

Environmental Groups' Joint Presentation on Draft Order Regarding Petitions Challenging the 2012 LA MS₄ Permit

State Water Board Workshop

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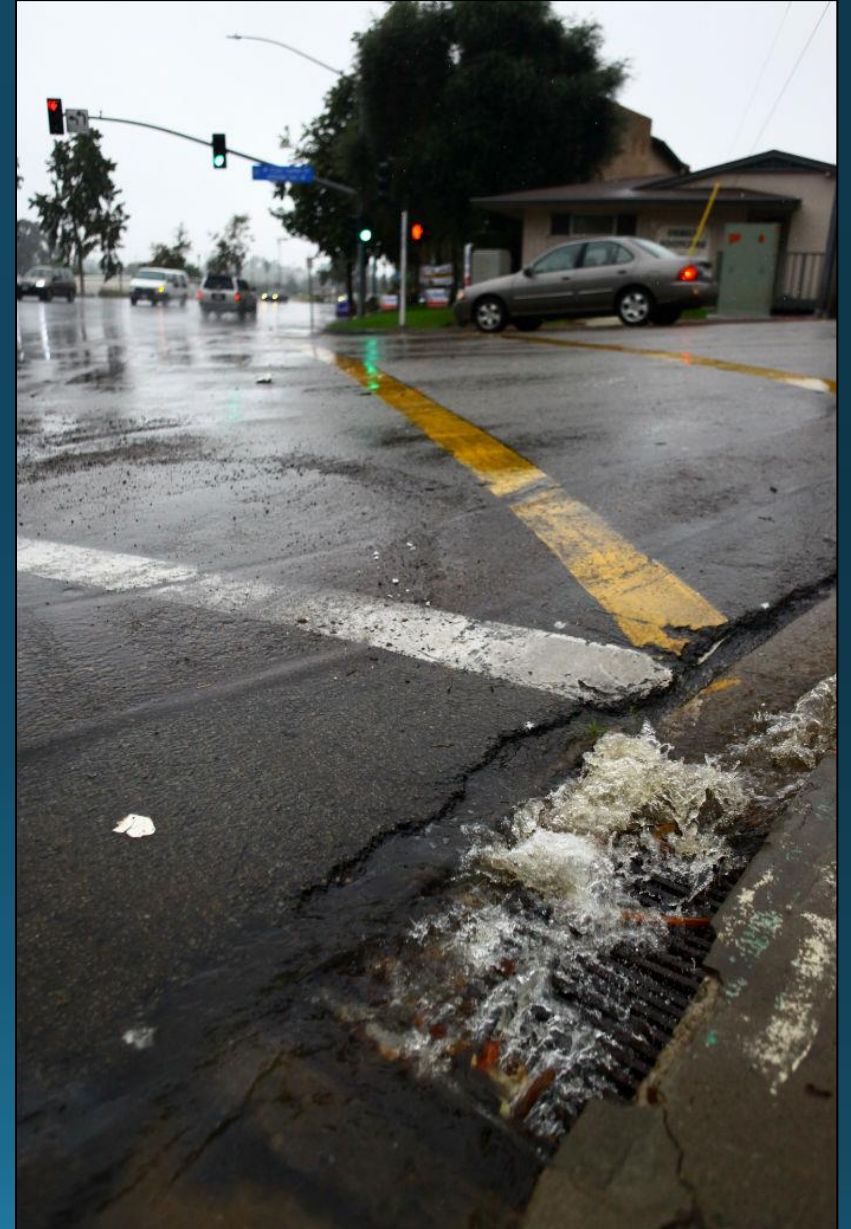
Steve Fleischli, Natural Resources Defense Council

