Building Industry Legal Defense Foundation

November 13, 2012

c/o Ms. Jeannie Townsend, Clerk to the Board
California State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Submitted via U.S. Mail and
Electronically at: commentletters@waterboards.ca.gov

Re: Comments of Building Industry Legal Defense Foundation Concerning Municipal Storm Water (MS4) Permits – Receiving Water Limitations Language.

Ladies and Gentlemen:

Thank you for this opportunity to provide comments to the State Water Resources Control Board ("SWRCB") concerning the question of receiving water limitations ("RWLs") language in municipal storm water ("MS4") permits. The comments herein are those of Building Industry Legal Defense Foundation ("BILD"), which represents the homebuilding and community development industries within a six-county Southern California region that includes Los Angeles County.

BILD is a separate non-profit mutual benefit corporation and affiliate of Building Industry Association of Southern California, Inc. ("BIASC"). BILD's constituents are BIASC (which is BILD's sole corporate member) and BIASC's nearly 1,000 member companies involved in homebuilding and community development. BILD's purposes are to monitor legal and regulatory conditions for the construction industry in Southern California and intervene as appropriate. BILD focuses on litigation and pre-litigation regulatory matters with a regional or statewide significance to its mission.

MS4 permits issued by regional water quality control boards ("RWQCBs") have major and increasingly direct ramifications for BIASC's member companies; and they impose onerous and sometimes impossible-to-fulfill mandates on the regulated community. Consequently, BILD is very interested in helping SWRCB to bring reason and practicality to the fashioning of MS4 permits.

Concerning the issue of incorporating RWLs into MS4 permits, BILD urges SWRCB to both reaffirm and clarify its previous policy imperatives concerning the primacy of the Best Management Practices ("BMP") approach and the iterative compliance approach to potential enforcement. Consistent with this, BILD urges SWRCB to recognize that the best course that it could take is to provide the full safe harbor to dischargers that are either (i) complying with the implementation provisions of a TMDL, or (ii) engaging in an iterative process to address exceedances caused by wet or dry weather discharges. Thus, BILD urges SWRCB to select Option 5 from among the

five options that it set forth when soliciting comments concerning the RWLs, although there are elements of Option 2 which might be considered and further developed for inclusion within a safe harbor, iterative compliance process.

Two of the alternatives set forth by SWRCB (Option 1 and Option 3) should be rejected without hesitancy. Specifically, Option 1 would impose a new, strict liability regime – one in which RWLs are directly translated in water quality based effluent limits ("WQBELs") for MS4 systems. Option 3 would do the same thing, except that the WQBELs would be established by reference to the calculated total maximum daily loads ("TMDLs"), rather than the RWLs themselves. Options 2 and 4 are also problematic in that each fails to provide an adequate and sure safe harbor based independently on an iterative compliance process. Indeed, an iterative compliance process based on the BMP approach is appropriate for many NPDES permits, especially where highly-variable storm water is at issue. Such an approach is particularly necessary concerning MS4 operations because of many compounding issues about causation, economic and technical feasibility, the highly-variable nature of storm water generally, and the special challenges related to the control of pollution from non-point sources which drain into MS4 systems. For the reasons explained below, BILD urges SWRCB to settle on the safe harbor approach independently based on an iterative compliance process, which is Option 5 in the present Issue Paper.

1) **California Water Code section 13241 must be taken into account and applied if and whenever considering whether to impose any WQBELs in the MS4 context.**

All persons who possess a sound appreciation of both the technical challenges that MS4 operators face and the relevant law should recognize that Options 1 and 3 are unworkable and unjustifiable. First, any direct translation of RWLs into WQBELs for MS4 systems would be inconsistent with applicable federal regulations which specify a precise methodology and required steps before any WQBELs can be imposed consistent with federal law. Specifically, 40 C.F.R. section 122.44(d)(1)(ii) and (iii) sets forth a specific process for establishing enforceable WQBELs.[1] Therefore, if and to the extent

[1] Given the extreme variability of storm water, it is most probable that compliance with the Section 122.44(d)(1) procedures would result in adherence to an iterative BMP process approach. *See* "In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn.," Order WQ 2001-15 (Nov. 15, 2001). The order explained that site-specific, monitored exceedances of TMDL WQBELs and receiving water limitations would not constitute permit violations so long as permittees are implementing the required "iterative process."

that SWRCB believes that RWQCBs are merely adhering to federal law when imposing MS4 requirements, then SWRCB should recognize that 40 C.F.R. section 122.44(d) cannot be squared with any uncritical translation of RWLs or TMDLs into WQBELs.

