



June 2, 2015

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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P.O. Box 100
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Submitted via email: commentletters@waterboards.ca.gov

Re: Comments on Revised Draft Order SWRCB/OCC Files 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” or “Permit”), we submit the following comments on the April 24, 2015 State Water Resources Control Board (“State Board”) revised 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) (“Revised Draft Order” or “Order”). We appreciate this opportunity to comment on the Revised Draft Order.

I. Summary

The 2012 MS4 Permit presents a critical opportunity for the State Board and the Los Angeles Regional Water Quality Control Board (“Regional Board”) to create a new, better path forward to ensure our water quality and water supply challenges are addressed in a sustainable and holistic manner. Environmental Groups support the State Board’s desire to promote stormwater capture to augment local water supplies and address water quality concerns. This is especially important in response to the current historic drought and the increasing challenges of climate change. The State Board has emerged as a leader on drought response, and this Permit should not be the exception. The 2012 MS4 Permit can and should become the means to implement a true multi-benefit approach to stormwater management for Los Angeles and California – one that achieves compliance with water quality standards (“WQSs”), as the law requires, while also increasing local water supply, providing flood mitigation and improving local communities and habitats. Stormwater capture is a vital and necessary component of California’s water future, and the State Board should integrate its drought mitigation efforts with its stormwater management approach in this Order.

Unfortunately, the Revised Draft Order fails to address stormwater capture in a meaningful way and is a step away from the comprehensive drought response approach that is truly necessary for California's water future. Rather than requiring MS4 Permittees to efficiently and effectively achieve the multiple benefits desired by the State Board, the 2012 MS4 Permit and Revised Draft Order provide so-called "safe harbors" for Permittees that have already demonstrated a departure from meaningful stormwater capture and WQSs compliance. And, as discussed below, the Revised Draft Order condones a process mired in delay and uncertainties that fail to ensure the protection and restoration of Los Angeles waterways.

We acknowledge the Revised Draft Order's clarifications that the MS4 Permit's alternative compliance mechanism does not apply to non-stormwater discharges, which are subject to the federal Clean Water Act's ("CWA") strict prohibition on non-stormwater discharges.¹ However, the rest of the revisions do not address the significant legal deficiencies and policy flaws identified in our Petition² and our January 21, 2015 comment letter³ on the initial Draft Order.

First, despite the revisions, the alternative compliance approach proposed in the 2012 MS4 Permit and endorsed by the Revised Draft Order will neither accomplish the State Board's goal, nor meet the requirements of the CWA, to ensure that MS4 Permittees achieve compliance with WQSs. In fact, the recent "conditional" approvals of nine deficient Watershed Management Programs ("WMPs"), which were illegally issued by the Regional Board's Executive Officer, demonstrate that the Permit's alternative compliance approach is already failing to ensure compliance with Receiving Water Limitations ("RWLs").⁴ Moreover, the Revised Draft Order further weakens the alternative compliance approach by extending the deadline to update the Reasonable Assurance Analysis ("RAA") to eight and a half years and by allowing Permittees to request time schedule orders ("TSOs") to obtain more time to comply with RWLs not addressed by total maximum daily loads ("TMDLs") if Permittees fail to obtain funding.

Second, as discussed in detail in Environmental Groups' Draft Order Comments as well as further below, the Revised Draft Order and the 2012 MS4 Permit fail to comply with federal and state anti-degradation and anti-backsliding requirements and allow illegal compliance schedules for the TMDL-based limitations necessary to implement the California Toxics Rule ("CTR"). Adopting the Revised Draft Order as it currently stands, therefore, would not only be in violation of state and federal requirements, but it would also constitute bad policy and a tremendous lost

¹ Revised Draft Order at 52.

² For a full explanation of how the 2012 MS4 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.

³ *See* Environmental Groups' Comments on Proposed Draft Order SWRCB/OCC Filed to A-2236(a)-(kk): In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175) (January 21, 2015), ("Environmental Groups' Draft Order Comments"), incorporated herein.

⁴ *See* Regional Board's Comments on Draft WMPs, attached as Exhibits A, D, G, K, N, S, W, Z and CC to Environmental Groups' Request for Official Notice; Revised WMPs, attached as Exhibits B, E, H, I, L, O-Q, T, U, X, AA and DD to Environmental Groups' Request for Official Notice; Environmental Groups' Comments on Revised WMPs, attached as Exhibit FF to Environmental Groups' Request for Official Notice; Regional Board Executive Officer's "Conditional Approvals" of WMPs, attached as Exhibits C, F, J, M, R, V, Y, BB, EE to Environmental Groups' Request for Official Notice; *see also* Appendix A to this letter.

opportunity to decisively implement both short- and long-term solutions to California's water challenges.⁵ To avoid this result, the State Board must use its authority to remove all purported "safe harbors" from the 2012 LA MS4 Permit⁶ and instead require implementation of watershed management programs as one way to achieve, rather than demonstrate, compliance with RWLs and WQSS.

II. The Alternative Compliance Approach Endorsed by the Revised Draft Order is Arbitrary, Capricious and an Abuse of Discretion

Environmental Groups have consistently pointed out the numerous deficiencies and illegalities of the 2012 MS4 Permit's alternative compliance approach.⁷ This approach mirrors the flawed iterative process from the 2001 Permit, particularly with regard to the WMPs, which by design do not include as robust requirements nor ensure the kinds of multiple benefits envisioned by the Enhanced Watershed Management Programs ("EWMPs"). The recent illegal "conditional" approvals of nine WMPs, which manifestly fail to comply with the Permit's requirements as well as the CWA and will not result in achievement of RWLs, clearly demonstrate that our concerns with the 2012 MS4 Permit's alternative compliance approach are justified and the approach must be rejected or, at a minimum, significantly revised.⁸ The Regional Board staff's own comments on the initial draft WMPs identified numerous shortcomings in the plans and explicitly demanded that such deficiencies be fixed prior to approval of the final WMPs.⁹ The revised WMPs submitted by Permittees failed to address many, if not most, of the deficiencies identified by Regional Board staff. Yet, on April 28, 2015, the Regional Board's Executive Officer "conditionally" approved nine WMPs, and thereby not only wrote substantive requirements out of the Permit, but also acted in direct contravention of the Permit's clear directive that deficient WMPs must be denied.¹⁰ Some examples of the WMPs' significant flaws are: 1) failure to conduct a robust RAA for all constituents, 2) failure to include measurable milestones for implementing best management practices ("BMPs"), 3) failure to conduct RAAs for all waterbodies included in a watershed, and 4) failure to calibrate the model used for the RAA, among many others.¹¹

⁵ Environmental Groups' also object to the State Board's failure to grant our January 21, 2015 Request for Official Notice. For the numerous reasons stated in our Request for Official Notice, the documents for which we seek notice must be added to the administrative record.

