



# Ventura Countywide Stormwater Quality Management Program

Participating Agencies

July 23, 2012

Mr. Sam Unger  
Executive Officer

(via email)

Camarillo

Los Angeles Regional Water Quality Control Board  
320 4th Street, Suite 210  
Los Angeles, CA 90013

County of Ventura

**Subject: COMMENTS ON THE TENTATIVE ORDER FOR THE GREATER LOS ANGELES COUNTY MS4 PERMIT**

Fillmore

Dear Mr. Unger:

Moorpark

The Ventura Countywide Stormwater Quality Management Program (Program), which includes the cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, Ventura, Santa Paula, Simi Valley, and Thousand Oaks and the County of Ventura and the Ventura County Watershed Protection District, would like to take this opportunity to provide comments on the Tentative Order for the Greater Los Angeles County MS4 Permit (Draft Order). The precedent-setting nature of some of the provisions is of concern to our Program. These concerns are enumerated below.

Ojai

Oxnard

### NON-STORMWATER ACTION LEVELS

Port Hueneme

One of the goals of establishing non-stormwater action levels is to assist Permittees in identifying illicit connections and/or discharges at outfalls. Exceedances of action levels can help Permittees prioritize and focus resources on areas that are having a significant impact on water quality. Unfortunately, as currently drafted, the non-stormwater action levels do not accomplish this goal. The action levels established in the draft order Attachment G are derived from Basin Plan, California Toxic Rule (CTR), or California Ocean Plan (COP) water quality objectives. The non-stormwater action levels do not facilitate the consideration of actual impacts (e.g., excess algal growth), have no nexus to receiving water conditions, and do not address non-stormwater action level issues unrelated to illicit discharges (e.g., groundwater). The action levels and the associated monitoring specified in the Monitoring and Reporting Program would require Permittees to investigate and address issues on an outfall-by-outfall basis, even if the receiving water is in compliance with all water quality standards. This will not assist Permittees in prioritizing resources on outfalls that are clearly having an impact on water quality.

San Buenaventura

Santa Paula

Simi Valley

Thousand Oaks

Ventura County  
Watershed Protection  
District

In an effort to assess the impact of the non-stormwater action levels we have compiled a summary table comparing our dry weather monitoring results with the proposed action levels (see Attachment 1). A review of this table will show that in general the MS4s will be trying to identify bacteria sources for practically every outfall. As the Regional Board is well aware of, tracking and identifying bacteria sources is an expensive proposition and in many cases not conclusive. We believe that implementation of the proposed requirements would result in un-



necessary spending of Public Funds and limited or insignificant water quality improvement.

**Requested Action:**

Allow the Watershed Management Programs to guide the customization of the non-stormwater action levels based on the highest water quality priorities in each watershed. Levels should then be established which will provide more effective tracking tools for illicit discharges instead of assigning every outfall as a high priority outfall. If non-stormwater action levels are not established through the Watershed Management Programs, then Permittees should be required to use the default non-stormwater action levels and approach identified in the Draft Order and Attachment G.

**STORMWATER ACTION LEVELS**

Municipal Action Levels (MALs) established in Draft Order Attachment G, were "obtained by computing the upper 25<sup>th</sup> percentile for selected pollutants for Rain Zone 6." Despite this information, the Draft Permit does not provide transparency of how MALs were calculated (e.g. time period, land uses, etc. included in the calculation) and how non-detects were treated. The Program was not able to exactly reproduce the tentative MALs based on the National Stormwater Quality database, although the 75th percentiles of all Rain Zone 6 data were similar in most cases (see Attachment 2). Furthermore the Draft Order MALs are lower compared to Orange County stormwater action levels, which introduce some inconsistency for no apparent reason between regions.

**Requested Action:**

Provide transparency behind the Municipal Action Levels calculations and consider using a consistent approach across the region (i.e., calculate based on the 90<sup>th</sup> percentile as done by the San Diego Regional Board in south Orange County permit).

