



California Stormwater Quality Association®

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Subject: SWRCB/OCC File A-2236(a) through (kk) Response to Petitions filed by the City of San Marino, et. al., – Waste Discharge Requirements (Order No. R4-2012-0175 [NPDES NO. CAS004001]) for municipal separate storm sewer system (MS4) discharges within the coastal watersheds of Los Angeles County except those discharges originating from the City of Long Beach MS4 (LA MS4 Permit)

The California Stormwater Quality Association (CASQA) appreciates the opportunity to provide comments on the subject request by the State Water Resources Control Board (State Water Board) in its July 8 and 15, 2013 announcements with respect to the petitions received on the MS4 permit for discharges within Los Angeles County Flood Control District, including the County of Los Angeles, and the incorporated cities therein (LA MS4 Permit). We previously submitted on August 14, 2013 comments regarding the receiving water limitation provision of the subject order. This letter addresses other certain issues raised in the Petitions filed to the State Water Board.

Our letter is organized in two parts. The first part addresses certain issues contained in the petition filed by the Natural Resources Defense Council, Inc. (NRDC), Heal the Bay and Los Angeles WaterKeeper, (collectively hereafter referred to as NRDC Petitioners) regarding the validity of the LA MS4 Permit. The second part addresses our concerns with the LA MS4 Permit's expression of total maximum daily loads (TMDLs) and their associated Waste Load Allocations (WLAs) through the use of numeric water quality based effluent limits (WQBELs).

A. Response to NRDC Petitioners' December 10, 2012 Petition

1. NRDC Petition mischaracterizes application of water quality standards to municipal stormwater dischargers

As a preliminary matter, NRDC Petitioners' legal background discussion mischaracterizes the application of water quality standards (WQS) to municipal stormwater dischargers. (NRDC Petition, Memorandum of P's and A's, p. 8.) Specifically, the NRDC Petitioners argue "MS4 permits *must* ensure that discharges from storm sewers do not cause or contribute to a violation of water quality standards." (Id.) In other words, it NRDC Petitioners contend that National Pollutant Discharge Elimination System (NPDES) MS4 permits must require compliance with water quality standards. Such a statement is false and fails to consider long established law with respect to this issue. In the context of NPDES permits, the Clean Water Act (CWA) does not strictly impose WQS requirements

on Municipal Separate Storm Sewer Systems (MS4). The CWA treats stormwater differently from other discharges because, among other things: (1) it has an open and natural origin; (2) it has unpredictable, highly variable flows and volumes, which at times will exceed the size capacity of any capture, treatment, harvest, and use system; (3) the sources of potential pollutants are ubiquitous and the types of potential pollutants are infinite; (4) the concentrations of potential pollutants are usually relatively low, making the removal of pollutants from stormwater very difficult; and (5) the load of a potential pollutant generally comes from the relatively high volume of stormwater rather than the concentration of the potential pollutant.

The CWA requires permits for municipal storm sewers to “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (33 U.S.C., § 1342(p)(3)(iii).) In establishing this requirement, Congress intentionally exempted MS4 discharges from strict compliance with WQS. (*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999).) While MS4s are required to meet a technology-based standard for reducing pollutants in discharges to the maximum extent practicable (MEP), the water quality based effluent limitations in Section 301 of the CWA do not apply to MS4 permits. Rather, the permitting agency, i.e., the State Water Board and the regional water quality control boards (collectively, Water Boards), have the discretion and authority to impose requirements to meet WQS. (33 U.S.C. § 1342(p); *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).) In accordance with this federal scheme, therefore, only the WQS imposed by the Water Boards apply to MS4 dischargers. It is incorrect to state that MS4 permits *must* automatically impose WQS requirements.

The State Water Board exercised its discretion regarding compliance with WQS in MS4 permits, imposing permit provisions to control discharges so as not to cause or contribute to exceedances of WQS in receiving waters (known as “Receiving Water Limitations” or “RWLs”). (SWRCB Order WQ 98-01 (*Environmental Health Coalition*); WQ 99-05 (*Environmental Health Coalition*).) Although subject to much debate, CASQA contends that when the State Water Board adopted the original RWLs, it did not intend for MS4s to comply strictly with WQS. (See *In re Matter of the Petitions of Building Industry Assn. of San Diego and Western States Petroleum Assn.*, Order WQ 2001-15 (Nov. 15, 2001).) Rather, under the CWA, the State Water Board elected to impose an iterative approach for the implementation of best management practices (BMPs) in lieu of numeric water quality-based effluent limitations to meet WQS. (See SWRCB Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 98-01 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego County*).)

