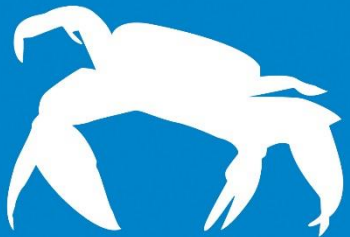


MS4 Safe Harbor Provisions

MATT O'MALLEY

WATERKEEPER AND LEGAL & POLICY DIRECTOR

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Safe Harbors

The Ninth Circuit defined a “safe harbor” as “the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.” (NRDC vs County of LA, 673 F.3d 880).

The TO creates Safe Harbors deeming a Permittee to be in compliance with the Permit’s RWL once a plan to address pollutants has been approved by the Regional Board.

- I. The TO's Safe Harbor provisions violate anti-backsliding requirements
- II. TO is Inconsistent with State Board's Order and Directives

I. The Safe Harbor violates anti-backsliding

CWA and federal regulations prohibit backsliding, or weakening of permit terms, from the previous permit:

“A permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.” (CWA Section 402(o)(1)), and

“When a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit...” (40 CFR 122.44(l)(1))

The Safe Harbor waives requirements to meet Water Quality Standards, is less stringent than existing permit and previous permit, and violates anti-backsliding requirements.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

AUG 08 2012

Mr. Jay Sakai, Director
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer
System (MS4) Permit MD0068284

Dear Mr. Sakai:

On May 18, 2012, the U. S. Environmental Protection Agency (EPA or the Agency),
received the latest draft of the above-referenced National Pollutant Discharge Elimination
System (NPDES) permit (Prince George's County permit) which was reviewed pursuant to 40
and EPA Region III

“Backsliding is prohibited in NPDES permits. . . .
Allowing additional time to complete a task that
was required by the previous permit constitutes a
less stringent condition and violates the
prohibition against anti-backsliding.”

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Federal regulations require that all NPDES permits contain limitations to control
discharges which may cause, have the reasonable potential to cause or contribute to an
excursion above water quality standards. 40 C.F.R. §122.44(d)(1)(i). Part VI of the draft
Prince George's County permit (Enforcement and Penalties) contains general language

SWRCB-Approved Justifications for Backsliding in LA

SWRCB found exceptions based on “new information since previous permit”, “paradigm shifts”, and TMDL “lessons learned” in LA

“Paradigm Shift” (stormwater as asset/water supply vs liability)

TMDL development & implementation and “Lessons learned”

Watershed planning and regional solutions

LID benefits

Justifications Don't Apply in SD

Response to comments states that exception exists because “circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause for permit modification....” (Response, p. 38)

In SD, little to no “new information”, and no substantial and material changes to justify anti-backsliding

Only material change here is adding the Safe Harbor

TMDLs as backstop

Justification: “We expect that the Los Angeles MS4 Order’s TMDL requirements and receiving water limitations...will be the means for achieving water quality standards for the majority of degraded water bodies in the region” (Order 2015-0075, p. 26).

“...the majority of pollutants of concern from the LA County MS4 are addressed by the 33 TMDLs that are included in the Permit.” (LARWQCB Response to Comments, Oct 2013, p.37).

BUT: SD has 5 TMDLs, and significant pollutants here are not addressed by TMDLs and are not expressly included in the permit.

Stormwater as a Water Supply

Justification: “...in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset...” (Order 2015-0075 at 21)

BUT:

“Groundwater production...is limited by a number of elements, including lack of storage capacity in local aquifers, availability of groundwater recharge, and degraded water quality,” and, “groundwater supplies are less plentiful in the San Diego region than in some other areas of California...” (SDCWA website)

AND:

SD MS4 does not require (as LA does) analysis of multi-benefit regional water supply projects that capture, retain, and use.

Watershed Planning and Prioritization

Justification: Watershed-based plans are the preferred stormwater planning mechanism

BUT: 2007 SD Permit already incorporated this:

“Watershed-based urban runoff management can greatly enhance the protection of receiving waters within a watershed. Such management provides a means to focus on the most important water quality problems in each watershed....**Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy...**” (Order R9-2007-0001)

II. TO is Inconsistent with State Board's Order and Directives

The Safe Harbor amendments are inconsistent with the SWRCB's Order and directives for adopting Safe Harbors

- ▶ No Reasonable Assurance Analysis (RAA), Guidelines, or Objective Standards in Permit
- ▶ No Regional Multi-benefit capture and use compliance provision
- ▶ Endless iterative loop without objective standards

SWRCB Order and the SD Tentative Order

SWRCB Order lays out a pathway for a Safe Harbors

The Problem:

The TO **borrow**s the **justifications** used in Los Angeles, but **ignores the approach and methodology** (in particular the RAA) that was specifically approved by the SWRCB's Order and that is the lynchpin of the Safe Harbor mechanism. In doing so, it fails to comply with the Order.