If SWRCB instead wants to advise the RWQCBs to exercise "independent state authority" to translate RWLs or TMDLs directly and uncritically into WQBELs, then such a step would violate California Water Code section 13241. Specifically, RWLs are themselves established by reference to designated beneficial "uses" of various receiving waters – typically without adequate or sometimes any consideration of economic factors or the practical limitations on coordinated efforts to protect or improve storm water quality. Virtually all RWLs were established without adequate consideration of the highly-variable nature of storm water quality (wrought by the high variability of storm events) or the physical loading of natural pollutants into MS4 systems (e.g., turbidity and bacteria). Subsections (c) and (d) of Section 13241, especially, were never adequately taken into account when RWLs were established; yet they must be taken into account whenever WQBELs are imposed as MS4 permit requirements under "independent state authority." ***Any uncritical, direct translation of RWLs or TMDLs into WQBELs for MS4 operations would therefore violate California's Porter-Cologne Act.***

Importantly, SWRCB admits that RWQCBs wield their regulatory *discretion* when they establish MS4 requirements, including the discretion to impose – or not to impose – any WQBELs. For example, SWRCB's Issue Paper that invited these comments states:

> In the context of NPDES permits for MS4, … the [federal] Clean Water Act does not reference the need to meet water quality standards. MS4 discharges must meet a technology-based standard of reducing pollutants in the discharge to the Maximum Extent Practicable (MEP), but *requirements to meet water quality standards are at the discretion of the permitting agency*.

Issue Paper, at p. 1 (emphasis added).

Clearly, imposing WQBELs in MS4 permits is therefore elective, as was recognized by the court in *San Diego Building Industry Assn. v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 883 (4th Dist. 2004) ("*BIASD*"). *See also Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-67 ("Under 33 U.S.C. § 1342(p)(3)(B)(iii), the … choice to include either management practices or numeric limitations in the permits was within [EPA Administrator's or the State's] discretion."). Because any RWQCB has the discretion to impose (or not impose)

WQBELs in the MS4 context, any such imposition would be subject to the consideration of Section 13241 factors.

2) SWRCB should take the present opportunity to recognize that RWQCBs must consider and reconcile the Section 13241 factors whenever they exercise their discretion when imposing NPDES requirements.

BILD submits that, consistent with the principles of federalism which are inherent in the Clean Water Act and reflected in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 ("*Burbank*"), the water boards must conform their actions to the Porter-Cologne Act's requirements (i.e.., consider the Section 13241 factors) whenever exercising discretion to establish NPDES requirements.

SWRCB and the RWQCBs have long been charged with administering the nationwide NPDES program within California. See *Shell Oil Co. v. Train* (9th Cir. 1978) 585 F.2d 408, 410. Under the resulting combined state-federal permitting NPDES regime and MS4 operations specifically, the RWQCBs are responsible for imposing permit requirements which will reduce the discharge of pollutants "to the maximum extent practicable ("MEP")...." 33 U.S.C. § 1342(p)(3)(B)(iii).

Separately, California Water Code sections 13241 and 13263 require the Board, whenever it is determining permit requirements, to apply six specific, non-exclusive considerations (including economic considerations, the need for regional housing, and the practical likelihood of achieving water quality improvements through coordinated efforts). Specifically, the six, non-exclusive § 13241 factors are:

(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 within the region.

(f) The need to develop and use recycled water.

Acting as a bridge between the nationwide federal law and the Porter-Cologne Act, California Water Code section 13372 provides that Sections 13241 and 13263 must be applied to the state water boards' implementation of the federal Clean Water Act unless such an application is "inconsistent" with the federal law. Importantly, there is no inconsistency between the section 1342(p)(3)(B)(iii) mandate to require pollution reduction to the MEP and the Section 13241 mandate to take into account certain non-exclusive factors whenever issuing waste discharge (i.e., permit) requirements. Thus, whenever an exercise of regulatory discretion is at issue, there is nothing about the federal Clean Water Act that negates the Section 13241 mandate.

