with a focus on Regional Board implementation and discharger compliance. The Board's initiation of a workshop and issue paper to consider major regulatory revisions at the behest of regulated entities poses serious public process concerns. In the Issue Paper, the Board notes that the need for and purpose of the workshop was MS4 dischargers' assertions "that the receiving water limitations and iterative process provisions of the Water Boards' permits do not afford them with a viable path to compliance for these violations, which may take years of technical efforts to correct, especially for wet weather discharges." It is not the iterative process and receiving water limitations that have caused non-compliance, the responsibility falls on the dischargers.

CCKA appreciates this opportunity to comment on the receiving water limitations provisions in the Los Angeles MS4 Permit. Please feel free to contact us with any questions or concerns you may have.

Sincerely,



Sara Aminzadeh
Executive Director
California Coastkeeper Alliance