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January 20, 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

Subject: Comments to A-2236(a)(kk)

Dear Ms. Townsend:

The **City of Lawndale** (City), a petitioner to A-2226(a)(kk), is pleased to submit the attached comments to the State Water Resources Control Board (State Board) in connection with Draft Order (WQ 2015-), in response to the administrative petitions cities filed by several cities challenging the current Los Angeles County MS4 Permit.

The City is relieved to learn that the State Board has upheld its precedential Order 99-05, which validates the SWMP and its iterative process as a determinant of compliance with Receiving Water Limitations (RWLs).

In October of 2014, the Los Angeles Regional Water Quality Control Board (Regional Board) issued the City a "letter of deficiency" regarding its submittal of a Watershed Management Program/Stormwater Management Program (I-WMP/SWMP). Because the Regional Board's Executive Officer denied the submittal, the City is subject to compliance with the SWMP in accordance with Part V.A.1, which prohibits RWLs exceedances. However, the Regional Board's requirement here is inconsistent with Order 99-05 and Part V.A of the MS4 Permit, which implements this Order. Although the Permit requires compliance with V.A.1 (along V.A.2), it also requires compliance with V.A.3, which is the SWMP/iterative process, as the following specifies:

> *The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications.*

In the event of an exceedance, the City need only implement V.A.3(a), which is the iterative process, where municipal Permittees must report instances, where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. As long as this procedure is implemented, no RWL violations can arise.

In closing, the City appreciates the opportunity to comment on the Draft Order. We also look forward to another State Board Workshop slated be held in Los Angeles.

In case of questions or comments, please contact me at Nabbaszadeh@lawndalecity.org or (310) 973-3266.

Sincerely,

Nasser Abbaszadeh, PE
Public Works Director/City Engineer

Attachment

Comments In Re: State Water Resources Control Board
Draft Order WQ 2015-

In the Matter of Review of
Order No. R4-2012-0175, NPDES Permit No. CAS004001

I. State Draft Order Needs to Assert that the Stormwater Management Program (SWMP) and Iterative Process Constitute a Valid Compliance Determinant in Accordance with Water Quality Order 99-05

In several of the administrative petitions, the petitioners argue that the Los Angeles Regional Board (Regional Board) disabled the SWMP/Iterative Process as a compliance determinant, in violation of Water Quality Order 99-05. Although the Draft Order (DO) upholds precedential Water Quality Order 99-05, it falls short of clearly asserting that it enables compliance with water quality standards -- including TMDLs expressed as numeric water quality based effluent limitations (WQBELs) and receiving water limitations (RWLs).[1] The DO should state, unequivocally, that the implementation of the SWMP in a timely and complete manner, together with the implementation of the iterative process that is triggered by a RWL exceedance, constitutes compliance.

This message is obfuscated by the State Board's comments on Receiving Water Limitation policy that was initiated in late 2012. The DO mentions that the iterative process does not forgive Receiving Water Limitation (RWL) violations, either through a safe harbor[2] or through a good faith engagement of the iterative process.[3] While the DO asserts that WQO 99-05 does not forgive violations it also does not say outright that WQO 99-05 avoids, preempts, or prevents violations as it should.

The DO further muddies the water here by stating:

> *We summarize the law and policy regarding Permittee Petitioners' position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.*[4]

[1]The Regional Board's use of RWLs to mean compliance with TMDL waste load allocations in receiving waters is inappropriate because it also applies to WQ Order 99-05 and Part V.A of the L.A. MS4 Permit to mean compliance with water quality standards at the outfall. To avoid confusion, it shall be replaced with the term in-stream TMDL/WLAs.

[2]See pages 12 and 14 of the Draft Order and State Board's RWL policy paper which discusses the safe harbor as an option to achieving RWL compliance.

[3]See pages 10, 13, 14 (footnote 45 and 48) of the Draft Order and the State Board's RWL policy paper which discusses the concept of good faith engagement as an option to achieving RWL compliance.