The fact that MS4 permitting is an act of discretion is underscored by the MEP standard itself. The maximum extent of that which is "practicable" is not an extraneous object to be indicated by irrefutable and precise proof. Instead, in the context of governmental decisions, a legislative directive to an agency to act or impose to the maximum extent "practicable" is a legislative directive to act to the maximum extent that is "advisable." *Outfitters Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 247 ("[C]ourts have said that 'practicable' in a government context means that an entity is vested with discretion to consider the 'advisability' of an action…."); *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1183-84; *Conservation Law Foundation v. Evans* (1st Cir. 2004) 360 F.3d 21, 28 ("[B]y using the term "practicable" Congress intended rather to allow for the application of … discretion in determining how best to manage [the natural] resource."). Although "practicable" is not defined in the federal Clean Water Act, all regulatory definitions of the terms imply the need to the regulator to *consider, balance and decide* – i.e., to wield regulatory discretion. *See, e.g.,* 8 C.C.R § 1504(J) ("Practicable … [m]eans capable of being accomplished by reasonably available and workable means.").

Recognizing that the ascertainment of MEP controls is an exercise of regulatory discretion, the federal and state courts have persistently rejected litigants' arguments that MS4 permits ***must*** impose upon the MS4 permittees to any particular extent or in some particular manner, such as by imposing numeric effluent limitations or WQBELs. *See Natural Resources Defense Council, Inc. v. U.S. E.P.A.* (1992) 966 F.2d 1292, 1308 ("[T]he language in [section 1342(p)(3)(B)(iii)] … requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements."); *Divers Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, 261 ("[I]n enacting section 402(p)[,] Congress intended to permit the EPA and [state] permitting authorities wide discretion in regulating storm water runoff…."). In all of these cases, SWRCB and the RWQCBs have consistently defended their discretionary powers concerning NPDES permitting. However, the same water boards have also

maintained that they do *not* need to comply with the Section 13241 requirements when they exercise discretion when implementing the NPDES.

The water boards' opposition to applying Section 13241 to their discretionary acts seems based upon the unstated assumption that the federal Clean Water Act and the Porter-Cologne Act combine to negate the California Legislature's Section 13241 mandate, even though it is a critical part of the water boards' enabling statute. Specifically, the California water boards must believe that the federal law ***preempts*** the California Legislature's specified mandates concerning how the water boards must exercise their discretion. If so, the water boards are – BILD believes – mistaken.

When Congress enacted the federal Clean Water Act, it took care to "*recognize, preserve, and protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis added). Under the Act, the states were entitled to qualify for and, upon such qualification, to assume the primary responsibility for implementing and enforcing the National Pollution Discharge Elimination System ("NPDES") as long as their state regulatory regimes were sufficient to achieve any minimum protections required by the Clean Water Act and federal limitations promulgated thereunder. 33 U.S.C. §§ 1342(b) and 1370. In 1978, the U.S. Ninth Circuit Court of Appeals explained the distribution of powers between federal and State governments concerning NPDES, and described the legal relationship as follows:

> Congress clearly intended that the states would eventually assume the major role in the operation of the NPDES program…. Under § 1342(b), a state may submit to the EPA a proposed permit program governing discharges into navigable waters within its borders. If the state can demonstrate that it will apply [any federally prescribed] effluent limitations and the [Act's] other requirements in the permits it grants and that it will monitor and enforce the terms of those permits, then, unless the Administrator … determines that a state program does not meet these requirements, he must approve the proposal (§ 1342(b)).… Upon approval of a state program, the EPA must suspend its own issuance of permits covering those navigable waters subject to the approved state program (§ 1342(c)). However, while the direct federal regulatory role largely ceases following EPA approval of a state program, the EPA does retain a review authority over the states. The EPA may veto particular [individual] permits issued by the state …, or it may withdraw approval of the entire state program upon a determination … that the [overall] program is not being administered in compliance with the mandates of federal law (§ 1342(c)). Despite this residual federal supervisory

> responsibility, the federal-state relationship established under 33 U.S.C. § 1342 is "a system for the ***mandatory approval of a conforming State program*** and the consequent suspension of the federal program (which) ***creates a separate and independent State authority to administer the NPDES pollution controls***." *Mianus River Preservation Committee v. Administrator, EPA* (2d Cir. 1976) 541 F.2d 899, 905.
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> California has adopted a plan for the issuance of NPDES permits [the Porter-Cologne Act] which has been approved by the EPA. 39 Fed. Reg. 26,061 (1973). The California State Water Resources Control Board ("State Board") and its nine subsidiary regional boards thus have primary responsibility for the enforcement of the [Clean Water Act]… in California.

