



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901In Reply
Refer to: WTR-5

JAN 21 1998

Walt Pettit
Executive Director
California State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: SWRCB/OCC File A-1041 for Orange County

Dear Mr. Pettit:

We have reviewed the revised draft Order dated January 15, 1998, prepared by the State Water Resources Control Board concerning the appeal of NPDES permit No. CAS0108740. This permit was issued by the San Diego Regional Water Quality Control Board on August 8, 1996 and authorizes storm water discharges from the municipal separate storm sewer system (MS4) serving the southern portion of Orange County. Our comments on the revised draft Order follow below.

We are pleased that the January 15 draft Order would clarify and establish the State's position that municipal storm water dischargers must meet water quality standards (WQS), which is consistent with EPA's position. We recognize that many municipalities have expressed concern regarding their ability to comply with WQS. If the situation should arise in which a municipality could not comply for technical or economic reasons, the Clean Water Act (CWA) provides several mechanisms to seek relief including a use attainability analysis, the development of site-specific WQS, or a short term WQS variance.

Although the draft Order recognizes the applicability of WQS to MS4 permits, we are concerned with other aspects of the draft Order. While we appreciate that revision of the Orange County permit, which is the basis for this appeal, would create inconsistencies with the earlier Orange County permit issued by the Regional Water Quality Control Board, Santa Ana Region, in March, 1996, the permit includes language which concerns us. In particular, the phrase, "permittees will not be in violation of this provision...." (if certain steps are taken to evaluate and improve the effectiveness of the Drainage Area Management Plan (DAMP)) is of the greatest concern to EPA. We understand this phrase would not appear in future storm water permits, should the alternative language proposed for such future permits be adopted; nevertheless, we feel that it is necessary to state our disagreement with Conclusion 2 of the proposed Order, which would find that the quoted phrase, as used in the Orange County permit, complies with the CWA.

The Orange County permit includes the requirement that the discharges meet WQS in the receiving water. That requirement was included in the Orange County permit in order to satisfy Section 301(b)(1)(C) of the CWA. Excusing the discharger from violations of that requirement effectively negates the requirement, a result which is inconsistent with CWA Section 301(b)(1)(C). Thus, we disagree with Conclusion 2.

Regarding the proposed receiving water limitations (RWLs) language for future storm water permits, we are pleased to see that the above-quoted phrase is no longer part of the approach for achieving compliance with WQS through storm water permits. We agree strongly, moreover, that the overall structure of the approach, which allows some flexibility for upgrading best management practices (BMPs), but requires compliance with WQS after implementing the upgrade of BMPs, and is limited to municipal storm water discharges, is an acceptable approach. However, the inclusion of certain terms in paragraph 2 of the proposed RWLs compromises the fundamental requirement for achieving WQS to such an extent that EPA would have to object to permits which included such language. The terms of concern are "substantially (in more than a *de minimis* amount)" and "continuing or recurring."

EPA's NPDES permitting regulations include 40 CFR 122.44(d), which implements CWA Section 301(b)(1)(C). Section 122.44(d)(1)(i) provides that "[L]imitations must control all pollutants or pollutant parameters...which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard...." This requirement clearly applies to all excursions above WQS. A limitation which regulates pollutants in storm water discharges that are causing or contributing to exceedances of WQS only if those exceedances are "continuing or recurring" does not meet this requirement. Likewise, it is unacceptable to regulate only contributions to WQS exceedances for which the discharge contributes "more than a *de minimis* amount".

All of the provisions which EPA objects to are concepts which are not objectionable in the context of an exercise of enforcement discretion. It might be reasonable to choose not to undertake enforcement action against a discharger which is in the process of making good faith efforts to meet WQS through its BMPs, or enforcement based on exceedances that are isolated events, or for which the discharger has made only *de minimis* contributions. However, it is inconsistent with the CWA and its implementing regulations to prevent regulatory agencies from taking such actions through restrictions in the permit requirements.


Even in those cases which the draft Order contemplates as appropriate for enforcement and does not bar, the phrases of concern unacceptably increase the burden of proof in establishing permit violations. To establish violations of the draft Order's proposed language, the enforcing entity would have to prove the threshold requirement that the exceedances were continuing or recurring, and, if the discharger merely contributed to those exceedances, that its contributions were substantial (in more than a *de minimis* amount). To enforce permits which correctly require compliance with WQS, EPA and other enforcers only have to prove that the discharger has caused or contributed to exceedances of the WQS. Since NPDES regulations at 40 CFR

123.27(b)(2) require that the burden of proof for a delegated State program be no greater than that which would be required for EPA under the CWA, the addition of threshold evidentiary requirements by California is unacceptable.

