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11 STATE OF CALIFORNIA
12 REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION
13 AND
14 STATE WATER RESOURCES CONTROL BOARD

15 Petition of NRDC, Los Angeles Waterkeeper, and)
16 Heal the Bay, for Review by the California)
17 Regional Water Quality Control Board, Los)
18 Angeles Region, of the Regional Board Executive)
19 Officer's Action to Conditionally Approve Nine)
20 Watershed Management Programs Pursuant to the)
21 Los Angeles County Municipal Separate)
22 Stormwater National Pollutant Discharge)
23 Elimination System (NPDES) Permit, Order No.)
24 R4-2012-0175, NPDES Permit No. CAS004001;)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR REVIEW OF LOS
ANGELES REGIONAL WATER
QUALITY CONTROL BOARD
EXECUTIVE OFFICER'S ACTION
TO CONDITIONALLY APPROVE
NINE WMPs PURSUANT TO THE
L.A. COUNTY MS4 PERMIT

25 Petition of NRDC, Los Angeles Waterkeeper, and
26 Heal the Bay, for Review by the State Water
27 Resources Control Board of the Regional Board
28 Executive Officer's Action to Conditionally
Approve Nine Watershed Management Programs
Pursuant to the Los Angeles County Municipal
Separate Stormwater National Pollutant
Discharge Elimination System (NPDES) Permit,
Order No. R4-2012-0175, NPDES Permit No.
CAS004001

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1 **I. INTRODUCTION**

2 This petition seeks review of the Los Angeles Regional Water Quality Control Board’s
3 (“Regional Board”) Executive Officer’s action to conditionally approve nine Watershed
4 Management Programs (“WMPs”) pursuant to the Los Angeles County Municipal Separate Storm
5 Sewer System (“MS4”) Permit (Order No. R4-2012-0175) (“2012 MS4 Permit” or “Permit”). The
6 2012 MS4 Permit regulates the discharge of stormwater for Los Angeles County and 84
7 incorporated cities therein (collectively “Permittees”). Petitioners request that the Executive
8 Officer’s action be reviewed by the Regional Board pursuant to Part VI.A.6 of the 2012 MS4
9 Permit, which states that concerns with the WMP approval process must be appealed to the
10 Regional Board. However, the California Water Code requires all improper actions by the
11 Executive Officer be appealed to the State Water Resources Control Board (“State Board”) within
12 30 day of such action. Therefore, Petitioners also file this appeal with the State Board and request
13 that, absent Regional Board action, the Executive Officer’s action be reviewed by the State Board
14 in accordance with Cal. Water Code § 13320 and 23 C.C.R. § 2050 *et seq.*

15 The 2012 MS4 Permit provides Permittees the option of developing a WMP or an
16 Enhanced Watershed Management Program (“EWMP”) as an alternative mechanism for meeting
17 water quality-based permit requirements. The Permit requires that the Regional Board, or
18 Executive Officer on behalf of the Board, must approve or deny the final WMPs submitted by
19 Permittees by April 28, 2015.¹ However, on April 28, 2015, the Executive Officer neither
20 approved nor denied the final WMPs pursuant to delegated authority in the Permit; rather, the
21 Executive Officer granted so-called “conditional approvals” for a total of nine final WMPs that
22 were submitted by Permittees.² For reasons discussed below, the Executive Officer’s action in
23 issuing the “conditional approvals” fails to comply with legal requirements. Petitioners therefore
24 request that the Regional Board invalidate the Executive Officer’s conditional approvals and deny
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27 ¹ Final WMPs were submitted to the Regional Board at the end of January 2015. Within three months of receiving the
28 final WMPs, the Regional Board, or Executive Officer on behalf of the Board, must approve or deny the programs.
2012 MS4 Permit, at Table 9. That deadline was April 28, 2015.

² See Exhibit B: Letters of Conditional Approvals from the Executive Officer.

1 all nine final WMPs as required by the 2012 MS4 Permit. (2012 MS4 Permit, at Part VI.A.6.)
2 Absent such action by the Regional Board, Petitioners request that the State Board invalidate the
3 Executive Officer's conditional approvals as such action constitutes an abuse of discretion
4 pursuant to Cal. Water Code § 13330(e) and Cal. Civ. Proc. Code §§ 1094.5(b) and 1094(c).

