



COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

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January 21, 2015

IN REPLY PLEASE

REFER TO FILE: WM-9

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

Dear Ms. Townsend:

**COMMENT LETTER IN RESPONSE TO PROPOSED STATE WATER
RESOURCES CONTROL BOARD DRAFT ORDER IN THE MATTER OF REVIEW
OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ORDER
NO. R4-2012-0175, NPDES PERMIT NO. CAS004001**

The County of Los Angeles and Los Angeles County Flood Control District appreciate the opportunity to provide written comments in reference to the State Water Resources Control Board's Draft Order dated November 21, 2014. The Draft Order, which generally upholds the 2012 Los Angeles County Municipal Separate Storm Sewer System National Pollutant Discharge Elimination System Permit, is in response to issues raised by 37 petitions challenging various provisions of the Permit. The County of Los Angeles and the Los Angeles County Flood Control District are not among the petitioners. Attached are our written comments in support of the State Water Board's Draft Order and the continued rigorous implementation of the 2012 Los Angeles MS4 Permit.

If you have any questions, please contact me at (626) 458-4300 or ageorge@dpw.lacounty.gov or your staff may contact Mr. Paul Alva at (626) 458-4325 or palva@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

ANGELA R. GEORGE
Assistant Deputy Director
Watershed Management Division

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County of Los Angeles and Los Angeles County Flood Control District Comment Letter Supporting the State Board's MS4 Petition Proposed Order

The County of Los Angeles (County) and Los Angeles County Flood Control District (LACFCD) support the State Board's Draft Order and continue to support a rigorous implementation of the 2012 LA MS4 Permit. In short, the County and LACFCD support implementation of the Permit for the following reasons:

- The Permit improves and protects water quality by incentivizing Permittees to increase stormwater reuse.
- The Permit encourages drought planning and sustainable communities.
- The WMP/EWMP provisions are generating unprecedented cooperation and action by the Permittees.
- The Permit contains an 85th percentile design storm that is not only a technically feasible and reasonable means for implementing CWA requirements, but is also a critical component of the success of this Permit.
- The Permit is consistent with EPA-endorsed principles and sets the national standard.

Introduction

The County and LACFCD appreciate the opportunity to comment on the proposed State of California State Water Resources Control Board Order WQ 2015-XX ("Draft Order") In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS00400, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except those Discharges Originating from the City of Long Beach MS4 ("2012 LA MS4 Permit" or "Permit") issued by the California Regional Water Quality Control Board, Los Angeles Region SWRCB/OCC FILES A-2236(a)-(kk). The State Water Resources Control Board ("State Board") issued the Draft Order in response to 37 petitions challenging the 2012 LA MS4 Permit. The County and LACFCD are not among the 37 petitioners.

In addition to submitting written comments via this letter, the County and LACFCD were represented by the offices of Los Angeles County Board Supervisors Sheila Kuehl and Hilda Solis at the State Board workshop regarding the Draft Order on December 16, 2014. It was apparent from the workshop comments that, in contrast to the long and contentious history of stormwater management in California, there is significant support for the Permit and the Draft Order. The County and LACFCD, among other Permittees, commented that the Los Angeles Regional Water Quality Control Board (Regional Board) has issued an MS4 permit that uniquely and effectively incentivizes the reuse of stormwater for water conservation while fostering unprecedented cooperation across the region.

The County and LACFCD support the State Board's Draft Order and continue to support a rigorous implementation of the 2012 LA MS4 Permit. The Permit is a tool to assist the County and LACFCD with their commitment to improve the health of water bodies throughout the County. The County and LACFCD's goal is to address flood risk management, water quality, water conservation, open space, and recreational needs through an integrated, multi-purpose approach that is consistent with watershed management principles so that multi-purpose projects may be implemented over time to achieve improved water quality results. The 2012 LA MS4 Permit provides the opportunity to achieve that goal. The Draft Order issued by the State Board includes some modifications and additional findings that uphold and strengthen the fundamental provisions of the 2012 LA MS4 Permit.

Although the 2012 LA MS4 Permit continues the Regional Board's history of permitting stormwater, it has symbolically and legally ushered in a new era. As the permit simply states, "[t]his Order supersedes Order No. 01-182 as amended, except for enforcement purposes." (2012 LA MS4 Permit, Part II.X.) However, the Permit supersedes not just the prior permit, but also the very mechanism and culture of planning and facilitating water quality improvements throughout Los Angeles County. The expiration of the prior permit marked the end of a constituent-by-constituent approach and ushered in coordinated regional approaches to water quality improvements and stormwater management.

Through the submission of this comment letter, the County and LACFCD endeavor to illustrate how the Permit and Draft Order work together to create a clear set of rigorous requirements in an effort to build a robust and environmentally sound approach to clean water throughout Los Angeles County. This permit is already working and will continue to work if it remains intact through this petition process.

The 2012 LA MS4 Permit and Draft Order View Stormwater as a Resource

Stormwater is typically very difficult to manage, especially in regions like southern California where large quantities of runoff are discharged over short periods of time by intense rain events. In addition, historical approaches to stormwater permit compliance tend to be cost-prohibitive with a single focus on the challenges and seemingly impossible task of cleaning stormwater. However, instead of issuing another permit that generates a risk that even the most diligent Permittees may remain out of compliance, the 2012 LA MS4 Permit brings together Permittees in an effort to plan for water quality management and drought response on a regional level with multiple benefits as a result.

