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

Re: **Joint Comment Letter by 19 Municipal Petitioners Addressing Draft Order Resolving Petitions for Review (SWRCB/OCC Files A-2236(a)-(kk))**

Dear Ms. Townsend:

This joint comment letter is submitted on behalf of 19 municipal co-permittees and petitioners (collectively, "Cities" or "Petitioners")[1] to the Los Angeles Municipal Separate Storm Sewer System Permit, Order No. R4-2012-0175, NPDES Permit No. CAS004001 ("MS4 Permit") issued by the Los Angeles Regional Water Quality Control Board ("Regional Board") on November 8, 2012. The Petitioners welcome the opportunity to comment on the State Water Resources Control Board's ("State Board") November 21, 2014 Draft Order ("Draft Order") addressing the 37 petitions challenging the MS4 Permit.

The joint comment letter will: (1) provide feedback on the specific issues that the State Board has included in the Draft Order; (2) respond to certain oral comments made at the State Board's December 16th workshop on the Draft Order; and (3) propose recommended language changes to the Draft Order.

For the sake of brevity, this comment letter will not address each and every argument previously raised in the initial petitions submitted by the Cities to the State Board ("Petitions"). The Draft Order dismisses some of those legal and policy arguments on

[1] Petitioners are: City of Agoura Hills (A-2236(w)); City of Artesia (A-2236(e)); City of Beverly Hills (A-2236(g)); City of Commerce (A-2236(aa)); City of Culver City (A-2236(hh)); City of Downey (A-2236(dd)); City of Hidden Hills (A-2236(h)); City of Inglewood (A-2236(ee)); City of La Mirada (A-2236(q)); City of Manhattan Beach (A-2236(r)); City of Monrovia (A-2236(v)); City of Norwalk (A-2236(d)); City of Rancho Palos Verdes (A-2236(b)); City of Redondo Beach (A-2236(jj)); City of San Marino (A-2236(a)); City of South El Monte (A-2236(c)); City of Torrance (A-2336(f)); City of Vernon (A-2236(t)); and City of Westlake Village (A-2236(p)).

the basis that they fail to raise "substantial issues appropriate for State Water Board review." [Draft Order Part II., Pg. 4.] In order to preserve the Petitioners' arguments previously raised in the Petitions, the Petitioners firmly reassert each and every argument made in their separate petitions with supporting memoranda and incorporate those arguments herein as though set forth in full.

I. THE PETITIONERS LARGELY SUPPORT THE WMP/EWMP APPROACH

A. The 19 Petitioners Have Substantial Economic Limitations in Implementing Any Major Infrastructure and Maintenance Program

The 19 Petitioners are a diverse group of cities that represent at least four different watershed areas in the Los Angeles County area. While the Petitioners include significantly different median household incomes within their various boundaries, all share common challenges: limited resources in an age of reduced State funding, restrictions on generating dedicated stormwater revenue, and increasing pension plan obligations. At bottom, these stakeholders all share one common goal: improve the quality of stormwater discharge from their municipal separate storm sewer systems ("MS4"). But this goal must be accomplished in accordance with state and federal law and within the economic and technological means available to the Petitioners. The final order should strive to improve stormwater quality while ensuring that the Petitioners can feasibly and economically meet the requirements of the MS4 Permit.

At the Petitioners' presentation on December 16, 2014, Mayor Mary Ann Lutz of the City of Monrovia specifically referenced the U.S. Conference of Mayors report: "Public Water Cost Per Household: Assessing Financial Impacts of EPA Affordability Criteria in California Cities" (November 2014).[2] That report documents that poorer communities often pay a disproportionate per capita share of annual income on water costs, including stormwater, than more affluent communities. Thus, financial considerations of new regulations by the State that seek to extend the Clean Water Act impact financially challenged California municipalities and particularly impact some cities with significant below-average median household incomes.

To be clear, the Petitioners continue to believe that a BMP-based iterative compliance approach is consistent with the maximum extent practicable ("MEP") standard under

[2] Available at http://www.usmayors.org/pressreleases/uploads/2014/1202-report-watercostsCA.pdf.

the Clean Water Act [33 U.S.C. § 1342(p)(B)(iii)], as well as the most appropriate approach for the MS4 Permit. The Petitioners further believe that a strict numeric limits approach for MS4 discharges monitored in the receiving waters is not currently feasible. Nonetheless, the Petitioners provide additional comments on the watershed management program structure articulated in the MS4 Permit and further refined in the Draft Order, which has an ultimate goal of compliance with certain numeric standards.

B. The Customized Watershed Management Program Recognizes a Common Truth—That No "One Size Permit" Fits All Circumstances

The municipal separate stormwater sewer systems within Los Angeles County are complex and diverse, encompassing over 80 jurisdictions spread out over 3,000 square miles. [Draft Order, Part I., Pg. 1.] As the MS4 Permit recognizes, some specific requirements are organized by watersheds within this total area [MS4 Permit, Part II.C., Pg. 15], specifically the Santa Clara River Watershed, the Santa Monica Bay watershed, including the Malibu Creek and Ballona Creek watersheds, the Los Angeles River watershed, the Dominguez Channel and Greater Los Angeles/Long Beach Harbors watershed, the Los Cerritos Channel and Los Alamitos Bay watershed, the San Gabriel River watershed, and the Santa Ana River watershed. [MS4 Permit, Part II.G., Pg. 18.]

