

Response to Comments on the 2024 Informal Draft Small MS4 General Permit

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Introduction

The State Water Resources Control Board (State Board) is currently working towards reissuing the Small MS4 General Permit (Permit), also known as the Phase II MS4 Permit. In July 2024, State Board staff released an informal partial draft of the reissuance to collect preliminary feedback to inform further edits before proceeding with the formal release of a draft (formal draft). State Board received 40 comment letters on the informal draft from a broad range of interested parties including currently permitted traditional and non-traditional municipalities (Permittees), non-governmental organizations (referred to as environmental NGOs or municipal NGOs), engineering firms, the US EPA, and private individuals.

This document does not respond to every comment received; rather, it summarizes significant comments received and provides State Board staff responses, including whether changes were made in response to those comments in the formal draft. Post-construction was the most mentioned topic in the comment letters, followed by Total Maximum Daily loads (TMDLs), trash capture implementation, asset management, illicit discharge facility inspections, and construction. Other common concerns include the timing and phasing of requirements throughout the permit and unique circumstances and challenges for the non-traditional Permittees.

Comment Category: Post-Construction

The informal draft proposed large-scale changes to this section including new sizing thresholds, explicit prioritization of best management practice (BMP) selection, detailed specifications for Site Design Measures, changes to terminology, and many other smaller changes.

These changes were intended to iteratively improve on the existing standards, add clarity, and bring the standards closer in-line with various regional standards. Staff observe that the comments received expressed concerns with this section and noted the significant amount of work that has already been done to enact and implement the existing post-construction standards, which have now been in place for over ten years.

Comments and discussions through the informal draft process conveyed that the proposed large-scale changes would require significant implementation challenges. In response, the Post-Construction standards have been largely reverted to those in the existing 2013 permit. Smaller changes to the standards are still being proposed to iteratively improve the standards. These include:

- Removal of the exclusion of large single-family houses from the definition of Regulated Projects.
- Removal of the soil quality improvement and maintenance Site Design Measure.
- Allowance for off-site BMPs to meet peak flow requirements.
- Alteration of the 50 percent redevelopment rule to also include projects that result in an alteration (as opposed to only an increase) of more than 50 percent of the existing impervious surface.
- Field verification that Post-Construction standards have been followed prior to occupancy.
- Addition of onsite inspections to verify the maintenance condition of installed Post-Construction BMPs.

Comment Category: TMDLs

Permittees expressed various concerns over specific TMDL implementation requirements including compliance timelines, sampling location and frequency, safety considerations during sampling, reporting timing and frequency, applicability, and interpretation of waste load allocations.

State Board staff worked with the applicable Regional Water Quality Control Board (Regional Board) staff to consider and make edits to address the comments throughout the TMDL attachment, including clarifying changes, changes to sampling design, and updated references to TMDL monitoring plans submitted since the informal draft. The formal draft also includes a draft Fact Sheet, which was not included in the informal draft, with more detail on TMDL waste load allocations and implementation requirements.

Comment Category: Trash Capture Implementation

Comments on Attachment H included concerns regarding consistency with the Trash Provisions, recognition of trash capture progress to date, the number and frequency of reporting submittals, a request for alternatives to the rational method for sizing devices, and extension of the 2030 compliance deadline for existing permittees.

The proposed requirements are consistent with and implement the Trash Provisions; Attachment H adds necessary detail to implement the Trash Provisions. Trash capture progress to date is recognized by the interim milestones. Required submittals are necessary to track progress towards meeting the provisions of this attachment.

This formal draft does not add an alternative to the rational equation for certified full capture devices. The Trash Provisions specifically require use of the rational equation for all certified full trash capture devices. Thus, Track 1 Permittees must use the rational equation in all cases. If a Track 1 permittee uses a method other than the rational equation to size BMPs, that permittee will need to utilize Track 2.

It is not possible to change the 2030 compliance deadline for existing permittees through this permit. A change to the compliance deadline would require the State Board to amend the Trash Provisions. Permittees who are unable to meet the 2030 deadline may request a Time Schedule Order (TSO).

Comment Category: Pollution Prevention and Good Housekeeping

Sub-topic: Asset Management

Commenters noted the broad scope of asset types, specificity of asset details, and the reporting timeline in the informal draft's asset management requirements. Multiple commenters suggested narrowing the focus of these requirements to water quality assets (in other words, to exclude pipe infrastructure) and phasing in elements over multiple permit terms.