⁶ For a detailed discussion of the specific sections of the 2012 LA MS4 Permit that constitute purported "safe harbors," see Environmental Groups' Petition at 11-13.

⁷ See Environmental Groups' Petition at 11-31; Environmental Groups' Draft Order Comments at 7-28.

⁸ For additional discussion of the shortcomings of the 2012 MS4 Permit alternative compliance approach and recommendations for improvements, see Environmental Groups' Draft Order Comments at 9 – 36.

⁹ See Regional Board's Comments on Draft WMPs, attached as Exhibits A, D, G, K, N, S, W, Z and CC to Environmental Groups' Request for Official Notice; Revised WMPs, attached as Exhibits B, E, H, I, L, O-Q, T, U, X, AA and DD to Environmental Groups' Request for Official Notice; Environmental Groups' Comments on Revised WMPs, attached as Exhibit FF to Environmental Groups' Request for Official Notice; Regional Board Executive Officer's "Conditional Approvals" of WMPs, attached as Exhibits C, F, J, M, R, V, Y, BB, EE to Environmental Groups' Request for Official Notice; see also Appendix A to this letter.

¹⁰ 2012 MS4 Permit at Table 9.

¹¹ See Regional Board's Comments on Draft WMPs, attached as Exhibits A, D, G, K, N, S, W, Z and CC to Environmental Groups' Request for Official Notice; Revised WMPs, attached as Exhibits B, E, H, I, L, O-Q, T, U, X, AA and DD to Environmental Groups' Request for Official Notice; Environmental Groups' Comments on

Moreover, the “conditions” imposed by the Executive Officer not only demonstrate the WMPs’ deficiencies as they were finally submitted, but also, and perhaps most significantly, are themselves insufficient to ensure that the WMPs will achieve compliance with WQSs and RWLs.¹² The WMP/EWMP approach is no better than the failed iterative process from the 2001 MS4 Permit and will only result in further delay and confusion.

The 2012 MS4 Permit’s alternative compliance approach, therefore, has proved to be inadequate and reliance on it as the sole vehicle to assure MS4 Permittee compliance with WQSs and RWLs is both mistaken and illegal.

III. The Revised Draft Order Further Weakens the Alternative Compliance Approach

Instead of strengthening the 2012 MS4 Permit’s WMP/EWMP requirements, the revisions proposed in the Revised Draft Order fail to ensure that the approach, even if followed, will result in achievement of WQSs.¹³ These revisions include requirements for additional reporting by MS4 Permittees regarding the progress of WMP/EWMP implementation, such as reporting of “[m]onitoring data that evaluates the effectiveness of implemented control measures in improving water quality” and a “[c]omparison of the effectiveness of the control measures to the results projected by the RAA.”¹⁴ The revisions, however, do not include a firm requirement that the WMPs, EWMPs or the RAA, on which these programs rely, must be updated to ensure that WQSs are met when data and information collected during the programs’ implementation show that Permittees continue to fail to meet RWLs and Water Quality-Based Effluent Limitations (“WQBELs”).¹⁵

In fact, the Revised Draft Order not only fails to address Environmental Groups’ concerns regarding the deficiencies of the RAA but further undermines the 2012 MS4 Permit’s RAA requirements by extending the deadline for Permittees to update the RAA to June 30, 2021, eight and a half years from the Permit’s adoption date.¹⁶ This unwarranted extension allows Permittees to implement deficient WMPs and EWMPs for years after the current permit cycle, even when additional monitoring collected during WMP and EWMP implementation¹⁷ shows that the RAA was inadequate and WQSs are not being met. Thus, rather than improving water quality over time, the alternative compliance approach is a recipe for yet another lengthy process where Permittees implement control measures and BMPs and expend resources, but no clear demonstration is made that these efforts actually result in achieving RWLs.

Finally, the Revised Draft Order weakens the alternative compliance approach by allowing Permittees to request TSOs for extensions of deadlines for RWLs not addressed by TMDLs due

Revised WMPs, attached as Exhibit FF to Environmental Groups’ Request for Official Notice; Regional Board Executive Officer’s “Conditional Approvals” of WMPs, attached as Exhibits C, F, J, M, R, V, Y, BB, EE to Environmental Groups’ Request for Official Notice; *see also* Appendix A to this letter..

¹² *See* Regional Board Executive Officer’s “Conditional Approvals” of WMPs, attached as Exhibits C, F, J, M, R, V, Y, BB, EE to Environmental Groups’ Request for Official Notice; *see also* Appendix A to this letter.

¹³ Revised Draft Order at 42-44.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 44.

¹⁷ *Id.* at 43 – 44

to “inability despite all reasonable efforts to obtain funding for a project.”¹⁸ This broad language fails to define “reasonable efforts” and will undoubtedly be used as an excuse for additional substantial delays in achieving compliance with RWLs. The results, again, will be failure to meet the ultimate goal of the 2012 MS4 Permit – compliance with WQSs – and continued degraded water quality.

IV. The Stormwater Retention “Safe Harbors” for TMDL-based RWLs and QBELs Are Illegal and Must Be Stricken from the 2012 MS4 Permit

The 2012 MS4 Permit and the Revised Draft Order improperly allow compliance with TMDL-based QBELs and RWLs to be established through the development and implementation of an EWMP requiring retention of runoff from the 85th percentile, 24-hour storm, wherever feasible (“stormwater retention approach”).¹⁹ Both during the Permit adoption and in its comments on the Draft Order, the U.S. Environmental Protection Agency (“EPA”) explained that “where a MS4 permit does not incorporate TMDL WLAs as numeric limits, the permit’s administrative record must demonstrate that specified control measures will be sufficient to ensure compliance with WLAs.”²⁰ As EPA concluded, however, the 2012 MS4 Permit’s record did not “support[] the conclusion that [the stormwater retention approach] will result in achievement of WLAs.”²¹ The agency further stated that the “plan for additional control measures” for achievement of final QBELs and RWLs based on TMDL waste load allocations (“WLAs”), initially proposed in the Draft Order to address situations where monitoring data shows that the stormwater retention approach is failing to achieve compliance with RWLs and QBELs,²² is not, by itself, sufficient to establish that TMDL WLAs will be met.²³ EPA, however, recommended strengthening the proposed provision by: 1) submitting a plan for additional control measures, 2) adding a requirement for “a quantitative analysis demonstrating that proposed additional control measure will result in attainment of WLAs,” and 3) adding a provision authorizing the Regional Board’s Executive Officer “to require strict compliance with numeric WLAs if continued progress is not being made.”²⁴

The Revised Draft Order acknowledges that the 2012 MS4 Permit’s stormwater retention approach does not constitute compliance with final QBELs and other TMDL-specific

¹⁸ Revised Draft Order at 40.

