January 21, 2015

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
Submitted via email: commentletters@waterboards.ca.gov

Re: Comments on Proposed Draft Order SWRCB/OCC Files to A-2236(a)-(kk): In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175)

Dear Members of the Board:

On behalf of the Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (collectively, "Environmental Groups"), petitioners to the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175) ("2012 MS4 Permit"), we submit the following comments on the November 21, 2014 State Water Resources Control Board ("State Board") proposed draft order SWRCB/OCC Files A-2236(a) through (kk): In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175) ("Draft Order"). We appreciate this opportunity to comment on the Draft Order.

I. Summary

The 2012 MS4 Permit presents a critical opportunity to meaningfully address the number one source of water pollution in the Los Angeles Region – urban runoff. Despite more than two decades of stormwater regulation, urban runoff continues to chronically impact human health and impair water quality at our beaches and in our rivers. It is time for this problem to be addressed in a way that will both reduce pollutant loading and guarantee attainment of water quality standards ("WQSs").

We support the State Board and Los Angeles Regional Water Quality Control Board's ("Regional Board") desire to promote stormwater capture to help augment local water supplies while addressing water quality concerns. Such an approach is critically important in helping California cope with current and future drought as well as the increasing challenges of climate change. This approach also has the potential to achieve healthy waterways and compliance with WQSs, as the law requires. Unfortunately, the 2012 MS4 Permit and the Draft Order fail to adequately promote this objective and instead provide safe harbors for Permittees that neither embrace a watershed approach nor commit to capture meaningful amounts of stormwater runoff – let alone guarantee compliance with WQSs.

As is detailed more fully in these comments, we oppose the 2012 MS4 Permit and the Draft Order because as currently written they represent bad public policy and are illegal.

First, the 2012 MS4 Permit contains safe harbors that retreat from more than a decade of precedence by the State and Regional Board requiring compliance in fact with WQSs in all instances. These safe harbors also treat dry weather and wet weather runoff the same, when under the law they are not. And the safe harbors treat watershed management programs ("WMPs") and enhanced watershed management programs ("EWMPs") the same, when by the defining terms of the permit they are not.

Moreover, the underlying justifications for the WMP/EWMP approach in the 2012 MS4 Permit are inadequate, and the Draft Order does not resolve the problems observed with the failed iterative process from the prior 2001 Permit.[1] With history as our guide, this ongoing, protracted approach will only lead to additional delay in achieving water quality objectives and protecting public health. Even assuming the WMP/EWMP process is sufficient to meet RWLs (which it is not, for the reasons described below), Permittees' compliance with the WMP/EWMP process cannot be assured. This means that dischargers could still be in violation of WQSs many years down the road. While we recognize that the draft order reads the permit to require that all WMPs and EWMPs include an express deadline for ultimate compliance in fact with RWLs, they must only be achieved at some undetermined "final date."[2] Even assuming the permit is interpreted or revised accordingly, a lengthy delay in achieving receiving water limitations still renders the 2012 Permit illegal.

The 2012 MS4 Permit and Draft Order also present the potential for serious unintended consequences. For example, in recent court filings, the County of Los Angeles has taken the extreme view that the 2012 MS4 Permit excuses all of the County's violations of the receiving water limitations ("RWLs") in the 2001 Permit – violations proven after six years of litigation in federal court. While we disagree with the County's claim, the County's position highlights the potential arguments the 2012 MS4 Permit may invite from Permittees seeking to evade responsibility for their contribution to water quality impairment.

Finally, in addition to the above major shortcomings, the 2012 MS4 Permit and Draft Order are also illegal[3] for the following reasons:

- They fail to ensure compliance with WQSs and total maximum daily load ("TMDL") provisions;
- The safe harbors violate anti-backsliding provisions;
- The safe harbors violate antidegradation provisions; and
- The findings proposed by the Draft Order are not supported by the 2012 MS4 Permit, the Draft Order itself, or by the evidence in the record.

There is a better way forward. We believe the State Board can achieve the mutual goals of water quality protection and stormwater capture by embracing compliance with WQSs while retaining critical enforcement discretion. Enforcement is a proven tool to drive success and can be used to motivate

[1] Los Angeles Regional Water Quality Control Board, Waste Discharge Requirements for Municipal Separate Storm Sewer and Urban Runoff Discharges Within the County of Los Angeles, and the Incorporated Cities Therein, Except the City of Long Beach, Order No. 01-082, NPDES Permit No. CAS004001 (Dec. 13, 2001) ("2001 Permit").
[2] *See e.g.*, Draft Order, at 44-45.
[3] For a full explanation of how the permit violates the law, *see* Memorandum of Points and Authorities in Support of Petition of NRDC, Los Angeles Waterkeeper, Heal the Bay for Review of Action by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting the Los Angeles County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2012-0175; NPDES Permit No. CAS004001 (Dec. 10, 2012) ("Environmental Groups' Petition"), SWRCB/OCC File No. A-2236(m), incorporated herein.

compliance where other regulatory methods have failed over the past two decades. As is discussed in more detail below, we propose an alternative compliance approach that retains the Boards' enforcement discretion, is consistent with the legal mandates of the Clean Water Act ("CWA") and avoids the numerous potential unintended consequences of the Draft Order.

A strong MS4 permit is critical to the health of Los Angeles waterways and the millions of people who depend on them. Moreover, because any final Order has the potential to create water quality policy statewide, a strong Order from the State Board is critical to water quality all across California.

We appreciate the State Board's consideration of these comments, and we urge the Board to strengthen water quality protections, the 2012 MS4 Permit and the Draft Order by, at a minimum, removing the 2012 MS4 Permit's safe harbor provisions.

II. Background

a. Stormwater Runoff is the Leading Source of Surface Water Pollution in Southern California

Waters discharged from municipal storm drains carry bacteria, metals, and other pollutants at unsafe levels to rivers, lakes and beaches in Los Angeles County. This pollution causes increased rates of human illness, harm to the environment, and an economic loss of tens to hundreds of millions of dollars every year from public health impacts alone. In fact, stormwater is the leading source of surface water pollution in all of Southern California. Monitoring data from mass mission stations collected between 2003 and 2013 revealed that WQSs were exceeded at least 1,283 times in Ballona Creek, Malibu Creek, Los Angeles River, Santa Clara River, Dominguez Channel, and Coyote Creek alone.[4] In addition, the majority of Los Angeles's waterways are impaired – 33 TMDLs, covering over a dozen major waterbodies, have been integrated into the 2012 MS4 Permit. Unfortunately, monitoring demonstrates that Los Angeles-area MS4s consistently contribute to exceedances of these TMDLs. In light of Los Angeles County's high rate of urbanization and persistent water quality problems in the region, the MS4 Permit demands the most effective management tools. Clear, enforceable provisions requiring strict compliance with WQSs are necessary to prohibit discharges from further impairing regional surface waters and impacting beneficial uses.

b. Stormwater Pollution Threatens Public Health, Impacts California's Economy and Undermines Watershed Restoration Efforts

Polluted urban runoff increases bacteria levels and illness rates among swimmers.[5] Contact with waters contaminated by stormwater runoff can lead to fever, chills, ear infections and discharge, coughing and respiratory ailments, vomiting, diarrhea and other gastrointestinal illness, and skin rashes.[6] Scientists reviewing 22 epidemiological studies found that 19 of them showed that adverse health effects were

---

[4] Los Angeles County Department of Public Works, *Stormwater Monitoring Reports*, available at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

[5] Curriero et al., *The Association Between Extreme Precipitation and Waterborne Disease Outbreaks in the United States, 1949-1994,* American Journal of Public Health, August 2001, 91:8 1194-1199. *See also*, Letter from Dr. Jennifer Jay to Mr. Sam Unger, Executive Officer and Members of the Board, Regional Board re: MS4 Permit for Los Angeles County, July 23, 2012.

[6] *See, e.g.*, Haile, et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Epidemiology 10(4): 355-63, 1999, at 356-57; Haile, R. W. et al., *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay,* Santa Monica Bay Restoration Project, 1996, at 3.

significantly related to fecal indicator bacteria or bacterial pathogens.[7] One local analysis investigated health risks of people exposed to storm drain runoff while swimming in Santa Monica Bay and found that swimmers exposed directly in front of a storm drain experienced increased health risks of approximately 50-100 percent compared with people swimming more than 400 yards away from the drain.[8]

The Regional Board itself has acknowledged that the harm to the public from exceeding bacteria standards "is dramatic both in terms of health impacts to exposed beachgoers, and the economic cost to the region associated with related illnesses."[9] These health impacts come at tremendous cost—one study demonstrated that swimming at polluted beaches in Los Angeles and Orange Counties caused between 627,800 and 1,479,200 excess cases of gastroenteritis per year, resulting in annual health costs of between $21 and $51 million, or $176 and $414 million per year (depending on whether only market costs or both market and non-market costs, such as willingness-to-pay not to get sick, were considered).[10]

In addition, stormwater runoff in Los Angeles County's coastal waters causes or contributes to an enormous number of beach closures or advisories each year.[11] Beach closures and advisories result in direct and indirect negative effects on the coastal economy, such as lost revenue.[12] One study estimated that a hypothetical beach closure of Huntington Beach for one day would result in a loss of 1200 beach visits and associated economic losses of $100,000.[13] Conversely, the National Oceanic and Atmospheric Association found that improving water quality in Long Beach from a C grade to the healthier standards of Huntington City Beach (a B grade) would create $8.8 million in economic benefits over a 10-year period.[14]

Finally, stormwater runoff undermines efforts to restore and revitalize Los Angeles watersheds. For example, the Los Angeles River revitalization, which is currently gaining substantial attention as planning gets underway, will rely heavily upon Los Angeles River water quality to restore this heavily degraded ecological system. Without effective stormwater controls measured by compliance with WQSs, poor water quality originating from the region's MS4s threatens to severely undermine these efforts.

---

[7] Pruss, A., *Review of epidemiological studies on health effects from exposure to recreational waters*, International Journal of Epidemiology 27:1-9, 1998, at 3.

[8] Haile, R. W. et al., *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay,* Santa Monica Bay Restoration Project, 1996, at 54. *See also*, Haile, et al, *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Epidemiology 10(4): 355-63, 1999, at 357.

[9] 2001 Permit, at 15-16.

[10] Given, S., et al., *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, Environmental Science & Technology 40(16): 4851-4858, 2006, at 4856.

[11] Los Angeles County reported 2,430 total closing or advisory days in 2011 from all sources. Reported closing or advisory days are for events lasting six consecutive weeks or less. *See* Natural Resources Defense Council, *Testing the Waters: A Guide to Water Quality at Vacation Beaches*, 2012, available at http://www.nrdc.org/water/oceans/ttw/ttw2012.pdf.

[12] See Leeworthy, V.R. and Wiley, P.C., *Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California*, National Oceanic and Atmospheric Administration, 2000, at 4 ("2000 NOAA Report").

[13] Hanemann, M. et al., *Welfare Estimates for Five Scenarios of Water Quality Change in Southern California: A Report from the Southern California Beach Valuation Project*, Marine Ecosystem Services Partnership, November 2005, at 7-8.

[14] 2000 NOAA Report, at 9, 15.

c. Watershed-based and Green Infrastructure Solutions are the Correct Approach to Control Stormwater Pollution

Controlling pollution from MS4 systems has far-reaching economic and social benefits for the State. To further that end, watershed-based best management practices ("BMPs") are a valuable tool for controlling urban runoff and have a long history in Los Angeles. It was the 1996 MS4 Permit that first adopted the watershed approach and required the development and implementation of the Standard Urban Stormwater Mitigation Plan ("SUSMP") to retain, treat and infiltrate stormwater generated by developed areas. (1996 Los Angeles MS4 Permit at 5, 7-8; 2000 Los Angeles County SUSMP, at 10.) Since then, Los Angeles County (in 2009), and several cities - City of Santa Monica (in 2010), City of Long Beach (in 2010), and City of Los Angeles (in 2012) - have adopted additional low-impact development ("LID") ordinances prior to the requirement in the 2012 MS4 Permit.

Environmental Groups have long supported the use of green infrastructure or LID techniques to control urban runoff. Green infrastructure provides multiple benefits to surrounding communities at a higher benefit-cost ratio when compared to grey infrastructure.[15] A 2007 U.S. Environmental Protection Agency (EPA) study found that "in the vast majority of cases . . . implementing well-chosen LID practices saves money for developers, property owners, and communities while protecting and restoring water quality."[16] With only "a few exceptions," the EPA study found that "[t]otal capital cost savings ranged from 15 to 80 percent when LID methods were used" instead of conventional stormwater management techniques.[17] The EPA study is not alone in reaching this conclusion. A report by ECONorthwest concluded that LID methods not only "cost less to install, have lower operations and maintenance (O&M) costs, and provide more cost-effective stormwater management and water-quality than conventional stormwater controls" but they also provide "ecosystem services and associated economic benefits that conventional stormwater controls do not.[18] Moreover, a survey released by the American Society of Landscape Architects in 2011 found that green infrastructure reduced or did not influence project costs 75 percent of the time."[19]

In this time of drought, protecting and augmenting local water supplies is essential for long-term sustainability. A report by the Natural Resources Defense Council found that implementing LID practices at new and redeveloped residential and commercial properties in urbanized areas of Southern California and limited portions of San Francisco Bay has the potential to increase local water supplies by up to 405,000 acre-feet of water per year by 2030.[20] This volume of water accounts for roughly two-thirds of

---

[15] U.S. Environmental Protection Agency, *Case Studies Analyzing the Economic Benefits of Low Impact Development and Green Infrastructure Programs* (August 2013), *available at* http://water.epa.gov/polwaste/green/upload/lid-gi-programs_report_8-6-13_combined.pdf.

