San Diego Regional Water Quality Control Board
Alternative Compliance for Receiving Water Limitations
Workshop Summary
May 21, 2015
1:00 p.m. to 3:30 p.m.

Participants

David Barker, San Diego Water Board
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Laurie Walsh, San Diego Water Board
Tomas Morales, San Diego Water Board
Jo Ann Weber, County of San Diego
Clem Brown, City of San Diego
Heather Stroud, City of San Diego
Helen Davies, City of Escondido
Richard Boon, County of Orange
Ryan Baron, County of Orange
Lisa Zawaski, City of Dana Point
Tracy Ingebrigtsen, City of Laguna Beach
David Garcia, Riverside County Flood Control & Water Conservation District
Stuart McKibbin, Riverside County Flood Control & Water Conservation District
Marco Gonzalez, Coastal Environmental Rights Foundation
Matt O'Malley, San Diego Coastkeeper
Michael McSweeney, Building Industry Association
Facilitator - Lewis Michaelson, Katz & Associates
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Summary of Revised Draft Permit Language

- Based on previous workshop discussions, some changes were made to the alternative compliance option, including:
  - Strengthened connection to Provision A
  - Replaced term "effluent limitations" with "numeric goals"
  - Restructured analysis component
  - Added public participation to analysis component

Summary of Comments

Copermittees

- Changing the language from effluent limitations to numeric goals makes the permit more workable.

- The revised language gives more comfort from a legal perspective and takes the uncertainty out of the process.
- MS4 topics for discussion identified by Copermittees:
  1. Seeking clarification that a Copermittee can comply with its numeric goals either at the MS4 outfall or in the receiving water.
     - Are the outfall numeric goals required to be load-based or concentration-based?
       - San Diego Water Board Response: Yes, the numeric goals for MS4 outfalls are required to be load-based or concentration-based.
     - Copermittees would like the numeric goals to be broader (e.g. restoring two miles of a stream, reduction in flow during dry weather, improving integrity index).
       - San Diego Water Board Response: The examples given sound like receiving water goals. Reduction in flow sounds like a reduction in load.
     - What about having MS4 outfall goals, but not goals for receiving waters?
       - San Diego Water Board Response: That's an option we can consider. Provision B.3.c.(1)(a)(ii) allows a Copermittee to show exceedances are from other sources. Provision B.3.c.(1)(a)(iii) allows a Copermittee to address beneficial uses in receiving waters. The San Diego Water Board would consider making revisions if they make sense. For instance, having numeric goals in the receiving water, instead of or in addition to having them for the MS4 outfalls. The vision has been to restore beneficial uses and show they're being supported. If that happens, arbitrary numbers for MS4 outfalls shouldn't matter as much.
  2. Seeking clarification that the *Alternative Compliance Option* should be utilized for persistent exceedances and that non-persistent exceedances can be addressed in existing watershed or jurisdictional programs.
     - Provision A.4.a already has policy for dealing with persistent exceedances.
     - Copermittees recommend there should only be numeric goals for Total Maximum Daily Loads (TMDLs) and 303 d-listed pollutants, allowing Copermittees to put resources into highest priorities. For intermittent exceedances, Copermittees should only be required to have strategies.
       - San Diego Water Board Response: Copermittees would not be required to have numeric goals for non-TMDLs or pollutants not on the 303 d list; those would be handled within a Copermittees regular program.
     - Copermittees recommend simplifying the process and give coverage from litigation by putting focus on implementation instead of modeling for pollutants that are not typically in exceedances (e.g. metals).
       - Environmental Community Response: Copermittees need to consider intermittent exceedances in the watershed model in order to have safe harbor, not just ignore them. Environmental groups have to prove an ongoing violation, so intermittent exceedances would not put Copermittees at risk of litigation.
       - Environmental Community Response: If there are intermittent violations, environmental groups won't be able to sue. The Board can still enforce.
     - What if a pollutant is persistent but not on the 303 d list yet?

