



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

December 7, 2015

Hope Smythe
Unit Supervisor
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Re: Tentative Order/Draft MS4 Permit for Orange County and Co-Permittees (NPDES Permit No. CAS618030)

Dear Ms. ~~Smythe~~ *Hope*:

Thank you for the opportunity to review and comment on the revised tentative order/third draft permit (Order No. R8-2015-0001/NPDES Permit No. CAS618030) for discharges from the municipal separate storm sewer system (MS4) serving Orange County and co-permittees therein within jurisdiction of Santa Ana Regional Water Quality Control Board (Regional Board). We provided comments on the two previous public drafts (dated May 2, 2014 and December 22, 2014). In this third draft, we recognize and appreciate the Regional Board has worked hard to provide additional clarification in regards to receiving water limitations and alternative compliance mechanisms based on watershed management plans. We generally support these revised provisions. As discussed below, our most significant remaining concern is the omission of water quality-based effluent limitations for fecal coliform related to TMDL requirements. We also have continued concerns about modified new and redevelopment requirements, which should be changed to align with other southern California MS4 permits, and permit provisions for trash which may not be consistent with State Water Board Trash Amendments adopted in spring 2015.

A. Total Maximum Daily Load (TMDL) Requirements

The latest proposed permit (Table C-1 in Appendix C) appears to remove previously proposed numeric water quality-based effluent limits (WQBELs) for fecal coliform to protect REC-1 beneficial uses. Federal regulations at 40 CFR 122.44(d)(1)(vii)(B) require that NPDES permits must include effluent limitations consistent with assumptions and requirements of all waste load allocations (WLAs) in approved TMDLs. The Newport Bay TMDL includes WLAs based on fecal coliform to protect the REC-1 use. Therefore, the permit must be modified to incorporate effluent limitations consistent with the fecal coliform WLAs. As we discussed with

you last month, the Regional Board has several options or in combination for addressing this requirement. The permit could be revised to:

- directly incorporate the REC-1-based fecal coliform WLAs as numeric WQBELs,
- incorporate numeric WQBELs based on existing REC-1-based *enterococcus* and/or *E. coli* indicator values based on an argument that these indicators adequately serve as surrogates for fecal coliform that make the resulting WQBELs consistent with the terms and conditions of the fecal coliform-based WLAs, or
- explain that the proposed permit's numeric WQBEL based on the existing fecal coliform-based WLA to protect the shellfish (SHELL) beneficial use is more stringent than the WLA that protects the REC-1 use and is therefore sufficiently protective to meet the terms and conditions of the REC-1-based WLA.

Pursuant to 40 CFR 123.44, EPA reserves the right to object to issuance of this permit if our concern on this matter is not addressed prior to permit issuance. Based on our discussions last month, we understand the Regional Board planned to make revisions to the permit and/or fact sheet consistent with the options discussed above. However, as we did not receive revised permit or fact sheet language for review prior to the comment due date, we need to reserve our right to object pending review of these revisions.

As we discussed, all existing WLAs within approved and applicable TMDLs must be implemented through NPDES permits. We do not support the rationales provided in the draft fact sheet that permits can exclude WQBELs solely because TMDL implementation schedules have been missed, water quality standards revisions are contemplated, or TMDL revisions are planned in the future.

Concerning compliance timeframes, if the Regional Board's intent is to include compliance schedules in the permit for any of the pollutants addressed, please ensure that the fact sheet provides specific justification of the need for the compliance schedule(s) and shows how the specific regulatory requirements for establishing compliance schedules within NPDES permits have been met (see 40 CFR 122.2 and 122.47).

As discussed above, EPA supports the Regional Board's inclusion of sediment WQBELs in this permit, even if the permittee appears to be meeting the corresponding sediment WLAs. In general, permits must include WQBELs consistent with the terms and conditions of any approved WLA.

B. Watershed Management Plans as Alternate Compliance Pathway

EPA supports the inclusion and thorough description of the Watershed Management Plan (WMP) based alternative compliance pathway in the Permit Order, Section XI. We appreciate the Board's effort to be transparent and outline the components to be included in WMPs, since this makes it clear for permittees and stakeholders as to what compromises this alternate compliance pathway. Some specific requirements for WMPs are noteworthy, namely the inclusion of critical milestones to help with accountability and potential enforcement with non-

compliant WMPs, detailed financial analyses such as asset management plans, public review of draft or amended WMPs and explanations of WMP compliance determination criteria.

However, Section XI also provides that permittees are deemed in compliance with receiving water limitations (RWLs) and WQBELs whose final deadlines have not yet passed upon notification to the Regional Board of their intent to develop a watershed management plan (WMP). We strongly recommend that the Regional Board change the timing of when a permittee would be deemed in compliance. Rather than being deemed in compliance upon notification of intent to prepare a WMP, we recommend that a permittee be deemed in compliance only after approval of a WMP. Establishing a “safe harbor” during the planning phase is not warranted, since permittees have been required to meet RWL for many years prior to this proposed permit cycle. We believe this prudent choice in timing allows Regional Board staff to review and ensure the approved WMPs contain sufficiently robust analyses and adequate schedule for BMP implementation during this permit and future permit cycles. See EPA comments to State Water Board on this matter, dated January 20, 2015. Also, the San Diego Regional Board recently included and approved such a provision in the updated San Diego Regional MS4 permit.