Thus, general understanding by CASQA and others has been that MS4s’ compliance with WQS is to be achieved over time, through an iterative approach whereby exceedances of WQS trigger a process of improvements. The iterative process allows for a logical, science-based, and progressive management process to achieve WQS, and is a mechanism for improving water quality while promoting adaptive management and continuous improvement.

The important take-away is that the RWLs are *discretionary* provisions – i.e., they are not required by the CWA, the federal regulations, or Porter-Cologne Water Quality Act (Porter-

Cologne). MS4 permits are, indeed, not subject to the same CWA requirements as other NPDES permits. Therefore, NRDC Petitioners' characterization regarding the application of WQS is inaccurate. Furthermore, because the application of WQS to municipal stormwater is discretionary, the Water Board's have the discretion to develop permitting programs and schemes that do not require strict compliance with WQS. The Watershed Management Plan (WMP) and Enhanced Watershed Management Plan (EWMP) provisions in the LA MS4 Permit are a clear example of Water Board discretion, and are legal under the CWA and Porter-Cologne.

2. Watershed Management Plan and Enhanced Watershed Management Plan Provisions do not violate Federal Anti-Backsliding Provisions

A central point of NRDC Petitioners' argument is that adoption of the WMP and EWMP provisions in the LA MS4 Permit violates federal anti-backsliding provisions. CASQA disagrees with these arguments for several reasons, including: (1) municipal RWLs are not final effluent limitations under the CWA, or permit standards or conditions within the meaning of the United States Environmental Protection Agency's (EPA) regulations; (2) the WMP and EWMP are not more lenient permit provisions, they are merely alternative compliance pathways; and (3) new information supports the need for a more rigorous iterative approach through the WMP and EWMP. Consistent with federal law, RWLs provisions can allow permittees flexibility to demonstrate compliance with WQS, and the WMP and EWMP provisions allow for the implementation of permit requirements in an integrated and collaborative manner to address water quality priorities.

a. Federal Anti-Backsliding Provisions Do Not Apply to RWLs

The federal anti-backsliding provisions are applied under Section 402(o) of the CWA or the EPA's regulations; however, neither applies to RWLs, which are discretionary provisions imposed by the State Water Board. Accordingly, the Permit's WMP and EWMP do not violate federal anti-backsliding provisions.

i) The CWA Anti-Backsliding Provisions do not apply because RWLs are not Effluent Limitations

Section 402(o) of the CWA (33 U.S.C. § 1342(o)) establishes anti-backsliding requirements that apply to effluent limitations. Specifically, the federal anti-backsliding provisions prohibit the reissuance or modification of a permit to include "effluent limitations" less stringent than "the comparable effluent limitations in the previous permit," unless certain exceptions are met. (33 U.S.C., § 1342(o).) The CWA anti-backsliding rules apply in two situations:

The first situation occurs when a permittee seeks to revise a technology-based effluent limitation based on best professional judgment (BPJ) to reflect a subsequently promulgated effluent guideline that is less stringent. The second situation addressed by § 402(o) arises when a permittee seeks relaxation of an effluent limitation that is based upon a State treatment standard or water quality standard.¹

¹ EPA (1989) Memorandum on Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits by James R. Elder, Director, Office of Water Enforcement and Permits at p. 1.

While NRDC Petitioners attempt to take an expansive view of the term “effluent limitations” to encompass the RWLs, it is important to note the actual text of Section 402(o)(1), which circumscribes the application of the statute:

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section [304(b)] of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section [301(b)(1)(C)] or section [303(d)] or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section [303(d)(4)] of this title.