5 The Executive Officer's action to conditionally approve nine WMPs pursuant to the 2012
6 MS4 Permit is an abuse of discretion for three principal reasons: 1) the Executive Officer acted
7 outside of his delegated authority in conditionally approving the WMPs; 2) the Executive Officer's
8 conditional approvals – a step nowhere allowed in the 2012 MS4 Permit – is an improper permit
9 modification without notice, hearing, or Regional Board approval as required by law and
10 furthermore, exceeds the statutory limits for delegation imposed by Cal. Water Code § 13223(a);
11 and 3) the terms of the conditional approvals are inconsistent with core Permit requirements and
12 the federal Clean Water Act (“CWA”), and therefore demonstrate that the only available course of
13 action for the Executive Officer was to deny the WMPs.

14 **A. Legal Background**

15 In 1972, Congress enacted the CWA to “restore and maintain the chemical, physical, and
16 biological integrity of the Nation's waters.”³ Because of the serious threats imposed by stormwater
17 runoff, Congress amended the CWA in 1987 with a phased schedule for developing stormwater
18 permitting regulations under the National Pollutant Discharge Elimination System (“NPDES”)
19 program.⁴ Twenty years later, the U.S. Environmental Protection Agency (“EPA”) has noted the
20 continuing problems caused by stormwater, stating that “[s]tormwater has been identified as one of
21 the leading sources of pollution for all waterbody types in the United States.”⁵

22 The CWA requires each state to adopt Water Quality Standards (“WQSs”) for all waters
23 within its boundaries, which include maximum permissible pollutant levels that must be
24 sufficiently stringent to protect public health and enhance water quality.⁶ States must also identify
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26 ³ 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

27 ⁴ See 33 U.S.C. § 1342.

28 ⁵ U.S. EPA (December, 2007), *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices*, at 1.

⁶ 33 U.S.C. § 1311(b)(1)(C), 1313, 1313(c)(2)(A).

1 as impaired any water bodies that fail to meet WQSs for specific designated uses.⁷ For impaired
2 waters, states must establish total maximum daily loads (“TMDLs”), which set a daily limit on the
3 discharge of each pollutant necessary to achieve WQSs.⁸ TMDLs assign a waste load allocation
4 (“WLA”) to each source for which an NPDES permit is required, and “once a TMDL is developed,
5 effluent limitations in NPDES permits must be consistent with the WLAs in the TMDL.”⁹

6 Beginning in 1990, the Regional Board issued a NPDES permit to cover stormwater
7 discharges by the County and municipalities in the region. (2012 MS4 Permit, at Finding B.)
8 Whenever a permit is reissued, modified, or revoked, a new draft permit must be prepared and
9 fully comply with certain substantive and procedural requirements under state and federal law,
10 such as being accompanied by a fact sheet, and providing public notice, comment period, and
11 hearings.¹⁰

12 **B. The 2012 MS4 Permit**

13 On November 8, 2012, the Regional Board approved the current 2012 MS4 Permit for Los
14 Angeles County.¹¹ The previous MS4 Permit for Los Angeles County issued in 2001 (Order No.
15 01-182) (“2001 Permit”) set receiving water limitations (“RWLs”) for Los Angeles County waters,
16 stating that discharges from the municipal storm drain system that “cause or contribute” to
17 violations of WQSs or water quality objectives are prohibited. (2001 Permit, at Part 2.3.) The 2012
18 MS4 Permit contains the same RWLs provisions as the 2001 Permit, but unlike the 2001 Permit,
19 incorporates several “safe harbors” that create an alternative means to comply with the RWLs
20 provisions in certain circumstances. Specifically, under the 2012 MS4 Permit, Permittees may
21 develop a WMP or an EWMP whereby they can select their own control measures, best
22 management practices, and compliance schedules to implement permit requirements, subject to
23 minimum standards set forth in the Permit. (2012 MS4 Permit, at Part VI.C.) Under certain
24 circumstances, if a Permittee fully complies with the WMP development and implementation
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26 ⁷ 33 U.S.C. § 1313(d).

27 ⁸ 33 U.S.C. § 1313(d)(1).

28 ⁹ *Communities for a Better Env’t v. State Water Res. Control Bd.*, 132 Cal.App.4th 1313, 1321 (2005).