[16] U.S. Environmental Protection Agency, *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices,* December 2007, at iii. available at http://water.epa.gov/polwaste/green/upload/2008_01_02_NPS_lid_costs07uments_reducingstormwatercosts-2.pdf.

[17] *Id.* at iv.

[18] ECONorthwest, *The Economics of Low Impact Development: A Literature Review,* November 2007, at 4, available at http://www.econw.com/media/ap_files/ECONorthwest-Economics-of-LID-Literature-Review_2007.pdf,

[19] Stormwater Case Studies, American Society of Landscape Architects, available at http://www.asla.org/stormwatercasestudies.aspx.

[20] Natural Resources Defense Council, *A Clear Blue Future: How Greening California Cities Can Address Water Resources and Climate Challenges in the 21st Century*, August 2009, at 4, available at http://www.nrdc.org/water/lid/files/lid_hi.pdf ("A Clear Blue Future").

all water used by the City of Los Angeles each year.[21] Historically, southern California has imported approximately 50 percent of its water supply from distant, energy-intensive sources such as the Sacramento-San Joaquin Delta and the Colorado River.[22] Green infrastructure thus has the potential to greatly reduce Los Angeles' dependence on imported water.

Environmental Groups embrace stormwater capture and reuse as it provides water quality *as well as* water supply benefits. However, as is discussed more fully in Section VIII below, the 2012 MS4 Permit's emphasis on stormwater capture and reuse without mandating ultimate compliance with WQSs loses sight of CWA requirements. Legal requirements aside, without the "backstop" of water quality standard compliance, the MS4 Permit's effectiveness to protect and restore waters of the United States and their beneficial uses is questionable. Instead of delaying the provisions to strictly comply with WQSs, the 2012 MS4 Permit should rely on proactive enforcement of all its requirements.

III. The 2012 MS4 Permit is a Step Backwards in Stormwater Regulation

The 2012 MS4 Permit's safe harbor provisions defer compliance with the RWLs and TMDL limitations for Permittees that elect to participate in a WMP or an EWMP, and violate multiple provisions of the CWA and other federal and state regulations. This approach represents a significant step backwards in stormwater regulation in California.

a. The 2001 Permit Properly Rejected Safe Harbors to the RWL Provisions

Similar to the 2012 MS4 Permit, the 2001 Permit contained RWL provisions prohibiting "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives."[23] Permittees were directed to begin remedial measures immediately if discharges violated WQSs.[24] If exceedances of WQSs persisted, notwithstanding control measures, Permittees were required to "assure compliance" through an iterative process by preparing a compliance report that identifies the violations and adopting more stringent pollution control measures to correct them.[25]

As the Draft Order recognizes, the requirement to comply with the 2001 Permit's iterative process was designed to assist Permittees in meeting water quality goals, but did not excuse violations of WQSs based on Permittees' efforts to comply with these standards.[26] One reason for rejecting a safe harbors in the 2001 Permit was EPA's position that such an approach is illegal. In fact, an earlier MS4 permit for Orange County, approved by the State Board, had included language stating "the permittees will not be in violation of [receiving water limitations] so long as they are in compliance with [the iterative process set forth in the permit]."[27] The EPA objected to this approach as a "safe harbor" which illegally deemed the Permittees in compliance with the permit regardless of whether water quality standards were then met.[28] In response, the State Board adopted Order No. 99-05, which directed the Regional Boards to

---

[21] *Id.*
[22] *Id.,* at 18-19.
[23] 2001 Permit, at Part 2.1.
[24] *Id.*, at Part 2.3.
[25] *Id.*
[26] Draft Order, at 14.
[27] State Water Resources Control Board, *Own Motion to Review the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03*, State Board Order No. WQ 98-01, at 6-7.
[28] State Water Resources Control Board, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES permit No. CAS0108740 for Storm Water and*

include receiving water limitations language devised by EPA, without a safe harbor provision, into all future MS4 permits.[29]

The Regional Board has consistently supported the 2001 Permit approach in both the enforcement context[30] and in defense of the 2001 Permit in Los Angeles County and 43 cities' legal challenge, and rightfully so - this approach is mandated by both the federal CWA and the California Porter-Cologne Act.[31] Specifically, the Regional Board has stated:

> Permittees would like to read a "safe harbor" into the Permit: if a permittee was in compliance with the iterative process specified in Sections 2.3 and 2.4 of the Permit, it would be in compliance with the Permit, regardless of whether water quality standards are met… In other words, if a permittee is *trying* to meet water quality standards, it would be the same as meeting them. The Regional Board did not include a safe harbor in the Permit and, *under California law, could not have done so*.[32]
>
> The Regional Board's position then, as now, is that the Permit cannot be read so as to excuse exceedances of water quality standards. A permittee cannot shield itself from liability for causing exceedances of water quality standards simply by invoking the iterative process.[33]

The Ninth Circuit Court of Appeal confirmed the 2001 Permit's approach, holding that "no such 'safe harbor' is present in this Permit … [there is] no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions."[34]

b. The 2012 MS4 Permit's Safe Harbors Allow and Excuse Exceedances of WQSs in Certain Circumstances

In contrast with the 2001 Permit, the 2012 MS4 Permit unjustifiably and illegally postpones the requirement that MS4 Permittees must strictly comply with WQSs. Rather, Permittees have two different compliance options, known as WMPs and EWMPS, which trigger application of a safe harbor.[35] These programs effectively allow a Permittee to draft their own permit requirements, conditions, and schedules for compliance.

Under a WMP, a Permittee is required to identify water quality priorities, select watershed control measures to be implemented, and establish compliance schedules for addressing water quality

---

Urban Runoff from the Orange County Flood Control District and the Incorporated Cities of Orange County Within the San Diego Region, Issued by the California Regional Water Quality Control Board, San Diego Region, State Board Order: WQ 99-05, at 1, available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1999/wq1999_05.pdf ("WQ Order No. 99-05).

[29] *See* WQ Order 99-05.

[30] Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 8 ("Regional Board Malibu Amicus Brief").

[31] *See, In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548, at 4-7 (L.A. Super. Ct. Mar. 24, 2005).

[32] Regional Board Malibu Amicus Brief, at 8 (emphasis added).

[33] *Id.* at 9.

[34] *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897 (reversed and remanded on other grounds). *See also*, *Natural Resources Defense Council v. County of Los Angeles* (Aug. 8, 2013) No. 10-56017, 2013 Westlaw 4017155.

[35] 2012 Permit, at Part VI.C.

priorities.[36] For an EWMP, a Permittee must, in addition to WMP requirements, where feasible within a given watershed, retain all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to identified regional projects.[37] Under both options, Permittees must conduct a Reasonable Assurance Analysis ("RAA") to assess whether non-85th percentile retention projects within these programs will result in discharges that achieve WQSs and TMDL limitations or water quality based effluent limitations ("WQBELs") in the 2012 MS4 Permit.[38]

Although it is a stated goal of these programs to ensure that stormwater discharges do not cause or contribute to exceedances of RWLs,[39] and that TMDL waste load allocations ("WLAs") are achieved**, it is not a requirement that the programs achieve these results in fact**. Permittees are instead given a safe harbor from the prohibition on violations of RWLs, or, in some cases of TMDL limits, if they participate in a WMP or an EWMP – regardless of whether RWLs or TMDLs are achieved.[40]

The 2012 MS4 Permit's safe harbors are exceedingly broad and allow exceedances of WQSs and TMDLs at various stages of plan and development. First, during the period of plan development and review,[41] the Permittee is excused for violations of the Permit's RWLs:

> Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. not otherwise addressed by a TMDL…[42]

Second, after approval of a Permittee's WMP or EWMP by the Regional Board or the Board's Executive Officer, a safe harbor excuses liability for a violation of all RWLs if the WMP or EWMP addresses that water body-pollutant combination, regardless of whether or not compliance with the RWL is actually achieved:

> A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the specific water body-pollutant combinations addressed by an approved Watershed Management Program or EWMP.[43]

Third, the 2012 MS4 Permit provides a safe harbor from certain TMDL requirements. Specifically, the 2012 MS4 Permit provides a safe harbor for interim TMDL WLAs for Permittees indicating their intent to develop a WMP or an EWMP:

---

[36] *Id.* at Part VI.C.5.
[37] *Id.* at VI.C.1.g.
[38] *Id.* at VI.C.1.g; VI.C.5.b.iv(5).
[39] *See, e.g.*, *id.* at VI.C.5.b.ii.
[40] In some circumstances the 2012 Permit provides a safe harbor for compliance with either interim or final TMDL limits, or both.
[41] For a WMP, the period of plan development and review is up to 28 months from the 2012 MS4 Permit's effective date, and for an EWMP, up to 40 months from the 2012 MS4 Permit's effective date before it may be approved. *Id.* at VI.C.4.a.)
[42] *Id.* at Part VI.C.2.d.
[43] *Id.* at VI.C.2.b. (emphasis added).

> Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements *shall constitute a Permittee's compliance* with provisions pertaining to interim WQBELs with compliance deadlines occurring prior to approval of a WMP or EWMP.[44]

And, for Permittees implementing an EWMP, the 2012 MS4 Permit provides a safe harbor for all interim TMDLs[45]and final limits other than for Trash TMDLs:

> *A Permittee shall be deemed in compliance* with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if… (4) In 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.[46,47]

By allowing these safe harbors, the 2012 MS4 Permit excuses compliance with RWLs and TMDL WLAs despite the State Board's clear goal to achieve WQSs and the 2001 Permit's clear mandate.

IV. The WMP/EWMP Approach Falls Short of the State Board's Stated Goals

The Draft Order emphasizes that "[c]ompliance with water quality standards is and should remain the ultimate goal of any MS4 permit."[48] Despite this clear mandate, the safe harbors discussed above, do not guarantee achievement of water quality standards. Moreover, the 2012 MS4 Permit's misguided adaptive management process and inadequate technical requirements undermine the goals of meeting water quality standards and promoting stormwater capture.

a. The 2012 MS4 Permit's WMP/EWMP Provisions Do Not Ensure the Proper Rigor, Accountability, and Transparency to Lead to the Achievement of WQSs

The Draft Order's endorsement of the WMP/EWMP alternative compliance approach is based on the mistaken belief that the 2012 MS4 Permit's WMP and EWMP provisions ensure the "appropriate rigor, transparency, and accountability" and "are designed to lead to achievement of receiving water limitations."[49] The Draft Order seeks to distinguish the WMP/EWMP approach from the RWL provisions in the 2001 Permit primarily based on the following reasons: (1) unlike the iterative approach, the adaptive management process provides Permittees the opportunity to modify and improve control measures, (2) the 2012 LA MS4 Permit requires Permittees to conduct a RAA for each water body-pollutant combination incorporated into the WMP/EWMP, (3) the new permit requires specific compliance deadlines and interim milestones within the WMP/EWMP for achieving RWLs. Yet, as is explained below, none of these provisions ensures the WMP/EWMP alternative compliance approach will result in achieving RWLs and thus cannot provide justification for the inclusion of safe harbors.

---

[44] *Id.* at VI.E.2.d.i(4)(d) (emphasis added).
[45] *Id.* at VI.E.2.d.i(4).
[46] *Id.* at VI.E.2.e.i. (emphasis added).
[47] The Draft Order's attempt to add a backstop to this provision falls short because it merely adds the requirement to engage in the inadequate adaptive management process. *See* Section IV.a.i. below.
[48] Draft Order at 14.
[49] Draft Order, at 32.

i. The Adaptive Management Process Suffers From the Same Shortcomings as the Failed Iterative Approach

We agree with the Regional and State Boards that the iterative process has not been effective at bringing Permittees into compliance with WQSs.[50] The Draft Order's attempt to draw a distinction between the adaptive management process and the failed iterative process, however, are without merit. Upon even cursory examination, the adaptive management process is essentially a "rebranded" iterative process and suffers from its same shortcomings.

