August 15, 2013

VIA ELECTRONIC MAIL

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RE: Comments on the Receiving Water Limitations Approach in Los Angeles Permit

Dear Ms. Wadhwani:

This comment letter is being submitted on behalf of the City of Dana Point in South Orange County on the "receiving waters approach" (WMP/EWMP approach) in the Los Angeles MS4 2012 Permit. We helped develop the proposed additions/modifications, as provided by Richard Montevideo, who also represents the City of Dana Point, on behalf of the Cities of Duarte and Huntington Park ("Cities"), both of whom are Petitioners challenging portions of the 2012 Los Angeles Municipal Separate Storm Sewer System (MS4) Permit (hereafter "LA Permit").

The City of Dana Point supports the attached Points & Authorities and the "PROPOSED ADDITIONS/MODIFICATIONS TO WMP/EWMP APPROACH IN LA MS4 2012 PERMIT" dated August, 2013, as provided in Attachment A. Conceptually, these are the same issues shared by the majority of the LA Permit petitioners and all of the co-permittees that we have conferred with. We also concur with the concerns and Principles for Compliance as described in CASQA's comment letter dated August 15, 2013, but the language provided herein is preferable.

As you may be aware, this language was a priority concern in the development process of San Diego Regional Water Quality Control Order No. R9-2013-0001 ("Regional Permit"), adopted on May 8, 2013. The Board did not address this issue in light of the fact that the State was currently reviewing said language. In anticipation of revisions, our Regional Permit was drafted noting a specific re-opener clause addressing this specific language (Page 125 of 127, Order No. R9-2013-0001, Provision H: Modification of Order, 4.a.); and therefore we have spent considerable effort in helping develop this proposal before you today (Attachment A).

This is a complicated issue. We understand the Board's need to ensure accountability, assess progress and compliance, and achieve the goals of improving and protecting our water quality that we share. With this in mind, clear, concise, yet flexible language is also necessary, in hopes of avoiding unintended consequences (the good old saying, "no good deed goes unpunished"). As we all know, finding this balance is challenging. As a Director of Public Works, I have witnessed firsthand how the threat of third party lawsuits has now become an unfortunate reality and, similar to ADA abuse from arm chair bandits, the citizen suit lawyers are beginning a new cottage industry in the absence of permit language allowing reasonable maximum extent practicable compliance measure acceptance of the iterative process.

A flaw that may not be immediately recognized and understood in the existing language, is the fact that the WMP/EWMP approach, which provides an option for compliance with final numeric limits, is frankly, not practicable (i.e., not an option) in the majority of watersheds-especially ones that are mostly developed. This is because it is technically infeasible for a variety of geotechnical/engineering constraints, flood control health and safety issues, and logistical constraints to retain the huge wet weather storm water volume from major watershed areas. Although technology is evolving, there are some pollutants, that may or may not be anthropogenic, for which practicable and effective BMPs do not yet exist. Therefore without the proposed additions in Attachment A, compliance could be questioned with the language as written, regardless of implementing an iterative/adaptive approach as intended by the Clean Water Act.

We are making improvements in water quality. There have been, and will continue to be, advances in science and technology. We have made great strides in understanding, and in some cases identifying, ubiquitous sources of pollutants, which has shown to be an extremely challenging and resource intensive effort in many cases when dealing with non-point source pollution. Coordination among agencies and non-governmental organizations is improving. We feel that the State as a whole is in a good position to continue with this momentum. Please carefully consider our proposal based on the concerns and the associated rationale before you so that the most equitable decision can be made.

Thank you again for the opportunity to provide input to the State Board in connection with this very important matter. The Cities stand ready to answer any questions or provide the State Board with any additional information it may request in this regard.

