



B A S M A A

Alameda Countywide
Clean Water Program

Contra Costa
Clean Water Program

Fairfield-Suisun
Urban Runoff
Management Program

Marin County
Stormwater Pollution
Prevention Program

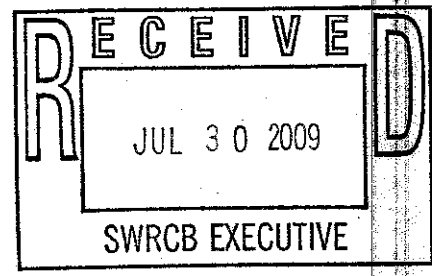
San Mateo Countywide
Stormwater Pollution
Prevention Program

Santa Clara Valley
Urban Runoff Pollution
Prevention Program

Vallejo
Sanitation and Flood
Control District

July 30, 2009

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



**Subject: Public Comments on Draft Order, File No. A-1780; August 4, 2009
State Water Resources Control Board Meeting (re: Petition of
County of Los Angeles, et al.)**

These comments are being submitted on behalf of the Bay Area Stormwater Management Agencies Association ("BASMAA") with regard to the draft State Water Resources Control Board Order in the *Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District*, SWRCB/OCC File A-1780 ("Petition"). BASMAA is a consortium of eight area-wide municipal stormwater programs in the San Francisco Bay Area, collectively representing 96 municipal agencies, including 84 cities and 7 counties.¹

Several of the issues discussed in the staff's proposed revised order concerning the Petition are of critical importance to BASMAA member agencies. While we strongly support municipal efforts and programs to address stormwater issues in the San Francisco Bay Area and throughout the State, the proposed revised order would, in our view, wrongly affirm the imposition of technically infeasible and economically unattainable permit requirements, and, worse yet, do so at a time of shrinking State and municipal budgets.

In particular, BASMAA is concerned with the following:²

1. The staff's analysis and proposed revised order dismisses, without addressing, the important issue raised in the Petition concerning the potential imposition of joint liability on municipalities for permit requirements that are not met by one member of a system or jurisdiction-wide MS4 program – by making municipalities potentially responsible for discharges other than their own, this

Bay Area
Stormwater Management
Agencies Association
1515 Clay Street
Suite 1400
Oakland, CA 94612
510.622.3326
www.basmaa.org

¹ BASMAA specifically requests that these comments in support of the Petition be placed in the record of this action and also be forwarded to the chair and members of the State Water Board prior to the hearing date.

² The staff's attempt to limit additional public comments and hearing testimony to only issues raised by the two minor, non-substantive revisions to the proposed order is a rebuff to the notion and purposes of public participation and would effectively deprive the State's municipalities of presenting their views to the State Water Board on the very issues that several of its members indicated they wanted to further consider at the conclusion of the last hearing on this item. The attempt to shut out additional input and cut off a robust discussion on these issues should be rejected.

represents a departure from existing regulation and a major threat to the continuation of our programs and the cooperative efforts we have undertaken that leverage resources and benefit the public;

2. The staff's analysis and proposed revised order wrongly suggests that TMDLs need to be "incorporated" into MS4 permits and that such should occur through the imposition of numeric permit limitations for non-stormwater discharge control and, in the absence of certain findings, also for discharges of municipal stormwater – this represents a seismic and ill advised shift in California's historic iterative BMP-based approach to MS4 permitting, and it portends to put the State's municipalities at risk of liability for facing permit requirements that cannot be met at the same time their ability to attempt to address the underlying stormwater management issues as best they can are facing a fiscal crisis made recently even worse by the State government's own plan to address its fiscal problems;

3. The staff have recommended that the revised proposed order be adopted as a precedent order when the important policy issues it addresses have not received sufficient vetting by or input from *all* those municipalities around the State that would potentially be implicated by it – the State Water Board should either address this Petition on a non-precedential basis and then establish statewide policy governing MS4 permits through the appropriate quasi-legislative process (e.g., the adoption of a water quality control plan or promulgation of regulations), or it should dismiss or defer its decision on the Petition until after it conducts a series of further workshops around the State to much more fully involve those that may be affected; and

4. The important issues addressed in the last paragraph of Section II of the revised proposed order concerning the relationship between TMDLs and MS4 permit requirements governing stormwater (as opposed to non-stormwater) were not even raised by the Petition and are not properly before the State Water Board and should not be addressed in the context of this quasi-adjudicative process – if the Board is going to proceed to adopt the revised proposed order on either a precedential or non-precedential basis, at a minimum, this paragraph should first be deleted.

