November 13, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th floor
Sacramento, CA 95814
Via electronic mail to commentlettters@waterboards.ca.gov

Re: Comment Letter – Receiving Water Limitations Workshop

Dear Members of the Board:

On behalf of the Natural Resources Defense Council ("NRDC"), California Coastkeeper Alliance, the Los Angeles Waterkeeper ("Waterkeeper"), American Rivers, and Heal the Bay (collectively, "Environmental Groups"), we submit these comments on the October 10, 2012, Issue Paper regarding Municipal Storm Water Permit Receiving Water Limitations ("Issue Paper").

I. Introduction

Our organizations have long been involved in the development and enforcement of storm water controls throughout the state. We have often defended stormwater permits and the receiving water limitations on behalf of the State Water Resources Control Board ("State Board") and the regional water quality control boards. Because polluted runoff remains the number one source of contamination in California's surface waters, and because State and Federal Law prohibit backsliding from established water quality protections, **the State Board must require permittees' to meet water quality standards in our state's stormwater permits through the receiving water limitations language prescribed in State Board Order 99-05. Environmental groups strongly support Alternative 1 of the Issue Paper**.

The current receiving water limitations language based on precedential State Board Order WQ 99-05 provides the necessary protection to ensure that the beneficial uses in our state's waters are protected. Any attempt to create a safe harbor from discharger requirements to meet water quality standards would fail to meet the requirements of the federal Clean Water Act and California Porter Cologne Act, and is otherwise inconsistent with both state and federal law. As described below, any attempt to shield permittees from enforceable requirements meant to ensure water quality standard compliance would move the state backwards in terms of water quality and discharger accountability and thus represents poor public policy. We also have public process concerns about the fact that discharger lobbying provided the impetus for State Board consideration of this matter.

We also stress the need for the State Board to make its determination that storm water permits must be adopted without safe harbors in a timely fashion and to avoid any further delay in permit adoption processes. Given the continuing threat to public health and the environment posed by polluted runoff in California, the State Board should ensure that Municipal Separate Storm Sewer System ("MS4") permits throughout the State meet the requirements of state and federal law and are finalized as soon as possible.

II. Summary of Comments

The Issue Paper suggests alternatives that fail in several aspects to meet the requirements of federal and state law, and are inadequate to control pollution and protect the state's waters, which are threatened by persistent, pervasive polluted runoff.

- The Receiving Water Limitations in the State Board's precedential order WQ 99-05 have been upheld against numerous administrative, judicial, and enforcement challenges, and under federal law must prohibit discharges that cause or contribute to a violation of water quality standards as independently enforceable provisions.

- Urban runoff remains the number one source of contamination of California's surface waters and poses significant risks to public health.

- Alternatives 3, 4, and 5 allow for unprecedented and unlawful waivers from core stormwater permit provisions and TMDL requirements with suggested permit terms that violate the anti-backsliding provisions, the state's antidegradation policy and federal requirements that NPDES permits ensure compliance with water quality standards.

- For TMDLs, Alternative 3 appears to incorporate unlawful compliance schedules that are inconsistent with federal requirements under the Clean Water Act.

- Alternative 2 warrants some discussion to improve permittees' compliance with water quality standards, but that discussion must be separate from the discussion of safe harbors.

III. Factual Background

The receiving water limitations language prescribed by State Board Order WQ 99-05 has been the subject of repeated administrative, judicial, and enforcement challenges, the majority brought against the regulatory agencies by the Permittees. For example, in the Los Angeles region, permittees challenged the receiving water limitation language in the 2001 Los Angeles County Regional MS4 Permit[1] and the California Court of Appeal for the Second District upheld the validity of the 2001 Permit on all grounds, including the permit's foundational requirement that "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited."[2]

Many of the dischargers have suggested the State Board weaken protections from the previous permits that include the provisions from Order WQ 99-05, upheld by the courts and legally required by the Clean Water Act, that have been properly incorporated into permit throughout the state. But stormwater runoff remains the leading cause of surface water pollution in California, and a

[1] Los Angeles Regional Water Quality Control Board, Order No. 01-182, NPDES Permit No. CAS004001 (as amended by Orders R4-2006-0074, R4-2007-0042, R4-2009-0137, and October 19, 2010 and April 14, 2011 pursuant to L.A. Superior Court Case No. BS122724) ("2001 Permit").
[2] See *County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 989; see also, *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897.

substantial and persistent public health risk and source of harm to aquatic life. The State Board should reject calls to place California's waters and residents at further risk.

