

RESOLUTION NO. 2016-_____

**A RESOLUTION OF THE CITY COUNCIL OF
THE CITY OF MERCED, CALIFORNIA,
ADOPTING A MUNICIPAL SEPARATE STORM
SEWER SYSTEM ENFORCEMENT RESPONSE
PLAN**

THE CITY COUNCIL OF THE CITY OF MERCED DOES HEREBY
RESOLVE, DETERMINE, FIND, AND ORDER AS FOLLOWS:

SECTION 1. In accordance with Title 15 – Public Service, Division III – Storm Water System, Chapter 15.50, Storm Water Management and Discharge Control of the Merced Municipal Code, the Municipal Separate Storm Sewer System Enforcement Response Plan attached hereto as Exhibit “A” is hereby adopted.

PASSED AND ADOPTED by the City Council of the City of Merced at a regular meeting held on the ____ day of _____ 2016, by the following vote:

AYES: Council Members:

NOES: Council Members:

ABSENT: Council Members:

ABSTAIN: Council Members:

APPROVED:

Mayor

ATTEST:
STEVE CARRIGAN, CITY CLERK

BY: _____
Assistant/Deputy City Clerk

(SEAL)

APPROVED AS TO FORM:

Kelly Fincher 5/11/16
City Attorney Date

Municipal Separate Storm Sewer System (MS4):
Enforcement Response Plan (ERP)



CITY OF MERCED

June 2016



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INTRODUCTION

GENERAL INFORMATION

OVERVIEW

On February 5, 2013, United States Environmental Protection Agency (USEPA) adopted Phase II storm water regulations under authority of the Clean Water Act section 402(p)(6). The City of Merced is subject to the State Water Resources Control Board's (SWRCB) National Pollution Discharge Elimination System (NPDES) Water Quality Order NO. 2013-0001-DWQ for Small Municipal Separate Storm Sewer Systems (Phase II MS4 Permit). As a result the City is required to develop and implement an Enforcement Response Plan (ERP). The ERP is to address storm water and non-storm water discharges with pollution potential.

USEPA requires the City to identify all violations, respond accordingly and to follow-up these violations with escalated enforcement if needed. The City's objective is to maintain compliance with the Phase II MS4 Permit; it is not the City's intent or desire to pursue punitive enforcement action when compliance is more readily achieved through mutual cooperation and assistance. Nevertheless, it is the City's obligation to investigate and respond to instances of noncompliance.

The City's Storm Water ERP is intended to assist City personnel in using their own enforcement expertise to develop a flexible and appropriate enforcement response based upon the particular situation.

PURPOSE

The purpose of this document is to formally establish consistency with the City of Merced's enforcement procedures and follow up actions for non-compliance with the City's Storm Water Ordinance (§15.50) The ERP is to:

- a) Reduce the potential impact(s) of pollution from urban areas in waters of the State and waters of the United States (U.S.) and protect their beneficial uses; and;
- b) Develop and implement an effective stormwater program that is well-understood and broadly supported by stakeholders and to protect employees, residents, and the environment. The City must ensure compliance of Regional Water Quality Control Board (RWQCB) orders, and City ordinances.

The ERP outlines in a step-by-step fashion the procedures to be followed by the City to identify, document, and respond to storm water violations. The ERP provides guidance in selecting the initial and follow-up enforcement actions, clearly states staff responsibilities for these enforcement actions, and specifies appropriate timeframes for the various enforcement steps to occur. Most importantly, the ERP specifies criteria by which the City can determine the enforcement action most appropriate to the nature of the violation.



INTRODUCTION

ELEMENTS OF AN ENFORCEMENT RESPONSE PLAN

According to USEPA, a comprehensive and effective enforcement response plan must:

- Describe how the City will investigate instances of non-compliance.
- Describe the types of escalated enforcement actions that the City will utilize in response to all anticipated types of violations and the time periods for which the City will initiate and follow-up with these actions.
- Demonstrate the City's primary responsibility to enforce all applicable Phase II MS4 Permit requirements.