¹⁹ 2012 MS4 Permit, Part VI. E.2.e.i.(4).

²⁰ United States Environmental Protection Agency Comments to A-2236(a)-(kk) (January 20, 2015) (“U.S. EPA Comments”) at 2; *see also* Regional Board, In the Matter of the Regional Board Public Meeting/Hearing, Thursday, November 8, 2012. (“November 8 Hearing”), at 365:24-25 to 366:1-7 and 366:10-18; 367:6-8 (comments by Mr. John Kemmerer, U.S. EPA); *see also* Memorandum from Andrew D. Sawyers and Benita Best-Wong, U.S. EPA, to Water Division Directors, Regions 1 – 10, re: Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, November 26, 2014, (“EPA Sawyers Memo”) at 6 (“the permit’s administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs”)

²¹ U.S. EPA Comments at 2.

²² 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”) at 44.

²³ U.S. EPA Comments at 2.

²⁴ *Id.*

limitations.²⁵ While the Order states that “ultimate compliance is subject to continued planning, monitoring and adaptive management,”²⁶ it provides no details regarding these additional requirements and whether they, alone or in combination with the stormwater retention approach provided in Part VI.E.2.e.i.4 of the 2012 MS4 Permit, will achieve compliance with TMDL-based WQBELs and WLAs. More significantly, the requirement to submit a “plan for additional control measures” when monitoring data shows WQBELs and RWLs implementing TMDL WLAs are not being met has been deleted from the Revised Draft Order and none of EPA’s recommendations to ensure the stormwater retention approach will actually achieve WLAs have been incorporated.²⁷ Thus, neither the record for the adoption of the 2012 MS4 Permit, nor the record for the Draft Order and the Revised Draft Order, demonstrate that the stormwater retention approach, by itself or together with other measures (including “continued planning, monitoring and adaptive management”²⁸) proposed to implement TMDL WLAs in the Permit, will achieve the WLAs. Because the administrative record does not establish that the 2012 MS4 Permit’s EWMP stormwater retention approach in Part VI.E.2.e.i.(4) will ensure compliance with TMDL WLAs, the provisions allowing compliance through implementation of this approach must be stricken from the Permit.²⁹

As discussed in our comments on the Draft Order, Environmental Groups support the concept of the 2012 MS4 Permit’s EWMP provisions and stormwater retention as an effective method to address both water pollution and local water supply shortages.³⁰ However, to meet the State Board’s goal of achieving WQSs and contribute to increased local water supplies during California’s unprecedented drought, the stormwater retention approach must be revised to require calibrated modeling demonstrating that any WMP or EWMP will in fact achieve compliance for each and every applicable WLA.³¹

V. The “New Information” Exception Is Inapplicable and Cannot Justify Backsliding in Permit Requirements

As discussed in Environmental Groups’ Draft Order Comments, none of the information on which the Regional Board and the Revised Draft Order rely to justify the Permit’s backsliding is in fact “new.”³² The watershed management approach to stormwater control is not new but was known to the Regional Board at the time the 2001 Permit was adopted.³³ In fact, this approach was the approach contemplated in the 2001 Permit, TMDLs, and EPA’s stormwater rule.³⁴ Moreover, the Regional Board’s “new understanding” gained as a result of “the more than a decade of implementation of storm water requirements, as well as the development and

²⁵ Revised Draft Order at 50.

²⁶ *Id.*

²⁷ *Id.* at 50-51.

²⁸ *Id.* at 50.

²⁹ See EPA Sawyers Memo at 6 (WQBELs implementing numeric WLAs into an MS4 permit can be expressed as numeric limits or as “measurable, objective BMP-based limit[s] that is projected to achieve the WLA” and “the permit’s administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs”).

³⁰ See Environmental Groups’ Draft Order Comments at 5-6, 32-36.

³¹ *Id.* at 35.

³² *Id.* at 22-26.

³³ *Id.*

³⁴ *Id.*; see also 55 Fed.Reg. 47990.

implementation of TMDL requirements”³⁵ cannot serve as a basis for backsliding under the “new information” exception. The Regional Board has not presented any facts, studies and information showing that since 2001, MS4 Permittees have fully implemented BMPs and measures to control stormwater pollution that were envisioned by the 2001 Permit, but, despite their best efforts, WQSs and RWLs proved to be unattainable.³⁶ Quite the contrary, MS4 Permittees have failed to implement well-known measures and BMPs, including measures and BMPs on watershed-wide basis endorsed by the 2001 MS4 Permit. In fact, many MS4 Permittees did not engage in the 2001 MS4 Permit’s RWL compliance process which required revisions and implementation of additional BMPs to ensure RWL requirements are met.³⁷ Similarly, MS4 Permittees failed to fully implement BMPs that they themselves proposed to address stormwater pollution.³⁸ Thus, the Board’s “new understanding” is not grounded in the type of previously unknown and unavailable information that could provide the basis for as an exception to federal anti-backsliding requirements.³⁹

There are sound policy reasons to demand more than generalized statements about the Regional Board’s “new understanding” to justify backsliding from long-standing permit requirements, such as the 2001 MS4 Permit’s requirement to strictly comply with the Permit’s RWL provisions. Perhaps the key reason is to avoid likely endless delays in achieving compliance with WQSs where backsliding from NPDES permit requirements are allowed whenever Permittees fall short of CWA requirements as a result of their own failure to implement well-known and available BMPs and stormwater control approaches identified in previous MS4 permits. MS4 Permittees have had 25 years to address the number one cause of water quality impairment in Southern California. It is time for the State Board and the Regional Board to get serious about implementing and enforcing the law – rather than finding new excuses to create more delay.

For all of the reasons stated above and the reasons provided in Environmental Groups’ Petition and Draft Order Comments, the “new information” exception to anti-backsliding cannot provide a justification for backsliding.

VI. The Revised Draft Order Fails to Conduct a Proper and Adequate Anti-Degradation Analysis and the Anti-Degradation Findings Are Unsupported by the Evidence

³⁵ See Revised Draft Order at 23-24,n.74.

³⁶ See *Waste Action Project, et al., v. Washington Department of Ecology, et al.*, PCHB 97-69, 1997 WA ENV LEXIS 195, at *14 (Wash. Pollution Control Hearings Bd., Oct. 13, 1997). (the “new information” exception to anti-backsliding justified lowering of effluent standards in an NPDES permit regulating industrial stormwater discharges because the state regulator “did not know, at the time it issued the original permit, that *full implementation of BMPs* would not achieve the effluent standards” set for various pollutants) (emphasis added).

³⁷ See 2012 MS4 Permit at F-12 (discussing the 2001 MS4 Permit’s RWL compliance provisions); November 8 Hearing, at 173:20-174:1 (comments by Steve Fleischli, Natural Resources Defense Council, discussing MS4 Permittees’ failure to comply with the 2001 MS4 Permit’s RWL compliance provisions).