A. Stormwater Runoff is the Leading Source of Water Pollution in California and Poses a Significant Threat to Public Health.

Waters discharged from municipal storm drains carry bacteria, metals, and other pollutants at unsafe levels to rivers, lakes and beaches in California. This pollution causes increased rates of human illness, harm to the environment, and an economic loss of tens to hundreds of millions of dollars every year from public health impacts alone. The U.S. Environmental Protection Agency ("U.S. EPA") considers urban runoff to be "one of the most significant reasons that water quality standards are not being met nationwide."[3] As the U.S. EPA has stated:

> Most stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.[4]

Numerous receiving waters around the state do not meet water quality standards or fully support beneficial uses. Seventy-nine percent of the Sierra Nevada's vast network of rivers and streams are too polluted for fishing, and 83 percent of the region's waterways are too polluted for swimming.[5] It is well known that pollutants in storm water and non-storm water have damaging effects on both human health and aquatic ecosystems. Discharges of polluted urban runoff result in elevated bacteria levels and increased illness rates among swimmers, and the association between heavy precipitation (leading to increased runoff) and waterborne disease outbreaks is well documented.[6]

Swimming or contact with waters contaminated by stormwater runoff can lead to fever, chills, ear infections and discharge, coughing and respiratory ailments, vomiting, diarrhea and other gastrointestinal illness, and skin rashes.[7] In a peer reviewed evaluation of 22 selected epidemiological studies from around the world, scientists found that 19 of 22 studies showed that

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[3] U.S. General Accounting Office (June 2001) *Water Quality: Urban Runoff Programs*, Report No. GAO-01-679.
[4] U.S. Environmental Protection Agency (December 2007) *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices*, at v.
[5] Clayburgh, J. et al. "*State of Sierra Waters: A Sierra Nevada Watershed Index*" Sierra Nevada Alliance. March 2006. Notably, water originating in the region provides more than 60% of California's and most of northwestern Nevada's developed water supply. See Clark Anderson and Patricia Hickson (August 2008) "Planning for Waterwise Development in the Sierra: A Water and Land-Use Policy Guide" Sierra Nevada Alliance August 2008.
[6] Curriero et al., (August 2001) *The Association Between Extreme Precipitation and Waterborne Disease Outbreaks in the United States, 1949-1994,* American Journal of Public Health, 91:8 1194-1199.
[7] See, e.g., Haile, et al. (1999) *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Epidemiology 10(4): 355-63; Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay*, Santa Monica Bay Restoration Project, 70 pp.

adverse health effects were significantly related to fecal indicator bacteria or bacterial pathogens.[8] Among those, an epidemiological study of Santa Monica Bay investigated health risks of swimmers exposed to storm drain runoff while swimming in ocean waters.[9] The study found that the number of adverse health effects in swimmers at beaches receiving stormwater discharge increases with increasing densities of fecal bacteria indicators in the water; the study concluded that high levels of indicator bacteria were more likely to be in or close to a storm drain, and there was an approximately 50-100 percent increase in health risk for those swimming directly in front of a storm drain versus those who swam more than 400 yards away from the storm drain.[10] The study reported that per 10,000 swimmers, there were 130 cases of attributable highly credible gastroenteritis, 165 attributable cases of skin rash, and 277 cases of attributable diarrhea.[11]

And the health impacts come at tremendous cost—one study demonstrated that swimming at polluted beaches in Los Angeles County caused between 427,800 and 993,000 excess cases of gastroenteritis per year, in turn resulting in annual health costs of between $14 and $35 million, or $120 and $278 millon (depending on the epidemiological model used) per year.[12] Without question, swimming in stormwater runoff contaminated water has a high cost for our State.

B. Economic Studies Indicate that the Control of Stormwater Pollution Provides Numerous Economic Benefits, While Stormwater Pollution Creates Much Economic Harm.

