



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

JAN 11 2013

Wayne Chui
San Diego Regional Water Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Draft San Diego Regional MS4 Permit

Dear Mr. Chui:

The following are EPA Region 9's comments on the draft permit for the municipal separate storm sewer system (MS4) located within the jurisdiction of the San Diego Regional Board, which the Board released for public comment on October 31, 2012. We also provided comments on an early draft of this permit in a letter to the Board dated February 14, 2012. For the most part, we are pleased with the latest version of the permit and we commend the Board and its staff for their extensive efforts in developing this draft permit. We also offer the following comments for the Board's consideration:

A. *Total Maximum Daily Loads (TMDLs)*

In our February 14, 2012 letter, we also generally supported the Board's approach for incorporation of applicable TMDL requirements into the permit, i.e., incorporation of applicable wasteload allocations (WLAs) as numeric effluent limits. We urge the Board to retain this approach in the final permit as well since it will enhance enforceability and will most clearly ensure consistency with the WLAs.

Our February 14, 2012 letter had also suggested revisions of certain provisions of the early draft permit related to TMDLs; the October 31, 2012 draft permit has been substantially revised from the early draft and many of our early comments have been addressed. However, as discussed below, we still have certain concerns whether the monitoring requirements of the October 31, 2012 draft permit would be adequate to ensure compliance with the TMDLs.

Sections II.D.1 and 2 set forth the receiving water monitoring and MS4 outfall monitoring requirements of the draft permit. In general, a monitoring program would be developed and conducted by the permittees to assess the impacts of the discharges and the effectiveness of the Water Quality Improvement Plans (WQIPs), focusing on the highest priority water quality conditions. Compliance with applicable WLAs from TMDLs would be one of several competing priorities in selecting monitoring locations in the receiving waters and at MS4 outfalls.

Attachment E to the draft permit requires monitoring at MS4 outfalls or receiving water locations, but the locations to be monitored are not fully specified. Although TMDL compliance would presumably receive a high ranking in setting the monitoring program priorities, it is still not clear that appropriate monitoring locations would necessarily be selected to measure compliance with WLAs. As such, we recommend that Section II.D of the permit clarify that notwithstanding other monitoring priorities, at a minimum, appropriate monitoring locations must be selected to ensure compliance with all applicable WLAs and associated effluent limitations. The permit should specify that a mix of receiving water and representative end-of-pipe monitoring locations must be selected to ensure that the monitoring data collected will be sufficient to determine compliance with effluent limitations based on WLAs and to determine whether individual copermitttees have caused or contributed to observed in-stream noncompliance. The permit should provide that the parties that develop and submit for Regional Board review a monitoring plan for a WQIP agree to the use of monitoring plan results for purposes of compliance determination.

Section II.D.2.c.(2) of the draft permit also requires monitoring at an “appropriate” frequency for the post-transitional period; the transitional monitoring program (Section II.D.2.a.(3)) would require twice/year monitoring during the wet season. We recommend the permit clarify the minimum monitoring frequency for the post-transitional period and suggest maintaining the twice/year frequency.

Attachment E also describes the specific provisions for TMDLs adopted and approved that are applicable to this tentative order. We note that a few of the compliance requirements provided in an existing TMDL were not included in this tentative order. We recommend that all applicable TMDL WLAs and compliance endpoints be included in Attachment E. For instance, the TMDL for Indicator Bacteria Project I – Twenty Beaches and Creeks in San Diego Region (including Tecolote Creek), provided both concentration-based and mass-based TMDLs. All identified TMDL WLAs and endpoints should be included in Attachment E to prevent confusion with the WLA requirements described and adopted in the TMDL.