Peter Shellenbarger, Heal the Bay



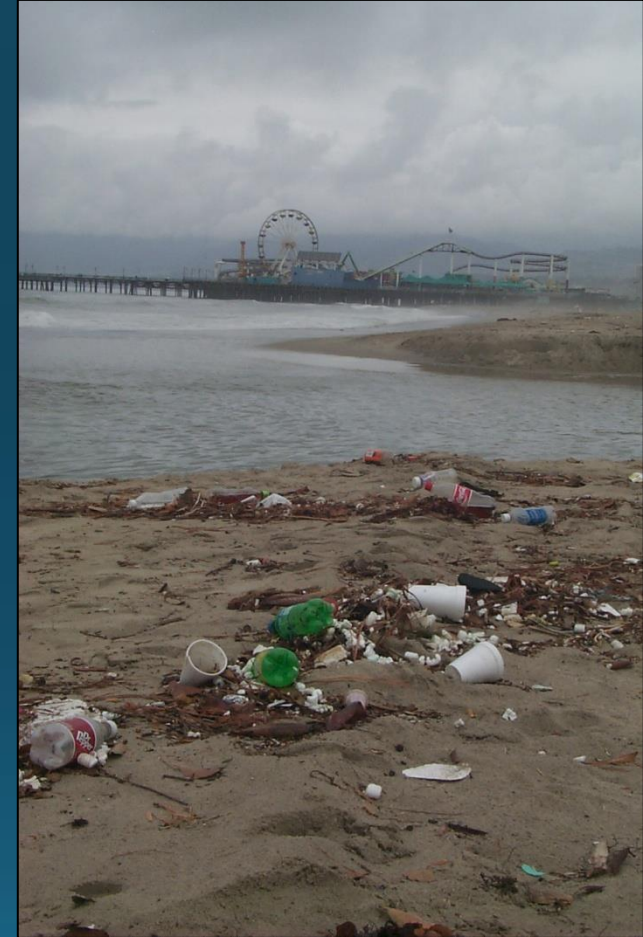
Key Points

- Urban runoff remains the number one source of contamination of CA surface waters.
- Failure of scheme under 2001 MS₄ Permit was not the language itself, but in its implementation.
- This is an especially critical decision because the Draft Order contemplates using LA Permit as an example for the state.
- The proposed Safe Harbors approach is inconsistent with the CWA, federal regulations and sets bad public policy.



Key Points

- The adaptive management process suffers many of the same shortcomings as the iterative process.
- Draft Order improperly treats WMPs and EWMPs the same.
- Draft Order improperly treats dry weather and wet weather the same.
- Potential Unfunded Mandate implications.
- There is a better way forward.



Receiving Waters Do Not Meet Water Quality Standards

- 170% increase in number of rivers, streams and lakes showing toxicity.
- 83% percent of the total miles of California's rivers and streams are impaired.
- 96% of the total assessed acres of California's lakes and reservoirs are impaired.



Number of Bacteria TMDL Exceedances (Santa Monica Bay, Marina del Rey, LA Harbor)

2006*	2007**	2008	2009	2010***	2011	2012	2013+	Total
181	533	664	590	540	919	631	485	4543

* Santa Monica Bay Bacteria TMDL compliance deadline (9-14-06)

** Marina del Rey Bacteria TMDL compliance deadline (8-9-07)

*** LA Harbor Bacteria TMDL compliance deadline (4-1-10)

+ Partial AB411 year (4-1-13 through 9-25-13)



LA County Mass Emission Stations

Discharger Data

The LA County MS₄ persistently contributes to **violations of water quality standards and TMDLs**.

The water quality limits for fecal **bacteria**, various heavy **metals**, ammonia, pH and **cyanide**, among other constituents were exceeded in **Ballona Creek, Malibu Creek, the Los Angeles River, Santa Clara River, Dominguez Channel, and Coyote Creek** at least **1283 times** from 2003-2013.



Los Angeles River near mass emissions station, 2012



Beneficial Use Impacts



Los Angeles County Ocean Economy

“California has the largest Ocean Economy in the United States...”

- Accounts for over 375,000 jobs
- \$10 billion in wages
- \$20 billion in goods and services

An increase in water quality in Long Beach from a C grade to a B grade would create \$8.8 million in economic benefits.

A hypothetical closure of Huntington Beach due to poor water quality:

- One day = losses of \$100,000
- One month = losses of \$3.5 million
- Three months (summer season) = economic losses of \$9 million



Areas of Agreement between Approach in Draft Order and Environmental Groups

- Receiving Water Limitations should be maintained in 2012 Permit.
- The incorporation of 33 TMDLs is required.
- Permittees should be incentivized to capture stormwater and make it available for reuse.
- Multi-benefit watershed-based BMPs are a priority to address water quality.
- The iterative process has been ineffective at helping permittees achieve compliance with WQS.



Safe Harbors are a Major Departure and a Step Backwards from Progress Made

Safe Harbor previously rejected by:

EPA (1999)

LARWQCB (2001, 2010*)

Gov. Davis and Gov. Schwarzenegger State Water Boards (1999 & 2009**)

LA County Superior Court (2005)

California State Court of Appeals (2006)

Ninth Circuit Court of Appeals (2011* and 2013*)

*Enforcement cases

** Dry Weather TMDL decision



LA Regional Board Previously Argued Safe Harbors are Unlawful

Board **does not** support the position that “if a permittee is *trying* to meet water quality standards, it would be the same as meeting them. **The Regional Board did not include a safe harbor in the Permit and, under California law, could not have done so.**”

LA Regional Board Amicus Brief in SM Baykeeper & NRDC v. Malibu, 2010, at 8.

