THE CITY OF SAN DIEGO

January 21, 2015

Electronic Submission: commentletters@waterboards.ca.gov

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

Subject: Comments to A-2236(a)-(kk), *Proposed Order In the Matter of Review of Los Angeles Municipal Separate Storm Sewer (MS4) Permit*, Order No. R4-2012-1075

Dear Ms. Townsend:

The City of San Diego appreciates the opportunity to comment on the proposed order regarding review of the 2012 Los Angeles MS4 Permit (Draft Order). The City thanks the State Board for taking up the receiving water limitations issue and for the hard work that so clearly went into crafting the Draft Order. The City strongly supports the Draft Order's well-reasoned decision upholding watershed management plans as an alternative option for complying with receiving water limitations.

This issue is vitally important to the City. The City is subject to the regional MS4 permit issued by the San Diego Regional Water Quality Control Board in 2013 (San Diego MS4 Permit), which imposes significant watershed planning requirements. Unlike the Los Angeles MS4 Permit, however, the San Diego MS4 Permit's watershed planning requirements are mandatory and are not linked to compliance with receiving water limitations. Instead, the San Diego MS4 Permit imposes strict liability, irrespective of the good faith actions taken to reduce pollutants in MS4 discharges. Imposing strict liability for MS4 discharges is not appropriate, given the variability of potential sources of pollutants in urban runoff. To ensure statewide consistency on this important issue, the City urges the State Board to revise the Draft Order to *require* regional boards to allow alternative compliance pathways similar to the watershed planning approach in the Los Angeles MS4 Permit.

The City agrees with the seven principles that the Draft Order directs other regional boards to use in developing variations on the watershed-based alternative compliance approach in the Los Angeles MS4 Permit, but suggests a clarification to ensure a meaningful ability to prioritize water quality issues. The City supports the 85th percentile retention approach in the Los Angeles

MS4 Permit and encourages the State Board to support this approach. Further detailed comments on the alternative compliance approach are in Part I of the attachment to this letter.

In Part II of the attachment, the City requests changes to the Draft Order on three other issues of statewide importance: (A) the analysis regarding numeric Water Quality Based Effluent Limitations (WQBELs) should be updated based on the revised U.S. EPA memorandum dated November 26, 2014; (B) the non-storm water discharge prohibition should be revised to be consistent with the Clean Water Act; and (C) the State Board should modify the Los Angeles MS4 Permit to avoid inadvertently imposing joint liability, which the Draft Order makes clear was not the intent. If you have questions regarding the City's comments, please contact Ruth Kolb, Program Manager, at (858) 541-4328 or at rkolb@sandiego.gov.

Sincerely,

Kris McFadden
Director

Attachment: City of San Diego Comments on Draft Order

cc: Mike Hansen, Office of the Mayor
Heather Stroud, Deputy City Attorney
Tony Heinrichs, Deputy Chief Operating Officer, Infrastructure & Public Works
Drew Kleis, Deputy Director, Storm Water Division
Ruth Kolb, Program Manager, Storm Water Division

Attachment:

City of San Diego Comments on Draft Order

I. Alternative Compliance Pathways Are Critical In Any MS4 Permit That Includes Receiving Water Limitations Based on Order WQ 99-05

The Draft Order appropriately recognizes that State Board has discretion to modify the receiving water limitations language through this precedential order, but declines to do so. As stated in the Los Angeles MS4 Permit, and based on State Board Order WQ 99-05, the current receiving water limitations language is:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.
2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.
3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications . . . .

Draft Order at 9-10 (quoting the Los Angeles MS4 Permit, Part V.A at 38-39). The Draft Order recognizes that that the State Board may "make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance." Draft Order at 13-14. The City agrees that whether to continue to use the current receiving water limitations language is a policy choice, as stated in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999).

