



# County of San Diego



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Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor (95814) P.O. Box 100  
Sacramento, CA 95812-0100

Electronic Submission: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Dear Ms. Townsend:

**COMMENTS TO A-2236(a)-(kk) – COMMENTS ON REVISED PROPOSED ORDER IN RE PETITIONS CHALLENGING 2012 LOS ANGELES MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT (ORDER NO. R4-2012-0175)**

The County of San Diego (County) appreciates the opportunity to comment on the State Water Resources Control Board's (State Board) Revised Proposed Order *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except those Discharges Originating from the City of Long Beach MS4* (Revised Proposed Order) that was issued on April 24, 2015. The Revised Proposed Order is critically important since it provides guidance to all Regional Water Quality Control Boards regarding language for compliance with receiving water limitation in MS4 permits. The County appreciates many of the modifications that have been made since the release of the November 21, 2014 Proposed Order, but requests that additional modifications be considered:

1. The County appreciates the clarification of the discretion the State Board and Regional Boards have regarding requiring strict compliance with water quality standards, but requests that the State Board utilize that discretion to remove the requirement to include receiving water limitations in MS4 permits.
2. The County appreciates the modifications in the direction to Regional Boards to state that it is the expectation of the State Board that they will follow the principles unless there is a specific showing as to why the principle would not be appropriate. However, the County continues to request that the language be strengthened to require the Regional Boards to incorporate alternative compliance pathways.

3. The County appreciates the modifications of the language that recognizes the need to consider the inability to obtain funding, opportunity costs of treating all stormwater, and the recognition that TMDLs and water quality standards may be revisited and evolve over time. However, we request that some additional constraints be recognized in the Revised Proposed Order, including physical constraints, technical infeasibility of meeting water quality objectives, and natural sources of pollutants.
4. While the County appreciates the clarifications on determining compliance with receiving water limitations, we remain concerned that the alternative compliance pathway does not adequately address lower priority pollutants and puts MS4 permittees in the position of either expending resources to model and address them as priorities in a watershed plan or be subject to enforcement and third-party liability for constituents that are only occasionally exceeding objectives in receiving waters and not causing impairments.

A more detailed discussion of each of these points is provided below.

***The Revised Proposed Order should affirm that Receiving Water Limitations Provisions are not required in the renewed MS4 Permits.***

While the County appreciates some of the clarifications and discussion in the Revised Proposed Order regarding the discretion afforded to the State Board and Regional Boards in regards to requiring strict numeric compliance with objectives<sup>1</sup>, the County respectfully requests that the State Board modify its determination that provisions requiring compliance with receiving water limitations should be included in renewed MS4 Permits by utilizing this discretion.

The Revised Proposed Order provides an accurate and well-reasoned analysis of the history and discretionary authority of the State Board on this issue, including confirmation that, "Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process, we may even have the flexibility to reverse our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance." (Footnotes omitted).<sup>2</sup>

Unfortunately, the Revised Proposed Order concludes that the State Board declines, as a matter of policy, to reverse course and discontinue including receiving water limitations provisions in MS4 permits. The Order states "We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are 'appropriate for the control of... pollutants' addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations." (Footnotes omitted).<sup>3</sup>

The County respectfully submits that this is not a sound policy decision. The State Board broadly concludes that "the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards."<sup>4</sup> To the contrary, significant advances in reducing pollutants in receiving waters have been made and will

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<sup>1</sup> Revised Proposed Order p. 12 and 14

<sup>2</sup> Revised Proposed Order p. 14-15

<sup>3</sup> Revised Proposed Order p. 15

<sup>4</sup> Revised Proposed Order p. 15

continue to be made as science and technology improve and watershed management approaches are implemented. In addition, the most recent permit renewals in Los Angeles and San Diego allow, for the first time, comprehensive and prioritized watershed planning efforts that will allow the copermitees the ability to focus on the highest priority pollutants of concern with the implementation of their stormwater program.