Provision B.6 identifies the WQIP submittal, updates and implementation. Paragraph 3 under this Provision should clarify that the intent of all monitoring and assessment is to improve our evaluation of the waterbodies’ conditions, including the 303(d) listed impaired waterbodies. We recommend paragraph 3 under Provision B.6 be modified to the following:

“All State identified impaired waterbodies within the Watershed Management Area should be placed on the 303(d) List as required under CWA Section 303(d) and 40 CFR §130.7(b)(4). However, in specific cases supported by robust analytical documentation the implementation of the Water Quality Improvement Plans may demonstrate that TMDLs are not necessary for identified impaired waterbodies within the Watershed Management Area if the analytical record demonstrates that technology-based effluent limitations required by the CWA, more stringent effluent

limitations required by state, local, or federal authority, and/or other pollution control requirements (e.g., best management practices) required by local, state or federal authority are together stringent enough to implement applicable water quality standards associated with the waterbody impairment causes within a reasonable period of time."

Finally, we reiterate our suggestion from the February 14, 2012 letter that a provision be added to the draft permit to address TMDLs approved during the term of the permit; we had suggested a provision similar to section O of the 2012 MS4 permit for the City of Salinas (NPDES permit No. CA0049981) available at: http://www.ci.salinas.ca.us/services/maintenance/pdf/NPDES_Permit.pdf. The provision requires the development and submittal (within one year of final TMDL approval) of a plan for complying with applicable WLAs. Such a provision would expedite compliance with the WLAs by the permittees.

B. *Low Impact Development (LID) Requirements*

In our February 14, 2012 letter, we generally supported the LID provisions of the early draft permit, and we continue to largely support the proposed LID requirements of the October 31, 2012 draft permit. The proposed requirements in the October 31, 2012 draft (beginning on page 78) are also similar to the requirements in other recent California MS4 permits such as those for Los Angeles and Orange Counties. As you know, Region 9 is encouraging the Boards to include measurable requirements in MS4 permits to enhance clarity and enforceability of the permits. We are pleased to see the inclusion of the measurable requirement for onsite management of the runoff from the 85% storm similar to other recent permits. However, we also note that Section II.E.3.c.(1)(a)(ii) of the October 31, 2012 draft permit provides a new alternative of retaining the volume (determined by modeling) that would be retained under natural, undeveloped conditions. We are concerned that this option may create uncertainty and provide opportunities for subjective analyses that would be resource intensive and difficult to review. For this reason, and for consistency with other recent California MS4 permits, we recommend that Section II.E.3.c.(1)(a)(ii) of the proposed permit be removed. However, if this provision is retained, the permit and fact sheet should fully clarify that undeveloped conditions refer to natural conditions prior to any anthropogenic impacts.

We did raise a couple of questions regarding LID in our February 14, 2012 letter which we believe have been adequately addressed in the latest draft. We had been unclear concerning requirements related to biofiltration; the October 31, 2012 permit has been restructured in a way which clarifies the questions we had raised.

We had also suggested that the Board may want to consider off-site water supply augmentation projects as an acceptable alternative when onsite stormwater management is not feasible. Several recent studies have highlighted the many benefits (such as energy

savings) of increased stormwater infiltration for groundwater recharge. We note such a provision has been added to the draft permit, and we support this provision.

C. *Water Quality Improvement Plan Review*

In our February 14, 2012 letter, we had expressed concern whether the public would have an adequate opportunity to review draft WQIPs consistent with the 2005 decision by the Second Circuit Court in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, and the 2003 decision by the Ninth Circuit Court in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832. We are pleased to see the draft permit (section F) and the fact sheet have been revised to clarify that the Board would be soliciting public comment concerning draft WQIPs submitted to the Board for approval during the term of the permit.

The fact sheet and the permit also describe the WQIPs as dynamic and evolving documents which are likely to be updated and modified over time in accordance with the iterative process. Although permittees must solicit public input in developing proposed updates that are submitted to the Board, it does not appear that public comment would necessarily be solicited concerning Board action in approving, disapproving or revising proposed updates; we suggest that an opportunity be provided for public comment on such Board actions similar to that provided when the original WQIPs are submitted.

D. *Prescriptive BMP Requirements*

In our February 14, 2012 letter, we expressed concern that the early draft permit would only require inspections of construction sites “at an appropriate frequency”; this provision has also been included in the October 31, 2012 draft permit. We noted in our comments that the existing San Diego MS4 permit includes specific frequencies for the inspections (such as once/two weeks, or once/month), as do other recent California MS4 permits such as the San Ana Board’s 2009 MS4 permit for Orange County. As noted earlier, we are trying to improve the clarity and enforceability of MS4 permits and terms such as “an appropriate frequency” reduce clarity and make enforcement of the permit more difficult. Such provisions may also be insufficient to ensure compliance with the Clean Water Act’s requirement to reduce pollutants in the discharges to the maximum extent practicable (MEP). We recommend that the permit specify the required frequency of construction site inspections.