The City disagrees, however, with the Draft Order's policy choice to continue using the receiving water limitations language based on Order WQ 99-05 to the extent that the Draft Order could be read to require its inclusion in all Phase I MS4 permits. Draft Order at 48. Given the significant intervening legal events occurring in the fifteen years since that order was issued, it is no longer good policy to include that language in MS4 permits that lack an alternative compliance option. While the Draft Order questions the significance of the Ninth Circuit's decision in *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d. 880 (2011), it was the first case to hold local agencies liable in a citizen suit for failing to achieve strict compliance with water quality standards based on the receiving water limitations language.[1] The

[1] The two earlier decisions the Draft Order cites as examples of other cases coming to "the same conclusion" do not hold that MS4s may be liable in citizen suits for failing to achieve strict compliance with water quality standards. In *Building Industry Association of San Diego County v. State Water Resources Control Board*, 124 Cal. App. 4th 866, 891 (Cal. App. 2004), the court was skeptical that a citizen would have standing to sue while the iterative process was ongoing. The court in *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, 135 Cal. App. 4th 1377 (Cal. App. 2006), found that the challenged permit was not required to include a "safe harbor" provision stating that if a permittee is in compliance with all of the provisions of the

Los Angeles Regional Board developed the Watershed Management Plan/Enhanced Watershed Management Plan (WMP/EWMP) alternative compliance approach as a direct response to that case. Consequently, the potential liability created by that case has invited the high level of statewide interest and participation in these petition proceedings.

The Draft Order recognizes that permit compliance should be possible. The City agrees that "MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations." Draft Order at 15. The City agrees that as a matter of public policy, "it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms . . ." Draft Order at 30. Further, the City agrees that "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 at 31. By this reasoning, all MS4 permits that include receiving water limitations should have an alternative compliance pathway, because it is not realistic to expect that compliance with the receiving water limitations for all pollutants could be achieved within a five-year permit term. The result of including receiving water limitations language based on Order WQ 99-05 without an alternative compliance option is an inappropriate and counterproductive level of potential liability placed on local agencies. This potential liability may interfere with the State Board and local agencies' shared water quality improvement goals.

A. The Draft Order Should Be Revised to Require Regional Boards to Include Alternative Compliance Pathways

The draft order stops short of requiring regional boards to adopt the watershed alternative compliance approach. Instead, it "direct[s] all regional water boards to *consider* the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward." Draft Order at 48 (emphasis added). The City requests that the Draft Order be strengthened to require every MS4 permit that has the receiving water limitations language to include an alternative compliance pathway. The City further requests that the State Board encourage regional boards to reopen permits to make this change instead of waiting for the next permit adoption process, which may be five years or more into the future.

The Draft Order recognizes that including the receiving water limitations language based on Order WQ 99-05 in MS4 permits without an alternative compliance pathway "may result in many years of permit noncompliance." Draft Order at 15. The Draft Order also concedes that "receiving water limitations . . . may not in all cases be achievable within the five-year permit cycle." Draft Order at 31. To ensure that regional boards issue permits that are possible to

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permit, it could not be found in violation of the Clean Water Act. *Id.* at 1388. The court reasoned that it would be duplicative to include a safe harbor provision in the challenged MS4 permit because Section 402(k) of the Clean Water Act already provides a "safe harbor" to every NPDES permittee that is in compliance with the conditions of its permit. *Id.*

comply with, an alternative compliance pathway should be mandatory in all MS4 permits that include the receiving water limitations based on Order WQ 99-05.

Statewide consistency is important on this issue and strong guidance from the State Board is warranted. The 2013 San Diego MS4 permit proceedings underscore the need for statewide policy guidance. The San Diego Regional Board considered, but ultimately deleted, permit provisions that would have established an alternative compliance approach very similar to the enhanced watershed management programs in the Los Angeles MS4 Permit. Permittees would have been allowed to establish compliance with receiving water limitations by preparing and implementing a Water Quality Improvement Plan for each watershed. San Diego Regional Water Quality Control Board Draft Tentative Order R9-2013-0001 § II.B.3.c (Mar. 27, 2013). In order to use this compliance option, permittees would have been required to show through watershed modeling that implementation of the Water Quality Improvement Plan would achieve numeric water quality goals within the established schedules. *Id.* at II.B.3.c(1)(b). The U.S. EPA determined that the Water Quality Improvement Plan compliance option was acceptable because "it does establish a process intended to ensure that measureable water quality improvements are achieved." Transcript vol. I, 14:16-17 (May 8, 2013). The compliance option established a high bar but at least gave permittees a chance to comply with the San Diego MS4 Permit. The 39 permittees unanimously supported the watershed-based compliance alternative.