The State Board is unconditionally precluded from considering economic factors to weaken federally mandated controls in the MS4 permits.[13] Within this framework, however, controlling pollution in stormwater and non-stormwater discharges has far-reaching economic and social benefits for the region. According to a report to California's Resources Agency, "California has the largest Ocean Economy in the United States, ranking number one overall for both employment and gross state product . . . ."[14] One study estimated that local beach goers in California spend as much as $9.5 billion annually and the non-market values associated with beach going in California may be as high as $5.8 billion annually.[15] A review of multiple studies concerning the consumer surplus per visitor for beach visits found that welfare impacts were in the range of $8.16 to $60.79 per visit for several California beaches.[16]

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[8] Pruss, A. (1998) *Review of epidemiological studies on health effects from exposure to recreational waters*, International Journal of Epidemiology 27:1-9.
[9] See, Haile, R. W. et al (1996); see also, Haile, et al. (1999).
[10] Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay*, Santa Monica Bay Restoration Project, at 54.
[11] *Id*. at 59.
[12] Given, S., Pendleton, L. and Boehm, A. (2006) *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, Environ. Sci. Technol., 40 (16), 4851-4858, at 4856.
[13] California Water Code §13263.
[14] Judith Kildow and Charles S. Colgan, National Ocean Economics Program, California's Ocean Economy: A Report to the Resources Agency, State of California (2005), at 1.
[15] Pendleton, L. 2003. *Estimating the Regional Economic Benefits of Improvements in the California Coastal Ocean Observing System*. Arlington, VA: Ocean. Unnumbered Report. July.
[16] Chapman, D. and Hanemann, M. (2001) Environmental damages in court: the American Trader case, in The Law and Economics of the Environment, Anthony Heyes, Editor, pp. 319-367.

Yet stormwater runoff potentially caused or contributed to thousands of days of beach closures or advisories in California in 2011.[17] Beach closures and advisories result in direct and indirect negative effects on the coastal economy, such as lost revenue.[18] A hypothetical beach closure of Huntington Beach for one day was estimated to result in a loss of 1200 beach visits and associated economic losses of $100,000.[19] For a month long closure of the beach due to poor water quality, losses could be as much as 38,000 beach visits, with corresponding economic losses of more than $3.5 million; or a staggering $9.0 million in losses with a season long (i.e., June, July, and August) closure. Conversely, a 2007 study by the National Oceanic and Atmospheric Association found that an increase in water quality in Long Beach (a C grade), to the healthier standards of Huntington City Beach (a B grade) would create $8.8 million in economic benefits over a 10-year period.[20]

IV. Legal Context for the Receiving Water Limitations

Consistent with the federal Clean Water Act, a fundamental goal of all municipal stormwater permits is to ensure that discharges from storm sewers do not cause or contribute to a violation of water quality standards.[21] In addition, for MS4s covered under the NPDES program, permits for discharges from municipal storm sewers:

> shall 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.[22]

The maximum extent practicable ("MEP") standard serves effectively as a floor to performance for regulated parties. However, permits also require "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." This language in section 1342(p) has been held by California courts to grant "the EPA (and/or a state approved to issue the NPDES permit) . . . the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'"[23] As a result, while the MEP standard represents a statutory floor, rather than limit, for permit requirements, the Regional Board and EPA maintain the authority to impose additional restrictions over and above MEP as they determine appropriate.

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[17] NRDC (2012) Testing the Waters: A Guide to Water Quality at Vacation Beaches, at California Chapter Summary. California reported 5,794 total closing or advisory days in 2011 from all sources. Reported closing or advisory days are for events lasting six consecutive weeks or less.

[18] Leeworthy, V.R. and Wiley, P.C. (2000) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, National Oceanic and Atmospheric Administration, at 4.

[19] Hanemann, M., L. Pendleton, and C. Mohn (November 2005) Welfare Estimates for Five Scenarios of Water Quality Change in Southern California. A Report from the Southern California Beach Valuation Project, at 7-8.

[20] Leeworthy, V.R. and Wiley, P.C. (2000) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, National Oceanic and Atmospheric Administration, at 9, 15.