¹⁰ See 40 C.F.R. §§ 124.5-124.15.

¹¹ Regional Board Order No. R4-2012-0175.

1 requirements pursuant to the Permit, it will be deemed in compliance with the RWLs, at least
2 temporarily, whether or not such limitations are *actually* achieved. (*Id.*, at Part VI.C.2.b.)

3 On December 10, 2012, Petitioners filed a petition for review to the State Board
4 challenging the Regional Board’s adoption of the 2012 MS4 Permit. The State Board has yet to
5 make a final determination on Petitioners’ petition, but it has issued a Draft Order as well as a
6 subsequent revised Draft Order on the various Permit petitions. In the revised Draft Order, the
7 State Board continues to assert that the WMP alternative compliance approach “is a clearly
8 defined, implementable, and enforceable alternative to the receiving water limitations
9 provisions.”¹² Thus, the Revised Draft Order defines the WMPs as an acceptable means by which
10 compliance with WQSs – a core CWA requirement for all NPDES permits – is determined.

11 According to the 2012 MS4 Permit, once Permittees elect to participate in the Permit’s
12 alternative compliance approach and develop a WMP, the Regional Board, or Executive Officer on
13 behalf of the Board, must approve or deny the final draft WMPs submitted by Permittees. (*Id.*, at
14 Table 9.) The Permit provides a clear schedule for WMP development, submission, and approval
15 or denial as well as opportunity for public comments on the draft WMPs. (*Id.*) Furthermore, the
16 Permit contains a detailed section specifying the minimum requirements that must be included in a
17 draft WMP prior to approval, such as: 1) identification of water quality priorities; 2) selection of
18 watershed control measures; and 3) compliance schedules. (*See id.*, at Part VI.C.5.) The Permit
19 does not allow for “conditional approvals” of final draft WMPs submitted by Permittees by the
20 Regional Board or Executive Officer on behalf of the Board. (*Id.*, at Table 9).

21 The WMPs subject to this Petition were first submitted in June 2014. On August 18, 2014,
22 Petitioners submitted comments on most of the draft WMPs, which, among other things, addressed
23 the many deficiencies in the programs. Regional Board staff also reviewed the draft WMPs and in
24 October 2014, sent a letter to each of the nine WMP groups identifying significant deficiencies to

27 ¹² State Water Resources Control Board, Revised Draft Order: In Re Petitions Challenging 2012 Los Angeles
28 Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175), April 24, 2015, at p. 55 (“Revised Draft
Order”).

1 be corrected as a prerequisite to the Board’s approval of the WMPs.¹³ The Permittees were
2 directed to submit revised WMPs addressing the Board’s concerns, and accordingly all nine WMP
3 groups submitted revised plans in January 2015 – with the exception of City of Walnut, which
4 submitted its revised WMP in April 2015 – for Regional Board review and approval.¹⁴

5 In all nine revised WMPs, Permittees failed to correct many, if not most, of the deficiencies
6 that Regional Board staff had identified.¹⁵ Despite the revised plans’ near complete disregard for
7 the Regional Board demands and thereby Permit requirements, on April 28, 2015, the Executive
8 Officer, on behalf of the Board, illegally issued conditional approvals for the nine revised WMPs.

9 **II. STANDARD OF REVIEW**

10 In reviewing the Executive Officer’s decision, both the Regional and State Boards must
11 exercise their independent judgment as to whether the Executive Officer’s action is reasonable.¹⁶
12 The Executive Officer’s action constitutes an “[a]buse of discretion...if [he] has not proceeded in
13 the manner required by law, the order or decision is not supported by the findings, or the findings
14 are not supported by the evidence.”¹⁷ “Where it is claimed that the findings are not supported by
15 the evidence, . . . abuse of discretion is established if the court determines that the findings are not
16 supported by the weight of the evidence.”¹⁸

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22 ¹³ See Exhibit A: Regional Board Staff Review of Draft WMPs.

23 ¹⁴ See Exhibit C: Links to Revised WMPs.