In order to adequately address the water quality programs posed by such a vast system involving multiple and diverse watersheds, "innovative approaches and [a] significant investment of resources" will be necessary. [Draft Order, Part III., Pg. 75.] The Permittees believe that, in general, the watershed management program approach adopted by the MS4 Permit is an innovative approach that recognizes that no single set of conditions for the entire Los Angeles region can be uniformly and precisely applied to the geographic and watershed-specific areas. Indeed, as the Regional Board stated in the MS4 Permit: "The purpose of this Part VI.C. is to allow Permittees the flexibility to develop Watershed Management Programs to implement the requirements of this Order . . . through *customized* strategies, control measures, and BMPs." [MS4 Permit, Part VI.C.1.a., Pg. 47 (emphasis added).] The watershed management program—the cornerstone of the MS4 Permit—allows Permittees to collaboratively or individually adopt watershed management programs ("WMPs") or enhanced watershed management programs ("EWMPs"). The WMP/EWMP process represents a significant step in bringing permittees together on a watershed basis to address the water quality of MS4 systems.

C. Large-Scale Initial Compliance with WMP or EWMP Planning and Submittal Requirements Cannot Be Ignored

The Petitioners have all elected to adopt a WMP or EWMP. Accordingly, the Petitioners have and will continue to make significant long-term investments of taxpayer funds to develop and implement their WMPs/EWMPs. Although no study has identified the exact cost of fully carrying out a WMP/EWMP, each Petitioner has already expended hundreds of thousands of dollars to develop their WMPs/EWMPs. They have further committed to investing millions more on implementation. Various parties have submitted WMPs with cost estimates for structural BMPs ranging from up to $64.6 million (Lower San Gabriel River WMP) to $282.8 million (Lower Los Angeles River WMP). One preliminary estimate for constructing the necessary structural BMPs for a single watershed EWMP, the Los Angeles River watershed, is roughly $5 billion. Such a substantial projected expenditure of taxpayer funds demonstrates the Petitioners' clear intent to achieve the common goal of improving stormwater quality within the confines of their economically constrained public financial systems.

The Petitioners largely support the Draft Order's approval of the WMP/EWMP compliance process and appreciate the State Board's recognition that an alternative to strict numeric compliance is necessary. The Petitioners support such an alternative in the WMP/EWMP process, and join in the suggested language recommended in a separate comment letter by fellow petitioners, the City of Duarte and the City of Huntington Park.

With this understanding, the Petitioners do *not* suggest "undoing" the WMP/EWMP compliance approach. Significant investments in developing and implementing their WMPs/EWMPs have already been made and the Petitioners are achieving the deadlines for compliance set forth in the MS4 Permit. At present, the Regional Board has reviewed and either approved, approved subject to comments, or rejected the originally submitted WMPs. In addition, Petitioners who have selected the EWMP option are already hard at work and have expended considerable sums with consultants in order to meet the June 2015 deadline for submitting the more expansive EWMPs.

The Petitioners recognize the limits of the administrative record in this case, and do not seek to supplement the record with additional details about the WMP/EWMP process at this juncture. But, the Petitioners also believe that the State Board is a policy-making board, and that it cannot ignore the hard work and financial effort that

has already been committed in order to comply with interim deadlines of the 2012 MS4 Permit.

II. RESPONSES TO COMMENTS MADE AT THE DECEMBER 16, 2014 WORKSHOP

A. Environmental Petitioners' Criticism of the MS4 Permit's Alleged "Safe Harbors" Is Not Well Taken

The PowerPoint presentation and the oral comments made by three non-governmental organizations, the Los Angeles Waterkeeper, the Natural Resources Defense Council, and Heal the Bay ("Environmental Petitioners") argued that so-called "Safe Harbors" were a "step backwards" from progress already made on improving water quality and constituted a "major departure" from prior MS4 permits. While not initially identifying what the Environmental Petitioners saw as "Safe Harbor" provisions in the 2012 MS4 Permit, their subsequent presentation slides indicate that the target is EMWP and WMP requirements, which, according to these groups, do not ensure "ultimate compliance with water quality standards."

These Petitioners reject this criticism of the WMP/EWMP programs for multiple reasons. First, and as noted in these Petitioners' oral presentation at the December 16, 2014 workshop, the Regional Board must be given a fair opportunity to enforce the rigorous provisions of the MS4 Permit. The Regional Board has already shown that it will closely review WMPs, and has indeed rejected the WMPs submitted by seven cities as inadequate. This is the exact opposite of a "Safe Harbor." The implicit suggestion by the Environmental Petitioners is that the Regional Board cannot be trusted to enforce its own MS4 Permit conditions; that implicit suggestion ignores the very vigorous history of enforcement from this same Regional Board.