The Draft Order recognizes that the prior permitting scheme approached stormwater runoff only as a significant source of water pollution, completely missing the opportunity to embrace stormwater as a potentially significant source of water supply. Infiltration of stormwater on a regional basis is an important move towards improving the sustainability of our communities throughout Los Angeles County. We rely upon groundwater for much of our water supply, with 30 to 40 percent of the water used in

Los Angeles County pumped from groundwater supplies. Regional and coordinated efforts to enhance groundwater recharge with large infiltration areas and projects throughout Los Angeles County such as those incentivized through the 2012 LA MS4 Permit can improve water quality while increasing water supply along with providing various other benefits.

Population growth combined with periodic droughts has seriously depleted groundwater supplies. The 2012 LA MS4 Permit is designed to combat drought conditions and increase groundwater supplies by encouraging projects that capture stormwater during rain events. This new and visionary regulatory approach also improves and protects water quality by incentivizing Permittees to better utilize stormwater reuse that reduces runoff and diverts polluted stormwater before the pollutants are discharged into receiving waters. The 2012 LA MS4 Permit guides municipal stormwater Permittees toward a program of improved water quality and increased stormwater reuse opportunities. Stormwater management tools such as bioretention and infiltration can address multiple constituents that are subject to TMDLs and other requirements, providing a single solution to many problems, rather than a constituent-by-constituent approach where opportunities to leverage resources and address multiple-priority pollutants may be missed. This regional approach can also address those priority pollutants that are not currently covered by TMDLs. However, in order to bring together the expertise, funding, and cooperation of the many local agencies required to implement a regional plan, Permittees must be afforded the time and opportunity to identify and implement region-wide solutions.

The County and LACFCD strongly support the Water Boards' effort to improve water quality through the Permit's use of a cooperative watershed-based approach that also addresses the current and future water supply issues of the State. The Permit also represents a more balanced approach and should steer a path away from the continuous and costly fighting over water quality regulations. The new era ushered in by the 2012 LA MS4 Permit allows Permittees the opportunity and incentive to invest those funds in development and implementation of provisions of the Permit that benefit the region in a multitude of ways, instead of investing in litigation. The 2012 LA MS4 Permit and Draft Order together create a clear set of rigorous and clear requirements in an effort to build a robust and environmentally sound approach to clean water, removing ambiguous regulatory targets that can cause confusion not just for Permittees, but also in administrative and judicial proceedings. Clear goals and requirements help to avoid irregular or arbitrary implementation of stormwater projects and water quality improvements that are not the highest and best use of public resources.

The 2012 LA MS4 Permit Has Sparked Unprecedented Action

The watershed approach employed by the 2012 LA MS4 Permit is drastically different from that in the 2001 permit. The progress made to date as a result of the 2012 LA MS4 Permit tells the story: six months into the adoption of the 2012 Permit, 85 of the 86 Permittees submitted 31 Notices of Intent to the Regional Board to pursue either

WMPs or EWMPs. In July 2013, the Regional Board formed a Technical Advisory Committee, which met eight times between the summer of 2013 to the summer of 2014 to help clarify expectations and facilitate the development of the watershed plans. In June 2014, Permittees submitted to the Regional Board seven collaborative WMP plans, ten individual WMP plans, 12 EWMP work plans, and 30 monitoring plans. Of the 19 collaborative WMP and EWMP groups, the County and the LACFCD participate in 12 and 18, respectively.

During this intensive planning effort, Permittees also initiated and continued a number of implementation activities pursuant the 2012 LA MS4 Permit. For example, several Permittees, including the County and the LACFCD, worked with the Regional Board to obtain Time Schedule Orders for those TMDLs whose final effluent limitation deadlines have passed and for which additional time was needed to come into compliance. Permittees continued to implement the core programmatic control measures begun with earlier permits, such as public education and inspections. Additionally, a number of Permittees, including the County, have adopted Low Impact Development ordinances and green streets policies. The EWMP Permittees, including the County and the LACFCD, have been implementing “early action” projects, which are structural best management practices required by the permit given the extended planning period for the EWMP.

The 2012 LA MS4 Permit along with the Draft Order incentivizes the creation of multi-benefit projects across Los Angeles County. Permittees are currently spending significant resources planning for these projects because the permit has generated unprecedented momentum in the region to assess opportunities, on a large scale, for capturing and infiltrating urban and stormwater runoff that the County, the LACFCD, and our partners have done in the past on a more limited basis. An example of one of these past projects is the award-winning Sun Valley Park Infiltration Project, in which the LACFCD and the City of Los Angeles resolved chronic flooding in a neighborhood by capturing stormwater and infiltrating it into the groundwater through infiltration basins constructed in a local park. In addition to mitigating flood hazards, this project also improved stormwater quality, increased local drinking water supply, and improved recreational amenities in the park.

Another example is the Rory M. Shaw Wetlands Park, a collaborative effort of the LACFCD, the City of Los Angeles, and the Sun Valley Watershed Stakeholders Group. Once complete, the estimated \$52 million project is expected to treat and conserve nearly 600 acre-feet of urban and stormwater runoff annually from a drainage area over 900 acres, as well as enhance native vegetation, create wildlife habitat, and provide 46 acres of open, recreational space including trails and ball fields.

Similarly, the County has incorporated green street best management practices in 20 street projects since 2009 to make its unincorporated communities more sustainable. For instance, the Brandon Street Project east of the City of Pasadena is designed to augment groundwater supply and reduce pollutant loading into the Los Angeles River. The project infiltrates runoff from streets and private property through permeable

sidewalks and gutters, sediment filtration catch basins, bioretention planter boxes, and a 3,750-cubic-foot underground infiltration basin. Trees and drought-tolerant plants line the street to increase shade and conserve water usage.

The 2012 Permit and the Draft Order incentivize the creation of these types of projects across Los Angeles County and encourage their implementation on a larger scale than has been possible in the past. This incentive-based approach is working and should be allowed to continue.