“Those discharges are required to conform to the permit, but are subject to the underlying restrictions of the Porter Cologne Act. Namely, the discharges from the MS₄ may not violate the water quality objectives in the water quality control plan or contribute to a condition of nuisance.”

Legal Memo from Michael Lauffer, Office of Chief Counsel, to Dennis Dickerson
LARWQCB, Nov. 9, 2001, at 11.

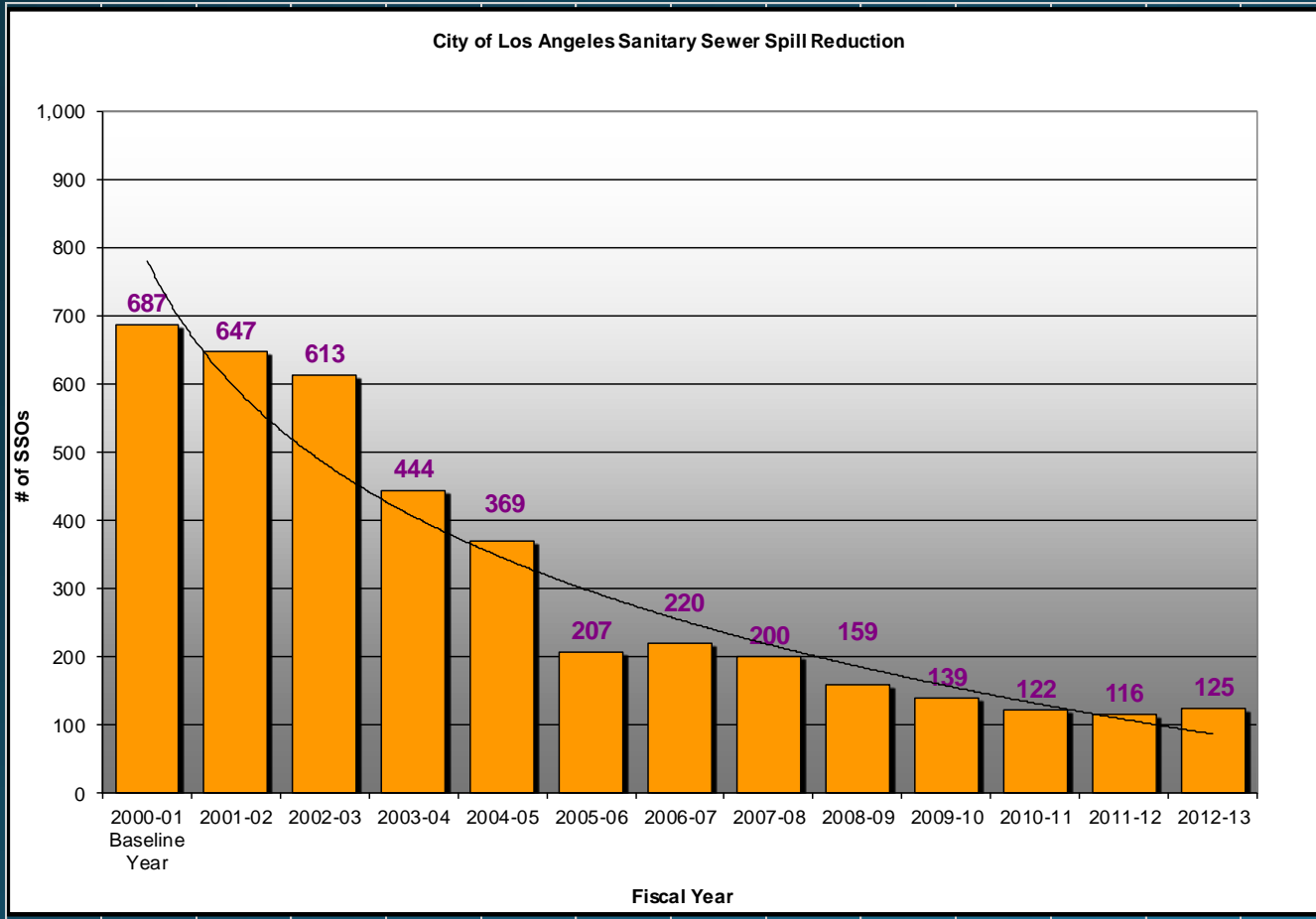


State Board Previously Rejected Safe Harbors from RWLs

- In State Board WQO 1999-05 , the safe harbor approach in the earlier WQO 98-01 was rejected.
- In State Board WQO 2009-0008, the State Board upheld the SMBBB TMDL receiving water language despite contentions from dischargers that the iterative process should equal compliance.



