

WARREN D. WILLIAMS
General Manager-Chief Engineer



Public Comment
LA MS4 Permit- A-2236(a)-(kk)
Deadline: 01/21/15 by 12:00 noon

1995 MARKET STREET
RIVERSIDE, CA 92501
951.955.1200
FAX 951.788.9965
www.rcflood.org

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

January 21, 2015



Submitted via email to: commentletters@waterboards.ca.gov

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100

Dear Ms. Townsend:

Re: SWRCB/OCC Files A-2236(a) through (kk); Comments on Proposed Order in In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0174)

The Riverside County Flood Control and Water Conservation District (District) appreciates this opportunity to comment on the above-captioned Proposed Order (Proposed Order). This letter briefly outlines some comments on specific aspects of the Proposed Order that are relevant to the District in its role as Principal Permittee for the Riverside County Co-Permittees.

General Comment

As we have stated in previous comment letters (dated November 13, 2012 and August 15, 2013) regarding the issues addressed in the Proposed Order, the District strongly supports the provision of an alternative compliance option for dischargers across the state, and not only in Los Angeles County. We believe that the principles set forth in Section B.7 of the Proposed Order may provide a foundation for such an option if flexibly applied to reflect a region's local hydrologic, geologic, climatic and municipal resource conditions.

Riverside County, which stretches in width some 180 miles from near-coastal areas to the Arizona border, is in many ways a microcosm of Southern California. Parts of the County feature a Mediterranean climate and urbanized watersheds, conditions similar to the other great Southern California metropolitan areas. Other areas are less developed, and affected by significant non-urban sources of pollutants entering the MS4 system. In the shadow of the coastal mountains, the County consists of low desert, featuring areas with extremely low annual rainfall, limited population and only minimal surface water features. It is because of this diversity that the District believes strongly that any alternative compliance option program not follow a statewide template but rather be drafted to best fit the specific conditions of the watersheds within the permit area.

In the more than two decades during which the District has addressed stormwater and urban runoff pollution, we have learned that prioritization of resources on the most important pollutants is critical

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to creating a successful program. We are, therefore, pleased that prioritization is included within the seven principles set forth in Section B.7 of the Proposed Order. Without an alternative compliance option, stormwater programs must be "defensive," chasing every exceedance in every watershed, irrespective of the significance of that exceedance to public health or to the health of the watershed.

The District's strong preference, one that we have stated clearly to each of the three water boards with which we work, is for permits that reflect prioritization and flexibility, while at the same time contain effective monitoring and reporting to enable the Permittees, the water boards and the public to assess and evaluate the progress made in addressing stormwater and urban runoff pollutants. An alternative compliance option, so long as it is appropriately targeted for the watersheds covered by the permit, effectuates this approach.

It is for these reasons that the District supports the provision of an alternative compliance option for water boards around the state.

Specific Comments

In addition to our general comment, the District has some additional specific comments on the Proposed Order and on an enforcement alternative suggested by non-governmental organization (NGO) representatives during the public workshop in Los Angeles on December 16, 2014.

1. 85th Percentile Design Storm Retention Standard

The District joins the California Stormwater Quality Association (CASQA) in urging the State Water Board not to change the existing provision in the Los Angeles County permit allowing Permittees, if they attain retention of the 85th percentile design storm, to be deemed in compliance with receiving water and TMDL requirements in a given watershed. This approach offers Permittees, who are faced with limited budgets and many other future financial commitments, the opportunity to plan, budget, and build with the certainty that at the end of that process, they will have reached an agreed upon goal. Such a process must be followed for all major capital projects, including the types of multi-benefit projects required to capture the 85th percentile design storm. If this multi-year, potentially multi-million dollar process ends in uncertainty, Permittees will have little incentive to build the kind of projects that all experts agree can provide real benefits to communities as well as a reliable source of future drinking water.

Testimony by Los Angeles Water Board staff at the workshop indicated that studies of the 85th percentile design storm retention standard provided evidence of excellent reductions (94-95%) in pollutant loadings. This standard has been adopted throughout the state as a design standard for development projects, with the support of multiple water boards. Major investments have been put into new development programs using this standard, including significant infrastructure, BMP manuals, training and test facilities. Thus, use of the 85th percentile design storm standard for watershed compliance with water quality standards reflects the consensus of both the regulators and the regulated community. The District urges the State Board either to retain the existing language or,

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if there is still concern as to the factual basis for the provision, to remand the issue to the Los Angeles Water Board for additional fact-finding.

2. Continued Assistance by the State In Evaluating Pollutants and Standards

At the workshop, the District and other parties stressed the need for the involvement of the state in the effort to address pollutants in stormwater and urban runoff. This includes not only the provision of more adequate state funding for MS4 permit compliance but also the state's leadership in source reduction efforts, such as the ongoing effort to reduce copper in brake pads. Such state-wide source reduction efforts will be key in achieving compliance with water quality standards not only for copper but also for other pollutants as well. The MS4 Co-Permittees cannot make adequate progress on achieving receiving water limitations without such efforts.