Second, the MS4 Permit itself has requirements that require, for example, that WMPs "shall ensure" that discharges from a permittee's MS4 "(i) achieve applicable water quality-based effluent limitations in Part VI.E . . . ." [MS4 Permit, Part VI.C.1.d., Pg. 47.] Each WMP "shall" contain various standards including the requirement that the watershed group "modify strategies, control measures and BMPs *as necessary based on analysis of monitoring data . . . to ensure that applicable water quality-based effluent limitations and receiving water limitations and other milestones . . . are achieved in the required timeframes."* [MS4 Permit, Part VI.C.1.f.iv., Pg. 48 (emphasis added).] While some may view this as a "replacement" of a "failed iterative process" (as presented by the Environmental Petitioners), the reality is that

the modifications must still be capable of "ensuring" that water quality standards are met within specified timeframes.

Third, the Environmental Petitioners criticize as a "Safe Harbor" Part VI.C.2. of the MS4 Permit, particularly language in Part VI.C.2.b., which states that "full compliance" with all requirements and dates for achievement of a WMP or EWMP "shall constitute" a Permittee's compliance with the receiving water limitations. But, they ignore the "full compliance" standard, and the very next section of the MS4 Permit, Part VI.C.2.c., which states that:

> If a Permittee fails to meet *any* requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee *shall* be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. [Draft Order, Part VI.C.2.c., Pg. 52 (emphasis added).]

In other words, full compliance means just that, and partial compliance will not, under the terms of the MS4 Permit, suffice, even for someone with a WMP or EMWP in place. This is hardly a "safe harbor" as suggested by the Environmental Petitioners.

B. The "Alternative Compliance" Program Urged by the Non-Governmental Organizations Was Properly Rejected in the Draft Order

The Environmental Petitioners have proposed a so called "alternative compliance" program, which would essentially require permittees to comply with the MS4 Permit's baseline numeric limits and achieve compliance through enforcement mechanisms and actions. The Draft Order in Part II.B.3. discusses in considerable detail why such an "alternative compliance" program is neither legally required (as a matter of federal and state anti-backsliding or antidegradation provisions) nor a wise policy decision. The Petitioners fully support that portion of the Draft Order, and in particular agree with the language on page 30 of the Draft Order:

> [F]rom a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders.

> Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with permit terms . . . . [Draft Order, Part. II.B.3., Pg. 30.]

The Draft Order fully addresses why the "alternative compliance" approach offered by the Environmental Petitioners is incorrect and unwise.

C. The WMP Process Is a Robust Compliance Alternative

Permittees participating in a WMP are subject to very demanding requirements. Those requirements require: identifying water quality priorities that, at minimum, include achieving applicable water quality-based effluent limitations ("WQBEL") and/or receiving water limitations, developing stringent BMPs to address those water quality priorities, compliance with numerous other baseline provisions of the MS4 Permit, conducting a Reasonable Assurance Analysis ("RAA") for *each* water body-body pollutant combination addressed in the WMP, development of an integrated monitoring program ("IMP") or coordinated integrated monitoring program ("CIMP"), and biennial adjustments to the WMP through the adaptive management process. [MS4 Permit, Part VI.C.5.-8., Pgs. 58-67.] These obligations are not only costly, but also represent obligations that WMP groups have already undertaken or are in the process of undertaking. They are real and significant obligations imposed on Permittees that elect to undertake a WMP.

Moreover, even the initially submitted WMPs are subject to modification—the plans must include provisions to "modify strategies, control measures, and BMPs as necessary . . . to ensure that applicable water quality-based effluent limitations and receiving water limitations . . . are achieved in the required timeframes." [MS4 Permit, Part VI.C.1.f.iv., Pg. 48.] Further, the plans are subject to biennial modification and revision through the adaptive management process.

III. RECOMMENDED CHANGES TO THE DRAFT ORDER

A. Watershed Management Program Six-Year Resubmittal Process

The Draft Order proposes a new requirement that permittees "submit an updated Watershed Management Program or EWMP with an updated RAA at an interval to be

determined by the Regional Board but not to exceed every six years for review and approval by the Regional Water Board Executive Officer." [Draft Order, Part II.B.4.c., Pg. 38.] The proposed requirement further proposed a lengthy approval process requiring additional hearings and public review. [*Id.*] Such a blanket requirement, without consideration of any other factors, is not a responsible use of public resources.

The cost of preparing a WMP or EWMP and conducting an RAA is expensive. For example, the Rio Hondo/San Gabriel Water Quality Water Quality Group, consisting of eight public agencies (the cities of Arcadia, Azusa, Duarte, Monrovia, Sierra Madre, the County of Los Angeles, and the Los Angeles County Flood Control District), incurred nearly $800,000 in consultant fees for the preparation of its EWMP. These fees come on top of already stretched municipal stormwater budgets. Further, many WMP/EWMP groups do not enjoy the benefit of spreading costs among eight agencies. It also bears mentioning that, due to geographical location, some cities may belong to more than one WMP/EWMP group, further increasing stormwater related costs for those cities.