Enforcement Can Drive Success



Shielding Dischargers Can Prevent Compliance



Alternative approach is not “ambitious, rigorous or transparent,” nor does it provide a “well defined, transparent and finite alternative path to permit compliance.”

- Ultimate compliance with water quality standards and TMDLs is not ensured by the EWMP or WMP requirements.
- 2012 Permit simply replaces the failed iterative process with an almost identical (and equally flawed) adaptive management process.



EWMPs Do Not Demonstrate Compliance With WQS Will Be Met

There is “no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements. . . .”

State Board Draft Order, at 42.



WMPs Do Not Even Require Consideration of Regional Stormwater Capture or Multi-Benefit Projects

WMP Components Require:

- Water Quality Prioritization
- Control Measures and BMPs
- Monitoring Plan
- Adaptive Management
- LID, Green Streets Ordinances (for > 50% of WMA if group WMP)

EWMP Also Requires:

- Comprehensive evaluation of opportunities to collaborate on **multi-benefit regional** projects that, wherever feasible, **retain** all non-stormwater and stormwater from the 85th percentile storm while achieving **other benefits** such as flood control and **water supply**.



LA Regional Board Acknowledges Failure of Iterative Approach

“Further, the City [of Malibu’s] own papers demonstrate that even *if* it was complying with the ‘iterative process,’ this has not been enough to eliminate discharges of pollutants”

Regional Board Amicus Brief in SM Baykeeper and NRDC v. Malibu, at 5.

The Draft Order reaches a similar conclusion:

“The iterative process has been underutilized and ineffective to date in bringing MS₄ discharges into compliance with water quality standards.”

Draft Order at 14.



“...we cannot accept a process that leads to a continuous loop of iterative WMP /EWMP implementation without ultimate achievement of receiving water limitations. . . .”

State Board Draft Order, at 32.

We agree.



Elements	Iterative Process	Adaptive Management Process (AMP)
Ultimate Goal	Compliance with WQS.	Compliance with WQS.
WQS Compliance Deadline	Immediate.	In some instances, as proposed by Permittees in their WMPs/EWMPs.
Opportunities for Deadline Extensions/BMP Modifications	Whenever a Permittee or the Regional Board discovers there has been a violation of WQS.	Every two years if “anticipated outcomes are not achieved” based on monitoring data and new information.
Requirements Once Process is Triggered	The Permittee must prepare and submit a compliance report, which, among other things, identifies additional BMPs to prevent future violations.	Permittees must “modify strategies, control measures, and BMPs, as necessary, based on analysis of monitoring data to ensure that applicable WQBELs and RWLs and other milestones set forth in the WMP/EWMP are achieved in the required timeframes.”
Types of Modifications Allowed	Permittees may propose modifications to current BMPs.	Permittees may propose modifications to final compliance deadlines and interim milestones (with the exception of final deadlines established in TMDLs), and control measures.
Grounds for Modifications	Not specified.	Technical infeasibility or substantial hardship may be grounds for Permittees to propose alternative controls or new timelines.
Other Requirements	The compliance report must include an implementation schedule for the new/additional BMPs.	Not specified.
Subject to Regional Board Approval?	Modifications are subject to approval by Regional Board Executive Director.	Modifications are subject to approval by Regional Board Executive Director.
Subject to Public Comment Period?	The compliance report is not subject to any public review and comment period.	Any requests for extensions of compliance deadlines and interim milestones and proposed alternative controls are subject to a 30-day comment period.
Steps for Implementation	Within 30 days of approval, the Permittee must “revise the storm water management program and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.	The Permittee must implement any modifications to the WMP/EWMP upon approval (no timeframe specified), or within 60 days of submittal if the Regional Board Executive Director does not object.
Number of Times Permittees Can Engage in the Iterative/Adaptive Management Process	Not specified – potentially no limit.	Not specified – potentially no limit.

The Need for Regional Solutions is Not New

“To the extent the comment maintains that State Board’s SUSMP Order **encouraged regional solutions**, the Regional Board staff concurs. Specifically, the State Board encouraged the permittees to develop such projects.”