The District also has gained experience and learned over time that the issue of how to achieve eventual compliance with all water quality standards in all watersheds is a difficult one. Despite the adoption of structural and non-structural BMPs and other source control measures, exceedances persist. At the workshop, the Board heard compelling testimony from Orange County representatives as to the persistence of bacterial contamination in channels that while clean in dry weather, greatly exceeded bacterial indicator standards in wet weather.

It is also vital that Basin Plans be routinely evaluated for the relevance and appropriateness of water quality standards. The District believes that, as additional information is obtained regarding the ability to achieve water quality standards over time, reevaluation of those standards will become even more crucial, so that Co-Permittee resources are not lost in a "do loop" of investigations and studies which do not advance our mutual goals of enhanced stormwater management.

3. Commingled Discharges and Alternative Pollutant Sources

The District agrees with the statement made in the Proposed Order, on page 63, that "we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance in question."

The Proposed Order sets forth a proposed amendment in Part VI.B of the Los Angeles County Permit which would allow Co-Permittees to demonstrate "that there is an alternative source of the pollutant that caused the exceedance, and that the pollutant is not typically associated with MS4 discharges." Proposed Order at 66.

While the District agrees that Co-Permittees need to have the ability to identify an alternative source of a pollutant, there should not be the limitation in the second clause as to "pollutants not typically associated with MS4 discharges." Given the ubiquity of the materials in MS4s (as we commented at the workshop, the "whole world drains to the MS4"), it would be impossible for a Co-Permittee ever to prove the existence of an alternative source. The District requests that the language of proposed

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amended Part VI.B.2.iv(3) be amended to recognize that ultimate liability should rest with the SOURCE of the discharge to the MS4. For example, if a discharge initiates within the jurisdiction of an upstream MS4 operator, downstream operators should not be held liable for the exceedance from an interconnected system.

4. Enforcement Orders Are Not An Appropriate Substitute for an Alternative Compliance Option

At the workshop, NGO representatives urged the State Board to amend the Los Angeles County permit to require the adoption of enforcement orders, such as time schedule orders (TSO), cleanup and abatement orders (CAO) or cease and desist orders (CDO), instead of allowing the alternative compliance option. The NGO representatives repeatedly asserted that the Los Angeles County Co-Permittees had "failed" to meet water quality standards with respect to their MS4 discharges, and that enforcement orders were the only lawful and appropriate alternative.

The District respectfully disagrees. While this letter does not discuss the legal and factual problems with the NGO assertions, the District would like to briefly highlight the practical problems associated with using enforcement orders.

First, if the Co-Permittees must enter into enforcement orders, the terms of those orders will require significant negotiation and legal review, as well as considerable water board staff resources and hearing time. If, after adoption, there is dissatisfaction with their terms, the orders could be challenged by the Co-Permittees or third parties, bringing that dispute before the State Board and/or the superior court. In this scenario, attorneys, not engineers or scientists, would drive the effort.

Such orders may be appropriate where there has been a clear failure by a discharger to comply with a requirement that is within its ability to comply. This is not the case for MS4 Co-Permittees, who are required to attain receiving water limitations for discharges from urban storm drains which serve huge metropolitan areas and where compliance with all water quality standards will take years, as acknowledged by the multi-year time frames in TMDL compliance plans. Water boards across the state, including the Los Angeles Water Board, have recognized this distinction and are now treating the Co-Permittees as partners, not adversaries, in a joint effort to address stormwater and urban runoff pollution. And, Co-Permittees similarly are now working with the water boards in a cooperative spirit, one aimed at solving problems, not simply setting forth objections.

Second, enforcement orders are limited in scope and timing, requiring a continuous "do loop" of negotiation and renegotiation. Despite the NGO assertions, MS4s are not like industrial plants, where management can turn a valve or install a filter and simply make the problem pollutant vanish. Orders would require to be renegotiated, renewed and heard multiple times. Again, water board resources would be drained by such efforts.

Third, a discharger's entry into an enforcement order does not provide it with protection from third party litigation. *Hawaii's Thousand Friends v. Honolulu*, 806 F. Supp. 225 (D. Hawaii 1992). If a

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third party citizen suit can be brought against a party subject to a TSO, CDO or CAO, the discharger still must implement a "defensive" program, aimed at trying to avoid litigation, rather than one which prioritizes the achievement of clean water goals on the most important pollutants and the most critical watersheds.

The enforcement order alternative is no adequate substitute for the alternative compliance option set forth in the Los Angeles County permit and in the Proposed Order.

The District again wishes to thank the State Board for the opportunity to provide these comments on the Proposed Order. Should there be any questions regarding these comments, please contact David Garcia at 951.95.1330 (dhgarcia@rcflood.org).

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason Uhley for".

JASON UHLEY
Assistant Chief – Engineer

DG:cw
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