TECS Environmental, Inc.
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November 8, 2012

Mr. Tom Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Subject: Comments on Receiving Water Limitations

Dear Mr. Howard:

Please see attached herewith comments regarding revised receiving water limitation language now being considered by the State Water Resources Control Board on behalf of my clients.[1] I hope that they prove useful in crafting new receiving water limitation language to be applied on a state-wide level.

Thank you once again for providing an opportunity to comment on this extremely important and urgent matter. Should have any questions, please call me. In the meantime I look forward to attending the State Board workshop on RWL language on November 20th.

Sincerely,

Ray Tahir

[1]Cities of Azusa, Baldwin Park, Carson, Claremont, Compton, Duarte, El Monte, Gardena, Glendora, Irwindale, Pico Rivera, San Dimas, San Fernando, San Gabriel, South El Monte, and West Covina.

I. Summary

The absence of State guidelines and policy relating to MS4 permit requirements has given rise to inconsistent permits throughout California. Political pressures and organizational interests have resulted in some Regional Boards selectively interpreting federal stormwater regulations and State Board water quality orders. This has led to wildly variable permits and unreasonable requirements.

Recently, for example, the Los Angeles Regional Board adopted an MS4 permit that is unlike any other. It is proposes: (1) strict compliance with TMDL waste load allocations through misinterpreted "numeric" WQBELs[2]; (2) re-defining RWL limitations in contravention to precedential State Board water quality orders; (3) requiring compliance with wet and dry weather TMDL waste load allocations, based on receiving water monitoring as well outfall monitoring instead of outfall monitoring only; (4) confusing wet weather TMDL waste load allocations with ambient (dry weather) water quality standards; (5) requiring compliance WQBELs as well as receiving water limitations; and (6) prohibiting non-stormwater discharges through the MS4 instead of "to the MS4." With the exception of the non-stormwater discharge issue, standardized RWL language would address these issues.

Critically needed is standardized RWL language, applicable to all MS4 permits, that would make it unequivocally clear that the implementation of a stormwater quality management plan, which would contain watershed management plans and/or BMPs and other actions, would attain compliance with TMDLs and other water quality standards.

II. Basic Receiving Water Limitation Requirements

Receiving water limitations to enable MS4 compliance with water quality standards established for receiving waters in the basin plan. Standard RWL

[2]Unless a permittee opts to participate in watershed management plan that calls for regional structural controls that would constitute BMP WQBELs.

language in California MS4 permits requires compliance with two basic provisions:

1. *Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.*
2. *Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.*

Achieving compliance with these two provisions requires the following:

> *The Permittees shall comply with Part 2.1. and 2.2. through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQMP and its components and other requirements of this Order including any modifications. The SQMP and its components shall be designed to achieve compliance with receiving water limitations.*

A SQMP (also referred to as SWMPs) consists of six core programs, each of which contains best management practices (BMP) and other permit requirements. Other requirements include but are not limited to establishing legal authority to compel compliance with permit conditions and submitting annual reports to the permitting authority.

In the final analysis, if a permittee implements the SQMP and other permit requirements, it would attain water quality standards, TMDLs as well as non-TMDLs, and would not be in violation of the nuisance standard. The SQMP, with its BMPs, along with other permit requirements, in effect constitutes "general water quality based effluent limitations," a view articulated by the San Francisco Regional Water Quality Control Board.[3]

III. Watershed Management Plans and Other Implementations Plans Must be Included in Stormwater Quality Management Plans

Regional Boards throughout the State have included TMDLs in MS4 permits. Watershed Management Plans (WMPs) and TMDL Implementation Plans (IPs) address TMDLs through pollutant-specific best management practices (BMPs). Many boards include these plans in MS4 permits which are executed through SQMPs. Plans that address TMDL pollutants are "specific pollutant water quality based effluent limitations" (specific WQBELs). According to the San Francisco Regional Board, an example of a pollutant specific WQBEL is its Pesticide Plan, the purpose of which is:

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[3]See *Example Water Quality Based Requirements in MS4 Permit in California, San Francisco Bay Region*, http://www.tmdls.net/Implementation/docs/CAMS4sRequirements.pdf.

To address the impairment of urban streams by diazinon and other pesticides, the Permittees shall continue to implement a Pesticide Toxicity Prevention and Reduction Plan (Pesticide Plan) to address their own use of pesticides including diazinon, other lower priority pesticides no longer in use such as chlordane, dieldrin and DDT, and the use of such pesticides by other sources within their jurisdictions. The Permittees may coordinate with agencies and organizations such as the Bay Area Stormwater Management Agencies Association or the Urban Pesticide Committee. The Pesticide Plan shall include a schedule for implementation and a mechanism for reviewing and amending the plan, as necessary, in subsequent years.[4]

As in the case of general WQBELS, if specific WQBELs are implemented in a SQMP in complete and timely manner, a permittee would meet receiving water limitations -- even if an exceedance for a pesticide is detected through monitoring. Thus WQBELs translate TMDL waste load allocations through BMPs.