The MS4 Permit already includes an adaptive management process, which requires that "every two years from the date of program approval, adapting the Watershed Management Program or EWMP to become more effective, based on, but not limited to a consideration" of numerous and substantial water quality considerations. [MS4 Permit, Part VI.C.8.a., Pgs. 66-67.] Those considerations include an analysis of whether the WMP/EWMP is achieving TMDL and receiving water limitation compliance. Further, the MS4 Permit includes a greatly expanded monitoring program under the IMPs and CIMPs, which go beyond traditional monitoring requirements under prior iterations of the MS4 Permit. Given the robust obligations imposed on Petitioners by the adaptive management process and the IMPs/CIMPs, further consideration of the WMPs/EWMPS is unnecessary during the life of the current MS4 Permit.

The six-year resubmittal requirement is not a minor obligation Petitioners may take lightly. Indeed, the Draft Order calls for a "*complete* re-consideration and re-calibration of the assumptions and predictions that support the proposed control measures and implementation schedule" for WMPs/EWMPs." [Draft Order, Part II.B.4.c., Pg. 38 (emphasis added).] At the December 16th workshop, Board Member Moore interpreted the reevaluation requirement such that it is not so onerous and does not require a new RAA, but merely requires a review of the monitoring data to confirm that the RAA had been properly conducted. Petitioners are concerned that

others may not read the proposed language so narrowly. The Draft Order calls for an "overhaul" of the RAA and WMP/EWMP based on the previous years' monitoring data and other performance measures. [Draft Order, Part II.B.4.c., Pg. 38.] Taken together, a "complete re-consideration" and "overhaul" of the RAA and WMPs/EWMPs suggests that, in most situations, they will have to be fully updated.

The Petitioners request that the proposed language be removed and allow permittees to go through one iteration of the adaptive management process and IMP/CIMP program before making any changes. If the adaptive management process does not yield meaningful changes to WMPs/EWMPs, then the State and Regional Boards may consider revising the language in the next iteration of the MS4 Permit expected in 2017. The next iteration, of course, is due before the overhaul of the WMPs/EWMPs may be required by the Regional Board under the proposed language.

The Petitioners recognize that the WMP/EWMP process should evolve to better address water quality concerns as needed. There may be situations where an overhaul is necessary. However, an element of discretion should be incorporated into that decision. If the State Board chooses to retain this requirement, then the Petitioners propose the following language change to Draft Order Part IV.C.8.:

> b. Watershed Management Program Six -Year Resubmittal Process
>
> i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a, Permittees must**, as part of the Permittee's Report of Waste Discharge under Water Code Section 13260 for the next term, submit an evaluation of the first RAA and propose whether or not to submit a revised RAA for the particular watershed. The Executive Officer of the Regional Board may order such a submittal as part of the permit renewal.**

We believe this language strikes the proper balance between preserving the limited resources of the Regional Board and permittees and ensuring that RAAs, WMPs, and EWMPs fulfill their water quality objectives. Significantly, our proposed language provides an element of flexibility to the Regional Board, which can then exercise discretion at the appropriate time to require an updated RAA, WMP, or EWMP for any single permittee or group of permittees based on demonstrated water quality outcomes over the life of the MS4 Permit. Flexibility is the cornerstone of the

WMP/EWMP process. [MS4 Permit, Part VI.C.1.a., Pg. 47.] Our proposal ensures that the Regional Board and the Permittees retain the flexibility to address changes through the adaptive management process, while preserving the ability of the Regional Board to modify these programs as necessary.

B. Retention Compliance Option for Storms up to the 85th Percentile, 24 Hour Storm Event for EWMPs[3]

The Draft Order proposes amending Part VI.E.2.e.i. of the MS4 Permit to require permittees participating in an EWMP to adopt additional control measures in the event that final WQBELs and final receiving water limitations are not being achieved. Specifically, the Draft Order proposes the following language:

> 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 any of the following is demonstrated:
>
> (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, and the Permittee is implementing all requirements of the EWMP, **including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order. Where water quality monitoring under VI.C.7 shows that final water quality–based effluent limitations and final receiving water limitations are not in fact being achieved, the Permittee remains in compliance with the final water quality based effluent limitations and final receiving water limitations only if the Permittee proposes a plan for additional control measures for achievement of these final limitations and submits the plan to the Executive Officer for approval within 30 days of**

[3] The Petitioners agree with the position of the California Stormwater Quality Association ("CASQA") on this issue, as orally presented at the December 16, 2014 workshop, and in CASQA's own comment letter submitted on this same date. We make our own separate comments to preserve the record, but concur with CASQA's observations about the benefits of a built-in "deemed compliance" standard for those watershed management groups that expend the large sums of monies necessary to retain stormwater in the specific drainage area for storms up to the 85th percentile of historical storm events.

> **the final deadline.** This provision (4) shall not apply to final trash WQBELs. [Draft Order, Part II.B.5.a., Pg.44.]

The added requirement that permittees develop and implement additional control measures when monitoring shows exceedances of WQBEL and receiving water limitations is misguided. As the Draft Order recognizes, there are very good reasons to encourage the use of the design storm retention approach. [Draft Order, Part II.B.5.a., Pg. 42.] Multi-benefit retention projects will result in no discharge during an 85th percentile, 24 hour storm event and will improve water supply through ground water recharge. Accordingly, participation in a retention-based EWMP should not be deterred.