[21] 33 U.S.C. § 1341.

[22] 33 U.S.C. § 1342(p)(3)(B)(iii).

[23] *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 883 (citing *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, at 1165–1167).

A. The Order WQ 99-05 Receiving Water Limitations.

The Receiving Water Limitations prescribed by State Board Order WQ 99-05 are not new requirements to MS4 permittees. In fact, in some regions these requirements have been in place for over a decade. For example, in 2001 the Regional Water Quality Control Board for the Los Angeles Region adopted a region-wide MS4 permit with the requirement to comply with the receiving water limitations.[24] The 2001 Permit, designed to address the harm caused by pollutants conveyed via storm drains to surface waters in the Los Angeles area—including bacteria hazardous to human health—regulates the County of Los Angeles and the Los Angeles County Flood Control District, and 84 incorporated cities within the County. The County, along with 43 of these cities,[25] challenged in state court the validity of the 2001 Permit; their challenge involved many of the permit provisions and requirements incorporated into the Draft Permit such as the permit's Receiving Water Limitations (discussed further below). After years of complex litigation, the case ended with the Permit being upheld on all grounds by the California Court of Appeal.[26]

B. The Receiving Water Limitations Have Withstood Multiple Legal Challenges.

A principal challenge to the 2001 Los Angeles County MS4 Permit by the Permittees was directed at the permit's Receiving Water Limitations section. Part 2.1 of the 2001 Permit stated, "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited."[27] Under Part 2.3 of the 2001 Permit, the Permittees were directed to begin remedial measures immediately if discharges violate water quality standards.[28] If exceedances of water quality standards persist, notwithstanding control measures, the Permittees "shall assure compliance" by preparing a compliance report that identifies the violations and adopts more stringent pollution control measures to correct them. However, compliance with the permit's reporting process does not excuse violations of water quality standards, prohibited under Part 2.1 of the 2001 Permit. MS4 discharges that exceed water quality standards were independently enforceable as violations of the permit and the Clean Water Act.[29] As the court stated in *L.A. County Mun.*

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[24] This was the third such permit issued by the Regional Board to Los Angeles County and local municipalities, prior permits were adopted in 1990 and 1996. (2001 Permit, at Finding A.); Similar provisions were required in the 2001 San Diego Region MS4 Permit. See San Diego Regional Board, Order No. 2001-01.

[25] Thirty-two cities and Los Angeles County appealed the Superior Court's decision in the matter. (*County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 990.)

[26] *See, In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 at 4-7 (L.A. Super. Ct. Mar. 24, 2005) ("*L.A. County Mun. Stormwater*"); *County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 989.) We also note that, in 2005, 21 of the Permittee cities and the Building Industry Legal Defense Foundation filed suit in California State Court for a writ of mandate ordering the State Water Resources Control Board and the Regional Board to declare the continued application of water quality standards to stormwater null and void, and cease all activities relating to the implementation and application of water quality standards to stormwater pending further specified action by the Regional Board. (See *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 161 (petition denied and appeal dismissed as moot on appeal).)

[27] 2001 Permit, at 23; "Water Quality Standards and Water Quality Objectives" are defined in the 2001 Permit to mean "water quality criteria contained in the Basin Plan, the California Ocean Plan, . . . the California Toxics Rule, and other state or federally approved surface water quality plans." 2001 Permit, at 70.

[28] *Id.*

[29] *L.A. County Mun. Stormwater*, at 7; This conclusion has been upheld by the 9th Circuit Court of Appeals, which found that "no such 'safe harbor' is present in this Permit . . . . Part 2.3 . . . offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions."