Compare the use of WQBELs and RWLs with what is proposed in the Los Angeles permit:

e. *Final Water Quality-based Effluent Limitations and/or Receiving Water Limitations*

i. *A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and/or final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:*

1. *There are no violations of the final water quality-based effluent limitation for the specific pollutant at the Permittee's applicable MS4 outfall(s);*

2. *There are no exceedances of applicable receiving water limitation for the specific pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s); or*

3. *There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL.*

It should be obvious that the proposed Los Angeles MS4 permit language has re-defined WQBELs and RWLs to mean something entirely different from federal definitions and State Board orders. A WQBEL is not, in and of itself, a compliance standard; rather it is a means of achieving compliance with receiving

[4] Ibid.

water limitations and, therewith, a way of attaining water quality standards. WQBELs are, generally speaking BMPs. They cannot be violated -- only not implemented.

Another serious problem the proposed Los Angeles permit poses is that it treats WQBELs and RWLs as being one of the same. Again, they cannot be: a WQBEL is a means of complying with RWLs. Strengthened RWL language, along with a clear definition of what a WQBEL is, and an affirmation that exceedances of water quality standards are determined through outfall monitoring evaluated against ambient standards, are required to prevent RWL language from being misused.

The State Board needs to set policy that ensures the consistent application of WQBELs and specific-WQBELs in meeting all water quality standards and objectives by all Regional Boards.

IV. Compliance with Ambient Water Quality Standards

California MS4 permits contain references to compliance with water quality standards. However, some Regional Boards, permittees, and members of the environmental community have understood, incorrectly, water quality standards to be both dry and wet weather-based standards. Actually water quality standards are exclusively ambient (dry weather) standards, as the following makes clear:

> *…EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution.*[5]

The question is what is an ambient water quality standard? The answer lies in USEPA's definition, which is the:

> *Natural concentration of water quality constituents prior to mixing of either point or nonpoint source load of contaminants. Reference ambient concentration is used to indicate the concentration of a chemical that will not cause adverse impact to human health.*[6]

It should be obvious that the "natural concentration of water quality constituents" cannot take place in a receiving water when it rains. This is because the highest concentration of pollutants occurs during the first six hours of a storm event. Further, the phrase "prior to mixing" of a point source contaminants clearly means before stormwater discharges from an outfall

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enters a receiving water. Therefore, an ambient water quality standard is a dry weather referent that determines what concentration of a pollutant is required to protect human health. Such an ambient reference can only be used to protect aquatic life. Stormwater discharges from outfalls are monitored (sampled and analyzed) for TMDL and other constituents and compared with the dry weather ambient standard in the receiving water.

That ambient water quality monitoring means dry weather monitoring is supported by the State's surface water ambient monitoring program (SWAMP). According to Michael Lyons, who heads the Los Angeles Regional Board SWAMP, ambient monitoring for various receiving waters in Los Angeles County was conducted between 48 and 72 hours after a storm event to allow the water body to return to a natural state. Further, according to a State SWAMP Quality Assurance Program Memorandum dated May 21, 2007:

> *All SWAMP-funded bio-assessments shall include sampling during the most appropriate index period (i.e., time of year that samples are collected).This interim guidance is needed to ensure data comparability by requiring that samples are collected during standardized index periods.* ***Since the appropriate index period varies at different latitudes and elevations (southern latitudes are generally sampled in late spring and northern latitude sites are generally sampled in late summer), this guidance will vary with the project boundaries.*** *If any disputes arise, the SWAMP Bioassessment Coordinator shall determine the most applicable index period for a given project.*[7]

Iterative Process and Safe Harbor

If outfall stormwater monitoring reveals persistent exceedances, measured against ambient water quality standards, the iterative process would be triggered. The question is when should the iterative process be triggered – one exceedance or several? That would depend on sampling frequency. According to federal stormwater regulations, MS4 permittees are required only to monitor three times with at least one month in between. A statistical approach should be used to determine if exceedances are significant to warrant invoking the iterative process within the five year term of the MS4 permit. Another consideration would be whether the source has been identified and determined to be subject to municipal control.