Even so, the San Diego Regional Board ended up deleting the alternative compliance language from the final version of the San Diego MS4 Permit. The San Diego Regional Board, however, left the Water Quality Improvement Plan requirements in place. The result is a permit with a rigorous watershed planning component but receiving water limitations that are impossible to meet. The Water Quality Improvement Plans include the seven principles set forth in the Draft Order, except the third: an alternative compliance path. Draft Order at 49.

The City is subject to six Water Quality Improvement plans, and is coordinating the planning process in three watersheds (Los Penasquitos, San Dieguito, and Mission Bay). Since the 2013 San Diego MS4 Permit was adopted, the City has spent $1,985,207 on developing Water Quality Improvement Plans in these three watersheds alone. Initial cost estimates for implementing the City's share of the Water Quality Improvement Plans are in the billions of dollars. It is difficult to adequately justify this level of resources to elected officials and the public when developing and implementing these plans leaves the City out of compliance with its MS4 permit.

B. The Seven Principles for Watershed-Based Alternative Compliance Pathways Are Appropriate

The City generally agrees with the seven principles that the Draft Order requires regional boards to include in any variation on the WMP/EWMP approach in Phase I MS4 permits:

1. The receiving water limitations as directed by Order WQ 99-05 should be included.[2]

[2] The City agrees with this principal only for permits including an alternative compliance pathway.

2. For water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. An "ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations," should be incorporated.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and low impact development.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required to prioritize water quality issues in the watershed and propose appropriate solutions. Permittees should be required to conduct adaptive management of the plans by adjusting assumptions and proposed solutions based on monitoring results.

Draft Order at 48-49 (paraphrased).

The City suggests a clarification to the third principle to ensure that there is a meaningful ability to prioritize water quality issues. This ability is central to the alternative compliance approach. One of the problems with being subject to strict compliance with water quality standards is that it is impossible to address all pollutants in all water bodies at all times. The third principle should be modified to make clear that permittees implementing a qualifying plan are deemed in compliance with the receiving water limitations for all water body-pollutant combinations, not just the priority water body-pollutant combinations addressed in the plan. Otherwise, the ability to prioritize would be undermined because high priority pollutant-water body combinations would be subject to a compliance schedule, while low priority pollutant-water body combinations would be subject to immediate strict compliance with water quality standards. This would create a perverse incentive to address low priority water quality issues ahead of higher priority issues in order to avoid liability for exceeding those low priority pollutant standards under the receiving water limitations.

C. The City Supports the 85th Percentile Retention Approach in the Los Angeles MS4 Permit

The Los Angeles MS4 Permit provides that Permittees will be deemed in compliance with final WQBELs and other TMDL-specific limitations "[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water 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." Draft Order at 39 (quoting Los Angeles MS4 Permit Part VI.E.2.e.i.4). The Draft Order is generally supportive of storm water retention as a technical approach to improving water quality, but states that the evidence in the Administrative Record does not show that retaining the 85th percentile storm will in all cases result in

achievement of final WQBELs and other TMDL-specific limitations. Draft Order at 40. In order to address this perceived shortcoming in the Administrative Record, the Draft Order adds a requirement that if water quality monitoring shows that final WQBELs are not being achieved, the Permittee must propose a plan for additional control measures to achieve the final limitations. Draft Order at 44.

The City of San Diego supports the storm water retention approach for demonstrating compliance with final WQBELs and other TMDL-specific limitations, and believes that sufficient justification exists to establish that this approach will achieve the final WQBELs and other TMDL-specific limitations. The retention approach is also consistent with the recent EPA memorandum supporting numeric WQBELs besides end-of-pipe limits. EPA Memorandum, Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" at 4 n.5 (Nov. 26, 2014).

