BEFORE THE STATE WATER RESOURCES CONTROL BOARD

REGIONAL BOARD COMMENT ON PROPOSED ORDER

In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association for Review of Waste Discharge Requirements Order No. 2001-01 for Urban Runoff from San Diego County [NPDES No. CAS0108758] Issued by the California Water Quality Control Board, San Diego Region

SWRCB/OCC Files A-1362 and A-1362(a)

Submitted by
California Regional Water Quality Control Board
San Diego Region
October 29, 2001

I. Introduction

The San Diego Regional Water Quality Control Board (SDRWQCB) is in general agreement with the majority of the State Water Resource Control Board's (SWRCB) draft order regarding the petition of SDRWQCB Order No. 2001-01 (permit). The comments presented here will address only those portions of the draft order where changes to the permit are proposed. The draft order proposes three changes to the permit. The SDRWQCB requests clarification regarding the first proposed change of the draft order, while disagreeing with the second and third proposed changes of the draft order.

II. Proposed Change to Permit Section C.2 (Receiving Water Limitations)

Regarding the first change proposed by the draft order (to permit section C.2), the SDRWQCB is in general concurrence with the change as it is specifically proposed. However, the SDRWQCB is concerned how this proposed change to the permit may be perceived regarding the implementation of the permit. In this respect, the SDRWQCB believes the draft order should be edited to include language addressing the implication (or lack thereof) of the proposed change on permit implementation.

The draft order's first proposed change to the permit's language clarifies that the permit's iterative best management practice (BMP) implementation approach (permit section C.2), which is designed to ensure compliance with water quality standards, applies to both Prohibition A.2 and section C.1 of the permit. The SDRWQCB agrees that this proposed change helps clarify the permit. However, the SDRWQCB is concerned with the language in the draft order which supports this proposed change. The SDRWQCB believes this language should be supplemented to clearly exhibit that the iterative BMP implementation process described in section C.2 of the permit does not provide authorization for continued urban runoff discharges which cause or contribute to violations of water quality standards, but rather provides the Copermittees with a process to ensure their return to compliance with the receiving water limitations requirements of the permit.

The SDRWQCB believes it is important for the draft order to be clear that municipal separate storm sewer system (MS4) discharges which cause or contribute to violations of water quality standards are in violation of the permit. In addition, the draft order should exhibit that this non-compliance status continues, regardless of whether or not the discharger is in an iterative BMP implementation process, until the discharge is no longer causing or contributing to a violation of water quality standards. By incorporating such language into the draft order, the SDRWQCB believes the draft order will be more consistent with SWRCB Order WQ 99-05.

Due to ongoing debate regarding receiving water limitations, the SDRWQCB believes it is significant for the draft order to reinforce Order WQ 99-05. While the draft order does not negate Order WQ 99-05, its support could be more clear. No mention was made in either SWRCB Order WQ 99-05 or other subsequent guidance that the iterative BMP implementation process described in section C.2 was meant to provide municipalities

with a shield from enforcement in the event that their MS4 discharges cause or contribute to a violation of water quality standards. Indeed, SWRCB Order WQ 99-05 expressly amended Order WQ 98-01 in order to address United States Environmental Protection Agency (USEPA) concerns over the potential for just such an interpretation of Order WQ 98-01. In its January 21, 1998 and March 17, 1998 letters to the SWRCB regarding the receiving water limitations language, USEPA makes clear that discharges which cause or contribute to an exceedance of water quality objectives are in violation of municipal storm water permits, regardless of whether or not an iterative BMP process is being implemented. USEPA states that "to enforce permits which correctly require compliance with WQS [water quality standards], EPA and other enforcers only have to prove that the discharger has caused or contributed to exceedances of WQS."[1] In other words, "the CWA [Clean Water Act] does not provide for […] an exception to compliance with standards," even if an iterative BMP implementation process is in place.[2] In addition, USEPA goes on to provide alternative receiving water limitations language to ensure that any receiving water limitations language is not misconstrued as supplying a "safe harbor" from necessary enforcement. This language was ultimately included in Order WQ 99-05. The proposal of this alternative language by USEPA, together with its subsequent adoption by the SWRCB in Order WQ 99-05, indicates that the Order WQ 99-05 receiving water limitations language does not provide dischargers with a shield from enforcement when MS4 discharges are causing or contributing to violations of water quality standards.