With respect to our concerns set forth above, we note as legal matters that the Clean Water Act and its regulations do not contemplate the imposition of joint liability in the MS4 context, providing only that permits may be issued on a system- or jurisdiction-wide basis. 33 USC § 1342(p)(3)(B)(i). Nor, contrary to EPA Region 9's misstatements, do they require the implementation or incorporation of a TMDL's numeric waste load allocation directly into NPDES permits; instead they impose only a "consistency" requirement as between these two regulatory mechanisms, 40 CFR § 122.44(d)(1)(vii), and "consistency" provides much needed flexibility to continue to pursue an iterative BMP-based approach in the MS4 permitting context.³ The staff's analysis and proposed revised order fail to recognize this, and the

³ Indeed, notwithstanding Region 9's current advocacy, U.S. EPA's official guidance encourages stormwater permit writers to address the regulation's consistency requirement through use of an iterative BMP-based approach. See Memorandum from Robert H. Wayland III and James A. Hanlon to Water Division Directors Regions 1-10 dated November 22, 2002 entitled *Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 5: "The policy outlined in this memorandum affirms the

distinction is of particular importance in the municipal stormwater permitting context as the courts have made clear that a decision to go beyond Section 402(p)(3)(B)(iii)'s maximum extent practicable standard in order to address water quality-driven objectives (such as TMDLs) is one that Congress made discretionary. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, (9th Cir. 1999).

We also note that, as a factual matter, that the State Water Board's own panel of experts recently concluded after thorough examination that the use of directly enforceable numeric limitations in the MS4 context remains infeasible and ill advised at this time. Moreover, the requirements to implement TMDLs, including developing compliance and monitoring plans, conducting monitoring, and BMP design and installation, are proving to be the single most expensive element of stormwater compliance. The pollutants covered by the TMDLs in our area are generated by a number of sources (including historical legacies such as mercury mining operations dating back to the Gold Rush and the use of PCBs and certain pesticides prior to them being banned for use in the United States), most of which are beyond the control of municipalities. In this era of shrinking government budgets, rather than embarking on an unrealistic command and control approach, the State and local governments need to work together better to achieve clean water goals using ever-limited public funds.

* * * * *

In sum, while we appreciate the staff's efforts to date and agree with them that TMDLs are not merely academic exercises that can be ignored, BASMAA and its member agencies do not believe that the State Water Board is required by the Clean Water Act to, or should as a discretionary matter, abandon its historic iterative BMP-based approach to MS4 permitting in California. Instead, consistent with its own panel of experts findings, the State Water Board should direct Regional Water Boards to re-double their efforts to make the iterative approach work given the realities of fiscal constraints and competing local needs (such as police and fire protection services).

We also ask the State Water Board to support the types of cooperative system- and jurisdiction-wide efforts that BASMAA members and many other MS4s around the State have developed to leverage their resources by making clear that joint liability for an individual municipality's failure to comply will not be imposed under these permits.

In our view, it is best that these important Statewide MS4 permitting policy matters be resolved through the State Water Board's quasi-legislative actions and not via a precedent order arising from a quasi-adjudicatory process that has failed to provide a sufficient opportunity for vetting of the issues and input from the State's hard-pressed municipalities. The proposed

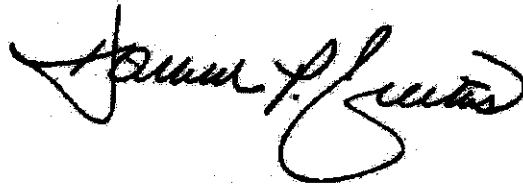
appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (e.g., a combination of structural and non-structural BMPs) that address storm water discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (i.e., more stringent controls or specific BMPs) as necessary to protect water quality. This approach is further supported by the recent report from the National Research Council (NRC), *Assessing the TMDL Approach to Water Quality Management* (National Academy Press, 2001)."

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revised order should be rejected or curtailed in both its substance and potential precedential effect accordingly.

We thank you in advance for your consideration of our concerns, these comments, and the important issues we have raised.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald P. Freitas". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Donald P. Freitas
BASMAA Executive Board Chair

cc: BASMAA Board of Directors