For example, the Regional Board claims that the iterative process has not resulted in the water quality outcomes that they had hoped for because it: (1) failed to specify "parameters regarding expectations of timeframes or type(s) of additional monitoring needed"; (2) provided "little guidance on reporting or compliance evaluations"; (3) gave Permittees "wide discretion on the level of detail to include in their plan to address RWLs exceedances"; and (4) is "largely reactive in that permittees are only required to take certain actions to evaluate and modify their BMPs and control measure once there has been an exceedance of a RWL."[51]

Ironically, all of the deficiencies of the iterative process that are identified by the Regional Board also exist under the adaptive management process:

- The adaptive management process provisions in the 2012 MS4 Permit do not provide any guidelines to determine the new expected timeframes for meeting compliance;
- The adaptive management process provisions do not mention whether additional monitoring is required (in contrast, the need for additional monitoring *is* recognized under the iterative process);
- The adaptive management process provisions say nothing about reporting or compliance evaluation requirements, or requirements to develop an implementation schedule (whereas the latter *is required* by the iterative process); thus, the adaptive management process provisions also give Permittees wide latitude regarding the level of details they need to include in their modified WMPs/EWMPs; and
- The adaptive management process is as ineffective in ensuring continual improvement in BMPS as the iterative process. The trigger for modification requests by Permittees under the adaptive management process is "when anticipated outcomes are not achieved."[52] Therefore, Permittees are not required to proactively evaluate the effectiveness of their BMPs but rather can modify their strategies when they realize that their BMPs will not be able to achieve the WQSs by the proposed deadlines. As a result, the adaptive management process is just as reactive as the iterative approach, which is triggered when a MS4 discharge is determined to have caused or contributed to an exceedance of a RWL.[53]

In addition, the Regional Board claims – and the Draft Order agrees – that the adaptive management process provides more transparency than the iterative approach. The adaptive management process

[50] Draft Order, at 14. *See also*, Los Angeles Regional Water Quality Control Board Comments on Receiving Water Limitations Questions, August 15, 2013, at 4 ("Regional Board RWL Comments").
[51] *Id.*
[52] *Id.* at. 6.
[53] 2012 Permit, at Part V.A.3.a.

does provide the opportunity for stakeholder review and input.[54] However, the decision to approve or disapprove program modifications is still at the Regional Board Executive Director's discretion, similar to the iterative approach.[55] Indeed, only where a change is considered a *permit modification* is the public afforded a meaningful opportunity to challenge and/or enforce permit terms.[56]

Finally, the Draft Order's attempt to distinguish the adaptive management process from the iterative process by claiming that the adaptive management approach requires Permittees to conduct "adaptive management on their own initiative without waiting for direction from the regional water board" is misplaced.[57] Under the iterative process, the Permittees *share* responsibility with the Regional Board to identify exceedances of WQSs. As the Regional Board stated, "… Part 2.3a grants the Regional Board the authority to trigger the iterative process, but this does not erode the permittees' responsibilities in the first instance…. the language merely ensures that *in addition* to the City's obligation to identify exceedances and direct the permittees to take future actions, the Regional Board can determine that there are exceedances and direct the permittees to take further actions."[58] In other words, there is no distinction between the adaptive management approach and the iterative process. Under both, Permittees may, on their own initiatives, evaluate their monitoring data and initiate the process to modify and improve their BMPs to ensure compliance with water quality standards.

ii. The RAA Requirements are Inadequate

The 2012 Permit requires WMPs and EWMPs (for non-85th percentile retention projects) to include a Reasonable Assurance Analysis (RAA) "to demonstrate that applicable water quality based effluent limitations and receiving water limitations shall be achieved."[59] However, the RAA provisions fail to ensure compliance with WQSs, and do not resolve problems with the prior iterative approach. For example, the RAA must be "quantitative and performed using a peer-reviewed model in the public domain"[60] and the 2012 MS4 Permit lists at least three approved models for this purpose. Yet at least one of those models – the Watershed Management Modeling System (WMMS) – was not peer-reviewed nor was its effectiveness and rigor validated through the permit adoption proceedings. Furthermore, notwithstanding the RAA requirement, Permittees are allowed to modify any BMP every two years pursuant to the adaptive management process based on monitoring data and new information, and without having to conduct a new RAA.[61]

In an effort to strengthen the RAA requirement, the Draft Order proposes to add language to the 2012 MS4 Permit that would require Permittees to conduct an RAA at least every six years. The State Board claims this will add greater rigor and accountability to the process of achieving WQSs.[62] However, this added requirement to conduct an RAA at least every six years does nothing to solve the overarching problems of the WMP/EWMP approach: Permittees are still allowed to *knowingly (and indefinitely)*

[54] Specifically, anytime a Permittee proposes modifications to deadlines and/or BMPs, the requests are subject to a 30-day comment period. Regional Board RWL Comments, at 4, 7; Draft Order, at 35.
[55] 2012 Permit, at Part VI.C.8.iii.
[56] *See e.g.,* 40 C.F.R. §122.62; 40 C.F.R. Part 124. *See also*, CA Water Code §13320.
[57] Draft Order, at 49.
[58] Regional Board Malibu Amicus Brief, at 11.
[59] 2012 Permit, at Part VI.C.1.g.
[60] 2012 Permit, at Part VI.C.5.v.iv.5.
[61] 2012 Permit, at Part VI.C.8.
[62] Draft order, p. 73

exceed WQSs and they may do so without suffering any penalties pursuant to the adaptive management process.

iii. Requirements to Include Deadlines Are Undermined by Never-ending Opportunities for Extensions

The 2012 MS4 Permit's provisions related to deadlines and compliance milestones under the WMP/EWMP compliance approach lack specificity and rigor. Many deadlines may be extended via the adaptive management process as Permittees are allowed to repeatedly modify deadlines and/or BMPs every 2 years.[63] For example, the 2012 MS4 Permit does not impose a limit on the number of times Permittees may propose modifications under the adaptive management process. The Draft Order claims it "cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations"[64] and yet the adaptive management process allows just that – an endless process of continual WMP/EWMP implementation and time extensions, which essentially removes any rigor, specificity and Permittee accountability.

b. The WMP Approach Does Not Require Stormwater Capture to be Considered or Implemented by the Permittees

The Regional Board and Draft Order repeatedly highlight the 2012 MS4 Permit's incentives for regional, multi-benefit stormwater projects that have the potential to augment local water supply. We whole-heartedly support projects that provide both water quality and water supply benefits. However, the proclaimed incentives do not exist with regard to the WMPs or "non-enhanced" watershed management programs. Permittees that elect to engage in a WMP are not required to consider regional, multi-benefit projects such as stormwater capture, yet they receive the same safe harbor protections as the Permittees who, under the EWMP approach, are required to consider stormwater retention wherever feasible.

The 2012 MS4 Permit requires WMPs to:

- Prioritize water quality issues resulting from storm water and non-stormwater discharges from the MS4 to receiving waters,
- Identify and implement strategies, control measures, and BMPs to achieve the outcomes specified [above],[65]
- Execute an integrated monitoring program to determine progress towards outcomes,
- Modify controls measures and BMPs according to adaptive management process, and
- Provide stakeholder input.[66]

WMP Permittees must also demonstrate compliance with the LID and Green Streets requirements.[67] But nowhere in the 2012 MS4 Permit are WMP Permittees required to implement, or even consider, multi-benefit stormwater projects generally, or capture and reuse projects specifically. Thus, WMPs are not required to provide *any* water supply benefits.

---

[63] 2012 Permit, at Part VI.C.8.a.
[64] Draft Order, at 32.
[65] Outcomes specified are RWLs, TMDL requirements, non-stormwater discharge prohibition. 2012 Permit, at Part VI.C.1.d.
[66] *Id*., at Part VI.C.1.
[67] *Id.*, at Part VI.C.4.c.

Moreover, in practice, WMPs submitted to date by Permittees have proven difficult to evaluate[68] because many WMPS lack meaningful specificity regarding the chosen BMPs.[69] For example, although the 2012 MS4 Permit requires that, "[e]ach plan shall include…[f]or each structural control and non-structural best management practice, the number, type, and location(s) and/or frequency of implementation,"[70] several WMPs fail to provide required specificity on the types, sizes, and locations of proposed BMPs.[71] Even without the specificity required, however, it is clear that little emphasis is placed on the use of multi-benefit strategies in the WMPs, on specific additional benefits that could be achieved (e.g., increased water supply), or on partnerships outside of the MS4 community that could be formed to increase utility of land area used for stormwater management.[72] It is therefore nonsensical to give a safe harbor to Permittees that are only required to meet the most minimum of requirements – and can ignore the benefits of stormwater capture.[73]

c. The EWMP Approach Does Not Ensure Ultimate Compliance with WQSs

The 2012 MS4 Permit provides that Permittees will be deemed in compliance with final WQBELs and other TMDL-specific limitations in drainage areas where the Permittees are implementing an EWMP and, where feasible, capturing all stormwater runoff up to an 85th percentile storm.[74] When a Permittee chooses to implement the stormwater retention approach, no RAA is required for projects designed to meet the 85th percentile standard. Yet the 2012 MS4 Permit's Administrative Record fails to demonstrate that retention of the 85th percentile storm event will, in fact, achieve compliance with either WQSs required under the RWLs provisions, or with numerous TMDL WLAs requirements in the 2012 MS4 Permit. The Draft Order, EPA, and Environmental Groups all seem to agree on this point.

At the November 8, 2012 Permit Adoption Hearing, EPA specifically questioned the adequacy of the record on this point:

> [T]he EPA guidance on incorporating TMDLs into … MS4 permits that has been around since 2002 talks about when you come up with a BMP-based approach for incorporating a TMDL into a permit—so basically this is a BMP-based approach. You would be retaining the 85th percentile

[68] Environmental Groups provided comments on many of the Draft WMPs submitted by the Permittees to the Regional Board on August 18, 2014.
[69] *See* Comments on Watershed Management Plans and Monitoring Plans Pursuant to Requirements under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. R4-2012-0175 submitted by NRDC, LA Waterkeeper, and Heal the Bay, August 2014, attached to Environmental Groups' accompanying Request for Official Notice as Exhibit K.
[70] 2012 Permit, at Part VI.C.5.b.iv(4).
[71] For example, although the Lower San Gabriel River WMP lists hundreds of *potential* BMP sites for regional or street right-of-way sites, the Permittees do not provide any specifics on BMP type, location, or size – let alone an indication of which ones will be implemented. *See,* Lower San Gabriel WMP, at 3-61 - 3-70, attached to Environmental Groups' accompanying Request for Official Notice as Exhibit E.
[72] *See e.g.,* Lower Los Angeles River Upper Reach 2 WMP, at 65 (prioritizing cost considerations over water supply benefits).
[73] Environmental Groups acknowledge that some WMP Permittees are prioritizing regional and multi-benefit projects voluntarily, but we maintain that consideration of such projects should be a requirement in all watershed management programs.
[74] 2012 Permit, at Part VI.E.2.e.i(4).

> storm—you have to have in the record for the permit the justification for how that gets to those specific wasteload allocations….[75]
>
> We've been very involved with the county's modeling and … we don't have that rigorous analysis that's been—that's required by the EPA guidance for saying and showing that that specific retention is going to achieve the numeric wasteload allocation…. I haven't seen the support in the administrative record, the fact sheet or otherwise.[76]

The Regional Board's attempts to justify the 85th percentile standard fall short. Following EPA's comments at the 2012 Hearing, the Regional Board Chair asked staff directly if the evidence requested by EPA was in the record.[77] The Board's Executive Officer, Mr. Unger replied:

> Yes. Yes. It was discussed when the county first presented at the last hearing, the enhanced management approach, they discussed their – the watershed modeling system that they would be using to demonstrate a reasonable assurance.[78]

However, the record, including watershed modeling discussed by Los Angeles County, does not anywhere demonstrate that retention of the 85th percentile storm will protect WQS or achieve TMDL WLAs as required by the CWA or EPA guidance. Moreover, the County's presentations merely demonstrate that the stormwater retention approach represents a cost-effective or "appropriate design storm [size] for use in BMP planning and design,"[79] not a standard designed to meet WQSs or TMDL limits.

The Draft Order acknowledges this deficiency in noting a "lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach."[80] Further, the Draft Order states, "the stormwater retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations."[81] Despite the Draft Order's recognition of this significant shortcoming in the EWMP approach, it nevertheless upholds the adaptive management process provisions of the 2012 MS4 Permit, which will only result in a continuous loop of program implementation and monitoring without ensuring ultimate compliance. This approach merely engages Permittees in a never-ending cycle of adaptive management which in practice, as discussed in Section IV.a.i. above, closely resembles the failed iterative approach, and will not achieve water quality goals. It does not resolve the underlying problem with a lack of evidence in the record, nor does it guarantee compliance with water quality standards.

---

[75] Mr. John Kemmerer, EPA, November 8 Hearing, at 365:24-25 to 366:1-7.
[76] Mr. John Kemmerer, EPA, November 8 Hearing, at 366:10-18; 367:6-8.
[77] *See* Ms. Maria Mehranian, Regional Board Chair, November 8 Hearing, at 368:13-14 (stating "So—I'm sorry… it is in the record?").
[78] Mr. Sam Unger, at 368:15-19.
[79] Mr. Gary Hildebrand, November 8 Hearing, at 220:18-19. Regional Board staff also indicated their understanding that selection of the 85th percentile storm was a cost consideration, not an independent assessment of the storm size required to be retained to meet applicable TMDL WLAs. *See also*, Mr. Sam Unger, November 8 Hearing, at 360:14-17 ("when you look at that curve, sort of a dollars versus precipitation event occurred, right about that 85th percentile – right at the 85th percentile, the curve trends up very markedly.").
[80] Draft Order, at 40.
[81] *Id*. at 42.

V. The Draft Order's Justifications for Providing Permittees Additional Compliance Time are Misguided

The Regional Board claims – and the Draft Order seems to agree – that since the adoption of the 2001 Permit, there has been a paradigm shift from viewing stormwater as a liability to a regional asset,[82] as well as from taking an individual programmatic approach to water quality improvement to taking a collaborative, watershed-based approach.[83] This "new" information informed the Regional Board that Permittees need additional time to bring themselves into permit compliance and ultimately shaped the WMP/EWMP approach in the 2012 MS4 Permit. As discussed in further detail below, the Regional Board's – and the Draft Order's – justifications are flawed because these approaches are not a novel concept to the either the Regional Board or Permittees.

a. Treating Stormwater as a Regional Asset is Not a New Concept

The concept that stormwater can be captured to provide a beneficial source of groundwater recharge or water supply is not new. For example, a 1994 EPA report in the record notes that "[b]efore urbanization, groundwater was recharged by precipitation infiltrating through pervious surfaces . . . Urbanization, however, reduced the permeable soil surface area through which recharge by infiltration could occur. This resulted in much less groundwater recharge. . . ."[84] The report goes on to state, "with a reasonable degree of site-specific design considerations to compensate for soil characteristics, infiltration may be very effective in controlling both urban runoff quantity and quality problems. This strategy encourages infiltration of urban runoff to replace the natural infiltration capacity lost through urbanization. . . ." In light of this record, the Regional Board cannot claim that use of stormwater capture and infiltration to increase groundwater recharge or create water supplies is categorically new information.

Further, in the years since the 2001 Permit's adoption, use of practices such as LID and green infrastructure have proliferated at both site-specific and regional or watershed scales[85] For example, the City of Los Angeles began implementing stormwater capture projects over a decade ago. The Sun Valley Park Drain and Infiltration System Project was completed in 2006 by the Los Angeles Flood Control District.[86] The Riverdale Avenue Green Street project was completed in early August 2010.[87] Construction for the Garvanza Park Stormwater BMP Project started in November of 2010, and was completed in March of 2012.[88] And, the South L.A. Wetlands Park was completed in February of 2012.[89]

---

[82] *Id.* at 20.