[4]See page 10.

Because this sentence appears in a paragraph that rejects the view that a good faith engagement of the iterative process forgives violations, it is clear that the sentence only applies to the good faith engagement interpretation of the iterative process and not to the iterative process in general as a means of preempting violations. To conclude otherwise would mean that all MS4 Permits in the State – including the Caltrans MS4 adopted by the State Board -- cannot avail themselves of the iterative process as a means of meeting RWLs and, therewith, water quality standards. The State Board should clarify that the sentence in question applies only to the erroneous interpretation that the good faith implementation of iterative process forgives RWL violations. If the State Board did not intend for WQO 99-05 to comply with RWLs then what purpose does it serve? Further, the DO also affirms that Permittees wishing to pursue options beyond the iterative process to achieve RWL compliance may do so through the WMP or EWMP alternatives. This suggests that the SWMP/iterative process is valid.

Further the Ninth Circuit of Appeal, in *NRDC v. County of Los Angeles*(9th Cir. 2011) 673 F.3d 880, 897, stated: "*As opposed to absolving noncompliance [with water quality standards] or exclusively adopting the MEP standard, the iterative process ensures that if water quality exceedances 'persist,' despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP.*" In other words, the Court inferred that the iterative process prevents violations.

The State Board even affirmed this in its DO:

> *... in State Water Board Order WQ 99-05, we established precedential language that required compliance with receiving water limitations. However, in lieu of "strict compliance" with water quality standards, we also established receiving water limitations provisions that prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements: reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs.*[5]

The State Board also clarified WQO 99-05 in precedential WQO 2001-15:

> *This Board has already considered and upheld the requirement that municipal storm water discharges must not* ***cause or contribute to exceedances*** *of water quality objectives in the receiving water. We adopted an* ***iterative procedure*** *for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters.*

Recommendation: The State Board should find in the final Order the following:

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[5]See DO, pages 11-12.

We find that the timely implementation of a Stormwater Management Program (SWMP) and the iterative process, in accordance with precedential Water Quality Order 99-05, enables the prevention of persistent exceedances of water quality standards, including TMDLs incorporated into MS4 permits. Exceedances shall be determined by measuring discharges at the outfall through water quality sampling and analysis. To assure that the SWMP/iterative process leads to eventual compliance with water quality standards, each iteration must include performance benchmarks that may consist of BMPs or numeric water quality based effluent limitations that use surrogate parameters such as impervious surface or flow reduction. In either instance, whether using BMP benchmarks or surrogate parameter WQBELs, each five-year MS4 permit cycle must identify goals expressed as numeric targets to achieve them. Computer modeling and outfall monitoring shall be used to evaluate progress in meeting numeric targets. If targets are not met, the iterative process will be invoked to determine why the targets were not met and provide a new plan for meeting them under the successor MS4 permit that will be addressed in the Report of Waste Discharge (ROWD).

II. Numeric WQBELs and Reasonable Potential Analysis

Many petitioners assert that the Regional Board failed to conduct an appropriate reasonable potential analysis in justifying numeric WQBELs. The numeric WQBELs have been structured to be the same as TMDL WLAs. Rather than being the same as WLAs, the numeric WQBELs should be a translation of the WLAs into actions to attain them. As part of the translation process, the Regional Board was required to perform a reasonable potential analysis.