24 ¹⁵ Petitioners have conducted a detailed analysis of draft WMPs, Regional Board staff comments, and revised WMPs
25 for three watershed management groups: Lower San Gabriel River, Los Angeles River Upper Reach 2, and Lower Los
26 Angeles River. *See* Comments on Revised Watershed Management Plans under the Los Angeles County Municipal
27 Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. R4-2012-0175 submitted by
28 NRDC, Los Angeles Waterkeeper, and Heal the Bay, March 25, 2015. Petitioners’ detailed comments on these three
WMPs are representative of inadequacies in all nine WMPs that were conditionally approved pursuant to the 2012
MS4 Permit.

¹⁶ *See Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16 (1986).

¹⁷ Cal. Civ. Proc. Code § 1094.5(b); *see also Zuniga v. Los Angeles County Civil Serv. Comm’n* (2006) 137
Cal.App.4th 1255, 1258 (applying same statutory standard).

¹⁸ Cal. Civ. Proc. Code § 1094.5(c).

1 **III. ARGUMENT**

2 **A. The Executive Officer’s Action to Grant Conditional Approvals Was Beyond His**
3 **Delegated Authority and Thus Constitutes an Abuse of Discretion**

4 The Executive Officer “conditionally” approved nine WMPs when the only authority
5 delegated to him by the Regional Board was to approve or deny the WMPs. (*Id.*, at Table 9.) By
6 granting conditional approvals, the Executive Officer has acted outside of his legally delegated
7 authority as provided for in the 2012 MS4 Permit, and therefore has abused his discretion.

8 The 2012 MS4 Permit allows Permittees the option to develop a WMP to implement permit
9 requirements. However, the Permit provisions make it clear that draft WMPs must meet certain
10 minimum requirements in order to receive Regional Board approval and thus before Permittees
11 can begin implementation of the approved WMPs. (*See id.*, at Part VI.C.5.) The Regional Board,
12 or the Executive Officer on behalf of the Board, must approve or deny the final plans within three
13 months after Permittees’ submittal of those plans. (*Id.*, at Table 9.)

14 Under state law, a Regional Board can delegate any of its powers and duties, with limited
15 exceptions, to its Executive Officer.¹⁹ The Executive Officer’s actions, however, are limited to
16 only carrying out the duties that have been explicitly delegated and, in any event, may not exceed
17 the statutory limits imposed by Cal. Water Code § 13223(a). As indicated in Table 9 of the 2012
18 MS4 Permit, the Board delegated to the Executive Officer the power to approve or deny WMPs,
19 which is a delegable duty under Section 13223(a).

20 Permittees submitted their revised final WMPs at the end of January 2015, making April
21 28, 2015 the date by which the Regional Board, or Executive Officer on behalf of the Board, had
22 to approve or deny the final WMPs. In its October 2014 comments on the draft WMPs, the
23 Regional Board staff required specific revisions that Permittees must make before their WMPs can
24 be approved.²⁰ Unfortunately, there was not a single revised WMP that fully and properly
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26 ¹⁹ Cal. Water Code § 13223(a); *see also* California Regional Water Quality Control Board Los Angeles Region (April
27 11, 2014), Resolution No. R14-005 amending Resolution No. R10-009, Delegation of Authority to the Executive
28 Officer (“Resolution No. R14-005”).

²⁰ *See* Exhibit A: Regional Board Staff Review of Draft WMPs.

1 responded to the Board's requests for revisions. In fact, as demonstrated by the Executive Officer's
2 issuance of "conditional approvals" all nine WMPs failed to comply with the Regional Board's
3 directive and thus fell short of meeting the Permit requirements necessary to allow Permittees to
4 pursue the Permit's alternative compliance approach.²¹ Because the nine WMPs, as finally
5 submitted, failed to meet the program development requirements by the designated schedule set
6 forth in the Permit, neither the Regional Board nor the Executive Officer on its behalf could
7 approve the final WMPs. Therefore, the only course of action available to the Executive Officer
8 pursuant to the Permit was to deny the final WMPs by the April 28, 2015 deadline.