The storm water retention approach in the Los Angeles MS4 Permit was based on extensive study performed by the Los Angeles County Flood Control District (LACFCD) during development of the County's Watershed Management Modeling System. During that study, LACFCD performed a detailed analysis of a water quality design storm, which included a public process with participation of a technical advisory committee consisting of Los Angeles Regional Board staff, the U.S. EPA, Permittees, and environmental advocacy groups. Results of the study were documented in a report entitled Evaluation of Water Quality Design Storms (June 20, 2011), which is publicly available and can be downloaded from Los Angeles County's website at http://dpw.lacounty.gov/wmd/wmms/res.aspx. The study included detailed hydrologic and water quality modeling of all coastal watersheds in Los Angeles County. This entailed dynamic modeling of storm water runoff from various land characteristics, resulting instream flow and water quality, and necessary structural retention to result in attainment of applicable TMDL wasteload allocations and water quality objectives for all impaired waterbodies in Los Angeles County.

The study's results provide a detailed understanding of the varying hydrologic conditions and retention requirements, as well as associated regional costs. The City believes this study represents sufficient evidence that the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations, and therefore supports the retention approach in the Los Angeles MS4 Permit. If the State Board deems it necessary, this issue could be remanded to the Los Angeles Regional Board to consider whether this study provides substantial evidence to support the retention approach.

D. The Draft Order Should Clarify What "Cause or Contribute to" Means

The City urges the State Board to take this opportunity to clarify what it means to "cause or contribute to" an exceedance of a water quality standard. Section V.A.1 of the Los Angeles MS4 Permit, which is representative of the "cause or contribute to" language used in MS4 permits statewide, states:

> Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

Los Angeles MS4 Permit at 38. At the workshop on December 16, 2014, one of the speakers expressed concern about the "one molecule problem," where an MS4 owner or operator faces potential liability for discharging any amount of a pollutant -- no matter how small -- to receiving water that already is exceeding the water quality standard for that pollutant. Board Member Moore and State Board counsel responded that some degree of significance would be required in a pollutant discharge before it could be found to "cause or contribute to" an exceedance. Board Member Moore aptly described this concept as finding the "signal above the noise."
The problem is that courts have not interpreted the "cause or contribute to" provision this way. For example, the 2013 Ninth Circuit decision held that the MS4 owners and operators are liable for a violation of this provision because receiving water monitoring indicated that water quality standards were not met in the receiving water, with no consideration of the significance of a particular discharge of pollutants from an MS4:

> If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds [water quality standards], then, as a matter of permit construction, the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.

Natural Resources Defense Council, 725 F.3d at 1206-07. In other words, the Ninth Circuit found that all of the MS4 owners and operators "caused or contributed to" the exceedance of water quality standards in receiving water irrespective of their individual contribution of pollutants. The Ninth Circuit remanded the case to the district court to determine the remedy for this violation, but did not provide guidance as to how to assign responsibility among the MS4 owners and operators for implementing the remedy. *Id.* at 1210.

If this result is inconsistent with the State Board's intent -- which appears to be the case based on the discussion at the workshop -- then the State Board should take this opportunity to revise the Draft Order to clarify its intent that a MS4 owner or operator is not liable for "causing or contributing to" an exceedance of a water quality standard for a pollutant in the receiving water unless the level of pollutants in its discharge is significant. However significance is determined, it should be measured by the relative level of the pollutant in question being discharged by an MS4 owner or operator in relation to the level of that pollutant in the receiving water and in relation to other sources of that pollutant.

E. The Enforcement Order Approach Would Not Achieve the Intent of the Alternative Compliance Pathway

The City does not support the enforcement order approach proposed by the Environmental Petitioners. The enforcement order approach would require Permittees currently out of compliance with receiving water limitations -- presumably, all Permittees -- to seek a time schedule order to achieve compliance with all water quality standards within the five-year permit term. Draft Order at 30. The Draft Order recognizes that this approach is neither required by law nor good public policy, and the City agrees. Among the reasons cited are fairness to the local agencies implementing a WMP/EWMP, regulatory efficiency, and the "intention to encourage a

watershed-based approach to addressing storm water issues going forward" that would be undermined by the enforcement order approach. Draft Order at 30-31.