    - San Diego Water Board Response: It would be best for the Copermittees to address these persistent exceedances without numeric goals before they go on the 303(d) List. If the persistent exceedances continue, the pollutant will likely be added to the 303(d) List, which would then require the Copermittee to set numeric goals for the alternative compliance pathway.
  - There is a potential unintended consequence of not being able to prioritize if Copermittees have to look at these persistent, but not prioritized pollutants. This seems counteractive to the goal of Water Quality Improvement Plans.
    - San Diego Water Board Response: If a pollutant is not on the 303(d) List the Copermittees are not required to develop numeric goals; the Copermittees can choose how/when they want to address them.
  - Copermittees don't want to base priorities on liability rather then what is affecting water quality.
    - San Diego Water Board Response: That's why Provision B.3.c.(1)(a)(iii) was included: to give Copermittees a way to show requirements are being met in receiving waters.
3. Seeking clarification that the *Alternative Compliance Option* will apply to TMDLs and water quality based effluent limitations (WQBELs).
  - Compliance option needs to cover TMDLs and WQBELs.
    - San Diego Water Board Response: It already does. Provision A.3.b requires Copermittees to comply with TMDLs and WQBELs in Attachment E.
  - Is A.3.b independently enforceable?
    - San Diego Water Board Response: If a Copermittee is out of compliance, the San Diego Water Board could choose to enforce Provision A.3.b or B.3.c.
    - Environmental Community Response: Including a direct link to Provision B.3.c in Provision A.3.b would probably be a problem for the USEPA.
4. Applying the *Alternative Compliance Option* to the planning phase of Water Quality Improvement Plans.
  - Copermittees recommend including compliance while the Water Quality Improvement Plans are being developed, and specifically describe in Provision B.3.c.
    - San Diego Water Board Response: The San Diego Water Board does not agree with the way the compliance option is included in the Los Angeles MS4 Permit. While the State Board upheld this aspect of the Los Angeles MS Permit, that does not require San Diego Water Board to handle it the same way, especially since we have significantly fewer TMDLs. The USEPA has said if a compliance option were to be included in the permit, it should not be during Water Quality Improvement Plan development. USEPA supports only granting compliance after the Water Quality Improvement Plan is accepted. Also, the State Board's draft order does not conflict with this approach.
  - This is about whether there is a reasonable amount of time to come into compliance. Copermittees who have not completed Water Quality

Improvement Plans are now out of compliance, and it could be up to two years before they will be in compliance (i.e. Orange County and Riverside County).
    - Environmental Community Response: This has been a 20 year process during which you haven't been sued. Copermittees should not be allowed to be in compliance without accepted Water Quality Improvement Plans.
    - San Diego Water Board Response: This is motivation to get the Water Quality Improvement Plans finished sooner
- What is the legal mechanism to obtain plan approval?
    - San Diego Water Board Response: There is a 30-day public comment period after final plans are completed. Then, the San Diego Water Board Executive Officer can accept the plans or have the Board adopt a resolution to accept the plans. This process is laid out in other parts of the permit.
- It can take 10, 20, or 40 years to come into compliance. There should be compliance during Water Quality Improvement Plan development.
- The State Board was okay with compliance during plan development as long as strict deadlines are met. The Regional MS4 Permit could follow that. Two years to complete the Water Quality Improvement Plan is a strict deadline, and Copermittees could not have met any stricter deadlines. Also, while Copermittees are developing Water Quality Improvement Plans, they must meet interim deadlines.
- There should be a monitoring plan, even during the interim.
- Unless there is a compliance pathway during entire Water Quality Improvement Plan development and implementation process, there will be threat of litigation for fecal bacteria contamination during wet weather. We will never get away from that unless we eliminate wildlife from the area. Copermittees shouldn't be exposed to the threat of litigation for that.
    - San Diego Water Board Response: The compliance pathway would not be applicable to bacteria since there is a TMDL that covers most of the region. The San Diego Water Board understands that the Copermittees are working on a study that may affect the water quality standards for wet weather.