9 Not only did the Executive Officer improperly issue conditional approvals instead of
10 denying the WMPs, but by conditionally approving the WMPs, the Executive Officer also
11 provided Permittees an additional 45 days to comply with the Permit's WMP development
12 requirements and thereby improperly extended the Permit's WMP deadlines. Notwithstanding the
13 fact that the conditions imposed by the Executive Officer are themselves insufficient (as discussed
14 in Section III.C. below), they were aimed at correcting the WMPs' failures to comply with the
15 Permit requirements and clearly demonstrate that the WMPs should have been properly denied on
16 April 28, 2015. The Executive Officer's action to conditionally approve the final WMPs is thus not
17 only contrary to the Permit requirements, but also outside the scope of the Executive Officer's
18 specifically-delegated authority to *only* approve or deny the WMPs on or before April 28, 2015.

19 Furthermore, the conditional approvals left the extension open-ended, specifying that "[t]he
20 Board *may* rescind this approval if all of the following conditions are not met to the satisfaction of
21 the Board" by June 12, 2015.²² Thus, the "conditional approvals" left open the possibility that the
22 Executive Officer/Regional Board may *further* extend the 45-day deadline and issue another round
23 of conditional approvals beyond June 12, 2015. However, the Executive Officer did not have any
24 authority to indefinitely extend the Permit's deadlines. More significantly, the Regional Board
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26 ²¹ See Exhibit B: Letters of Conditional Approvals from the Executive Officer; Exhibit C: Links to Revised WMPs.

27 ²² See Los Angeles Regional Water Quality Control Board, *Notice of Approval, with Conditions, of Nine WMPs*
28 *Pursuant to the LA County MS4 Permit, Order No. R4-2012-0174, Including Three WMPs Also Pursuant to the City of*
Long Beach MS4 Permit, Order No. R4-2014-0024, April 28, 2015 (emphasis added).

1 itself has repeatedly noted that the 2001 Permit’s iterative approach has been ineffective at
2 bringing Permittees into compliance with WQSS and therefore wants to avoid a process of
3 continual WMP implementation and endless extensions without ever achieving Permit
4 compliance.²³ The Permit required that the Executive Officer must approve or deny the final
5 WMPs by April 28, 2015. (*Id.*) Therefore, the conditional approvals’ open-ended extensions are a
6 further abuse of discretion.

7 As a result of the Executive Officer’s unauthorized actions, Permittees that have not
8 complied with the 2012 MS4 Permit’s WMP development requirements by April 28, 2015 – and
9 therefore have not demonstrated that their WMPs will achieve the RWLs and TMDL-specific
10 limitations – are nevertheless improperly allowed to continue to avail themselves of the Permit’s
11 “safe harbor” provisions. This directly undermines the Permit’s scheme and shows the validity of
12 Petitioners’ long-standing concern that the WMP/EWMP provisions and process allow an endless
13 loop of permit implementation without ultimate achievement of WQSS, specifically via the
14 adaptive management process.²⁴ Additionally, this is in direct contradiction to statements made by
15 Regional Board staff themselves asserting their commitment to following the WMP
16 approval/denial timeline.²⁵

17 While the State Board continues to claim that the WMP alternative compliance approach
18 provides a finite, concrete, and rigorous process for meeting Permit requirements,²⁶ it is quite
19 evident that the exact opposite is happening here. By granting conditional approvals, the Executive
20 Officer is creating yet another process and a new, unauthorized schedule that will only defer
21 compliance with the Permit’s RWLs and TMDL-limitations. Moreover, once a WMP is approved,
22 Permittees must immediately begin implementing measures and actions proposed in the WMP.

23 California Regional Water Quality Control Board, Los Angeles Region, *2012 MS4 Permit Adoption Hearing Transcript*, November 8, 2012, at pgs. 69-70, 326 (“2012 Permit Adoption Hearing Transcript”); *see also* Los Angeles Regional Water Quality Control Board Comments on Receiving Water Limitations Questions, August 15, 2013, at 4.

24 *See* Comments on Proposed Draft Order SWRCB/OCC Files to A-2236(a)-(kk): In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175) submitted by NRDC, Los Angeles Waterkeeper, and Heal the Bay, January 21, 2015.

25 2012 Permit Adoption Hearing Transcript, at p. 69.

26 Revised Draft Order, at p. 36.

1 (*Id.*, at Part VI.C.6.) However, if the WMPs are approved in their deficient state, implementing
2 such deficient programs will, by definition, fail to put Permittees on a rigorous path to achieving
3 Permit compliance.