³⁸ See e.g. Appendix B, Los Angeles Waterkeeper and Heal the Bay’s Comments on Tentative Time Schedule Order for Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175; NPDES Permit No. CAS004001) – Ballona Watershed Bacteria TMDL in Dry Weather (analyzing MS4 permittees failure to implement BMPs identified in the implementation plans for the TMDL which was adopted to implement bacteria WQSs for Ballona Creek).

³⁹ Cf. *Waste Action Project*, 1997 WA ENV LEXIS 195, at * 14.

The Revised Draft Order fails to address the numerous deficiencies in the 2012 MS4 Permit's anti-degradation analysis identified by Environmental Groups' Draft Order Comments.⁴⁰ Moreover, the Order's anti-degradation analysis and findings are improper and lack basis. As a result, the Revised Draft Order and the LA MS4 Permit are arbitrary and capricious and an abuse of discretion.

1. *The Revised Draft Order's Anti-Degradation Analysis Fails to Comply with EPA Requirements and Lack Support in the Record*

The Revised Draft Order claims "allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state."⁴¹ However, neither the State Board nor the Regional Board have undertaken the required analysis necessary to support such a finding.

EPA's Economic Guidance for Water Quality Standards Workbook⁴² ("EPA Workbook") establishes a test to determine if there might be interference with an important social and economic development. The EPA Workbook outlines three steps involved in performing an economic impact analysis as part of an anti-degradation review: (1) verify the project's costs and calculate annual costs of the pollution control project; (2) determine if maintaining high-quality waters will interfere with development; and (3) determine if development is economically and socially important.⁴³ The EPA Workbook provides several worksheets for addressing these factors.⁴⁴ Yet the State Board and the Regional Board have not addressed these basic factors or completed the EPA worksheets – or provided any evidence even remotely resembling such an analysis – in reaching their conclusion.

As a result, the Revised Draft Order and the 2012 MS4 Permit are inconsistent with the procedures established by the EPA and an abuse of discretion.

2. *The Revised Draft Order and 2012 MS4 Permit's Anti-Degradation Findings Are Flawed and Lack Basis*

The Revised Draft Order must "set forth findings that bridge the analytical gap between the raw evidence and ultimate decision."⁴⁵ The State Board's findings must provide "the analytic route [it] traveled from evidence to action" to satisfy this requirement, so as to allow the reviewing court to satisfy its duty to "compare the evidence and ultimate decision to 'the findings.'"⁴⁶ And mere recitation of legal requirements - as here - is not sufficient.⁴⁷ Neither the 2012 MS4 Permit nor the Revised Draft Order meet the requirements of law and are therefore an abuse of discretion.

⁴⁰Environmental Groups' Draft Order Comments at 26-28.

⁴¹ Revised Draft Order at 32.

⁴² U.S. Environmental Protection Agency, *Interim Economic Guidance for Water Quality Standards Workbook* (March 1995), available at <http://water.epa.gov/scitech/swguidance/standards/economics/chaptr5.cfm>

⁴³ *Id.* at 5-2

⁴⁴ *Id.* at Worksheets AA, AB, and O-Y.

⁴⁵ See *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d, 506, 514-516.

⁴⁶ *Id.* at 515.

⁴⁷ *Id.* at 515, n.16.

As noted above, the Revised Draft Order and the 2012 MS4 Permit failed to follow the procedures and requirements outlined in the EPA Workbook. Rather than following EPA procedures, the Revised Draft Order and the 2012 MS4 Permit proceeded to conduct an anti-degradation analysis that is unsupported by the evidence and is inadequate.

First, the Revised Draft Order lacks any evidence supporting the findings that any degradation of Los Angeles area waters will in fact “assist with maintaining instream flows that support beneficial uses, may spur the development of multiple benefit projects, and may be necessary for flood control, and public safety, as well as to accommodate development in the area.”⁴⁸

Second, the Revised Draft Order’s anti-degradation analysis is flawed and cannot support the finding that degradation of Los Angeles area waterbodies justified. The Order improperly omits from its anti-degradation analysis an evaluation of impacts on water quality from the discharge of *polluted* storm water regulated by the 2012 MS4 Permit.⁴⁹ The conclusion that discharge of storm water is to the maximum benefit of the people is therefore flawed. In fact, it is highly doubtful any discharges of *polluted* stormwater “can assist in maintaining instream flows that support beneficial uses” because, regardless of any contribution to instream flows, *polluted* stormwater, as shown by the record, uniformly degrades waterbodies’ beneficial uses. Further, the anti-degradation findings improperly conclude that the alternative to allowing water quality degradation is “capturing all storm water from all storm events.”⁵⁰ Capturing all storm water from all storm events is *not* the only alternative to ensure no degradation occurs as a result of *polluted* stormwater discharges. A viable alternative, for example, is the revised stormwater retention approach proposed by Environmental Groups and discussed in Section IV above.⁵¹ The Revised Draft Order, however, improperly fails to mention, let alone analyze, other alternatives in its anti-degradation analysis. As a result, the anti-degradation findings lack basis.⁵²

For these reasons and the reasons provided in Environmental Groups’ Petition and Draft Order Comments, the Revised Draft Order and the 2012 MS4 Permit fail to comply with anti-degradation requirements and constitute an abuse of discretion.

VII. The Revised Order and the 2012 MS4 Permit Allow Illegal Compliance Schedules for WQBELs based on the California Toxics Rule

Finally, the Revised Draft Order ignores the 2012 MS4 Permit’s failure to comply with the limitations on compliance schedules for WQBELs pursuant to the CTR. Compliance schedules for WQBELs based on TMDLs developed to implement CTR limits are not allowed beyond May 18, 2005.⁵³ Thus, the 2012 MS4 Permit’s provisions allowing MS4 Permittees to reach

⁴⁸ Revised Draft Order at 32-33.

⁴⁹ *Id.*

⁵⁰ *Id.* at 33.

⁵¹ Environmental Groups’ Draft Order Comments at 32-36.

⁵² See Los Angeles Regional Water Quality Control Board, Administrative Procedures Update: Antidegradation Policy Implementation for NPDES Permitting, APU-90-004, July 2, 1990.

⁵³ 40 C.F.R. 131.38(e)(8); see also California Toxics Rule Response to Comments Report, Volume 1 (December 1999), prepared by the U.S. Environmental Protection Agency, Response to Comment CTR-002-010b (explaining that compliance scheduled for CTR-based WQBELs may not exceed five years), available at http://water.epa.gov/lawsregs/rulesregs/ctr/upload/2009_03_26_standards_rules_ctr_responses.pdf.

compliance with CTR-based WQBELs past the compliance deadline established in the CTR are illegal and must be struck.

