



CITY OF COMMERCE

Joe Aguilar
Mayor

VIA E-MAIL

August 15, 2013

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Subject: SWRCB/OCC FILE A-2236(a) THROUGH (kk) – Comment Letter Regarding State Water Board Workshop on Receiving Water Limitations

Dear Ms. Wadhvani:

The City of Commerce appreciates the opportunity to comment on the Receiving Water Limitations (RWL) issue by responding to the questions posed in the State Water Quality Control Board's letter of July 8, 2013. Recent court rulings in the case of NRDC v. County of Los Angeles creates confusion and concern and further highlights the importance of the State Water Board issuing a clarification of its existing RWL policy. The RWL language in the 2012 MS4 Permit for the Coastal Waters of Los Angeles County (except for discharges originating from the City of Long Beach) is closely resembles the RWL language in the 2001 MS4 Permit that led to prolonged litigation and two unfortunate opinions from the Ninth Circuit Court of Appeals, most recently on August 8, 2013. However, the 2012 Permit does provide for compliance options in the watershed management program (WMP) and enhanced watershed management program (EWMP) provisions of the Permit. These modifications to allow for compliance for certain RWL requirements and other numeric limits through a WMP or EWMP do not go far enough however toward providing municipal Permittees with real and legitimate pathways to compliance with all interim and final numeric limits. The new RWL language must be clear and amended to better reflect the episodic and variable nature of stormwater, reduce the vulnerability to third-party lawsuits, and provide alternative pathways for permit compliance. The language must preclude courts from changing the intent of the permit by separating out interrelated parts for separate review.

Your letter of July 8, 2013 asked two questions:

1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?
2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 permits?

These questions indicate a focus on either the WMP/ EWMP contained in Part VI of the 2012 Permit or proposed modifications thereof as the approach for revising the existing RWL language set forth in State Board Order No. 99-05 and used in Part 5A of the Permit, namely the language that led to the recent troubling Ninth Circuit Court of Appeal decision. We will therefore limit our comments to issues related to the two interrelated questions.

After reviewing the RWL language in both the 2001 and 2012 MS4 permits, reviewing the WMP/EWMP requirements of the 2012 Permit, and considering the comments of our staff and consultants, the City of Commerce is of the opinion that, with appropriate revisions, the WMP/EWMP alternative in the Los Angeles MS4 Permit is conceptually a viable alternative approach to modifying receiving water limitations in MS4 permits. These revisions would have to account for differing permit provisions across the state and might need to be given a more generic name.

We are aware of the suggested RWL language revisions proposed by the California Stormwater Quality Association (CASQA) and an alternative approach being proposed by various LA Permit petitioning cities. Both have valid points. We agree strongly with CASQA's concerns with the current RWL permit language, as well as its discussion of practical impacts to municipalities and fundamental support for the concept of linking receiving water limitations and other permit requirements to compliance pathways.

Our City also agrees with much of what is contained in Attachment A to CASQA's letter on SWRCB/OCC File A-2236(a) through (kk) that has been circulated among cities for review. However, we are concerned that it lacks adequate protection for cities and believe that it must be amended. In particular, we are concerned that Section E.4.c focuses only on a Permittee's ability to comply with interim and final TMDL requirements. We believe that this section should apply more broadly to the ability to comply with applicable receiving water limitations and discharge prohibitions, as well as interim and final water quality-based effluent limitations (WQBELs) derived from waste load allocations in adopted TMDLs.

We further believe there should be a provision in Section E.5 of CASQA's suggested language that would provide that a permittee would be considered in compliance with receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs for portions of watersheds or subwatersheds served by best management practices (BMPs) designed to retain all non-stormwater discharges and all stormwater discharges up to the 85th percentile, 24-hour design storm specified in Section E.1.e.

The alternative approach suggested by the petitioning cities focuses on the addition of four subsections to Section VI.C.1 of the 2012 Permit. The first proposed new subsection describes the requirements for any watershed management program, including enhanced watershed management programs, proposed by a Permittee. It also includes a procedure for the approval of alternative BMPs by the Regional Water Board when a Permittee demonstrates, to the satisfaction of the Regional Board in a public meeting, that it is unable to develop sufficient BMPs to achieve timely compliance with one or more receiving water limitations, discharge prohibitions, interim WQBELs, or final WQBELs due to technical infeasibility or substantial hardship. The second proposed new subsection provides that "A Permittee's compliance with an approved program, including a program utilizing alternative BMPs, shall constitute a Permittee's compliance with the receiving water limitations, Discharge Prohibitions, and TMDLs and related WQBEL provisions set forth in Parts V.A, III.A.1, and VI.E of this Order."

The third section provides a mechanism to cure failures to meet a requirement or a date for its achievement in an approved WMP/EWMP program, or, if needed, a proposed adaptive modification to a program. This section also sets out the requirements to be considered in compliance with a WMP or EWMP in cases where a Permittee has cured a compliance deficiency or is following an approved adaptive management process to cure the deficiency. The fourth suggested new subsection of Section VI.C.1 includes a process for requesting an extension of a program deadline and for approval of the request by the Regional Water Board or the Executive Officer.