The DO responded to this charge by relying on the argument that the Regional Board's legal obligation was to develop WQBELs "consistent with the assumptions and requirements of any wasteload allocation" in the TMDLs and did not have to consider reasonable potential. The DO is correct in asserting that NPDES regulations at 40 CFR § 122.44(d)(1)(vii)(B) require that NPDES permits include effluent limitations *consistent with the assumptions and requirements of any WLA*. However, the TMDL and its WLA must also be translated into an effluent limitation when implemented through an MS4 permit. The procedure for accomplishing this is contained in federal stormwater regulations at 40 CFR § 122.44(d)(1)(i), which states:

When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the

effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

The DO contends that no reasonable potential analysis was required by referring to 6.2.1.2 of the *NPDES Permit Writers' Manual.* Section 6.2.1.2 of the Manual does in fact refer to a TMDL WLA as a means of identifying a pollutant of concern, of which it is one of several. However, once the pollutant of concern (in this case a TMDL) has been identified, the Manual also describes the process for developing the WQBEL to address it, which is stated in section 6.3 andrequires a reasonable potential analysis. Once this step has been completed, the Manual calls for calculating the WQBEL in section 6.4.

The Regional Board's legal obligation was to perform a reasonable potential analysis to determine if an MS4 Permittee's discharges caused or contributed to an *excursion above a water quality standard.* That determination can only come from conducting stormwater outfall monitoring and measuring the results against in-stream water quality standards, including TMDLs (which are ambient standards established for a receiving water). As mentioned in several of the administrative petitions, no outfall monitoring was required at the time the Regional Board established the numeric WQBEL in the current MS4 permit. As a consequence, no reasonable potential analysis could have been performed. Without the analysis, the next step in formulating a WQBEL could not have been completed. Therefore, the Regional Board's decision to impose a numeric WQBEL is unsupported.

Requiring compliance with an inappropriately crafted WQBEL compels Permittees to spend scarce fiscal resources on an unnecessarily stringent numeric effluent limitation.

Recommendation: First, eliminate the numeric WQBELs. Simply require, instead, compliance with TMDLs and other water quality standards through the SWMP and its six core programs and through an WMP or EWMP -- if warranted. Second, conduct a reasonable potential analysis to establish valid WQBELs -- numeric or non-numeric -- in accordance with the NPDES Permit Writers' Manual. A WQBEL should be developed for each TMDL pollutant

III. Numeric WQBELs Should be Subject to the Iterative Process

The DO agrees with the Regional Board's view that the numeric WQBEL is not subject to the iterative process. Nothing in federal law or applicable guidance supports the view that a numeric WQBEL voids the iterative process that prevents violations. Whether numeric or non-numeric, a WQBEL merely translates water quality standards into actions to address them. It cannot be asserted that a numeric WQBEL requires compliance with water quality standards by any means necessary. For example, MS4 permits issued in

Vermont and Connecticut contain TMDL requirements that are addressed through numeric WQBELs – in this case "flow based" numeric WQBELs and reduction of impervious surfaces. The implementation of these numeric WQBEL variations not only places these Permittees in compliance with TMDLs but also allows for an interpretive process. If the numeric target is not met within the 5 year term of these MS4 permits (which were issued by USEPA) then the Permittees here must amp-up flow-based or impervious-reducing BMPs and/or other actions. Further, there is nothing in the administrative record that shows the Regional Board conducted any kind of analysis or discussion justifying the use of a numeric WQBEL as opposed BMP effluent limitations.

Recommendation: As recommended above, the State Board should void the current "extreme" numeric WQBEL requirement and develop valid WQBELs using federal guidance. Emphasize that once developed, the WQBEL will be subject to the iterative process. The State Board should also explain it is the TMDL WLAs that are to be complied with through the WQBELs actions. Once outfall monitoring has been conducted to determine if excursions of the TMDLs and other water quality standards occur, then a WQBEL can be developed for each and every TMDL, based on USEPA's guidance in its Manual. The WQBEL should not only be pollutant-specific, but should also take into account what specific beneficial use(s) it is to protect. Further, a pollutant-TMDL specific plan should be developed, as proposed by Tom Mumley of the San Francisco Regional Board. For example, a TMDL plan for zinc could include pursuing legislation to eliminate zinc from tires, as in the case of the copper in break pads. Other specific BMPs could also be included that would be determined at the sub-watershed level by Permittees and other interested parties.

