March 18, 2014

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Proposed Caltrans Permit Amendment

Dear Chair Marcus and Board Members:

On behalf of Heal the Bay and California Coastkeeper Alliance, we welcome the opportunity to submit these comments on the Proposed Amendments ("Order") to the Statewide National Pollutant Discharge Elimination System (NPDES) Permit for the Discharge of Storm Water Runoff from the California Department of Transportation's (Department) Municipal Separate Storm Sewer System (MS4) (Order 2012-0011-DWQ) ("Final Permit"). Our organizations have been actively involved throughout California in ensuring the control of stormwater pollution generally, and Caltrans's pollution in particular, for many years. We have significant interest in the incorporation of Total Maximum Daily Loads (TMDLs) into the Final Permit.

The Clean Water Act's TMDL program represents the Act's "safety net."[1] It is the bedrock component of the Clean Water Act, the backstop to ensure that the goals of the Act can be achieved when initial efforts fail. With over 85 TMDLs that Caltrans is a party to, it is clear that initial efforts have failed to curtail stormwater pollution from California's roads and highways. As we have stated in previous comments, we believe California's failure to reduce stormwater pollution, and meet water quality standards, is due in large part to the lack of numeric standards within stormwater permits – and the excessive amount of compliance "off-ramps" provided to permittees. The TMDL program is the essential means to achieving the Clean Water Act's goal of restoring waters so that they are safe for swimming, fishing, drinking, and other "beneficial uses" that citizens enjoy, or previously enjoyed.

We recognize the State Board's difficult task of developing a TMDL compliance program for Caltrans, and we appreciate staff's attempt to develop a creative approach that requires Caltrans to make marked improvements leading to enhanced water quality. However, we continue to have serious concerns with the State Board's trepidation in using numerical Water Quality Based Effluent Limitations (WQBELs) to hold Caltrans responsible for their impairments – especially those TMDLs assigning Caltrans specific numeric waste load allocations (WLAs). Further as discussed below, we are concerned with the many assumptions made in developing the compliance unit approach in the Draft Order and do not have confidence that this approach will result in Caltrans meeting WLAs. Regardless of the approach taken, the State Board must ensure that Caltrans is meeting its WLAs in the compliance timeframe allotted to them during the rigorous public process surrounding all of Caltrans's TMDLs. With that in consideration, we offer the following points that are discussed in more detail below:

[1] Houck, Oliver A., The Clean Water Act TMDL Program 49 (Envtl. Law Inst. 1999).

- BMPs should not be used as a substitute for numeric WQBELs;
- TMDL compliance schedules should be incorporated directly into the Final Permit;
- TMDLs with specific WLAs (both interim and final) must be directly incorporated into the Permit as numeric WQBELs;
- The Draft Order should not excuse Caltrans's lack of effort to date to improve water quality;
- The State Board needs to ensure all TMDLs are identified in the Order and Caltrans has been held fully responsible for its contribution to impairment;
- Caltrans's contribution to water quality impairment should not be trivialized; and
- The Compliance Unit structure is flawed and needs to accurately access Caltrans's contribution to water quality impairments.

1. BMPs used as a substitute for numeric WQBELs ignore the U.S. EPA's 2010 guidance and can only be allowed if numeric WQBELs are deemed infeasible.

By using BMPs as a substitute for numeric WQBELs, the State Board is disregarding the U.S. EPA's 2010 guidance to incorporate WLAs as numeric WQBELs into stormwater permits as part of a Permittee's TMDL compliance program. Instead of directly incorporating Caltrans's WLAs into the Order as numeric WQBELs, the State Board is proposing to incorporate BMP-based requirements for TMDL implementation.[2] This proposal runs counter to the EPA's 2010 recommendation, and instead, seems to reflect the EPA's outdated 2002 guidance on incorporating TMDLs into stormwater permits.

