

**DEPARTMENT OF TRANSPORTATION**  
DIVISION OF ENVIRONMENTAL ANALYSIS, MS 27  
P.O. BOX 942873, MS-49  
SACRAMENTO, CA 94273-0001  
PHONE (916) 653-7507  
FAX (916) 653-7757  
TTY 711  
[www.dot.ca.gov](http://www.dot.ca.gov)



*Flex your power!  
Be energy efficient!*

June 26, 2012

Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



**Subject: Comment Letter – Caltrans MS4 Permit**

Dear Ms. Townsend,

The California Department of Transportation (Caltrans) appreciates the opportunity to provide comments on the Second Revised Draft Tentative Order and related attachments published by the State Water Resources Control Board (State Board) on April 27, 2012.

On September 19, 2011, Caltrans submitted comments on the August 18, 2011, draft Permit. We are pleased that many of the requested changes to the August 18, 2011, draft Permit have been made. We appreciate the time dedicated by State Board staff to understand the uniqueness of Caltrans procedures, limitations, and operations of the highway infrastructure. The revised permit presents a difficult challenge to Caltrans relative to the allocation of limited state highway funds. Our goal is to optimize use of our resources to ensure maximum environmental benefit while also achieving mobility and safety benefits to the traveling public. Notwithstanding these changes made to date, Caltrans still has issues with certain parts of the permit. These include the following:

**1. Regional Board Discretion**

Concern: The permit is enforced by nine autonomous Regional Water Quality Control Boards (Regional Boards or Regions), with varying interpretations of compliance requirements, which makes cost forecasting difficult. The most recent language in the April 27, 2012, Tentative Order still explicitly refers to Executive Officer discretion for most implementation issues.

The Order is the State Board's and therefore it is their duty to ensure appropriate and consistent interpretation by the Regional Boards. The Dispute resolution provisions referenced, though promising, lack sufficient detail to assure there will be an objective, timely and authoritative resolution of questions of interpretations between Caltrans and the Regional Boards.

Caltrans Request: The State Board develop a detailed process whereby disputes between the Regional Boards and Caltrans over interpretation of the permit can be objectively, expediently and authoritatively resolved to help promote our need for statewide consistency.

## **2. Location-Specific Requirements**

Concern: The inclusion of location-specific requirements in the context of a statewide permit undermines the principle of a consistent statewide approach. The statewide Caltrans permit was originally adopted in 1999 to consolidate the individual permits issued by Regional Boards. Consolidation was necessary because of the fundamental nature of the Caltrans system, which consists of a statewide highway system and associated linear infrastructure. It is not feasible or efficient for Caltrans to have its statewide system comply with “Region-specific” requirements from nine different Regional Boards. A permitting system such as this means requirements change for the same highway system just by “crossing into one Region from another.”

It has already been established that Caltrans represents a single land use statewide, unlike any other discharger and unlike any “municipality”. It is not acceptable to establish a Region-specific practice and force Caltrans to comply by arguing that Caltrans is just another municipal discharger.

Caltrans Request: To avoid potential conflicts in meeting “Region-specific” requirements, Caltrans recommends removing the Region-specific requirements.

## **3. Iterative Approach/Receiving Water compliance**

Concern: Caltrans continues to be concerned with the collective impact these provisions may have with respect to being able to comply with the revised draft Tentative Order. Caltrans anticipates minute amounts of multiple pollutants from roadwork-related activities will end up in stormwater runoff and will typically exceed water quality standards before it is discharged into the receiving waters, and this may cause or contribute to exceedances in the receiving water itself. Previously, Caltrans and others have relied on permit language like that expressed in Receiving Water Limitation D.4 to comply through an iterative approach and process. However, in the wake of the July 2011, Ninth Circuit Court of Appeal’s decision, the iterative language as expressed in the revised draft Tentative Order, as combined with General Discharge Prohibition A.4, does not allow the iterative process to constitute compliance.

Caltrans is vulnerable to enforcement actions by the state and third party citizen litigation alleging violations of the permit terms in question. As a practical matter, all of Caltrans' thousands of stormwater discharges may not cause or contribute to an exceedance of a water quality standard, which means stormwater discharges to receiving waters considered to exceed water quality standards must meet water quality standards at the point of discharge to avoid being in violation of permit terms.

To avoid strict application, and liability associated therewith, we urge revision of the Receiving Water Limitations language. To that end, Caltrans understands that the California Stormwater Quality Association (CASQA) has submitted a letter and draft suggested receiving water limitations language to the State Board for consideration. Caltrans would support revisions to the receiving water limitations language that are similar to those recommended by CASQA, or other options, as long as the receiving water limitations language is drafted in a manner to clearly indicate that compliance with the iterative process provides an exception from compliance with the discharge prohibition (General Discharge Prohibition A.4), and the "shall not cause or contribute" receiving water limitations (Receiving Water Limitations D.2 and D.3). Without such changes to the aforementioned provisions of the revised draft Tentative Order, Caltrans may be exposed to significant liability for failing to comply with the permit, even if Caltrans is in complete compliance with the iterative process provisions.

