

**City of Culver City, California
Agenda Item Report**

Meeting Date: 8/13/12		Item Number: <u>A-4</u>	
CITY COUNCIL AGENDA ITEM: Adoption of Los Angeles Permit Group's Position and Comments on the Draft Countywide Municipal Separate Storm Sewer System Permit.			
Contact Person/Dept.: Kaden Young/PW-EPO		Phone Number: (310) 253-6445	
Fiscal Impact: Yes ☐ No ☒		General Fund: Yes ☐ No ☒	
Public Hearing: ☐		Action Item: ☒ Attachments: ☒	
Commission Action Required: Yes ☐ No ☐ Date: _____			
Public Notification: Meetings and Agendas – City Council (08/09/12)			
Department Approval: Charles D. Herbertson (08/07/12)		City Attorney Approval: Carol Schwab (by H. Baker) (08/08/12)	
Chief Financial Officer Approval: Jeff Muir (08/08/12)		City Manager Approval: John M. Nachbar (08/09/12)	
<u>RECOMMENDATION:</u> Staff recommends the City Council support the Los Angeles Permit Group's (LA Permit Group) position and recommendations on the draft countywide Municipal Separate Storm Sewer System Permit (MS4 Permit). <u>BACKGROUND:</u> The Municipal Separate Storm Sewer System (MS4) is a structural system that is based on regional floodwater management and uses both natural and altered water bodies to achieve flood management goals. The extensive system conveys stormwater and non-stormwater across municipal boundaries where it is commingled within the MS4 and then discharged to a receiving water body. In general, a MS4 Permit has a term of 5 years with the possibility of continuing if a new one is not adopted on time. In 2001, the Los Angeles Regional Water Quality Control Board (LARWQCB) issued the first MS4 Permit for Los Angeles County that regulates discharges and established Best Management Practices (BMPs) aimed at the goal of reducing pollution from both storm water and dry weather urban runoff. A new permit was adopted in 2006 and remains in effect to this day. This draft MS4 Permit, once approved and adopted by the LARWQCB, will replace the current permit.			

City of Culver City, California
Agenda Item Report

The LA Permit Group is a consortium of municipalities that was formed to ensure Los Angeles' stormwater is managed properly, both for flood control and water quality protection. The LA Permit Group was formed, to accomplish several important objectives, including:

- Promoting constructive collaboration and problem-solving between the regulated community (municipalities) and the LARWQCB;
- Assisting in development of a new MS4 Permit that is capable of integrating the protection of water quality with other watershed objectives in a cost-effective and science-based manner;
- Focusing limited municipal resources on implementation of water quality protection activities that are efficient, effective and sustainable.

Over 62 (of the 88) Los Angeles County municipalities have actively participated in the effort to develop negotiation points and provide comments throughout the MS4 Permit development process since May 2011.

The process for providing comments on the new MS4 consisted of the LARWQCB staff developing working proposals of key provisions of the new permit and releasing them to the municipalities one section at a time. This piece-meal process made it difficult to understand how the key provisions interacted with each other. It was only after the full draft MS4 Permit was issued in June 2012, that the interaction (or lack of interaction) of the provisions could be seen. Each working proposal section was issued with only a few weeks for stakeholders to review and provide comments. Although comments were provided, it is unclear how LARWQCB staff addressed the comments. In some cases, changes were made and in other cases, no changes were made. In both cases, no explanation was provided by the LARWQCB.

Municipalities were given a 45 day public comment period for the draft MS4 Permit in its entirety (over 500 pages) after its release. The LA Permit Group and some of its member cities, including Culver City, made a request to the LARWQCB for a time extension, but the request was denied in the attached letter dated August 1, 2012 (see Attachments 1 and 2).

DISCUSSION:

Receiving Water Limitations (RWL) consist of all applicable numeric or narrative water quality objectives or criteria, or limitations to implement the applicable water quality objectives or criteria, for receiving waters as contained the Basin Plan, water quality control plans or policies adopted by the State Water Resources Control Board. The MS4 Permit includes three main provisions related to RWL. First, it states that discharges from the MS4 that cause or contribute to an exceedance of RWL are prohibited. Second, it states that discharges from the MS4 of stormwater or non-stormwater, for which a municipality is responsible, shall not cause or contribute to a condition of nuisance. Third, municipalities shall achieve these two

City of Culver City, California
Agenda Item Report

prohibitions “through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the stormwater management program and its components and other requirements of the MS4 Permit including any modifications.”

The most significant concern of the draft MS4 Permit is the language governing RWL. Recent court decisions have created a new interpretation of the RWL that creates a liability for the municipalities without a commensurate increase in protection of water quality. On July 13, 2011, the United States Court of Appeals for the Ninth Circuit issued an opinion 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) that determined that a municipality is liable for MS4 Permit violations if its discharges cause or contribute to an exceedance of a water quality standard. This represents a fundamental change in interpretation of policy and contrasts sharply with the LARWQCB’s own understanding as expressed in a 2002 letter from then-Chair Francine Diamond answering questions about the 2001 MS4 Permit in which she articulated the collective understanding that violation of the Permit would occur only when a municipality fails to engage in a good faith effort to implement the iterative process to correct the harm. In light of the Ninth Circuit Court’s decision and based on the significant monitoring efforts being conducted, many municipal stormwater Permittees, including Culver City, would likely be considered to be in non-compliance with their MS4 Permits as soon as it is adopted. At that point, municipalities would be immediately vulnerable to third-party lawsuits even though municipalities have little control over the sources of pollutants that create the vulnerability.

The LA Permit Group argued to the LARWQCB that it is unfair and poor public policy to put cities in non-compliance on day one of the MS4 Permit without the opportunity for the cities to develop a plan of action, develop source identification, and implement a plan to address the concern. The LA Permit Group has requested that this language be revised on several occasions including written comments, workshop comments, and meetings with LARWQCB’s staff; however, this issue has not yet been resolved in the draft MS4 Permit.

Alternative approaches are available to address the LARWQCB’s concerns and maintain the intent of the language in the approach. The California Association of Stormwater Quality (CASQA) has developed draft language that should be used in lieu of the current language. The language provides specificity in compliance and subjects Permittees who are not engaged in good faith in the iterative process to enforcement without unnecessary and counterproductive liability for the majority of Permittees who are diligently attempting to implement stormwater programs.

Staff recommends the City Council join the position of the LA Permit Group to attempt to persuade LARWQCB to give the municipalities additional time to review the MS4 Permit and work together to revise the RWL language.

City of Culver City, California
Agenda Item Report

FISCAL ANALYSIS:

According to the Los Angeles County BMPs Decision Support System model, it will cost municipalities \$17-42 billion to comply with current water quality standards. The cost to handle Ballona Creek for bacteria only is estimated to be \$1-2 billion, and Culver City's share is estimated to be \$40-80 million. Bacteria are only one of a few pollutants that can be present in Ballona Creek. Currently, Culver City spends approximately \$175,000 a year during the ambient monitoring phase. Once the BMP implementation phase begins, projections show that the City will spend in excess of \$1 million annually to comply with the requirements contained in the proposed 2012 MS4 Permit.

ATTACHMENTS:

1. Letter from Sam Unger, denial of time extension
2. Comment Letter from Culver City to LARWQCB on the Draft MS4 Permit Attachment
3. LA Permit Group's comments on draft MS4 Permit.

MOTION:

That the City Council:

Adopt the LA Permit Group's position and comments on the draft MS4 Permit.