Last Friday, January 16, I sent you the RWL language which EPA believes would be acceptable for future MS4 permits. It is essentially the same as the language in the January 15 draft order, but without the terms "substantially (in more than a *de minimis* amount)" and "continuing or recurring". We urge you to either adopt our proposed language, or adopt neither version and allow us to continue to work with your staff and the various stakeholders to draft language which provides flexibility but also meets the requirements of the CWA. We would expedite such efforts so that future permits or State Board decisions are not delayed.

Thank you for the opportunity to review and comment on the revised draft Order concerning the Orange County permit appeal. If have any questions regarding this matter, please call me at (415) 744-1860 or refer your staff to Eugene Bromley of the CWA Standards and Permits Office at (415) 744-1906.

Sincerely,


Alexis Strauss
Acting Director
Water Division

cc: Bruce Fujimoto, State Board
Regional Board Executive Officers
Robert Hale, State Storm Water Quality Task Force
Libby Lucas, Environmental Health Coalition
Jeffrey Joseph, Caltrans
Richard Boon, Orange County
Frances L. McChesney, State Board
Michael Cook, U.S. EPA

RECEIVING WATER LIMITATIONS PROVISIONS OF THE MS4

ATTACHMENT A:

Approaches to Modifying the Receiving Water Limitations Provisions of the Los Angeles Region MS4 Permit

This attachment provides potential approaches to modifying the Receiving Water Limitations provisions to (1) ensure that exceedances of water quality objectives within the TMDL implementation schedule do not result in noncompliance and (2) create a robust and effective compliance process that addresses exceedances of water quality standards in the receiving waters. The potential language provided herein is preliminary and additional modifications or revisions may be provided as discussions evolve related to the reissuance of the Los Angeles Region MS4 Permit.

A comparison of the options is provided in Table A-1 and Table A-2. The approaches are organized as follows:

- Option 1: Modified Current Approach (minor modifications to existing permit language)
- Option 2: Enhanced Approach (recommended approach)
- Option 3: Implementation Planning Approach

Option 1: Modified Current Approach

Part 2. Receiving Water Limitations

1. Except as provided in Parts 2.3 and 2.4 below, discharges from the MS4 that cause or contribute to the exceedance of Water Quality Standards or water quality objectives are prohibited.
2. Except as provided in Parts 2.3 and 2.4 below, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.
3. In instances where discharges from the MS4 cause or contribute to an exceedance of Water Quality Standards or water quality objectives, the Permittee shall be in compliance with Part 2.1 and Part 2.2 by implementing the following procedure:
 - a. Submit a Report to the Regional Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to an exceedance of water quality standards. The report shall include an implementation schedule. The Regional Board may require modifications to the report;
 - b. Submit any modifications to the report required by the Regional Water Board within 30 days of notification. The report is assumed accepted or approved within 60 days if no response is received from the Regional Water Board;

- c. Implement the actions specified in the report in accordance with the approved schedule;
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody pollutant combinations addressed in an effective TMDL, the permittees shall achieve compliance as outlined in Part 7 (Total Maximum Daily Load Provisions) of this Order.
 5. If a Permittee is found to have discharges causing or contributing to an exceedance of an applicable water quality standard, the Permittee will not be determined to be in violation of this Order unless it fails to comply with the requirements provided in Part 2.3 or Part 2.4.

Option 2: Enhanced Approach

Part 2. Receiving Water Limitations

1. Except as provided in Parts 2.3 and 2.4 below, discharges from the MS4 that cause or contribute to the exceedance of Water Quality Standards or water quality objectives are prohibited.
2. Except as provided in Parts 2.3 and 2.4 below, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.
3. In instances where discharges from the MS4 cause or contribute to an exceedance of Water Quality Standards or water quality objectives, the Permittee shall be in compliance with Part 2.1 and Part 2.2 by implementing the following procedure:
 - a. Submit a report to the Regional Board that:
 - i. Identifies a strategy to prevent or reduce pollutants from outfalls that are causing or contributing to the exceedances. The strategy shall specify a prioritized effort to address problematic outfalls with additional or enhanced BMPs. The strategy shall include an approach such as action levels or an equivalent type metric for prioritizing the implementation efforts and for assessing the effectiveness of BMPs.
 - ii. Includes an implementation schedule.
 - b. Submit any modifications to the report required by the Regional Board within 30 days of notification. The report is assumed accepted or approved within 60 days if no response is received from the Regional Water Board;
 - c. Implement the actions specified in the report in accordance with the approved schedule.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same

procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

4. For Receiving Water Limitations associated with waterbody pollutant combinations addressed in an effective TMDL, the permittees shall achieve compliance as outlined in Part 7 (Total Maximum Daily Load Provisions) of this Order.
5. If a Permittee is found to have discharges causing or contributing to an exceedance of an applicable water quality standard, the Permittee will not be determined to be in violation of this Order unless it fails to comply with the requirements provided in Part 2.3 or Part 2.4.

Option 3: Implementation Planning Approach

Part 2. Receiving Water Limitations

1. Except as provided in Parts 2.3, 2.4, and 2.5 below, discharges from the MS4 that cause or contribute to a violation of Water Quality Standards or water quality objectives are prohibited.
2. Except as provided in Part 2.3, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.
3. In instances where discharges from the MS4 cause or contribute to a violation of Water Quality Standards, water quality objectives or a condition of nuisance, but do not result in an impairment of water quality as defined by the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List, the Permittee shall be in compliance with Part 2.1 and Part 2.2 by implementing the following procedure:
 - a. Submit a report to the Regional Board that:
 - i. Describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to an impairment of water quality.
 - ii. Includes an implementation schedule.
 - b. Submit any modifications to the report required by the Regional Board within 30 days of notification. The report is assumed accepted or approved within 60 days if no response is received from the Regional Board.
 - c. Implement the actions specified in the report in accordance with the approved schedule.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.
4. In instances where discharges from the MS4 cause or contribute to an impairment of water quality as defined by the State's Water Quality Control Policy for Developing

California's Clean Water Act Section 303(d) List, the Permittee shall be in compliance with Part 2.1 and Part 2.2 by implementing the following procedure:

- a. Submit a work plan to the Regional Board that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives.
 - ii. Identifies the sources of or describes the approach for identifying the sources of the pollutant of concern (including those not associated with the MS4 such that proportional responsibility to non-MS4 sources can be established).
 - iii. Describes the strategy for implementing best management practices (BMPs) (including those that are currently being implemented) that will address the Permittees' sources of pollutants that are causing or contributing to the impairment and are reflective of the magnitude and frequency of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the exceedances and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in Part 4.a.ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and effectiveness of BMPs, and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Identifies if the work plan will be implemented by an individual Permittee or collectively by multiple Permittees.
 - vi. Includes an implementation schedule.
 - b. Submit any modifications to the work plan required by the Regional Board within 60 days of notification. The report is assumed accepted or approved within 60 days if no response is received from the Regional Water Board.
 - c. Implement the actions specified in the work plan in accordance with the approved schedule.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.
5. For Receiving Water Limitations associated with waterbody pollutant combinations addressed in an effective TMDL, the permittees shall achieve compliance as outlined in Part 7 (Total Maximum Daily Load Provisions) of this Order.
 6. If a Permittee is found to have discharges causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee will not be determined to be in violation of this Order unless it fails to comply with the requirements outlined in Provisions 2.3, 2.4, and 2.5, as appropriate.

Table A-1. Comparison of Approaches for “Cause or Contribute” Language

	Current LA MS4 Permit: Basis for 9 th Circuit’s Decision	Option 1: Modified Current Approach	Option 2: Enhanced Approach	Option 3: Implementation Planning Approach
Scope	<ul style="list-style-type: none"> Applies to all waterbodies, with exception of one bacteria TMDL (Part 2.1) Discharges of bacteria above WQOs in TMDL waterbody are also prohibited in a latter provision (Part 2.6) Does not address Trash TMDL (included in Part 7) 	<ul style="list-style-type: none"> Applies to non-TMDL waterbodies Requirements (and compliance assessment) for waterbody pollutant combinations addressed in an effective TMDL based upon Part 7 (TMDL provisions) 	<ul style="list-style-type: none"> Applies to non-TMDL waterbodies Requirements (and compliance assessment) for waterbody pollutant combinations addressed in an effective TMDL based upon Part 7 (TMDL provisions) 	<ul style="list-style-type: none"> Applies to non-TMDL waterbodies but distinguishes based upon exceedance frequency <ul style="list-style-type: none"> Waterbodies that do not meet 303(d) Listing requirements Waterbodies that are impaired per 303(d) Listing Policy Requirements (and compliance assessment) for waterbody pollutant combinations addressed in an effective TMDL based upon Part 7 (TMDL provisions)
Impact of Exceedances	<ul style="list-style-type: none"> Violation of MS4 Permit, based upon Ninth Circuit decision Permittee(s) subject to 3rd Party Lawsuits 	<ul style="list-style-type: none"> Triggers RWL compliance process Compliance based upon implementing process 	<ul style="list-style-type: none"> Same as Option 1 	<ul style="list-style-type: none"> Same as Option 1

