

WATER

Workable Approach to Environmental Regulation

Public Comment
Caltrans MS4 Permit
Deadline: 6/26/12 by 12 noon

June 26, 2012

Jeannie Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Comment Letter – Caltrans MS4 Permit

Dear Ms Townsend:

WATER appreciates the opportunity to comment on the proposed Caltrans Municipal Separate Storm Sewer System (“MS4”) Permit Second Draft Tentative Order issued April 27, 2012 (“Draft Caltrans MS4 Permit”), proposed for adoption by the State Water Resources Control Board (“State Water Board”). WATER is a coalition of businesses, schools, cities and local governments that supports cost-effective water quality policies. Collectively we represent 150 trade associations with over 20,000 businesses that employ 1.5 million workers, dozens of cities, and nearly 500 school districts that encompass 92% of California’s school children.

Thousands of school districts, truckers, manufacturers and other businesses rely on a reliable statewide highway infrastructure, and also rely on well-managed local municipal storm sewer systems which handle our drainage and provide flood control for our communities. WATER believes that the current language of the Draft Caltrans MS4 Permit is an issue of potential statewide significance because of its impacts on statewide and local infrastructure, as well as its impacts on how scarce resources are expended to achieve priorities in water quality protection.

The Draft Caltrans MS4 Permit is scheduled to be the first State Water Board decision addressing the critical portion of MS4 permits known as “receiving water limits,” since an important July 2011 opinion issued by the Ninth Circuit Court of Appeals, in *Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, Los Angeles County Flood Control District, et al.* (NRDC v. County of LA). This Ninth Circuit decision interpreted receiving water limit language in the Los Angeles County MS4 permit that is nearly identical to Sections D.2 and D.3, and related prohibition Section A.4 of the Draft Caltrans MS4 Permit. This similarity is no coincidence, in that it is wording the State Water Board previously ordered to be used in all California MS4 permits, most of which are issued by the nine Regional Water Quality Control Boards. The Ninth Circuit’s interpretation could make this language impossible to comply with, and thus would divert resources needed to address the highest priority water quality and operational matters to constant litigation risk from third parties, if not by the State. It creates compliance uncertainty that distorts choices in the selection of the most productive capital projects for water quality improvements.

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The receiving water limit language interpreted in *NRDC v. County of LA* had previously been interpreted by the State Water Board and Regional Water Boards to allow an iterative management approach over time to address discharges which may be seen as “causing or contributing to” water quality standard exceedances in the streams receiving the discharges (often referred to as working to “meet water quality standards” in those streams). It is currently impossible to not contribute in some way, or even at times to cause, water quality standards exceedances because the standards are extremely stringent, typically not adopted with storm conditions in mind, and stormwater carries manmade and natural materials from nonpoint sources that cannot be fully controlled and are extremely variable.

The Ninth Circuit found that the State Water Board’s language meant that discharges may not cause or contribute to water quality exceedances in streams, *because the language was not expressly linked closely enough the specific methods of compliance in the permit*. As a result, unless the iterative process language in the receiving water limitation section of the Draft Caltrans’ MS4 Permit is revised to address the Ninth Circuit’s decision, it could create open ended liabilities and expenses for Caltrans and, by virtue of the precedent set by the language of the Caltrans MS4 Permit, other municipalities.

To avoid these potentially severe impacts on Caltrans, municipalities and the public and private facilities which discharge to the MS4s, WATER requests that the State Water Board revise the current receiving water limitations language to make clear that compliance with the iterative management process provides effective compliance with the receiving water limits and prohibitions.

In addition, we believe that the proposed permit needs to be revised to be consistent with Finding 76 in the Construction General Permit to provide clarity that linear underground/overhead projects (LUPs) are not subject to post-construction BMPs. The State Water Board’s Construction General Permit is clear that LUPs are not subject to post-construction BMPs, such as SUSMPs, LID and hydromodification, and the proposed CalTrans MS4 Permit needs to also provide that same clarity.

Finally, WATER believes that it is premature and inappropriate for this permit to mandate the use of the Test of Significant Toxicity (TST) protocol, since the use of this protocol is the subject of a yet to be adopted State Water Board Toxicity Policy. We request the use of the Protocol be removed until if, and when, it is adopted for use by the State Water Board.

Thank you for your consideration of our concerns, and please let us know if there is any further information we can provide.

Sincerely,



James Simonelli
California Metals Coalition
WATER co-chair



Trudi Hughes
California League of Food Processors
WATER co-chair