VIII. Conclusion

The Revised Order contravenes the State's goals to maximize opportunities to overcome drought challenges and build resiliency in the face of climate change. Not only does the State Board continue to ignore federal and state legal requirements to ensure water quality protection, it is failing to acknowledge the connection between this Permit and the need to implement multi-benefit solutions to ensure a sustainable water future for California. In light of the water quality and supply issues the Board is charged to address, we ask you to reconsider your approach and implement a way forward that actually ensures compliance with WQs and water supply augmentation without "safe harbors" or undue delay.

Sincerely,



Steve Fleischli
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Natural Resources Defense Council



Liz Crosson
Executive Director
Los Angeles Waterkeeper



Rita Kampalath, Ph.D., P.E.
Science and Policy Director
Heal the Bay

APPENDIX A

**ENVIRONMENTAL GROUPS' COMMENTS ON REVISED DRAFT
COMMENTS ON REVISED 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)**

Lower Los Angeles River

Permit Citation	Staff Comments from October 30, 2014	Analysis of Revised WMP Responsiveness to Staff Comments	Conditional Approval Requirements
Part VI.C.5.b.iv.(4)(b)-(c)	"The MS4 Permit requires that the WMP provide specificity with regard to structural and non-structural BMPs, including the number, type, and location(s), etc. adequate to assess compliance. In a number of cases, additional specificity....is needed....[T]here should at least be more specificity on actions within the current and next permit terms."	The response, and other statements throughout the document, demonstrate that no commitments to "specificity or actions" or associated timelines are made.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(4)(b)-(c)	"...the WMP should at least commit to the construction of the necessary number of projects to ensure compliance with permit requirements per applicable compliance schedules."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The RAA should clarify that sufficient sites were identified so that the remaining necessary BMP volume can be achieved by those sites that were not 'excluded for privacy.'"	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The RAA identifies zinc as the limiting pollutant and notes that this pollutant will drive reductions of other pollutants. If the Group believes that that [sic] this approach demonstrates that activities and control measures will achieve applicable receiving water limitations, it should explicitly state and justify this for each category 1,2, and 3 pollutant."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"We note that modeling was not conducted for organics (DDT, PCBs, and PAHs). It is not clear why these pollutants were not modeled or why previous modeling of these pollutants could not be used....An explanation for the lack of modeling is needed."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"...the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL was [sic] appears to be completely omitted from the draft WMP."	No change was made in this section of the document and there is no inclusion of analysis of pollutant controls, as requested.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"Pursuant to Section VI.C.5.a., the WMP should be revised to include an evaluation of existing water quality conditions, classify them into categories, identify potential sources, and identify strategies, control measures, and BMPs as required in the permit for San Pedro Bay unless MS4 discharges from the LLAR WMA directly to San Pedro Bay are being addressed in a separate WMP."	There is only one reference in the document to San Pedro Bay, and it remains unchanged from the 2014 version of the WMP.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(4)(c)	"The draft WMP appears to rely mostly on the phase-out of copper in automotive brake pads...to achieve the necessary copper load reductions....[O]ther structural and non-structural BMPs may still be needed to reduce Cu loads sufficiently to achieve compliance deadlines fro interim and/or final WQBELs."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)(c)	"For waterbody-pollutant combinations not addressed by TMDLs, the MS4 Permit requires that the plan demonstrate using the reasonable assurance analysis (RAA) that the activities and control measures to be implemented will achieve applicable receiving water limitations as soon as possible....[The RAA] does not address the question of whether compliance with limitations for pollutants not addressed by TMDLs could be achieved in a shorter time frame."	No response identified.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The WMP assumes a 10% pollutant reduction from new non-structural controls....additional support for this assumption should be provided, or as part of the adaptive management process, the Permittees should commit to evaluate this assumption during program implementation and develop alternate controls if it becomes apparent that the assumption is not supported."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

Lower Los Angeles River

Part VI.C.5.b.iv.(5)	"...the predicted baseline concentrations and loads for all modeled pollutants of concern, including TSS, should be presented in summary tables for wet weather conditions."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	<p>"The report presents the existing runoff volumes, required volume reductions and proposed volume reductions from BMP scenarios to achieve the 85th percentile, 24-hour volume retention standard for each major watershed area....The same information...also needs to be presented for each modeled subbasin...Additionally, more explanation is needed as to what constitutes the 'incremental' and 'cumulative' critical year storm volumes in table 9-4 through 9-7 and how these values were derived from previous tables.</p> <p>"The report needs to present the same information, if available, for non-stormwater runoff."</p>	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

Lower San Gabriel River

Permit Citation	Staff Comments from October 30, 2014	Analysis of Revised WMP Response to Staff Comments	Conditional Approval Requirements
Part VI.C.5.b.iv.(4)(b)-(d)	"...the WMP should at least commit to the construction of the necessary number of projects to ensure compliance with permit requirements per applicable compliance schedules."	The response implies no commitment beyond good intentions and a willingness to track progress (or its lack thereof) through the permit cycle.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(4)(d)	"The MS4 Permit requires that the WMP provide specificity with regard to structural and non-structural BMPs, including the number, type, and location(s), etc. adequate to assess compliance. In a number of cases, additional specificity....is needed....there should at least be more specificity on actions within the current and next permit terms to ensure that the following interim requirements are met..."	The response, and other statements throughout the document, make it clear that no commitments to "specificity or actions" or associated timelines are made. There is also no cross-walk between scheduled completion dates and interim compliance deadlines. Given the vague nature of nearly all of the "milestones," it's not surprising that there is no direct linkage between actions, meeting interim requirements, and the schedule.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The RAA identifies zinc as the limiting pollutant and notes that this pollutant will drive reductions of other pollutants. If the Group believes that that [sic] this approach demonstrates that activities and control measures will achieve applicable receiving water limitations, it should explicitly state and justify this for each category 1,2, and 3 pollutant."	The draft WMP does not appear to have been modified in response to this comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"We note that modeling was not conducted for organics (DDT, PCBs, and PAHs). It is not clear why these pollutants were not modeled or why previous modeling of these pollutants could not be used....An explanation for the lack of modeling is needed."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(4)(c)	"The draft WMP appears to rely mostly on the phase-out of copper in automotive brake pads...to achieve the necessary copper load reductions....[O]ther structural and non-structural BMPs may still be needed to reduce Cu loads sufficiently to achieve compliance deadlines fro interim and/or final WQBELs."	No change was made in the document in response to the comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)(c)	"For waterbody-pollutant combinations not addressed by TMDLs, the MS4 Permit requires that the plan demonstrate using the reasonable assurance analysis (RAA) that the activities and control measures to be implemented will achieve applicable receiving water limitations as soon as possible....[The RAA] does not address the question of whether compliance with limitations for pollutants not addressed by TMDLs could be achieved in a shorter time frame."	There is no response to this comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

