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June 14, 2012



VIA E-MAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

Jeannie Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter - Caltrans Municipal Separate Storm Sewer System (MS4) Permit

Dear Ms. Townsend:

As a member of the Statewide Stormwater Coalition (SSC), the City of Lodi would like to submit the following comments regarding Part D of the proposed Caltrans MS4 Permit. The SSC is a group of nearly 100 local governments and organizations concerned about the cost and feasibility of achieving MS4 permit requirements. The SSC's members seek to maintain and improve water quality through achievable and cost-effective means. The the City of Lodi is concerned about the possible precedential effect of Part D of the Caltrans MS4 Permit, especially as it relates to changes our agency and fellow SSC members will be requesting be made to the proposed Small MS4 Permit.

Part D of the Caltrans MS4 Permit addresses compliance with the prohibitions and limits of Parts A.4, D.2 and D.3 of the Permit. The City of Lodi firmly supports the linkage between the iterative process in Part E.2.c.6).c) of the Permit and the prohibitions and limits of Parts A.4, D.2 and D.3. However, to strengthen this linkage in a crucial way, the Board should revise the phrase "assure compliance with" in the last clause of Part D.4 to either "achieve compliance over time with" or "obtain compliance over time with." The last clause would thus read as follows: "the Department shall *achieve compliance over time with* Sections A.4, D.2 and D.3 of this order by complying with the procedure specified in Section E.2.c.6).6) of this Order." In addition, the Board should amend Part D.2 to read as follows: "Except as provided in Part D.4 below, the discharge of storm water from a facility or activity shall not cause or contribute to an exceedance of any applicable water quality standard."

As the Fact Sheet properly recognizes, strict compliance with water quality standards is not mandatory in a municipal NPDES permit; rather, a permitting agency has the discretion to require dischargers to implement controls to meet water quality standards. (Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.2d 1159, 1166). The State Board, in precedent setting orders, has stated that for municipal permits in California compliance with water quality standards should be achieved over time through the iterative BMP process. Recent case law demonstrates that the receiving waters limitations language of MS4 permits must be carefully written to achieve the State's iterative BMP-based compliance goals. (NRDC v. Los Angeles County Flood Control District (9th Cir. 2011) 636 F.3d 1235. If not carefully written, receiving waters limitations provisions can and have been interpreted to require strict compliance with numeric water quality objectives in a manner inconsistent with this Board's stated policy. The language change suggested above would achieve the State's iterative BMP-based compliance goals in a manner consistent with the receiving waters limitations language of the precedential orders. It would require compliance with water quality objectives through the iterative BMP process.

The importance of this issue to our agency and fellow members of SSC cannot be overstated. Vague or poorly worded language exposes dischargers to strict compliance with numeric water quality standards even where such standards have not been translated into numeric water quality based effluent limitations. Such a result is not consistent with the Board's intention in its prior precedential orders and subjects municipal dischargers to a mandate well beyond the standard established in Section 402(p)(3)(B) of the Clean Water Act. Furthermore, the State has conceded that immediate compliance with many standards like copper and zinc are impossible for Caltrans to comply with due to the fact that these pollutants emanate from brake pad lining that are not mandated to be modified until 2025, or from tire wear that cannot be controlled by Caltrans. Thus, the State Board is subjecting its sister state agency to an impossible mandate that will subject it to potentially millions of dollars in penalties and attorneys fees for non-compliance with a standard everyone knows is not immediately attainable. Such a policy decision is unjustifiable in a time when the State has a budget deficit of over \$17 billion.

The SSC will be submitting more detailed comments on this issue in connection with the draft Phase II Small MS4 Permit. However, due to the importance of this issue and possible precedential nature of the State Board's decision, the City of Lodi requests the revisions to Part D noted above.

Sincerely,



Konradt Bartlam
City Manager

KB/kmg

cc: F. Wally Sandelin, Public Works Director
Larry Parlin, Deputy Public Works Director-Utilities
Kathryn E. Garcia, Compliance Engineer