**RECEIVING WATER LIMITATION LANGUAGE**

The Receiving Water Limitations Provision (Section V.A.) of the Draft Permit was not substantially modified from the language contained in the current Permit. This language is fairly standard throughout NPDES MS4 permits including the Ventura Permit. However, since the adoption of the Ventura Permit a court decision has seriously undermined the original intent of this language (i.e. to use the iterative process to address water quality standard exceedance to demonstrate compliance with the permit) and now the language places Permittees in an untenable position. Previously, MS4s have presumed that permit language like that expressed in Receiving Water Limitation V.A.3 in conjunction with Board Policy (WQ 99-05) established an iterative management approach and process as the fundamental, and technically appropriate, basis of compliance. The "iterative process language" now at issue in the Draft Order renders the iterative process obsolete as a compliance strategy. The Program, along with California Stormwater Quality Association (CASQA) and other NPDES MS4s believe that this status quo must be change due to the July 2011 Ninth Circuit Court of Appeals ruling (*Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, Los Angeles County Flood Control District, et al.*) that a party whose discharge "causes or contributes" to an exceedance of a water quality standards is in violation of the permit, even if a party is implementing the iterative process in good faith. This ruling came about because the iterative process paragraph did not explicitly state that a party who was implementing the iterative process was not in violation of the permit. Moreover, in the wake of the Ninth Circuit Court of Appeals' decision, if this language is not revised the precedent may be set for municipal permits that create unlimited liability for government entities across the State.

Due to the timing and statewide nature of the Draft Permit, it will likely set a precedent for future MS4 NPDES permits, making this language critical to affecting a change within the Receiving Water Limitations Provision. The Receiving Water Limitation language must be revised to allow MS4s to operate in good faith with the iterative process without fear of unwarranted third party action while still ensuring diligent progress in complying with water quality standards.

**Requested Action:**

Revise the language in the Receiving Water Limitation Provision as provided in Attachment 3.

**TREATMENT CONTROL BMP BENCHMARKS**

Our NPDES MS4 permit requires the project developer to determine the pollutant of concern(s) for the development project and use this pollutant as the basis for selecting a top performing best management practice (BMP). In the case of the Draft Order, there is no determination of the pollutant of concern for the development project. Instead, post-construction BMPs must meet all the benchmarks. Unfortunately, traditional post-construction BMPs are not capable of meeting all the benchmarks and thus the developer will not be able to select one top performing BMP.

**Requested Action:**

The Program requests that this provision be modified so that the selection of post-construction BMPs is consistent with the Ventura Permit and is based on the development site's pollutant of concern(s) and the corresponding top performing BMP(s) that can meet the Draft Order's Table 11 benchmarks.

**PUBLIC AGENCY ACTIVITIES**

There are several aspects of the Draft Order's Public Agency Activities Provision that present an increased level of effort in comparison with the current iteration of the permit. The Program does not believe that the resources needed to comply with these ramped up requirements are commensurate with the water quality benefit:

- **Retrofit Assessment:** This requirement as currently written would be onerous to implement. Although stormwater regulations (40 CFR 122.26.(d)(2)(iv)(4) requires consideration of retrofitting opportunities, the consideration is limited to flood management projects (i.e. public right of way) and does not require consideration of private areas. At a minimum, the retrofit provision requirement should clearly state that it only applies to flood management projects in the public right of way.
- **Retrofitting Vehicle Wash Areas to be Plumbed to Sanitary Sewer:** This requirement (and the option hauling washwater offsite) may be a challenge for some Permittees. An NPDES MS4 permit should not specify the conditions under which a wastewater treatment provider accepts vehicle wash water. This language should be modified to state "or discharge to comply with conditions as permitted by the local wastewater authority."
- **Annually Train All Employees and Contractors Who Use Pesticides:** Contractors are hired for their expertise and knowledge, providing annual training for contractors is excessive and may be in conflict with other certified pesticide applicator requirements. The requirement should be modified to annually for all employees and ensure contractors have been trained.

**Requested Action:**

Modify as recommended above.

### **CONSTRUCTION AND INDUSTRIAL DISCHARGES**

The Draft Order requires Permittees to prohibit non-storm water discharges through the MS4 to receiving waters with a number of exemptions including authorized non-storm water discharges separately regulated by an individual or general NPDES permit. The NPDES Permits include discharges from construction sites (General Construction Permit No. CAS000002) and from industrial facilities (General Industrial Permit No. CAS000001). Under Part VI.A.2 "Legal Authority", the Draft Order stipulates that Permittees "control the contribution of pollutants to its MS4 from storm water discharges associated with industrial and construction activity and control the quality of stormwater discharged from industrial and construction sites. This requirement applies [...] to industrial and construction sites with coverage under an NPDES permit [...]. Grading ordinances must be updated and enforced as necessary to comply with this Order."