The plain language of Section 402(o)(1) limits the anti-backsliding provisions to “effluent limitations” imposed under specific provisions in the CWA. Only if an “effluent limitation” is based on the specific enumerated provisions can anti-backsliding be triggered. As noted above, the RWLs provisions were adopted by the Water Boards within the discretion afforded to them in Section 402(p) of the CWA – a provision that is *not* listed in Section 402(o)(1). Accordingly, Section 402(o) expressly does not apply to RWLs adopted by the State Water Board within its discretion under Section 402(p).

ii) The EPA’s regulatory Anti-Backsliding Provisions also do not apply to RWLs

Petitioners claim that even if RWLs are not “effluent limitations” under the statutory anti-backsliding provisions, the Permit’s RWLs provisions violate the EPA’s anti-backsliding regulations because they are “standards” or “conditions” within the meaning of title 40 of the Code of Federal Regulations (CFR)² section 122.44(l). However, when this anti-backsliding regulation is read in context with other regulations in the same chapter, the meaning of “standard” and “condition” do not apply to the RWLs provisions.

NRDC Petitioners improperly strip quote the language of Section 122.44(l)(1). This provision states that, subject to paragraph (1)(2) and certain circumstantial changes, “when a permit is renewed or reissued, *interim* effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit.” Setting aside the fact that RWLs are not effluent limitations, standards, or conditions, it is worth noting that the provisions in question have been adopted are not identified as interim provisions. Therefore, the cited anti-backsliding regulations do not apply. Moreover, even if these regulations apply to final amended or revised standards or conditions, the RWLs do not fall within any of these categories.

As explained above, RWLs are not effluent limitations.³ Additionally, RWLs are not “standards” or “conditions” under the EPA’s regulations. Section 122.2 defines “[a]pplicable

² All citations in this subsection shall refer to title 40 of the Code of Federal Regulations, unless otherwise noted.

³ The federal regulations define effluent limitation to mean, “any restriction imposed by the Director on quantities, discharge rates and concentrations of “pollutants,” which are “discharged” from “point sources” into “waters of the

standards and limitations,” limiting the term to certain categories of requirements “under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.” Throughout the remainder of the regulations in Part 122, any and all references to “standards” relate back to the foregoing CWA sections. Nothing in the regulations place RWLs within the meaning of “standards.”

Additionally, the term “conditions” is discussed in Subpart C of the regulations, entitled “Permit Conditions.” The conditions listed throughout the subpart have something in common – they are required conditions as described in the regulations. In contrast, the RWLs provisions are *discretionary* and not required “conditions” outlined in the regulations or in the CWA.⁴ Accordingly, the RWLs are not a “condition” under the anti-backsliding provisions in Section 122.44(l), which is also located in Subpart C.

Because the RWLs are not effluent limitations, conditions, or standards, the anti-backsliding federal regulations do not apply.

iii) Even if Federal Anti-Backsliding Provisions apply, exceptions to Anti-Backsliding apply

Both the CWA and the federal regulations include exceptions to the anti-backsliding provisions, acknowledging that new information may lead to changed permit limitations, standards, or conditions. Thus, even if the anti-backsliding provisions could apply to the RWLs in the Permit and the modifications are viewed as less stringent, neither of which is true, the new information exception would save the amendments.

The CWA states that a permit may be renewed, reissued, or modified to a less stringent effluent limitation if “information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of a less stringent effluent limitation at the time of permit issuance.” (33 U.S.C. § 1342(o)(2)(B)(i).) The federal regulations similarly allow less stringent conditions, standards, or limitations when new information would have justified the application of different permit conditions at the time of issuance. (40 CFR §§ 122.44(l)(1), 122.62(a)(2).)

The WMP and EWMP revisions were made based on new information relating to MS4s’ efforts to achieve compliance with WQS over time. Due to the nature of stormwater discharges and the difficulty of removing pollutants from such discharges, alternative compliance pathways are needed to further the iterative process towards compliance. Municipalities have compiled many years of monitoring data, and the information supports the position that significant investment and time is required to provide solutions for water quality challenges. The nature of the problem is largely created by the characteristic imperviousness of the developed environment.

Controlling sources of pollutants and reconstructing the built environment towards restoration of

United States,”” (40 C.F.R., § 122.2.) The RWLs in the LA MS4 Permit, and generally, are narrative statements that do not constitute an actual restriction on quantity, rate and concentration of pollutants that may be discharged by the MS4.