Both approaches are potentially feasible for correcting the deficiencies in the RWL in the 2012 Permit as long as two key elements are addressed:

- The use of the watershed management program as a viable alternative to the current RWL language must apply broadly to receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs; and
- There must be a provision that compliance with an approved WMP/EWMP constitutes compliance with receiving water limitations, discharge prohibitions, interim WQBELs, and final WQBELs.

Our City regards these as critical issues. The State Water Board laid out an iterative process for complying with receiving water limitations in its Order 99-05 and has reiterated, in several subsequent orders, that local agencies are to follow an iterative

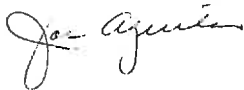
reiterated, in several subsequent orders, that local agencies are to follow an iterative BMP approach to protect water quality and generally are not required to strictly comply with numeric effluent limits.

We understand that some believe that the iterative process has not worked. We think that this is, in part, because the Regional Water Boards have not adequately implemented the process. Either the Permittee or the Regional Water Board may make a determination that discharges are causing or contributing to an exceedance of an applicable water quality standard, whereupon the Permittee is required to submit an RWL Compliance Report that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to exceedances of water quality standards. Perhaps the Los Angeles Water Board did not make the necessary determinations because it was underfunded and understaffed, or perhaps it lacked sufficient data to make such determinations. The data problem will be ameliorated by the robust monitoring and reporting requirements in the new Permit. The compliance reporting process should work better in the future, especially with modifications to the Permit to correct the deficiencies in the current RWL language based on the WMP/EWMP options in the Permit.

We look forward to the State Water Board addressing this serious issue inclusive of addressing the Petitions the Board has received on the Los Angeles MS4 Permit (Order No. R4-2012-0175). Resolving this issue could go a long way toward resolving many petitioners' concerns with the new Permit.

The City of Commerce also included a comment letter dated August 15, 2013 on our behalf from the City's MS4 Permit legal counsel, Richard, Watson & Gershon which was delivered separately.

Sincerely,



Joe Aguilar
Mayor

Attachments: Exhibit 1 - CASQA Recommended Language
 Exhibit 2 - LA Petitioning Cities' Alternative Approach
 Richard, Watson & Gershon RWL Correspondence dated August
 15, 2013

Exhibit 1

**CASQA Recommended Language
(Attachment A to CASQA's Letter)**

Attachment A

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Part E, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Part E, discharges from the MS4 of stormwater, or non-stormwater, for which a Permittee is responsible, shall not cause a condition of nuisance.

E. STRATEGIC COMPLIANCE PROGRAM

1. General

- a. The purpose of this Part is to allow for a Strategic Compliance Program (hereafter referred to as "Program") to address and provide for compliance with the requirements of this Order. The Program may be organized on a watershed scale or other appropriate basis and shall specify implementation of customized strategies, control measures, and BMPs on an established schedule.
- b. The Program may be structured for a watershed (or subwatershed), or for a jurisdiction or collection of jurisdictions.
- c. Participation in a Program is voluntary, and allows a Permittee to progressively address the highest water quality and/or watershed priorities.
- d. Unless otherwise delineated in this Order, the Program shall include a strategy and schedule for implementing BMPs for constituents that are causing or contributing to exceedances of applicable water quality objectives, or causing a condition of nuisance in specified water bodies. The Program may include, but is not limited to, specifically identified waterbody-pollutant combinations, watershed management plans, volume based controls designed to control the volume of run-off, and multi-benefit regional projects that, wherever feasible, retain the applicable water quality design storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood management and water supply.
- e. As used herein, "design storm" shall refer to the 85th percentile, 24-hour storm event or equivalent.

2. Requirements

- a. The Program shall be designed to address (i) applicable TMDL requirements in Part ..., (ii) contributions to exceedances of water quality standards in Parts ..., and (iii) non-stormwater discharges that are to be effectively prohibited pursuant to Part ... The Program shall also ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP).
- b. The Program shall identify the water quality priorities and establish goals to be addressed by the Program. Interim and final goals may take a variety of forms such as TMDL established requirements (e.g., waste load allocations, water quality based effluent limits, etc.), action levels, pollutant concentration, load reductions, performance standards, impaired water bodies to be delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, runoff volume reduction, or other appropriate metrics described in the Program.

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- c. The Program shall be based on or include an evaluation of existing water quality conditions for the jurisdiction(s), watershed, sub-watershed and/or waterbody-pollutant combinations that are being addressed with the Program.
- d. Based on the evaluation of historic and existing water quality conditions, the Program shall classify water body-pollutant combinations into categories to assist in prioritizing Program efforts. Examples of categories may include: classification of water body-pollutant combinations for which wasteload allocations are established pursuant to an adopted TMDL; classification of pollutants where a TMDL has not yet been developed but where data indicate water quality impairment in the receiving water according to the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (State Listing Policy) and for which MS4 discharges are causing or contributing to the impairment; and, classification of pollutants for which there are insufficient data to indicate water quality impairment in the receiving water according to the State's Listing Policy, but which on occasion may exceed applicable receiving water limitations contained in this Order and for which MS4 discharges are causing or contributing to the exceedance.
- e. The Program shall identify potential sources within the jurisdiction or watershed for the highest priority water quality issue(s) as specified in the Program. The Program shall identify known and suspected stormwater and non-stormwater pollutant sources in discharges to the MS4 and from the MS4 to receiving waters and other stressors related to MS4 discharges associated with the water quality priorities.
- f. A customized or modified monitoring program shall be submitted as part of the Program.
- g. Based on the findings of the source assessment, the goals to be achieved within each Program area shall be prioritized and sequenced. Program priorities shall include at a minimum:
 - i. TMDLs
 - ii. Receiving waters where data indicate impairment or exceedances of receiving water limitations or violations of Discharge Prohibition, and the findings from the source assessment implicates discharges from the MS4 as a primary source of the impairment.
- h. The Program shall identify strategies, control measures, and BMPs to implement through their individual Stormwater Management Plans, and/or collectively on a jurisdictional, watershed or sub-watershed scale.
- i. The Program shall include methodology(ies) that will assess the effectiveness of implementation strategies, control measures and BMPs selected to address the priority water quality issues of concern.
- j. The Program shall incorporate compliance schedules from adopted TMDLs and, develop interim milestones and dates for their achievement in a manner that is consistent with the TMDLs. The Program shall also include compliance schedules

