

Comment Letters Received from
United States Environmental Protection Agency
(USEPA)

USEPA, Region IX



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

JUL 23 2012

Ivar Ridgeway
Chief, Stormwater Permitting Unit
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Draft MS4 Permit for Los Angeles County (NPDES Permit No. CAS004001)

Dear Mr. Ridgeway:

The following are EPA Region 9's comments on the draft NPDES permit for discharges from the municipal separate storm sewer system (MS4) serving Los Angeles County and incorporated cities therein, which the Los Angeles Regional Board proposed on June 6, 2012. As you know, Region 9 has invested in the development of this draft permit, providing contract support for permit development, attending public workshops, and reviewing and commenting on early drafts of the permit. We are pleased with the draft permit that has emerged from these efforts and we urge the Board to adopt the permit at its meeting in September 2012. We also offer the following comments for the Board's consideration:

A. *Total Maximum Daily Load (TMDL) Requirements*

For the last several years, Region 9 has been encouraging the Regional Boards to incorporate applicable wasteload allocations (WLAs) from TMDLs as numeric effluent limits in MS4 permits. This practice improves the clarity and enforceability of the permits, and ensures consistency with the WLAs. We are pleased to see that applicable WLAs have been identified and incorporated as numeric effluent limits in Appendices K through R to the permit.

We also recognize the permit provides an opportunity for a permittee to demonstrate compliance with interim WLAs via Watershed Management Program Plans providing reasonable assurance that documented best management practices (BMPs) will achieve interim WLAs. We agree with this approach. Based on available information, it is appropriate that compliance with final WLAs (except for those associated with trash TMDLs) will be determined based on achievement of applicable numeric final water quality-based effluent limits and/or final receiving water limits. This is consistent with EPA guidance in its updated memorandum of November 10, 2010 concerning the incorporation of WLAs into stormwater permits, available at:

http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf. This memorandum

recommends the use of numeric effluent limits when feasible, and notes that BMP-based approaches are appropriate in cases where the administrative record for the permit quantitatively demonstrates the BMPs required by the permit will be sufficient to ensure compliance with the WLAs. This has also been a long-standing EPA policy dating back to EPA's previous 2002 guidance memorandum concerning the incorporation of WLAs into stormwater permits, available at: <http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf>.

We agree that the BMP-based approach this permit takes for trash TMDLs is appropriate given the record that has been compiled on the use of BMPs to address trash, and also agree that numeric limits are appropriate for determining compliance with final WLAs for the rest of the TMDLs incorporated into this permit. These procedures and requirements set forth in the draft permit are consistent with EPA guidance.

Section VI.A 5 of the draft permit notes that all documents submitted to the Regional Board for approval shall be made available for public review and comment for 30 days. This includes the important Watershed Management Programs (WMPs) developed by permittees in which BMPs may be selected to comply with applicable WLAs, along with a reasonable assurance analysis (RAA) to demonstrate compliance with the WLAs. The RAAs will likely be complex and we believe public review is critical to ensuring that any WMP approved by the Board is adequate to ensure compliance with applicable WLAs. We found no mention of public review of WMPs in the fact sheet, and we recommend this be mentioned and stressed to ensure the public is fully aware of this opportunity and to encourage public review. For example, page F-40 of the fact sheet notes that a draft WMP must be submitted to the Board for approval within one year of adoption of the permit, but no mention is made of any opportunity for public review and comment.

We note that separate and somewhat different provisions were developed for the EPA-established TMDLs than for the State-established TMDLs. The fact sheet correctly points out that unlike the State TMDLs, the EPA TMDLs do not include implementation plans or schedules, but they do typically include implementation recommendations. We believe the Board has discretion in developing permit requirements for the EPA TMDLs, and we believe the draft permit requirements are appropriate for the EPA TMDLs, and consistent with the implementation recommendations. EPA also supports the requirement of Watershed Management Program Plans, with the shortest possible implementation schedule, to achieve WLAs defined in the EPA-established TMDLs. EPA further supports language concluding that if the Board determines a plan or schedule is inadequate, then compliance with the numeric WLAs and water quality objectives, as defined in the TMDL, must be met immediately. We believe such provisions will best assure water quality improvements. To reinforce the permit expectations as we understand them, we'd suggest the following specific changes:

- Page 114, section VI.E.3. next to last sentence should be revised to "In lieu of inclusion of numeric water quality based effluent limitations at this time, this Order requires the Permittees subject to WLAs in USEPA established TMDLs to propose and implement best management practices (BMPs) that will be effective in achieving compliance with USEPA established numeric WLAs."

- Page 115, section VI.E.3.c.ii. should be revised to: "A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA."

B. *Low Impact Development (LID) Requirements*

As we've pointed out previously, implementation of LID requirements in MS4 permits is one of Region 9's priorities, along with implementation of TMDL requirements. And as in the case of TMDLs we are seeking clear, measurable LID requirements in MS4 permits to ensure enforceability of the requirements. We have reviewed the LID requirements of the proposed permit and we concur with these requirements. Importantly, we note that numeric sizing criteria for a design storm to be managed via LID have been included in the draft permit (section VI.D.6.c.i.(2)) which are comparable to other recent MS4 permits adopted in the State.