In addition, the plan must contain:

- Criteria for scheduling periodic inspections.
- Forms and guidelines for documenting compliance data in a manner which will enable the information to be used in administrative and judicial enforcement actions.
- Systems to track due dates for general compliance status and pending enforcement actions.
- Criteria and procedures by which responsible personnel can select and initiate an appropriate enforcement response from among those provided within the plan.

LEGAL AUTHORITY

Federal Clean Water Act of 1972

Pursuant to federal regulation, Title 40 of the Code of Federal Regulations (40 CFR) [Storm Water Discharges §122.26 Program Requirements: Development and Implementation]

"Shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants CWA Section 402(p)(3)(B)(iii)."

California Water Code (Porter Cologne)

California Regional Water Quality Control Board - Central Valley Region – Storm Water Discharge from Small Municipal Separate Storm Sewer Systems (MS4s)
Requirements for the City of Merced Order No. 2013-0001-DWQ.

Storm Water Requirements

The permittee shall implement its approved Storm Water Program, which shall be an enforceable condition of this Order. If the permittee fails to perform the Storm Water functions, the Regional Water Board, the State Water Board or the USEPA may take enforcement actions against the permittee as authorized by the Clean Water Act (CWA).



INTRODUCTION

The permittee shall enforce the Storm Water Standards promulgated under Sections 402(p)(3)(B)(iii) of the CWA. The Storm Water functions are required by Order No. 2013-0001-DWQ including, but not limited to:

- a) Adopting the legal authority required;
- b) Enforcing the CWA Storm Water Section 402(p)(3)(B)(iii);
- c) Implementing procedures to ensure compliance as required;
- d) Providing funding and personnel for implementation and enforcement of the Storm Water program as required.

Merced Municipal Code

Title 15 of Merced Municipal Code, Chapter 15.50, Storm Water Management and Discharge Control, and Chapter 15.50.150 Enforcement Authority:

Division III. - Storm Water System

Chapter 15.50 - STORM WATER MANAGEMENT AND DISCHARGE CONTROL

- 15.50.010 - Title.
- 15.50.020 - Purpose and intent.
- 15.50.030 - Definitions.
- 15.50.040 - Conflicts with other laws.
- 15.50.050 - Discharge of non-storm water prohibited.
- 15.50.060 - Exceptions to discharge prohibition.
- 15.50.070 - Reserved.
- 15.50.080 - Discharge in violation of permit.
- 15.50.090 - Illicit connections prohibited.
- 15.50.100 - Concealment and abetting.
- 15.50.110 - Acts potentially resulting in violation of Federal Clean Water Act and/or Porter-Cologne Act.
- 15.50.120 - Reduction of pollutants in storm water.
- 15.50.130 - Containment and notification of spills.
- 15.50.140 - Inspection authority.
- 15.50.150 - Enforcement authority.
- 15.50.160 - Administrative citation.
- 15.50.165 - Emergency orders and abatements.
- 15.50.170 - Appeals.
- 15.50.175 - Enforcement costs recovery.
- 15.50.180 - Civil action.
- 15.50.185 - Violations.
- 15.50.190 - Remedies not exclusive.
- 15.50.200 - Disclaimer of liability.
- 15.50.210 - City of Merced authority.
- 15.50.220 - Judicial review.



CHAPTER 1 – RESPONSIBLE PERSONNEL

ENFORCEMENT RESPONSE - RESPONSIBLE PERSONNEL

The City has specific personnel positions that participate in the implementation of the City's Storm Water Management Program. The following is a listing and description of those positions.

Qualified Storm Water Pollution Prevention Practitioner (QSP) - an individual assigned responsibility for the implementation of all elements of the Storm Water Pollution Prevention Plan (SWPPP). To ensure that the preparation and implementation of the SWPPP is sufficient for effective pollution prevention, Section VII of the Construction General Permit (CGP).

Qualified Industrial Storm Water Practitioner (QISP) – is a person (either the Discharger or a person designated by the Discharger) who has completed a State Water Board-sponsored or approved QISP training course, and has registered as a QISP via SMARTS.