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and interim milestones and dates to measure progress towards addressing other water quality priorities that have been identified.

- k. The Program shall include an adaptive management process that provides for review of Program implementation at appropriate intervals. The adaptive management process must evaluate the following: 1) Progress toward achieving TMDL requirements according to established compliance schedules; 2) Progress toward achieving improved water quality in MS4 discharges and addressing Receiving Water Limitations and Discharge Prohibition; 3) Progress towards achievement of any other identified milestones; and 4) Re-evaluation of water quality priorities based on more recent water quality data. Based on the review, the Permittees shall report proposed Program modifications to the Regional Water Board in the Program's Annual Report. Such modifications shall be implemented upon Regional Water Board approval.

3. Process for Development and Approval

- a. Permittees that elect to develop a Program or have an existing or modified program recognized as a Strategic Compliance Program shall notify the Regional Water Board and establish a mutually agreed upon schedule for development and submission of the Program or modification of an existing program.
 - i. Such notification shall specify the Permittee(s) requested submittal date. The requested submittal date should reflect the complexity associated with the Program being developed by the Permittee(s).
 - ii. As part of the notification, Permittees shall identify applicable interim and final TMDL-based requirements and their associated compliance deadlines. Permittees shall identify control measures, where possible from existing TMDL implementation plans that have been or will be implemented by participating Permittees concurrently with the development of a Program to ensure that MS4 discharges achieve compliance by applicable compliance deadlines occurring prior to approval of a Program.
- b. Until the Program is approved by the Executive Officer, Permittees that elect to pursue a submission pursuant to this Part shall:
 - i. Continue to implement control measures in their existing stormwater management Plans, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv);
 - ii. Continue to implement control measures to eliminate non-stormwater discharges through the MS4 that are a source of pollutants to receiving waters consistent with CWA section 402(p)(3)(B)(ii); and
 - iii. Implement control measures for MS4 discharges to achieve compliance with interim and final TMDL-based requirements by the applicable compliance deadlines occurring prior to approval of a Program.
 - iv. Permittees that do not submit a Program by the mutually agreed upon submittal date as set forth in provision Part E.3.a.i (unless such date has

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been extended by the Executive Officer), shall be subject to the baseline requirements in Part ... and shall demonstrate compliance with receiving water limitations pursuant to Part ... and with applicable interim water quality based effluent limitations in Part

4. Implementation

- a. Each Permittee shall begin implementing the Program upon approval by the Regional Water Board or the Executive Officer on behalf of the Regional Water Board, in accordance with the schedule for implementation set forth in the Program.
- b. Permittees may request an extension of deadlines for achievement of interim milestones and final compliance dates (unless final compliance dates are specifically dictated by adopted TMDLs). Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request justification for the extension. Extensions shall be subject to approval by the Regional Water Board Executive Officer.
- c. Prior to the effective final and interim compliance dates for TMDLs, and upon a timely request from a Permittee or the Permittees, the Board shall consider the Permittees' ability to comply with the interim and final TMDL requirements and if necessary, reopen the Order or the approved TMDL. In considering the requesting Permittees' ability to comply, the Permittee shall demonstrate to the satisfaction of the Regional Water Board that it is unable to develop sufficient BMPs to timely achieve compliance with interim or final TMDL requirements because the necessary BMPs would be either technically infeasible or would otherwise result in a substantial hardship to the Permittee.

5. Compliance determination.

- a. A Permittee's compliance with an approved Program shall constitute a Permittee's compliance with requirements of this Order that the approved Program is intended to address, including the receiving water limitation provisions in Part D.
- b. If a Permittee fails to meet a requirement or date for its achievement in an approved Program, the Permittee shall be subject to the Provisions of Part D for the waterbody-pollutant combination(s) that were to be addressed by that requirement until that requirement is met.
- c. Upon notification of a Permittee's intent to submit a Program and prior to approval of the Program, a Permittee's compliance with the following shall constitute a Permittee's compliance with the receiving water limitations in Part D:
 - i. Provides timely notice of its intent to submit a Program;
 - ii. Meets all interim and final deadlines for development/modification of a Program as agreed to by the Regional Water Board's Executive Officer;
 - iii. For the area or waterbody-pollutant combination(s) covered by the Program, targets implementation of control measures in its existing stormwater management program, including watershed control measures to address non-stormwater discharges of pollutants through the MS4 to