The practical effect of the Draft Order's proposed language, however, is to deter permittees from participating in a retention-based EWMP. The permittees that elected to adopt a retention-based EWMP did so in reliance on the full compliance coverage provided by this approach. This level of certainty was not only attractive to permittees willing to incur the additional time, cost, and effort of preparing an EWMP, but permittees also recognized the multiple benefits achieved by retention projects. For this reason, the EPA has rejected imposing more onerous requirements, particularly numeric limits, in the 2014 Final Rule on Effluent Limitations for Construction because of concern that such limits "may create a disincentive to green infrastructure techniques for managing stormwater." [79 Fed. Reg. 44, 1225 (Mar. 6, 2014).] As a policy matter, the State of California has taken the position that multi-benefit stormwater retention programs should be promoted and targeted for funding. The Governor's "California Water Action Plan" ("Water Action Plan") specifically calls for an:

> [I]ncreased focus on projects with multiple benefits, such as stormwater capture and floodplain reconnection, that can help simultaneously improve the environment, flood management and water supplies. These diversified regional water portfolios [including stormwater retention] will relieve pressure on foundational supplies and make communities more resilient against drought, flood, population growth and climate change. [California Natural Resources Agency, *et al.*, "California Water Action Plan," Pg. 4 (2014).]

The Water Action Plan goes on to state:

> The administration will direct agencies and departments to evaluate existing programs and propose modifications to incentivize and co-fund multi-benefit projects that promote integrated water management, such as stormwater permits that emphasize stormwater capture and infiltration, which provide both flood protection and groundwater recharge benefits, and agricultural groundwater recharge projects that emphasize water quality and conjunctive use. The commitment to emphasize multiple benefit projects will be applied to most of the actions in this plan. [*Id.* at 7.]

To achieve these goals, the Water Action Plan indicates that the Governor's administration "will work collaboratively with stakeholders to identify and remove impediments to achieving . . . stormwater goals." [*Id.* at 5.] Accordingly, disincentives to promoting the types of green infrastructure projects proposed by the EWMPs should be removed from the MS4 Permit.

Further, the retention-based EWMP provides a clear approach to permit compliance and a level of certainty to permittees. The Draft Order recognizes this principle:

> "[P]ublic projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations." [Draft Order, Part II.B.5.a., Pg. 42.]

The Draft Order's proposed language does not fulfill that commitment. Rather, it exposes permittees to further costs in developing additional BMPs that may be so onerous as to be impracticable. In other words, the Petitioners question whether further feasible control measures exist within the confines of the MEP standard in the event that exceedances are detected in a watershed that fully captures stormwater for a particular WQBEL. The Draft Order should be revised to allow for full permit compliance for permittees that adopt and implement an EWMP.

A design storm based on the 85th percentile, 24-hour rain event is not a novel approach. It is consistent with the State Board-issued Caltrans MS4 permit, Order No. 2012-0011-DWQ, NPDES Permit No. CA2000003 ("Caltrans Permit"). That permit provides that "[f]ollow up monitoring is not required where the discharge has

been eliminated, or where the implemented BMP provides full retention of the 85th percentile, 24-hour rain event." [Caltrans Permit, Part E.2.c., Pg. 34.] It is also consistent with the NPDES General Stormwater Permit for Industrial Activities, Order No. 2014-0057 DWQ, NPDES NO. CAS000001 and the MS4 NPDES Permit for the San Diego Region, Order No. R9-2013-0001, NPDES No. CAS0109266, issued by the San Diego Regional Water Quality Control Board. In other words, the State Board and Regional Boards recognize the 85th percentile, 24-hour rain event as a design storm capable of achieving meaningful results. If exceedances occur in a watershed equipped to handle such a design storm, it may be that the water quality standard must be reevaluated because it is simply unattainable.

Retaining the proposed language in the Draft Order could ultimately have the effect of deterring some permittees from making the substantial investment in multi-benefit stormwater retention projects prescribed by an EWMP. If other BMPs can feasibly attain the water quality standard, as the Draft Order assumes are available, then those are the BMPs the permittees should invest in. To resolve this issue, the Petitioners propose the following language:

> 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 any of the following is demonstrated:
>
> (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 **an** 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water, and the Permittee is implementing all requirements of the EWMP, **including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order.**

C. Extensions for WMP/EWMP Submittals

The MS4 Permit provides that a permittee is deemed in compliance with receiving water limitations and interim WQBELs "[u]pon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP," so long as certain requirements are met, including compliance with all interim and final

deadlines for development of a WMP or EWMP.[4] [MS4 Permit, Parts VI.C.2.d., Pg. 52, VI.C.3.b., Pg. 53, VI.E.2.d.i.(4)(d), Pg. 144.] The Draft Order proposes new language intended to provide permittees an opportunity to request and receive an extension of a WMP/EWMP interim or final deadline during the WMP/EWMP development process. [Draft Order, Part II.B.6., Pg. 45-48.] Specifically, that new language adds a new Part VI.C.4.g. to read as follows:

> **g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP /EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality -based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP /EWMP in place.**

The Petitioners support the State Board's recognition that extensions of the WMP/EWMP development schedule may be required under certain circumstances. The consequences of a permittee losing the protections afforded by the MS4 Permit's deeming compliance provisions when developing a WMP/EWMP are potentially severe—immediate compliance with numeric receiving water limitations and applicable interim and final WQBELs. [MS4 Permit, Parts V.A., Pgs. 38-39, VI.E., Pgs. 141-45.]