In 2002, the EPA provided guidance that "WQBELs for NPDES-regulated storm water discharges that implement WLAs in TMDLs may be expressed in the form of best management practices (BMPs) under specified circumstances."[3] Unfortunately, EPA's November 22, 2002 Memorandum "Establishing Total Maximum Daily Load Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (2002 Memorandum) has failed to lead to any notable reduction in impairments. Stormwater-caused impairments are pervasive throughout the country after over two decades of permitting based on best management practices. Since EPA's issuance of the 2002 Memorandum, states and EPA have obtained considerable knowledge in stormwater management. The 2010 Memorandum builds upon an expanded knowledge base and provides a critical path forward, primarily by encouraging more specifics in stormwater permits such as TMDL numeric stormwater WLAs and specific numeric WQBELs on stormwater-borne pollutants.

To address the growing quantity of waterbody impairments due to stormwater, the EPA reversed its 2002 recommendation and gave clear direction to regulators that "[w]here the TMDL includes WLAs for stormwater sources that provide numeric pollutant load or numeric surrogate pollutant parameter objectives, the WLA should, where feasible, be translated into numeric WQBELs in the applicable stormwater permits."[4] Rather than follow the EPA's intended guidance, the State Board cites, in footnote 2, the 2010 Memo's one off-ramp to allow the State Board to use BMPs instead of numeric WQBELs: "the permitting authority's decision as to how to express water quality based effluent limitations (WQBELs), i.e. as numeric effluent limitations or BMPs, would be based on an analysis of the specific facts and circumstances surrounding the permit."[5]

[2] WQBELs for NPDES-regulated stormwater discharges that implement WLAs in TMDLs maybe expressed in the form of best management practices (BMPs) under specified circumstances. See 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.44(k)(2)&(3).
[3] U.S. EPA, Establishing Total Maximum Daily Load Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, 2002.
[4] U.S. EPA, Establishing Total Maximum Daily Load Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, 2010.
[5] *Id.*

Unfortunately, footnote 2 is not complete and does not provide the public or the Board Members an accurate description of the high-standard the State Board must achieve in order to incorporate WLAs as BMPs instead of numeric limits. The Clean Water Act requires that when developing effluent limitations for NPDES permits, the permitting authority is required to ensure that "effluent limits are consistent with the assumptions and requirements of any available wasteload allocation for the discharge."[6] With the law clear, the 2010 Guidance Memo requires more than what the State Board's citation might suggest:

> The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or BMPs, including BMPs accompanied by numeric benchmarks, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results or other relevant information. As discussed in the 2002 memorandum, the permit's administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs. Improved knowledge of BMP effectiveness gained since 2002 should be reflected in the demonstration and supporting rationale that implementation of the BMPs will attain water quality standards and WLAs.[7]

The State Board states throughout the Fact Sheet that "[w]hile the Department is generally a small contributor to impairment, the statewide reach of its highway system means that it is a contributor in numerous impaired watersheds."[8] However, this is hardly the analysis the EPA requires in order for the State Board to move from numeric WQBELs to BMPs. Further as discussed below, these statements are unsubstantiated in the documentation.

To legally justify the Board's decision to use BMPs instead of NELs, the State Board cites 40 C.F.R. §122.44(k)(2)&(3), and states that "[e]ffluent limitations for NPDES-regulated storm water discharges that implement WLAs in TMDLs may be expressed in the form of best management practices (BMPs)."[9] Regretfully, the State Board has ignored a portion of their own legal citation of 40 C.F.R. §122.44(k)(3), which allows BMPS to be used when "[n]umeric effluent limitations are *infeasible*."[10] The State Board has not conducted the proper feasibility analysis to determine whether numeric WQBELs are feasible to incorporate Caltrans's TMDL WLAs.

In order to successfully implement Caltrans's TMDL program as the EPA intended, we strongly recommend the State Board incorporate WLAs as numeric WQBELs. If the State Board continues to use BMPs to implement Caltrans's WLAs, the State Board must conduct a proper analysis to determine whether numeric WQBELs are feasible. In addition to the feasibility analysis, the State Board must provide an adequate demonstration that the BMPs selected will be sufficient to implement the applicable WLAs.

In addition to the above recommendation, we request the following two changes be made to the Order: Finding #35: "Due to the nature of storm water discharges, and the typical lack of information on which to base numeric WQBELs, federal regulations allow for the implementation of BMPs to control or abate the discharge of pollutants from storm water, only when numeric WQBELs are demonstrated to be infeasible."