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receiving waters, and known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations; and,

- iv. Submits for approval its Program within the timeframe as agreed to by the Permittees and the Regional Water Board's Executive Officer.
- d. A Permittee shall be deemed in compliance with an applicable interim and final water quality-based effluent limitation and interim and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:
- i. There are no violations of the final water quality-based effluent limitation for the pollutant at the Permittee's applicable MS4 outfall(s);
 - ii. There are no exceedances of applicable receiving water limitation for the pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);
 - iii. There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL;
 - iv. The Permittee's discharge is within its waste load allocation; or
 - v. At regulated development projects or multi-benefit regional projects in watersheds or subwatersheds tributary to the applicable receiving water where Permittees are implementing a Strategic Compliance Program, (i) all non-stormwater and (ii) all stormwater runoff up to and including the volume equivalent to the water quality design storm are retained.

Exhibit 2

**PROPOSED ADDITIONS/MODIFICATIONS TO
WMP/EWMP APPROACH IN LA MS4 2012
PERMIT**

AUGUST, 2013

SECTION 1: ADDITIONS TO PART VI.C.1 TO LA MS4 2012 PERMIT.

h. Any Watershed Management Program, including an EWMP (collectively, "Program") proposed by a Permittee shall describe all significant BMPs to be implemented to achieve compliance with the applicable Receiving Water Limitations, Discharge Prohibitions and interim and final WQBELs derived from waste load allocations in adopted TMDLs (collectively, "Discharge Limitations"), and shall include a schedule of compliance for the development and implementation of the proposed BMPs, as well as the projected dates for the achievement of the Discharge Limitations. Where a Permittee demonstrates to the satisfaction of the Regional Board at a public meeting that it is unable to develop sufficient BMPs to timely achieve compliance with any particular Discharge Limitation or Limitations because the necessary BMPs would be either technically infeasible or would otherwise result in a substantial hardship to the Permittee ("Infeasible BMPs"), then the Program shall include: (i) the necessary BMPs and compliance schedule for all Discharge Limitations achievable through feasible BMPs; (ii) a description of the Discharge Limitation determined by the Permittee to be unachievable and an analysis of why the necessary BMPs are considered to be Infeasible BMPs; and (iii) a description of the BMPs the Permittee is proposing to implement in place of the Infeasible BMPs ("Alternative BMPs"), along with a schedule of compliance for their implementation and a schedule by which the Alternative BMPs are projected to result in achieving the subject Discharge Limitation.

i. A Permittee's compliance with an approved Program, including a Program utilizing Alternative BMPs, shall constitute a Permittee's compliance with the Receiving Water Limitations, Discharge Prohibitions and TMDL and related WQBEL provisions set forth in Parts V.A, III.A.1 and VI.E of this Order.

j. If a Permittee fails to meet a requirement or date for its achievement in an approved Program, the Permittee shall cure the compliance deficiency as soon as reasonably possible, or if it is unable to do so, propose a modification to its Program to the Executive Officer that follows an adaptive management process to address the deficiency. So long as the Permittee has timely cured the deficiency or is otherwise developing and thereafter following an approved adaptive management process to cure the deficiency, the Permittee shall continue to be considered in compliance with the subject requirement, including where the deficiency involves an exceedance of an applicable Discharge Limitation.

k. A Permittee may request an extension of any deadline in the Program by making such a request in writing to the Executive Officer as soon as the Permittee determines an extension will be necessary. Extensions shall become effective only after approval by the Regional Water Board or the Executive Officer.

SECTION 2: FURTHER REVISIONS TO INCORPORATE LANGUAGE IN SECTION 1 INTO LA 2012 MS4 PERMIT

[The above proposed additions/revisions to the LA 2012 MS4 Permit will require additional language modifications throughout the Order to ensure internal consistencies and avoid ambiguity within the WMP/EWMP provisions on the issue of a Permittee's deemed compliance with applicable Discharge Limitations.]

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Re: **SWRCB/OCC File A-2236(a) through (kk): Comment Letter
Addressing Receiving Water Limitations Language**

Dear Ms. Wadhvani,

This letter is being submitted on behalf of 20 municipal co-permittees and petitioners (the "Commenters")¹ to the new Los Angeles Municipal Separate Storm System Sewer Permit, Order No. R4-2012-0175, NPDES Permit No. CAS004001 ("LA MS4 Permit"), adopted on November 8, 2012. The Commenters greatly appreciate the opportunity to provide feedback on the appropriate receiving water limitations standard for MS4 permits. The Commenters are very pleased to offer their combined perspective to the State Water Resources Control Board ("State Board") regarding this crucial issue.

The State Board has asked the following two questions, which the Commenters will address below:

1. Is the watershed management program/enhanced watershed management program alternative contained in the LA MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?

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

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2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 Permits?

I. INTRODUCTION

The Commenters sincerely appreciate the efforts of the Los Angeles Regional Water Quality Control Board (“LA Regional Board”) and its staff in developing the LA MS4 Permit. Although the Commenters believe the LA MS4 Permit’s watershed management compliance approach is a step in the right direction insofar as it utilizes a modified iterative/adaptive management approach, they also believe that: (1) a pure iterative/adaptive management approach as set forth in State Board Precedential Orders 99-05 and 2001-15 remains the most appropriate one for MS4 permits; (2) to the extent the State Board is inclined to use the LA MS4 Permit’s watershed management approach, there are certain compliance gaps that should be addressed in a statewide receiving water limitations policy, as discussed below.