4 **B. The Executive Officer’s Conditional Approvals Constitute an Improper Permit**
5 **Modification**

6 By conditionally approving WMPs – a procedure nowhere provided for in the 2012 MS4
7 Permit – the Executive Officer improperly modified the 2012 MS4 Permit in violation of the
8 substantive and procedural requirements of state and federal law. Specifically, in issuing the
9 conditional approvals, the Executive Officer created new permit terms by: 1) inventing an
10 intermediate approval process not provided for in the 2012 MS4 Permit; 2) modifying the WMP
11 provisions by imposing conditions inconsistent with the express requirements of the Permit;²⁷ and
12 3) providing for an open-ended extension to the deadline for complying with the Permit’s WMP
13 provisions (allowing Permittees at least an additional 45 days to satisfy the conditions outlined by
14 the Executive Officer after which the Executive Officer “may,” or may not, withdraw the
15 approval).

16 The 2012 MS4 Permit’s terms specifically require that the Executive Officer, on behalf of
17 the Regional Board, must either approve or deny the final draft WMPs by a date certain – in this
18 case on or before April 28, 2015. (*Id.*, at Table 9.) The Executive Officer did neither, and instead
19 de facto amended the Permit terms, creating a new process, timeline, and set of standards by
20 conditionally approving WMPs. The Permit’s WMP provisions constitute the Permit’s alternative
21 compliance approach to meeting RWLs and TMDL-specific limitations and are therefore a key
22 part of the Permit. (*Id.*, at Part VI.C.6.) Moreover, once approved, the contents of the WMPs
23 become enforceable, substantive terms of the Permit – terms that are at the core of the 2012 MS4
24 Permit. (*Id.*)²⁸ Thus, by conditionally approving the WMPs and thereby extending the deadline by
25 which new substantive pollution control measures may be incorporated into the 2012 MS4 Permit,

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27 ²⁷ See *infra* Section III.C.

28 ²⁸ See also *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) (where a submission establishes what the discharger will do to reduce discharges to the maximum extent practicable, it crosses the threshold from being an item of procedural correspondence to being a substantive component of the regulatory regime).

1 the Executive Officer is modifying the Permit terms,²⁹ but without circulation of a draft permit,
2 public notice, fact sheet, or public hearing date, as required by law.

3 When a NPDES permit is reissued, or as here, modified, the issuing agency must follow
4 substantive and procedural requirements set out in the CWA's implementing regulations.³⁰ While
5 for modifications, the requirements apply only to those permit sections that are changed, the
6 issuing agency must nevertheless prepare and circulate a draft permit reflecting those changes.³¹
7 The draft permit must include, among other things, compliance schedules, monitoring
8 requirements, and a fact sheet.³² The fact sheet accompanying the draft permit must include,
9 among other things: 1) a brief statement of the activity at issue; 2) the type of waste discharged; 3)
10 a summary of the basis for the changed permit conditions, including citations to statutory and
11 regulatory authorization, and facts in the record; 4) a description of the procedures by which a final
12 decision on the modification will be reached, including the beginning and end dates for the
13 required notice to the public; and 5) procedures for requesting a hearing.³³ The issuing agency is
14 required to provide at least 30 days from notice of the draft permit modification to allow for public
15 comment.³⁴ Finally, under state law, modification of a NPDES permit is not delegable from the
16 Regional Board itself to the Executive Officer.³⁵ Therefore, any NPDES permit modification must
17 be adopted at a properly-noticed public hearing before the Regional Board members.

18 The conditional approvals constitute a modification of the 2012 MS4 Permit terms; yet, the
19 Regional Board failed to follow the required permit modification procedure. Instead, the
20

21 ²⁹ In certain circumstances where a permit modification satisfies the criteria for a "minor modification," which are not
22 applicable here, the permit may be modified without a draft permit or public review. 40 C.F.R. § 122.62. For
23 stormwater permits, minor modifications are narrowly defined as those needed to correct typographical errors, require
24 more frequent monitoring or reporting by the Permittee, change an interim compliance date in a schedule of
25 compliance, allow for changes in ownership or operational control of a facility (as long as no other changes are
26 needed), or to terminate a discharge outfall. 40 C.F.R. § 122.63. Conditionally approving WMPs – which, once
27 approved, become the enforceable, binding terms of the 2012 MS4 Permit – when the Permit only allows for approval
28 or denial does *not* constitute a minor modification.