Environmental Control Inspector (ECI) – performs storm water compliance inspections and sampling. Prepares samples for analysis by a contracted laboratory or coordinates chemical analyses of samples in the City's wastewater laboratory. This position serves as the primary contact for the storm water program and the City regarding MS4 Phase II Storm Water requirements.

Director of Public Works (DPW) – has overall responsibility within the City for water and sewer utility operations, including compliance with all federal, state, and local regulations. The DPW possesses overall responsibility for administration of all storm water enforcement response actions.

Public Works Water Quality Manager (WQM) – responsible for the operation of the City of Merced's Waste Water Treatment Facility (WWTF), as well as oversight of the City's Pretreatment Program to ensure compliance with all federal and state regulations.

Chief Building Official (CBO) – responsible for the monitoring of construction activities related to residential, commercial, or industrial development, including any construction project, regardless the size, creating soil disturbances or activities encroaching to storm water. The CBO has the authority to issue abatement orders and cease and desist orders.

Assistant Chief Building Official (ACBO) -- responsible for assisting the CBO in monitoring of construction activities related to residential, commercial, or industrial development, including any construction project, regardless the size, creating soil

City Manager (CM) – has total responsibility of the operations of all City facilities, including but not limited to water and sewer utilities. The CM possesses overall responsibility for the administration of all City Ordinances and enforcement actions.

City Attorney (CA) – advises technical and managerial personnel on enforcement matters and orchestrates the judicial responses deemed necessary by the WQM and DPW. The City Attorney's office is consulted on all matters requiring legal interpretation of the Merced Municipal Code, state and federal law, and this ERP.



CHAPTER 2 – PROCEDURES TO EVALUATE NON-COMPLIANCE

IDENTIFYING AND EVALUATING NON-COMPLIANCE

There are many activities associated with identifying and investigating non-compliance, including several notification mechanisms for identifying spills and illicit discharges. These mechanisms include phone reporting (24-hour reporting line 209.385.6905.), online complaint forms, and field identification by Operations and Maintenance and emergency responders (i.e. Fire Department).

ESSENTIAL STEP FOR IDENTIFYING NON-COMPLIANCE

An essential step for identifying non-compliance is identifying potential pollutant discharges to the City storm drain system, where they are located, and the nature and volume of the potential pollutant discharge. City Department personnel will assist with this task including the Fire Department (Hazardous Materials, Unknown/Unidentifiable Materials and Emergency Response), Public Works Department (Facilities, Refuse, Water, Streets, Parks, and Sewer Utility Applications), and Building Department (Building Permit Applications).

NPDES Permit

The City will set initial storm water compliance inspection frequency at construction sites based on project's threat to water quality and monitor Industrial activities under the City of Merced's Airport Industrial Storm Water permit.

- Sites that are unable to demonstrate that they have obtained applicable Industrial General Permit (IGP) or Construction General Permit (CGP) coverage will be referred to the Water Board within 30 days of making the non-filer determination.
- The City will refer ongoing violators to the Water Board for those still in non-compliance after the City's progressive enforcement program attempts.

Prior to referral, must have records of communication with the owner or operator including at least two follow-up inspections, two warning letters or notices of violations, and any response from the owner operator.

INSPECTION AND SAMPLING

Inspection and verification sampling of discharges is the method by which the Water Quality staff obtain compliance data. Verification monitoring by the City is a MS4 Phase II Storm Water requirement: and the authority of Municipal Code Section 15.50.140 [Inspection Authority].

Inspection and verification sampling may be a result of:

- Response to known or suspected compliance problems.
- Investigating sources of suspected pollutants discharges.
- Verification of corrective actions required of the non-compliance by the City.

For the purpose of compliance, the City has a daily Storm Drain Preventive Operations & Maintenance program.



CHAPTER 3 – ENFORCEMENT TOOLS

ENFORCEMENT TOOLS: TYPICAL ENFORCEMENT ACTIONS

The City has developed formal enforcement procedures to address discharge violations. These procedures provide persons with the opportunity to respond in a timely manner, to correct non-compliant conditions, or to appeal actions or decisions made by the City. Variances from established procedures may occur, depending on the individual case, with approval of the DPWs.