Stormwater, the Regional Board "included Parts 2.1 and 2.2 in the Permit without a 'safe harbor.'"[30] The Regional Board has affirmed this interpretation: "the plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a 'violation of Water Quality Standards' [or water quality objectives] or to a condition of nuisance."[31] Put simply, "[t]he Regional Board's position . . . is that the Permit cannot be read to excuse exceedances of water quality standards."[32]

Based on the authority of permitting authorities under section 1342(p)(3)(B)(iii) to issue NPDES permits imposing "appropriate" water pollution controls, the court in *L.A. County Mun. Stormwater* noted that, "the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."[33] But regardless of this authority, as described above, the Court found that "the terms of the Permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged Permit Provisions."[34] Having carefully reviewed the administrative record, the Court found that compliance with Part 2.1 and 2.2 of the permit, which prohibit discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives, constitute compliance with MEP.[35]

V. Providing Safe Harbors for Municipal Stormwater and Non-stormwater Discharges in Violation of Receiving Water Limitations Is Inconsistent with Federal and State Law.

The current RWL provisions contain clear, appropriate, and enforceable language that complies with the Clean Water Act and has stood the test of administrative, judicial, and enforcement challenges.[36] However, dischargers now suggest that the State Board revise the RWLs to incorporate "safe harbor" provisions.[37] The State Board should decline this request. As described below, any weakening of the RWL language would fail to meet minimum federal requirements, and would constitute a violation of the Clean Water Act's anti-backsliding provisions for any permit previously incorporating the required language of Order 99-05.[38] Adopted permits must require compliance with water quality standards, with no "safe harbor" or other restriction placed on the prohibitions against exceeding water quality standards. Safe harbors also have the potential to violate the state's antidegradation policy and federal regulations requiring that NPDES permits ensure compliance with

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Natural Resources Defense Council v. County of Los Angeles (2011) 673 F.3d 880, 897. This portion of the 9th Circuit Court's Opinion is not subject to further review.

[30] *Id.*

[31] Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4.

[32] *Id*. at 9.

[33] *In re L.A. County Mun. Stormwater* at 7; see also *Building Industry Ass'n of San Diego County* 124 Cal.App.4th at 883.

[34] *Id*. at 7-8.

[35] *Id.* at 8.

[36] "[T]he plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a 'violation of Water Quality Standards' [or water quality objectives]." Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4. See also, *In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 at 4-7 (L.A. Super. Ct. Mar. 24, 2005).

[37] Issue Paper at 2.

[38] 40 C.F.R. 122.44(l)(1) provides that except for a narrow set of enumerated circumstances, "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."

water quality standards.[39]

Moreover, despite claims that the Ninth Circuit Court of Appeals only recently "determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard," and therefore "municipal stormwater Permittees will now be considered to be in non-compliance with their NPDES permits,"[40] there is categorically nothing new about this interpretation of the Receiving Water Limitations. The prohibition against discharges that cause or contribute to an exceedance of water quality standards has been in effect and explicitly understood at least since the Los Angeles and San Diego MS4 Permits were adopted in 2001, and at least as far back as 2006 in light of the Court's decision in *L.A. County Mun. Stormwater*.[41] Permittees will not only "now" be considered to be in non-compliance for their discharges, they have been in non-compliance for over a decade. Permittees' failure to meet water quality standards is more appropriately attributed to the permittees' lack of meaningful action and the statewide lack of enforcement.

A. "Safe Harbors" in California's MS4 Permits Would Violate Anti-Backsliding Provisions.

The Clean Water Act, through its anti-backsliding provisions, prohibits a permit from being renewed, reissued, or modified with effluent limitations less stringent than the comparable limitations in the previous permit.[42] Water quality based effluent limits in NPDES permits can be revised to be less stringent only where consistent with a TMDL properly incorporated into that permit.[43] And any TMDL implementation must be consistent with the requirements for compliance schedules in NPDES permits.[44]

Federal regulations further require that "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."[45] The receiving water limitations in existing MS4 Permits have been required to be incorporated into permits across the state since 1999, and many MS4 permits have included this language for over a decade. Any attempt to now include safe harbors in those permits from the required receiving water limitations would violate anti-backsliding

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[39] See 40 C.F.R. 122.4(d), which prohibits the issuance of an NPDES Permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

[40] See, e.g. Letter from LA Permit Group to Regional Board re: Technical Comments on Los Angeles Regional Water Quality Control Board Staff Working Proposals for . . . Watershed Management Programs, TMDLs and Receiving Water Limitations, May 14, 2012, at 6.