The Revised Proposed Order seems to overlook the intent of Congress in enacting §402(p) of the Clean Water Act, the Chief Counsel 1993 Memorandum explaining the rationale for the separate Maximum Extent Practicable (MEP) standard for MS4 systems, and Congress' recognition of the unique challenges that an MS4 faces with an open system.<sup>5</sup>

For example, the Caltrans Permit (Order 2012-0011 DWQ) contains language that is more consistent with Clean Water Act §402(p).<sup>6</sup> It recognizes the infeasibility of setting numeric effluent criteria for municipal BMPs and urban discharges. Setting a policy consistent with these realities and using language that reflects the appropriate MEP standard and iterative process would advance improvement of water quality by creating a climate of cooperation and innovative solutions.

The County respectfully requests that the State Board use the discretion noted in the Revised Proposed Order to remove the receiving water limitations from MS4 permits.

***The Revised Proposed Order should affirm the incorporation of an alternative compliance pathway for compliance with the Receiving Water Limitations Provisions.***

In the event that the State Board does not remove or significantly modify the Receiving Water Limitations provisions, the County supports the incorporation of an alternative compliance pathway to the current MS4 permit language, which requires immediate compliance with receiving water limitations.

The County recognizes and appreciates the important steps that the State Board has taken with the Revised Proposed Order in supporting an alternative compliance pathway that will provide local governments with the time necessary to obtain compliance with receiving water limitations, without being in immediate violation of the permit. This will allow the MS4s the ability to continue implementing the robust stormwater management programs called for in the recent MS4 permits.

While the County generally supports the concept of alternative compliance, the following specific revisions are suggested for the Revised Proposed Order.

***The Revised Proposed Order should direct, not request, that other Regional Water Quality Control Boards include an alternative compliance pathway where such language does not already exist.***

Although the Revised Proposed Order "directs all regional water boards to consider the Watershed Management Plan (WMP)/Enhanced Watershed Management Plan (EWMP) approach to receiving water limitations compliance when issuing Phase 1 MS4 permits going forward"<sup>7</sup> [emphasis added], the County recommends strengthening this language from

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<sup>5</sup> 1993 Memorandum of Chief Counsel, p. 2

<sup>6</sup> Order 2012-0011 DWQ, Finding 20, p. 11; Provision A.1., p. 18.

<sup>7</sup> Revised Proposed Order p. 55

"consider" to "require". While we recognize that additional language was added that identifies that it is the expectation of the State Board that the regional water boards follow the principles outlined in the Revised Proposed Order unless there is a specific showing as to why the principle would not be appropriate<sup>8</sup>, it seems that all of the Phase I communities throughout the State of California are in an identical situation as was faced by the Los Angeles region. Thus, all regional water boards should be directed to include similar language in their MS4 stormwater permits.

***The Revised Proposed Order should recognize that there are circumstances where compliance with receiving water limitations may not be attainable due to technical, economic, and/or other constraints.***

The language in the Revised Proposed Order assumes that achievement of receiving water limitations is possible in all circumstances and is simply a matter of effort. The Revised Proposed Order states: "We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations."<sup>9</sup>

However, there are barriers to MS4 compliance with current water quality standards that are not currently recognized within the Revised Proposed Order. We appreciate the language that was added to recognize that "technical infeasibility or substantial hardship, including the inability despite all reasonable efforts to obtain funding for a project, may be grounds for a request"<sup>10</sup> for an extension in meeting receiving water limitations in waterbodies that are not addressed by a TMDL. We additionally support the language that was included to recognize that TMDLs and water quality standards may evolve and require revisions. "Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted. We additionally recognize that municipal storm water management is an area of continued development and with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time."<sup>11</sup>

While inclusion of these provisions is important, the County feels that there are additional barriers that should be recognized in the Revised Proposed Order as follows.

