

Primer on Municipal Stormwater Permitting in California

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Introduction

This paper summarizes the statutory and regulatory framework of municipal stormwater permitting in California, significant State Water Resources Control Board (State Board) Orders, and recent case law.

Statutes & Regulations

1. The Clean Water Act

Section 402(p)(3)(B) of the Clean Water Act (codified at 33 U.S.C. 1342(p)(3)(B)) lays out the requirements for National Pollution Discharge Elimination System (NPDES) permits issued for municipal discharges of stormwater. In its most relevant and controversial part, the statute provides that municipal NPDES stormwater permits “shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” 33 U.S.C. 1342(p)(3)(B)(iii) (emphasis added).

The maximum extent practicable (MEP) standard generally involves applying “best management practices” (BMPs) to try to reduce the discharges of pollutants in stormwater runoff. It has not been defined by regulation; however, courts have favorably cited a memorandum authored by the Office of the Chief Counsel of the State Board which states that “[t]o achieve the MEP standard, municipalities must employ whatever [BMPs] are technologically feasible (i.e., are likely to be effective) and are not cost prohibitive,” taking into account factors such as “Effectiveness,” “Regulatory Compliance,” “Public Acceptance,” “Cost,” and “Technical Feasibility.” Memorandum of Elizabeth Jennings, Senior Staff Counsel of the State Board, *Definition of Maximum Extent Practicable* (Feb. 11, 1993).

2. EPA’s Regulations Implementing Section 402(p)

In 1990, the U.S. Environmental Protection Agency (EPA) codified rules implementing the NPDES stormwater permit program at 40 C.F.R. 122.26(d). The provisions addressing municipal stormwater permits largely provide only initial permit application requirements for large and medium municipal separate storm sewer (MS4) dischargers—generally those serving populations above 100,000. 40 C.F.R. 122.26(d). However, they have come to be looked on to inform the substance of municipal stormwater permit requirements. The following are the fundamental elements of a municipal stormwater program, as laid out by these application-oriented regulations:

- Legal authority: The permittee must have existing legal authority to control discharges to the MS4, implement its stormwater management program, and conduct surveillance and monitoring.
- Management program: The management program must include a comprehensive planning process involving public participation and intergovernmental coordination as needed to reduce pollution discharge to the MEP, and a description of staff and equipment available to implement the program. The management program must also describe the municipality’s priorities for implementing controls/BMPs. The program components must include the following:

- 1) Structural and source control measures to reduce polluted runoff from commercial and residential areas, including an estimate of expected pollutant load reductions and a schedule for implementation. The structural and source control measures must include:
 - a) maintenance activities and schedules for structural controls to reduce pollutants, including floatables, in discharges from the municipal storm sewers;
 - b) planning procedures to reduce discharges of pollutants from areas of new development and significant redevelopment after construction is completed;
 - c) practices for operating and maintaining public streets, roads and highways to reduce impacts on receiving waters;
 - d) procedures to assess the impacts of and evaluate the retrofitting for enhanced pollutant removal of flood management projects and devices;
 - e) procedures to inspect, monitor and control pollutant discharges from operating or closed municipal landfills;
 - f) practices to reduce, to the maximum extent practicable, pollutants from the application of pesticides, herbicides and fertilizers by commercial applicators and in municipal rights-of-way and facilities;
 - 2) a program and schedule to detect and eliminate illicit discharges and improper disposal, including via: inspections and ordinance enforcement; spill prevention, containment and response; public incident reporting systems; public education; and prevention of seepage of sanitary waste;
 - 3) a program to monitor and inspect discharges from industrial facilities;
 - 4) a program to reduce construction site discharges through planning procedures, inspection, education and enforcement; and
 - 5) a description of staff and equipment available to implement the program.
- Monitoring program: The monitoring program must describe the location of representative points to be sampled, the frequency of sampling, the parameters to be sampled, and a description of the sampling equipment.
 - Fiscal resources: The permittee must identify financial resources available to the municipality to implement its stormwater management and monitoring program.