Respectfully,

CITY OF DANA POINT

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Enclosures:

- Rutan Comment Letter dated August 14, 2103
- Attachment A

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Re: SWRCB/OCC File A-2236(a) thru (kk) – Comment Letter Re State Water Board Workshop on Receiving Water Limitations

Dear Ms. Wadhwani:

This Comment Letter is being submitted on behalf of the Cities of Duarte and Huntington Park ("Cities"), both of whom are Petitioners challenging portions of the 2012 Los Angeles Municipal Separate Storm Sewer System (MS4) Permit (hereafter "LA Permit"). Consistent with the points and authorities set forth in their Petition to the State Board in connection with the LA Permit, the Cities herein submit these comments in response to the questions posed in your letter of July 8, 2013, regarding State Water Board policy on MS4 permittee compliance with receiving water limitations, discharge prohibitions and total maximum daily loads ("TMDLs"), including water quality based effluent limitations ("WQBELs") related thereto (hereinafter, collectively, "Discharge Limitations").

As explained further below (and discussed in the Cities' Petition and supporting Points and Authorities), the Watershed Management and Enhanced Watershed Management program (hereafter "WMP/EWMP") set forth in the LA Permit, although good in concept, as written is plainly inconsistent with State and federal law, and thus without modification, should ***not*** be adopted as new policy to replace State Board Resolution No. 99-05 to govern compliance with the various Discharge Limitation provisions within MS4 Permits throughout the State. Thus, the answer to the first question raised in your letter of July 8, 2013, is that although the WMP/EWMP process in the LA Permit provides for a solid foundation for new State Board policy, such process, as written, is in need of amendment to be both achievable and compliant with governing law.

In response to the second question raised in your July 8, 2013 letter, the Cities are hereby proposing revisions to the LA Permit WMP/EWMP approach, which proposed revisions are set forth in Attachment "A" to this Comment Letter. The primary issues of concern addressed by the revisions proposed in Attachment A ("Alternative Approach") are summarized as follows:

(1) Although the LA Permit requires Permittees to implement WMPs to ensure compliance with all interim and final limits, even if such limits can only be achieved through the use of technically or economically infeasible BMPs, the Alternative Approach would give Permittees the ability to seek approval from the Regional Board for the use of Alternative BMPs, in place of infeasible BMPs, and if the Regional Board approves the Alternative BMPs and approves the Permittee's overall program, the Permittee would be considered in compliance with such numeric limits;

(2) The only exception to actually meeting the final numeric limits in the LA Permit is through the use of an EWMP, which would only provide for deemed compliance for those drainage areas within a Permittee's jurisdiction where structural BMPs are installed that capture all non-storm water runoff and the 85th percentile design storm event. The Alternative Approach attached would similarly allow for compliance through the use of such design storm BMPs, but would also allow for deemed compliance through the use of other Alternative BMPs, where the 85th percentile design storm BMPs (and other BMPs necessary to meet the limits) are shown to be infeasible;

(3) Another concern with the LA Permit Approach involves the lack of a mechanism for a permittee to continue to be in compliance with the applicable numeric limits, where the targets or requirements set forth in the Permittee's approved WMP are not being met (including where any final limit is not being met). Under the Alternative Approach attached, where an approved WMP program is in place, but an exceedance of a final limit or a target or other requirement of the WMP occurs, a Permittee would still be considered in compliance with the subject numeric limit, so long it is following the iterative/adaptive management process to address the deficiency with its WMP. The LA Permit language does not appear to allow for such continued compliance.

(4) The Alternative Approach language would also make clear that a Permittees compliance with an approved WMP or EWMP program, including those that utilize 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."

For the reasons set forth herein, the Cities believe that the proposed Attachment "A" revisions to the LA Permit represent necessary minimum revisions to the LA Permit in order to bring the WMP/EWMP provisions therein into compliance with governing law, and the Cities thus respectfully request that the Alternative Approach language be accepted by the State Board as the basis for new State policy, and that other necessary revisions be made to the LA Permit approach to incorporate the substance of the Alternative Approach (as indicated in Section 2 of the Alternative Approach).

A. Revisions To The LA Permit WMP/EWMP Program Are Necessary To Enable A Permittee To Be Considered In Compliance With Discharge Limitations Where The Permittee Is Acting In Good Faith And Implementing Technically and Economically Feasible BMPs.