In response, the formal draft simplifies asset management overall, focusing on adding long-term condition assessments to the inventories the current permit already requires for multiple categories of stormwater assets (outfalls, catch basins, and post-construction BMPs) as well as newly-required trash capture devices. This culminates in a Long-Term Asset Operation and Improvement Plan in the final year of the permit term. The plan will include a list of needed repairs; improvement; and maintenance projects, beyond routine maintenance, that have been identified by the condition assessments thus far and a high-level estimate of project costs.

Sub-topic: Pet Waste

One environmental NGO responded positively to the proposed pet waste programs and suggested expanding it to include feral cat populations. Permittees commented asking for clarification or reduction of the scope of the survey noting feasibility of walking every mile of every trail.

No changes were made in response to these comments. The hotspot inventory does not necessarily require mile-by-mile inspections of entire trail systems. Parts of extensive trail

systems that do not drain to an MS4 or waters of the US would be outside of the scope of this requirement.

Comment Category: Illicit Discharge Detection and Elimination Program

Sub-topic: Facility Inventory and Inspections

The informal draft proposed a new inspection program for industrial and commercial facilities, similar to those required in Phase I permits. Commenters contend that these types of inspection programs are already difficult for the larger Phase I permittees to conduct and would be especially onerous for the smaller municipalities under the Small MS4 Permit. Some commenters took the position that it would be more effective and less expensive to forgo the proposed individual facility inspections in favor of higher-scale visual inspections of priority areas for signs of illicit discharges.

Upon consideration of these comments and additional information provided by permittees showing very few illicit discharge detections from other inspections targeted at discrete locations (outfall inspections during mapping), State Board staff is proposing expanded priority area surveillance and removing both the inspections of commercial and industrial facilities proposed in the informal draft as well as the inventory of potential illicit discharge facilities that the informal draft carried forward from the existing permit. The facility-level inventory by itself was not found to be effective at preventing illicit discharges and therefore is no longer required. The resources spent updating this inventory can now be focused instead on priority areas.

The existing permit defines priority areas for illicit discharge detection and elimination but only requires these areas to be assessed once during the permit term. This formal draft adds to the list of types of areas that must be prioritized (including areas with commercial and industrial activities) and increases the priority area assessment frequency from once per permit term to once every two years. Water Board staff believe this strategy will lead to more proactive identification and elimination of illicit discharges than the existing permit.

Sub-topic: Dry Weather Flows

Commenters stated that dry weather flow monitoring required under the existing permit has been costly and ineffective at eliminating illicit discharges. Some commenters thought the informal draft was proposing an increased number of dry weather flow samples. This is incorrect. Edits have been made, however, to clarify that the first step is investigation of dry weather flows (anywhere, not only at outfalls), with the understanding that the source can often be found without costly sampling. Sampling is then reserved for any dry weather flow

(from an outfall or anywhere within the conveyance system) for which the source cannot be identified.

Comment Category: Construction

Sub-topic: Local ordinance

Several commenters took issue with proposed wording in Section D5.1 requiring a local ordinance for all land disturbances less than one acre, pointing out that this would include land disturbances beyond their authority and should be limited to projects requiring a building or grading permit. The wording “all land disturbances less than one acre” was a carryover from the existing permit, which does not require permittees to exceed or expand their authority. However, State Board staff has proposed the following language to clarify that this provision only applies to projects within the permittee’s building and grading authority: “Construction projects disturbing less than one acre that are subject to a municipal grading or building permit.”

Sub-topic: Non-Traditional Construction Program

The informal draft proposed an expanded construction site stormwater runoff program for Non-traditional Permittees, including an inventory of projects, plan review, site inspections, and a policy or procedure for erosion and sediment control that would mirror the requirement for Traditional Permittees’ local ordinance for projects below the one-acre size threshold for the Construction General Permit (CGP).

Commenters objected to the imposition of what they feel is a new administrative burden for the Non-traditional Permittees. Commenters content that this provision is largely duplicative because the requirements could have Non-traditional Permittees inspecting projects for which they are the named CGP permit-holder. In response, most of the expanded construction requirements were removed from the formal draft. However, the requirement to have a policy or procedure to mirror the local ordinance required of Traditional permittees for projects not covered by the CGP was retained.

State Board staff added language to limit the scope of this new policy to land disturbances less than 1 acre that are not already covered by best management practices elsewhere in the Permit (e.g. maintenance activities that already have sediment and erosion control best management practices identified and implemented through Pollution Prevention and Good Housekeeping).

Sub-topic: Previously approved plans

Four commenters interpreted section D5.3.5 of the informal draft as requiring the re-review of construction plans approved under the existing Small MS4 Permit. However, the intent of this section was only to require review of plans that are subsequently revised after their initial approval, not to revisit standing plans that have not been revised.