Compliance with receiving water limitations should be determined only through good faith adherence to an iterative/adaptive management process. Such a process generally consists of implementing best management practices (“BMPs”) and other control measures and programs geared toward limiting the loading of pollutants into and out of storm drains, conducting monitoring to measure their effectiveness, and adjusting those BMPs if the monitoring shows that water quality standards are not being met. This process continues until water quality standards are met, and stays in place to the extent necessary to ensure they are maintained. As long as the iterative/adaptive management process is being followed in good faith, a permittee is deemed in compliance with the entire permit, including receiving water limitations.

The LA MS4 Permit’s watershed management approach is unworkable because of the likelihood that it will result in permit violations by requiring compliance with numeric “enforceable benchmarks” and final Total Maximum Daily Load (“TMDL”) and receiving water targets set at levels beyond what permittees can accomplish even with best efforts. Modifications to the LA MS4 Permit’s watershed management approach will be necessary to avoid the potential legal liability and never-ending litigation that enforcing these numeric limits will invariably create.

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II. THE LA MS4 PERMIT'S WATERSHED MANAGEMENT COMPLIANCE APPROACH

A. Permit Background

The pertinent aspect of the LA County MS4 Permit's watershed management program is the language that provides that compliance with all the requirements for a Watershed Management Plan ("WMP") or an Enhanced Watershed Management Plan ("EWMP") constitutes compliance with TMDL numeric targets, non-exempt non-stormwater discharge prohibitions, and receiving water limitations ("WMP Compliance Option").² A permittee who fails to adhere to any of the watershed management program requirements loses the benefit of the WMP Compliance Option and becomes subject to the receiving water limitations provision of the LA MS4 Permit in part V.A., which includes the prohibition on any discharges that cause or contribute to violations of receiving water limitations.³

Another major component of the LA MS4 Permit's watershed management compliance approach is the requirement that a permittee that creates a WMP or EWMP must conduct a "reasonable assurance analysis" as part of the plan.⁴ This analysis must utilize computer modeling for every water body-pollutant combination dealt with in the plan to *guarantee* compliance with TMDL interim and final targets and receiving water limitations. Permittees must ensure they will hit "interim milestones"—which have been referred to by the Regional Board as "enforceable benchmarks"—and achieve actual final numeric targets to maintain the WMP Compliance Option. Thus, numeric targets are part of the LA MS4 Permit, but their enforceability only occurs upon completion of a "reasonable assurance analysis" and at the time as interim and final targets are scheduled to be achieved.

The WMP Compliance Option also requires MS4 permittees to address 303(d)-listed water body-pollutant combinations that are not the subject of TMDLs or in the same class as TMDL-listed water body-pollutant combinations. Such combinations are thus to be addressed in the reasonable assurance analysis, and are therefore also treated as enforceable numeric targets in the EWMP or WMP implementation

² LA MS4 Permit, part VI.C.2.b. and .d., at pages 52-53.

³ *Id.* at part V.A., at pages 38-39.

⁴ *Id.* at part VI.C.5.b.iv., at pages 63-64.

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process.⁵ The same is true of pollutants that are not 303(d)-listed but for which there have been past exceedances of receiving water limitations.⁶

The watershed management program also utilizes an iterative/adaptive management process that requires permittee participants to assess the progress of the plan every two years and ramp up watershed control measures where necessary to meet the enforceable benchmarks.⁷ Thus, adaptive management is part of the process, but a permittee can still arguably be found in violation of the permit for numeric standard violations even if it engages in the process in good faith.

B. The LA MS4 Permit's Watershed Management Approach, Without Adjustments, Will Result in Permit Violations

Maintaining compliance with the LA MS4 Permit's WMP Compliance Option will be impossible for at least some LA MS4 permittees. First, the WMP Compliance Option does not cover portions of a watershed not covered by a WMP or EWMP. The LA MS4 permittees still must first demonstrate compliance through computer modeling, and then actually meet phased interim and final numeric TMDL targets and receiving water limitations. If there is any failure to meet these limits, the WMP Compliance Option is inapplicable. Furthermore, the numeric limits otherwise imposed are, in some instances, unrealistic. It is thus inevitable that, despite best efforts and good faith adherence to a WMP or EWMP, some Watershed Management Groups will fail to meet applicable numeric water quality standards.

Los Angeles County's MS4 is a gigantic interconnected structure consisting of storm drains, pipes, culverts, gutters, and catch basins for which no comprehensive maps exist. Even its exact size is unknown. Storm drains line every major thoroughfare and thousands of side-streets in Los Angeles County and collect rainwater runoff from virtually every inch of a largely urban, industrialized landscape consisting of 89 independent governmental jurisdictions. Further, rainwater runoff does not follow municipal boundaries; storm water enters Los Angeles County along its entire boundary adding to the volumes discharged and the complexity of regulation. The LA MS4 system contains millions of inputs and tens of thousands of outputs. The notion of effectively managing this giant interconnected system and effectively regulating the runoff caused by Los Angeles County's nearly 10 million human residents and tens of thousands of businesses is daunting.

⁵ LA MS4 Permit, parts VI.C.2.a.i. and ii., at pages 49-51.