To a considerable degree, the LID requirements of the proposed Los Angeles County MS4 permit were derived from the requirements developed for the Board's MS4 permit for Ventura County which was adopted in 2010. However, there are also a few differences based on new information which has become available since 2010 and as discussed below, we would concur with the changes made from the Ventura County MS4 permit.

First, we note that the draft Los Angeles County MS4 permit omits the provision in the Ventura County permit which allows the runoff from 5% of the effective impervious area (EIA) of a new development to be excluded from the LID management requirements. We found the EIA concept to be confusing to many parties and excluding 5% of the EIA makes little difference from an engineering standpoint. The removal of this EIA provision will also align the Los Angeles County MS4 permit with other recent MS4 permits such as the North Orange County MS4 permit adopted by the Santa Ana Regional Board in 2009 (NPDES permit No. CAS0108740) in which the runoff from the full design storm must be managed using LID techniques. By requiring LID management of the full design storm runoff, the Los Angeles County permit will also be somewhat more protective of water quality than the Ventura County permit.

We support provisions in the draft Los Angeles County permit which provide specificity on the implementation of LID, for example Attachment H's Bioretention/Biofiltration Design Criteria. This is an improved approach over the Ventura County permit's reliance on a Technical Guidance Manual which had to be updated subsequent to issuance of the Ventura County permit to provide these design criteria. By providing specifications in the permit the draft Los Angeles County permit provides clear expectations to the public on how the LID requirements will be implemented and eliminates the delays associated with reaching agreement on a Technical Guidance Manual.

Another difference from the Ventura County permit is that special alternative compliance provisions have been included in the Los Angeles County permit which allow the use of offsite regional groundwater recharge sites without a showing of LID technical infeasibility onsite (section VI.D.6.c.iii). The benefits of increased stormwater infiltration for

the purpose of the groundwater recharge in Southern California have been highlighted in several recent studies such as the 2010 Los Angeles Basin Water Augmentation Study, available at:

http://watershedhealth.org/Files/document/522_WAS_StrategyDocument_web.pdf and NRDC's 2009 study entitled "A Clear Blue Future: How Greening California Cities Can Address Water Resources and Climate Change in the 21st Century." We did not find an explanation in the fact sheet for the special provisions related to groundwater recharge; we suggest adding an explanation, citing studies such as those mentioned above. These studies show the benefits stemming from increased groundwater recharge in Southern California would be substantial, and we believe they merit the special consideration provided in the draft permit. However, we would recommend that the permit limit this alternative compliance option to recharge sites where the groundwater can actually be used for a beneficial purpose. To this end, we'd suggest the following specific revision:

- Page 70, section VI.D.6.c.ii.(1) should be revised to, "In instances of technical infeasibility or where a project has been determined to provide an opportunity to replenish regional ground water supplies at an offsite location where ground water can be used for beneficial purposes, each Permittee may..."

Also, we have a minor suggestion to clarify the circumstances where technical infeasibility exists:

- Page 71, section VI.D.6.c.ii.(2)(d) should be revised to, "Brownfield development sites where infiltration poses a risk of causing pollutant mobilization."

Note also that the citation on page 71 at the end of section VI.D.6.c.ii.(3) should be "VI.D.6.c.i."

We support the option for achieving compliance via implementation of Offsite Projects which Retrofit Existing Development (page 72, section VI.D.6.c.iii.(3)). This provides added flexibility to the permittees as a means for complying with LID requirements, and has the potential of achieving valuable water quality benefits.

In addition to the provisions in the LID requirements, we also support the provisions on page 94 (section VI.D.8.d) requiring the development of an Inventory of Existing Development for Retrofitting Opportunities. These provisions are similar to those in MS4 permits issued by the San Diego Regional Water Quality Control Board, and should result in valuable consideration of retrofit projects that can contribute to water quality improvements. They are also supported by EPA's 2010 MS4 Permit Improvement Guide (EPA 833-R-10-001) which recommends such provisions be considered.

Lastly, there are three documents cited on page F-62 of the fact sheet where a reference citation was not included – the study by "Hawley et al.", the USGS study and the Grand River TMDL. We suggest footnotes which would provide the reference information.

C. Receiving Water Limitations

We understand that concerns have been raised regarding the receiving water limitations (RWL) language (Section V.A) in the draft permit. We would note that the State Board adopted standard RWL language to be used in all California MS4 permits in WQ Order 99-05 dated June 17, 1999. The State Board provided further clarification of its intent in WQ Order 2001-15, but it generally retained the substance of WQ Order 99-05. WQ Order 99-05 also allowed minor variations in the language to ensure consistency with the terminology in a particular permit. We have reviewed the RWL language in the draft MS4 permit for Los Angeles County and we believe it is consistent with WQ Order 99-05, and we would urge the Regional Board to retain the proposed language in the final permit. We also believe the permit is consistent with the Clean Water Act as interpreted by the Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, in which the Court determined that the Board has discretion in setting these requirements.