The City agrees that it would be unfair to require local agencies to develop a plan to achieve all water quality standards within the five-year permit term when it is generally understood that this would be impossible. The Draft Order even recognizes this may be impossible. Draft Order at 31. Local agencies need time to obtain funding, plan, design, and construct the infrastructure projects that will be necessary to achieve water quality standards. A single large multi-jurisdictional project could easily take five years from the planning stage to the initiation of construction. The City also agrees that requiring regional boards to issue time schedule orders to every Phase I MS4 permittee in the state covering all pollutants and all water bodies would be an incredible drain on the regional boards' limited resources.

But perhaps the most important reason to reject the enforcement order approach is that it is inconsistent with the goal of the WMP/EWMP to encourage watershed-based planning and projects to achieve better water quality. Enforcement orders are good at subjecting dischargers to numeric pollutant limits and deadlines, but do not place the appropriate emphasis on the enormous coordination and planning efforts that will be required to achieve the water quality improvements sought. While the WMP/EWMP process encourages permittees to work together toward shared goals, the enforcement order approach would encourage each permittee to look out for its own interests first with the individual goal of avoiding potential liability. There would be little incentive for collaboration. Further, enforcement orders do not allow for prioritization. Presumably, every pollutant would need to be addressed simultaneously.

In addition to the well-reasoned analysis in the Draft Order, it is important to note that third party lawsuits enforcing strict compliance with receiving water limitations under the Clean Water Act may be brought while time schedule order implementation is underway. *See Cal. Sportfishing Ass'n v. Chico Scrap Metal*, 728 F.3d 868, 877-78 (9th Cir. 2013) (holding that a citizen suit under the Clean Water Act is not barred by an administrative enforcement action that does not impose monetary penalties). While citizen suits can serve an important enforcement function, the Draft Order aptly recognizes that requiring a permittee to meet strict compliance with receiving water limitations is not appropriate where a WMP/EWMP is being implemented. Draft Order at 30-31. Setting up a process that would allow citizen suits for alleged violations of receiving water limitations while a Permittee is implementing its plan to achieve the receiving water limitations would undermine the planning framework the Los Angeles Regional Board envisioned.

II. The City Requests Clarification on Three Other Issues of Statewide Importance

A. The Analysis Upholding the Use of Numeric WQBELs in the Los Angeles MS4 Permit Should Be Updated Based on the Revised EPA Memorandum

The Draft Order upholds the use of numeric WQBELs in the Los Angeles MS4 Permit for pollutant-water body combinations with state-issued TMDLs, based on the particular facts and circumstances of that permit and those TMDLs. Draft Order at 54. The Draft Order, however, notes that regional boards have discretion instead to include BMP-based WQBELs in permits, if

facts and circumstances support that decision. Draft Order at 54-55. The City agrees that numeric WQBELs should not be required for all TMDLs in all MS4 permits, and requests that the Draft Order be updated to incorporate analysis from the revised EPA memorandum on this issue, released just after the Draft Order on November 26, 2014.

Two points in the Draft Order deserve reconsideration based on the revised EPA memorandum. First, the Draft Order states that "we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger." Draft Order at 53 n. 143. The revised EPA memorandum, however, "encourages permit writers to identify specific shares of an applicable wasteload allocation for specific permittees during the permitting process." EPA Memorandum at 8 (Nov. 26, 2014). The revised EPA memo further provides guidance on how to disaggregate a wasteload allocation based on information such as land use and growth projections. *Id.* The State Board should reconsider the Permittee Petitioners' request to disaggregate wasteload allocations.