⁶ *Id.* at part VI.C.2.a.iii., at pages 51-52.

⁷ *Id.* at part VI.C., at pages 66-67.

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The unfortunate reality is that in largely urban counties such as Los Angeles, exceedances of water quality standards in receiving water bodies happen with regularity, despite the 20-plus years of regulation under MS4 Permits and untold millions of dollars spent on improving water quality. Monitoring conducted by the Los Angeles County Flood Control District under Los Angeles County's prior MS4 permit, which showed regular numeric water quality violations for numerous constituents at each of four mass-emissions stations placed in different receiving waters around the county, identified 1,105 violations of numeric water quality standards for various pollutants since 2003. Even with good faith efforts and noted water quality improvements, the permittees under the former permit were simply not able to consistently achieve the then water quality standards. Imposing numeric limits will virtually guarantee some numeric standard violations, and thus set permittees up to fail.

The LA MS4 Permit implemented 33 new TMDLs in addition to the numerous TMDLs already in place and forthcoming TMDLs. These TMDLs were created because of the failure of specified receiving waters to meet water quality standards for certain pollutants. These are thus bodies of water where, by definition, pervasive violations of water quality standards exist and will, at least for some, continue to exist even despite best efforts. Beyond the TMDLs, the LA MS4 Permit regulates 140 pollutants in total, for which water quality standards exist and can be exceeded at any time. The sheer number of TMDLs and other regulated pollutants makes compliance with all numeric limits for all 140 pollutants, including those for which interim and final TMDL targets exist, a practical impossibility.

Furthermore, it is clear that numeric limits are often set at unrealistic levels. For one example, the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL sets the numeric limit for certain toxic materials such as DDT at a "non-zero" level, which means it is *less than zero*, and a level that is lower than the rate of DDT introduced to the water bodies by aerial deposition. In other words, the receiving water limitation for DDT for the harbor and channel is less than what comes into it from the sky.

The LA Regional Board's response to this fact was: "...Staff acknowledges the DDT TMDL is smaller than the air deposition load for certain water bodies; however, staff does not find that this will require constant remediation of bed sediments. Rather a

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more extensive DDT flux study within these waters will help clarify these results and perhaps provide a more accurate characterization.”⁸

As the LA Regional Board clearly stated, the numeric standard was set with the understanding that a more accurate figure would be achieved as further studies are conducted. Under a pure numeric standard receiving water standard, until such time as the TMDL can be re-opened and *potentially* changed, however, the non-zero standard stands as a receiving water limitation, subjecting the permittees to open-ended potential liability for violations that can be caused entirely by aerial deposition. Even under the LA MS4 Permit’s compliance approach, there is still no guarantee that an achievable numeric target will be set and, if it is, that it will be achievable within the given timeframes, even with best efforts by permittees.

For another example, in the Santa Monica Bay Bacteria TMDL, the summer dry weather receiving water standards for indicator bacteria are set at zero exceedances. This zero exceedance standard does not take into account natural background conditions such as bird droppings and other sources aside from MS4s which may cause exceedances. Data collected at the reference beach since adoption of the TMDL in 2006 demonstrates that natural conditions associated with freshwater outlets transporting runoff from undeveloped watersheds results in exceedances of the single sample bacteria limits during both summer and winter dry weather on approximately 10% of the days sampled. The numeric limit simply does not take into consideration the scientifically proven reality of natural and non-point sources of indicator bacteria that are entirely beyond the ability and legal authority of any permittee to control. Imposing interim or final numeric limits will almost certainly result in violations, because sources outside the permittees' control cause exceedances all on their own. Again, even if more reasonable numeric limits are imposed, permittees still may need more time to comply than is provided for in the TMDL, and may similarly be unable to meet “enforceable benchmarks” along the way.

The legal uncertainties created for many MS4 permit holders have been highlighted by two seemingly irreconcilable appellate decisions issued just this year. In January 2013, the U.S. Supreme Court ruled in favor of an MS4 permit holder, the Los Angeles County Flood Control District. The Supreme Court held that the County could not be held liable for a “discharge” under the Clean Water Act when the water was discharged from one part of a lined portion of the Los Angeles River to an unlined portion of the same river. The Supreme Court then remanded the case for

⁸ Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL, Regional Board Responses to All Comments, April 26, 2011, at page 107.

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further proceedings to the Ninth Circuit, whose earlier opinion to the contrary was reversed.⁹ Then, in an entirely different opinion issued earlier this month, a three-judge panel of the Ninth Circuit concluded that as a matter of law the same MS4 permit holder, the County, was liable under an arguably different theory—that a mere exceedance of a permit limit at a mass-emissions monitoring point in the Los Angeles River was sufficient to hold it liable under the Clean Water Act.¹⁰

Whatever might be said about these two dramatically different legal opinions involving the same permit and the same permit holder, one must conclude that a current permittee must be very wary of any receiving water limitation that sets an absolute numeric standard. Various third parties not directly affected by the LA MS4 Permit could, if they otherwise qualified, use the current judicial uncertainty to sue a number of permittees, alleging strict liability for any exceedance of a numeric limit.