⁴ While Section 122.44(k) mentions BMP “to control or abate the discharge of pollutants when . . . (2) [a]uthorized under section 402(p) of the CWA for the control of storm water discharges,” it does not change the analysis. CWA section 402(p)(3)(B)(iii) requires controls to reduce the discharge of pollutants to the MEP, including BMPs, but allows the State to require other provisions it determines appropriate for the control of municipal stormwater discharges. The RWLs fall within the latter discretionary provision.

more natural hydrologic processes is tied to the development cycle and will require years to complete. Further, for example, programs targeting public behavior modification require time to reach maximum effectiveness.

The compilation and examination of monitoring data provide information assisting the iterative process towards continuous improvement in meeting WQS. The new information supports the need for alternative compliance pathways, such as the WMP and EWMP, to further improvements in water quality. Accordingly, even if the anti-backsliding provisions were applicable, the exception to anti-backsliding applies.

3. Adoption of the LA MS4 Permit does not violate State or Federal Anti-Degradation Provisions

Next, NRDC Petitioners argue that the Los Angeles Water Quality Control Board (Los Angeles Water Board) failed to conduct a required anti-degradation analysis. The Permit revisions do not trigger the state and federal anti-degradation principles. State Water Board Resolution No. 68-16, *Statement of Policy With Respect to Maintaining High-Quality Waters in California*, (Resolution No. 68-16) contains the state anti-degradation policy and title 40 of the CFR section 131.12 sets forth the federal policy that applies to NPDES permits. The state policy has been interpreted to incorporate the federal policy where it applies.⁵ State and federal guidance explain that an anti-degradation analysis is not required for an NPDES permit when the proposed action will not reduce existing water quality.

As EPA explained: “The first step in any antidegradation analysis is to determine whether or not the proposed action will lower water quality. . . . If the action will not lower water quality, no further analysis is needed and EPA considers 40 CFR 131.12 to be satisfied.”⁶ Similarly, state guidance provides that the “federal antidegradation policy is triggered by reduction in surface water quality” and “only if there is a reduction in water quality” must anti-degradation review occur.⁷ Existing water quality includes that which is *already permitted or authorized*, even if the permitted degradation has yet to occur.⁸ In a memorandum of points and authorities before a California court, the Regional Water Board said:

Where applicable, the state [antidegradation] policy incorporates the federal policy. Further, the state policy is consistent with Clean Water Act requirements. The state policy is triggered by a lowering of water quality after a permitting decision or other regulatory action. In general, the policy requires an antidegradation analysis when a permit authorizes a new discharge or a

⁵ See e.g., *In the Matter of the Amendment of the City of Los Angeles’ Water Rights Licenses*, Decision No. 1631, p. 250.

⁶ Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. § 131.12 (June 3, 1987), pp. 3-4.

⁷ Memorandum to Regional Board Executive Officers from William R. Attwater, Chief Counsel, Federal Antidegradation Policy (Oct. 7, 1987) (Attwater Memo re: Federal Antidegradation Policy), p. 3; see Antidegradation Policy Implementation for NPDES Permitting, APU 90-004, p. 2.

⁸ APU 90-004, p. 4.

significant increase in discharge flow rates, or relaxes existing requirements in a manner that will increase pollutant loadings.⁹

The court agreed with the Regional Water Board's position, stating in the issued judgment:

[T]he Board is not required to undertake an antidegradation analysis where there is no reason to believe the activity could or will lower water quality. . . . [L]ittle would be gained in compelling the Board to waste time and money performing an antidegradation analysis when there is no reason to believe that existing water quality will be degraded by the proposed action.¹⁰

Neither the anti-degradation policies nor related guidance calls for a new analysis based on a modification of the manner for addressing RWLs provisions. The MS4 is still required to comply with WQS; however, the MS4 may now use the WMP and EWMP to demonstrate its compliance with WQS. The RWL provisions in Part V.A. of LA MS4 Permit are nearly identical to those in the 2001 Permit, including the prohibition on discharges from the MS4 that cause or contribute to violations of RWL and the process for addressing discharges from the MS4 that have caused or contributed to violations of RWL.