As discussed further below, the WMP/EWMP approach, without substantive revisions to enable a Permittee to be considered in compliance with any specific Discharge Limitations through the use of technically and economically feasible BMPs, is an approach that is clearly inconsistent with applicable law. In short, because the WMP/EWMP approach does not provide a Permittee a compliance path that is consistent with the Maximum Extent Practical ("MEP") standard, and instead requires strict compliance with Discharge Limitations, irrespective of the MEP standard, it is an approach that goes beyond what is required under the Clean Water Act ("CWA"), and thus is an approach that is not permitted under applicable State law, namely the Porter-Cologne Act (California Water Code ["CWC"], § 13000, et seq.).

Revisions are therefore necessary to the WMP/EWMP approach to bring it into compliance with governing law, and to provide a Permittee with the ability to implement alternative BMPs, where the only means by which it may actually meet interim or final Discharge Limitations is through the use of infeasible BMPs (defined in Attachment "A" as either being technically infeasible BMPs or BMPs that would otherwise result in a substantial hardship to the Permittee).

The Alternative Approach would thus enable a Permittee, where it demonstrates (to the satisfaction of the Regional Board at a public meeting) that it is unable to develop feasible BMPs to timely achieve compliance with any particular Discharge Limitation, to instead develop a Program for Regional Board approval that: (i) include necessary BMPs and a compliance schedule for all applicable Discharge Limitations believed to be achievable; (ii) contains a description of the Discharge Limitation determined by the Permittee to be unachievable, along with an analysis of why the necessary BMPs are considered to be "Infeasible BMPs" (defined as being technically infeasible BMPs, or BMPs which would otherwise result in a substantial hardship to the Permittee); 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. (*See* Attachment "A" hereto.)

The Alternative Approach would therefore provide a Permittee implementing an approved Program, including one that contains Alternative BMPs, to be considered in compliance with the Discharge Limitation requirements in the Permit.

Finally, the proposed language set forth in Attachment "A" would allow a Permittee the ability to cure a compliance deficiency through proposed modifications to the Program that address the deficiency through an adaptive management process. Without such a provision, again a Permittee would be subject to having to strictly comply with numeric limits, even if it is unable to do so through the use of feasible BMPs.

In short, for the reasons described further below, the existing WMP/EWMP approach in the LA Permit does not provide a compliance path forward for Permittees to legitimately meet all applicable interim and final Discharge Limitations, and thus is a program that goes beyond what is required under federal law, and beyond what is permitted under State law.

B. The LA Permit WMP/EWMP Program Does Not Allow For Deemed Compliance Through Technically And Economically Feasible BMPs, And For This Reason Exceeds The CWA's Requirements For MS4 Permittees And Violates State Law And Policy.

Part V of the LA Permit entitled "Receiving Water Limitations" ("RWL") has been explained in past State Board rulings as being an "iterative process." It was initially included and developed based on State Board Order No. 98-01, as amended by State Board Order No. 99-05, and was designed to provide Permittees a means of complying with the RWL requirements where it provides that: "So long as the Permittees have complied with the procedures [the iterative process procedures] . . . and are implementing the revised SWMP, the Permittees do not have to repeat the same procedure for a continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develop additional BMPs." (*See* State Board Order No. 99-05.)

In State Board Order No. 2001-15, the State Board confirmed that the process to be followed in municipal NPDES Permits for meeting the RWL requirements was to be an "iterative process," which focuses on timely improvements of BMPs:

> **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. The iterative approach is protective of water quality, but at the same time considers the difficulty of achieving full compliance**

> **through BMPs that must be enforced throughout large and medium municipal storm sewer systems.**

(State Board Order No. 2001-15, p. 8.) In fact, the permit that was the subject of State Board Order No. 2001-15 was a San Diego MS4 NPDES Permit, with the State Board finding that it was deficient because it did not make clear that the "iterative process" was to be applied to both the receiving water limitation language as well as the language concerning exceedances of water quality objectives. (*Id.*)

Similarly, in State Board Order No. 2001-12 DWQ, involving a general NPDES Permit for discharges of aquatic pesticides to surface waters, the State Board expressly provided that compliance with the "iterative process" set forth in State Board Order No. 99-05, was to constitute compliance with the RWL language. In particular, the Receiving Water Limitation language included in Order No. 2001-12 DWQ provided, in part, that: "***A discharger will not be in violation of receiving water limitation f.2 as long as the discharger has implemented the BMPs required by this general permit and the following procedure is followed***: ...." (*See* Order No. 2001-12 DWQ, p. 9.)