[41] See, e.g. Cities of Arcadia et al.'s Opening Brief, Feb. 13, 2006, in *County of Los Angeles* 143 Cal.App.4th 985 ("it is impossible for Permittees to strictly comply with Part 2 of the Permit; they would be in violation of Parts 2.1 and 2.2 of the Permit from its effective date. . . ."). See also, *Building Industry Ass'n of San Diego*, 124 Cal.App.4th at 880 (the Building Industry argues that provisions of the Ms4 Permit "prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law").

[42] 33 U.S.C. § 1342(o)(1).

[43] *Id.*

[44] See *In the Matter of Star-Kist Caribe, Inc.*, 1989 EPA App. LEXIS 38, at *7 (E.A.B. 1989); 33 U.S.C. § 1313(e)(3)(F); 40 C.F.R. § 122.47.)

[45] 40 C.F.R. 122.44(l)(1).

provisions.[46]

B. Safe Harbors Would Violate the State's Antidegradation Policy.

Water Quality Standards include an antidegradation policy and implementation scheme to protect the Nation's existing uses and the water quality necessary to support existing uses, or, for "high quality" waters, to protect water quality better than necessary for "fishable/swimmable" uses. Federal regulations require that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy.[47] The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. Thus, any action by the State Board that would result in lower water quality must be analyzed to ensure consistency with the State's antidegradation policy, and in no case may water quality be lowered to a level which would interfere with existing or designated uses.[48] Further, simply saying that no degradation will occur does not satisfy the Clean Water Act's requirement;[49] nor does a claim that new permit terms will not make things worse than the status quo in receiving waters.[50] The Environmental Groups cannot envision a scenario where a safe harbor could comply with the State's Antidegradation Policy. Certainly not the sweeping safe harbors proposed by the dischargers.

VI. Improvements to the Iterative Process Warrant Discussion, But Should be Separate from the Discussion of Safe Harbors.

Existing MS4 permits have not reduced urban runoff impacts to water quality to the extent that the public deserves and the law requires under existing MS4 Permits. Environmental groups agree that the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. However, the program's failure is the direct result of widespread non-compliance by permittees and non-enforcement by Regional Boards. Any discussion of improvements to the iterative process must be undertaken with a focus on Regional Board implementation and discharger compliance.

The Board's initiation of a workshop and issue paper to consider major regulatory revisions at the behest of regulated entities poses serious public process concerns. A CASQA proposal is attached to the Board's Issue Paper, suggesting a clear preference for certain proposed alternatives over others at the outset of the public process. In the Issue Paper, the Board notes that the need for and purpose of the workshop was MS4 dischargers' assertions "that the receiving water limitations and iterative process provisions of the Water Boards' permits do not afford them with a viable path to compliance

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[46] *See* also United States Environmental Protection Agency Region III letter, "Backsliding is prohibited in NPDES permits. . . . Allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against anti-backsliding." August 8, 2012. Attached as Exhibit A.
[47] 40 CFR 131.12.
[48] *See* State Bd. Resolution 68-16; 40 CFR § 131.12.
[49] *Associacion de Gente Unida for El Agua v. Central Valley Regional Board*, 34-2008-00003604CV-WM-GDS (Nov. 6, 1012 Cal App. Dist. 3d) at p. 5
[50] *Id.*

for these violations, which may take years of technical efforts to correct, especially for wet weather discharges." As described above, it is not the iterative process and receiving water limitations that have caused non-compliance, the responsibility falls on the dischargers.

A discussion of improvements to the iterative process warrants discussion, but should be undertaken separately from the discussion of safe harbors, which is ostensibly geared towards dischargers' interests, rather than the larger public interest.

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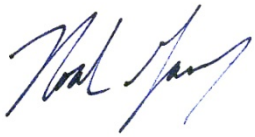
Environmental Groups appreciate this opportunity to comment on the Issue Paper. Please feel free to contact us with any questions or concerns you may have.