3. EPA Stormwater Phase II Final Rule: Small MS4 Stormwater Program

This EPA rule, codified over a decade later at 40 C.F.R. 122.30-37, takes a slightly different and significantly less burdensome approach to how stormwater management programs are developed for “small” MS4s. A “small” MS4 is any MS4 that is not a medium or large MS4 (generally, small MS4s serve urban populations under 100,000).

Like their larger brethren, operators of small MS4s are required to design their programs to reduce the discharge of pollutants to the MEP. To accomplish this, small MS4s must implement stormwater management programs that focus on the following six elements:

- i. Public Education and Outreach
- ii. Public Participation/Involvement
- iii. Illicit Discharge Detection and Elimination
- iv. Construction Site Runoff Control
- v. Post-Construction Runoff Control

vi. Pollution Prevention/Good Housekeeping

A major difference between these requirements and those for medium and large MS4s is that many of the specific requirements of the six elements are only considered “guidance” as to small MS4s. Also, while small MS4s do need to evaluate compliance and assess their programs, they generally do not need to conduct water quality monitoring. Another significant difference is that for small MS4s, implementation of BMP consistent with a municipal stormwater management program addressing the above elements constitutes compliance with the MEP standard as a matter of law. 40 C.F.R. 122.34.

4. EPA Interpretive Policy Memorandum on Reapplication Requirements for MS4s

EPA issued guidance in 1996 to specify the application requirements for renewal or reissuance of NPDES permits for MS4s.¹ Under long-standing Clean Water Act regulations, permittees with currently effective permits must submit a new application 180 days before their existing permit expires. If a complete reapplication package is submitted, conditions of the permit which expires will continue in effect administratively until a new permit is issued.

Under EPA’s Policy Memorandum, municipal stormwater permit applicants and their permit writers have “considerable discretion” to customize renewal applications, using as the principal reapplication document the municipality’s fourth year annual report as submitted under its existing permit. The annual report generally constitutes a review of all aspects of the municipal stormwater management program and should emphasize proposed changes as circumstances dictate. According to the Policy Memorandum, as a general matter, the components of the original stormwater management program which are found to be effective should be continued and made an ongoing part of the proposed new stormwater management program. Updates to the municipality’s stormwater program may also include de-emphasizing or even eliminating certain program components and increasing coordination with adjacent MS4s on efforts such as monitoring as well as using a watershed approach to stormwater management.

State Board Orders & Reports**1. Order WQ 91-03**

In 1991, the State Board issued Water Quality (WQ) Order 91-03 in response to a petition seeking review of the first municipal stormwater permit ever issued in California. One of the main issues decided by the State Board in that proceeding was that *numeric* effluent limitations are *not* legally required in stormwater permits by the Clean Water Act. Furthermore, the State Board held that the program of prohibitions, source control measures and “best management practices” set forth in the permit constituted valid effluent limitations consistent with “maximum extent practicable” controls and State water quality standards.

¹ Found at <http://www.epa.gov/fedrgstr/EPA-WATER/1996/August/Day-09/pr-21008DIR/pr-21008.txt.html>.

2. Order WQ 99-05

This Order sets out precedential language pertaining to “Receiving Water Limitations” which must be included in all municipal stormwater permits according to the State Board. Municipal permittees who achieve timely implementation of all elements of their stormwater management plans and other specific requirements contained in their permits (such as monitoring and reporting provisions) are effectively deemed to be in compliance with State water quality standards by this language.

As refined two years later in WQ Order 2001-15, municipal stormwater permittees must effectuate compliance with State water quality standards not only through compliance with their management plan and other specific requirements of their permit, but also through an iterative approach, requiring assessment and revision over time. Specifically, if exceedances of water quality standards persist notwithstanding implementation of a municipality’s stormwater management program, the permittee must notify the Regional Water Quality Control Board (Regional Board) and submit a report that describes the BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce pollutants that are causing or contributing to the exceedance of water quality standards. A proposed implementation schedule must accompany the report (which can be a component of the municipality’s annual report to the Regional Board unless specifically required sooner). Within 30 days after the Regional Board’s approval of the report, the permittee must revise its management program to incorporate the revised BMPs and associated implementation schedule.