IV. Non-Stormwater Discharge Prohibition through the MS4

The DO disagrees with the petitioners' contention that the L.A. permit should not require using the phrase prohibiting non-stormwater discharges through the MS4 and instead should use "to" or "into" the MS4. The DO claims that this is "a distinction without difference." This is incorrect. The phrase "through the MS4" is problematic in terms of syntax and logic. The MS4 Permit consists of streets, catch basins, storm drains, and other structures, natural or manmade that convey runoff to a receiving water. Therefore, you do not prohibit discharges through streets, catch basins, or through storm drains – but instead ***to or into*** them. Using "through the MS4" will make enforcement more difficult (how can a non-permitted discharger prohibit its dischargers "through" a street or catch basin?). Beyond this, using "through the MS4" is inconsistent with CWA Section 402(p)(3)(B)(ii) which says that MS4 permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." All MS4 permits issued in the State, including the Caltrans Permit, use ***to or into*** the MS4. The Petitioners have already used "to or into" the MS4

in their municipal codes since the second L.A. MS4 Permit was issued on 1996. Further, USEPAs *Illicit Discharge Detection and Elimination Guidance Manual* also uses this phrase.

Recommendation: The State Board should strike the use of "through and 'from' the MS4" in connection with the non-stormwater discharge prohibition and use instead the customary *"to" or "into"* phrase.

V. Non-Stormwater Discharge Compliance with TMDLs

The DO refuted the petitioners' claim that TMDLs cannot be applied to non-stormwater discharges. The DO contends:

> *... the Los Angeles Water Board's legal authority to impose TMDL based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require "such other provisions" as the Permitting authority "determines appropriate for the control of such pollutants."*[6]

This explanation is faulty for several reasons. First, the TMDLs themselves, as basin plan amendments, make no reference to WQBELs as compliance determinants for meeting non-storm water or dry weather discharges. Second, TMDLs are not self-regulating; they rely on the MS4 Permit for implementation. Third, WQBELs apply only to stormwater discharges from the MS4[7] -- not non-stormwater discharges. Fourth, even if WQBELs could be applied to dry weather TMDLs, they were not properly developed as was the case for stormwater discharges. As mentioned earlier, the Regional Board failed to properly follow federal regulations and guidance on setting numeric WQBELs, including a reasonable potential analysis. Specifically, the Regional Board neither required Permittee outfall monitoring nor conducted outfall monitoring of its own to determine if any Permittee discharge caused an excursion above a TMDL that would, as a result, necessitate a numeric WQBEL. Fifth, the prohibition against non-stormwater discharges to, into or even from the MS4 is sufficient to address pollutants including those subject to TMDLs. Sixth, the water boards reference to CWA Section 402(p)(3)(B)(iii) does not apply to non-stormwater discharges (which are prohibited under 402(p)(3)(B)(ii)), but rather to stormwater discharges which are subject to the maximum extent practicable (MEP) limitation.

The State Board has, through its precedential orders, established that only stormwater discharges are subject to MEP. The State Board has also firmly

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[6]See DO, page 59.

[7]An effluent limitation applies to a restriction applied to the outfall discharge. Dry weather discharges are non-stormwater discharges that only require a prohibition of non-stormwater discharges to the MS4 as opposed to controlling stormwater discharges and reducing pollutants therein to the maximum extent practicable.

determined in WQO 2009-0008 that dry weather flows are non-stormwater discharges as the following illustrates:

> *U.S. EPA has previously rejected the notion that "storm water," as defined at 40 Code of Federal Regulations section 122.26(b)(13), includes dry weather flows. In U.S. EPA's preamble to the storm water regulations, U.S. EPA rejected an attempt to define storm water to include categories of discharges "not in any way related to precipitation events."*

Thus, if a dry weather flow is not associated with storm water it must be a non-stormwater discharge which, therefore, can only be regulated through the non-stormwater discharge prohibition to the MS4.[8] This same Order, which dealt with the dry weather bacteria TMDL for Santa Monica Beaches also asserted:

> *In adopting the TMDL, the Los Angeles Water Board identified summer dry weather discharges as a source of water quality exceedances for bacteria. Prohibiting summer dry weather bacteria exceedances caused or contributed to MS4s is therefore consistent with the federal framework for non-storm water discharges.*

In the final analysis, the Regional Board does not have the authority to impose effluent limitations on dry weather discharges to comply with TMDLs.