As discussed previously, the Regional Board has already rejected several WMPs on the basis that they did not meet the stringent requirements of Part VI.C. of the MS4 Permit, leaving those permittees in the precarious position of potentially being required to comply with the MS4 Permit's baseline numeric requirements. This

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[4] It is, perhaps, confusing when the Draft Order refers to these provisions of the MS4 Permit as a "safe harbor" when, in fact, the Petitioners are subject to costly and robust compliance requirements during the WMP/EWMP development process. Not only must a municipal Permittee develop a WMP/EWMP, but it must also continue to implement applicable provisions of its existing stormwater management program. [MS4 Permit, Parts VI.C.2.d., Pg. 52, VI.C.3.b., Pg. 53, VI.E.2.di.(4)(d), Pg. 144.] We suggest referring to this language as an "interim compliance option" as opposed to a "safe harbor."

comes at a time when compliance with numerics is simply infeasible. In that situation, an extension of the WMP/EWMP development schedule, summarized in Table 9 of the MS4 Permit, for those permittees would be of great benefit.

But despite the perceived benefit of granting the Regional Board discretion to extend interim and final deadlines, the Draft Order actually creates a source of liability for those permittees that receive such an extension. This is so because the proposal would require permittees in receipt of an extension to comply with the MS4 Permit's "baseline requirements . . . and shall demonstrate compliance with receiving water limitations . . . and with applicable interim water quality-based effluent limitations . . . until the Permittee has an approved WMP/EWMP in place." [Draft Order, Part IV.C.6., Pgs. 47-48.] This gap in compliance comes at a time when a permittee is working in good faith, and at great cost, to develop a WMP/EWMP over a multi-year process. Under the Draft Order's proposal, the very act of requesting and receiving an extension exposes a permittee to the potential of third party lawsuits when the permittee is attempting to attain compliance.

It is for that reason that an extension in the WMP/EWMP development schedule should not subject permittees to numeric receiving water limitations or WQBELs during the extension period. The proposal to provide deadline extensions does not go far enough to provide meaningful assistance to Permittees at a time when it is needed most. The Petitioners recommend the following language to close this gap in compliance:

> g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP /EWMP shall be **deemed in compliance with the receiving water limitations pursuant to Part V.A. and applicable interim water quality-based effluent limitations in Part VI.E so long as the Permittee has submitted a final WMP/EWMP subject to Regional Board approval.**

D. Commingled Discharges

The Draft Order proposes new language intended to address violations of receiving water limitations involving commingled discharges where the pollutant at issue is not addressed by a TMDL. Specifically, the Draft Order proposes the following language to be added to Part VI.B.2. of the MS4 Permit:

2. Compliance Determination

a. A Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.

b. A Permittee shall demonstrate compliance with the requirements of Part V.A for commingled discharges as follows:

i. Pursuant to 40 C.F.R. section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.

ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.

iii. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.

iv. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:

(1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;

> **(2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water; or**
>
> **(3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, and that the pollutant is not typically associated with MS4 discharges.**

The proposed language neglects to consider that a permittee may be in full compliance with a WMP/EWMP and should therefore be considered in compliance with applicable receiving water limitations. Accordingly, a permittee should not be subject to liability for a particular pollutant if the WMP/EWMP provides that participating permittees are deemed in compliance. To address a potential loophole in the WMP/EWMP program, the Petitioners recommend that a new part VI.B.2.b.iv.(4) be added as follows:

> **(4) Demonstrate that the Permittee is in current compliance with the design or implementation of a Watershed Management Program or EWMP.**

The Permittees further object to the language of Part VI.B.2.b.ii., which improperly places the burden on a permittee to prove its innocence when commingled discharges cause or contribute to violations of receiving water limitations. As the Draft Order correctly states, the Regional Board "has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred." [Draft Order, Part II.F., Pg. 64, n. 178.] However, the Regional Board may not satisfy this burden unless it can raise at least a rebuttable presumption that the contamination is the result of a particular permittee's actions. The proposed language would otherwise allow the Regional Board to hold all permittees within an entire watershed liable for a single exceedance, then shift the burden to the innocent permittees to prove the impossible—that their commingled discharge did not cause or contribute to the exceedance. Such a scenario improperly holds the permittee guilty until proven innocent.