Watershed Management Program/Enhanced Watershed Management Program

The 2012 LA MS4 Permit includes receiving water limitations provisions that are consistent with the State Board's direction in State Water Board Order WQ 99-05 ("Order WQ 99-05") in Part V.A. of the 2012 LA MS4 Permit. Order WQ 99-05 requires compliance with receiving water limitations, but in lieu of immediate compliance, the State Board established receiving water limitations provisions that prescribe an iterative process where exceedances of a water quality standard triggers a process of BMP improvements. However, the State Board has stated in the Draft Order that compliance with that iterative process is not compliance with receiving water limitations. According to the State Board, when a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process. (Draft Order, p. 12.)

Nonetheless, the State Board has acknowledged that receiving water limitations provisions of Order WQ 99-05 may result in many years of permit noncompliance, "because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges." (Draft Order, p. 15.) Accordingly, the 2012 LA MS4 Permit provides Watershed Management Program/Enhanced Watershed Management Program ("WMP/EWMP") provisions as "a well-defined, transparent, and finite alternative path to permit compliance with significant undertakings beyond the iterative process." (Draft Order, p. 15.) The 2012 LA MS4 Permit includes WMP/EWMP provisions as an appropriate alternative to immediate compliance with receiving water limitations because WMP/EWMPs require the implementation of enforceable compliance schedules with monitoring and adaptive management to verify compliance with all provisions of the Permit.

WMP/EWMP Provisions are Consistent with Anti-backsliding and Antidegradation Requirements

The WMP/EWMP provisions are consistent with anti-backsliding and antidegradation requirements. The inclusion of the WMP/EWMP in the LA MS4 Permit does not violate the statutory (Clean Water Act section 402(o)) or regulatory (40 C.F.R. section

122.44(l)) anti-backsliding provisions of the Clean Water Act (CWA) and Federal regulations.

Section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment when there is a newly revised effluent limitation guideline, which is inapplicable because receiving water limitations are not effluent limitations and the WMP/EWMP is not derived from an effluent limitation guideline.

The regulatory anti-backsliding provision is also inapplicable to the Permit; it prohibits relaxing effluent limitations imposed pursuant to CWA sections 301(b)(1)(C) or 303(d) or (e), while the receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the CWA. The regulatory anti-backsliding provisions do not apply to the Permit. However, the Draft Order concluded that even assuming regulatory anti-backsliding provisions did apply, the WMP/EWMP provisions would qualify for an exception to the provisions. (Draft Order, p. 20.) The CWA and Federal regulations contain exceptions to anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time. The development of 33 watershed-based TMDLs adopted since 2001 and the shift from viewing stormwater as a liability to a regional asset are new information available to the Regional Board that fundamentally shaped the WMP/EWMP alternative of the 2012 LA MS4 Permit. (See Draft Order, p. 20.) The EPA November 2014 Guidance Memorandum similarly concludes that states and the EPA have gained considerable experience and better information since 2002 in developing TMDLs and wasteload allocations that address stormwater sources. (See EPA November 2014 Guidance Memorandum, p. 2.)

Additionally, as the Draft Order finds, the 2012 LA MS4 Permit meets antidegradation requirements. The Permit maintains and improves the level of control achieved under the 2001 LA MS4 permit. The Draft Order finds that, based on the antidegradation baseline of 1968, the provisions of the Permit ensure that water quality necessary to protect beneficial uses is maintained and protected and, therefore, amends Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, to include its own findings—at a generalized level because there is insufficient data available for a complete analysis for each water body-pollutant combination—based on the record. (Draft Order, pp. 25-29.)

WMP/EWMP is an Appropriate Alternative Approach to Compliance

The WMP/EWMP provisions allow a Permittee to choose an integrated and collaborative watershed-based approach to meeting the requirements of the 2012 LA MS4 Permit, including the receiving water limitations. Under certain conditions Permittees may be deemed in compliance with the receiving water limitations, the water quality-based effluent limitations (“WQBELs”) and other TMDL-specific limitations by fully implementing the WMP/EWMP. (See 2012 LA MS4 Permit, Parts VI.C.2.b,

VI.C.3.a, and VI.E.2.e.i.) The 2012 LA MS4 Permit authorizes Permittees to propose control measures and a schedule for implementation of the seven EPA-established TMDLs that is as short as possible as part of a WMP/EWMP. If an adequate WMP/EWMP is not submitted the Permittee is required to demonstrate compliance with the wasteload allocations immediately. (2012 LA MS4 Permit, Part VI.E.3.e.)

In addition, the 2012 LA MS4 Permit includes clear and concrete milestones and deadlines. For water body-pollutant combinations addressed by TMDLs, the Permit requires the incorporation of compliance schedules in Attachments L-R of the Permit, and as necessary, to develop interim milestones and dates for their achievement. (2012 LA MS4 Permit, Part VI.C.5.c.) For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the CWA section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Permit requires that the WMP /EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant. (Part VI.C.2.a.i.)

Where receiving water limitations exceedances are not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Permit requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. (2012 LA MS4 Permit, Part VI.C.5.c.iii.(3).) The WMP /EWMP must also incorporate a final date for achievement of receiving water limitations that is as soon as possible. (2012 LA MS4 Permit, Part VI.C.5.c.iii.(3)(b).)

These compliance schedules are not arbitrary, but are instead appropriately created based on TMDLs, pollutant class, and measurable criteria or indicators. Additionally, compliance schedules, as well as any extensions of compliance deadlines and interim milestones, are subject to Regional Board Executive Officer approval and public review. (2012 LA MS4 Permit, Parts VI.C.4.c, VI.C.8, VI.C.6.a.)