[83] Regional Board RWL Comments, at 8.

[84] U.S. Environmental Protection Agency, *Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration*, EPA/600/SR-94/051, May 1994, at 1, 6 ("EPA Stormwater Infiltration Report").

[85] To this end, we note that the 2001 Permit contained requirements for development to "Maximize the percentage of pervious surfaces to allow percolation of storm water into the ground" and "Minimize the quantity of storm water directed to impervious surfaces and the MS4." 2001 Permit, at Part 4.D.

[86] *Sun Valley Park Drain and Infiltration System*, Department of Public Works, accessed at http://dpw.lacounty.gov/wmd/svw/SVP.aspx.

[87] *The Tale of Two Green Streets,* LA Stormwater, accessed at http://www.lastormwater.org/blog/2010/09/the-tale-of-two-green-streets-2/.

[88] *Garvanza Park Stormwater BMP Project,* North East Trees, accessed at https://northeasttrees.wordpress.com/2011/01/14/garvanza-park-stormwater-bmp-project/. *See also, Los Angeles To Celebrate Grand Re-Opening of Garvanza Park,* LA Stormwater, accessed at http://www.lastormwater.org/blog/2012/03/la-to-celebrate-grand-re-opening-of-garvanza-park/.

In light of these projects, neither Permittees nor the Regional Board can claim that green infrastructure solutions are somehow "new" knowledge or new solutions to an old problem.

Nonetheless, even if we agreed with the Regional Board's position that it has only recently identified new techniques to address stormwater pollution, it still does not logically lead to the conclusion that more time for compliance with RWLs is warranted. If anything, the additional options now available to Permittees should mean they need *less* time to comply with the water quality objectives rather than more, because there are *more* tools at the Permittees' disposal. Overall, the additional time given for compliance is misguided, most significantly, because Permittees have had 13 years to achieve WQSs since the adoption of the 2001 Permit (including through use of regional or watershed-based strategies or use of stormwater capture and groundwater recharge practices available to the Permittees). The State Board should not be sympathetic to Permittees' claims that they cannot comply with WQSs overnight because immediate compliance has been required since 2001, and the Permittees have yet to meet this mandate. Furthermore, the fact that the Regional Board has finally now determined to embrace practices known for over a decade does not justify further delay.

b. A Regional, Watershed-Based Approach to Controlling Urban Runoff is Not a New Concept

Just as implementing green infrastructure techniques is hardly new ground for Permittees, the watershed-based approach to controlling urban runoff is similarly not a new concept. In fact, this approach was well-known by Permittees and the Regional Board at the time of the 2001 Permit adoption. In several instances, the Regional Board and 2001 Permit explicitly called for a watershed-based approach to be adopted.

For example, while the Regional Board claims it has achieved a "new understanding" that BMPs or management strategies may be best implemented on a watershed scale, the 2001 Permit already called for stormwater management to be conducted on a coordinated, watershed basis. The 2001 Permit states:

> The Regional Board supports a Watershed Management Approach to address water quality protection in the region. The objective of the Watershed Management Approach should be to provide a comprehensive and integrated strategy towards water resource protection, enhancement, and restoration while balancing economic and environmental impacts within a hydrologically defined drainage basin or watershed. It emphasizes cooperative relationships between regulatory agencies, the regulated community, environmental groups, and other stakeholders in the watershed to achieve the greatest environmental improvements with available resources.[90]

Moreover, numerous commenters on the 2001 Permit, including Permittees, pointed specifically to the need for approaches in the Permit that embrace watershed-based management or for regional projects and solutions to be implemented:

- Heal the Bay discussed the lack of a proper watershed-based approach in the Draft 2001 Permit, stating "inclusion of watershed-specific requirements for each of the watersheds within the storm water permit is long overdue . . . Watershed specific issues were addressed and studied extensively as part of the 1996 Permit, which required all

[89] *South Los Angeles Wetlands Park,* LA Stormwater, accessed at http://www.lastormwater.org/green-la/proposition-o/south-los-angeles-wetlands-park/.
[90] 2001 Permit, at 11. *See also*, 2001 Permit, at 23.

the watershed groups prepare a watershed management area plan (WMPA). However, the [Regional Board] has failed to require implementation of these plans in order to achieve receiving water quality objectives."[91]

- NRDC discussed need for regional projects and solutions in the Draft 2001 Permit, stating "water quality standards are not being met in this region. This indicates that regional solutions are needed. . . ." NRDC specifically called on the Regional Board to act in this regard: "Regional Board leadership is needed in this area. We are increasingly concerned about the Permittee's commitment (or lack thereof) to developing regional programs and solutions . . . although several permittees often tout them as the most effective solution. Clearly, specific requirements are needed to ensure that regional programs are developed."[92]

- The Mayor of Signal Hill, Larry Forester, noted at the 2001 Permit Adoption Hearing that, "the permit contains a section discussing regional solutions which are widely recognized as the most cost effective means of dealing with storm water cleanup."[93]

Moreover, Regional Board staff also repeatedly referred to the need or opportunity for regional solutions at the 2001 Permit adoption hearing,[94] and even the State Board Office of Chief Counsel, in response to discussion surrounding use of regional solutions in the 2001 Permit, stated:

> A comment asserts that the Regional Board has failed to adequately consider "regional solutions." To the extent the comment maintains that State Board's SUSMP Order encouraged regional solutions, the Regional Board staff concurs. Specifically, the State Board encouraged the permittees to develop such projects. . . . it is the burden of the permittees to develop and present workable, acceptable programs that meet or exceed the requirements of the draft MS4 permit. At this time, the permittees have not submitted any specific proposals for regional solutions or programs. The Regional Board itself maintains broad discretion to consider proposed programs in the future.[95]

The Regional Board was well aware of, and in fact, supportive of, the benefits of watershed-based stormwater management and regional projects and solutions – as a result, the State Board should not endorse the Regional Board's justification for providing the Permittees additional time for compliance.

---

[91] Letter from Heal the Bay to Dr. Xavier Swamikannu, Regional Board, re: Comments on the Second Draft of the LARWQCB NPDES No. CAS614001 – Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles and the Incorporated Cities, Except for Long Beach and Santa Clarita, August 6, 2001, at 2.

[92] Letter from NRDC to Xavier Swamikannu, Regional Board, re: Comments on the June 29, 2001 Draft of the LARWQCB NPDES Permit No. CAS614001 – Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles and the Incorporated Cities Therein, August 6, 2001, at 3-4.

[93] 2001 Permit Adoption Hearing transcript, at 55:25 – 56:2.

[94] *See, e.g.*, November 8 hearing transcript, at 13, 19, 21, 37, and 146.

[95] Legal Memo from Michael Lauffer, Office of Chief Counsel, to Dennis Dickerson LARWQCB, Nov. 9, 2001, at 7, available at http://www.swrcb.ca.gov/losangeles/water_issues/programs/stormwater/municipal/los_angeles_ms4/tentative/121301_legal%20brief%20ms4%2011-9-01.pdf.

VI. The WMP/EWMP Approach is Not Comparable to the Trash TMDL Approach

As is noted above, the WMP/EWMP approach attempts to incentivize a particular technology-based approach (i.e., stormwater capture) to achieve compliance with WQSs. There is nothing inherently wrong with this type of approach, as technology-based requirements can be effective at achieving compliance with WQSs. However, the WMP/EWMP approach lacks the necessary rigor and accountability for success.

An oft-cited example of a successful technology-based approach to water quality compliance in the stormwater context is the Los Angeles River Trash TMDL and some Permittees have tried to argue that the WMP/EWMP approach of the 2012 MS4 Permit is just like the L.A. River Trash TMDL approach. This is simply not true. First and foremost, the Trash TMDL sets a waste load allocation for stormwater at zero. While the Trash TMDL approach provides an alternative compliance path for dischargers that install "full capture systems," in doing so, the provisions provide very clear and definitive compliance language. The TMDL requirements state:

> Compliance with the final waste load allocation may be achieved through a full capture system. A full capture system is any device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate (Q) resulting from a one-year, one-hour, storm in the subdrainage area. [96]

Note that under the Trash TMDL approach, a discharger is not deemed in compliance with the final WLAs unless a full capture system that meets the stated requirements is actually installed. Mere evaluation of opportunities to deploy full capture systems or the use of undersized systems does not equal compliance.

Unfortunately, the WMP/EWMP approach is not equivalent to the Trash TMDL approach in its specificity or in its implementation requirements. Notably, the WMP approach fails to identify what technologies or control measures will result in a compliance determination. It does not even mention stormwater capture. It merely creates a *process* for dischargers to develop programs, regardless of what technology they choose to deploy.[97] The EMWP process is slightly better in that it at least attempts to incentivize stormwater capture, but in doing so it falls far short of ensuring that capture will be widespread or meaningful. In particular, the EWMP language states:

> An EWMP is one that comprehensively **evaluates opportunities**, within the participating Permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among Permittees and other partners on multi-benefit regional projects that, **wherever feasible**, retain (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood control and water supply, among others.[98]

---

[96] *See* Attachment A to Resolution No. 07-012, Amendment to the Water Quality Control Plan – Los Angeles Region to incorporate the TMDL for Trash in the Los Angeles River Watershed (Adopted by the California Regional Water Quality Control Board, Los Angeles Region on August 9, 2007).

[97] 2012 Permit, at Part VI.C.1.

[98] 2012 Permit, at Part VI.C.1.g. (emphasis added).

This approach not only fails to ensure that water quality goals will be met but also fails to ensure stormwater capture will be utilized. A far better approach would be to *require* the use of stormwater capture (rather than merely consider it) if a Permittee is to benefit from any alternative compliance pathway. Such an approach would be far more analogous to the Trash TMDL approach and far more likely to achieve the desired effect.

VII. The Permittees Exaggerate the Costs of Compliance, and Contrary to Permittees' Assertions, There are Available Sources of Funding for Permit Implementation.

At the December 16, 2014 State Board workshop on the Draft Order, many Permittees raised concerns about costs of permit implementation – similar to past claims – specifically relating to the development of WMPs/EWMPs and the implementation of green infrastructure projects, and asserted that there are very few sources of funding available for Permittees to pursue. In addition, the City of Monrovia brought up the recently released U.S. Conference of Mayors report[99] to argue that many communities are facing serious economic challenges with limited resources and financial capabilities as a result of having to comply with CWA objectives.[100] The findings of this report, according to the City of Monrovia, indicate that a tipping point has been reached and help is needed. The City then concluded that the WMP/EWMP discussion speaks directly to these affordability concerns (because if costs were not an issue, then every Permittee can develop its WMP/EWMP and achieve WQSs within the five-year permit cycle), and therefore Permittees need more time to develop and implement their WMPs/EWMPs and to find the funding in order to make permit compliance more affordable for their residents.[101]

Monrovia's reliance on the U.S. Conference of Mayors report is misplaced because the report suffers from several deeply flawed analyses. First and foremost, the report lumps *all types* of water costs together (sewer, water, *and* flood control), thus making it difficult to ascertain just how much of the economic expense borne by communities can be attributed to stormwater management or even the CWA. Second, while the report concludes that lower income households are disproportionately impacted by the economic burdens of public water services, it says nothing about what these households are *actually paying* in their water and sewer bills.

Permittees have a long history of overlooking the benefits of implementing stormwater programs while exaggerating the costs of compliance. In comments submitted on the 2001 Permit, for example, the City of Signal Hill and city members of the "Coalition for Practical Regulation"[102] stated that "the cost of the

---

[99] The U.S. Conference of Mayors, *Public Water Cost Per Household: Assessing Financial Impacts of EPA Affordability Criteria in California Cities,* November 2014, available at http://www.usmayors.org/pressreleases/uploads/2014/1202-report-watercostsCA.pdf. Environmental Groups note that this report has not been properly incorporated into the Administrative Record by Permittees.

[100] Some the major findings of the report that were mentioned at the workshop included: 1) More than half of the 30+ cities that were surveyed are spending money for public water services in excess of 2% of their median household income; 2) ten of the cities are spending more than 4.5% of their actual income; and 3) thirty-nine percent of paramount's residents are already spending more than that threshold for their water. Recording of December 16, 2014 Board Workshop, at Part 2, 1:17:22.

[101] *Id.* at 1:18:30.

[102] At the time of this comment, the Coalition for Practical Regulation was made up of at least 35 cities regulated under the Los Angeles County MS4 permit, of which at least 20 were members of the current Los Angeles Permit Group, comprising one-third of that group's membership, as of May 30, 2012. These cities include: Arcadia, Artesia, Bellflower, Burbank, Commerce, Diamond Bar, Industry, Lakewood, Lawndale, Monrovia, Montebello, Paramount, Pico Rivera, Pomona, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, South Gate, and Vernon. (See Letter from Larry Forester, Coalition for Practical Regulation, to Mr. Dennis Dickerson, Regional Board, re:

TMDL program for Los Angeles County alone, which is to be implemented in part, through the NPDES permitting process, could result in expenditures to Los Angeles taxpayers in excess of ***$50 billion***."[103] In contrast to this assertion, the Regional Board notes in the 2012 MS4 Permit Fact Sheet[104] that "Based on reported values [by the Permittees], the average annual cost to the Permittees in 2010-11 was $4,090,876 with a median cost of $687,633," for implementation of their entire stormwater programs, including TMDL requirements.[105] In 2010, Los Angeles County asserted, for instance, that compliance with the Trash TMDLs "could cost the municipalities over $1 billion."[106] Yet the staff report for the TMDLs states that the cost of implementing the TMDLs "will depend on the BMPs selected by the Permittees,"[107] and in fact, the County itself points out that compliance could cost less than $1 million.[108] The listed implementation costs for the Los Angeles River Trash TMDL are also spread among 44 Permittees, meaning the costs borne by any one discharger are only a fraction of any total cost estimate.[109]

Further, and directly applicable to the problems of accounting contained in the Conference of Mayors report, as the Regional Board notes, the "reported program costs [by Permittees] are not all solely attributable to compliance with requirements of the LA County MS4 Permit. . . . For example, storm drain maintenance, street sweeping and trash/litter collection costs are not solely or even principally attributable to MS4 permit compliance, since these practices have long been implemented by municipalities," and provide separate and additional municipal benefits beyond stormwater pollution control.[110] As a result, "the true program cost related to complying with MS4 permit requirements is some fraction of the total reported costs. For example, after adjusting the total reported costs by subtracting out the costs for street sweeping and trash collection, the average annual cost to the Permittees was $2,397,315 with a median cost of $290,000."[111] Even multiplied over the course of the many years the 2001 Permit has been in effect, these expenditures (which as stated above, cover the entire program, not just TMDL implementation), are an order of magnitude less than claimed by the commenting cities.