1. There are a number of site-specific constraints, which must be evaluated before structural BMPs can be implemented.

For example, infiltration BMPs cannot be implemented in areas with relatively impervious soils, shallow groundwater, steep hillsides, landslide or liquefaction risk zones, subsurface contamination, or close proximity to certain structures. Similarly, capture and use BMPs are not cost effective for areas with limited water demand or where water demand is temporally inconsistent with available supply, which is frequently the case in the southwest. As a result, some urban areas exist without feasible or cost-effective wet

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<sup>8</sup> Revised Proposed Order p. 55-56

<sup>9</sup> Revised Proposed Order p. 36

<sup>10</sup> Revised Proposed Order p. 40

<sup>11</sup> Revised Proposed Order p. 49-50

weather structural BMP options available<sup>12</sup>.

Similar analyses by ASCE have shown that consistently and reliably attaining water quality standards under wet weather conditions may, in fact, be infeasible for some types of pollutants<sup>13</sup>. As discussed by representatives from Orange County at the December 16, 2014, workshop<sup>14</sup>, certain BMPs (e.g., detention basins, restored channels) have been shown to serve as net sources of indicator bacteria during and after storm events, even though they have created other desirable ecological and water quality benefits during dry weather. There are other examples in small watersheds and beaches where nonstructural and structural BMPs have been intensively applied at significant costs and standards are still not attained.<sup>15</sup>

2. There are also economic limitations for the stormwater program. The MS4 stormwater permits contain numerous mandates (including TMDLs), which are imposed without commensurate funding. Due to the constraints created by Proposition 218, it is very difficult for the MS4s to establish and/or raise rates to generate the funds necessary to implement the various water quality mandates. Many communities have been unsuccessful in establishing fees or taxes to fund their stormwater programs. For example, after a multi-year effort to analyze water quality costs and program needs, survey voters, and develop a watershed-based, three-tiered rate initiative, the Contra Costa County Clean Water Program (CCCCWP), was unable to obtain voter approval for a proposed fee<sup>16</sup>. In the San Diego region, the cost to comply with a single TMDL (the Bacteria TMDL for Beaches and Creeks) has been estimated to cost up to \$5.1 billion over the next 17 years.

The County appreciates the inclusion of the limitations with regards to costs and the need to balance other important social needs recognized within the Revised Proposed Order, but feel that the limitations do not only apply to capture of all stormwater and the opportunity costs and benefits of implementing treatment to meet water quality standards needs to be considered as well.<sup>17</sup>

3. There are also pollutants that cause or contribute to exceedances of water quality objectives that are either naturally occurring or are outside of the regulatory authority of the MS4s. Examples of the types of pollutants that may originate from natural sources include bacteria, selenium, and metals. Examples of pollutants that are outside of the MS4s' regulatory authority includes zinc in tires, copper in brake pads, pesticides, and dry air deposition of nitrogen from air pollution<sup>18</sup>. It is not within the purview of MS4

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<sup>12</sup> *Technical Assessment of the San Diego Beaches and Creeks Bacteria TMDL*, Prepared by Geosyntec Consultants for the County of San Diego Dept. of Public Works, January 2013, p.20

<sup>13</sup> *Pathogens in Urban Stormwater Systems*, Prepared by Urban Water Resources Research Council, Pathogens in Wet Weather Flows Technical Committee, and Environmental and Water Resources Institute, American Society of Engineers, August 2014, p.222

<sup>14</sup> [http://www.waterboards.ca.gov/board\\_info/video.shtml](http://www.waterboards.ca.gov/board_info/video.shtml) (Video Link for Dec 16-17 Meeting- Beginning at 1:05:40)

<sup>15</sup> *Technical Assessment of the San Diego Beaches and Creeks Bacteria TMDL*, Prepared by Geosyntec Consultants for the County of San Diego Dept. of Public Works, January 2013, p.21

<sup>16</sup> *Stormwater Funding Options: Providing Sustainable Water Quality Funding in Los Angeles County*, Prepared by Ken Farfsing and Richard Watson, May 21, 2014, p.39

<sup>17</sup> Revised Proposed Order p. 33

<sup>18</sup> State of California Regional Water Quality Control Board Santa Ana Region Order No. R8-2009-0030. As amended by Order No. R8-2010-0062. P.4 of 93.

agencies to regulate pesticides, automobile manufacturing, tailpipe emissions, or stationary sources of nitric oxide and nitrogen dioxide. The recent brake pad legislation is an example of an appropriate and economic way to deal with significant sources such as these, yet they are not recognized as such within the MS4 permits.