Permittees have a strong incentive to implement control measures that will bring them into compliance by the established deadline because where no extension is available, as with final deadlines established in TMDLs, or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply immediately with the receiving water limitations, WQBELs and other TMDL-specific limitations.

WMP/EWMP Provisions are Not "Safe Harbors"

A safe harbor is generally any place or situation that offers refuge or protection. In a regulatory context, a safe harbor can be used to shield those regulated. The 2012 LA MS4 does not contain a safe harbor under any definition and is thus properly supported by the Draft Order. A Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with

interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided the Permittee meets certain conditions, during both development and implementation of the WMP/EWMP. (2012 LA MS4 Permit, Part VI.C.5.c.iii.(3)(b).) This is not a “safe harbor” provision because the WMP/EWMP provisions are consistent with the CWA and federal regulations and the Permittee is deemed in compliance with the receiving water limitations and with interim WQBELs only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP. The WMP/EWMP provisions do not allow Permittees to simply “try” to meet water quality standards, but instead require the actual design and implementation of WMP/EWMPs to meet water quality standards. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP /EWMP, then the Permittee must instead demonstrate compliance with receiving water limitations and with applicable interim WQBELs. (Parts VI.C.2.d, VI.C.3.b, and VI.E.2.d.i.(4)(d).)

The provisions sufficiently constrain the planning phase because compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP. Compliance with deadlines is extremely rigid. In fact, because the Permit currently does not provide for extensions or modifications of WMP/EWMP development and implementation deadlines, the Draft Order adds Part VI.C.4.g. to provide the Regional Board or its Executive Officer discretion to grant a short extension of interim or final deadlines. (Draft Order, p. 47.) However, Permittees that are provided these extensions will not be deemed in compliance with the applicable receiving water limitations and WQBELs during this period of extension. (Draft Order, p. 47.)

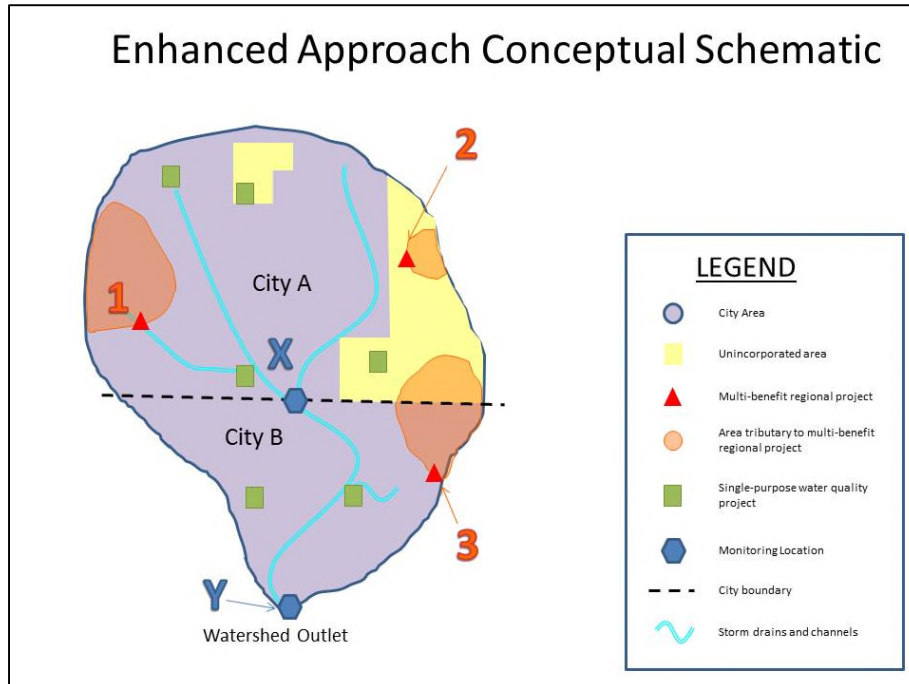
Implementation of nonstructural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation. (2012 LA MS4 Permit, Part VI.C.2.c.) The Draft Order amends the Permit to specify that at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. (Draft Order, p. 45.)

Although the Permit is sufficiently stringent in requiring achievement of water quality standards, the Draft Order further strengthens compliance requirements by requiring Permittees to have a plan in place for any “gaps” in compliance that may emerge. (Draft Order, pp. 43-44.) The Draft Order anticipates that implementation of stormwater retention projects will bring the drainage area most or all the way to achievement of water quality standards, however, where there is still a gap in required water quality improvement the Draft Order requires that Permittees have an approved plan in place to close the gap with additional control measures in order to be considered in compliance with the WQBEL or other TMDL-specific limitation. (Draft Order, p. 43.) The required plan for additional control measures to reach compliance should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP. (Draft Order, p. 43.)