Lower San Gabriel River

Part VI.C.5.b.iv.(5)	"The draft assumes a 10% pollutant reduction from new non-structural controls....additional support for this assumption should be provided, particularly since the group appears to be relying almost entirely on these controls for near-term pollutant reductions to achieve early interim milestones/deadlines."	There was no substantial advance over what was previously included, though the issue is acknowledged explicitly.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"Based on the results of the hydrology calibration shown in Table 4-3, the error difference between modeled flow volumes and observed data is 19%....The higher error percentage could be due to the exclusion of contributions of flow volume from upstream. For calibration purposes, upstream volume should be included....Once model calibration has been completed, the upstream flow volume can then be excluded...."	Between the 2014 and 2015 RAA's, the % error improves from -19.0% to -3.31%. There is no text change to explain this difference, nor any difference in the graphed monthly hydrographs for observed and modeled flows.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"...the predicted baseline concentrations and loads for all modeled pollutants of concern, including TSS, should be presented in summary tables for wet weather conditions."	No change in the RAA to address this comment.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	<p>"The report presents the existing runoff volumes, required volume reductions and proposed volume reductions from BMP scenarios to achieve the 85th percentile, 24-hour volume retention standard for each major watershed area....The same information...also needs to be presented for each modeled subbasin...Additionally, more explanation is needed as to what constitutes the 'incremental' and 'cumulative' critical year storm volumes in table 9-6 and 9-7 and how these values were derived from previous tables.</p> <p>"The report needs to present the same information, if available, for non-stormwater runoff."</p>	The request for a series of tables by subbasin has not been met; an added sentence defines the terms used but not how the values were derived from previous tables. No new information addressing comment about non-stormwater runoff.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

Los Angeles River Upper Reach 2

Permit Citation	Staff Comments from October 30, 2014	Analysis of Revised WMP Responsiveness to Staff Comments	Conditional Approval Requirements
Part VI.C.5.b.iv.(5)	"The WMP did not model and pollutants in Categories 2 and 3. These pollutants or surrogates need to be included in the RAA, or supported justification for the use of the proposed limiting pollutants as surrogates for each Category 2 and Category 3 waterbody-pollutant combination."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.a.iii	"...the WMP should utilize General Industrial Storm Water Permittee monitoring results...to assess and potentially refine estimates of pollutant loading from the identified "non-MS4" areas.	The recommended action was not done.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.a.iii	"The draft WMP should consider existing TMDL modeling data, where available, when refining the source assessment.	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.a.iii	"A process and schedule for developing the required spatial information on catchment areas to major outfalls should be proposed, if this information does not already exist."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b Part VI.C.5.b.iv.(5)	"The draft WMP does not clearly specify a strategy to comply with the interim WQBELs for the LA River metals TMDL....Further discussion of current compliance with the LA River nitrogen compounds TMDL, for which there is a final compliance deadline of 2004, is also needed..."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b	"...the specific LID street projects and their locations are not identified. The draft WMP should provide as much specificity as feasible in describing the potential locations for LID streets. Additionally, the permittees that would be responsible for implementing LID street projects should be specified."	Section 4.3.3.2 identifies on proposed LID street BMP in Vernon and one completed and one potential LID street BMP in Commerce. It went on to give some budgetary rationalizations. Mere mention of three LID street BMPs, only one finished or with a solid commitment, is unresponsive.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b	"The WMP assumes a significant reduction in copper based on the phase-out of copper in automotive brake pads...to achieve the necessary copper load reductions....[A]dditional structural BMPs may still be needed to reduce copper loads prior to entering receiving waters and eliminate copper exceedances of RWLs."	Section 3.3.2 reasons that the phase-out is ahead of schedule and that other copper reductions will be afforded by source controls for zinc. Section 4.3.2.2 also discusses the issue but with nothing beyond the content of the draft WMP. The WMP shows no analysis of other sources and their magnitudes, how the accelerated phase-out might affect copper concentrations and loadings, or how source controls for zinc will affect copper. Sources of zinc and copper are not necessarily coincident, and frequently are not.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"Table 1-5 should be updated....The concentration-based WQBELs for metals on page 78 are incorrect...."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The differences between baseline concentrations/loads and allowable concentrations/loads should be presented in a time series...and then as a summary of 90th percentile of the differences between pollutant concentrations/loads and allowable concentrations/loads for wet weather periods, in units consistent with the applicable WQBELs and Receiving Water Limitations..."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"...a detailed explanation should be provided of the calculations used to derive the target load reductions."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"Model output should also be provided for phased BMP implementation to demonstrate that interim WQBELs for metals and bacteria will be met."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The ID number for each of the 50 subwatersheds from the model input file should be provided and be shown in the simulation domain to present the geographic relationship of subwatersheds within the watershed area that are simulated in the LSPC model."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

Los Angeles River Upper Reach 2

Part VI.C.5.b.iv.(5)	"The flow, runoff volume and water quality....time series output at the watershed outlet as well as for each modeled subbasin should be provided using the 90th percentile critical conditions....to estimate the baseline condition. In addition, per RAA Guidelines, the model output should include stormwater runoff volume and pollutant concentration/load at the outlet and for each modeled subbasin for each BMP scenario as well..."	There is no evidence that this comment was considered or addressed.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"The identification of the 90th percentile years in Table 4-2 needs to be supported by presenting historical hydrological data to demonstrate the selected critical period will capture the variability of rainfall and storm sizes/conditions."	The presentation does not demonstrate that the choice of critical years given in Table 4-2 is correct. The analysis and graphing are not for precipitation frequency, as requested by the comment, but flow rate frequency. The addition to the WMP is thus unresponsive.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.
Part VI.C.5.b.iv.(5)	"Model simulation for copper, lead, zinc, nitrogen, and bacteria under the dry weather condition was not included in the Report and needs to be addressed."	Two paragraphs were added to the WMP in section 4.3 reasoning that the approved models are not applicable to dry weather. Yet the consultant who prepared the Lower San Gabriel River RAA developed methodology to simulate dry weather conditions and to develop dry-weather pollutant reduction targets.	No Requirement to address Oct. 30, 2014 Staff comment or to comply with Permit term.