Table A-2. Comparison of Approaches for RWL Compliance Provisions

	Current LA MS4 Permit: Basis for 9th Circuit's Decision	Option 1: Modified Current Approach	Option 2: Enhanced Approach	Option 3: Implementation Planning Approach
Scope	Applies to all water bodies.	Applies to all water bodies without effective TMDLs.	Applies to all water bodies without effective TMDLs..	Waterbodies that are <u>not</u> impaired (per 303(d) Listing Policy) do not have effective TMDLs
Action	<p>Permittee(s) submit a report to RB that:</p> <ul style="list-style-type: none"> • Describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented • Includes an implementation schedule. 	Same as Current Permit Language	<p>Permittee(s) submit a report to RB that:</p> <ul style="list-style-type: none"> • Identifies a strategy to prevent or reduce pollutants from outfalls that are causing or contributing to the exceedances • Specifies a prioritized effort to address problematic outfalls with additional or enhanced BMPs. • Includes an approach such as action levels or an equivalent type metric for prioritizing the implementation efforts and for assessing the effectiveness of BMPs. • Includes an implementation schedule. 	<p>Permittee(s) submit a Work Plan that:</p> <ul style="list-style-type: none"> • Evaluates WQ data • Describes approach to identify sources • Describes strategy to implement BMPs, including tracking BMP implementation • Identifies additional monitoring to assess water quality improvements/BMP effectiveness. • Includes implementation schedule
Approval	<ul style="list-style-type: none"> • The Regional Board may require modifications to the report; • Submit any modifications to the report required by the Regional Water Board within <u>30 days</u> of notification; • No schedule for approval, but Permittees must implement within 30 days of approval 	<ul style="list-style-type: none"> • Regional Board may require modifications to the report; • Permittee(s) submit any modifications to the report required by the Regional Water Board within <u>30 days</u> of notification; • Report is assumed accepted or approved within 60 days if no response is received from the Regional Board 	Same as Option 1	<ul style="list-style-type: none"> • Same as Option 1, but modifications must be made within <u>60 days</u> of notification
Implementation	Implement the actions specified in the report in accordance with the approved schedule.	Same as Current Permit Language	Same as Current Permit Language	Same as Current Permit Language
Follow-up Exceedances	As long as Permittees are implementing the actions, Permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develop additional BMPs.	Same as Current Permit Language	Same as Current Permit Language	Same as Current Permit Language



California Stormwater Quality Association

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

February 21, 2012

Mr. Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Receiving Water Limitation Provision to Stormwater NPDES Permits

Dear Mr. Hoppin:

As a follow up to our December 16, 2011 letter to you and a subsequent January 25, 2012 conference call with Vice-Chair Ms. Spivy-Weber and Chief Deputy Director Jonathan Bishop, the California Stormwater Quality Association (CASQA) has developed draft language for the receiving water limitation provision found in stormwater municipal NPDES permits issued in California. This provision, poses significant challenges to our members given the recent 9th Circuit Court of Appeals decision that calls into question the relevance of the iterative process as the basis for addressing the water quality issues presented by wet weather urban runoff. As we have expressed to you and other Board Members on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits needs to be modified to create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but also allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. To that end, we have drafted the attached language in an effort to capture that intent. We ask that the Board give careful consideration to this language, and adopt it as 'model' language for use statewide.

Thank you for your consideration and we look forward to working with you and your staff on this important matter.

Yours Truly,

Richard Boon, Chair
California Stormwater Quality Association

cc: Frances Spivy-Weber, Vice-Chair – State Water Board
Tam Doduc, Board Member – State Water Board
Tom Howard, Executive Director – State Water Board
Jonathan Bishop, Chief Deputy Director – State Water Board
Alexis Strauss, Director – Water Division, EPA Region IX

CASQA Proposal for Receiving Water Limitation Provision**D. RECEIVING WATER LIMITATIONS**

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State of Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.