Discharges currently regulated under the NPDES Permits and specifically exempt from the MS4 Permit's Discharge Prohibitions should not be subject to redundant regulations under MS4 Permits.

#### **Requested Action:**

Remove requirements for the Permittees to regulate discharges from construction sites and industrial facilities listed in the paragraph (i) under Part VI.A.2 "Legal Authority", because discharges from those sites/operations are regulated by the Regional Water Board under separate NPDES General Permits.

### **TMDLS: COMPLIANCE WITH FINAL WLAs**

The Draft Permit allows a BMP-based compliance option for interim Waste Load Allocations (WLAs). However, this option is not available for compliance with final WLAs. According to an EPA issued memo in 2002<sup>1</sup>, EPA expects that water quality-based effluent limits (WQBELs) will be expressed as BMPs and that numeric limits for most WQBELs will only be used in rare instances. The memo goes on to recognize the need for an iterative approach to controlling pollutants in stormwater discharges – that discharges implement BMPs and make adjustments as needed to improve water quality. EPA issued another memo in 2010 stating that where feasible, the NPDES permitting authority may exercise its discretion to include numeric effluent limitations. The memo also provides for WQBELs to be expressed as BMPs. No state or federal law requires the use of numeric effluent limitations.

The TMDL implementing conditions in the stormwater NPDES permit should be established in a manner that clearly conveys that the requirements of the Federal regulations have been satisfied; the provisions provide objective and measurable direction to permittees; preserve the ability to adapt the implementation to meet changing conditions, and provide a means to assess compliance. To do this, the permit needs to be modified to:

1. Establish WQBELs to implement the WLAs in the permit, but the WLAs should not be identified as the WQBELs. The WLAs as established by TMDL can be incorporated into the permit to provide the linkage to the WQBELs, but should not be considered a WQBEL.
2. Clearly define the process for determining compliance and ensure one option is through the iterative implementation of BMPs per the approved implementation plans or Watershed Management Program. Where implementation actions are implemented per the approved schedule, the Permittee would be in compliance. Where implementation plans are not implemented per the approved schedule, the Permittee would not be in compliance. Consistent with recent MS4 permits in California<sup>2</sup> and Washington D.C.<sup>3</sup>, and EPA guidance, the compliance assessment provisions can be structured in a manner that provides accountability and enforceability while still utilizing adaptive management for the implementation of BMPs.
3. Compliance assessment should also consider other instances in which the Permittee would be in compliance (such as attainment of water quality standards in receiving waters, no discharge, etc.). Compliance assessment can also include a fall back to the WLAs as numeric effluent limits when a permittee fails to implement the required implementation actions.
4. Define attainment of the WLAs and compliance with the permit provisions as clearly separate concepts. For example, if WLAs are not *attained*, the permit could require additional actions from the Permittees, but as long as the approved implementation plan was implemented per the approved schedule, then the Permittee would be in *compliance*.
5. Monitoring and reporting requirements need to be consistent with the approved TMDLs, but flexible enough to allow for the development of integrated monitoring programs. The monitoring requirements need to provide the information needed to evaluate progress towards attaining the WLAs. The monitoring points need to be clearly defined as one

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<sup>1</sup> Wayland, R. and J. Hanlon. 2002. Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs. Washington, DC.

<sup>2</sup> R8-2010-0036 San Bernardino County Flood Control District

<sup>3</sup> NPDES Permit No. DC0000221, October 7, 2011, issued by USEPA Region 3.

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option for defining compliance and not the sole option. As noted above, where the WLAs are expressed as BMPs, there is an important distinction between attaining the WLAs and complying with the permit provisions. The monitoring and reporting requirements can be structured in a way to ensure that the implementation of BMPs is resulting in attainment of the WLAs.

**Requested Action:**

Provide an option for flexible implementation of BMPs through an iterative process for compliance with final WLAs as described above.

Thank you for your time to consider our comments and suggestions. If you have any additional questions or further clarification, please contact Arne Anselm at (805) 654-3942.

Sincerely,



Gerhardt Hubner  
Chair

**Attachments:**

- 1 Non-Stormwater Action Level Assessment
- 2 Critique of Treatment Control BMP Performance
- 3 CASQA Proposed Language for Receiving Water Limitation Provision

cc: Renee Purdy, Regional Program Section Chief  
Ivar Ridgeway, Stormwater Permitting Chief  
Ventura County Stormwater Quality Program Managers