Shell Oil Co. v. Train, 585 F.2d 408, 410 (9th Cir. 1978) (emphasis added).

California was the first state in the nation which EPA authorized to implement NPDES within its boundaries. As a result, EPA's role in NPDES administration was withdrawn in favor of the water boards' administration of NPDES. Under the congressionally-prescribed arrangement, EPA still: (a) reviews the permits issued by the water boards, (b) may veto inadequate permits (a reactive legal role), and (c) may revoke California's implementing authority entirely if EPA concludes that the state is implementing the NPDES program inadequately. *See* 33 U.S.C. § 1342(d); 40 C.F.R. § 123.44; *Save the Bay, Inc. v. U.S. E.P.A.*, 556 F.2d 1282, 1285-87 (5th Cir. 1977). Under this structure, however, whenever one of California's water boards exercises its discretion, it does so, as the Ninth Circuit explained, pursuant to its "separate and independent [state] authority to administer the NPDES pollution controls…." *Shell Oil Co. v. Train*, 585 F.2d at 410 (quoting *Mianus River Preservation Committee v. Administrator, EPA* (2d Cir. 1976) 541 F.2d 899, 905).

Here, SWRCB is considering whether there should be statewide policy about imposing WQBELs on MS4 permittees. Before settling on any option, SWRCB should recognize the legislative requirements that it (perhaps, on a statewide basis, although the need for attention to individual contexts suggests otherwise) or each RWQCB (anecdotally) marshal evidence necessary to consider and reconcile the six balancing factors that are prescribed by California Water Code § 13241.

The California Supreme Court's *Burbank* opinion explained the interplay between federal and state water quality regulation and the applicability (or not) of the § 13241 balancing requirement to the establishment of state waste discharge requirements. Per

the *Burbank* opinion, in any situation where such a federal minimum requirement is prescribed:

1. First, the state may not avoid any federally-prescribed requirement or relax any federally-prescribed minimum standard. The U.S. Constitution's "Supremacy Clause" operates to prevent the State from relaxing a specified federal minimum requirement. *See Burbank*, 35 Cal.4th at 626 ("[Section 13241] cannot authorize a regional board, when issuing a wastewater discharge permit, to use [section 13241 considerations] to justify pollutant restrictions that do not comply with federal clean water standards."); 33 U.S.C. § 1370 ("[A] State or political subdivision … may not adopt or enforce any effluent limitation … or other limitation … which is less stringent than the effluent limitation … or other limitation … [established federally] under this chapter [i.e., the Clean Water Act]….").

2. Second, impliedly, if the State ***meets*** (i.e., does not exceed) a specified, federally-prescribed minimum nationwide standard, then the permittee cannot complain that the agency should have undertaken the minimum amount of consideration and reconciliation required under Water Code section 13241, because the failure to consider Porter-Cologne factors is of no consequence to the permittee. Where the state agency conforms the exercise of its independent authority to a specified, federally-prescribed minimum nationwide standard, the state agency itself is not exercising its discretion to impose upon the regulated community. In such a scenario, the state agency would not need to justify its determination by considering and reconciling the legislatively-imposed Section 13241 considerations.

3. Third, however, when a state agency exercises its discretion to impose a permit requirement, then State must apply and reconcile the Section 13241 balancing factors, in accordance with the Porter-Cologne Act. *Burbank*, 35 Cal.4th at 628 ("The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards."). The California Supreme Court explained in *Burbank* that federal law does ***not*** foreclose consideration of the prescribed Section 13241 factors:

> The federal Clean Water Act … does not … restrict the factors that a state may consider when exercising [its] independent authority, and thus it does not prohibit a state – when imposing effluent limitations that are more stringent than required by federal law – from taking into account [Section 13241 considerations when] doing so.