Moreover, there can be no legitimate dispute but that federal law does not otherwise compel the use of numeric effluent limits in municipal NPDES permits. For example, in *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866, 874, the California Court of Appeal acknowledged that the CWA is to be applied differently to municipal stormwater dischargers than to industrial stormwater dischargers, finding as follows:

> **In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges .... With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable.**

(*Id.*, citing 33 USC § 1342 (p)(3)(B)(iii) and *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 ("*Defenders*") (bolding and underling added, italics in original).)

In *Defenders*, the Ninth Circuit recognized the different approach taken by Congress for municipal permits, finding that "***industrial discharges must comply strictly with state water-quality standards,*** ***while Congress chose "not to include a similar provision for municipal storm-sewer discharges.***" (191 F.3d at 1165, emphasis added.) The Court found that "33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with

33 U.S.C. § 1311," but instead section 1342(p)(3)(B)(iii) [of the CWA] "***replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable.***'" The Court then held that ***"the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)."*** (*Id.* at 1165; *also see Divers' Environmental Conservation Organization v. State Water Resources Control Board (Divers' Environmental)* (2006) 145 Cal.App.4th 246, 256, emphasis added ["***In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations.***"].)

In the *Divers' Environmental* case, the plaintiff brought suit claiming that an NPDES Permit issued to the United States Navy by the San Diego Regional Board was contrary to law because it did not incorporate waste load allocations ("WLAs") from a TMDL as numeric effluent limits into the Navy's permit. After discussing the relevant requirements of the Clean Water Act, as well as governing case authority, the Court of Appeal acknowledged that in regulating stormwater permits EPA ***"has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."*** (*Id.* at 256.) The Court went on to find that "***it is now clear that in implementing numeric water quality standards, such as those set forth in CTR, permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL's [water quality based effluent limit].***" (*Id.* at 262.)

Similarly, as discussed in part above, it has long since been the policy of the State of California not to require the use of strict numeric limits for stormwater (urban runoff) dischargers, but rather to apply the maximum extent practicable ("MEP") standard through an iterative BMP process. (*See, e.g.*, State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; State Board Order No. 91-03, ["***We . . . conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law.***"]; State Board Order No. 96-13, p. 6 ["***federal laws does not require*** the [San Francisco Reg. Bd.] to dictate the specific controls."]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."]; State Board Order No. 2000-11, p. 3 [***"In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."***]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; State Board Order

No. 2006-12, p. 17 ["***Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 ["***It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"].)

C. The LA Permit Must Be Revised To Allow For A Deemed Compliance Approach Through The Use Of Technically And Economically Achievable BMPs.

Rather than providing municipal permittees the ability to comply with the LA Permit Discharge Limitation provisions through continued compliance with the adaptive management process/iterative process, the LA Permit makes clear that regardless of the MEP standard, various numeric Discharge Limitations in the LA Permit must be strictly complied with. In particular, the WMP/EWMP provisions in the LA Permit allow for deemed compliance with final Discharge Limitations only where the area in question is addressed by an EWMP. Under the LA Permit, an EWMP requires the use of BMPs to retain "all non-storm water runoff" and "all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects." (LA Permit, p. 48.) Given these EWMP BMP requirements , there can be no dispute but that an EWMP is not a viable program for a majority of the drainage areas within any given city, and instead can only be implemented to cover a fraction of such city. In short, even with an approved EWMP in place, a municipal permittee under the LA Permit will need to strictly comply with the final numeric limits for a majority of the drainage areas within its jurisdiction.