Moreover, it is no secret that the financial situation of municipalities and other government agencies in California is a dire one. This is an era of shrinking government budgets, layoffs, reduced staff hours and services, and, for some government entities, the possibility of bankruptcy. The LA MS4 Permit has already caused many permittees to double or more-than-double their projected expenses for stormwater regulation from FY 2012-2013 to FY 2013-2014, and that period merely encompasses the expense of developing the WMPs, EWMPs, and monitoring plans, which will generally cost between \$750,000 and \$1.3 million dollars to develop per watershed. The burdensome cost of implementing the plans will far exceed the development costs each year thereafter. Under California Proposition 218, securing additional funding for storm water programs will be left up to the voters, so permittees that are unable to convince voters to increase taxes will likely have to cut core municipal functions such as police, fire, libraries, public works, and programs for children and the elderly. If administrative liability and the huge expenses associated with third party lawsuits are added to this equation, a truly untenable situation will be created, and funds that should go toward improving water quality will be diverted to costly legal battles that provide no benefit to the public.

⁹ *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013).

¹⁰ *Natural Resources Defense Council, Inc. v. Los Angeles County Flood Control Dist.*, ___ F.3d ___, 2013 U.S. App. LEXIS 16416 (Aug. 8, 2013).

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C. MS4 Permits Have Always Utilized the Iterative/Adaptive Management Process For Compliance With MS4 Permits While Numeric Limits Contravene Federal Law and Are Infeasible

The iterative/adaptive management process has long been the compliance standard for receiving water limitations in MS4 Permits and continues to be used in permits throughout the State and around the nation. Therefore, characterizing the iterative/adaptive management process as a “safe harbor” as the Natural Resources Defense Council has done in its Petition for Review of the LA MS4 Permit is not accurate.

Under the Clean Water Act, MS4 permittees are required to reduce pollutant loading into an MS4 and to a receiving water body to the Maximum Extent Practicable (“MEP”).¹¹ In practice and through guidance memoranda, the federal MEP standard has been defined as an iterative, BMP-based standard that does not impose numeric limits on MS4 permittees.¹²

The LA MS4 Permit’s own definition of MEP, which is derived from a 1993 State Board memorandum, does not require achieving numeric water quality standards.¹³ Rather, the State’s MEP definition is *solely* a BMP-based standard that factors in: (1) effectiveness; (2) compliance with applicable regulations; (3) public support; (3) whether the cost of the BMP will have a reasonable relationship to the pollution control benefits; and (4) technical feasibility.¹⁴ Simply requiring adherence to numeric standards without reference to the BMP-based MEP factors would clearly exceed MEP, and thus trigger the requirement to conduct a full economic impact analysis under California Water Code sections 13241, 13263, and 13000.¹⁵

¹¹ Clean Water Act § 402(p)(3) (33 U.S.C. § 1342(p)(3)).

¹² See 2003 EPA Memorandum, “Guidance on Definition of Maximum Extent Practicable”; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Divers Environmental Conservation Organization v. State Water Resources Control Board*, 145 Cal.App.4th 246, 256 (2006); State Board Water Quality Order No. 2006-12, at page 17 (“Federal regulations do not require numeric effluent limitations for discharges of storm water.”)

¹³ LA MS4 Permit, Attachment A at page 11; February 11, 1993 State Board Memorandum, “Definition of Maximum Extent Practicable” at pages 4-5.

¹⁴ *Id.*

¹⁵ Cal. Water Code §§ 13241, 13263 and 13000; *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 625-27 (2005).]

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In 2010, the EPA reiterated its commitment to the iterative/adaptive management process as a means of permit compliance, and directed permit writers to impose numeric limits only “where feasible” and only as to “effluent limitations.”¹⁶ This position is based on the EPA’s Clean Water Act regulations, which authorize the use of the iterative/adaptive management process for MS4 permits “when numeric *effluent limitations* are *infeasible*.”¹⁷ Thus, the notion that federal authority authorizes the imposition of numeric limits for receiving waters, rather than through a permittee’s MS4 effluent, is incorrect. Any imposition of numeric receiving water limitations thus lacks support under the Clean Water Act, EPA’s Clean Water Act regulations and EPA’s TMDL guidance memoranda.

The iterative/adaptive management approach has always been the compliance standard for MS4 permit compliance in California as well. In 1991, the State Board concluded that “numeric effluent limitations are *infeasible* as a means of reducing pollutants in municipal storm water discharges, at least at this time.”¹⁸ In 2001, the State Board reiterated that the compliance standard for MS4 permits is to be an “iterative” one, and that “we will generally not require ‘strict compliance’ with water quality standards through numeric effluent limitations and we continue to follow an iterative approach, which seeks compliance over time.”¹⁹

The 2001 State Board precedential order followed the 1999 opinion of the Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner*. In that case, the Ninth Circuit clarified that the Clean Water Act section 301—which demands that industrial NPDES permittees meet numeric water quality standards through the imposition of the “best available” technology—*does not* apply to municipal MS4 permittees.²⁰ The 2001 order is the last State Board order issued on the subject.

¹⁶ See EPA’s November 12, 2010 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” at page 2 (“*where feasible*, the NPDES permitting authority exercises its discretion to include *numeric effluent limitations* as necessary to meet water quality standards.” (emphasis added)).

¹⁷ 40 C.F.R. §122.44(k) (emphasis added).

¹⁸ State Water Resources Control Board Water Quality Order No. 91-03, at page 49 (emphasis added).