The second point that warrants reconsideration based on the revised EPA memorandum is whether permit writers must find that the MS4 sources have a "reasonable potential" to cause or contribute to water quality standards excursion. The Draft Order concludes that no further "reasonable potential" analysis was required to impose numeric WQBELs in the Los Angeles MS4 Permit because "[t]he Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations." Draft Order at 55. The revised EPA memorandum, however, anticipates that the *NPDES permitting authority* will consider whether MS4 dischargers have reasonable potential to cause or contribute to an excursion. EPA Memorandum at 4 (Nov. 26, 2014) ("Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that the NPDES permitting authority exercise its discretion to include . . . where feasible, numeric effluent limitations as necessary . . . .") The City expects that the NPDES permitting authority would consider any reasonable potential analysis done in developing the TMDL, but that in some cases more analysis will be necessary to justify imposing numeric WQBELs, and especially end-of-pipe numerics. For example, more analysis may be necessary in the permit phase where a TMDL includes a combined wasteload allocation for all NPDES-permitted sources, because technical analysis in the TMDL regarding the relative contribution of each source category may be lacking. The Draft Order appears to assume that permit writers will never need to do any further reasonable potential analysis. The Draft Order should be updated to make clear that further reasonable potential analysis may be necessary in some cases, consistent with the revised EPA memorandum.

These issues are important to the City because the San Diego Regional Board appears to be defaulting to including numeric end-of-pipe WQBELs for Phase I MS4s. Many TMDLs in the San Diego region have a single wasteload allocation shared by all NPDES-permitted sources. Even so, the 2013 San Diego MS4 Permit imposes numeric, end-of-pipe WQBELs on Phase I MS4s for all six TMDLs incorporated into that permit. San Diego MS4 Permit, Attachment E (May 8, 2013). The San Diego MS4 Permit includes no additional analysis or calculations beyond that already done in the TMDLs to incorporate these WQBELs; it simply cuts and pastes the wasteload allocations from the TMDLs and re-names them as end-of-pipe WQBELs. None of the other sources identified as responsible parties in those TMDLs, however, are subject to end-

of-pipe WQBELs.[3] The lack of regulatory consistency concerns the City because these other responsible parties ultimately discharge storm water to the City's MS4. The end result is an inequitable transfer of liability and cost to the Phase I MS4s from other NPDES-permitted sources, where Phase I MS4s like the City are held responsible for -- and required to implement expensive controls to treat -- pollutants discharged to the MS4 by other regulated sources.

B. The State Board Should Modify the Non-Storm Water Discharge Prohibition to be Consistent With the Plain Language of the Clean Water Act

The Draft Order upholds the non-storm water discharge prohibitions, which require Permittees to "prohibit non-storm water discharges *through* the MS4 to receiving waters." Draft Order at 57-60 (emphasis added). The language is inconsistent with Clean Water Act section 402(p)(3)(B)(ii), which requires Permittees to "effectively prohibit non-storm water discharges *into*" the MS4. The Clean Water Act then regulates discharges of pollutants from the MS4 without reference to whether those pollutants derive from storm water or non-storm water, requiring "controls to reduce the *discharge of pollutants* to the maximum extent practicable." Clean Water Act § 402(p)(3)(B)(iii) (emphasis added).

The Draft Order concludes that the use of "through" in the Los Angeles MS4 Permit instead of "into" used in the Clean Water Act is a "distinction without a difference." Draft Order at 57. To the contrary, this distinction is legally significant because it places Permittees at risk of not being able to comply, or at least not being able to prove they are in compliance with the prohibition on non-storm water discharges "through" the MS4. A Permittee only has the practical ability to control non-storm water discharges originating within its own jurisdiction. In the interconnected and complex MS4 system where upstream jurisdictions' systems connect with and flow freely into downstream jurisdictions' MS4s, the downstream jurisdiction cannot guarantee that non-storm water is not flowing "through" its MS4. Further, because of the commingled nature of MS4 discharges, it generally is not possible to trace specific pollutants back to a storm water versus non-storm water source. Finally, as a practical matter, the controls used to "effectively prohibit" non-storm water from entering the MS4 are not necessarily the same as the controls used to reduce the discharge of pollutants from the MS4. The Draft Order finds that applying the