While the SDRWQCB finds that cooperative responsive actions on the part of the discharger to address MS4 discharges that cause or contribute to violations of water quality standards are crucial in the assessment of enforcement options, less effective actions cannot be considered a shield from all enforcement in the event that water quality standards continue to be violated. If there is a lack of good faith effort on the part of the discharger to implement the iterative BMP process effectively, the SDRWQCB maintains that the potential threat of enforcement is a necessary incentive to help ensure timely and adequate action by the discharger. As such, the SDRWQCB believes the draft order should be amended to clarify this matter.

III. Proposed Change to Permit Section A.3 (Prohibitions)

The second change to the permit proposed by the draft order allows for pollutants which have not been reduced to the maximum extent practicable (MEP) to be discharged into the MS4. While the SDRWQCB agrees that there may be isolated instances where such discharges may be acceptable, provided there is adequate treatment prior to discharge to receiving waters, the SDRWQCB disagrees that the "into and" text should be deleted from Prohibition A.3. Rather than delete the subject text, the SDRWQCB proposes that Prohibition A.3 can be modified to address the SWRCB's concerns if necessary. Prohibition A.3 can be altered to require that the MEP standard be met for discharges into the MS4 only in instances where treatment to the MEP does not subsequently occur

[1] USEPA, 1998. January 21, 1998, Letter from Alexis Strauss, USEPA, to Walt Pettit, SWRCB, Re: SWRCB/OCC File A-1041 for Orange County.
[2] USEPA, 1998. March 17, 1998, Letter from Alexis Strauss, USEPA, to Walt Pettit, SWRCB.

somewhere within the MS4 prior to discharge to receiving waters. In this manner, the permit can continue to convey the importance of BMP implementation which addresses urban runoff before it enters the MS4. Any inadvertent message that the draft order may send (i.e., that onsite BMPs are not necessary) can be damaging to efforts conducted by the SWRCB[3] and SDRWQCB to require pollutants to be addressed onsite where they are generated.

The "into and" language was included in Prohibition A.3 to exhibit that BMPs which address urban runoff before it enters the MS4 are crucial to the protection of water quality. As a practical matter, the most effective means to control urban runoff pollution is through the implementation of a combination of pollution prevention, source control, and structural treatment BMPs.[4] Pollution prevention and source control BMPs are largely implemented onsite prior to urban runoff discharges into the MS4. While structural treatment BMPs can be located offsite, they are often most effective when located close to pollutant sources prior to discharge to the MS4.

The sole use of offsite end-of-pipe treatment BMPs, without supplementation from onsite BMPs prior to discharge to the MS4, can be problematic for several reasons. First, offsite end-of-pipe treatment BMPs (such as diversion to the sanitary sewer during dry weather) are typically ineffective during significant storm events. Onsite source control BMPs can be applied during all runoff conditions, while end-of-pipe BMPs are typically limited to low-flow runoff conditions. Second, such BMPs can often be incapable of capturing the wide range of pollutants which can be generated on a sub-watershed scale. End-of-pipe treatment BMPs, due to their usually singular nature, may only be capable of targeting particular types of pollutants. Unfortunately, when BMPs are placed at the end-of-pipe, they must address a much wider palate of pollutants to be effective - a task for which they are not always designed. Site specific BMPs, however, can be effective in addressing such a wide range of pollutants, thereby contributing to overall pollutant removal effectiveness when implemented in combination with end-of-pipe treatment BMPs. Third, end-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented. An end-of-pipe BMP which receives urban runoff that is essentially "pretreated" by onsite source control BMPs will generally be more effective and require less maintenance than it would otherwise. Finally, offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding how minor changes in our everyday activities can significantly reduce the amount of pollutants in urban runoff and receiving waters.