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[6] 40 C.F.R. § 122.44(d)(1)(vii)(B); *Communities*, 1 Cal. Rptr. 3d at 80 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)).
[7] Supra Note 4, at 4.
[8] Draft Order, pg. 20.
[9] Draft Order, pg. 20.
[10] 40 C.F.R. §122.44(k)(3).

P.24 of the Order should be redacted: "…the WLAs are to be achieved jointly by a number of storm water dischargers ~~and accordingly are of limited use in determining and enforcing the Department's specific responsibilities under the TMDL~~." The Clean Water Act requires the State Board to ensure "effluent limits are consistent with the assumptions and requirements of any available wasteload allocation for the discharge."[11] The State Board's statement that WLAs are of "limited use" makes clear that the Board disregarded Caltrans's WLAs when developing the Orders' BMP program to implement the TMDLs.

2. The State Board needs to properly consider the applicable TMDL compliance schedules when determining the Order's compliance schedule.

The State Board has determined that Caltrans must complete a certain amount of compliance units (CUs) "based on the objective of addressing every TMDL in Attachment IV within 20 years." Based on the record before the public, 20 years seems to be an arbitrary number with the State Board's only justification that a "primary factor considered in the determination of the number of CUs to be completed each year is the compliance due date for the final WLA for many of the relevant TMDLs." However, the public has no way of determining from the record how the State Board used some of the compliance dates from some of the TMDLs to determine 20 years was appropriate. It is clear from the Board's statement that not all WLAs were considered when determining the appropriate compliance schedule.

EPA's regulations at 40 CFR § 122.47 govern the use of compliance schedules in NPDES permits. Central among the requirements is that the effluent limitation(s) must be met "as soon as possible."[12] The EPA expects the permitting authority to include in the permit record a sound rationale for determining that any compliance schedule meets this requirement. However, the State Board has not made any finding, or delivered any analysis, to justify that compliance in 20 years is "as soon as possible." Moreover, if certain TMDLs currently provide for specific compliance schedules that require Caltrans to come into compliance now, or before 20 years, how can the State Board determine that 20 years is as soon as possible? We request that the State Board reevaluate Caltrans's compliance schedules, and incorporate the specific schedules for each applicable TMDL.

The Order also allows Caltrans to determine the prioritization process for which TMDLs will be met first. The Order states that Caltrans "will consider the final compliance deadlines under the TMDLs", but they are not required to follow the compliance deadlines. The Order acknowledges that the "State Water Board recognizes that the requirements in Attachment IV do not mirror all specific interim deadlines for studies, reports, and pollutant reductions in the TMDLs included to demonstrate progress toward meeting the WLAs."

The EPA expects that where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority should consider the schedule as it decides whether and how to establish enforceable interim requirements and interim dates in the permit. The State Board is not determining enforceable interim requirement dates, and is not considering the TMDLs already established compliance schedule. Instead, the Board is allowing Caltrans to determine its own compliance schedule (both interim and final). We request Caltrans not be given the discretion to determine its own compliance schedule, and instead, the State Board reevaluate the TMDLs' compliance schedules and incorporate the interim and final compliance dates directly into this Order.

3. TMDLs with specific WLAs pertaining to Caltrans should be incorporated into the Permit as numeric WQBELs.

[11] 40 C.F.R. § 122.44(d)(1)(vii)(B); *Communities*, 1 Cal. Rptr. 3d at 80 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)).
[12] 40 CFR 122.47(a)(I).

WLAs that apply directly to Caltrans must be incorporated into the Permit as numeric WQBELs. The State Board states that the Order "does not list the final required WLAs for each TMDL"[13] with the justification that WLAs "are of limited use in determining and enforcing the Department's specific responsibilities under the TMDL."[14]

Regrettably, this proposal is a complete reversal of the position taken when adopting the final Caltrans Permit in September 2012. The Final Permit, as currently adopted, states that "TMDL-specific permit requirements for all other TMDLs in Attachment IV will be incorporated into Attachment IV through a reopener as described in provisions E.4.b and E.11.c. below." However, the currently proposed Draft Order does not do as the Final Permit promised. As discussed above, the Order does not incorporate specific TMDL requirements, but rather, requires Caltrans to meet a specified number of CUs within 20 years.