¹⁹ State Board Water Quality Order No. 2001-15, at page 8.

²⁰ *Defenders of Wildlife v. Browner*, 191 F.3d 1159 at 1165-66 (9th Cir. 1999).

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More recently, in the Caltrans MS4 permit, the final version of which became effective on July 1, 2013, the State Board did not impose enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.²¹

Rather, the Caltrans MS4 permit's fact sheet notes that the permit contains an "iterative process [that] is modeled on receiving water limitations set out in State Water Board precedential Order WQ 99-05 and required by that Order to be included in all municipal storm water permits."²² The State Board should similarly conclude that imposing numeric receiving water limitations criteria on other MS4 permittees around the State is inconsistent and unjustifiable.

Furthermore, supporting documentation detailing the feasibility of imposing numeric limits for receiving water limitations has never been provided. Thus, the Permittees believe that the LA MS4 Permit's watershed management compliance approach, while laudable in its attempt to impose an achievable compliance standard, is still flawed because it applies strict numeric limits to permittees in the form of enforceable benchmarks, TMDL final targets, and receiving water limitations. Imposing such numeric limits as receiving water limitations is unsupported by federal law and will invariably set some permittees up to fail. Accordingly, the Commenters suggest two alternative approaches to the LA MS4 Permit's watershed management approach that will be consistent with controlling federal authority and create a workable approach that avoids open-ended liability while still working toward the shared goal of improving water quality.

III. ALTERNATIVE APPROACHES

A. Adaptive Management

For all the reasons stated above, the Permittees believe that the iterative/adaptive management process as spelled out in State Board Order No. 99-05 and further described in State Board Order 2001-15 should be established as the sole receiving water limitation compliance standard in California. The imposition of numeric

²¹ Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG, September 7, 2012, page 9.

²² Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-11-DWQ, at page 9.

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standards in receiving waters is not supported by law, sound public policy, or any indication of feasibility in terms of both cost and available technology.

A strong statement of clarification in this regard is called for at this time, and the language of State Board Order No. 99-05 should be altered to state that the prohibition on “causing or contributing” to a water quality standard violation in the receiving water can be complied with solely through good faith adherence to the iterative/adaptive management process. This is by far the simplest, most straightforward method of compliance and is well-supported by law.

B. Alternative “Compliance Gap” Language

To the extent the State Board is inclined to use the LA MS4 Permit watershed management compliance approach, there are certain compliance gaps that should be addressed in a statewide receiving water limitations policy. The following language should be included in the model permit language to provide a clearer and more stringent adaptive management procedure than is spelled out in prior State Board precedential orders for instances in which a permittee finds it is or will be unable to meet a WMP or EWMP requirement. The Commenters recommend that the following language be added to LA MS4 Permit, Part VI.C.1.²³:

“Where a Permittee demonstrates to the satisfaction of the Regional Board at a public meeting that it cannot achieve compliance with any requirement or date for its achievement in a draft or approved WMP or EWMP because the requisite BMPs are technically or economically infeasible (“Infeasible BMPs”), then the Permittee shall timely submit to the Regional Board in writing: (i) a description of the requirement that cannot be achieved and an analysis of why it could not be achieved; and (ii) a description of the BMPs the Permittee will implement in place of the Infeasible BMPs (“Alternative BMPs”), along with an implementation schedule with interim milestones and the date the requirement is projected to be achieved. A Permittee’s compliance with the Alternative BMP procedure shall constitute a Permittee’s compliance with the Receiving Water Limitations, Discharge Prohibitions and TMDL and related WQBEL provisions set forth in Parts V.A, III.A.1 and VI.E of this Order.”

²³ The proposed additions/revisions to the LA MS4 Permit will require additional language modifications throughout the LA MS4 Permit to ensure internal consistencies and avoid ambiguity within the WMP/EWMP program.

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IV. CONCLUSION

The iterative/adaptive management process has been and continues to be the only sensible approach to receiving water limitations compliance for MS4s. Numeric standards for receiving waters, as opposed to an MS4's effluent, are not supported by federal law. Furthermore, under controlling federal authority, numeric standards may only be imposed where "feasible." No study of feasibility has been made for the imposition of numeric limits in receiving waters, which the LA MS4 Permit's watershed management approach appears to ultimately impose.

A reservation of rights by the Water Boards to enforce numeric limits for receiving waters is unnecessary, because liability should exist only where a permittee is not engaging in the iterative/adaptive management process in good faith. Permittees who engage in the iterative/adaptive management process in good faith should not be liable for violations of MS4 permits' receiving water limitations when inevitable numeric violations occur, because adherence to the process is literally all permittees can do. So long as a permittee is doing all it can to comply, it should be allowed to be free of the lingering possibility of administrative liability and third-party lawsuits, to be instituted at any time at the complete discretion of the Water Boards or *any* third-party. Implementing the recommendations set forth in this letter will establish a workable approach to receiving water limitations compliance and allow permittees to focus all available resources on improving water quality in collaboration with the LA Regional Board.

Thank you again for the opportunity to comment on the receiving water limitations language. Please feel free to contact me or my colleague, Andrew Brady at (213) 626-8484 or via email at clee@rwglaw.com or abrady@rwglaw.com if you have any questions or would like to further discuss any of these issues.

Very truly yours,



Candice K. Lee

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