For the above reasons, the SDRWQCB believes that the "into and" text of Prohibition A.3 should not be deleted, and can be modified if necessary. Furthermore, if the SWRCB finds that Prohibition A.3 cannot be modified to limit the application of the "into and" text to applicable circumstances, the SDRWQCB requests that at a minimum, the draft order language be expanded to illustrate that onsite BMPs are still necessary for compliance with the permit to be achieved. The SDRWQCB is concerned that deletion

[3] The SWRCB's recent October 15, 2001 Draft Water Quality Enforcement Policy refers to requirements that discharges of storm water into MS4s be in compliance with municipal storm water permits.
[4] Order No. 2001-01 Finding 11.

of the term "into and" from Prohibition A.3 can convey the potentially harmful message that onsite BMPs are no longer needed to satisfy the requirements of the permit. The draft order should convey the continuing importance the permit places on BMPs which address urban runoff before it enters the MS4.

Indeed, an onsite BMP approach which addresses pollutants before they enter the MS4 is clearly a preferred permit approach.[5] While the permit allows for "regional solutions" through the use of shared post-construction BMPs,[6] the permit is explicit in its requirements for onsite BMP implementation as well. The Standard Urban Storm Water Mitigation Plan (SUSMP) requirements included in the permit are a good example of this. While these requirements allow for offsite structural treatment BMPs in some cases, they also require onsite source control BMPs to address urban runoff before it enters the MS4. If the term "into and" is struck from Prohibition A.3, the draft order needs to reflect that the onsite BMP requirements found elsewhere throughout the permit are still in effect and must be implemented.

The SDRWQCB believes that the draft order should exhibit these concerns and illustrate that the most effective means for controlling urban runoff pollution is to use a combination of onsite source control BMPs augmented with structural treatment BMPs.[7] This can easily be achieved by allowing the "into and" text to remain in Prohibition A.3, with perhaps minimal modification to the Prohibition. This will serve to effectively exhibit that not only is treatment of urban runoff prior to discharge to the MS4 a crucial element to protecting receiving waters from the impacts caused by urban runoff, but it is also required elsewhere throughout the Permit.

IV. Proposed Change to Permit Section F.1.b.2.a.x (Retail Gasoline Outlets)

Regarding the third proposed change to the permit (section F.1.b.2.a.x), the SDRWQCB respectfully disagrees with the draft order. The SDRWQCB believes that adequate information was provided for the SDRWQCB to act on including retail gasoline outlets (RGOs) under the SUSMP requirements.

The SDRWQCB disagrees with the draft order's finding that there was inadequate justification for the permit to apply SUSMP requirements to retail gasoline outlets (RGOs). Findings 3, 4, 5, 6, 7, and 9 either directly or indirectly address retail gasoline outlets, the pollutants they generate, and the impact of those pollutants on receiving waters. The Draft Fact Sheet/Technical Report directly discusses the need and feasibility for SUSMP requirements to be applied to RGOs.[8] Moreover, the permit includes a waiver provision to address any issues of unfeasibility regarding SUSMP requirement implementation. Finally, various thresholds for the types of RGOs to be subject to the

[5] Order No. 2001-01 Findings 11 and 12.
[6] Order No. 2001-01 section F.1.b.2.c.
[7] Order No. 2001-01 Finding 11.
[8] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 99-100. A.R. Vol. 1-25.

SUSMP requirements have been developed and can be included in the Copermittees' Model SUSMP.[9]

V. Conclusion

The SDRWQCB is appreciative of the SWRCB's efforts to bring resolution to the many issues put forth by the petition of the permit. The draft order will be a significant aid in the development of future municipal storm water permits.

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[9] SDRWQCB and LARWQCB, 2001. Retail Gasoline Outlet New Development Design Standards for Mitigation of Storm Water Impacts – Technical Report. A.R. Vol. 1-58.