WMPs, moreover, provide no deemed compliance with final Discharge Limitation requirements and only allow for compliance with interim Discharge Limitations where the Permittee first provides "reasonable assurances" that such interim Discharge Limitations will be met by the applicable deadlines. In such instance, the WMP would constitute deemed compliance with the interim Discharge Limitations, but no compliance with the final Discharge Limitations. Further, if "reasonable assurances" cannot legitimately be provided (that the WMP will meet the interim Discharge Limitations), there is similarly no deemed compliance with even the interim Discharge Limitations. Accordingly, under the LA Permit, where a Permittee cannot genuinely develop technically and economically feasible BMPs to meet the numeric Discharge Limitations, whether interim or final, it will be in violation of these numeric requirements.

Yet, imposing numeric limits on municipalities that cannot be achieved through the use of technically and economically feasible BMPs, in lieu of allowing for deemed compliance through the iterative/adaptive management process, is a significant change in MS4 permit-writing policy in California, and is a change that ignores the reality that iterative BMPs are the only means by which municipal permittees actually have to comply with Discharge Limitations. It also ignores the reality that requiring compliance with numeric limits will not in any way alter a Permittee's ability to achieve those limits or improve water quality.

In short, municipalities have no means of attempting to achieve compliance with numeric Discharge Limitations, other than by complying in good faith with an iterative/adaptive management process. The LA Permit, which demands that the Permittees do more, is simply not feasible and will only result in more litigation and wasted resources, without any benefit to the public.

The LA Permit approach further ignores the true limitations municipalities face when attempting to reduce the discharge of pollutants from their respective MS4 systems. There can be no dispute that municipal dischargers do not have the luxury of ceasing operations or installing a single or a series of filtration or treatment systems to eliminate pollutants from urban runoff. Municipal Permittees do not generate a vast majority of the urban runoff from their city, and cannot close a valve to prevent the rain from falling or runoff from entering their expansive storm drain systems. Accordingly, to, in effect, conclude that municipalities must develop and implement whatever BMPs will be necessary to meet numeric limits, is to require municipalities to develop and implement infeasible BMPs, which are, by definition, BMPs that exceed the MEP standard.

The LA Permit includes a definition of the term "maximum extent practicable" or "MEP." (Permit, Attachment A, p. A-11.) This definition is based on a February 11, 1993 Memorandum issued by the State Board's Office of Chief Counsel, subject "Definition of Maximum Extent Practicable" (hereafter "Chief Counsel Memo"), and provides as follows:

> "In selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. **This means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive.** The following factors may be useful to consider:
>
> Effectiveness: Will the BMP address a pollutant of concern?
>
> Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?

Public acceptance: Does the BMP have public support?

Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?

Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?"

(LA Permit, p. A-11, emphasis added.) Moreover, as noted in the Chief Counsel Memo, the term "MEP" as used by Congress was intended to include a requirement "***to reduce the discharge of pollutants, rather than totally prevent such discharge,***" and Congress presumably applied an MEP standard, rather than a strict numeric standard with the "***knowledge that it is not possible for municipal discharges to prevent the discharge of all pollutants in storm water.***" (Chief Counsel Memo, p. 2, emphasis added.)

Both the definition of MEP in the LA Permit and in the Chief Counsel Memo acknowledge the need to consider both "technical feasibility" and "cost," including specifically asking: "*Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved.*" In short, both the Memorandum and the LA Permit's definition of MEP confirm that the imposition of "impracticable" BMPs, whether technically or economically impracticable, to achieve a numeric effluent limit are requirements that go beyond what is required under the Clean Water Act, and are, in effect, terms that are not suitable for imposition on municipal dischargers.

In the June 2006 report prepared by the Expert Storm Water Quality Numeric Effluent limits Panel, a panel commissioned by the State Water Board, and entitled, "*Storm Water Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated With Municipal, Industrial and Construction Activities,*" the Panel concluded that: "***It is not feasible at this time to set enforcement numeric effluent criteria for municipal BMPs in particular for urban discharges.***" (*Id.* at p. 8.) Similarly, in a November 22, 2002 US EPA Memorandum entitled "*Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources as NPDES Permit Requirements based on those WLAs,*" EPA commented as follows: ***"EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water dischargers. ... Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs and that numeric limits will be used only in rare instances.].)*** (EPA November 22, 2002 Guidance Memo, p. 4.)