We note that certain aspects of permit provisions for WMPs could be improved with enhanced permit language consistent with the following recommendations for Section XI:

Part A. (1) should further describe that milestones are “based on measureable water quality criteria or indicators or other specific water quality endpoints”. Please clarify what is meant by a milestone.

Part A. should also describe that “time between milestone dates shall not exceed one year” to be consistent with federal regulations regarding compliance schedules in NPDES permits. See our discussion above of compliance schedules in this permit.

Part E. (8) and Part R (2) should, at a minimum, provide that a “quantitative” analysis is required component of WMPs. Preferably the modification would use the simple and declarative term “reasonable assurance analysis”. This modification would be consistent with existing language for “reasonable assurance analysis” in Order section XIX. Part F. regarding Program Effectiveness Assessments. The term “reasonable assurance analysis” is also explained in the State Water Board’s decision concerning the Los Angeles Regional MS4 permit petitions. The key point is that the permit should create a clear expectation that permittees using this alternative compliance pathway will create and use a robust analytical framework that is capable of supporting well-supported conclusions that the proposed stormwater management programs can be expected to meet specific WQBELs and associated water quality based requirements.

Part R. should also be revised to require a periodic “comprehensive” update of the reasonable assurance analysis on a specified schedule.

C. New and Redevelopment Requirements

A few provisions in Section XII, New Development (including Significant Redevelopment), should be revised to clarify the expectations for controls at priority projects.

The Priority Consideration of BMPs for New Development (including significant redevelopment) projects in Section XII should be revised to align with other southern California MS4 permits and with the basic priorities established in the Santa Ana Regional Board's previous Orange County MS4 permit.

We agree that it is appropriate to establish the first two priorities (sections XII F, and XII G) as low impact development best management practices (LID BMPs) and biotreatment Control BMPs. However, it is not appropriate to include as a third priority, "all other structural treatment control BMPs: non-LID BMPs," in section XII H. As has been the case with previous southern California MS4 permits, including the Santa Ana Board's previous Orange County permit, if onsite LID or biotreatment controls are not feasible, the next priority should be implementation of off-site LID projects. The Santa Ana Board's 2008 Orange County MS4 permit called for implementation of LID at the "sub-regional" and "regional" scales if LID implementation at the project site is infeasible. The San Diego Regional MS4 permit, covering its portion of Orange County, contains a hierarchy of BMPs for new/redevelopment projects which calls for onsite LID BMPs, onsite biotreatment controls if onsite LID is infeasible, and if onsite biotreatment is infeasible, a combination of an offsite LID project AND flow-through (non-LID) treatment controls onsite. In the Los Angeles County MS4 permit, if onsite LID controls and bio-treatment are infeasible, the next priority is implementation of an offsite infiltration project in addition to providing treatment of stormwater runoff from the project site to meet specific pollution reduction benchmarks.

In order to maintain an equivalent level of protection to these other permits, this draft permit should be revised. Where implementation of onsite LID controls and onsite bio-treatment controls are infeasible, the next priority should be implementation of an offsite LID project in combination with non-LID controls at the project site to reduce pollutant loads. We'd recommend the approaches used in either the Los Angeles County MS4 permit or San Diego Regional Board's Regional MS4 permit.

In addition, the draft permit's discussion of non-LID BMPs refers to the classification of these controls as providing a high, medium and low level of removal. While we support providing expectations for these flow through treatment controls, we'd recommend that the expectations for these levels be clearly defined in the permit, as has been done in the Los Angeles County MS4 permit and the San Diego Regional MS4 permit.

EPA supports the use of offsite LID projects where there is a greater benefit for groundwater replenishment offsite than can be achieved onsite. This flexibility has been incorporated into the Los Angeles County MS4 permit issued by Los Angeles Regional Board (VI.D.7.C.iii (3)).

We recommend inclusion in the permit of language requiring that in cases where offsite LID projects are to be implemented, the permittees develop specific institutional mechanisms subject to Regional Board oversight that ensure that offsite projects will be correctly designed, regularly maintained in the future, financially and legally viable, and subject to corrective action if they do not yield expected pollution control effectiveness.

We suggest providing greater clarity regarding the use of Infiltration LID BMPs for stormwater runoff associated with industrial activity. See Order, Section K. (9). Stormwater from industrial activity could conceivably receive sufficient treatment to meet water quality requirements and therefore become viable resource for either infiltration or other consumptive uses. To that end, we encourage the Regional Board to remove a 'blanket' prohibition regarding possible application of infiltration BMPs to stormwater runoff associated with industrial activity. Instead, the permit can provide that this type of stormwater can be used for infiltration or other consumptive uses if it receives treatment sufficient to control any pollutants of concern.

D. State Board Trash Amendments

On April 7, 2015, the State Water Board adopted an Amendment to the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan). Together, these are collectively referred to as "the Trash Amendments". The State Board Trash resolution states: "The Regional Water Boards, within eighteen months of the effective date of the Trash Amendments, and for each NPDES MS4 permittee within their respective region subject to either of the Trash Amendments, shall comply with the time schedules contained therein." The proposed permit does not acknowledge the Trash Amendments, nor does it describe with sufficient detail as to how and when permittees must implement trash control measures to fulfill MS4 implementation requirements therein. The permit should be modified to clarify how its provisions are consistent with this recently adopted State-wide Trash Amendments.

We appreciate the opportunity to provide our views on the revised draft permit. If you have any questions regarding this matter, please contact either Peter Kozelka at (415) 972-3448 or me at (415) 972-3464.

Sincerely,



David Smith, Manager
NPDES Permits Office (WTR 2-3)