Principles of SWRCB Order

SWRCB's Order states the following principles must apply to any region's safe harbor provisions (Order WQO 2015-0075):

- ▶ Permits should incorporate an **ambitious, rigorous, and transparent** alternative compliance path.
- ▶ The safe harbor should encourage **multi-benefit water supply compliance projects** that capture, infiltrate, and use storm water and support a local sustainable water supply.
- ▶ The safe harbor should have **rigor and accountability**.
- ▶ The RWL provisions should not deem good faith engagement in the iterative process to constitute such compliance.

Reasonable Assurance Analysis (RAA)

Approved of in SWRCB Order as a “well defined, transparent”, detailed, pre-reviewed and approved modeling mechanism.

“...the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. Competent use of the RAA should facilitate achievement of final compliance within the specific deadlines.” (Order WQO 2015-0075).

SWRCB-Approved RAA Language

“Permittees shall conduct a Reasonable Assurance Analysis for each water body-pollutant combination addressed by the Watershed Management Program. A Reasonable Assurance Analysis (RAA) shall be quantitative and performed using an approved model in the public domain. Models to be considered for the RAA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP Prioritization and Analysis Tool (SBPAT). The RAA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis. Data on performance of watershed control measures needed as model input shall be drawn only from peer-reviewed sources. These data shall be statistically analyzed to determine the best estimate of performance and the confidence limits on that estimate for the pollutants to be evaluated. The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees’ MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.” (Order No. R4-2012-0175, as amended by Order WQ 2015-0075).

RAA Guidelines

LA's RAA is accompanied by guidelines detailing objective standards for conducting the required analyses, and criteria for doing so, leading to rigor, transparency, and accountability.

“The RAA must be adequate to identify the required reduction for each water body–pollutant combination at each compliance deadline and analyze the BMP scenario to achieve that deadline.” (“Guidelines for Conducting RAA...”, March 25, 2014).

Guidelines for RAAs

Stated intent: “Permittees shall provide a modeling system to support the estimation of baseline loadings, required load reductions that are used to set targets/goals for selected BMPs/watershed control measures...”
(Guidelines, March 2015)

“The models appropriate for conducting the required RAA...are selected based on the following model capabilities:

1. Dynamic continuous long-term simulation for modeling pollutant loadings, flows, and concentrations in receiving water from lands in a watershed system.
2. Can represent rainfall and runoff processes above soil surface, and baseflow contributions in subsurfaces of urban and natural watershed systems.
3. Can represent variability in pollutant loadings, based on land use, soil hydrologic group, and slope.
4. BMP process based approach or empirically based BMP approach.
5. Decision support to evaluate BMP performance.” (Guidelines)

TO Language on Analysis

“An analysis, with clearly stated assumptions” (TO, Section B.3.c.1.(b)(i)).

TO allows noncompliance with Safe Harbor with **“acceptable rationale”** (TO, Section B.3.c.2.(c)).

- ▶ TO contains no RAA or equivalent and lacks objective criteria and guidelines present in RAA and approved by SWRCB Order.
- ▶ As proposed, the Safe Harbor lacks objectivity and accountability and is not well-defined or transparent

Continuous iterative loop

“...we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations....” (State Board Draft Order)

TO has no guidance or objective measure as to what “acceptable rationale” would be, and so lacks transparency and accountability.

EPA: Amendments “Provide Only Limited Direction”; Need Guidance

- ▶ “The proposed permit modifications...provide only limited direction concerning the Regional Board’s specific technical, analytical, and planning expectations that must be met by permittees pursuing this alternative compliance pathway.” (Dave Smith email to SDRWQCB, 11/16/15).
- ▶ Recommend prompt development of guidance
- ▶ “It will best serve everyone’s interests if there are clear understandings about the level of technical rigor necessary to demonstrate reasonable assurance and the specificity of implementation commitments necessary in the associated implementation plans to secure approval.” (Dave Smith email to SDRWQCB, 11/16/15).

Where Are We?

Not rigorous, transparent, or well-defined

- ▶ No RAA or other established objective methodology or guidance.
- ▶ Allows for non-achievement of RWLs based on nebulous “acceptable rationale”.

Not ambitious

- ▶ Does not embrace the paradigm shift by failing to include regional multi-benefit water supply projects as part of compliance mechanism.

Water Quality Safety Nets

In LA you have 33 TMDLs incorporated into MS4 Permit as a safety net and assurance WQS will be met

In LA you have the objective RAA requirements and associated guidance docs as a safety net and assurance plans will meet RWLs

Neither exist in SD

EPA: “Inappropriate” to apply Safe Harbor to regions outside LA

“The WQ Order directs all Regional Boards to consider the approach in the LA MS4 permit, but does not require its use. **We believe it would be premature and inappropriate to require the LA MS4 permit approach throughout the State...**”
(EPA letter to SWRCB, Jan 2015).