Id. at 627-28.

The California Supreme Court's appreciation for the State's continuing NPDES prerogatives, expressed in *Burbank*, are similarly recognized by the federal courts. *See, e.g., Mianus River Preservation Committee v. Administrator, EPA* (2d Cir. 1976) 541 F.2d 899, 905-06 ("It is quite clear … that Congress intended that the States' programs were to be their own and that it was fully aware of the difference between States' and [the EPA] Administrator's permits.").

Section 13241 prescribes a mandatory, minimum amount of regulatory circumspection that must occur when the water boards exercise their discretion. There is nothing about complying with Section 13241 which conflicts with any federal NPDES mandate sufficient to find federal preemption. The body of state and federal case law concerning general questions about federal preemption supports such a conclusion.

First, the question of whether federal law preempts a state legislative directive is a question of law that is for the courts to decide. *See, e.g., Industrial Trucking Association v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), *citing Inland Empire Chapter of Associated Gen. Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir.1996) and *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir.1993) ("Preemption is … a matter of law subject to de novo review."); *see also Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994) (meanings of federal regulations are questions of law to be resolved by the court).

The burden of proving that preemption should operate rests with the party asserting preemption (here, it would be the water boards) because federal preemption is an affirmative defense to a claim that a state statute applies. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956-57 (2004) ("The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption."); *see also United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990) (the burden is on the party asserting a federal preemption defense). Therefore, if the water boards were to continue to avoid the Section 13241 requirements, then the water boards will bear the burden of demonstrating that, as a matter of law, the actions required of it under the Porter-Cologne Act are preempted by federal law.

In doing so, they would face an uphill legal battle. The U.S. Supreme Court has ruled that courts should always attempt to reconcile the tension among separate sovereign laws to avoid federal preemption of state laws. *See Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("[T]he inquiry is whether there exists an irreconcilable conflict

between the federal and state regulatory schemes."). Both state and federal courts have a presumption against finding federal preemption, even when a federal statute *expressly* states that at least state laws are preempted to a degree. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773 (1999):

> In interpreting the extent of the express [federal] preemption, courts must be mindful that there is a strong presumption against preemption or displacement of state laws. Moreover, this presumption against preemption applies not only to state substantive requirements, but also to … causes of action.

Id. at 782.

In the absence of any express federal preemptive language – i.e., where a defendant argues that a federal law *impliedly* preempts a state law, the presumption against federal preemption is even stronger:

> In the absence of express pre-emptive language, Congress's intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.

Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 713 (1985).

Armed with understanding of the strong presumption against preemption, the water boards cannot reasonably maintain that the federal statute or regulations preclude the Board's application of the California Water Code § 13241 considerations to the discretionary policy choices before it. First, there is no express federal preemption here that would preclude consideration of the Section 13241 factors. Absent any expressly preemptive federal law, if preemption exists, it must be implied – and therefore the water boards must overcome the very strong legal presumption against implied federal preemption.

Second, the water boards cannot argue that the federal regulatory scheme at issue here "left no room" for supplementary state regulation. To the contrary, the federal statutory scheme here (the Clean Water Act) elevates authorized state agencies to the level of the "major" or primary governmental actors, wielding their "separate and independent State authority to administer the NPDES pollution controls." *Shell Oil Co. v. Train*, 585 F.2d at 410; *see also* 2 Cal. Jur. 3d Admin. Law § 589 (2012) ("[W]here coordinate state and federal efforts exist within a complementary administrative

framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.").

Finally, although the California water boards are acting as the federal EPA Administrator's congressionally-authorized *replacement* when establishing NPDES permit requirements (e.g., when requiring pollution controls to the MEP), the water boards admittedly wield discretion when deciding what pollution controls to require. Given the breadth of the discretion that the water boards exercise when regulating MS4 operations, they cannot reasonably maintain that they also lacked the power to consider and reconcile the six non-exclusive factors for consideration which the California Legislature prescribed in Water Code section 13241.

3) Generally and in light of Water Code section 13241, the iterative compliance process (Option 5) is well suited to MS4 operations because of the challenges inherent in conveying highly-variably storm water from myriad sources (both point sources and non-point sources) and the limited powers of the MS4 operators.