³⁰ See 40 C.F.R. §§ 124.5-124.15.

³¹ 40 C.F.R. § 124.5.

³² 40 C.F.R. § 124.6.

³³ 40 C.F.R. § 124.8(b).

³⁴ 40 C.F.R. § 124.10(b).

³⁵ Cal. Water Code § 13223(a); see also Resolution No. R14-005 ("...the Executive Officer is specifically precluded from...[i]ssuing, modifying, or revoking any waste discharge requirements.").

1 conditional approvals were issued as letters to the Permittees. The Executive Officer’s action,
2 therefore, failed to meet the requirements of the federal regulations for modifying a NPDES permit
3 and constitutes an abuse of discretion.

4 **C. The Terms of the Conditional Approvals Are Inconsistent with Permit Requirements**
5 **and the Federal CWA and Therefore Establish That the Only Available Course of**
6 **Action for the Executive Officer Was to Deny the WMPs**

7 Following submission of the initial draft WMPs, Regional Board staff identified numerous
8 and significant failures to comply with Permit requirements and therefore directed Permittees, in
9 writing, to submit revised plans to address the deficiencies.³⁶ Unfortunately, the revised draft
10 WMPs failed to address virtually all of the identified non-compliance issues.³⁷ Rather than denying
11 the insufficient WMPs as required by the 2012 MS4 Permit, however, the Executive Officer
12 approved the WMPs with conditions – conditions that fail to address all of the WMP inadequacies
13 previously cited by Regional Board staff itself.³⁸ As such, the terms of the Executive Officer’s
14 conditional approvals are inconsistent with Permit requirements, and constitute an abuse of
15 discretion.

16 **1. Reasonable Assurance Analysis**

17 Perhaps the most glaring deficiency in the WMPs is the flawed Reasonable Assurance
18 Analysis (“RAA”) in each. The 2012 MS4 Permit requires:

- 19 (5) Permittees shall conduct a Reasonable Assurance Analysis for each
20 water body-pollutant combination addressed by the Watershed
21 Management Program. A Reasonable Assurance Analysis (RAA) shall
22 be quantitative and performed using a peer-reviewed model in the
23 public domain. Models to be considered for the RAA, without
24 exclusion, are the Watershed Management Modeling System
(WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the
Structural BMP Prioritization and Analysis Tool (SBPAT). The RAA

25 ³⁶ See Exhibit A: Regional Board Staff Review of Draft WMPs.

26 ³⁷ See Exhibit C: Links to Revised WMPs.

27 ³⁸ While Petitioners’ review of the revised WMPs and their correlating letters of conditional approvals was mainly
28 focused on three watershed management groups (Lower San Gabriel, Los Angeles River Upper Reach 2, and Lower
Los Angeles River), Petitioners’ argument about the illegality of the conditional approvals applies to all nine WMPs
that were conditionally approved.

1 shall commence with assembly of all available, relevant subwatershed
2 data collected within the last 10 years, including land use and pollutant
3 loading data, establishment of quality assurance/quality control
4 (QA/QC) criteria, QA/QC checks of the data, and identification of the
5 data set meeting the criteria for use in the analysis. Data on
6 performance of watershed control measures needed as model input
7 shall be drawn only from peer-reviewed sources. These data shall be
8 statistically analyzed to determine the best estimate of performance
9 and the confidence limits on that estimate for the pollutants to be
10 evaluated. The objective of the RAA shall be to demonstrate the ability
11 of Watershed Management Programs and EWMPs to ensure that
12 Permittees' MS4 discharges achieve applicable water quality based
13 effluent limitations and do not cause or contribute to exceedances of
14 receiving water limitations.

- 15 (a) Permittees shall demonstrate using the RAA that the activities
16 and control measures identified in the Watershed Control
17 Measures will achieve applicable water quality-based effluent
18 limitations and/or receiving water limitations in Attachments L
19 through R with compliance deadlines during the permit term.
- 20 (b) Where the TMDL Provisions in Part VI.E and Attachments L
21 through R do not include interim or final water quality-based
22 effluent limitations and/or receiving water limitations with
23 compliance deadlines during the permit term, Permittees shall
24 identify interim milestones and dates for their achievement to
25 ensure adequate progress toward achieving interim and final
26 water quality-based effluent limitations and/or receiving water
27 limitations with deadlines beyond the permit term.
- 28 (c) For water body-pollutant combinations not addressed by TMDLs,
Permittees shall demonstrate using the RAA that the activities
and control measures identified in the Watershed Control
Measures will achieve applicable receiving water limitations as
soon as possible.