Finally, contrary to Permittees' claims, there are both available and feasible sources of funding for Permittees to seek to help cover their costs of permit compliance. For example, in Los Angeles County,

---

Second Draft – Municipal NPDES Permit, August 6, 2001, at 1; Statement by Larry Forester, Coalition for Practical Regulation, December 13, 2001, at 1; City Manager's Office, City of San Gabriel (May 30, 2012) The Council Weekly, "LA Permit Group: Voting Agencies," at 9.)

[103] Letter from Rutan & Tucker, LLP, to Dr. Xavier Swamikannu, Los Angeles Regional Water Quality Control Board, re: Los Angeles Regional Water Quality Control Board, October 11, 2001 Draft NPDES Permit No. CAS004001, November 13, 2001, at 20.

[104] Los Angeles Regional Water Quality Control Board, Fact Sheet for Order R4-2012-0175, NPDES Permit No. CAS004001, November 8, 2012 ("2012 Permit Fact Sheet").

[105] 2012 Permit Fact Sheet, at F-146.

[106] Brief of Amicus Curiae County of Los Angeles and Los Angeles County Flood Control District in Support of Cross-Appeal of Plaintiffs/Cross-Appellants Cities of Arcadia et al., in *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 161, at 16 ("County and LACFCD Amicus Brief").

[107] Regional Board Trash Total Maximum Daily Loads for the Los Angeles River Watershed (Revised Draft July 27, 2007), at 42.

[108] County and LACFCD Amicus Brief, at 16, fn 5.

[109] See, e.g., *City of Arcadia v. U.S. E.P.A.* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1157 (rejecting an economic challenge to the Trash TMDL in part based on the fact that costs are spread among multiple parties).

[110] 2012 Permit Fact Sheet, at F-146.

[111] *Id.*

public agencies (both federal and state) have provided significant sources of funding through grants, bonds, and fee collections designated for implementation of stormwater management programs in Los Angeles County. From sources such as Prop O, Props, 12, 13, 40, 50, and 84, grants or funds from state agencies such as DWR and the Coastal Conservancy, and Measure V, more than $645 million has been provided for stormwater management in Los Angeles County.[112] Proposition 1, the new California Water Bond, also includes funds for stormwater capture.

VIII. The Draft Order and the 2012 MS4 Permit are Illegal

In multiple aspects, the 2012 MS4 Permit, the Draft Order and their provisions are contrary to both state and federal law, and must be revised in order to pass legal muster.

a. The Draft Order and 2012 MS4 Permit Violate Anti-backsliding Provisions

i. The Statutory Prohibition Against Backsliding Under the CWA is Applicable

The Draft Order asserts that "The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o)," which "prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e)."[113] The Draft Order then cursorily asserts that "The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable."[114] This position directly ignores and contradicts the Regional Board's express statement of the legal basis for the 2001 Permit. As the Fact Sheet for the 2001 Permit states:

> The conditions established by this permit are based on CWA § 402(p)(3)(B) which mandates that a permit for discharges from MS4s must: effectively prohibit the discharges of non-storm water to the MS4; and require controls to reduce pollutants in discharges from MS4 to the maximum extent practicable (MEP) including best management practices, control techniques, and system, design and engineering methods, and such other provisions determined to be appropriate. *MS4s are not exempted from compliance with Water Quality Standards. CWA § 301(b)(1)(C) requires NPDES permits to incorporate effluent limitations, including those necessary to meet water quality standards, applies.* The permit conditions have been developed to meet the statutory mandate of the CWA."[115]

Further, the 2001 Permit defined the Water Quality Objectives and Water Quality Standards at issue in the Draft Order as "water quality criteria contained in the Basin Plan, California Ocean Plan, National Toxics Rule, the California Toxics Rule…"[116] All of these standards are by definition adopted pursuant to Section 301(b)(1)(C). In addition, Part 5 of the 2001 Permit defines "Applicable Standards and Limitations" as "all state, interstate, and federal standards and limitations…*under sections 301*, 302,

---

[112] *Id.* at F-150.
[113] Draft Order, at 18-19.
[114] Draft Order, at 19.
[115] Los Angeles Regional Water Quality Control Board, Fact Sheet/Staff Report for the County of Los Angeles Municipal Storm Water NPDES Permit (CAS004001) Order. No. 01-182, December 13, 2001, at 7 ("2001 Permit Fact Sheet") (emphasis added).
[116] 2001 Permit, at 70.

303, 304, 306, 307, 308, 403, and 404 of the CWA."[117] Contrary to the State Board's stated position now, both the 2001 and 2012 Permits were adopted to follow sections 301(b)(1)(C) *and* 402(p) of the CWA, therefore the statutory prohibition on backsliding under section 402(o) applies.[118]

ii. No Exception to the Regulatory Prohibition Against Backsliding Exists to Justify the 2012 MS4 Permit's Weakened Requirements

Even if the Draft Order's argument that the statutory prohibition against backsliding did not apply were correct, the regulatory prohibition against backsliding under 40 C.F.R. § 122.44(l) plainly does. This regulatory prohibition requires that "when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under [40 C.F.R. § 122.62].)" (40 C.F.R. § 122.44(l)(1).) The Draft Order's rationale for claiming an exception exists here is deeply flawed.

At the outset, the Draft Order conjectures that "With respect to the regulatory anti-backsliding provisions 40 Code of Federal Regulations section 122.44(1), the non-applicability is less clear cut," and that it has "found no definitive guidance . . . from USEPA or the courts applying the general provisions of section 122.44(l) in the context of municipal storm water permits."[119] While the Draft Order "acknowledges" a letter from U.S. EPA Region 3 applying the regulatory prohibition of 40 C.F.R. § 122.44(l) to permit provisions in a Draft Phase I MS4 permit for Prince George County, Maryland, the Order declines to accord it any weight. More critically, the Draft Order fails to consider the guidance contained in the U.S. EPA NPDES Permit Writers' Manual, which, applicable to all forms of NPDES permitting, states "this regulation [at § 122.44(l)(1)], in effect, addresses all types of backsliding not addressed in the [statutory Clean Water Act] provisions."[120] The Draft Order fails to cite to any guidance or other documentation to show that this regulation does not apply to stormwater.

As referenced above, modification or revocation of a MS4 Permit, and thus, potentially backsliding, would be allowed under section 122.62(a)(2) where new information is available to the agency, but "only if the information was not available at the time of permit issuance." (40 C.F.R. 122.62(a)(2).) The Draft Order echoes this statutory exception by stating that "backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order." The Draft Order then concludes that the Regional Board has in fact gained a new understanding about both the approach and method to controlling urban runoff – namely that Permittees should collaborate on a watershed scale and treat stormwater as a regional asset. As discussed in Section V., above, none of these concepts are new. Nor were these concepts unknown at the time of the 2001 Permit's adoption.

---

[117] 2001 Permit, at 60 (emphasis added).

[118] The Draft Order asserts that under *Defenders of Wildlife v. Browner,* 191 F.3d 1159, effluent limitation in MS4 Permits are only imposed pursuant to section 402(p). Draft Order, at 19, fn 60. Yet nothing in *Defenders* prevents permit writers from including, as in the 2001 Permit, *more stringent* limits pursuant to section 301(b)(1)(C). *See Defenders,* at 1166.

[119] Draft Order, at 19.

[120] U.S. Environmental Protection Agency, *NPDES Permit Writers' Manual*, EPA-833-K-10-001, September 2010, at 7-4, *available at* http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm.

The impacts of MS4 discharges on receiving waters, the control measures available to reduce or prevent the MS4 discharges, including technologies such as low-flow diversions and full and partial trash capture devices, and the time needed for Permittees to implement those measures have all been discussed prior to 2001 Order adoption.[121]

1. The Concepts of Watershed-based Stormwater Management and Stormwater Capture for Water Supply Augmentation are not "New" Information to the Regional Board

As we detail earlier in our letter, the 2001 Permit explicitly called for stormwater management to be conducted on a coordinated, watershed basis.[122] Commenters including Heal the Bay, NRDC, and the Mayor of Signal Hill all pointed to the need for watershed-based approaches and regional projects during the adoption process of the 2001 Permit.[123] Moreover, both Regional Board staff and the State Board Office of Chief Counsel commented on, if not directly encouraged, the use of regional projects as a means of achieving water quality goals pursuant to the 2001 Permit.[124]

Similarly, the Regional Board was well aware of the concept that stormwater can be captured to provide a beneficial source of groundwater recharge or water supply prior the adoption of the 2001 Permit, having received, among other documents, a report by U.S. EPA detailing the water supply augmentation of infiltration practices,[125] as well as multiple Watershed Management Area Plans submitted by the Los Angeles County Department of Public Works detailing the presence of spreading grounds used to capture stormwater runoff and recharge groundwater in the region.[126]

Therefore, the State Board should not agree with the Regional Board that these approaches are "new" information that justifies the imposition of weaker requirements in the 2012 MS4 Permit.[127]

2. The Development and Implementation of TMDLs Does Not Constitute New Information

The Draft Order's additional claim that the Regional Board acquired new information through the development and implementation of TMDLs in the Los Angeles Region since 2001 is similarly flawed and contradicts the CWA's framework and goals.[128]

TMDL requirements implement water quality standards and are the CWA's ultimate tool to ensure WQSs are achieved when the Act's technology-based requirements have failed. (33 U.S.C. § 1313(d)(1)(A),(C); 40 C.F.R. §§ 130.2 (i), 130.7.) Thus, as a policy matter, using TMDLs to justify the

---

[121] Los Angeles Regional Water Quality Control Board Response to Petitions Challenging 2012 MS4 Permit, October 15, 2013, at 51.
[122] 2001 Permit, at 11. *See also*, 2001 Permit, at 23.
[123] *See* Section V.b. above.
[124] *Id.*
[125] EPA Stormwater Infiltration Report, at 1, 6.
[126] *See, e.g.* Los Angeles County Department of Public Works (February 1, 2001) Watershed Management Area Plans (WMAP), Pursuant to NPDES Permit Order No. 96-054 (CAS614001), at Los Angeles River 3, 15; San Gabriel River at 3, 17.
[127] We note as well that even if these approaches could be considered "new," it would still not justify backsliding in this instance; as discussed above in Section V.a., an improvement or development of new technology provides the Permittees with *additional* options for meeting the requirements imposed on them by the prior permit and hence does not justify eliminating or delaying those requirements.
[128] Draft Order, at 20.

Permit's safe harbors, which excuse violations of the exact WQSs that the TMDLs were developed to achieve is irrational and undermines the directive and spirit of the CWA.

Further, none of the information the Regional Board claims to have acquired is actually new. First, the Regional Board's claim that it learned about MS4 discharges' impacts to receiving waters because of the development and implementation of the TMDLs is not supported by the evidence. In fact, the Board well understood the impacts of MS4 discharges on receiving waters prior to the adoption of the 2001 Permit because it had conducted "water quality assessments [which] identified impairment, or threatened impairment, of beneficial uses of water bodies in the Los Angeles Region" concluding that "[t]he causes of impairments include pollutants of concern identified in municipal storm water discharges by the County of Los Angeles in the Integrated Receiving Water Impacts Report (1994-2000)." (2001 Permit, at 2.)

Second, the Board was also well aware that the municipal stormwater control measures available at the time the 2001 Permit was adopted included technologies such as diversions of dry weather flows to the sanitary sewer system and full and partial trash capture devices.[129] Moreover, the Regional Board knew that these technologies were already being successfully implemented even before the 2001 Permit was adopted and understood that their design and implementation may require significant funding and coordination among permittees and agencies.[130]

Third, the Regional Board's assertion that the development and implementation of TMDLs somehow provided it with new information about the time necessary to implement stormwater control measures cannot justify backsliding. The Board has already considered and addressed this issue during the adoption of the TMDLs, and already provided Permittees with lengthy implementation schedules and interim and final compliance deadlines to ensure sufficient time will be allotted to ensure WQSs are met.[131] Furthermore, any concerns that additional time may be necessary to reach compliance for constituents not subject to TMDLs or constituents subject to TMDLs without implementation schedules or with expired implementation schedules can and must be dealt with through the Regional Board's enforcement authority as discussed in Section X. below, and not through an unfounded grant of additional time by the Permit itself.

---

[129] *See* 2001 Permit at 51 (requiring Permittees to develop together with the Los Angeles County Sanitation Districts a study to investigate the possible diversion of dry weather discharges and create a list of drains for potential diversion); Draft Trash Total Maximum Daily Loads for the Los Angeles River Watershed, November 27, 2000, at 28-38 (discussing full and partial trash capture devices and their costs).

[130] *Id.*; *see also* Draft Total Maximum Daily Load to Reduce Bacterial Indicator Densities at Santa Monica Bay Beaches, November 8, 2001, at 42, 44 (discussing the completion of dry weather diversions by City of Los Angeles, County of Los Angeles and other Santa Monica Bay adjacent cities at 11 of 27 major storm drains and providing information on the costs of the diversions).