The ultimate outcome of imposing numeric effluent limits on municipalities will not be to improve water quality, but instead to increase litigation and attorneys fees in fighting

enforcement actions and citizen suits (*see, e.g., NRDC v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011)), and, as well, will only subject municipalities to unnecessary penalty claims, including mandatory minimum penalties. (*See* LA Permit, p. 45-46, citing CWC § 13385.) In a second Ninth Circuit Opinion in the case of *NRDC v. County of Los Angeles* ___ F3d __ (9th Cir., filed August 8, 2013), the Ninth Circuit went so far as to hold that "the pollution exceedance detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' liability for NPDES permit violations as a matter of law." (Slip Opinion, p. 5.) Although this second Ninth Circuit Opinion was just announced (on August 8), and as of this date is not yet final, it nonetheless clearly illustrates the uncertainty created by the existing State Board RWL policy language and the importance of providing municipal permittees with a path of complying with numeric limits through an iterative/adaptive management process.

Accordingly, establishing sound State Board policy, consistent with prior State Board policy, that compliance with applicable water quality standards is met through compliance with an iterative/adaptive management process, "in lieu of numeric effluent limitations" (State Board Order No. 2000-11, p. 3), is essential at this time in order to avoid the floodgate of litigation that will surely ensue against municipal permittees absent State Board intervention.

Moreover, to avoid such litigation, any State Board RWL policy must genuinely recognize the technical and economic realities of attempting to reduce the discharge of pollutants in urban runoff to meet a numeric limit, and that Discharge Limitations can, in truth, only ever be achieved through an adaptive management process implemented over time, which, at its heart, involves the development and implementation of technically and economically feasible BMPs. ***Requiring more will not result in more.***

It has long been recognized by the State Board, as well as the courts and US EPA, that the use of iterative BMPs, which are technically and economically available, is in fact the only means by which municipalities actually have to comply with MS4 permit terms. Requiring strict compliance with numeric Discharge Limitations is, therefore, neither realistic nor consistent with state policy or State law (as discussed below).

D. The LA Permit Terms Requiring Compliance With Discharge Limitations, Irrespective Of Whether Such Is Technically Or Economically Achievable, Are Contrary To The Requirements Of CWC §§ 13000, 13263 And 13241.

As discussed above, federal law only requires that municipal storm sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable," and specifically does not require that such dischargers comply with numeric effluent limits. (*See, e.g. Defenders, supra*, 191 F.3d 1159, 1165; *also see Divers' Environmental, supra,* 145 Cal.App.4th 246, 256, where the court found that: ***"In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either***

technology-based or water quality-based numerical limitations.") As such, any attempt to impose strict Discharge Limitations on municipal permittees, requires compliance with the California Porter-Cologne Act, namely, CWC sections 13263, 13241 and 13000.

CWC sections 13241, 13263 and 13000 all directly or indirectly require a consideration of "economics," as well as whether the permit term in question is "reasonable achievable," including a balancing of the benefits of the requirement, *e.g.*, "***the total values involved, beneficial and detrimental, economic and social, tangible and intangible***" (CWC § 13000), the "***water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area***" (CWC § 13241), and the need to "take into consideration the beneficial uses to be protected" and the "***water quality objectives reasonably required for that purpose***" (CWC § 13263(a).)

Moreover, under the California Supreme Court's holding in *Burbank v. State Board* (2005) 35 Cal.4th 613 ("*Burbank*"), a regional water board must consider the factors set forth in sections 13263, 13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.* at 627.) As stated by the *Burbank* Court: ***"Section 13263 directs Regional Boards, when issuing waste discharge requirements, to take into account various factors including those set forth in Section 13241."*** (*Id.* at 625, emphasis added.)