3. Expert Panel Recommendations to the State Board: The Feasibility of Numeric Effluent Limits

This June 2006 report by a panel of eight experts, selected by the State Board, addressed the feasibility of the application of numeric effluent limits to municipal stormwater discharges. The expert panel’s studies revealed that the current practice for permitting, designing, and maintaining municipal stormwater treatment facilities in urban areas does *not* result in reliable and efficient performance of BMPs. Nevertheless, the panel concluded that it is *also not* feasible “at this time” to set enforceable numeric effluent criteria for municipal BMPs, and, in particular, for urban discharges. However, the expert panel found that it would be possible to use numeric criteria as “upset” values or “action levels,” to trigger review of BMP efficacy. The State Board has not taken formal action on the expert panel’s report or otherwise yet adopted a comprehensive policy addressing California’s approach to stormwater.

Case Summaries

The cases summarized below are significant in that, among other things, they further define the application for the Clean Water Act’s MEP standard to municipal stormwater permitting in California.

1. Defenders of Wildlife v. Browner 191 F.3d 1159 (9th Circuit, Sept. 15, 1999)

This Ninth Circuit case involved an objection by a citizens’ group to a Clean Water Act municipal stormwater permit issued by the EPA to five Arizona municipalities, on the basis that it

did not require numeric limitations to ensure compliance with state water quality standards. Under 33 U.S.C. Section 1342(p)(3)(B), stormwater permits may be issued on a system or jurisdiction-wide basis, must include a requirement to effectively prohibit non-stormwater discharges into storm sewers, and must require controls to reduce the discharge of pollutants to the “maximum extent practicable,” including “management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants.” In support of its position, Defenders principally relied on another provision of the Clean Water Act, 33 U.S.C. Section 1311(b)(1)(C), which states that a permit holder “shall ... achiev[e] ... any more stringent limitation, including those necessary to meet water quality standards ... established pursuant to any State law or regulation.”

The Ninth Circuit held that, although Congress expressly required industrial stormwater discharges to comply with the requirements of Section 1311, it chose to require that municipal stormwater discharges reduce pollution discharges only to the “maximum extent practicable.” However, focusing on the last phrase of 1342(p)(3)(B), the Ninth Circuit also stated in dicta that the EPA (or a federally-approved State permitting authority) *has the discretion* to require strict or less-than-strict compliance with state water quality standards if it so chooses.

2. **Building Industry Association of San Diego County v. State Board**
124 Cal.App.4th 866 (Cal. Court of Appeal, 4th District, Division 1) (Dec. 7, 2004)

This case involved a challenge by the Building Industry Association to a comprehensive municipal storm sewer permit issued by the San Diego Regional Board to the County and Port District of San Diego and 18 local cities (Municipalities). The Building Industry Association claimed that the permit violated federal law because the Regional Board imposed municipal storm sewer control measures that were more stringent than the Clean Water Act’s “maximum extent practicable” standard. The Court of Appeal disagreed; citing the Ninth Circuit’s prior decision in *Defenders of Wildlife*.

In reaching its conclusion, the Court of Appeal rejected the Building Industry Association’s State law-based argument that anything more stringent than “maximum extent practicable” is “not practicable” and therefore “technologically impossible.” It also reasoned that the Regional Board provided reasonable time to comply with the new permit requirements, provided for an iterative process to address water quality standards compliance by employing, in consultation with the Regional Board, additional best management practices, and indicated that enforcement might not be forthcoming if the municipality was engaged in the iterative procedure.

3. **City of Burbank v. State Board**
35 Cal.4th 613 (Cal. Supreme Court) (Apr. 4, 2005)

This California Supreme Court decision addressed the question of whether Regional Boards must consider economic factors when issuing Clean Water Act permits. At issue were renewed *wastewater* discharge permits for sewage treatment plants owned and operated by the Cities of Los Angeles and Burbank. The Cities alleged that the Los Angeles Regional Board failed to consider the Cities’ economic burdens of having to reduce substantially the pollution content of their discharged wastewater.