The WMP and EWMP provisions merely allow the permittee flexibility to implement permit requirements in an integrated and collaborative manner to address water quality priorities and to achieve WQS as soon as possible. Accordingly, the adoption of the Permit is consistent with state and federal anti-degradation provisions. The Permit does not allow for increased degradation. Rather, the iterative approach established through the WMP and EWMP is to the maximum benefit to the People of the State and will provide multiple benefits, including water quality, water supply, and flood control.

Because the WMP and EWMP will not lower water quality relative to the baseline, no further analysis is necessary and the state and federal anti-degradation requirements are satisfied. An anti-degradation analysis would result in a waste of time and money. Therefore, adoption of the Permit is consistent with the anti-degradation requirements.

B. Response to TMDL Provisions in LA MS4 Permit

The LA MS4 Permit in Provision VI.E includes requirements implementing some 33 TMDLs that include WLAs for MS4s discharges. These requirements are expressed in several ways depending upon the nature of the pollutant, its impact on the receiving water and whether the WLA is an interim or final allocation. Our comments here are directed at the expression of the limitations intended to implement final WLAs.

The LA MS4 Permit includes limitations to address the final WLAs for all TMDLs (except trash) through one of the following options:

⁹ Respondent's Memorandum of Points and Authorities In Support of Opposition to Motion for Preemptory Writ of Mandate, *California Sportfishing Protection Alliance v. California Regional Water Quality Control Board, Central Valley Region*, Case No. 34-2009-80000309 (September 3, 2010), p. 13.

¹⁰ *California Sportfishing Protection Alliance v. California Regional Water Quality Control Board, Central Valley Region*, Case No. 34-2009-80000309 (March 28, 2011), p. 7.

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- (1) There are no violations of the final water quality-based effluent limitation for the specific pollutant at the Permittee's applicable MS4 outfall(s);
- (2) There are no exceedances of applicable receiving water limitation for the specific pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);
- (3) 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; or
- (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24-hour event is retained for the drainage area tributary to the applicable receiving water.

The requirements associated with the final WLAs are similar to those associated with interim WLAs with one significant difference. For requirements associated with an interim WLA, the MS4 may demonstrate compliance by submitting an approved Watershed Management Program or EWMP consistent with the LA MS4 Permit's requirements (a BMP based compliance approach). Such an option is not available for requirements associated with final WLAs. The options available (specifically options 1 and 2 above) for requirements associated with final WLAs essentially include numeric effluent limits (NELs) for stormwater discharges. CASQA has serious reservations with such an approach and offers the following comments.

1. NELs are contrary to Blue Ribbon Plan Recommendations

In 2005 the State Water Board convened a "Blue Ribbon Panel" to determine if it was technically feasible to establish numeric effluent limitations for inclusion in stormwater permits. The Blue Ribbon Panel found that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." (See, e.g., Exhibit G of the County of Los Angeles 7/23/12 comment letter - State Water Board Blue Ribbon Panel Final Report (Final Report), p. 8.)

The State Water Board has used the findings of the Blue Ribbon Report in its own development of the recently adopted Caltrans MS4 permit. In response to public comment dated April 27, 2012, with respect to the draft tentative order for the California Department of Transportation, State Water Board staff cited the findings of the Blue Ribbon Panel and endorsed them. "Consistent with the findings of the Blue Ribbon Panel and precedential State Water Board orders (State Water Board Orders Nos. WQ 91-03 and WQ 91-04), this Order allows the Department [Caltrans] to implement BMPs to comply with the requirements of this Order." (SWRCB Comment Response Report, for Caltrans MS4 Permit, April 27, 2012, Page 2 of 110).

2. NELs are not mandated by EPA regulations/guidance

EPA consistently provides for flexibility in its regulations and guidance regarding the establishment and use of BMPs in NPDES permits for MS4 dischargers. The regulations in section 122.44(k) of the Title 40 of the Code of Federal Regulations directly authorize the use of

BMPs to control or abate the discharge of pollutants when “... (2) Authorized under section 402(p) of the CWA for the control of storm water discharges; [and] (3) Numeric effluent limitations are infeasible; or (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.” (40 C.F.R. § 122.44(k)). The State Water Board recognizes that federal regulations do allow for the use of BMPs rather than numeric effluent limitations. For example, in the recently adopted Caltrans permit that State Water Board acknowledged that it chose to “impose BMPs for control of storm water discharges in lieu of numeric effluent limitations,” citing section 122.44(k)(2) and (3).