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[3] For example, the General Industrial Permit adopted by the State Board on April 1, 2014, includes the general statement that "discharges addressed by this General Permit are considered to be point source discharges, and therefore must comply with effluent limitations that are consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the state and approved by USEPA." However, the General Industrial Permit has not yet incorporated specific TMDL compliance provisions, let alone effluent limitations. Similarly, the General Phase II Permit adopted by the State Board on February 5, 2013, states generally that "discharges from Small MS4s are point source discharges subject to TMDLs," and further states that "this Order requires Permittees to comply with all applicable TMDLs." However, the TMDL provisions in Attachment G of the Phase II Permit do not impose any effluent limitations on the Phase II MS4s in the San Diego region. As noted in the Draft Order, the Caltrans storm water permit amendments to incorporate TMDL requirements, dated July 1, 2014, allow for BMP-based compliance instead of imposing numeric effluent limitations.

maximum extent practicable standard to non-storm water would render the effective prohibition of non-storm water entering the MS4 meaningless. Draft Order at 58. This is not true. The non-storm water prohibition is enforced at the MS4 inlet, while the MEP standard is enforced at the outfall.

Responding to a similar argument, the State Board modified the 2001 San Diego MS4 Permit in Order WQ 2001-15. The 2001 San Diego MS4 Permit attempted to apply the maximum extent practicable standard to discharges "into and from" the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited." Order WQ 2001-15 at 9 (quoting 2001 San Diego MS4 Permit Provision A.3). The State Board granted the petition on this issue, reasoning that "the permit language is overly broad because it applies the MEP standard not only to discharges 'from' MS4s, but also to discharges 'into' MS4s." Order WQ 2001-15 at 9.

The same reasoning should apply here. It is unclear what, if anything, is gained in terms of water quality by using different terminology in the Los Angeles MS4 Permit than in the Clean Water Act. The City requests that the State Board take another look at this issue and modify the Los Angeles MS4 Permit to be consistent with the plain language of the Clean Water Act.

C. The State Board Should Modify the Los Angeles MS4 Permit to Avoid Inadvertently Imposing Joint Liability

The Draft Order states that, "we do not sanction 'joint and several liability' that would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation." Draft Order at 64. The Draft Order further clarifies that "the Los Angeles MS4 Order does not impose joint and several liability, and . . . we do not find such liability appropriate from a policy perspective . . . ." Draft Order at 64 n.177. The City is concerned that, despite these unequivocal statements of intent, the Draft Order actually does risk imposing joint liability on Permittees in practice. Legal issues aside, as a matter of public policy, each Permittee should be in control of its own permit compliance. The Los Angeles MS4 Permit and Draft Order establish that the WMP/EWMP process is one way to establish permit compliance. The City requests a modification to the Draft Order on this point.

The Draft Order upholds provisions of the Los Angeles MS4 Permit ascribing "joint responsibility" to Permittees with commingled discharges from commingled sources. Draft Order at 63. The Los Angeles MS4 Permit places the burden on a Permittee initially found jointly responsible for an exceedance of a TMDL pollutant to prove it did not cause or contribute to the exceedance. Draft Order at 64 (referencing Los Angeles MS4 Permit, Part VI.E.2.b). The Draft Order expands this approach to non-TMDL pollutants by allowing a Permittee to demonstrate it did not cause or contribute to an exceedance in one of the following ways:

(1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;
(2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water; or

(3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, and that the pollutant is not typically associated with MS4 discharges.

Draft Order at 65-66. The City is concerned that a court may interpret this added language to be a separately enforceable permit provision requiring strict compliance with water quality standards, which could undermine the intent of the WMP/EWMP process. The City is also concerned that this provision may subject Permittees to joint liability in practice because it is unclear how a Permittee can prove its discharge did not "cause or contribute" to an exceedance where that term is not defined. Thus, the City requests that the Draft Order be revised to add another pathway to demonstrate compliance and ensure that the Los Angeles MS4 Permit's requirements are coordinated:

(4) Demonstrate that the Permittee is implementing an approved WMP/EWMP.