We also understand that concerns have been raised regarding compliance determinations with RWLs and WLAs under the proposed permit, and that concerns have been raised about requiring instream/receiving water monitoring. First of all, we support instream as well as outfall monitoring since they both may provide useful information; both are also well established and supported by EPA's 1990 Phase I stormwater regulations (40 CFR 122.26(d)(2)(iii)(D)) and EPA's Part 2 MS4 permit application guide (EPA 833-B-92-002). NPDES regulations at 40 CFR 122.44(i)(1) also provide broad authority to the Board in determining monitoring requirements, including "other measurements as appropriate" (40 CFR 122.44(i)(1)(iii)). Lastly, we believe the fact sheet provides a solid rationale for the instream monitoring which is consistent with the applicable regulations and EPA guidance on this matter.

Section II.E of Attachment E (Monitoring and Reporting Program) summarizes how compliance determinations would be made, and what the points of compliance would be; we support the draft permit on this matter. NPDES regulations at 40 CFR 122.44(d)(1)(vii)(B) require that NPDES permits be consistent with assumptions and requirements of applicable WLAs. We believe it is appropriate for the Board to incorporate the WLAs as they were adopted, including provisions for compliance determination.

Section II.E of Attachment E also notes that instream monitoring locations may be used to assess compliance with the RWL requirements of the permit. However, the discussion in the fact sheet (Section XIII.C) clarifies that the Board would use outfall monitoring in conjunction with instream monitoring to identify particular MS4s which may be responsible for exceedances at the instream location. As such, we believe the concerns about the permit's compliance determinations are not warranted.

D. Non-Stormwater Discharges

We support the draft permit's approach for regulating non-stormwater discharges. We've heard criticism of these provisions on the grounds that they are somehow inconsistent with the Clean Water Act. Section 402 (p)(3)(B)(ii) requires that MS4 permits "shall include

a requirement to effectively prohibit non-stormwater discharges into the storm sewers.” The draft permit implements this statutory provision by a number of means, including comparison of effluent concentrations to non-stormwater action levels. We find that the approaches used in the draft permit are appropriate and practical means to implement the CWA’s requirement that non-stormwater discharges into the MS4 are effectively prohibited. We also believe they are consistent with NPDES regulations at 40 CFR 122.26(d)(2)(iv)(B) which describe what a stormwater management program should include to address non-stormwater discharges.

We understand that concerns have been raised specifically on Section III.A.1 of the draft permit which requires that the permittee prohibit certain non-stormwater discharges “through” the MS4 while Section 402(p)(3)(B)(ii) of the Clean Water Act requires that the permittee prohibit discharges “into” the MS4. We support the Board’s proposed language on this issue. We would note that the preamble to EPA’s 1990 stormwater regulations (55 FR 47995) itself uses the word “through” in describing the discharges which are to be prohibited. We believe this is in recognition of the fact that a discharge “into” the MS4 is tantamount to a discharge “through” the MS4 to receiving waters since the principal purpose of an MS4 is conveyance of water.

We also support the exception to the non-stormwater discharge prohibition for temporary discharges authorized by USEPA pursuant to CERCLA (page 26, Section III.A.1.b.). EPA Region 9 worked closely with LA Regional Board staff on this provision. These discharges are authorized in narrow circumstances when an alternative means for handling these waters is not practical in the performance of necessary actions to remediate contaminated groundwater. This by no means results in any expansion of CERCLA liability for permittees as has been alleged during public workshops.

E. Watershed Management Programs

We support the permit’s establishment of voluntary Watershed Management Programs. However we have two specific comments about the draft permit’s provisions in this area.

- Page 51, Section VI.C.3.b. iv.(1)(c) should be revised to: “If the Permittee(s) elects to eliminate a control measure identified in Part VI.D.4 to Part VI.D.9 because that specific control measure is not applicable to them, the Permittee(s) shall provide a justification for its elimination.”
- Page 55, Section VI.C.6.b.ii. should be revised to clarify that the reference to modifying compliance deadlines or interim milestones does not apply to deadlines or milestones associated with TMDLs, but rather applies to new deadlines and milestones that are not including in this permit, but are developed pursuant to the Permittee(s)’ Watershed Management Program.

We appreciate the opportunity to provide comments on the draft permit. It’s been many years since the Los Angeles County MS4 permit was last reissued in 2001, and much

has happened since then, particularly the approval of a large number of TMDLs with applicable WLAs. While this necessarily complicates the 2012 permit, it also provides a major opportunity for water quality improvement via the implementation of these TMDLs. Our understanding of the benefits of LID has also increased since 2001 and this proposed permit provides another substantial opportunity of water resource benefits. The process for the development of the new draft permit has also been lengthy, but we believe the permit is ready for adoption and again we urge the Board to adopt the permit at its September 2012 meeting. If you would like to discuss this matter further, please contact Eugene Bromley of the NPDES Permits Office at (415) 972-3510.

Sincerely,

Eugene Bromley
for David Smith, Manager
NPDES Permits Office (WTR-5)