APPENDIX B

**ENVIRONMENTAL GROUPS' COMMENTS ON REVISED DRAFT
COMMENTS ON REVISED 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)**



April 27, 2015

Mr. Samuel Unger, Executive Officer
Los Angeles Regional Water Quality Control Board
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

Via email: Samuel.Unger@waterboards.ca.gov, Renee.Purdy@waterboards.ca.gov,
Ivar.Ridgeway@waterboards.ca.gov, Chris.Lopez@waterboards.ca.gov, losangeles@waterboards.ca.gov

Re: Comments on Tentative Time Schedule Order for Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175; NPDES Permit No. CAS004001) – Ballona Watershed Bacteria TMDL in Dry Weather

Dear Mr. Unger,

On behalf of Heal the Bay and Los Angeles Waterkeeper, non-profit environmental organizations dedicated to protecting and restoring our rivers, creeks and coastal waters, we appreciate the opportunity to submit the following comments on the Tentative Time Schedule Order (TSO) No. R4-2015-XXXX requiring the City of Los Angeles, the County of Los Angeles, the Los Angeles County Flood Control District, the City of Beverly Hills, the City of Culver City, the City of Inglewood, and the City of West Hollywood¹ to comply with the requirements prescribed in the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175; NPDES Permit No. CAS004001) implementing the Ballona Creek Watershed Bacteria Total Maximum Daily Load (TMDL) limitations (hereinafter "Tentative Ballona Creek TSO").

As parties to the 1999 Consent Decree with the United States Environmental Protection Agency which established the schedule for adoption of TMDLs for the Los Angeles Region, our organizations have worked on the development, adoption and implementation of the Ballona Creek Bacteria TMDL ("Bacteria TMDL") for more than 15 years. Just as with all TMDLs included in the 1999 Consent Decree, our goal for the Bacteria TMDL has been not only to establish the TMDL, but to also implement it as quickly as possible in order to ensure all point and non-point sources discharging into Ballona Creek and Estuary meet TMDL requirements and come into compliance with water quality standards. The Tentative Ballona Creek TSO will not achieve this goal and will in fact unjustifiably prolong the degradation of Ballona Creek and Estuary exposing the public to the well-known harms associated with fecal bacteria pollution. As discussed below, Heal the Bay and Los Angeles Waterkeeper do not support the TSO and ask the Regional Board to deny the TSO applications.

I. Introduction, TMDL Requirements, and General Concerns

¹ "Ballona Creek Jurisdictional Group" includes all except Los Angeles County and Los Angeles County Flood Control District



The Bacteria TMDL became effective on April 27, 2007.² Pursuant to the TMDL, in 2009 the Ballona Creek Jurisdictional Group and the County of Los Angeles submitted to the Los Angeles Regional Water Quality Control Board (“Regional Board”) lengthy Draft Implementation Plans covering the entire Ballona Creek Watershed.² The Draft Implementation Plan submitted by the cities outlined many of the same BMPs that are now proposed in the Tentative TSO.^{3,4} The County of Los Angeles Draft Implementation Plan only identified non-structural programmatic BMPs to address dry weather compliance.² Both Draft Implementation Plans identify and outline interim and final compliance deadlines to attain dry weather waste load allocations (“WLAs”) by April 27, 2013, as mandated by the Bacteria TMDL. Following Draft Implementation Plan submission, the Bacteria TMDL was revised, increasing in some cases the number of allowable exceedance days; these revisions became effective on July 2, 2014.² Although the Implementation Plans identify the needed steps to bring MS4 Permittees into compliance with final dry weather WLAs, TMDL monitoring data collected from 2009-2014 shows a general trend toward increased exceedances of bacteria limits.⁵ Unsurprisingly, Permittees have failed to meet the TMDL dry weather WLAs expressed as allowable exceedance days by the April 27, 2013 deadline and now request a TSO.

While we acknowledge the efforts Permittees in the Ballona Creek Watershed have made up to this point to meet the requirements of the Bacteria TMDL, these efforts fall short of those outlined in the Ballona Creek Bacteria TMDL Draft Implementation Plans. The two major projects identified to treat 88 percent of the watershed for the Ballona Creek Jurisdictional Group were not constructed. Similarly, Los Angeles County’s efforts towards achieving compliance with the Bacteria TMDL have also been inexplicably slow and ineffective. In fact, Los Angeles County, who failed to propose any structural BMPs in their Draft Implementation Plan, is now, 8 years after the TMDL became effective, proposing for the first time in their TSO request a Dry-Weather Low Flow Reconnaissance Study which would outline possible structural BMPs.⁶

Moreover, a TSO is unjustified where, as here, Permittees have failed to secure the timely funding for projects included in their Implementation Plans despite being aware since 2006 or 2007 that they must comply with Bacteria TMDL waste load allocations by April 27, 2013. For example, the City of Los Angeles only applied for Clean Beach Initiative Funding for LTF-1, which would treat roughly 70 percent of the watershed, in August 2012 and funding commitments have still not been finalized.

Finally, the Tentative Ballona Creek TSO unjustifiably extends the deadline to comply with final dry weather TMDL WLAs by four-and-a-half years and allows exceedances in 92% of the samples in some cases.⁷ This essentially ignores and accepts a continued risk of serious public health impacts from discharges of fecal indicator bacteria into Ballona Creek and Estuary and rewards the little progress that has been made over the last nine years since original TMDL adoption. Surely this outcome is not in the public interest and must not be allowed.

² Tentative Ballona Creek TSO at 3.

³ Total Maximum Daily Load for Bacterial Indicator Densities in Ballona Creek, Ballona Estuary, and Sepulveda Channel, Implementation Plan-Draft, City of Los Angeles et al. (November 30, 2009) at 5-2.

⁴ They both rely on the implementation of two very similar, in one case flow treatment facilities to meet dry weather WLA.

⁵ Tentative Ballona Creek TSO at 6-7.

⁶ Los Angeles County and Los Angeles County Flood Control District TSO Request at 5-6.

⁷ Tentative Ballona Creek TSO at 14-15.



We understand that TSOs can be a valuable tool for the shared goal of attainment of receiving water limitations; however, we believe that these should be used sparingly and in cases where it is clear that a good faith effort, including efforts to secure funding from all available sources and revise BMPs where monitoring data shows they are failing, has been made by Permittees. This, however, is not the case with the Tentative Ballona Creek TSO as outlined in more detail below.