The Iterative process has been characterized as a procedure that "forgives" violations or provides a "safe harbor" for exceedances. The iterative process does not and should not forgive a violation resulting from an exceedance. But a

[7]See http://swamp.mpsl.mlml.calstate.edu/resources-and-downloads/standard-operating-procedures.

violation should not result when an exceedance occurs either.[8] Instead, a permit violation should only arise when a RWL provision – as mentioned above -- is not met. If an exceedance is detected (at the outfall) the permittee must report it to the Regional Board and provide an explanation of what BMPs it is implementing to address the pollutant that outfall monitoring had determined had been exceeded. The permittee must then demonstrate that it is implementing its SQMP in accordance with the permit (viz., in a timely and complete manner). The permittee should also explain in a report to the Regional Board if it intends to revise its SQMP (BMPs specifically) to address persistent exceedances.

The iterative process, therefore, is a "sight adjustment" mechanism. It is triggered when an exceedance is detected at the outfall. If persistent exceedances occur during the term of the permit, then the permittee is obligated to identify the source or cause of the exceedances and ramp-up pollutant specific BMPs. As long as this process is followed, the permittee will be in compliance with the permit, even if water quality exceedance occurs.

During the adoption hearing of the Los Angeles MS4 permit, both Regional Board staff and board member commented that the iterative process has proven ineffective as a tool to meet water quality standards. These comments were to support the elimination of the iterative process that would generally apply to MS4 permits in deference to a conditional iterative process (referred to the adaptive management). This procedure is only available for these permittees that elect to participate in a watershed management plan.

Disenchantment with the iterative process is based on the 2001 MS4 permit. It was noted that the iterative process was never triggered, even through persistent exceedances were detected through in-stream monitoring. Such criticism, however, is unwarranted. The reason why the iterative process was not triggered in spite of detected exceedances is that it could never be proven who or what caused the exceedance. In an expansive water body such as the Los Angeles River there are multiple point source and non-point source inputs. It is impossible to know source of the exceedance.

However, by monitoring at the outfall, per federal stormwater regulations, the iterative process would be triggered after multiple stormwater exceedances are detected. The iterative process is this case would be a valuable tool in evaluating the quality of permittee's stormwater discharges and activate a procedure to identify the source of the exceedance, on an intra-MS4 level, and respond to it through the implementation of additional BMPs or intensifying existing ones.

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Critically needed is standardized RWL language, applicable to all MS4 permits, that would make it unequivocally clear that the implementation of a stormwater quality management plan, which would contain watershed management plans and/or BMPs and other actions, would attain compliance with TMDLs and other water quality standards.

II. Basic Receiving Water Limitation Requirements

Receiving water limitations to enable MS4 compliance with water quality standards established for receiving waters in the basin plan. Standard RWL language in California MS4 permits requires compliance with two basic provisions:

1. *Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.*
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[1]Unless a permittee opts to participate in watershed management plan that calls for regional structural controls that would constitute BMP WQBELs.

Achieving compliance with these two provisions requires the following:

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However, by monitoring at the outfall, per federal stormwater regulations, the iterative process would be triggered after multiple stormwater exceedances are detected. The iterative process is this case would be a valuable tool in evaluating the quality of permittee's stormwater discharges and activate a procedure to identify the source of the exceedance, on an intra-MS4 level, and respond to it through the implementation of additional BMPs or intensifying existing ones.

VI. Recommendation

Use as a base the proposed Phase II MS4 permit with the following enhancements:

D. RECEIVING WATER LIMITATIONS

Discharges shall not cause or contribute to an exceedance of ambient water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan The Permittee shall comply with Receiving Water Limitations through timely implementation of control measures/BMPs and other actions to reduce pollutants in the discharges and other requirements of this Order including any modifications. The storm water program shall be designed to achieve compliance with Receiving Water Limitations. If exceedance(s) of water quality objectives or water quality standards persist notwithstanding implementation of other storm water program requirements of this Order, the Permittee shall assure compliance with Receiving Water Limitations by complying with the following procedure:

1. *Upon a determination by either the ~~Regulated Small~~ MS4 or the Regional Water Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, based on outfall monitoring, the ~~Regulated Small~~ MS4 shall promptly notify and thereafter*

submit a report to the Regional Water Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report shall include an implementation schedule. The Regional Board may require modifications to the report;

2. *Submit any modifications to the report required by the Regional Water Board within 30 days of notification;*

3. *Implement the actions specified in the report in accordance with the approved schedule.*

4. *So long as the ~~Regulated Small~~ MS4 has complied with this iterative/adaptive management procedure set forth above and is implementing the actions, the Regulated Small MS4 does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.*

In addition, model "findings" language should be developed for inclusion into MS4 permits to support the need (1) a clear reference to outfall monitoring to meet ambient water quality standards; and (2) an explanation of how the iterative process is to operate.