Part VI.E.2.e.i.(4) of the 2012 LA MS4 Permit provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if “[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-stormwater and (ii) all stormwater runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water.” (2012 LA MS4 Permit, Part VI.E.2.e.i.(4).) The Draft Order clarifies that Part VI.E.2.e.i.(4) requires Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the stormwater retention approach. (Draft Order, p. 41.) The EWMP, as defined by the permit, is a program where permittees identify multi-benefit projects that will infiltrate all non-stormwater runoff and all stormwater runoff from the 85th percentile 24-hour storm event for the drainage areas tributary to those multi-benefit projects. (2012 LA MS4 Permit, Part VI.C.1g)

EWMP Implementation

The schematic below illustrates a hypothetical scenario where four Permittees - City A, City B (both shown in purple), the County, and the LACFCD – have joined to develop an EWMP. Through this hypothetical planning process, the Permittees have collectively identified three multi-benefit regional projects and six “single-purpose” water quality projects. Pursuant to the 2012 LA MS4 Permit, the three multi-benefit regional projects are designed to capture all non-stormwater runoff and all stormwater runoff from the 85th percentile 24-hour storm event from the drainage areas (shown shaded in peach). The six “single-purpose” projects are located in drainage areas where retention of the 85th percentile 24-hour storm event is not feasible and these projects are subject to the Reasonable Assurance Analysis. The Permittees conduct monitoring at points X and Y pursuant to an approved CIMP to determine whether or not the final effluent limitations and final receiving water limitations are met. If they are not met, Permittees will propose a plan for additional control measures to achieve these final limitations and submit the plan to the Executive Officer of the Regional Board for approval within 30 days of the deadline. It is anticipated that any additional control measures (if necessary) will be outside of the peach shaded areas, as the permittees will have already expended significant funds in those areas to capture all non-stormwater runoff and all stormwater runoff from the 85th percentile design storm.



The EWMP Design Storm is a Critical Component of the Permit

Use of an 85th percentile design storm is a technically feasible and reasonable means for implementing CWA requirements. Design storms are in fact a widely used stormwater tool. For example, this Board has required an 85th percentile design storm in the General Permit for Stormwater Discharges Associated with Industrial Activities Order NPDES No. CAS000001 (“Industrial General Permit”). The Industrial General Permit provides that all new, volume-based treatment BMPs shall be designed to treat the volume of runoff produced from an 85th percentile 24-hour storm event, (this is the same as the design storm adopted by the Regional Board in the 2012 LA MS4 Permit, though the discharge volume generally is smaller because of the smaller drainage areas of industrial facilities). (See General Permit for Stormwater Discharges Associated With Industrial Activities; NPDES No. CAS000001, p. 36.)

Another example of a design storm used to determine compliance is a CWA stormwater case consent decree that resolved litigation. *Santa Monica Baykeeper v. Kramer Metals, Inc.*, was a CWA citizen suit brought by Los Angeles Waterkeeper, then known as the Santa Monica Baykeeper, against an industrial stormwater permittee whose discharges flow through the MS4 and then into the Los Angeles River. The federal consent decree includes what is termed as an “Interim Qualifying Storm Event” for the first year of the consent decree: “Kramer Inc. shall eliminate stormwater discharges from the Kramer 1760 facility for all storms up to and including the 5 year, 24 hour storm

event.” (Consent Decree, State Board Office of Enforcement Website,¹.) Subsequent wet seasons applied a “Discharge Minimization Qualifying Storm Event” as defined by “all storms up to and including the 25 year, 24 hour storm event.” (*Id.* at p. 8.) Also, the Stipulation Modifying Consent Decree included the requirement that infiltration and containment plans be designed and operated (throughout the year) to infiltrate at least 95% of the annual runoff volume. (Kramer Metals Stipulation Modifying Consent Decree, Part A.1.)

The design storm element of the EWMP in the 2012 LA MS4 Permit is a critical element of the incentivized stormwater infiltration projects. The Draft Order confirms the State Board’s support of the EWMP’s use of the stormwater retention approach as a technical requirement because retention of stormwater is likely to be an effective path to water quality improvement and has additional benefits including recharge of groundwater. (Draft Order, p. 40.) The Draft Order again strengthens the Permit by revising Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the stormwater retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations. (Draft Order, p. 42.) The 2012 LA MS4 Permit requires monitoring and adaptive management to verify compliance with all provisions of the Permit. (Draft Order, pp. 41-42.) Permittees will verify that the stormwater retention approach will result in achievement of final WQBELs and other TMDL-specific limitations through the required monitoring and adapt the EWMP in response to the monitoring.

The EWMP compliance mechanism is a critical cog in the incentive wheel and provides a clear path to compliance. Ambiguous regulatory targets and permits can cause confusion not just for Permittees but also in administrative and judicial enforcement proceedings. If standards for compliance with the permit are unclear, enforcement proceedings could bring confusion and uncertainty to the courts as well. This confusion may compel irregular or arbitrary implementation of stormwater projects and water quality improvements and is not a reasonable use of public resources. The EWMP is just one example of how the Permit and Draft Order set forth an unambiguous path to compliance.

Accountability and Rigor

Accountability is built into the Permit as WMP/EWMPs are subject to a public review and comment period. (Parts VI.C.4.d, VI.C.6, and VI.A.5.) Additionally, proper accountability of WMP/EWMP compliance schedules and deadlines is provided for in the 2012 LA MS4 Permit by requiring the proposed compliance schedule of the WMP/EWMP to be subject to public review and comment, and approval by the Regional Board or its Executive Officer. (2012 LA MS4 Permit, Parts VI.C.4.c, VI.C.5.b.) The 2012 LA MS4 Permit allows for proposal of compliance schedules where the final date

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http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/citizen_suits/attachment_d/kramer_metals.pdf

for achieving the receiving water limitations is as soon as possible. (2012 LA MS4 Permit, Part VI.C.5.c.iii.(3)(b).) Extensions of compliance deadlines and interim milestones require Regional Board Executive Officer approval and are subject to a 30-day public comment period. (2012 LA MS4 Permit, Part VI.C.5.b.) These public comment periods allow interested persons to remark on any requested extensions and to seek review of the Executive Officer's decision by the Regional Board. The Draft Order recognizes that this is an appropriate balance because WMP/EWMP is subject to an adaptive management process and Permittees may need to propose modifications to compliance deadlines and interim milestones in the Annual Reports. (Draft Order, p. 53.)