Concerning the ascertainment of MEP applicable to individual MS4 operators, it is clear that the RWQCBs exercise discretion and should pursue Section 13241. As SWRCB recognizes, the relevant case law holds that the federal Clean Water Act does ***not*** require any such regulatory imposition. *See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-67 ("Under 33 U.S.C. § 1342(p)(3)(B)(iii), the … choice to include either management practices or numeric limitations in the permits was within [EPA Administrator's or State's] discretion."); *BIASD*, 124 Cal.App.4th 866, 886-87 ("[S]ection 1342(p)(3)(B)(iii)'s statutory language unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with effluent limitations." (quotation omitted)). Indeed, in *BIASD*, the water boards argued successfully that they possessed the discretion under federal law to require MS4 compliance with NELs even if such an imposition exceeded the MEP. *See id*. at 882 ("[The water boards] argue that the "and such other provisions" [i.e, the discretionary clause of Section 1342(p)(3)(B)(iii)] cannot be fairly read as restricted by the 'maximum extent practicable' phrase.").

Given these relevant court opinions and the water boards' own argument in many cases, the water boards cannot maintain that federal law – and in particular the federal requirement to require pollution control to the MEP – require them to impose the WQBELs based on RWLs or TMDLs. Therefore, legally, the water boards cannot demonstrate that they are preempted by federal law from undertaking the minimum level of regulatory circumspection that the California Legislature prescribed in Water Code

section 13241. If the SWRCB (statewide) or the RWQCBs (anecdotally) want to try to impose WQBELs through MS4 permits, then they should respectively undertake the legislatively-prescribed level of circumspection concerning all discretionary waste discharge requirements.

The basic nature of MS4 operations make them particularly ill-suited to any translation of RWLs or TMDLs into WQBELs – whether under the federal regulatory procedures specified in 40 C.F.R. section 122.44(d) or pursuant to the considerations listed in California Water Code section 13241. When WQBELs are imposed without an accompanying safe harbor for an iterative compliance process, the WQBELs will themselves operate as automatic liability triggers, which invite citizen law suit enforcement (with the prospect of huge potential penalties and "private attorney general" attorneys' fees). It is essential that the regulatory scheme avoid penalizing MS4 permittees for the problematic quality of water that flow through MS4 systems inevitably from time to time. In many instances, MS4 permittees neither cause nor can prevent the water quality problems associated with their systems; and "due process" requires that proximate causation must be considered when determining their liability.

To illustrate, SWRCB staff knows that many of the problems with the quality of the water within the MS4s are due to natural loads (e.g., excessive natural "waste" from mountainous natural areas) and other constituents that are uncontrollable in large storm events. It is improper to penalize the MS4 permittees under the Clean Water Act for the fate and disposition of such natural loads, because they do constitute an anthropogenic "addition" of a pollutant to receiving waters; and their discharge would not constitute the discharge of a pollutant as defined in the CWA by the permittees. *See* 33 U.S.C. § 1362(12) (definition of "discharge of a pollutant" for federal Clean Water Act purposes). Similarly, other influent into an MS4 – even if it is anthropogenic in its origins – is simply impossible to prevent or reduce in many storm events (e.g., airborne deposition). Accordingly, no MS4 operator should have legal responsibility under the CWA for such their inevitable discharge from the MS4 system. Yet any imposition of WQBELs (based on RWLs or TMDLs) as liability triggers ignores questions about impossibility and causation.

Even in the context of relatively strict industrial permits and anthropogenic activities, due process concerns about causation must be taken into account. *See, e.g.*, *American Iron and Steel Institute v. E.P.A.*, 526 F.3d 1027, 1055-56 (3rd Cir. 1975) ("due process" concerns require a net-gross adjustment if a plant could be subjected to heavy penalties because of circumstances beyond its control); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("Industry is … required [by EPA] to treat and reduce pollutants *other than those added by the plant process*. This, we are of opinion, is beyond

the scope of EPA's authority." (emphasis added)); *Northern Plains Resource Council v. Fidelity Exploration and Development Co*., 325 F.3d 1155, 1162 (9th Cir. 2003) ("but for" causation was sufficient to show that alteration of water quality was "man-induced," and thus pollution subject to the CWA). The E.P.A. was compelled to respond to such court rulings by promulgating the so-called "net-gross" regulations found at 40 C.F.R. § 122.45(g), which allow industrial dischargers to take into account the water quality of influent into their systems. *See American Iron and Steel Institute v. E.P.A.*, 526 F.3d at 1055-56.