Furthermore, the Final Permit stated that the State Board would require the "Department [to] implement all controls necessary to meet the WLAs or LAs included with the TMDL, or to meet the specifically assigned actions to implement the TMDL.[15]" This provision is redacted from the Draft Order, along with the Final Permit's statement that for "many of the TMDLs, WLAs, LAs, effluent limitations, implementation requirements, and monitoring requirements are specified in the adopted and approved Regional Water Board Basin Plans, which are incorporated by reference as enforceable parts of this Order."[16] Does this mean that the Final Permit, as currently adopted, requires specific TMDL requirements to be achieved by Caltrans, but if redacted as proposed in the Draft Order, Caltrans would only have to meet the requirements of the CU compliance program? If so, this is inappropriate.

The Order acknowledges that Caltrans has both specific and joint WLAs, which are discussed in the Order, but are not incorporated as Permit requirements. The Order states that while "the WLAs are not incorporated into Attachment IV as permit requirements, the discussion establishes that Attachment IV is consistent with the requirements and assumptions of the WLAs." It is within the State Board's discretion to determine that the Order is consistent with the requirements and assumptions of Caltrans's joint WLAs. However, determining the Order is consistent with Caltrans's specific WLAs when those specific WLAs are not incorporated as numeric WQBELs seems arbitrary and inconsistent with the law. Therefore, we request the State Board incorporate all Caltrans's specific WLAs into the Final Permit as numeric WQBELs.

The following two TMDLs serve as examples of the State Board's requirement to incorporate Caltrans's specific WLAs into the Order.

a. Los Angeles River Metals TMDL

Attachment IV is inconsistent with the requirements and assumptions of the WLAs established by the Los Angeles River Revised Metals TMDL in 2005 because the program fails to incorporate, and require Caltrans's immediate compliance with these WLAs.[17] While the Caltrans Permit states that "[w]here complete implementation requirements have not been specified in the TMDLs … it is necessary that specific requirements and clear deliverables be developed…",[18] there is no question that (1) the Los Angeles River Revised Metals TMDL WLAs are applicable to Caltrans, (2) Caltrans is required to

[13] Draft Order, pg. 25.
[14] *Id*.
[15] Draft Order, pg. 23.
[16] Draft Order, pg. 13.
[17] Caltrans Permit, Fact Sheet at 23-25; *see also* Caltrans Permit, Attach. IV.
[18] Caltrans Permit, Fact Sheet at 26.

immediately implement its WLAs compliance program set under the TMDL, and (3) the TMDL already includes complete implementation requirements.

The Metals TMDL sets forth specific wet and dry weather allocations for Caltrans's MS4 discharges.[19] Caltrans is required to begin its Metals TMDL compliance program immediately, as compliance with California Toxics Rule based criteria was due more than two years ago.[20] The implementation section of the Los Angeles River Revised Metals TMDL explicitly contemplates that re-issuance of the Caltrans MS4 Permit will implement the TMDL by incorporating the WLAs as permit terms.[21]

b. Los Angeles Trash TMDL

The LA Trash TMDL's specific Caltrans WLAs requires Caltrans to meet specific target trash reductions by specific dates. The Los Angeles Trash TMDL states that "…the Caltrans permit will be based on a phased reduction from the estimated current discharge (i.e., baseline) over a 9-year period until the final Waste Load Allocation (currently set at zero) is met."[22] This is not reflected in the State Board's Draft Order, nor is the Order's BMP compliance program sufficient to implement the LA Trash TMDL's WLAs. The LA River Trash TMDL was adopted in 2007, and final reductions are required by 2016. This Order would allow an additional 18 years for compliance, which is unjustified by the record. It should be noted that most municipalities are on schedule with compliance milestones for the LA Trash TMDL. Why should Caltrans be treated differently?