Footnote 178 of the Draft Order suggests that this burden shifting scheme is proper because it is "consistent with the Restatement of Torts §433B." [Draft Order, Part II.F., Pg. 64, n. 178] As a preliminary matter, the Permittees question how uncodified rules of tort liability can form the basis of subjecting them to penalties for exceedances under the federal Clean Water Act. As a matter of law, the cited section

of the Restatement presupposes that all of the jointly liable tortfeasors have actually caused the harm to some extent, and the burden placed on the tortfeasors is to then apportion liability. [Restatement (Second) of Torts § 433B(2) (1965).] In this case, the municipal co-permittees are not "joint tortfeasors" under the common law or under the Clean Water Act. Rather, they are "dischargers" who must act in compliance with NPDES permit conditions. As a matter of law, the Restatement analogy to tortfeasors is simply inapplicable to the types of municipal discharges regulated by statute.

Moreover, in the case of receiving water limitation violations, it may be that some of the permittees discharging into the same watershed are completely innocent. Those innocent permittees should not be required to apportion liability, since they have no liability. The Regional Board must have some evidence, other than a bare assertion that the permittee's discharge was commingled, in order to meet its burden.

The Petitioners are also concerned that the "cause or contribute to" standard for liability is vague and inappropriate. Any discharge could contribute to an exceedance, even if that discharge otherwise complies with the applicable water quality standard. In other words, a permittee may be held jointly liable for an exceedance despite that permittee's discharge being in full compliance with an applicable numeric standard. At the December 16th workshop, State Board counsel suggested that the "cause or contribute to" standard is not used to impose liability upon a de minimis contribution to an exceedance. The language does not suggest that this is the case, and despite the use of the "cause or contribute" standard in other NPDES permits, the Petitioners recommend that it be revised to clarify that liability requires a significant contribution to an exceedance.

Thus, the Petitioners suggest that the Draft Order's proposed language amending Part VI.B.2 of the MS4 Permit be further revised to read:

> (b) A Permittee shall demonstrate compliance with the requirements of Part V.A. for commingled discharges as follows:
>
> (i) [omitted]
>
> (ii) [omitted]

> (iii) For purposes of compliance determination, each Permittee **in a commingled watershed area** is responsible for demonstrating that its discharge did not cause **or substantially contribute to** an exceedance of the receiving water limitation in the target receiving water;
>
> (iv) A Permittee may demonstrate that its discharge did not cause or **substantially contribute** to an exceedance of a receiving water limitation in one of the following ways . . . .

IV. JOINT RESPONSIBILITY VERSUS JOINT LIABILITY

The Petitioners disagree with Part II.F. of the Draft Order, at least insofar as it seeks to impose joint liability on a group of permittees that are cooperating on implementing programs within their particular watershed. The definition of "joint responsibility" contained in the MS4 Permit at Part II.K.1. is just that—that permittees have a joint responsibility to work together within the scope of a specific watershed management plan. [MS4 Permit, Part II.K.1., Pg. 23.] But, the Draft Order goes much further and attempts to impose a legal liability standard of "joint liability" upon co-permittees. This standard violates federal regulations implementing the Clean Water Act, specifically 40 C.F.R. Section 122.26(a)(3)(vi), which states that even in large and medium municipal separate storm sewer systems:

> (vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers *for which they are operators.* [40 C.F.R. § 122.26(a)(3)(vi) (emphasis added).]

This federal standard was referenced and adopted in the MS4 Permit, as noted on page 23 of the Permit:

> Individual co-permittees are only responsible for *their contributions* to the commingled MS4 discharge. This Order *does not* require a Permittee to individually ensure that a commingled MS4 discharge meets the applicable water quality-based effluent limitations included in this Order, unless such Permittee is shown to be *solely responsible* for an exceedance. [MS4 Permit, Part II.K.1., Pg. 23 (emphasis added).]

The Petitioners submit that the federal regulations discussing a co-permittee's responsibility within a large municipal separate storm sewer system and the wording

of the MS4 Permit at issue are consistent: Co-permittees should work together (as they are currently doing) within the context of WMPs/EWMPs to cooperate and coordinate on achieving water quality standards. But the Draft Order goes further than what is authorized under both the federal Clean Water Act and the state Water Code. The Draft Order would impose liability on permittees simply because they are working together and, therefore, such a standard of joint liability is improper in the MS4 Permit.

The Draft Order cites federal regulations which "anticipate the need for inter-governmental cooperation," citing to 40 C.F.R. Section 122.26(d)(2)(i)(D) [Draft Order, Part II.F., Pg. 63], but that provision simply requires that an application for a new NPDES permit contain various legal authority to control illicit discharges and various other types of discharges, and to:

> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system; . . . . [40 C.F.R. § 122.26(d)(2)(i)(D).]

With respect, this provision does not impose any legal liability standard, nor does it justify the imposition of such a standard.

The Draft Order next cites in support of its position on "joint liability" a footnote in a Ninth Circuit decision, ***Natural Resources Defense Council v. County of Los Angeles***, 725 F.3d 1194, 1205, n. 16 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 2135 (2014). But, the cited footnote, footnote 16, begins with the statement that what was *not* before the Court was whether the Clean Water Act requires a particular liability scheme. As the Ninth Circuit stated in the beginning of footnote 16: "The question before us is *not whether the Clean Water Act mandates any particular result . . . .*" [*Id.* (emphasis added).] Although the Court, in that same footnote, stated that the permitting agency did have discretion, it did *not* opine that "joint liability" was a permissible standard, and the footnote's discussion of any possible standard is pure *dicta.*

The Petitioners submit that the Draft Order cites no specific provision of federal regulations implementing the Clean Water Act nor anything other than *dicta* in one Ninth Circuit opinion to support its determination that the "Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow." [Draft Order, Part II.F., Pg. 64.] The Petitioners further submit that by imposing something called "joint

liability," the Draft Order has gone beyond the provisions of the federal Clean Water Act and the state Water Code. Joint liability should be rejected.