Legal Memo from Michael Lauffer, Office of Chief Counsel, to Dennis Dickerson LARWQCB, Nov. 9, 2001, at 7.

“...water quality standards are not being met in this region. This indicates that **regional solutions** are needed, in addition to the SUSMP program and other existing requirements, in order to ensure that water standards and beneficial uses are attained and maintained.”

NRDC Comments on 2001 Draft MS₄ Permit to LARWQCB, August 6, 2001, at 3-4.



The Need for a Watershed Approach is Not New

- 2001 MS₄ permit initiated a watershed approach
 - SUSMP-Standard Urban Stormwater Mitigation Program
 - Subsequent LID Ordinances
- 2010 Ventura MS₄ Permit
- Other Regions in United States since late 1990's
 - City of Seattle Natural Drainage System approach
 - City of Philadelphia
- Permittees have been pursuing these approaches for a decade.



The Need for Stormwater Capture is Not New



*Parkway Infiltration Swale
11th St & Hope St – Los Angeles*



Before



After



Additional Unintended Consequences of the Draft Order

- *Non-stormwater discharges are swept in under safe harbor provisions.*

“Section 402(p)(3)(B) includes three discrete obligations for MS4 permits. First, permits for MS4 discharges must prohibit non-stormwater discharges into the MS4. (33 USC §1342(p)(3)(B)(ii).) Second, permits for MS4 discharges must include ‘controls to reduce the discharge of pollutants to the maximum extent practicable...’”

Respondents State Dept. of Finance, State Water Board, and Los Angeles Regional Board’s Brief on the merits in State Dept. of Finance v. Commission on Mandates, Supreme Court of California, at 6 (emphasis added).



Additional Unintended Consequences of the Draft Order

- *Potential implications of exercising broad discretion and ongoing unfunded mandates litigation*
- *De-designation by EPA for stormwater program?*
 - “If Petitioner’s interpretation [that the permit includes a safe harbor] were adopted, the Regional Board’s ability to enforce MS4 NPDES permits would be seriously undermined. Moreover, the Regional Board’s NPDES program would be at risk for revocation by the U.S. E.P.A.”

LA Regional Board Amicus Brief in LA County Enforcement Case, at 5.



Illegal Safe Harbors in the LA MS₄ Permit:

Part VI.C.2.d:

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

Part VI.C.2.b:

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



Illegal Safe Harbors in the LA MS₄ Permit:

Part VI.E.2.d.i(4)(d):

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

Part VI.E.2.e.i.:

- *A Permittee shall be deemed in compliance* with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if. . . . (4) In drainage areas where Permittees are implementing an EWMP, [all] runoff up to and including the volume equivalent to the 85th percentile, 24-hour event is retained. . . .



Minimum Legal Requirements:

Eliminate safe harbor provisions :

- Delete WMP/EWMP Section VI.C.2(b)-(d) on pages 52-53
- Delete WMP/EWMP Section VI.C.3 (TMDLs) on page 53
- Delete TMDL Section VI.E.2.d.i.(4) on pages 143-144
- Delete TMDL Section VI.E.2.e.i.(4) on page 145
- Delete Illegal Compliance Schedules referenced under Part IV.A.2.a



Environmental Groups' Proposal



Proposal: General Principles

1. Require demonstration of compliance.
 - a. Strong Science: Board approved, peer reviewed model.
 - b. Public Input: Proposals subject to public notice and comment or hearing.
 - c. Enforceable schedule for implementation, including for interim limits/requirements.
 - d. Dischargers are not deemed in compliance during the Program development or construction phases.
2. Time for implementation provided by TSOs, CDOs, or CAOs, not the permit.
 - a. Compliance is based on implementation of the Program.
3. End-of-pipe and receiving water monitoring continue for the life of the permit and to calibrate models.
4. Ultimate compliance determined through monitoring.



Proposal: Require Demonstration of Compliance

Where TMDLs have been adopted

Require:

- Demonstration that the proposed engineered Pollution Control Program will achieve compliance with applicable Waste Load Allocations (WLAs).
- Time for implementation of the Program could be provided by TSOs, CDOs, or CAOs, *not* by the permit.



Proposal: Require Demonstration of Compliance

Where TMDLs have not been adopted

Require:

- Demonstration that the proposed engineered Pollution Control Program will achieve compliance with applicable Water Quality Standards during the five year life of the Permit.
- Time for implementation of the Program could be provided by TSOs, CDOs, or CAOs, *not* by the permit.