As provided above, Regional Water Boards have already gone to great lengths to determine the appropriate WLAs and compliance schedules specific to Caltrans. Yet the State Board has provided no reason why incorporating Caltrans specific WLAs into the Final Permit is infeasible. Until the Board provides an analysis, we request the Board incorporate Caltrans's specific WLAs and compliance schedules as numeric WQBELs and interim compliance terms into the Final Permit.

4. The Order should not excuse Caltrans's lack of effort to improve water quality to date.

The Order should not "excuse" Caltrans's lack of effort to improve water quality to date. Caltrans has been a responsible party to dozens of TMDLs around the state for many years. For instance the Ballona Creek Metals and Selenium TMDLs have been in effect since 2005. We are concerned with Caltrans's lack of on-the-ground progress to date. Accordingly, the Draft Order acknowledges that:

> "…the Department has devoted significant effort to coordination and exercises to determine the next steps, with limited progress in installing on-the-ground control measures to achieve actual water quality improvements."[23]

The Order does not outline any measures that Caltrans has taken to comply with TMDLs. The State Board should review what Caltrans has or has not done for each TMDL before they are given a compliance off-ramp for strict compliance with interim deadlines and final WLAs. Based on this evaluation, the State Board should determine if a 20 year compliance timeline is prudent across-the-board

[19] *See* Los Angeles River Revised Metals TMDL at 7, 8, and 10.
[20] *See* State Water Resources Control Board Memo dated September 15, 2006 Re: CTR Compliance Schedules ("the effect of the CTR's sunset provision was to 'limit the longest time period for compliance to ten years after the effective date of the CTR,' which is May 18, 2010"); *see also* Inland Surface Water Plan at 19.
[21] *See* Los Angeles River Revised Metals TMDL at 11.
[22] Trash Total Maximum Daily Loads for the Los Angeles River Watershed, Revised Draft. California Regional Water Quality Control Board, Los Angeles, July 2007, p. 21.
[23] Draft Order , pg. 21.

for all Caltrans's TMDL responsibilities. At a minimum, any measures taken to date should not apply as future "compliance units."

As discussed above, one clear-cut example of TMDLs that should not be included in the Order's TMDL compliance approach is the Los Angeles Trash and Metals TMDLs. As noted, both programs have specific WLAs and compliance schedules that Caltrans should already be in the process of implementing. They should not be permitted to use previous implementation to justify future compliance units.

5. The State Board needs to ensure all TMDLs are identified in the Order.

The State Board needs to ensure all of Caltrans's TMDLs are incorporated into the Final Permit. With just a cursory review of applicable TMDLs, we have identified 4 TMDL requirements that include Caltrans as a responsible party and are missing from Table 1. Although we did not have the resources to review the over 85 TMDLs in the draft Order, we are concerned that other regions may also have TMDLs missing. We request the State Board provide reasoning for not including the following TMDLs:

<u>Entire TMDLs Missing</u>

- Harbor Beaches of Ventura County (Kiddie Beach and Hobie Beach) Bacteria TMDL.

<u>TMDL Waste Load Allocations Missing</u>

- Ballona Creek Estuary Toxic Pollutants TMDL - WLAs for cadmium, copper, lead, silver, and zinc.
- Lake Sherwood TMDL - WLA for mercury
- Ballona Creek Wetlands TMDL for Sediment and Invasive Exotic Vegetation - load allocations for invasive exotic vegetation.

We also request the State Board to revise the Order to reflect newly adopted TMDL requirements that apply to Caltrans. For instance, the TMDLs for Bacterial Indicator Densities in Ballona Creek, Ballona Estuary, and Sepulveda Channel as well as the Marina del Rey Harbor Toxic Pollutant TMDL have recently been reconsidered. The Order does not reflect these newly adopted revisions.

Finally, the Order only includes final WLAs and deadlines for applicable TMDLs. The inclusion of final compliance points is imperative for reducing impairments; however, the interim compliance points are also essential for tracking progress. Thus, interim WLAs compliance points outlined in all TMDLs' implementation schedules should be included in the Order.

6. Minimizing Caltrans's overall contribution to water quality impairment throughout the Order sets a bad precedent and should not be trivialized.