Recommendation: Strike from the L.A. MS4 Permit the requirement of TMDL compliance with non-stormwater discharges and instead rely on the illicit connection and discharge program to reduce pollutant discharges to receiving waters.

VI. Requiring Compliance Monitoring for In-stream Wet Weather TMDL WLAs

Several petitioners argue that the Regional Board cannot require compliance with wet weather TMDL WLAs. The DO disagrees with that view based on the following rationale:

> *The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance permit conditions. In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.*[9]

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[8] If an impermissible non-stormwater discharge is detected by a Permittee, from a source over which it has legal authority, it is required to either halt the discharge through its municipal code or, if not feasible, require the discharger to obtain discharge permit. Eliminating an illicit discharge or permitting a discharge that poses no threat to water quality, reduces pollutants, including TMDLs, in discharges to receiving waters.

[9] See DO, page 61.

There is no denying that the water boards have the legal authority to require water quality standards-related monitoring for MS4 permit compliance purposes. However, the State Board's reference to 40 CFR § 122.26(d)(2)(i)(F) does not provide that authority, nor does it compel MS4 Permittees to conduct monitoring in the receiving water. Rather, it requires the MS4 discharger to demonstrate, among other things, that it has the legal authority to:

> *Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.*

This regulation only applies to the MS4 Permittee in conducting monitoring of facilities within its control to determine compliance with its requirements.

As mentioned in the several petitions, federal stormwater regulations only require compliance with water quality standards at the outfall. There are multiple are references to outfall monitoring in 40 CFR § 122.26 which clearly require outfall monitoring for compliance purposes. In contrast, there is no reference, whatsoever, to in-stream monitoring for compliance purposes.

The MS4 permit is a point source permit, meaning that only discharges from the outfall -- before they reach the receiving water -- are subject to meeting water quality standards compliance. Determining compliance in the receiving water cannot determine compliance because it contains flows from other dischargers, point source and non-point. Point source dischargers include other MS4s, construction sites and industrial facilities covered under stormwater permits and non-permitted dischargers of stormwater. Receiving waters also contain non-point source discharges associated, for example, with aerial deposition. Therefore, basing compliance with wet weather discharges on receiving water monitoring is very likely to result in exceedances and pose the daunting challenge of what discharger or type of discharge caused or contributed to the exceedance.

This was the dilemma that the Ninth Circuit dealt with in *NRDC v. County of Los Angeles* in determining whether the County had caused or contributed to exceedances of water quality standards based on in-stream monitoring. The court ruled that because in-stream monitoring could not provide evidence that discharges from County outfalls had caused or contributed to a water quality standards exceedance, the County could not be held responsible. This led the Court to advise NRDC of the following:

> *...Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from* at least one *outflow that included a standards-exceeding pollutant.*

(*Id.* at 901.) The Court's ruling in this case also affirmed the federal district court's ruling that it is the outfall rather than in-stream monitoring that determines compliance.

As also noted in the petitions, federal regulations at 40 CFR § 122.44(d)(1)(vi)(C)(3) authorize effluent and ambient monitoring. Nevertheless, the DO attempts to negate the application of this regulation by concluding:

> *Permittee Petitioners reference language in the federal regulations concerning effluent and ambient monitoring (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water* quality objective for *a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.*[10]

The DO errs here. First, the federal citation in questionsays*: "The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards."* This clearly applies to compliance monitoring relative to water quality standards. Second, the DO is also incorrect in suggesting that the State in this instance has not established a water quality objective for a pollutant. The State of California, through the Water Boards (State and Regional) have already established water quality standards (including objectives) and TMDLs through the basin plan.