The only EPA regulation directly addressing how to implement WLAs in NPDES permits is 40 CFR 122.44(d)(1)(vii). This regulation should not even apply directly to supersede the MEP standard. However, even if the regulation is applied, as the language of the permit suggests, the regulation merely provides that water quality-based effluent limits (WQBELs) in NPDES permits that implement WLAs in approved TMDLs must be “*consistent with the assumptions and requirements of any available WLA for the discharge.*” This consistency does not require that effluent limits in NPDES permits be expressed numerically, or in a form identical to the form of the WLA. The regulation leaves the State flexibility to design limits appropriate to MS4 discharges, using BMPs and watershed programs.

Over the last decade, EPA has issued a succession of policy memoranda and guidance documents regarding the incorporation of TMDLs into stormwater permits, including:

1. *Guidance for Developing TMDLs in California* (EPA Region 9). January 7, 2000
2. *Establishing Total Maximum Daily Load (TMDL) WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Wayland and Hanlon). November 22, 2002
3. *TMDLs to Stormwater Permit Handbook* (Draft) (EPA). November 2008
4. *Revision 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”* (Hanlon and Keehner). November 12, 2010
5. *Untitled Letter* (Kevin Weiss). March 17, 2011

In each of these EPA documents, EPA allows for discretion on the part of the permitting authority in the use of numeric effluent limitations or BMP-based effluent limitations when addressing municipal stormwater. This flexibility is a key aspect of both Wayland and Hanlon (2002), and Hanlon and Keehner (2010). Further, it is important to note that the EPA documents do not identify any differences or distinctions between interim and final WLAs when being applied as effluent limitations. In particular, the guidance does not limit BMP-based effluent limitations to interim WLAs only.

Moreover, a recent decision by the United States District Court for the Middle District of Pennsylvania clearly indicates that states have considerable discretion in interpreting and implementing WLAs. (See *American Farm Bureau Federation v. United States Environmental Protection Agency* (September 13, 2013) 2013 U.S. Dist. LEXIS 131075.) As recognized by the Court, “WLAs are not permit limitations *per se*; rather they still require translation into permit limits . . . [W]hile [40 C.F.R. § 122.44(d)(1)(vii)(B)] require[s] *consistency*, [it does] not require

that permit limitations that will finally be adopted by a final NPDES permit be *identical* to any of the WLAs that may be provided in a TMDL.” (*Am. Farm Bur. Fedn. v. U.S. EPA*, 2013 U.S. Dist. LEXIS 131075, *103, internal citation omitted.)

The 2010 memorandum deserves special discussion here. First, EPA guidance indicates that NPDES provisions implementing TMDLs need to be enforceable, objective, and measurable. The Hanlon and Keehner (2010) memorandum notes that while numeric effluent limitations provide this type of accountability, effluent limitations expressed as BMPs can include objective and measurable elements. Such measurable elements might include, “*schedule for BMP installation or level of BMP performance*” or “*numeric benchmarks for BMPs and associated monitoring protocols or specific protocols for estimating BMP effectiveness.*” (Hanlon and Keehner (2010), p. 3.) The LA MS4 Permit provides for enforceable, objective, and measurable provisions in the WMP and EWMP provisions.

Second, the Hanlon and Keehner 2010 memorandum further states that “Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality excursion, EPA recommends that, *where feasible*, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards.” (Hanlon and Keehner (2010), p. 2, emphasis added.) There are generally two approaches for conducting a reasonable potential analysis (RPA): (1) Use effluent and receiving water data and modeling techniques (e.g., approach contained in the State’s *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (“SIP”)¹¹; or, use a non-quantitative approach. There is no evidence in the record that indicates that the Los Angeles Water Board conducted a reasonable potential analysis, or determined that it was feasible to include numeric effluent limitations here to implement TMDL final WLAs. Moreover, with respect to the issue of feasibility, the County provided substantial evidence in Exhibit R of their July 23, 2012 letter, which included a quantitative analysis of a TMDL implementation plan that demonstrated complexities and uncertainties associated with TMDL compliance and final WLAs. Because of this uncertainty, the use of numeric limitations is infeasible.