As stated in the Final Permit, "[d]ischarges of storm water and non-storm water from Department properties, facilities, and activities have been shown to contribute pollutants to waters of the United States. As such, these discharges may be causing or threatening to cause violations of water quality objectives and can have damaging effects on human health and aquatic ecosystems."[24] However, inappropriately, the Order repeatedly seems to lessen the importance of Caltrans's pollution contribution with no substantiation provided. For example:

> "In most of the relevant TMDLs, the Department's contribution to impairment is a small portion of the overall contribution from multiple sources(less than 5 percent)."[25] Or "The Department is a relatively minor source of pollutants and small percentage of the watershed."[26]

[24] Order No. 2012-001-DWQ at 8.
[25] Draft Order, pg. 20.

Further, the Draft TMDL Program appears to offer Caltrans a "reward" for being a responsible party to many TMDLs statewide.

> "…because the Department must comply with numerous TMDLs, the Department must phase in implementation requirements for TMDLs over several years."[27]

This type of reasoning sets an extremely bad precedent. The fact that Caltrans is a source of pollution in many waterbodies throughout the state does not mean that their contribution is any less important than any other responsible party. There are many municipalities in California that are also responsible parties under numerous TMDLs, yet they are appropriately required to meet their WLAs under approved deadlines.

With over 15,000 miles of state highways in California and responsibility for over 85 TMDLs, the contribution of Caltrans to the state's water quality impairments should not be trivialized. Thus, these statements should be removed for the Draft Order.

7. The Compliance Unit structure is flawed and needs to accurately access Caltrans's responsibility to improve water quality impairments.

a. Compliance Unit Requirement

The Order requires Caltrans to "…implement control measures to achieve 1650 Compliance Units ("CUs") per year [where] [o]ne CU is equivalent to one acre of the Department's ROW, from which runoff is retained, treated, or otherwise controlled prior to discharge…".[28] While we acknowledge staff's attempt at a creative implementation approach, the justification for the proposal is very weak and un-substantiated in the record.

First, there is mention that the Caltrans's right-of-way (ROW) within TMDL watersheds is 68,000 acres. Where is the documentation and associated maps used to derive this estimate? There is also the assumption that 32 percent of the acres in the ROW do not need to be treated, which is somehow derived from the percentage of Areas of Special Biological Significance (ASBS) sites that were found to be inaccessible. How does the State Board correlate "inaccessible" sites to those that are not necessary to be treated to meet Caltrans's TMDL responsibilities? This proposal needs more clarification.

The second approach that is discussed and is ultimately recommended by staff also has serious flaws. It appears that Caltrans's proposed arbitrary CU commitments total 1650 CUs each year. How did staff ensure that this proposal meets the assumptions of the underlying WLAs. Again, an unsubstantiated total ROW of 33,000 acres is provided. A footnote states that Caltrans developed an average cost per BMP/acre value that again does not include any documentation or references. Staff concludes without adequate discussion that this is "a reasonable balance of resources and environmental protection, and will be sufficient to address the TMDLs…in the foreseeable future."[29] This approach is unscientific and does not provide any type of assurance that TMDL WLAs will ultimately be met. Also, it is unclear what design criteria will be used for the BMPs.

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[26] Draft Order, pg. 27.
[27] Draft Order, pg. 21.
[28] Draft Order, pg. 22.
[29] Draft Order, pg. 23.

If the State Board moves forward with the CU approach, further documentation should be provided for all of the assumptions made to arrive at the final CU annual requirement. The monitoring program should be sufficient to determine throughout the implementation process that the assumptions were, in fact, correct and that sufficient progress towards TMDL compliance is being made. In addition, we strongly urge the State Board to include a significant margin of safety in their calculation for an annual CU to account for the large uncertainty in this approach.

b. Credit Structure

The Order allows for a "50% discount" for participation in "coordinated efforts."[30] While leveraging funds and collaborating on projects is often prudent, the "discount" proposed by the State Board is not justified. The dollar amount spent on implementation does not necessarily correlate to the effectiveness of treatment, and hence the environmental benefit. Also, how does this proposal ensure that the best, most effective projects are implemented? How do we ensure that credit is not taken for projects that have already been completed or projects that are already underway? Again, this is another unsubstantiated factor that lessons the responsibility of Caltrans. We urge the State Board to remove the credit system. At a minimum, there needs to be strict criteria in place for projects that would qualify for a credit.