Specifically, the *Burbank* Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, the Boards there were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that such requirement means that the Water Boards must analyze the ***"discharger's cost of compliance."*** (*Id.* at 618.)

The Court in *Burbank* thus interpreted the need to consider "economics" as requiring a consideration of the "cost of compliance" on the cities involved in that case. (*Id.* at 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board ***consider the costs of compliance when setting effluent limitations in a waste water discharge permit.***"].) The Court further recognized that the goals of the Porter-Cologne Act as provided for under Section 13000 are to "attain the highest water quality ***which is reasonable***, considering all demands being made and to be made on those waters ***and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.***" (*Id.* at 618, citing § 13000.)

Moreover, under section 13263(a), waste discharge requirements developed by the Regional Board: "shall implement any relevant water quality control plans that have been adopted, and take into consideration the beneficial uses to be protected, the water quality objectives ***reasonably required for that purpose***, other waste discharges, the need to prevent nuisance, ***and the provisions of Section 13241.***" (§ 13263(a).)

In addition, CWC section 13241 compels the Boards to consider the following factors when developing NPDES Permit terms:

> "(a) Past, present, and probable future beneficial uses of water.
>
> (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
>
> (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
>
> (d) Economic considerations.
>
> (e) The need for developing housing in the region.
>
> (f) The need to develop and use recycled water."

(§ 13241.) In a concurring opinion in the *Burbank* case, Justice Brown made several significant points regarding the importance of considering "economics" in particular, and the section 13241 factors in general, when adopting an NPDES Permit that includes terms not required by federal law:

> "Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) – the body responsible to enforce the statutory framework – failed to comply with its statutory mandate.
>
> For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so."

(*Id* at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

> "Accordingly, the Board has failed its duty to allow public discussion – including economic considerations – at the required intervals when making its determination of proper water quality standards. What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions." (*Id* at 632-33.)

In light of the above, the LA Permit terms that go beyond a maximum "practicability" standard will, by definition go beyond what a water board has the authority to impose under California law. In essence, as a matter of law, MS4 permit terms that go beyond "maximum practicability" are terms that go beyond the balancing, reasonableness and economic considerations, and other considerations, required before any such permit terms can lawfully be imposed under California law. Here, because, as the courts have found, the imposition of numeric limits in a municipal storm water permit go beyond what is required under federal law, *i.e.,* go beyond the MEP standard, as discussed above, by definition they also go beyond the Regional and the State Board's authority under State law. (See CWC §§ 13241, 13263 and 13000.)

E. Conclusion.

In light of the foregoing, it is clear that the WMP/EWMP provisions within the LA Permit, as presently written, do not comport with the requirements of State and federal law because they require a municipal permittee to show that their proposed WMP will meet the interim discharge limits, regardless of technical feasibility or cost, and because, with the limited exception of where an EWMP is viable, said Permittee must strictly comply with all final Discharge Limitations and must provide reasonable assurances it will meet all interim numeric limits, even if it is not able to do so through the use of reasonably feasible BMPs. As such, without modification, the LA Permit WMP/EWMP approach cannot and should not be used as a model for MS4 permits throughout California.

Without providing Permittees a path forward, consistent with the substance of the approach set forth in Attachment "A" hereto, the adoption of a new State Board Policy based on the approach set forth in the LA Permit is not legally supportable. The Cities therefore respectfully request that the State Board consider revising the WMP/EWMP approach under the LA Permit to include the additions/modifications set forth in Attachment "A" hereto, as State Board policy for MS4 Permits in California.

Thank you again for the opportunity to provide input to the State Board in connection with this very important matter. The Cities stand ready to answer any questions or provide the State Board with any additional information it may request in this regard.

Sincerely,

RUTAN & TUCKER, LLP

Richard Montevideo

RM:pj

Enclosure
cc: Attached Service List
Jeannette L. Bashaw, Esq., Legal Analyst
Darrell George, City of Duarte, City Manager
Desi Alvarez, City of Huntington Park
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Todd Litfin Esq., City Attorney, City of Huntington Park

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

AUGUST, 2013

Attachment A

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.]