[131] *See e.g.,* Ballona Creek Estuary Toxic Pollutants TMDL, at 16-17 (final compliance deadlines for MS4 Permittees in 2021 (metals) and 2025 (PCBs)); Ballona Creek Metals TMDL, at 16 (final compliance deadlines for MS4 Permittees in 2021); Santa Monica Bay Beaches Bacteria TMDL, at 9 (final wet weather compliance deadline in 2021); Dominguez Channel and Greater Los Angeles and Long Beach Harbor Toxics TMDL (final compliance deadline in 2032); Los Angeles River and Tributaries Metals TMDL, at 21 (final compliance deadline in 2028).

iii. Information Gained by the Regional Board Through Developing and Implementing Los Angeles Specific TMDLs Cannot be Used as a Basis for Statewide Application of the Draft Order

A separate and significant cause for concern in using Los Angeles Region TMDLs as a basis for backsliding from strict compliance with WQSs stems from the fact that the Draft Order directs other regional boards to consider incorporating similar WMP/EWMP provisions when issuing MS4 permits.[132] Assuming *arguendo* that the development and implementation of the 33 TMDLs in Los Angeles region has provided the Regional Board with new information that can justify backsliding from the 2001 Permit's RWL provisions, this information cannot support backsliding from the RWL provisions in *other* Regional Boards' MS4 permits because it is strictly based on Los Angeles region TMDLs. Moreover, for regions with few or no TMDLs applicable to MS4 discharges, TMDL development or implementation can never be grounds for backsliding.[133]

b. The 2012 MS4 Permit Violates Antidegradation Requirements

While the Draft Order acknowledges that the antidegradation analysis required by state and federal law is triggered by the 2012 MS4 Permit, rather than remanding to the Regional Board to conduct the required analysis, the Draft Order merely adds conclusory findings to the 2012 MS4 Permit. The Draft Order's analysis and findings thus are inadequate and fail to comply with state and federal law.

i. The Draft Order Violates Federal Antidegradation Regulations

The Draft Order spends considerable energy arguing that data to set a water quality baseline in the Los Angeles area is lacking.[134] Yet in doing so, the Draft Order ignores the absolute floor on degradation set by Federal Regulations—that existing instream uses and the level of protection necessary to protect existing uses be maintained. (40 CFR §131.12(a)(1).) As noted by EPA, 40 C.F.R. section 131.12(a)(1) "provides the absolute floor of water quality in all waters of the United States…If a planned activity will foreseeably lower water quality to the extent it is no longer sufficient to protect and maintain the existing uses in that water body, such activity is inconsistent with EPA's antidegradation policy, which requires that existing uses are to be maintained."[135]

There is ample evidence in the record that that water quality in the receiving waters of discharges permitted by the 2012 MS4 Permit is insufficient to maintain existing uses, and that those discharges contribute to their impairment.[136] Yet the Draft Order approves a continuation of the program that results in these exceedances, and moreover, deems that program, and the resulting discharges, in compliance with the Permit until (and potentially after) WMPs and EWMPs are fully implemented.[137] The Draft Order acknowledges that degradation will continue, at least in the "short term," which the

---

[132] Draft Order at 48.
[133] *See* 2010 California List of Water Quality Limited Segments Being Addressed by USEPA Approved TMDLs, available at http://www.waterboards.ca.gov/water_issues/programs/tmdl/2010state_ir_reports/category4a_report.shtml) (no TMDLs in Regions 7 and 8; one TMDL in Region 9.
[134] Draft Order, at 24-25.
[135] U.S. Environmental Protection Agency, *Water Quality Standards Handbook, Chapter 4,* EPA-823-B-12-002, accessed at http://water.epa.gov/scitech/swguidance/standards/handbook/, at 3.
[136] *See* Section II.a., above.
[137] Draft Order, at 25, fn 77.

2012 MS4 Permit anticipates to be a decade or more.[138] The Draft Order deems this degradation to be acceptable, given the long-term prospect of progress.[139] However, the CWA's antidegradation regulations do not allow this trade off. The 2012 MS4 Permit, through its safe harbor provisions, contemplates discharges that cause or contribute to exceedances of WQSs in Los Angeles area rivers and beaches while compliance plans are being developed and implemented, and therefore violates 40 C.F.R. section 131.12(a)(1).

ii. The Draft Order's Antidegradation Analysis Is Inadequate

Conceding that the 2012 MS4 Permit requires an antidegradation analysis, the Draft Order then contends that only a "generalized" analysis is required.[140] Yet, other than protesting that the task might be difficult, and that receiving water data dating to 1968 is limited, the Draft Order provides no rationale for its proscribed, but deeply inadequate, analysis.

In 1990, the State Board issued an Administrative Procedures Update.[141] APU-90-004 provides guidance for implementing California's antidegradation policy, Resolution No. 68-16, and the federal antidegradation policy.[142] Specifically, APU-90-004 directs that where an antidegradation analysis is required for an NPDES Permit, the permit findings should indicate:

1) The pollutants that will lower water quality;
2) The socioeconomic and public benefits that result from the lowered water quality; and
3) The beneficial uses that will be affected.[143]

APU-90-004 next provides criteria for applying a "simple" antidegradation analysis, [144] none of which apply here, and then describes a "complete" antidegradation analysis.[145] APU-90-004 directs that an antidegradation analysis begins by comparing receiving water quality to the water quality objectives established to protect designated beneficial uses.[146] Baseline water quality, or the best water quality in the receiving water since 1968, is used to determine the level of protection required by the permit.[147] The analysis is conducted pollutant by pollutant. Where baseline water quality is equal to or less than WQSs, permit limits must be sufficient to achieve those WQSs.[148] Where baseline water quality is better than WQSs, permit limits must ensure that this level is maintained, unless a reduction in water quality is offset by maximum public benefit to the people of the State.[149] Four conditions must be met for a reduction of water quality to be allowed:

1) The reduction is consistent with maximum public benefit;
2) The reduction will not unreasonably affect beneficial uses;

---

[138] *Id*. at 25.
[139] *Id.*
[140] Draft Order at 26.
[141] Los Angeles Regional Water Quality Control Board, Administrative Procedures Update: Antidegradation Policy Implementation for NPDES Permitting, APU-90-004, July 2, 1990.
[142] *See* APU-90-004. .
[143] *Id*. at 1.
[144] *Id*. at 2.
[145] *Id*. at 4.
[146] *Id*.
[147] *Id.*
[148] *Id.*
[149] *Id.*

3) Water quality will not fall below water quality objectives; and
4) The proposed action is necessary to accommodate important economic or social development in the area.[150]

APU-90-004 provides a further four-step analysis to determine whether the reduction is needed for important social and economic development.[151]

The Draft Order and the 2012 MS4 Permit fall short of the requirements of APU-90-004 and Order No. 68-16 in myriad ways. Neither document identifies the pollutants lowering water quality, nor the beneficial uses affected, nor the extent of that impact. The socio-economic and public benefits resulting from the degradation are described in a cursory manner, and no explanation of how permitting WQS exceedances provides any instream flow, flood control, or public safety benefit is provided.[152] Finally, neither the Draft Order nor the 2012 MS4 Permit provides any of the analysis required by APU-90-004. As such, the Draft Order fails to conduct the antidegradation analysis required by law.

Dismissing the applicability of APU-90-004 to the 2012 MS4 Permit, the Draft Order asserts that APU-90-004 was intended only for discrete discharges or facilities, and not for stormwater discharges from a large region.[153] However, APU-90-004 was issued in 1990, four years after section 402(p) was added to the CWA, and the APU-90-004 itself does not exclude any type of NPDES permit from antidegradation analysis. Even if not mandatory for the 2012 MS4 Permit, the analysis described in APU-90-004 is instructive as to the adequacy of the Regional Board's review. A recent California Court of Appeal used APU-90-004 as the basis for the court's decision to reject as an antidegradation analysis for a Concentrated Animal Feeding Operation's Waste Discharge Requirements covering 1600 dairy farms throughout the Central Valley – a category of comparable scope and complexity as the 2012 MS4 Permit – despite the APU-90-004's focus on NPDES permits.[154]

The Draft Order next asserts that the Regional and State Boards lack the data to either conduct a pollutant by pollutant antidegradation analysis, or to set the baseline for water quality.[155] Yet, while data dating back to 1968 may be lacking, the Draft Order itself confirms that data extends back over more than twenty years.[156] In any event, a lack of data more than 20 years old does not lead to *elimination* of meaningful antidegradation analysis. Whether or not data to support *higher* levels of protection are available, an analysis of the contribution of MS4 discharges to current impairments is required.[157] (40 CFR 131.12(a)(1).)

Finally, the Draft Order argues that APU-90-004 is of "limited value" given the complexity of the issues raised by the region-wide 2012 MS4 Permit.[158] The Regional Board's decision – for administrative reasons – to issue a regional MS4 permit does not exempt that permit from antidegradation requirements. The Regional Board is nonetheless required to conduct the analysis mandated by state

[150] *Id.* at 4-5.
[151] *See id.* at 5.
[152] Draft Order, at 29.
[153] *Id.,* at 26.
[154] *See Association de Gente unida por El Aqua v. Central Valley Regional Board ("Aqua") (2012),* 210 Cal. App. 4th 1255, 1270.
[155] Draft Order, at 26.
[156] *Id.* at 24, fn 76; 28.
[157] APU-90-004 at 4-5.
[158] Draft Order, at 26.

and federal Law, whether the NPDES permit is for a small private facility or large multi-city stormwater permit. Although APU-90-004 points out that "A Regional Board may decide that an antidegradation finding is not required because the proposed discharge is prohibited. . . .",[159] the *Aqua* decision establishes that merely including a prohibition against discharges causing or contributing to WQS exceedances is not enough to ensure that a permit prevents degradation—monitoring sufficient to demonstrate water quality protection is required.[160] While the 2012 MS4 Permit includes a monitoring program to identify changes in water quality, rather than prohibiting discharges that cause or contribute to WQS exceedances, the safe harbor provisions *authorize* degradation of receiving waters while WMPs and EWMPs are developed, then approved, and then eventually implemented. This alternative path for compliance with WQS will cause more harm than good. The safe harbor scheme triggers complete antidegradation review, which has not been conducted and given the impairment of the receiving waters, ensures that the federal antidegradation policy cannot be complied with.

c. The 2012 MS4 Permit and the Draft Order Illegally Authorize Compliance Schedules for California Toxics Rule ("CTR")-based TMDLs Beyond May 18, 2010

Attempting to circumvent the antidegradation requirements of the CWA, the Draft Order asserts that the 2012 MS4 Permit's safe harbor provisions require strict compliance with WQSs, albeit "by implementing Watershed Management Programs/EWMPs with a compliance schedule."[161] This argument must fail for all of the reasons explained in Section VIII above. In addition, the Draft Order fails to recognize the requirements of the Inland Surface Water Plan, which prohibits compliance schedules for CTR-based TMDLs past May 18, 2010. Since the WLAs for the metal TMDLs in Los Angeles region are based on the CTR criteria, compliance schedules for these TMDLs are only authorized for a maximum of 10 years from the time the CTR criteria were first promulgated in 2001.[162] Thus, no discharger can be given a compliance schedule to meet Permit provisions based on CTR criteria after May 18, 2010.[163] As a result, to the extent the safe harbor provisions are characterized as compliance schedules for CTR pollutants, they are illegal.

d. The Findings Proposed by the Draft Order Are Not Supported by the 2012 MS4 Permit, the Draft Order, or the Evidence in the Record

The State Board must ensure that sufficient evidence is analyzed to support its decision and that the evidence is summarized in an appropriate finding.[164] The administrative decision must be accompanied by findings that allow the court reviewing the order or decision to "bridge the analytic gap between the raw evidence and ultimate decision or order."[165] This requirement "serves to conduce the

---

[159] APU-90-004, at 2.
[160] *Aqua,* 210 Cal App 4th, at 1286.
[161] Draft Order, at 28.
[162] State Board Resolution No. 2000-15, *Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California*, at 19. *See also* October 23, 2006 EPA Letter re: California SIP, Compliance Schedule Provisions; State Board Memo dated September 15, 2006 Re: CTR Compliance Schedules; State Board Resolution No. 2008-0025 at 4; Final Staff Report, State Board Resolution No. 2008-0025 at 10; Final Response to Written Comments, State Board Resolution No. 2008-0025 at 6, 9, 10, 18-19, 26.
[163] *Id.*
[164] *See* Cal. Civ. Proc. Code § 1094.5(b); *see also, Zuniga v. Los Angeles County Civil Serv. Comm'n* (2006) 137 Cal.App.4th 1255, 1258.
[165] *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision . . . to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions."[166]

The Draft Order adds a series of findings that purport to bring the 2012 MS4 Permit into compliance with antidegradation requirements. However, none of the findings make any reference to the record.[167] The findings of the Draft Order stating that "the order ensures water quality necessary to protect beneficial uses is maintained and protected," and "This order further requires compliance with receiving water limitations to meet water quality standards in the receiving water…" are not supported by any evidence in the record.[168] In fact, the findings are contradicted by the mass emission sampling data collected over the prior permit term, by the 2012 MS4 Permit's safe harbor provisions, and by the Draft Order itself. Finally, the record contains no evidence or analysis to support the findings that degradation is permitted because it is necessary to accommodate economic and social development, and existing uses are fully assured and protected despite the limited degradation.[169]

Given that the Draft Order fails to cite to, or provide any analysis or evidence to support the antidegradation findings, the proposed findings are arbitrary and capricious and an abuse of discretion.