This section has been removed, and the language clarified to require the review of an Erosion and Sediment Control Plan for written re-approval only if the Erosion and Sediment Control Plan has been revised.

Sub-topic: Inspections

Three commenters asked for removal of Section D5.4.3.b which requires annual inspections of all non-priority Regulated Construction Projects, contending that this is a large expansion of currently required inspections, will be resource intensive, and will require inspections of many projects that are not a threat to water quality. Some commenters also argued that inspections based on the first forecast rain event as described in Section D5.4.3.c.1 are impractical.

The annual inspection requirement for non-priority projects has been removed to allow inspections to focus on priority sites. The forecast-based inspection timing has been changed to simply “prior to the rainy season.” Rainy season is defined as October 1 through April 30.

Comment Category: Areas of Special Biological Significance (ASBS)

One environmental NGO provided comments focused on strengthening the oversight and monitoring of discharges into ASBS. State Board staff reviewed the concerns and have made several revisions to clarify requirements and added new language to make clear that a new round of monitoring is required for all permittees that have not been granted approval to cease monitoring. Permittees are also required to revisit and update their ASBS Compliance Plans with information regarding BMP implementation to date and a schedule of any additional BMPs to be installed to maintain Natural Ocean Water Quality.

Comment Category: Timing Throughout the Permit

Many commenters expressed concerns with both the timing and sequencing of requirements in the permit. Many deliverables and actions were required in the first two years and commenters pointed out issues with the sequencing of some requirements.

State Board staff reconsidered timing and sequencing throughout the permit resulting in many of the requirements being pushed back a year or more. Additionally, some of the edits and removals in response to other comments negated some of the sequencing issues.

Comment Category: Public K-12 School Inclusion as Permittees

Several comment letters suggested reconsidering the inclusion of public schools as permittees. Broad inclusion of public schools throughout the state was a major topic in earlier work on this reissuance. However, the current formal draft does not designate schools because discussions and comments throughout this process led State Board staff to conclude that a better understanding of the opportunities and challenges inherent in designating schools is needed. In the meantime, the State Board encourages schools to proactively address stormwater, including capturing stormwater on site, reducing trash, and eliminating non-stormwater discharges. Staff plan to continue to work with schools and MS4s to gain a better understanding of barriers preventing schools and the surrounding municipalities from partnering to do more stormwater related work.

Comment Category: Alternative Compliance and Time Schedule Orders (TSOs)

Sub-topic: Alternative Compliance

Commenters noted that the proposed Alternative Compliance approach was based on the existing approach in the Industrial General Permit (IGP) rather than those in other MS4 permits. They questioned whether this option would be feasible or useful to Small MS4 Permittees and whether this option meets the State Board's own precedential orders regarding alternative compliance.

The proposed Alternative Compliance approach implements the retention-based approach first incorporated into the Los Angeles MS4 Order and approved by the State Board in precedential Order WQ 2015-0075. The retention-based approach was similarly incorporated into the IGP.

This approach is fully aligned with State Board's precedential ruling, Order WQ 2015-0075 regarding rigor, accountability, and transparency. Because this approach is a more straightforward capture option as opposed to a highly complex watershed management plan, the associated planning and reporting are also less complex.

Some commenters questioned why a watershed planning approach using a reasonable assurance analysis was not included. This style of alternative compliance is more complex and resource intensive, making it better suited to the interconnected, multi-permittee MS4s in large urban corridors covered by Phase I Permits. Small MS4s generally have more limited resources individually as well as fewer collaborative opportunities because of their less interconnected nature. State Board staff judged that the more complex watershed planning approach would be less useful to the Small MS4 Permittees and thus did not develop that option for this iteration of the permit.

Sub-Topic: TSOs

One commenter suggested allowing permittees to request coverage under existing TSOs rather than having to negotiate a separate TSO with the applicable Regional Board. This could allow Small MS4 Permittees to have consistent implementation requirements with neighboring Phase I Permittees already under a TSO and encourage collaboration between permittees.

TSOs are generally issued by the Regional Boards. Permittees interested in TSOs should work with the appropriate Regional Board.

Multiple commenters requested to add a provision to the TSO section to provide alternative timelines for TMDLs while TSOs are being issued. No change was made in response to these comments because the State Board cannot change an adopted TMDL compliance deadline via an NPDES permit.

Multiple commenters requested to add a provision to the TSO section to include a specified timeframe for receiving response from the Regional Boards and stipulate that the request will be deemed approved if no written response is provided within that timeframe. A TSO review timeframe for automatic approval has not been added to the formal draft. State Board staff recommends permittees regularly follow up with the applicable Regional Board on the progress of issuing TSOs.