Table 1 – Enforcement Responses

Enforcement Response	Authorized Personnel
A. Phone Call	ECI, QSP, QISP
B. Written Warning	ECI, QSP, QISP
C. Informal Meeting	ECI, QSP, QISP
D. Formal Mitigation Meeting	WQM, DPW, CBO, ACBO
E. Notice of Violation	ECI, QSP, QISP
F. Compliance Order with Time Schedule Order	ECI, WQM, CBO, ACBO
G. Administrative Citation (Civil Penalties)	ECI, WQM, DPW,
H. Abate and Desist Order	DPW, CBO, ACBO
I. Withhold Plans, Approvals & Authorization	CBO, ACBO and Planning Department
J. Criminal Penalties	DPW, CA
Reference QSP – Qualified Storm Water Practitioner ECI - Environmental Control Inspector WQM – Water Quality Manager CBO—Chief Building Official QISP- Qualified Industrial Storm Water Practitioner DPW – Director of Public Works CA - City Attorney ACBO—Assistant Chief Building Official	



CHAPTER 3 – ENFORCEMENT TOOLS

Written Warning is issued by staff either by mail, in person, or electronically. The typical purpose of a Written Warning is to formally document significant incidents and to clarify the required response or corrective action that must be implemented. The written warning shall state the provision(s) violated and the facts alleged to constitute the violation and may include any proposed corrective actions or monitoring to be required. Compliance date for the violation is included in the Written Warning; the compliance time can range from immediate to 30 days depending on the severity of the violation. Staff shall use the best professional judgment in establishing compliance dates. Follow-up inspections shall be used to verify compliance on the due date stated in the inspection report.

Informal Meeting is used to bring the violator and the City together to clarify any issue(s) related to the violation, permit, or conditions levied upon said violator by the City. This meeting is for informational purposes only and does not carry any penalties.

Formal Mitigation Meeting The purpose of the meeting is for Staff to discuss the violation(s) and the potential consequences for not achieving compliance after the issuance of a Written Warning. This meeting provides an opportunity to educate the person about their violation(s) and affords an opportunity to present potential mitigation options to achieve compliance before a Notice of Violation is issued.

Notice of Violation (NOV) is issued for a significant violation and applies when there is evidence of neglect or intent to harm. The NOV documents the type of violation that occurred and directs corrective action. The violator is required to respond in writing, within 30-days, describing the cause of the violation and the corrective actions taken.

ESCALATED ENFORCEMENT ACTIONS

Almost all cases of non-compliance are corrected by following the routine types of enforcement actions listed above and in the Enforcement Response Plan. In those cases where non-compliance is not corrected, the next step in the escalation of enforcement action is the issuance of an Administrative Order (AO). The types of AOs include, but are not limited to:

- Administrative Citation
- Increase in Monitoring
- Cease and Desist Order
- Permit Revocation
- Termination of Service

All AOs are generated by the DPW, or designee, with the advisement of the CA's Office. If the violator does not comply with the enforcement action, then the CA's office may issue an enforcement action for the AO that was issued. Additionally, he/she may be referred to the District Attorney's Office for criminal prosecution.



CHAPTER 3 – ENFORCEMENT TOOLS

For case referrals, the CA is consulted and assists the DPW in developing the referral document. The City's authority to initiate administrative, civil, or criminal enforcement responses are pursuant to 15.50.160, 15.50.180, 15.50.080, 15.50.150 and 15.50.190 of the Merced Municipal Code.

The enforcement official may order the immediate abatement of any discharge from any source to the storm water conveyance system when, in the opinion of the enforcement official, the discharge causes or threatens to cause a condition that presents an imminent danger to the public health, safety, welfare, or environment, or a violation of a NPDES permit. Abatement and cleanup of spills, illicit discharges, or dumping to the storm drainage system must occur within 72 hours of notification; or sooner for high risk spills or discharges. For areas of uncontrolled pollutant sources, abatement must be performed within thirty days of notification. The City will notify the RWQCB within five (5) days when all parties agree that clean-up activities cannot be completed within the original timeframe and the determination has been made that the compliance timeframe needs revision.