IX. The Draft Order Has the Potential to Result in Severe Unintended Legal Consequences

In its effort to embrace the, in part, positive opportunities presented by the 2012 MS4 Permit, the State Board has unfortunately been forced into a position of conducting legal and policy acrobatics to justify the 2012 MS4 Permit's numerous unlawful provisions. The positions taken by the Regional Board and Draft Order result in potential unintended legal consequences that the State Board must take action to correct.

a. The Permit's EWMP/WMP Provisions Are Being Used by Permittees In an Attempt to Escape Accountability for Past RWL Violations and Undermine Monitoring Obligations

Of substantial concern, Permittees have already used the 2012 MS4 Permit's alternative compliance approach to argue that the 2012 Permit renders moot any remedy for their past violations of RWLs under the 2001 Permit. In a recent federal court brief, Los Angeles County and the Los Angeles County Flood Control District assert that, despite a previous ruling by the Ninth Circuit Court of Appeals that the County and District are liable for multiple violations of the 2001 Permit's RWL provisions, these same violations must now be ignored.[170] As basis for this claim, the County and District state that the 2012 MS4 Permit allows compliance with RWL provisions through "compliance with the WMP and EWMP programs, as well as TMDLs" with which the County and District allege they are "in full compliance."[171]

---

[166] *Id.* at 516.
[167] Draft Order, at 27-29.
[168] *Id.* at 28.
[169] *See id.* at 29.
[170] Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs' Second, Third and Fifth Claims for Relief or, in the Alternative, Dismiss or Strike Plaintiffs' Prayer for Injunctive Relief filed on January 14, 2015 by the County of Los Angeles and the Los Angeles County Flood Control District in Case No. 08-CV-01467 BRO (PLAx), *Natural Resources Defense Council & Santa Monica Baykeeper v. County of Los Angeles, et. al.* before the United States District Court for the Central District of California, Dkt. No. 395, at 19-22.
[171] *Id.*

Further, the County and District have taken the position that the monitoring required under the 2012 MS4 Permit is now precluded from being used to determine compliance with the Permit provisions. Specifically, the County and District argue that, under the 2012 MS4 Permit, "compliance with the WMP, EWMP, and TMDL programs … constitute[s] compliance with the permit's receiving water limitations provision, without regard to exceedances at the mass emission stations."[172] In fact, the County and District state that "[n]o monitoring is needed to determine whether a permittee is in compliance" with the RWL provisions of the 2012 MS4 Permit because a Permittee will be deemed in compliance "so long as it is participating in a WMP or EWMP or is in compliance with the permit's TMDL provisions."[173] We strongly disagree with the County's interpretation of these provisions. However, these examples of deliberate attempts to use the 2012 MS4 Permit's alternative compliance provisions to escape responsibility for remedying past Permit violations and to directly undermine monitoring efforts exemplify the unintended ramifications of the 2012 MS4 Permit's safe harbors, and point to the substantial harms these provisions have potential to cause.

b. The 2012 MS4 Permit Would Potentially Allow Non-Stormwater Discharges

Section 402(p)(3)(B)(ii) of the CWA requires Permits for discharges from municipal storm sewers to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." To implement this requirement, the 2012 MS4 Permit states, under its Discharge Prohibitions section, that "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters. . . ."[174] However, the Permit's WMP/EWMP section appears to contain several confusing or directly conflicting provisions that pose a considerable threat to the 2012 MS4 Permit's legality, both as adopted and in practice.

First, the 2012 MS4 Permit requires that, rather than "effectively prohibiting" non-stormwater discharges to or through the MS4, Permittees developing a WMP or EWMP must "Prioritize water quality issues resulting from storm water and non-storm water discharges from the MS4 to receiving waters."[175] Second, Permittees developing an EWMP are required to retain all non-stormwater "where feasible," but does not appear to require additional action where retention is not feasible.[176] Third, in several instances, Permittees developing a WMP or EWMP must target implementation of existing watershed control measures "to eliminate non-storm water discharges that are a source of pollutants to receiving waters," rather than eliminating discharges entirely.[177] At best, the 2012 MS4 Permit's provisions addressing non-stormwater requirements are confusing; at worst, they create terms that appear to fold compliance with non-stormwater requirements under the WMPs/EWMPs with the implication that compliance with an approved WMP or EWMP constitutes compliance with the Permit's otherwise enforceable prohibition against non-stormwater discharges. The State Board must clarify that Permittees are required to meet the conditions for non-stormwater discharges identified under the Discharge Prohibitions section of the 2012 MS4 Permit[178] regardless of the WMP/EWMP provisions.

---

[172] *Id.* at 21.
[173] Defendant County of Los Angeles' Response to Plaintiff Santa Monica Baykeeper's Interrogatory Nos. 24-25, in Case No. 08-CV-01467 BRO (PLAx), *Natural Resources Defense Council & Santa Monica Baykeeper v. County of Los Angeles, et. al,* at 6.
[174] 2012 Permit, at Part III.A.1.
[175] 2012 Permit, at Part VI.C.1.f.i.
[176] 2012 Permit, at Part VI.C.1.g.
[177] *See, e.g.,* 2012 Permit, at Part VI.C.2.a.ii(5)(a); Part VI.C.2.a.iii(2)(d)(i).
[178] 2012 Permit, at Part III.

c. The Broad Discretion Claimed by the Draft Order Presents Potential Unfunded Mandate Concerns

The Draft Order asserts that, overall, "the State Water Board has discretion under both federal and state law as to whether and how to require compliance with water quality standards for MS4 discharges,"[179] and notes generally that "the permitting authority has wide discretion concerning the terms of a permit."[180] To the extent the Draft Order is relying, in general terms, on the language of section 402(p) of the CWA, which states, MS4 permits must require "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants," we agree that the Board has discretion to require additional controls. This language has been held by California courts to grant "the EPA (and/or a state approved to issue the NPDES permit) . . . the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'"[181] As a result, while the MEP standard represents one element of permit requirements, the Regional Board and EPA maintain the authority to impose additional restrictions over and above MEP as they determine appropriate. Moreover, MEP itself is not meant to be a static requirement—the standard anticipates and in fact requires new and additional controls to be included with each successive permit. As EPA has explained, NPDES permits, including the MEP standard, will "evolve and mature over time." (55 Fed. Reg. 47990, 48052.)

These claims in the Draft Order are species of an argument that the Regional and State Boards have effectively unfettered discretion in determining how and under what conditions to develop Permit requirements, so long as they fit within the Boards' vision of MEP. However, the Draft Order fundamentally misunderstands that these are directives to implement stricter, not less stringent, requirements; despite the framework the Draft Order attempts to establish, it cannot simply reverse course and eliminate requirements it earlier determined appropriate.

Further, both the Regional and State Boards should exercise caution in claiming that all these provisions are implemented entirely at their "discretion." Currently before the California Supreme Court is a challenge to the 2001 Permit brought by Permittees on grounds that provisions of the 2001 Permit, adopted by the Regional Board at its discretion, constitute an unfunded mandate under the California Constitution.[182] While we disagree with the merits of these claims, should the California Supreme Court rule in favor of the Permittees, the Draft Order's claim that "whether and how to require compliance with water quality standards for MS4 discharges" are at the discretion of the Regional and State Boards could open the 2012 MS4 Permit to potential legal challenges as an unfunded mandate or on other grounds under state law. The Regional Board has previously acknowledged the risk it faces from potential challenges to its authority to properly administer the NPDES program in California, stating, in separate challenges to the Regional Board's ability to strictly enforce water quality standards, "the Regional Board's ability to enforce MS4 NPDES permits would be seriously undermined. Moreover, the

[179] *Id.* at 11,

[180] *Id. at 63.*

[181] *Building Industry Ass'n of San Diego County*, 124 Cal.App.4th at 883 (citing *Defenders of Wildlife v. Browner*, 191 F.3d at 1165–1167.

[182] *See* Opening Brief of County of Los Angeles and Cities of Bellflower, Carson, Commerce, Covina, Downey and Signal Hill in *State Department of Finance v. Commission on State Mandates*, California Supreme Court, Case No. S214855, filed on October 21, 2014.

Regional Board's NPDES program would be at risk for revocation by the U.S. E.P.A."[183] The State Board should recognize that the requirement to meet WQS is required by federal law, and exercise greater caution in its assertion of discretion in all facets of permit development.

X. Environmental Groups' Proposed Alternative Compliance Mechanism

Municipal dischargers, as evidenced by their comment letters, testimony, and petitions filed on the 2012 MS4 Permit and other MS4 permits throughout the state, consistently complain[184] about alleged uncertainty relating to compliance with RWLs in NPDES permits. On that basis, municipal dischargers have argued for unenforceably vague permit limits and/or safe harbors, which, as described above, are inconsistent with the requirements of the CWA and are therefore illegal.

Environmental Groups maintain, as we advocated at the November 8, 2012 Permit Adoption Hearing and in our December 10, 2012 Petition to the State Board, that the proper course of action for the State Board is to strike those portions of the 2012 MS4 Permit that incorporate safe harbors, which render the RWLs inoperative under certain circumstances. The offending language contained in the 2012 MS4 Permit at Parts VI.C.2.d. and VI.C.2.b. should be struck from the 2012 MS4 Permit. Moreover, related language providing a safe harbor for compliance with interim and final TMDL limitations in sections VI.E.2.d.i (4) and VI.E.2.e.i(4) should likewise be struck from the 2012 MS4 Permit.

However, potential alternative RWLs compliance determination mechanisms are available that would both comply with the CWA, and provide more certainty for dischargers, including those that petitioned the 2012 MS4 Permit. Alternative compliance mechanisms could also meet the State's goal to incentivize multi-benefit stormwater projects that address pollution and local water supply shortages. The WMPs do not meet these goals, because these programs do not require consideration of multi-benefit projects, and these programs should thus be immediately subject to applicable water quality limits. In concept, the EWMP approach could be a viable path toward such an alternative; in practice, however, the 2012 MS4 Permit's EWMP implementation process unlawfully deems Permittees in compliance with RWLs and TMDL limits while watershed management plans are being developed (and while an open-ended approval process proceeds), and also adopts a performance standard with no analysis or evidence in the record to demonstrate that meeting the stated standard will actually achieve compliance with WQSs.

A workable and *legal* RWL that would also provide more engineering certainty for municipal dischargers is available, however. This program would consist of pollution control programs (or enhanced watershed management plans; the name is immaterial) designed to achieve compliance with all applicable water quality-based requirements within the 5-year life of the Permit. Instead of providing the illegal "safe harbors" currently incorporated in the 2012 MS4 Permit, Time Schedule Orders ("TSOs") would provide time for implementation of the programs, and compliance with the TSOs would be determined based on compliance with the engineering standards in the program, and on meeting the interim and final deadlines for implementation within the Permit terms. Ultimate compliance with WQBELs and RWLs

[183] Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles region, In Support of Plaintiffs' Motion for partial Summary Judgment and Opposing Defendant's Motion for Judgment on the Pleadings, in Santa Monica Baykeeper and Natural Resources Defense Council v. City of Malibu, at 5.
[184] See, e.g., City of Sierra Madre Petition; City of Carson Petition; City of Arcadia Petition.

would be determined via water quality monitoring pursuant to deadlines within the TSOs. Permittees would thereby gain certainty during the life of the Permit, pollutant loads would be significantly reduced, and the core requirement of the CWA – that ultimate compliance be determined via end-of-pipe monitoring *in the receiving water – would* be met.

One of the key elements of Environmental Groups' proposal submitted to the State Board in August 2013[185] requires Permittees to employ a pre-approved, peer reviewed computer model when determining stormwater control measures to meet water quality limits. This requirement is based on ongoing concerns about the County's WMMS model utilized in many of the WMPs and EWMPs. First, there is no evidence in the record that this model was peer-reviewed. Thus, there is no assurance that the model assumptions reflect real world conditions and are producing accurate results. Second, without those assurances, model inputs used by Permittees become more vulnerable to further inaccuracy in the output data. Environmental Groups have reviewed and submitted extensive comments on the deficiencies in submitted WMPs and EWMP Work Plans,[186] including improper assumptions and non-representative input data, thus an un-validated model only exacerbates those concerns. In contrast, our alternative approach requires a pre-approved (by the Regional Board) and peer reviewed computer model, which should be revisited at the beginning of each permit term or every five years, whichever is sooner. Additionally, any model approved should be continuously updated to reflect what is actually happening on the ground in terms of water quality, water supply and implemented BMPs.

The Draft Order questions the efficiency and appropriateness of using enforcement orders to ensure compliance with WQSs and TMDL limits by stating 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."[187] This position seems to erase history. Permittees have certainly exhibited over a decade of shortcomings in addressing stormwater pollution under the 2001 Permit, and for many years previously. Now is exactly the right time for the Regional Board to use its authority to ensure progress, and as discussed above, enforcement drives success. The proper use of TSOs will relay the seriousness of the Regional Board's commitment to addressing the region's stormwater pollution problem, while giving Permittees time to reach compliance where justified and closely monitored.