The adaptive management provisions of the Permit ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP /EWMP and implement those modifications. (2012 LA MS4 Permit, Part VI.C.8.) The requirement for a reasonable assurance analysis is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. (2012 LA MS4 Permit, Part VI.C.5.b.iv.(5).) The Draft Order recognizes that the Regional Board expects that Permit required monitoring and adaptive management will continue to inform the Regional Board regarding the efficacy of this stormwater retention approach. (Draft Order, p.42.) The Draft Order further recognizes that public projects requiring investment of the magnitude of a 85th percentile retention plan are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations. (Draft Order, p. 42.) Although the Permit provides sufficient accountability through its adaptive management approach, stormwater retention approach, and public review, the Draft Order further strengthens its accountability by adding a provision that requires Permittees to resubmit the WMP/EWMP, along with updated reasonable assurance analysis, at an interval to be determined by the Regional Board, but not to exceed every six years. (Draft Order, pp. 37-38.) The Permittee will be required to submit a full revised package to the Regional Board Executive Officer for approval, following public review. (Draft Order, p. 38.)

The WMP/EWMP provisions "include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs." (Draft Order, p. 72.) The County and LACFCD believe that the Draft Order properly upholds "the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations" and directs all regional water boards statewide to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward. (Draft Order, p. 48.)

Enforcement Orders

Some petitioners have contended that WMP/EWMP compliance schedule provisions should be removed so that separate enforcement actions may drive Permittee compliance with water quality standards. However, this separate enforcement approach is an impracticable, discouraging and costly approach. The Draft Order appropriately finds that the ultimate goal of MS4 permitting may not in all cases be achievable within the 5-year permit cycle and that it is appropriate to regulate Permittees in a “manner that will allow them to strive for compliance with permit terms.” (Draft Order, pp. 30-31.) The Draft Order properly identifies that “[g]enerally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition.” (Draft Order, p. 31.) MS4 permits should not be intended to force failure on even the most diligent and good faith efforts to achieve permit requirements.

Additionally, the Permit already allows the opportunity to request time schedule orders (“TSOs”) for those Permittees out of compliance with final WQBELs and other TMDL-specific limitations. (2012 LA MS4 Permit, Part VI.E.4.) Cleanup and abatement orders, cease and desist orders, and TSOs can be useful to achieve compliance with water quality standards and are available for use by the Regional Board where Permittees have failed to meet the compliance schedules established. However, the County and LACFCD agree with the Draft Order’s conclusion that building a TSO structure into the permit itself, rather than through multiple separate enforcement orders, is a more efficient regulatory structure. (Draft Order, p. 30.) The Draft Order asserts the State Board’s intention to encourage a watershed-based approach to addressing stormwater issues statewide and its belief that it would be contrary to that intention to structure the watershed-based requirements as an enforcement order. (Draft Order, p. 31.) The Draft Order does clarify the use of the TSO by adding a provision that gives a Permittee the ability to request a TSO if a Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee’s WMP/EWMP by adding a new Part VI.C.6.b. and revising Part VI.E.4.b. (Draft Order, p. 31.)

The 2012 LA MS4 Permit not only offers solutions to control the discharge of pollutants, but also imposes consequences for exceedances of water quality standards. The alternative path to compliance with water quality standards complements and improves upon the Best Management Practice-based iterative process.

The 2012 LA MS4 Permit and Draft Order are Consistent with EPA’s 2014 Stormwater Permit Guidance

As the Draft Order explains, the 2012 LA MS4 Permit is a model for California. The Permit also appropriately parallels some of the most advanced stormwater programs

nationwide. EPA has recently issued guidance (“EPA November 2014 Guidance Memorandum”) that supports the approach of the 2012 LA MS4 Permit and Draft Order. The memorandum reiterates a permitting agency’s “significant flexibility” in how WQBELs are to be expressed in MS4 permits and supports MS4 permitting authorities’ emphasis on “clear, specific, and measurable permit requirements” for improving stormwater management over time. (EPA November 2014 Guidance Memorandum, p. 2.) The guidance encourages, where feasible, the use of numeric effluent limitations as necessary to meet water quality standards, but does not require it. (EPA November 2014 Guidance Memorandum, p. 4.) In addition, “numeric” refers to quantifiable or measurable parameters related to a pollutant that may include other types of numeric limits in addition to end-of-pipe limits, such as on-site stormwater retention volume or amount of impervious cover. (EPA November 2014 Guidance Memorandum, p. 4.) WQBELs may be expressed through system-wide requirements rather than individual discharge location requirements. (EPA November 2014 Guidance Memorandum, pp. 4-5.)

The 2102 LA MS4 permit is consistent with these EPA endorsed principles. It includes clear, specific and measurable permit requirements. The Permit contains interim milestones to ensure that progress is being accomplished and tracked, and encourages multi-benefit projects as contemplated by EPA’s encouragement of stormwater retention.

The 2012 LA MS4 Permit and Draft Order Set the National Standard for Stormwater Management

The 2012 LA MS4 Permit and the Draft Order not only resonates with recent EPA guidance as discussed above, it also parallels MS4 permits and stormwater management programs from around the country. An examination of receiving water limitations and TMDL requirements and enforcement of interim and final compliance milestones and deadlines in permits and stormwater requirements nationwide shows that the 2012 Permit is consistent with the very best and latest approaches to water quality challenges. In many cases, the 2012 LA MS4 Permit exceeds the national standard.