Here, SWRCB – unless it adopts its proposed Option 5 and prescribes that numerical exceedances of RWLs and TMDLs are not *ipso facto* or presumptive permit violations – will be failing to consider causation in connection with storm water discharges from the MS4s. For example, even during modest or moderate storms, sediment discharges (with their attendant readings for turbidity and total suspended solids ("TSS")) will flow *naturally* from many land areas, including from lands that are undisturbed by anthropogenic activity. The TSS concentrations and turbidity readings of such natural discharges will depend on many factors, each of which is extremely difficult to predict, measure, prevent or repeat, such as the anecdotal storm movements and dynamics, fine-scale storm intensity (especially), storm duration, storm water volume, the exact site location, geology, topography, vegetation, soil characteristics, and the like. Given the myriad factors at play, it is effectively impossible to determine what proportion of problematic constituents in storm water entering and exiting MS4s should be excused due to impossibility and a lack of causation.

Because the MS4 permittees cannot control – and should not be required to control – unavoidable and natural discharges of water from its system, MS4 permits should operate to protect MS4 operators from unreasonable citizens' law suits. "In the absence of congressional abrogation of traditional principles of causation …, … parties should be held liable under [the relevant statute, even if it is a strict liability statute,] *only if their … actions proximately cause* [the harm]." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring) (emphasis added); *Kleebauer v. Western Fuse and Explosives Co*. (1903) 138 Cal. 497, 504-05 ("The damage in question resulted from a cause entirely beyond [the defendant's] control, and without any carelessness or negligence on its part whatever, and under the more recent and better line of authorities, as shown under such circumstances, it is not responsible.").

SWRCB knows that – during any appreciable storm event – MS4s will (i) necessarily yield *naturally-occurring* discharges of sediment, metals, bacteria, and the like (often flowing from uncontrollable non-point sources such as undeveloped lands), and (ii) unavoidably yield additional anthropogenic pollutants. Recognition of this fact alone

should lead SWRCB to conclude that any MS4 discharges which exceed RWLs or TMDLs should not *ipso facto* constitute permit violations.

A proper recognition of the myriad causes of MS4 exceedances will also have major implications for any fair application of the regulatory processes indicated by 40 C.F.R. section 122.44(d)(1)(ii) and (iii), should SWRCB choose to heed those processes. Given the extreme variability of regional storm water (particularly in the southern part of California, where storm events tend to be "flashy"), and the exorbitant costs and impossibility of trying to meet strict RWLs and TMDLs through MS4 systems, any fair application of the federal regulatory process would surely result in the non-application of RWLs and TMDLs to hard-pressed MS4 operators.

Similarly, any fair consideration of the factors set forth in California Water Code section 13241 (c) and (d) should similarly rule out the discretionary application of RWLs and TMDLs to MS4 operators without the sure safe harbor of an iterative compliance process. An uncritical, immediate translation of RWLs or TMDLs into WQBELs cannot be squared against Water Code section 13241(c) (which requires consideration of "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area") or section 13241(d) (economic considerations).

Notably, the *BIASD* court, which upheld certain MS4 permit requirements against challenge, commented that the water quality based requirements at issue there were "particularly" unobjectionable *because they were for use in an iterative compliance process*:

> The legislative purpose underlying the Water Quality Act of 1987, and section 1342(p) in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, *particularly where, as here, that compliance will be achieved primarily through an iterative process*.
>
> *BIASD*, 124 Cal.App.4th at 883 (emphasis added).

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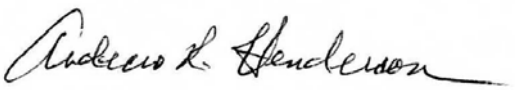
Thank you for considering these comments. We look forward to our ongoing discussions and cooperation with SWRCB, the RWQCBs and their staffs on the challenge of shaping and implementing progressive and workable water quality regulations.

Sincerely,



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cc: David W. Shepherd
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