Even if 40 CFR § 122.44(d)(1)(vi)(C)(3) were not applicable, 40 CFR § 122.26 provides ample federal legal authority to compel and restrict compliance monitoring only to outfall water quality testing of effluent discharges to the MS4. The results of outfall sampling and analysis are to be measured against water quality standards, which are ambient standards. Further, ambient monitoring, which is to be conducted before or after a stormwater event, provides valuable information regarding the overall quality of receiving waters during their "normal" state.

The most powerful legal argument against in-stream wet-weather monitoring for compliance with TMDL WLAs and other water quality standards is State Board Water Quality Order 2001-15. The petitioner in that case, the Building Industry Association of San Diego, claimed that *State law requires the adoption of wet weather water quality standards ...* The State Board's response was: *This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions.* As the several petitions have pointed out, water quality standards are ambient (dry weather) weather standards. The State Board's finding here

[10]See DO, page 61, footnote 170.

demonstrates clearly that no federal law requires compliance with wet weather water quality standards.

Recommendation: Eliminate from the L.A. MS4 Permit compliance with TMDLs and other water quality standards based on in-stream wet weather monitoring and instead limit compliance monitoring to outfall discharge sampling and analysis as required by federal stormwater regulations and guidance. In-stream monitoring can continue to be conducted, as it is currently done through the mass emissions stations in several receiving waters, but limited only to evaluating the overall health of receiving waters during storm events. However, ambient monitoring should continue to be conducted -- through the State's Stormwater Ambient Monitoring Program (SWAMP) -- to determine receiving water health during normal periods of water bodies.

VII. Requiring In-Stream Monitoring for Reasons Other than Determining Compliance

The DO supports the Regional Board's authority to require in-stream monitoring because:

> *...Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.*[11]

As explained above, there is nothing in federal law that requires an MS4 Permittee to conduct in-stream monitoring for compliance or other purposes, with the possible exception of ambient monitoring. The impact of stormwater discharges from a Permittee's MS4 on a receiving water can be determined by outfall monitoring measured against ambient standards. If persistent exceedances are recorded the Permittee is required to implement the iterative process. Conducting in-stream monitoring, on the other hand, does little to determine to what extent an MS4 impacts receiving waters because other dischargers may cause or contribute to receiving water limitation exceedances. Further, wet weather monitoring does little to determine the health of the receiving water. In general, the health of a receiving water during a significant storm event will almost always be poor because of the volume of runoff and pollutants it receives from a multiplicity of sources. In-stream monitoring has been conducted in each of the receiving waters in Los Angeles County at several mass emissions stations. Because of seasonal variability of stormwater, monitoring results have been inconsistent and have not been a reliable metric for determining compliance or assessing receiving water quality relative to beneficial uses. The benefits of such monitoring do not justify the costs. Once again, the health of a receiving water is better evaluated through ambient monitoring.

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[11] See DO, page 62.

Recommendation: The State Board should eliminate in-stream wet weather monitoring as an MS4 Permit requirement. If the Regional Board can justify wet weather monitoring, Permittees may consent to defraying the cost of such monitoring through an increase in the annual MS4 Permit Fee Surcharge. Currently, the surcharge is used to pay for ambient monitoring performed by SWMP.