Third, the Hanlon and Keehner (2010) memorandum caused considerable concern throughout the United States. In response to the significant concern raised, EPA issued a letter in 2011 requesting comments on the memorandum. (See K. Weiss, March 17, 2011.) The comment period closed on May 16, 2011. Since closure of the comment period, EPA has not issued a revised version of the memorandum or a response to comments. However, EPA staff has recently indicated that a revised version of the Hanlon and Keehner (2010) memorandum is currently under review internally. More importantly, in the letter requesting comments, EPA responded to some of the concerns expressed by stakeholders and emphasized that permit writers have considerable flexibility in establishing effluent limitations in permits, noting in particular:

- EPA does not anticipate that NELs applied “end-of-pipe” will be used frequently;

¹¹ By its own terms, the SIP does not apply to stormwater discharges. (See SIP, p. 3, fn. 1.) The reference to the SIP here is merely to provide an example of a traditional reasonable potential analysis used for conventional point sources of discharge.

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- NELs are broadly defined and can include surrogates such as stormwater volume; and
- The 2010 memorandum is intended as guidance and does not include legally binding requirements.

Accordingly, there is nothing in law or guidance that mandates the use of NELs in municipal stormwater permits when implementing final WLAs.

3. Many Permits use a BMP-based approach for implementing WLAs

In recent permit actions, permitting authorities have taken a variety of approaches to incorporate TMDL compliance with WLAs into MS4 permits. In a review of ten recently issued (since 2009) final and draft permits¹², including permits from Washington D.C. and Washington State, all but one identified a BMP-based approach for implementing TMDL WLAs. The permits reviewed include the following:

1. Order No. R9-2013-0001 NPDES Permit and Waste Discharge Requirements for Discharges From The Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region issued by the San Diego Regional Water Quality Control Board. May 8, 2013 (San Diego Permit)
2. Order No. 2013-001-DWQ NPDES General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s). February 5, 2013 (Phase II Permit)
3. Order No. 2012-0011-DWQ NPDES Statewide Storm Water Permit for State of California Department of Transportation issued by the State Water Resources Control Board. September 19, 2012 (Caltrans Permit)
4. Phase I Municipal Stormwater Permit National Pollutant Discharge Elimination System and State Waste Discharge General Permit for discharges from Large and Medium Municipal Separate Storm Sewer Systems, August 1, 2012, issued by the State of Washington Department of Ecology. (Draft Washington State Permit)
5. NPDES Permit No. DC0000221 Authorization to Discharge under the National Pollutant Elimination System Municipal Separate Storm Sewer System Permit, October 7, 2011, issued by USEPA Region 3 (Washington D.C. Permit)
6. Order No. R4-2010-0108 Municipal Separate Storm Sewer Systems within the Ventura County Watershed Protection District, County of Ventura, and the Incorporated Cities Therein issued by the Los Angeles Regional Water Quality Control Board. July 8, 2010 (Ventura Permit)

¹² CASQA requests the State Water Board take official notice of the permits identified here pursuant to section 648.2 of Title 23 of the California Code of Regulations as such permits are facts that may be judicially noticed by courts of this state.

7. Order No. R8-2010-0036 San Bernardino County Flood Control District, the County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana issued by the Santa Ana Regional Water Quality Control Board. January 29, 2010 (San Bernardino Permit)
8. Order No. R8-2010-0033 Riverside County Flood Control District, the County of Riverside, and the Incorporated Cities of Riverside County within the Santa Ana issued by the Santa Ana Regional Water Quality Control Board. January 29, 2010 (Riverside Permit)
9. Order No. R2-2009-0074 San Francisco Bay Region Municipal Regional Stormwater NPDES Permit issued by the San Francisco Bay Regional Water Quality Control Board. October 14, 2009 (Bay Area Permit)
10. Order No. R8-2009-0030 The County of Orange, Orange County Flood Control District and the Incorporated Cities of Orange County within the Santa Ana Region issued by the Santa Ana Regional Water Quality Control Board. May 22, 2009 (North Orange County Permit)