Caltrans is vulnerable to potential third-party lawsuits (or being included in lawsuits on other MS4 permittees) statewide leading to monetary fines and cost-prohibitive statewide retrofits of our facilities. It appears that our outfall monitoring data could be paired to a downstream MS4's receiving water data. The iterative process is specifically identified as providing a pathway to compliance for permit provisions related to Water Quality Standards.

Caltrans Request: Change the language and use similar approaches requested by CASQA or other MS4s so Caltrans is not in automatic non-compliance. Caltrans strongly believes this language needs to be worked out before adoption and before the limitations become effective.

#### **4. TMDL and ASBS Implementation**

Concern: The permit requires Caltrans to comply with 68 TMDLs statewide, and this number is expected to increase to around 200 TMDLs possibly within the permit term (five years). The sheer magnitude of the number of TMDLs, various implementation plans, and requirements will make it difficult, if not impossible, for Caltrans to effectively and efficiently implement all of the various TMDLs. Further, requiring Caltrans as a single agency to implement dozens of different implementation plans for essentially the same pollutants is not practical or feasible.

The list does not consider prioritization (Caltrans is required to comply also with TMDLs where Caltrans is a minor source and for pollutants Caltrans cannot control, such as aerial deposition and agricultural run-on from non-Caltrans point sources). TMDL programmatic

model practices need to be considered so Caltrans can implement them consistently statewide. As written, it will be difficult to estimate costs, implement statewide prioritization of TMDLs, predict costs arising as a result of the Regional Boards' use of 13267, and ensure consistency with the State Board on the process as identified in the Tentative Order.

Caltrans Request: Omit specific TMDL and ASBS implementation language until the agreed-upon statewide meetings with Regional Boards occur (p.14 of the Order). These meetings are intended to define statewide consistent and efficient approaches to achieve maximum life cycle cost over water quality benefit. It is premature to include TMDL implementation language at this time. We request that all TMDLs are on a level playing field, considering time schedules, and priorities. Caltrans requests the Tentative Order require development of statewide TMDL implementation plans for various pollutants that come from the Caltrans stormwater system that are subject to such TMDLs, i.e., "model practices." For example, many TMDLs throughout the state address issues associated with metals. Caltrans proposes that preparing one statewide implementation plan for metals would be more appropriate than subjecting Caltrans to dozens of different implementation requirements throughout the state. The statewide implementation plan could then be referenced and incorporated into individual TMDLs as applicable.

It is essential that the effluent limitations associated with the implementation of TMDL waste load allocations (WLAs) be based on the proven effectiveness of tested best management practices (BMPs) and not numeric limits or numeric standards. The federal regulations and guidance both clearly indicate that to implement WLAs for stormwater as BMPs rather than numeric effluent limits are appropriate. Specifically, "Best Management Practices to control or abate the discharge of pollutants when: ... (3) numeric effluent limits are infeasible..." 40 C.F.R. § 122.44(k)(3). When incorporating WLAs into permits, the federal regulations require that the permit limits be "consistent with the assumptions and requirements of available WLAs." Additionally, WLAs for stormwater are appropriately expressed in the form of BMPs consistent with EPA's 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and National Pollutant Discharge Elimination System Permit requirements based on those WLAs. Where effluent limits are specified as BMPs, the permit should also specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved (e.g., BMP performance data).

All TMDL WLAs applicable to Caltrans should be implemented as BMPs. Further, we request the State Board work with Caltrans to develop a more efficient and effective process. Thus, instead of allowing a year for each of the nine individual Regional Boards to develop TMDL specific permit requirements, we recommend that the year would be better spent developing statewide management plans for the various pollutant types (e.g., metals, pesticides, etc.).

Prioritize TMDLs to address only where Caltrans is a major source generator of specific pollutants.

Ms. Jeanine Townsend  
June 26, 2012  
Page 5

**5. Other Additional Issues**

Concern: There are additional specific issues that have been identified to State Board staff that will subject Caltrans to develop and implement new procedures. Additional resources will be required (e.g., statewide monitoring, statewide retrofits, and water quality treatment measures) that will impact project delivery along with maintenance and operations.

Caltrans would like to continue to work with State Board staff to refine the permit approach on issues 1 through 5 raised above. Caltrans and the State Board have a common interest in achieving the highest water quality benefit at a minimum life cycle cost to ensure responsible expenditure of public funds. Many of the provisions in the draft order related to these issues may still pose impediments to achieve this objective.

Resolution of the above five points are needed to ensure that the permit is environmentally and fiscally responsible. If you have any questions, please contact me directly at (916) 653-4446.

Sincerely,



SCOTT McGOWEN, P.E.  
Chief Environmental Engineer

cc: Malcolm Dougherty, Director, California Department of Transportation  
Richard Land, Acting Chief Deputy Director, California Department of Transportation  
Tom Howard, SWRCB  
Jonathan Bishop, SWRCB  
Bruce Fujimoto, SWRCB  
Vicky Whitney, SWRCB  
Walt Shannon, SWRCB