Our Proposal

- A. Remove Safe Harbor Language and substitute with Time Schedule Orders or other compliance mechanism, or
- B. Delay Safe Harbor until statewide EPA/SWRCB guidance developed and reconsider at next permit renewal (2018)

If choose to adopt despite legal and practical problems:

Rigor Up Front – RAA and guidance in permit, or

Rigor on Back End - Miss goals two years in a row and no longer covered (“hard out”)

Add requirement for 85th-percentile storm capture for multi-benefit water supply compliance projects

Ramp up legal obligation to develop TMDLs that are on hold or not yet developed to act as backdrop

EPA: Safe Harbor Grace Period

“establishing a safe harbor during this phase is not warranted...we disagree that permittees should be considered in compliance with these limits solely based on a notification of intent to prepare a plan.” (David Smith letter to SWRCB, Jan 2015)

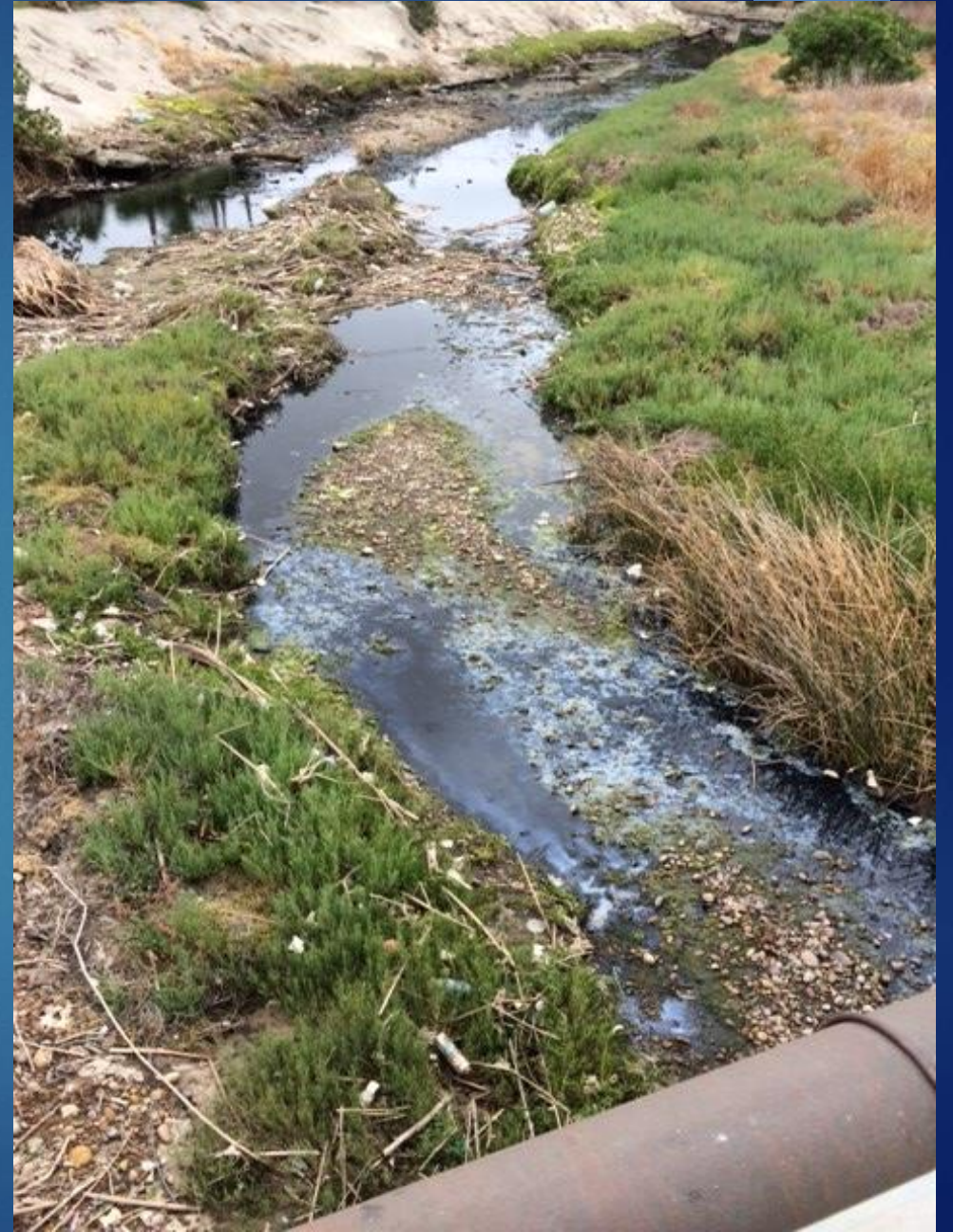
“Prior to a determination by the Regional Board that the submitted plan contains specific implementation commitments that are sufficient to provide reasonable assurance that TMDL and other relevant water quality based requirements will be met, **there is insufficient basis to conclude that the permittees are or will be in compliance.**” (David Smith email to SDRWQCB, 11/16/15).

2013 Permit – Where Are We?

Submitted WQIPs have shown that without clear, rigorous, and strict guidelines and directives the outputs and plans were trial-and-error and (in some cases woefully) inadequate.

MS4 Enforcement actions taken by SDRWQCB since 2013:

Escondido (multiple), City of SD (multiple), Carlsbad, Chula Vista, Lemon Grove, Unified Port





Richard Murphy



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