Table 1 - Permit TMDL Compliance Provisions

Permit	Method of Assessing Compliance	Difference Between Interim and Final WLAs
San Diego Region Permit (San Diego County, South Orange County, Riverside County)	Multiple Options – BMP based or numeric based	Multiple Options available for both interim and final WLAs
Phase II Permit	BMP-based	TBD
Caltrans Permit	BMP-based	TBD
Washington State Permit	BMP-based	No difference noted
Washington D.C. Permit	BMP-based	No difference noted
Ventura Permit	Hybrid BMP-based	No difference noted
San Bernardino Permit	BMP-based	No difference noted
Riverside Permit	BMP-based	No difference noted
Bay Area Permit	BMP-based	No difference noted
North Orange County Permit	Hybrid BMP-based	No difference noted

For example, the Washington D.C. and the Bay Area permits integrate most aspects of the TMDL requirements into the permit conditions. However, the permits do not distinguish between interim and final WLAs. The Washington D.C. permit requires the discharger to develop a Consolidated TMDL Implementation Plan, which in many ways appears to be similar to the WMP and EWMP programs in the LA MS4 Permit. The Washington D.C. permit is particularly notable because it was issued by EPA Region 3 in 2012 after the Hanlon and Keehner (2010) memorandum. This provides for a significant example that EPA staff believe that it is not necessary or required to incorporate numeric effluent limitations to implement WLAs in adopted TMDLs.

The purpose of introducing these permits is to demonstrate that permitting authorities continue to incorporate numeric WLAs into MS4 permit as BMPs or implementation actions even after the Hanlon and Keehner (2010) memorandum was issued. Considering the Hanlon and Keehner (2010) memorandum, CASQA contends that the more appropriate focus is on measurable and objective provisions to assess and ensure implementation progress. The WMP and EWMP provisions of the LA MS4 Permit achieve such a purpose.

Thus, with respect to the incorporation of TMDLs (and their WLAs) into the Los Angeles Permit, CASQA recommends that final WLAs be reflected as BMP-based effluent limitations in subsequent permit actions. The approach is consistent with recent court decisions, EPA guidance and other MS4 permits implementing TMDLs. It is also consistent with the approach used by the Los Angeles Water Board in the LA MS4 Permit to incorporate the EPA promulgated TMDLs.

Moreover, use of BMP-based effluent limitations is consistent with adaptive management, which is a key part of assumptions of TMDL adoption that apply to municipal stormwater. In comparison, translating a WLA into a numeric effluent limitation significantly limits adaptive management. Once WLAs are incorporated as end of pipe numeric effluent limitations into permits, the ability to modify such WLAs based on new information becomes increasingly more difficult.

C. Conclusion

In conclusion, CASQA encourages the State Water Board to deny NRDC Petitioners' request to overturn the WMP and EWMP provisions in the LA MS4 Permit or remand the LA MS4 Permit back to the Los Angeles Water Board with specific direction to remove such provisions. (NRDC Petition for Review, p. 6.) NRDC Petitioners' have provided no viable legal arguments as to why the provisions in question are not appropriate, or appropriately adopted by the Los Angeles Water Board under the discretion afforded it under the CWA and Porter-Cologne. Further, CASQA encourages the State Water Board to rescind the Los Angeles Water Board's adoption of numeric effluent limitations for the implementation of WLAs, or at the very least, CASQA encourages the State Water Board to direct the Los Angeles Water Board to reconsider the inclusion of numeric effluent limitations as the only alternative for implementing WLAs. In its direction to the Los Angeles Water Board, the State Water Board should clearly indicate the use of BMP-based effluent limitations are legal and viable option for implementing interim and final WLAs in stormwater permits.

Thank you for the opportunity to comment. Please contact Geoff Brosseau, our Executive Director, at (650) 365-8620 if you have any questions or need additional information, or me at (714) 955-0670.

Sincerely,



Richard Boon, Chair
California Stormwater Quality Association