Sincerely,



Noah Garrison
Project Attorney
Natural Resources Defense Council

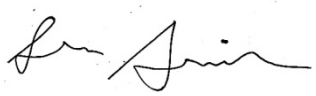


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Exhibit A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

AUG 0 8 2012

Mr. Jay Sakai, Director
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284

Dear Mr. Sakai:

On May 18, 2012, the U. S. Environmental Protection Agency (EPA or the Agency), received the latest draft of the above-referenced National Pollutant Discharge Elimination System (NPDES) permit (Prince George's County permit) which was reviewed pursuant to 40 C.F.R. § 123.44 and the Memorandum of Agreement (MOA) between MDE and EPA Region III (May 22, 1989).

On June 14, 2012, EPA sent written comments and a marked-up version of the Prince George's County permit to the Maryland Department of the Environment (MDE) requesting that changes be made to the draft permit. On June 15, 2012 EPA issued a time extension letter to increase our review time to 90 days, since we had reason to believe that the comments would not be addressed within the initial 30 day review period. EPA and MDE are currently in productive discussions on these issues. Since these discussions are ongoing and the 90-day review period will expire on August 16, 2012, EPA is issuing this specific objection to the issuance of the referenced permit pursuant to 40 C.F.R. §§ 123.44(b)(1) and (c)(1) and Section III.A of the MOA. As further explained herein, EPA believes that several substantive requirements for MS4 permits, as required by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and its implementing regulations, have not been incorporated into the Prince George's County permit.

EPA's objection to the draft permit and identification of revisions needed before EPA can remove the objection, *see* 40 C.F.R. § 123.44(b)(2)(ii), are described below:

1. **Water Quality Standards**

Federal regulations require that all NPDES permits contain limitations to control discharges which may cause, have the reasonable potential to cause or contribute to an excursion above water quality standards. 40 C.F.R. §122.44(d)(1)(i). Part VI of the draft Prince George's County permit (Enforcement and Penalties) contains general language

related to "minimizing" and "preventing to the MEP" contamination or physical alteration of waters of the state; however, it does not actually prohibit water quality exceedances. Please refer to EPA's suggested language in our comments of June 14, 2012 and also consider the recommendation made therein that the language be contained in the first part of the permit and not placed in a later section that would get lost among standard conditions and boilerplate language.

MDE may also wish to refer to the 2011 previously approved Frederick County permit (p.7), which contains the following provision: "Frederick County shall annually provide watershed assessments, watershed implementation plans, opportunities for public participation, and TMDL compliance status *as required below to ensure that water quality standards are met for all water bodies in the County.*" (emphasis added) The italicized language, which was omitted from the Prince George's County permit, would be appropriate to ensure attainment of water quality standards as well as consistency with federal regulations.

In order to resolve this portion of our objection, MDE must add the language recommended by EPA via the enclosed marked-up permit, the Frederick County language listed above, or similar acceptable language.

2. Anacostia Trash Total Maximum Daily Load (TMDLs)

EPA was pleased that the draft Prince George's County permit includes requirements for trash and litter reductions at Part III.D.4. However, the permit fails to include specific requirements related to the Anacostia River and its associated Trash TMDL, which includes a wasteload allocation (WLA) for Prince George's County. As noted above, federal regulations require that all NPDES permits contain limitations to control pollutants which will cause an excursion above any water quality standard. They also require that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, be consistent with the assumptions and requirements of any available applicable WLA(s) for the discharge developed under approved TMDLs. 40 C.F.R. § 122.44(d).

EPA provided language to MDE on June 14, 2012 to include in this section of the permit in accordance with the terms and conditions listed in the Anacostia TMDL. In order to resolve this portion of our objection, MDE must revise the permit to include EPA's recommended language, or similar acceptable language.

3. Chesapeake Bay TMDL

In 2010, EPA issued a document entitled "Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed" (herein after "Urban Stormwater Approach"; available at: http//www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf), which outlines the standards that permitting authorities within Region III are expected to adopt to ensure that MS4 permits will contribute to meeting the water quality objectives of the

Clean Water Act, including relevant WLAs. One such expectation is that "[p]ermits implementing Chesapeake Bay watershed WLAs should also include specific two year milestones, and the reporting requirements to determine if these milestones are being met." The Prince George's County draft permit does not contain sufficient requirements for Chesapeake Bay milestones and related reporting requirements. The section of the Prince George's County permit that relates to the Chesapeake Bay (Part V.A) provides background and generalities about the NPDES program related to the Chesapeake Bay TMDL; however, it fails to explicitly state what steps the permittee must actually take to comply with the TMDL.