Environmental Groups propose a program that would facilitate engineered solutions while meeting the State Board's stated goals. The following elements would replace current Permit language:

a. Where TMDLs Have Been Adopted

The 2012 MS4 Permit provides illicit safe harbors under Parts VI.E.2.d.i(4)(d) ("Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's

[185] *See* Response to State Water Resources Control Board Request for Comment on Receiving Water Limitations and Opposition to Petitions for Review on Limited Receiving Water Limitation Issues, submitted by NRDC, LA Waterkeeper, and Heal the Bay, August 2013.
[186] *See* Environmental Groups' Comments on the Draft Watershed Management Programs and Coordinated Monitoring Plans submitted to the Regional Board on August 18, 2014; *see also* Environmental Groups' Comments on Enhanced Watershed Management Program Work Plans and Monitoring Plans submitted to the Regional Board on September 16, 2014.
[187] Draft Order, at 31.

compliance with provisions pertaining to interim WQBELs with compliance deadlines occurring prior to approval of a WMP or EWMP"), VI.E.2.d.i(4) ("A Permittee shall be considered in compliance with an applicable interim water quality-based effluent limitation and interim receiving water limitation for a pollutant associated with a specific TMDL if… the [p]ermittee has submitted and is fully implementing an approved Watershed Management Program or EWMP…") and VI.E.2.e.i(4) ("A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a TMDL if" an approved EWMP is implemented.). Parts VI.E.2.d.i(4)(d), granting a safe harbor prior to implementation of a WMP or EWMP should be struck from the Permit, and requirements under the Permit's EWMP provisions pertaining to Parts VI.E.2.d.i(4) and VI.E.2.e.i(4) must be revised to incorporate the following components:

1. A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will achieve compliance with applicable WLAs where TMDLs have been adopted, including any applicable interim limits, during the five year life of the Permit. For example, a Program implementing capture and/or infiltration of all stormwater in a sub-watershed up to the 85th percentile rain event would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance for each and every applicable WLA.

    a. The demonstration that the program will achieve compliance with applicable WLAs would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
    b. The proposed programs would be subject to public review and comment, and, if requested, a public hearing before the Regional Board.
    c. The program will include an enforceable schedule for implementation, including interim deadlines and interim load reductions.
    d. The Permit would *not* deem dischargers to be in compliance during the Program development process or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contained therein.

2. Where dischargers are not currently in compliance with interim or final WLAs with passed compliance deadlines, time for implementation of the Pollution Control Program sufficient to achieve compliance, not to exceed the five year life of the permit, could be provided via Time Schedule Orders, Cease and Desist Orders ("CDOs"), and/or Clean Up and Abatement Orders ("CAOs").
3. Compliance with the TSO, CDO or CAO would be based on implementation of the Program, including meeting interim deadlines and interim load allocations as set forth in such orders, rather than on receiving water sampling.
4. End-of-pipe and receiving water monitoring would continue for the life of the permit, and would be used to continue to calibrate modeling and to modify/adjust program elements where anticipated performance (i.e., compliance with interim or final WLAs) is not being achieved.
5. Ultimate compliance would be determined through end-of-pipe and receiving water monitoring.

b. Where TMDLs Have Not Been Adopted

For either 303(d) listed waters or waters identified as impaired but not included on the state's 303(d) list, the 2012 MS4 Permit provides illicit safe harbors under Parts VI.C.2.d. ("Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. not otherwise addressed by a TMDL") and VI.C.2.b. ("A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A."). Part VI.C.2.d., granting a safe harbor prior to implementation of a WMP or EWMP should be struck from the Permit, and requirements under the Permit's WMP and EWMP provisions pertaining to Part VI.C.2.b. must be revised to incorporate the following components:

For 303(d) listed Receiving Water parameters, without TMDLs

1. A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will achieve compliance with applicable WQSs. For example, a Program implementing capture and/or infiltration of all stormwater in a subwatershed up to the 85th percentile rain event (such as the LA County MS4 Permit) would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance for each and every applicable WQS.

    b. The demonstration that the program will achieve compliance with the WQSs would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
    c. The proposed programs would be subject to public review and comment, and, if requested, a public hearing before the Regional Board.
    d. The program will include an enforceable schedule for implementation, including interim deadlines and interim requirements
    e. The Permit would *not* deem dischargers to be in compliance during the Program development process, or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contain therein.

2. Where dischargers are not currently in compliance with existing WQS, time for implementation of the Pollution Control Program sufficient to achieve compliance, not to exceed the five year life of the permit, would be provided via TSOs, CDOs, and/or CAOs.
3. Compliance with the TSO, CDO, or CAO would be based on implementation of the Program, including meeting interim deadlines as set forth in such orders, rather than on receiving water sampling.
4. End-of-pipe and receiving water monitoring would continue for the life of the permit, and would be used to establish compliance (discharges from the MS4 are not causing or contributing to WQS violations, including concentration-based WQS) to calibrate modeling, and to modify/adjust program elements where anticipated performance is not being achieved.
5. Ultimate compliance would be determined through end-of-pipe and receiving water monitoring.

For Parameters Not 303(d) listed (Antidegradation)

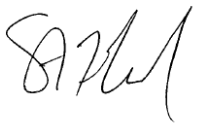
1. A demonstration that the proposed engineered Pollution Control Program (infiltration, treatment, diversion, LID, and combinations thereof) will for "high quality" waters protect water quality better than that minimum necessary for "fishable/swimmable" uses. For example, a Program implementing capture and/or infiltration of all stormwater in a sub-watershed up to the 85th percentile rain event would be in compliance with Permit requirements where calibrated modeling demonstrates that this level of capture and infiltration will achieve compliance with WQSs, and will maintain existing water quality for higher quality waters.

    a. The demonstration that the program will achieve compliance with antidegradation requirements would be made using a Board approved, peer reviewed model, applied on a sub-watershed basis.
    b. The proposed programs would be subject to public review and comment, and, if requested, a public hearing before the Regional Board.
    c. The program will include an enforceable schedule for implementation, including interim deadlines and interim requirements.
    d. The Permit would *not* deem dischargers to be in compliance during the Program development process, or the design and construction phase. Dischargers would only be deemed in compliance with the Pollution Control Program upon full deployment of the pollution control measures contained therein.
    e. Ultimate compliance would be determined through end-of-pipe and receiving water monitoring.

XI. Conclusion

For all the foregoing reasons, the Draft Order should be revised, and the State Board should strike the illegal safe harbor provisions of the 2012 MS4 Permit, including language in Parts VI.C.2.d, VI.C.2.b., VI.E.2.d.i(4)(d), and VI.E.2.e.i.

Sincerely,



Steve Fleischli
Water Program Director & Senior Attorney
Natural Resources Defense Council

Liz Crosson
Executive Director
Los Angeles Waterkeeper

Peter Shellenbarger
Science and Policy Analyst, Water Quality
Heal the Bay

STEVE FLEISCHLI, Bar No. 175174
BECKY HAYAT Bar No. 293986
NATURAL RESOURCES DEFENSE COUNCIL, INC.
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300

Attorneys for NATURAL
RESOURCES DEFENSE COUNCIL, INC.
AND HEAL THE BAY

LIZ CROSSON, Bar No. 262178
TATIANA GAUR, Bar No. 246227
LOS ANGELES WATERKEEPER
120 Broadway, Suite 105
Santa Monica, CA 90401
(310) 394-6162

Attorneys for LOS ANGELES
WATERKEEPER
AND HEAL THE BAY

DANIEL COOPER, Bar No. 153576
LAWYERS FOR CLEAN WATER, INC.
1004A O'Reilly Avenue
San Francisco, CA 94129
(415) 440-6520

Attorney for LOS ANGELES
WATERKEEPER

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of NRDC, Los Angeles Waterkeeper, and Heal the Bay, for Review of Action by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting the Los Angeles County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2012-0175; NPDES Permit No. CAS004001	) REQUEST FOR OFFICIAL NOTICE RE: ENVIRONMENTAL GROUPS' COMMENTS ON DRAFT ORDER WQ 2015- IN THE MATTER OF REVIEW OF ORDER NO. R4-2012-0175, NPDES PERMIT No.CAS004001 WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHED OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4, SWRCB/OCC FILES A-2236 (A)-(KK)

The Natural Resources Defense Council ("NRDC"), Los Angeles Waterkeeper ("Waterkeeper"), and Heal the Bay (collectively, "Environmental Groups"), in conjunction with our Comments on the Draft Order WQ 2015- In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No.CAS004001 Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watershed of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4, SWRCB/OCC Files A-2236 (a)-(kk) ("Draft Order"), hereby request that the State Water Resources Control Board ("State Board") take official notice of the following documents, pursuant to Section 648.2 of Title 23 of the California Code of Regulations:

1. Attached as "Exhibit A" is a true and correct copy of Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs' Second, Third and Fifth Claims for Relief or, in the Alternative, Dismiss or Strike Plaintiffs' Prayer for Injunctive Relief filed on January 14, 2015 under Docket No. 395 by the County of Los Angeles ("County") and the Los Angeles County Flood Control District ("District") in Case No. 08-CV-01467 BRO (PLAx) in the United State District Court for the Central District of California. Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, "[t]he Board or presiding officer may take official notice of such facts as may judicially be noticed by the courts of this state." Evidence Code section 452(d) allows California courts to take judicial notice of "[r]ecords of … any court of record of the United States." The document attached as Exhibit A is a record of a United State Court and therefore is subject to official notice by the State Board. This document will assist the State Board in evaluating the impacts of the alternative compliance approach proposed in Order No. R4-2012-0175, NPDES Permit No.CAS004001 Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watershed of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4 ("2012 LA MS4 Permit").
2. Attached as "Exhibit B" is a true and correct copy of Defendant County of Los

Angeles' Response to Plaintiff Santa Monica Baykeeper's Interrogatory Nos.24-25 filed by the County on January 5, 2015 in *Natural Resources Defense Council, Inc. and Santa Monica Baykeeper v. County of Los Angeles, et al.,* Case No. 08-CV-01467 BRO (PLAx) in the United State District Court for the Central District of California. The document attached as Exhibit B is a record of a United State Court and therefore is subject to official notice by the State Board pursuant to Section 648.2 of Title 23 of the California Code of Regulations and Section 452(d) of the California Evidence Code. The document will assist the State Board in evaluating the impacts of the alternative compliance approach proposed in the 2012 LA MS4 Permit.

3. Attached as "Exhibit C" is a true and correct copy of a report by the United States Environmental Protection Agency ("U.S. EPA") titled "Case Studies Analyzing the Economic Benefits of Low Impact Development and Green Infrastructure Programs" issued in August 2013. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.) Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the benefits of green infrastructure in relations to the provision of the 2012 MS4 Permit.

4. Attached as "Exhibit D" is a true and correct copy of Environmental Groups' Comments on Enhanced Watershed Management Program Work Plans and Monitoring Plans Pursuant to Requirements under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. R4-2012-0175, including Exhibits A through K, submitted to the Los Angeles Regional Water Quality Control Board ("Regional Board") on September 16, 2014. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of

the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

5. Attached as "Exhibit E" is a true and correct copy of the Lower San Gabriel River Watershed Management Program submitted by the Cities of Artesia, Bellflower, Cerritos, Diamond Bar, Downey, Hawaiian Gardens, La Mirada, Lakewood, Norwalk, Pico Rivera, Santa Fe Springs, Whittier, Long Beach and the Los Angeles County Flood Control District to the Regional Board on June 27, 2014, with appendices. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

6. Attached as "Exhibit F" is a true and correct copy of a memorandum from Michael Lauffer, Staff Counsel, State Board Office of Chief Counsel to Dennis Dickerson, Regional Water Quality Control Board, Los Angeles Region, dated November 9, 2001. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State

Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

7. Attached as "Exhibit G" is a true and correct copy of the Draft Total Maximum Daily Loads for the Los Angeles River Watershed by the California Regional Water Quality Control Board, Los Angeles Region, dated November 27, 2000. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

8. Attached as "Exhibit H" is a true and correct copy of the Draft Total Maximum Daily Load to Reduce Bacteria Indicator Densities at Santa Monica Bay Beaches by California Regional Water Quality Control Board, Los Angeles Region, dated November 8, 2001. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

9. Attached as "Exhibit I" is a true and correct copy of the 2010 California List of Water Quality Limited Segments Being Addressed by USEPA Approved TMDLs approved by the U.S. Environmental Protection Agency on October 11, 2011. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the

legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "Official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

10. Attached as "Exhibit J" is a true and correct copy of the Water Quality Standards Handbook issued by the United States Environmental Protection Agency. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

11. Attached as "Exhibit K" is a true and correct copy of Environmental Groups' Comments on Watershed Management Plans and Monitoring Plans Pursuant to Requirements under the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. R4-2012-0175, with Exhibits A-E, submitted to the Regional Board on August 18, 2014. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this

document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

12. Attached as "Exhibit L" is a true and correct copy of Environmental Groups' Comments on the Draft Individual Watershed Management Plans and Coordinated Monitoring Plans for the cities of Carson, Compton, Gardena, Irwindale, Lawndale, South El Monte and West Covina submitted to the Regional Board on August 18, 2014. Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts have found that "official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.). Pursuant to Section 648.2 of Title 23 of the California Code of Regulations, the State Board should take official notice of this document as it will assist it in evaluating the alternative compliance approach proposed in the 2012 LA MS4 Permit.

13. Attached as "Exhibit M" is a true and correct copy of the Opening Brief of County of Los Angeles and Cities of Bellflower, Carson, Commerce, Covina, Downey and Signal Hill in State Department of Finance v. Commission on State Mandates, California Supreme Court, Case No. S214855, filed on October 21, 2014. Evidence Code section 452(d) allows California courts to take judicial notice of "[r]ecords of … any court of record of the United States." The document attached as Exhibit A is a record of a United State Court and therefore is subject to official notice by the State Board pursuant to Section 648.2 of the Title 23 of the California Code of Regulations. The document will assist the State Board in evaluating the impacts of the alternative compliance approach proposed in the 2012 LA MS4 Permit.

///

///

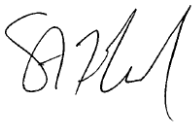
///

///

For the foregoing reasons, Environmental Groups respectfully request that the State Board take official notice of these documents.

Dated: January 21, 2015

NATURAL RESOURCES DEFENSE COUNCIL, INC.



Steve Fleischli
Attorneys for NATURAL RESOURCES DEFENSE COUNCIL, INC. & HEAL THE BAY

Dated: January 21, 2015

LOS ANGELES WATERKEEPER

Elizabeth Crosson
Tatiana Gaur
Attorneys for LOS ANGELES WATERKEEPER & HEAL THE BAY