The Supreme Court agreed that Sections 13421 and 13263 of the California Water Code require that Regional Boards consider the cost of compliance when setting effluent limitations for a

permit, but held that these provisions are effectively trumped by Section 13377 of the Water Code, which specifies that Clean Water Act permits issued by the State must meet certain minimum standards set by federal law. *The decision's implication is that economic considerations can be taken into account if the requirements set out in a permit exceed the requirements of the Clean Water Act.* It remains to be seen how this plays out in the municipal stormwater context where the distinction between federal minimum requirements and State-imposed permit conditions imposed at the discretion of a Regional Water Board may be significant.

4. **City of Arcadia v. State Board**

135 Cal.App.4th 1392 (Cal. Court of Appeal, 4th District, Division 1) (Jan. 26, 2006)

This case involved not a Clean Water Act permit per se, but rather efforts by the Los Angeles Regional Board to ameliorate the problem of litter discharged from municipal storm drains into the Los Angeles River by means of a trash Total Maximum Daily Load (trash TMDL). The trash TMDL plan envisioned a zero discharge limit for trash from municipal storm drains and provided for a multi-year implementation period. It was challenged by the City of Arcadia and 21 other cities (Cities) primarily on the grounds that the target of zero trash discharge from municipal storm drains was too expensive and unattainable.

The court rejected the Cities' argument that a zero target was unattainable because the trash TMDL provided options that would be "deemed compliance" with the zero limit even if it was not literally met; it also pointed out that the TMDL contained an interim goal of a 50% trash discharge reduction and that it was possible that the TMDL would be revised at that point.

The court upheld the California Environmental Quality Act (CEQA) aspect of their challenge because the Regional Board failed to analyze the environmental impacts of the mitigation measures and pollution control systems the trash TMDL could require.

5. **City of Rancho Cucamonga v. Regional Board**

135 Cal.App.4th 1377 (Cal. Court of Appeal, 4th District, Division 2) (Jan. 26, 2006)

This case involved procedural and substantive challenges to a municipal stormwater permit issued by the Santa Ana Regional Board to 18 public entities. The court rejected the contention that the permit was not supported by substantial evidence because staff simply copied a similar permit without identifying any particular water quality impairments caused by the permittees.

6. **County of Los Angeles v. California State Board**

50 Cal.Rptr.3d 619 (Cal. Court of Appeal, 2nd District, Division 5) (Oct. 5, 2006)

In this case, numerous municipal agencies challenged an order by the State Board adopting a municipal stormwater permit for the Los Angeles County Flood Control District and 84 unincorporated cities (Cities). The District and Cities claimed, among other things, that the permit violated the separation of powers doctrine. The court rejected the Cities' arguments, reasoning that Regional Boards are part of a joint state and federal process to enforce the Clean Water Act.

7. **Divers' Environmental Conservation Organization v. State Board**
145 Cal.App.4th 246 (Cal. Court of Appeal, 4th District, Division 1) (Nov. 29, 2006)

In this California Court of Appeal case, the court held that the San Diego Regional Board was *not* required to impose numeric effluent limitations for individual pollutants in a stormwater discharge permit issued to the U.S. Navy. The court also rejected the need for a highly prescriptive permitting approach and upheld the use of permit requirements that provided the Navy with considerable discretion to formulate its own stormwater management plans and monitoring requirements.

8. **County of Los Angeles v. State of California, Commission on State Mandates**
150 Cal.App.4th 898 (Cal. Court of Appeal, 2nd District, Division 3) (May 17, 2007)

At issue in this case was the question of whether requirements contained in municipal stormwater permits in California were necessarily beyond the reach of a prior voter-adopted initiative requiring the State to provide funding to local governments for the programs and requirements "any state agency" imposes beyond those required by federal law. A statute adopted by the State Legislature following the initiative exempted everything in Water Board permits from the "unfunded mandates" requirement that had previously been adopted by the voters. The Court held that this statute was unconstitutional, thereby subjecting future municipal stormwater permits to review by the Commission on State Mandates (an entity that implements the voter initiative and can suspend requirements that are found to go beyond federal requirements until funding from the State is provided for their implementation).