EPA's permit review has concluded that although the 20% restoration strategy in the Prince George's County draft permit does present a Bay milestone (and apparently constitutes partial compliance with Maryland's Watershed Implementation Plan), it is not adequately expressed in the draft permit. EPA included recommended language in our marked-up permit at Part VI.A that would clearly state that by requiring a 20% reduction, compliance with the TMDL can be reasonably achieved for this permit term.

In order to resolve this portion of our objection, the permit shall be revised to include the recommended provision.

4. Backsliding

Backsliding is prohibited in NPDES permits. *See* Section 402(o) of the CWA, 33 U.S.C. § 1342(o) ("[A} permit may not be renewed, reissued, or modified on the basis of effluent guidelines...subsequent to the original issuance of such a permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit..."). *See also* 40 C.F.R. § 122.44(l). Allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against anti-backsliding.

The draft Prince George's County permit contains a number of provisions which violate this principle. For example, the draft permit requires the permittee to, *inter alia*: (1) establish or implement a management program in areas served by the County's MS4 (Part III.D.1-3, at pp. 2-4); and (2) establish and publicize a compliance hotline for the public reporting of suspected illicit discharges (Part III.D.6.a). These same requirements are contained in Prince George's current permit. Prince George's County cannot be allowed an additional permit term to complete tasks that were required under the previous permit.

In order to resolve this portion of our objection, MDE must revise the draft permit to include new and updated permit requirements that will expand upon the tasks required by the current permit. For example, instead of requiring that a hotline be established as was required by the previous permit, this permit should include a provision to track the amount of calls received and actions taken in response to those calls. EPA's marked permit and comments to MDE reflected proposed language that would be acceptable to resolve this concern.

5. **Industrial / Commercial Monitoring**

Part III.C of the draft Prince George's County permit requires source identification of pollutants in certain categories of stormwater runoff County-wide. However, this requirement is insufficient because the draft permit does not specifically include the category of industrial and commercial sources. An inventory of industrial and commercial sites which could contribute pollutants to receiving waters is integral to compliance with the requirement under federal regulations that stormwater management programs for a description of "[d]escribe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C)..." 40 C.F.R. § 122.26 (d)(2)(iv)(C)(*2*).

EPA provided recommended language in Part IV.C, Part IV.D.3.b, and Part V.A.2 of the marked-up permit that was submitted to MDE. In order to resolve this portion of our objection, MDE must revise the permit in accordance with those recommendations.

EPA also suggests the following recommendations for inclusion in the County's permit.

1. **Education**

In Part IV.D.1 of the EPA marked-up permit (Management Programs), EPA recommended adding an additional section for staff training that includes requirements for new technology, implementing pollution prevention, good housekeeping, inspections and permit requirements. EPA believes this will improve employee efficiency and awareness during inspections while ensuring continued and thorough maintenance of the stormwater program.

2. **Maximum Extent Practicable**

Throughout EPA's permit mark up, we requested removing the use of the phrase "maximum extent practicable" or "MEP". EPA has a number of concerns about inclusion of this language: it is imprecise in its interpretation and thus makes enforcing the permit terms more difficult; it could lead to backsliding; and it rightfully is a determination to be made by the permitting authority in the permit's terms. All references to MEP, with the exception of the requirement that the permittee develop and implement the "Stormwater Management Act of 2007 and Environmental Site Design to the MEP" should be modified.

EPA looks forward to working cooperatively with MDE to resolve the remaining issues in an expeditious manner. Until the issues are resolved, however, in accordance with 40 C.F.R §122.4(c), MDE may not issue the Prince George's County MS4 permit without written authorization from EPA.

If you have any questions, please contact me, or Evelyn S. MacKnight, Chief, NPDES Permits Branch, at (215) 814-5717.

Sincerely,

Jon M. Capacasa, Director
Water Protection Division

cc: Brian Clevenger, MDE
Samuel Wynkoop, Jr., Prince George's County