Although the County agrees that water quality standards should be achieved wherever possible and that the copermitees need to be accountable, it is critical that the Revised Proposed Order recognize that there are circumstances where the water quality standards may not be met in the receiving water due to a number of constraints. While the Revised Proposed Order appears to recognize the difficulty for municipal stormwater to not cause or contribute to violations of receiving water quality standards, everywhere, at all times, it still requires compliance with the receiving water limitations. The County encourages the State Water Board, Regional Boards, MS4s, and other interested stakeholders to continue discussions with respect to how water quality standards should be applied to municipal stormwater.

***The Revised Proposed Order provides potential relief from immediate compliance for water body-pollutant combinations covered in watershed plans, but should be revised to provide relief for all water quality constituents while considering the priorities of those constituents.***

The Revised Proposed Order states: "Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP"<sup>19</sup>. However, as written, municipalities would be required to either include all pollutants with any exceedances of water quality objectives in the plan or be exposed to enforcement and third-party liability for lower priority issues that are not being addressed by the watershed plans. Including receiving water limitations for all constituents, without consideration of persistence of exceedance or priority to the watershed, forces resources and analysis to be spent on setting goals and conducting analysis for constituents that are infrequently exceeding objectives and not causing waterbody impairments or risk being out of compliance with the receiving water limitations when the infrequent exceedances occur.

In San Diego County, and presumably across the state, watershed plans that are required elements of MS4 permit implementation will be focused on the water quality issues determined to be the highest priorities within that area. Since the County cannot address every pollutant-water body combination at the same time, we strongly support the ability to prioritize the focus of the watershed plans and resulting implementation actions.

In order to support the existing permit requirements and the ability to prioritize the implementation actions, the County recommends that the Revised Proposed Order also provide an alternative compliance pathway for the lower priority pollutants and/or water bodies that reflects the lower priority and infrequent exceedances of these constituents. In San Diego County, the water quality improvement plans required by the MS4 permit include an adaptive management process, requiring periodic revisions and adjustments to ensure that the priorities established in the plans reflect the most recent data and information available. These established permit provisions provide adequate protection against the concern that municipalities should be monitoring for emerging priority issues and/or that they will not be addressed. This type of permit provision should be included in the Revised Proposed Order

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<sup>19</sup> Revised Proposed Order pgs. 18-19

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and be clearly linked to compliance with the receiving water limitation provisions. While the County appreciates the clarifications to the provisions discussing compliance for receiving water limitations not addressed by a TMDL on page 52, the County requests additional modifications to specifically address alternative compliance pathway modifications for lower priority receiving water limitation exceedances.

***The Revised Proposed Order should clarify added language regarding compliance determination for commingled discharges.***

On page 76 of the Revised Proposed Order, modifications were made to 2.b.iv.(3). The County notes that the additional language appears to actually undermine the intent of this provision, and adds an additional burden for permittees to demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limit. Specifically, under option 3, a permittee would now need to demonstrate that the cause of exceedance was from an alternative source **and that the pollutant was not in the permittees discharge**. Rather than requiring a demonstration that the pollutant was not in the discharge altogether, the County requests the following wording that the appropriate demonstration should be *“and that the pollutant was not discharged from the Permittee’s MS4 at a level that would cause or contribute to an exceedance in the receiving water.”*

Thank you for your time and consideration of these comments. If you have any questions, please contact me at (858) 694-3672 or via email at [Todd.Snyder@sdcounty.ca.gov](mailto:Todd.Snyder@sdcounty.ca.gov).

Sincerely,



TODD E. SNYDER, Manager  
Watershed Protection Program