Certain other provisions of the October 31, 2012 draft permit are also less prescriptive than the existing permit, such as the storm drain maintenance requirements and the inspection requirements for commercial and industrial facilities. We recognize that the Board is attempting to improve the environmental outcome of its stormwater program by shifting the focus from prescriptive BMPs to prescriptive water quality results, and we concur with the increased emphasis on water quality results. However, we are not convinced that the prescriptive BMPs of the existing permit are as significant

a burden as portrayed in the draft fact sheet, and we suggest they be retained for the most part in the new permit to ensure permit clarity, enforceability and compliance with MEP. To the extent the requirements for numeric water quality goals in the WQIPs would also ensure compliance with MEP, such requirements would be acceptable.

We recommend the permit or fact sheet also clarify that the numeric water quality goals (and the schedule for attainment of the goals) in the draft WQIPs would become enforceable permit requirements once the Plans are approved by the Board. EPA's 1999 regulations for Phase II MS4s (64 FR 68722, December 8, 1999) required similar measurable goals for stormwater management programs and intended that "goals" would be enforceable permit requirements once approved. Further, a wide variety of measurable goals were intended to be considered including measurable BMPs and measurable water quality improvements.

E. Action Levels

In our February 14, 2012 letter, we expressed concern that there did not seem to be any clear actions which would be required on the part of permittees if an action level concentration were exceeded. Although the draft fact sheet of October 31, 2012 provides additional insight into the Board's intent, we still believe the clarity and enforceability of the permit would be enhanced by adding clearer provisions for acting upon action level exceedences to the permit similar to the Board's 2009 permit for Orange County.

Footnote 7 in the proposed permit notes that NALs are not intended to be enforceable limitations. Provision II.C.1.b.(2) also provides that some NALs may be based on WLAs established in TMDLs included in Attachment E of the permit. We believe the Board intends the WLAs to be enforceable permit requirements; as such, we recommend NALs not be based on the WLAs. Instead, enforceable effluent limitations should be incorporated that are consistent with and ensure effective implementation of WLAs.

F. Toxicity Testing

The toxicity testing monitoring provisions proposed in the draft permit should be brought up to date with those in MS4 permits recently issued by the State Water Board (Caltrans MS4) and the Los Angeles Regional Water Board (Los Angeles MS4). Following the approach in these permits, only chronic toxicity monitoring should be required and biological toxicity test endpoints should be analyzed using the Test of Significant Toxicity hypothesis testing approach. At minimum, the permit should be revised to reflect the following requirements: (1) monitoring for chronic toxicity in fresh or marine waters shall be estimated as specified in U.S. EPA's short-term chronic toxicity methods in the most recent edition of 40 CFR 136; and (2) for chronic toxicity test samples (either stormwater or non-stormwater), the in-stream waste concentration (IWC) is 100 percent to calculate either a pass or fail test sample result following Appendix A in

National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document (EPA 833-R-10-003, June 2010). A pass result indicates no toxicity at the IWC. A fail result indicates toxicity at the IWC.

G. Permit Expiration Date

In our letter of February 14, 2012, we had expressed concern that the Board appeared to be considering a permit term longer than five years to accommodate the expiration dates of the current MS4 permits for Orange County and Riverside County. We noted such a provision would conflict with NPDES regulations at 40 CFR 122.46 which require that the term of a permit not exceed five years. We are pleased to see the proposed permit term has been revised to be consistent with this requirement.

We appreciate the opportunity to provide our views on the draft permit. If you would like to discuss these comments, please contact me at (415) 972-3464 or Eugene Bromley of the NPDES Permits Office at (415) 972-3510.

Sincerely,



David Smith, Manager
NPDES Permits Office (WTR-5)