c. Effectiveness Assessment and Operation and Maintenance

Proper assessment of BMP effectiveness and continued operation and maintenance of BMPs is critical for the effectiveness of an implementation program. The Order should outline this expectation explicitly. Caltrans should not be allowed to simply complete the 1650 CU obligation and be in compliance without evaluating and maintaining its TMDL program.

We recommend that the Order outline minimum BMP performance standards. One of the most significant shortcomings in previous stormwater permits is the lack of performance-based criteria for BMPs. As a result, BMPs are added as part of permit requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. An effective way to ensure the success of stormwater programs and the attainment of water quality standards is to assess BMPs based on performance. Flow-based design criteria are simply not adequate to ensure that water quality standards are consistently met because flow, and corresponding BMP size, is but one factor determining BMP effectiveness.

d. Program Objective

The draft Order states that "[t]he determination of the number of CUs the Department must complete each year is based on the objective of addressing every TMDL." Instead the State Board should maintain the ultimate objective of "complying with" every TMDL." Using this as the standard, the State Board should determine how the proposed approach will lead to meeting approved WLAs and associated timelines.

8. The State Board needs to address additional miscellaneous issues.

a. Discharges with the Highest Impact

The Draft TMDL Program states that "…phase-in must be accomplished in a manner that addresses discharges with the highest impact on water quality first." How will the set of qualitative criteria be developed? How is "percent pollution reduction needed to achieve the WLA" evaluated? Does the more reduction needed equate to the higher priority? As these criteria are a key part in the proposed Order, we

[30] Draft Order, pg. 24.

believe that the Board should approve the criteria with opportunity for public comment. Further, we support the criterion that "multi-benefit projects that provide benefits in addition to water quality" would be prioritized. However, how will the State Board ensure that this occurs?

b. Monitoring

The draft Order requires monitoring necessary to determine compliance with effluent limits. However, it also states that "[w]here monitoring limitations are specified as BMPs, the permit should specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved."[31] While we agree that BMP performance should be assessed, the ultimate goal of the monitoring program should be to assess whether or not interim and final WLAs are being met, and if not, the progress towards meeting these allocations. An evaluation during the permit reissuance application is not sufficient. Thus the Draft TMDL Program should be modified to include this critical goal.

The draft Order requires a monitoring plan by January 2015 for those TMDLs without a regional board-adopted program in place. The public should have the opportunity to evaluate these draft plans prior to approval.

c. Water Effects Ratio Studies

The draft Order discusses Water Effect Ratios (WER) Studies for Metals in the "Metals Control Requirements" Section. The proposal specifically states, "The Department is encouraged to participate in the optional WER studies to develop improved and cost-effective regulation to address metals in discharges."[32] The Order then asks for these proposed studies to be submitted by January 1, 2018. This section is inappropriate and should be removed.

While Caltrans is free to conduct a WER study, this should be done of their own accord and not encouraged by the Board and touted as a "cost-effective regulation." We have found that WER studies are typically conducted with the goal of weakening protections and only represent a small "snap shot" in time. Instead money would be more wisely spent to implement pollution reducing projects. Thus, the permit should not overtly encourage these studies.

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To reiterate, we recognize and appreciate the State Board's efforts to move Caltrans towards actual water quality improvements. But at the end of the day, the State Board needs to ensure Caltrans is meeting its legal requirements to comply with WLAs in applicable TMDLs. Anything less than full compliance does not meet the standards of the Clean Water Act. We look forward to working with you and your staff to ensure the Final Permit will meet these requirements and serves to protect California's water resources.

Sincerely,

Sean Bothwell
Staff Attorney
California Coastkeeper Alliance

Kirsten James
Science and Policy Director, Water Quality
Heal the Bay

[31] Draft Order, pg. 25.
[32] Draft Order, pg. 177.