5. Including dry weather flows in the *Alternative Compliance Option* or clarifying that a Copermittee is in compliance with non-stormwater discharge prohibition by implementing Provision E.2.
    - Copermittees recommend including non-storm water discharges in compliance language or provide affirmation that E.2 compliance is equivalent.
        - San Diego Water Board Response: Provision A.1.b clearly addresses this. Non-storm water discharges must be effectively prohibited and Copermittees should be enforcing this. The question is whether Copermittees are effective at enforcement. There is no need for clarification that the effective prohibition is to be implemented through

the requirements of Provision E.2, since the language is already there in Provision A.1.b.
    - Environmental Community Response: There's no way a Copermittee should allow prohibited non-storm water discharges. If it is from another entity, the responsible Copermittee should serve a notice or sue them.

6. Linking Provision A to the *Alternative Compliance Option*.
    - Provision A needs have a direct link to Provision B.3.c so it is not separately enforceable.
        - San Diego Water Board Response: The permit is written this way because the USEPA and State Board support the existing Provision A language. They support an alternative compliance pathway, which is proposed to be added. The permit was also revised to include stronger language suggesting Copermittees will be in compliance if they meet the requirements set forth in the permit. The language is not likely to be changed to include a link in Provision A.
    - Is it the Board's intent that Provision A will be separately enforceable?
        - San Diego Water Board Response: A third part would have a difficult time to separately enforce Provision A if a Copermittee is in compliance with Provision B.3.c. There's no way to write a permit that completely shields permit holders from the potential of a lawsuit.

- In regards to public participation process added to the analysis component, will additional time be included to complete this?
    - San Diego Water Board Response: This pathway is intended to be done as quickly as possible. Two years to develop a Water Quality Improvement Plan is a strict timeframe. Not every Copermittee is expected to use the alternative compliance option. A request for more time can be made if necessary. We don't want to extend this to the point where we run into another permit cycle.

Environmental Community

- This is a pretty good framework, but Provision B.3.c.(3) is a concern. There should be rigorous guidelines and a clear idea of what is going to happen and how long you can be in compliance. At what point does a Copermittee go from compliance to being out of compliance? The permit should specify frequency, milestones, etc. before a Copermittee has to recertify. The environmental community would like to see a maximum of one year compliance before completing a recertification process.
    - San Diego Water Board Response: The language is a little ambiguous to provide flexibility for how Copermittees set up plans. The expectation is that the San Diego Water Board will be checking status, etc. consistently. There is not a lot for a third party to use in order to audit this. However, it could be a consideration as we do want the process to be transparent. The primary concern is that a lot of these strategies take time to get up and running. Outcomes might not be seen for a while. The San Diego Water Board is open to seeing proposed language for this.
    - Copermittee Responses/Questions:
        - Modeling is very expensive. This seems like a significant undertaking.

- The annual report will be going to clearinghouse; wouldn't that achieve the recertification goal?
- An adaptive management process is already in place, which includes milestones and analysis. How is this different?
- Isn't there a five year limit on interim goals, is that too long?

- Environmental Community Responses:
  - The environmental community would like to know at what point it would go back to a public process.
  - Alternative compliance is not the same as iterative process.
  - There needs to be more included to provide objective enforceability for third party.
  - If a Copermittee isn't meeting goals, then the process becomes longer and when is a Copermittee no longer in compliance?

Comments from Audience

- County of Orange – When asked whether Provision A is separately enforceable, the answer was that third party wouldn't be able to, but San Diego Water Board might. Are the two separately enforceable?
  - San Diego Water Board Response: We are not prepared to say yes or no in regards to separate enforceability by the San Diego Water Board.
- Tory R. Walker Engineering – My concern is that there would be an over-emphasis on models. In the end, a model is just that. I see room for other tools and I would want to stress that other, less expensive, tools can be used. Models can be pretty ineffective. There are simple tools that can be just as, or more, effective.

Final Comments

- The next workshop on June 30 will be more of a reporting out workshop than a discussion format. If anyone has specific comments and/or questions for consideration, feel free to reach out to the San Diego Water Board for a meeting in the next two weeks. There will also be a public comment period after the Tentative Order is released.
- Issues discussed today that might warrant additional changes to Provision B.3.c are:
  - Whether Provision A.3.b will be incorporated into the alternative compliance pathway
  - How Copermittees are allowed to propose numeric goals
  - When and/or how a Copermittee is no longer in compliance