IX. No Response to Municipal Action Level Requirements

Several Pemittees argued in their petitions that the Regional Board imposed Municipal Action Level (MAL) monitoring and compliance requirements in addition to outfall and in-stream monitoring. The petitioners argue that the additional monitoring requirements are redundant. According to the L.A. MS4 Permit's fact sheet:

> *This Order also provides for the use of municipal action levels ("MALs") derived from the National Stormwater Quality Database (NSQD), as a means of evaluating the overall effectiveness of a Permittee's storm water management program in reducing pollutant loads from a particular drainage area and in order to assess compliance with the MEP standard.*

This same purpose can be easily realized by relying on conventional monitoring of TMDL and other water quality standards that the MS4 Permit requires. MALs are discussed in a National Resource Council study entitled *Urban Runoff Management* in the United States, commissioned by USEPA. MALs are intended to be an alternative to conventional monitoring against chemical constituents that were developed for industrial and sewage treatment facilities. MAL performance is to be measured against a national data base. While the MAL alterative might be a more reliable metric to evaluate stormwater programs, it should not be used as another monitoring requirement that only adds to Permittee compliance costs. Furthermore, the Regional Board has not provided any guidance on how the MAL program interacts with conventional monitoring.

Recommendation: The State Board should direct the Regional Board to either eliminate the MAL or justify its need given that conventional monitoring essentially serves the same purpose.

VIII. Compliance with Invalid TMDLs

The DO failed to respond to several of the petitioners' claims that the L.A. MS4 Permit requires compliance with TMDLs that are legally invalid. Specifically, the MS4 Permit lists TMDLs for compliance despite the fact that they do not appear on the Clean Water Act's 303(d) list which identifies TMDLs. Examples include the metals and trash TMDL for Reach 2 of the Rio Hondo and metals TMDLs for San Gabriel River Reaches 3 and above. In addition, the L.A MS4 Permit requires compliance with non-point source TMDLs, despite the fact that MS4 Permits are point source permits. Compliance with these "pseudo" TMDLs unnecessarily increases MS4 compliance costs.

Recommendation: The State Board should direct the Regional Board to remove invalid TMDLs from its MS4 Permit. The Regional Board can validate the TMDLs by using monitoring data generated from its SWAMP measured against the California Toxics Rule, which establishes ambient water quality criteria for priority toxic pollutants in California. Once this analysis is completed, the Regional Board can begin the TMDL listing process.

IX. Failure to Comply with California Water Code § 13241

The DO did not respond to the petitioners' complaint that the MS4 Permit contains requirements that exceed federal law. The Regional Board should have complied with Water Code § 13241, which requires a balancing of considerations, including "economic considerations" (*i.e.*, costs). The MS4 Permit requirements that exceed federal law include the following:

1. the imposition of numeric WQBELs to comply with TMDL WLAs that were not established in accordance with federal law;

2. requiring non-stormwater discharge compliance with TMDL WLAs expressed as numeric WQBELs;

3. requiring compliance with in-stream monitoring;

4. requiring compliance with wet weather water quality standards;

5. requiring Municipal Action Level monitoring; and

6. requiring compliance with invalid TMDLs.

X. Requirements that are Arbitrary and Capricious and Constitute Abuse of Discretion

The following requirements of the Los Angeles MS4 Permit are arbitrary and capricious and constitute abuse of discretion:

1. Disabling the SWMP as a RWL compliance determinant notwithstanding that WQO 99-05 and Part V.A of the MS4, which implements this order, requires it to meet RWLs;

2. Requiring the WMP and EWMP as an RWL compliance determinant, notwithstanding that neither of these so-called alternative pathways are referenced in Part V.A of the L.A. MS4 Permit;

3. Requiring compliance with wet weather water quality standards, despite the fact that State Board WQO 2001-15 affirms that *nothing in federal or state law mandates the adoption of separate water quality standards for wet weather condition*;

4. Establishing numeric WQBELs without complying applicable federal regulations or USEPA guidance;

4. Requiring in-stream monitoring for compliance and non-compliance purposes;

5. Requiring compliance with dry weather TMDLs based on outfall monitoring;

6. Requiring compliance with Municipal Action Levels; and

7. Requiring compliance with TMDLs referenced in the L.A. MS4 Permit that are not 303(d) listed and requiring compliance with non-point source TMDLs.

---------- **END COMMENTS** ----------