District of Columbia MS4 NPDES Permit

The District of Columbia MS4 NPDES Permit No. DC0000221 (D.C. MS4 Permit), issued by EPA on September 30, 2011, requires the permittee, the District of Columbia, to develop, public notice and submit to EPA for review and approval a Consolidated TMDL Implementation Plan for all TMDL wasteload allocations assigned to the District MS4 discharges. (D.C. MS4 Permit, Section 4.10.3.) Interim milestones are to be included where final attainment of applicable wasteload allocations requires more than five years. (D.C. MS4 Permit, Section 4.10.3.) Milestone intervals are to be as frequent as possible but will not be greater than five years. (D.C. MS4 Permit, Section 4.10.3.) On November 4, 2011, environmental groups filed a petition requesting that the

Environmental Appeals Board review the permit (appeal 11-06). On the same day, the District of Columbia Water and Sewer Authority and the Wet Weather Partnership also jointly filed a petition requesting review of the permit (appeal 11-05). As a result of the appeals, certain provisions of the permit were stayed, pursuant to 40 C.F.R. 124.16, including Section 4.10.3 (Consolidated TMDL Implementation Plan). (See D.C. MS4 Permit, Fact Sheet.) On May 18, 2012, the EPA and the environmental groups signed a settlement agreement in which the EPA agreed to propose modifications to language in several sections of the permit and to provide certain clarifications in the draft fact sheet for those proposed modifications. (D.C. MS4 Permit, Fact Sheet.)

The modifications made to the D.C. MS4 Permit by the EPA include providing additional clarity and accountability for specific water quality-related outcomes by clarifying that “benchmarks” and “milestones” are enforceable permit requirements. (D.C. MS4 Permit Modification Final Fact Sheet, Section II.2.) However, the permit modification itself does not establish any benchmarks or milestones, nor does it establish any numeric effluent limitations. (D.C. MS4 Permit Modification Responsive Summary, p. 4.) The EPA modifications simply clarify that final dates for attainment of wasteload allocations must be specified in the permittee’s TMDL Implementation Plan (which may span more than five years) and that the EPA will incorporate interim and final milestones for attainment as enforceable permit provisions. (D.C. MS4 Permit Modification Final Fact Sheet, Section II.2.)

According to the requirements of the D.C. Permit, if evaluation data indicate insufficient progress towards attaining any WLA covered, the permittee must make the appropriate adjustments within 6 months to address the insufficient progress and document those adjustments in the Consolidated TMDL Implementation Plan. (D.C. MS4 Permit, Section 4.10.4.) The Consolidated TMDL Implementation Plan modification must include a reasonable assurance demonstration of the additional controls to achieve the incorporated milestones. (D.C. MS4 Permit, Section 4.10.4.) The permit further requires annual reports to “include a description of progress as evaluated against all implementation objectives, milestones and benchmarks.” (D.C. MS4 Permit, Section 4.10.4.) “In the event the permittee does not submit a Consolidated TMDL Implementation Plan, submits a plan that fails to address one or more applicable TMDLs, or submits a plan that the EPA disapproves, the EPA will initiate action to set the relevant milestones and final dates for attainment by which the permittee will meet applicable WLAs, pursuant to section 4.10.3 of the permit, within 6 months of the failure and finalize those requirements within 2 years of the failure. The EPA will incorporate those elements as enforceable permit provisions.” (D.C. MS4 Permit, Draft Fact Sheet, p. 7.)

Additionally, the EPA modification extended the compliance schedule for development of the Consolidated TMDL Implementation Plan from 24-months to 30-months to allow for adequate public involvement and public notification. (D.C. MS4 Permit, Draft Fact Sheet, p. 6.) The 30-month period began with the effective date of the permit modification because the provision was stayed due to the permit appeals. (D.C. MS4 Permit, Draft Fact Sheet, p. 6.) Also the modification specifies that compliance with the

provisions of the permit “including milestones and final dates for attainment of applicable [wasteload allocations], shall constitute adequate progress toward compliance with DCWQS and [wasteload allocations] for this permit term.” (D.C. MS4 Permit, Section 1.4.3.) EPA determined that its final modified D.C. MS4 Permit “provides additional clarity and accountability for specific water quality-related outcomes, specifically on the content and timelines for the Consolidated TMDL Implementation Plan.” (D.C. MS4 Permit, Fact Sheet.) In stark contrast, the 2012 Permit forces real and substantive water quality improvements during the permit term – not just a plan.

Michigan Stormwater Permits

The State of Michigan has issued two general MS4 permits; jurisdictional general stormwater discharges permit No. MIS040000 and watershed general stormwater discharge permit MIG619000 (Michigan Watershed Plan Permit). The Michigan Watershed Plan Permit requires development and implementation of a Watershed Management Plan (WMP). (Michigan Watershed Plan Permit, Section I.B.1.) Where multiple permittees are responsible for submittal of a WMP for the same watershed, one WMP must be submitted on behalf of all the permittees. (Michigan Watershed Plan Permit, Section I.B.1.) The permittee must use the WMP to develop a Stormwater Pollution Prevention Initiative (“SWPPI”) that specifies the permittee’s obligations under the WMP. (Michigan Watershed Plan Permit, Section I.B.1.) In order to produce an approvable SWPPI, the WMP, among other requirements, must contain: short-term measurable objectives for the watershed; long-term goals for the watershed (which include both the protection of designated uses of the receiving waters as defined in Michigan’s Water Quality Standards, and attaining compliance with any TMDL established for a parameter within the watershed); commitments to implement actions by specified dates necessary to achieve the short-term measurable objectives; and commitments to implement actions by specified dates necessary to initiate achievement of the long-term goals. (Michigan Watershed Plan Permit, Section I.B.1.)