V. THE DRAFT ORDER IMPROPERLY DEFERS TO THE REGIONAL BOARD'S INCLUSION OF NUMERIC WQBELS

In their Petitions, Petitioners asserted that the numeric WQBELs included in the MS4 Permit were improperly developed and infeasible. Petitioners had hoped the State Board would independently review the Regional Board's determination to include the numeric WQBELs, particularly because compliance with a number of the WQBELs is infeasible at this time. The State Board declined to do so, instead deferring to the Regional Board's determination in a brief statement that it would not "second-guess" the Regional Board. [Draft Order, Part II.C.1., Pg. 54.] Such a deferential standard of review is inadequate given the significant costs and compliance challenges associated with including numeric WQBELs in an MS4 Permit. The Petitioners request that the State Board reevaluate the Regional Board's determination and consider whether the Regional Board properly concluded that such WQBELs were in fact feasible.

VI. FUNDING FOR MS4 PERMIT COMPLIANCE

A. The Regional Board Failed to Adequately Consider Economic Impacts Pursuant to Water Code Section 13241

As previously asserted in the Petitions, pursuant to Water Code Sections 13241 and 13263, the Regional Board was obligated to take into consideration the economic capability of the permittees to meet the requirements of the MS4 Permit. Under California Supreme Court precedent, a regional board must consider, among other factors enumerated under Water Code Section 13241, "[e]conomic considerations" when issuing an NPDES permit containing pollutant restrictions that are more stringent than required by federal law. [***City of Burbank v. State Water Resources Control Bd.***, 35 Cal. 4th 613, 618, 627 (2005).] That is, in part, when pollutant restrictions are more stringent than the MEP standard established under the Clean Water Act. [33 U.S.C. §1342(p)(3)(B).] The inclusion of numeric receiving water limitations and WQBELs exceed the MEP standard, and thus mandate an analysis of economic impacts under Water Code Sections 13241 and 13263.

In addition, the MS4 Permit itself recognizes that the economic capabilities of the permittees must be taken into account when meeting the MEP standard. The definition of MEP under the MS4 Permit is as follows:

> "In selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. This means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. The following factors may be useful to consider:
>
> [¶] 4. Cost: *Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved*?" [MS4 Permit, Att. F, Pg. A-11 (emphasis added).]

The State Board should recognize that cost is a significant factor under the federal MEP standard and the plain language of the MS4 Permit. Ultimately, BMPs are the only means that the Permittees have to attain compliance and, therefore, the cost of implementing the BMPs must be considered.

B. Funding Considerations

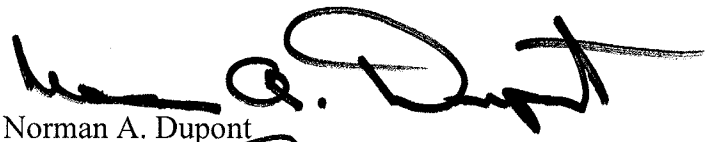
The MS4 Permit provides, and the State Board acknowledges, that the adaptive management process "will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 . . . and Proposition 1 [the 2014 voter-approved water bond]." [Draft Order, Part II.B.4., n 102, Pg. 37.] If this language is to mean that the Permittees have discretion in revising their WMPs/EWMPs to account for cost feasibility, we suggest that the State Board clearly state this intent in its final order. Certain provisions, such as the six-year resubmittal process for WMPs/EWMPs and the additional control plans for retention-based EWMPs, suggest that the Regional Board will not consider cost in determining whether further control measures are required of Permittees. To the contrary, those provisions impose mandatory duties that provide no discretion based on cost.

Additionally, as a matter of sound public policy, cost considerations can be mitigated with the availability of dedicated stormwater funding. To that end, the Petitioners urge the State Board to set aside a substantial amount of Proposition 1 funding for the

types of stormwater projects likely to be constructed as part of the WMPs/EWMPs. Such projects will in most circumstances involve multiple benefits, including reducing stormwater pollution and improving water storage. [*see* Water Code § 79747.] This, of course, is fully consistent with the stormwater priorities articulated in the Governor's Water Action Plan. With funding, the projects developed under the WMPs/EWMPs will have a significant effect on water quality, and they should be given special consideration in funding considerations.

Finally, the Petitioners respectfully request that the State Board release another draft order, and afford the Petitioners a further opportunity to be heard, prior to adopting the final order on the MS4 Permit.

Very truly yours,



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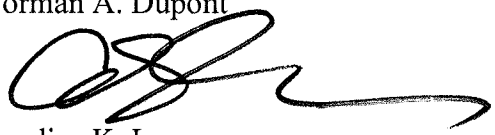

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