In addition to the above, violations of California State Hazardous Waste limits may be referred to the Merced County District Attorney.

Administrative Citations

(Civil Liability / Administrative Adjudication Merced Municipal Code (15.15.180, 15.50.160, 1.12.020)

On March 2, 2015, the City Council approved the Administrative Citation Ordinance (Ordinance No. 2439), which establishes a procedure that provides an additional civil legal remedy that allows for Merced Municipal Code violations to be processed in a civil manner, thereby providing a quick and efficient code enforcement process and avoiding the necessity of a criminal prosecution. The Ordinance provides an effective tool in dealing with any violations of the City Code. Whenever an Enforcement Officer, charged with the enforcement of any provision of the Merced Municipal Code, determines that a violation of that provision occurred, the Enforcement Officer shall have the authority to issue an Administrative Citation to any person responsible for the violation.

Whenever an Enforcement Officer, charged with the enforcement of any provision of the Merced Municipal Code, determines that a violation of that provision occurred, the Enforcement Officer shall have the authority to issue an Administrative Citation to any person responsible for the violation.

If the responsible party fails to correct the violation(s), subsequent Administrative Citations may be issued for the same violation(s). The amount of the fine(s) shall increase at a rate specified in Title 1.12.020 of the Merced Municipal Code.



CHAPTER 3 – ENFORCEMENT TOOLS

- A. Misdemeanors. Unless otherwise provided, any person convicted of a misdemeanor under the provisions of this code shall be punishable by a fine of not more than one thousand dollars (\$1,000.00) or by imprisonment in the county jail of Merced County for a period not exceeding one (1) year, or by both such fine and imprisonment.
- B. Infraction. Unless otherwise provided, any person convicted of an infraction under the provisions of this code shall be punishable for a first conviction by a fine of not more than one hundred fifty dollars (\$150.00), for a second conviction within a period of one (1) year by a fine of not more than three hundred dollars (\$300.00), and for a third or any subsequent conviction within a period of one (1) year, by a fine of not more than five hundred dollars (\$500.00).
- C. Infraction as Misdemeanor. Any offense which would otherwise be an infraction is a misdemeanor if a defendant has been convicted of three (3) or more of the same violations of this code within a one-year (1) period immediately preceding the commission of the offense and such prior convictions are alleged in the accusatory pleading. For this purpose, a bail forfeiture shall be deemed to be a conviction of the offense charged.

Payment of the fine(s) shall not excuse the failure to correct the violation(s) nor shall it bar further enforcement action by the City. All fine(s) assessed shall be payable to the City unless otherwise directed on the citation. An Administrative Citation may be issued for multiple violations. Each violation constitutes a separate offense for which a separate penalty may be imposed. The aggregate amount of penalties imposed for each violation cited will be set forth on the Administrative Citation.

Increase in Monitoring

The City will set initial storm water compliance inspections at construction sites, and daily observations of industrial activities at City of Merced Municipal Airport. Failure to comply with NOVs, will increase the frequency of inspections to verify that the violation has been corrected.

Termination of Service

An abatement order to suspend actual discharge which presents or may present an imminent or substantial endangerment to the health or welfare of persons or to the environment, or causes the City to violate any condition of its Phase II MS4 Permit may be immediately issued. If failure to comply voluntarily with the suspension order, the DPW, CA, CBO, and ACBO shall take such steps as deemed necessary to prevent or minimize the endangerment to any person or the environment. All costs shall be paid by the violator.



CHAPTER 3 – ENFORCEMENT TOOLS

Criminal Liability

Pursuant to Merced Municipal Code Section 15.50.050, it shall be unlawful for any person to intentionally or negligently fail to comply with or violate any provisions of this chapter conditions as set forth in this chapter or any provision of federal or state law which governs discharges.