II. The Tentative TSO Is Unjustified Because the Permittees Have Not Demonstrated That They Have Engaged in Diligent Efforts to Achieve Compliance with the Ballona Creek Dry Weather Bacteria TMDL by the April 27, 2013 Deadline

The 2009 Draft Implementation Plan submitted by the Ballona Creek Jurisdictional Group proposed the construction of two low flow treatment facilities (LFTF-1 and LFTF-2) as the primary strategy to achieve dry weather compliance.⁸ Although the Plan states that wet weather structural BMPs and non-structural programmatic BMPs will help reduce bacteria discharges to the MS4, it acknowledges that these measures alone would not be sufficient to achieve compliance.⁹ The Draft Implementation Plan submitted by the County of Los Angeles proposes targeted non-structural programmatic BMPs to address the sources of dry weather flows, with the major source identified as excessive residential irrigation.¹⁰

As outlined in the Tentative TSO, however, the majority of the efforts undertaken by some of the Permittees, including City of Beverly Hills, the County of Los Angeles and the Los Angeles County Flood Control District, appear to consist of measures that are not specifically directed at addressing bacteria source reductions, such as street sweeping, litter pick up and trash BMPs maintenance, and public education and outreach measures. In addition, programs proposed in the County Implementation Plan do not appear to have been implemented, such as those that address irrigation flows which were identified as a major source of dry weather flow bacteria pollution. Several Permittees identify implemented watershed control measures, which are used for justification of the TSO, that are 2012 Los Angeles County MS4 Permit requirements (e.g. Storm Water Management Program Minimum Control Measures); these programmatic BMPs should not be used to justify TMDL final compliance extensions because Permittees were aware that compliance with Bacteria TMDL WLAs was required long before the 2012 MS4 Permit was adopted. Further, no information is provided as to the effectiveness of the BMPs that were implemented in reducing bacteria loading and, in fact, monitoring data collected under the TMDL monitoring plan show these and other BMPs have not actually reduced the number of exceedance days.

Permittees themselves in cities' Draft Implementation Plan include implementation schedules for LFTF-1 and LFTF-2, yet it appears from review of the Tentative Ballona Creek TSO that these projects merely consist of concept reports, with no planning or design work completed. Both of these projects were supposed to be completed by the April 27, 2013 dry weather Bacteria TMDL final compliance deadline. The Tentative Ballona Creek TSO further states that LFTF-2 as described in the Implementation Plans was found to be infeasible, however it is unclear how long ago LFTF-2 was deemed infeasible and whether there would have been time to locate and implement an alternative project to replace LFTF-2.¹¹ In

⁸ Total Maximum Daily Load for Bacterial Indicator Densities in Ballona Creek, Ballona Estuary, and Sepulveda Channel, Implementation Plan-Draft, City of Los Angeles et al. (November 30, 2009) at 5-1.

⁹ *Id.* at 5-31.

¹⁰ Draft Multi-Pollutant TMDL Implementation for the Unincorporated County area of Ballona Creek, County of Los Angeles, (October 26, 2009) at 50.

¹¹ Tentative Ballona Creek TSO at 5.



addition, based on the analysis in the Implementation Plan, it is not clear that LFTF-2 would be absolutely necessary to meet the overall bacteria load reduction goals in the Watershed¹², therefore the infeasibility of this project cannot serve to justify the delay in implementing the Ballona Bacteria TMDL and cannot serve as a basis for approving the Tentative Ballona Creek TSO.

The Tentative TSO states that one justification for its issuance is that the analysis in the City's 2009 Draft Implementation Plan needs to be refined to address bacteria limits in specific reaches of the Ballona Creek Watershed.¹¹ Given that the TMDL had specific WLAs for listed reaches, this cannot be justification for a TSO. The County's TSO request proposes a low flow reconnaissance study as well as structural controls, without a clear explanation as to why these measures were not proposed as part of the 2009 Draft Implementation Plan.⁶ These proposals simply imply that the submitted Implementation Plans were not adequate and that the County and the Flood Control District have in fact failed to develop and take measures specifically designed to address bacteria dry weather pollution in Ballona Creek and meet Bacteria TMDL WLAs. Thus, the County has not made a diligent attempt to comply with the Ballona Bacteria TMDL by the April 27, 2013 deadline. Once again, this failure to comply cannot provide justification for the Tentative Ballona Creek TSO.

Finally, no information is provided about any efforts undertaken by Permittees to secure funding necessary to comply with the TMDL provisions and implement LFTF-1 or LFTF-2. Instead, Permittees simply state that they "lack ... sustainable funding source."¹³ Without documents or information to substantiate it, this statement cannot provide the necessary justification for the TSO. Furthermore, it is unclear when Permittees first initiated efforts to fund LFTF-1 or LFTF-2; Clean Beach Initiative funding under Proposition 40, Proposition 50, and Proposition 84 was not requested for LFTF-1 until April 23, 2012, only one year before the final dry weather bacteria TMDL WLA was supposed to be met. Applying for funding one year prior to a TMDL final compliance date does not exemplify a good faith effort.

III. The Tentative TSO Is Unjustified Because It Requires Permittees to Implement BMPs That Were Already Included In the Implementation Plans.

Perhaps the most important reason why the TSO is unjustified is the fact that its main directive to Permittees is to implement the LFTF-1. As already discussed, LFTF-1 was envisioned by the 2009 Ballona Creek Jurisdictional Group's Implementation Plan and no specific information is provided as to why this treatment system was not installed by the TMDL deadline. Again, failure to implement BMPs proposed by Permittees' themselves without any demonstration that good faith efforts were undertaken to comply with TMDL deadlines in light of monitoring data showing a clear trend toward increased exceedances cannot not serve as a basis to extend deadlines even further and deprive the public of the protections it is entitled to under the TMDL and the Clean Water Act.

IV. Low Flow Diversion to Sanitary Sewer Alternative

The Tentative Ballona Creek TSO would allow the City of Los Angeles the option to divert in-stream flow in Ballona Creek to the sanitary sewer at or downstream of the proposed LFTF-1 location to serve as an

¹² See Table 5-11 of the City of Los Angeles et al Implementation Plan-Draft; if reductions from LFTF-2 are removed, it appears that concentrations would still be below TMDL limits.

¹³ See City of Los Angeles Request for TSO, page 7.



alternative control measure to comply with dry weather bacteria requirements.¹⁴ It is unclear if any flow would be re-introduced downstream of this sanitary sewer diversion. Is the Tentative Ballona Creek TSO proposing to remove all dry weather flow? Would there be any flow left in Ballona Creek to support the its other beneficial uses? This approach is unclear, and in the absence of any details, we ask the Regional Board not to approve the TSO with this option.

In conclusion, for all the reasons discussed above, the Tentative TSO is unjustified and we ask the Regional Board to reject it. At a minimum, the term of the Tentative TSO should be significantly shortened to two-and-a-half years. Allowing more time to Permittees to conduct belated source studies and implement BMPs that were identified six years ago is unwarranted and will set a precedent for other TMDL-based provisions in the 2012 LA MS4 Permit. The Regional Board must protect public health and ensure that TMDLs, which take a lot of time and effort to develop, will be implemented to protect the Los Angeles region's waterways. The way to accomplish this is by steadfastly maintaining TMDL deadlines.

Sincerely,

Tatiana Gaur
Senior Attorney
Los Angeles Waterkeeper

Rita Kampalath, Ph.D., P.E.
Science and Policy Director
Heal the Bay

Peter Shellenbarger
Water Resources Manager
Heal the Bay

¹⁴ Tentative Ballona Creek TSO at 11 and 16.