Deadlines to submit the permittee’s WMP to the Michigan Department of Environmental Quality are not included in the Michigan Watershed Plan Permit, but are instead specified in the permittee’s certificate of coverage. (Michigan Watershed Plan Permit, Section I.B.1.) Because watershed management is an iterative process of decision-making, the Michigan Watershed Plan Permit expects revisions to the WMP to be made “from time to time.” (Michigan Watershed Plan Permit, Section I.B.1.) Similar to the Michigan approach, the 2012 Permit contains Watershed Management Plans along with *Enhanced* Watershed Management Plans with a design storm requirement and a robust monitoring program requirement.

Pennsylvania Stormwater Management

The Pennsylvania Stormwater Management Act of 1978 (PA Act 167) requires the preparation and adoption of stormwater management plans for each watershed within a county in Pennsylvania. The purpose of PA Act 167 is to encourage planning and

management of stormwater on a watershed basis consistent with sound water and land use practices. (PA Act 167, Section 3(1).) Each county must prepare and adopt a watershed stormwater management plan for each watershed located in the county—in consultation with the municipalities located within each watershed—and must periodically review and revise such plan at least every five years. (PA Act 167, Section 5(a).) The counties must prepare and adopt the watershed stormwater management plans within two years following the promulgation of guidelines by the Philadelphia Department of Environmental Protection (“DEP”). (PA Act 167, Section 5(a).) DEP may grant an extension of time to any county for the preparation and adoption of a watershed stormwater management plan if good cause is shown. (PA Act 167, Section 5(a).) Within six months following adoption and approval of the watershed stormwater plan, each municipality must adopt or amend, and implement ordinances and regulations, including zoning, subdivision and development, building code, and erosion and sedimentation ordinances, as are necessary to regulate development within the municipality, consistent with the applicable watershed stormwater plan and the provisions of PA Act 167. (PA Act 167, Section 11(b).)

In June 2011 the DEP executed a Consent Order and Agreement with the City of Philadelphia for the implementation of the Philadelphia Water Department’s Combined Sewer Overflow Long Term Control Plan Update (“Green City, Clean Waters”).² Green City, Clean Waters is Philadelphia’s 25-year plan to protect and enhance watersheds by managing stormwater with innovative green infrastructure projects.³ The Green City, Clean Waters plan is an ambitious and multi-beneficial plan that reflects the long-term commitment necessary to address the city’s water quality and quantity needs. As part of the DEP Consent Order, and Agreement the City of Philadelphia created a Comprehensive Monitoring Program that sets forth how the City of Philadelphia will use monitoring and metered data along with hydrologic and hydraulic modeling, as well as an on the ground verification process, to document the ability of the Updated Long Term Control Plan to achieve the performance standards set forth in the Consent Order and Agreement. (DEP Consent Order and Agreement, Section 3a.) The DEP Consent Order and Agreement requires the City of Philadelphia to submit to the DEP an Evaluation and Adaption Plan at least every 5 years that is a comprehensive assessment of the City’s progress with implementation of the approved Updated Long Term Control Plan up until that time and include a description of program elements anticipated to be implemented in the next 5-year period. (DEP Consent Order and Agreement, Section 3e.) The Order and Agreement requires the City to achieve quantitative performance standards by specific interim dates or by the end of the Program. (See Green City, Clean Waters Comprehensive Monitoring Plan.)

In April 2012 the EPA and the City of Philadelphia signed a partnership agreement recognizing the Green City, Clean Waters plan and its approach to stormwater

² http://phillywatersheds.org/what_were_doing/documents_and_data/cso_long_term_control_plan (Last visited on December 29, 2014.)

³ Id.

management.⁴ EPA has stated that the partnership demonstrates its “strong support for sustainable stormwater management yielding multiple benefits for community livability and other urban environment improvements.” (Green City, Clean Waters Partnership Agreement, p. 1.) EPA has used this partnership to emphasize its commitment to encouraging and supporting adoption of green infrastructure to improve both water quality and the sustainability of neighborhoods and views Green City, Clean Waters “as a model for other municipalities seeking more sustainable solutions for urban wet weather pollution control.” (Green City, Clean Waters Partnership Agreement, p. 1.)

Additionally, the EPA executed an Order for Compliance on Consent in September 2012 that incorporates the terms of the 2011 DEP Consent Order and Agreement, requiring the City of Philadelphia to submit deliverables to EPA as well as DEP. (See EPA Order for Compliance on Consent.) The City of Philadelphia is required to submit deliverables to DEP and the EPA including an Implementation and Adaptive Management Plan (within 6 months) and a Comprehensive Monitoring Plan (within 18 months). (DEP Consent Order and Agreement, Section 3a.) The DEP Consent Order and Agreement implements water quality requirements that include water quality-based effluent limits to be achieved by specific interim dates at years 5, 10, 15 and 20, or quantities to be achieved by the end of the 25-year program. (See DEP Consent Order and Agreement, Section 3c and Appendix I, Table 1.)

These examples of stormwater management provide a glimpse into how stormwater is managed nationally. Clearly, these examples do not compare to the rigor and ambitious timeframes of the 2012 LA MS4 Permit. The 2012 LA MS4 Permit is not just consistent with these examples, but is much more advanced with a comprehensive scope, ambitious deliverables, and an aggressive time frame.

Conclusion

The Permit and Draft Order work together to create a set of rigorous and clear requirements in an effort to build a robust and environmentally sound approach to clean water throughout Los Angeles County. The Permit incentivizes multi-benefit water conservation projects and creates a collaborative regional approach to sustainable community planning and water quality improvements. It is for these reasons and those expressed above that the County and LACFCD stand behind the Water Boards in support of this ambitious Permit.

⁴ http://phillywatersheds.org/what_were_doing/documents_and_data/cso_long_term_control_plan (Last visited on December 29, 2014.)