Any person which willfully or knowingly violates any provision of this Chapter, or any orders or permits issued hereunder shall, upon conviction, be guilty of a misdemeanor, punishable by a fine not to exceed one thousand dollars (\$1,000) or imprisonment for not more than three (3) years, or both, per violation per day. This penalty shall be consistent with the Federal Clean Water Act, 33 U.S.C. 1251, *et. Seq.* and amendments thereto, and shall apply to the exclusion of any other more lenient provision in the Merced Municipal Code. A Person shall be guilty of a separate violation for each day a violation of any provision of the Merced Municipal Code Waste Discharge Permit is committed or continued by such person.

Any person that willfully or knowingly makes any false statements, representations, or certifications in any application, record, report, plan or other document filed or required to be maintained pursuant to Merced Municipal Code or the Discharge Permit, or which falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required by the Merced Municipal Code or the Discharge Permit shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars (1,000) per violation per day or imprisonment for not more than six (6) months, or both, per violation per day.

This penalty shall be consistent with the Federal Clean Water Act, 33 U.S.C. 1251, *et seq* and amendments thereto, and shall apply to the exclusion of any other more lenient Chapter provision Any person that is discovered having committed violations of the Federal Clean Water Act, 33 U.S.C. 1251, *et seq* may be referred to the United States Environmental Protection Agency – Criminal Investigations Division and the United States Department of Justice for investigation and criminal prosecution.

Appeals

Any person, permit applicant, or permit holder may appeal any decision made by the City pursuant to 15.50.170 of the Merced Municipal Code.



APPENDIX A – ACRONYMS & DEFINITIONS

AO Administrative Order
CFR Code of Federal Regulations
CWA Clean Water Act
NPDES National Pollutant Discharge Elimination System

DEFINITIONS

Administrative Citation: Enforcement action that assesses monetary penalties for non-compliance.

Administrative Order (AO): Enforcement document that directs a Person to undertake or to cease specified activities. An Administrative Order may incorporate compliance schedules, time frames, administrative penalties, and termination of service orders.

Finding of Non-compliance: A written notice instructing a Person to identify and correct causes of non-compliance.

Consent Order: Documents non-compliance and includes actions required to be accomplished by specific dates. Consent orders are developed during Compliance Meetings and both parties agree to terms.

Compliance Order: Directs a violator to achieve or restore compliance by a date specified in the order. A compliance order is often a stipulated agreement that may include a Compliance Schedule, the payment of monetary penalties, or cost recovery for and the imposition of fines when milestones are not met.

Cease and Desist Order: Directs a violator to cease illegal or unauthorized discharges immediately or to terminate discharge altogether.

Civil Action: An order, hearing, or other action by the presiding court. Such orders may include penalties.

Compliance Inspection: An inspection to determine compliance status and to identify practices, which may lead to non-compliance. Compliance inspections are not normally scheduled.

Compliance Meeting: A meeting between the City and violator to discuss the causes of non-compliance, corrective actions to achieve compliance, and time frame for implementing corrective actions.



APPENDIX A – ACRONYMS & DEFINITIONS

Compliance Schedule: A timetable in which Inspectors will implement corrective actions in order to achieve consistent compliance.

Control Authority: The entity directly administering and enforcing Storm Water Standards and Requirements. The City of Merced is the Control Authority for the City of Merced MS4 Phase II Storm Water Permit.

Criminal Action: Similar to civil action, but the charges are for criminal neglect that may include fines and or penalties.

Fines: Monetary penalties imposed by the court or by the City for violation of regulations.

Good Faith Effort: Prompt and vigorous pollution control measures undertaken by any person which show that extraordinary efforts have been made to achieve compliance. Good faith may also be defined as the person's honest intention to remedy its non-compliance coupled with actions, which give support to this intention. (See USEPA's *Guidance for Developing Control Authority Enforcement Response Plans* 4.1.6).

Notice of Violation (NOV): An official notice that a violation of discharge regulations has occurred. A written response to the NOV identifying causes of the violation and corrective actions taken to prevent recurring violations is required within thirty days of the mailing date.

Verbal Warning: A documented warning communicated orally.
The violation is usually slight or within the range of analytical error.