(*Id.* at Part VI.C.5.b.iv.5.)

Thus, the RAA is a detailed modeling exercise, intended to ensure that the WMPs
implement stormwater pollution control measures of the correct type, location, and size to achieve
compliance with WQs in receiving water bodies. The RAA forms the bedrock for WMP
development, and therefore for pollution control and compliance with the CWA for those
Permittees that choose to develop WMPs. As noted by the State Board in the most recent Draft
Order on the 2014 MS4 Permit,

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...the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.³⁹

Moreover, Regional Board staff has also recognized the importance of the RAA in WMP development and implementation and thereby need for a robust analysis.⁴⁰ As a result, Regional Board staff generated extensive comments on the RAAs that were described in the initial drafts of the WMPs. For example, for the Lower San Gabriel River WMP, Regional Board staff's list of inadequacies included:

- 1) No modeling of organics (PAH, DDT, PCB);
- 2) No explanation for use of zinc as limiting pollutant and no assurance that zinc will lead to compliance with other parameters;
- 3) No predicted baseline presented for modeled pollutants;
- 4) No summary or time series comparisons of baseline data and applicable limits;
- 5) No measurable milestones for implementing BMPs in two year intervals provided;
- 6) No table providing existing runoff volume, required reduction, and proposed reduction to achieve 85% retention, by sub-basin; and
- 7) No table providing existing non-stormwater volume, required reduction, and proposed reduction by sub-basin.⁴¹

For the Lower Los Angeles River WMP, Regional Board staff's list of identified inadequacies included:

- 1) Dominguez Channel, LA and Long Beach Harbor Toxics TMDL completely omitted from WMP (and thus RAA); and
- 2) San Pedro Bay itself completely omitted from WMP (and thus RAA).⁴²

For the Los Angeles River Upper Reach 2 WMP, Regional Board staff identified a litany of inadequacies:

³⁹ Revised Draft Order, at p. 41.
⁴⁰ 2012 Permit Adoption Hearing Transcript, at p 67.
⁴¹ See Exhibit A: Regional Board Staff Review of Draft WMPs.
⁴² *Id.*

- 1 1) Failed to separately calculate wet and dry weather allowable pollutant loading;
- 2 2) Failed to provide any dry weather modeling;
- 3 3) Failed to provide model outputs for interim WQBELs;
- 4 4) Failed to provide justification for 90th percentile rain years for use in model;
- 5 5) Failed to include category 2 and 3 pollutants in the RAA; and
- 6 6) Failed to calibrate the model – to compare modeling results to real world data and
- 7 adjust on that basis.⁴³

8 In each of the initial comment letters, Regional Board staff warned Permittees that failure
9 to revise the WMPs to address the inadequacies would result in them being subject to the baseline
10 requirements of the Permit – in other words, the WMPs would be denied.⁴⁴

11 Despite the detailed comments from Regional Board staff, and the admonition that failure
12 to conduct the required corrections to the RAA modeling would result in denials, the final draft
13 WMPs for the Lower San Gabriel, Los Angeles River Upper Reach 2, and Lower Los Angeles
14 River watershed management groups either failed to meaningfully address or completely ignored
15 all of the Regional Board staff’s comments listed above. Furthermore, for the Los Angeles River
16 Upper Reach 2 WMP, the revised plan confirms that the model had not been calibrated and is thus
17 an almost entirely speculative exercise.

18 Rather than denying the facially inadequate final WMPs as required by the 2014 MS4
19 Permit, however, the Executive Officer, on behalf of the Regional Board, chose to conditionally
20 approve nine final WMPs, ostensibly requiring corrections within 45 days. Yet, the conditions
21 included in the conditional approvals *fail to address any of the RAA inadequacies identified by*
22 *RWQCB staff*. Therefore, even if fully complied with, the terms of the conditional approvals will
23 *not* ensure that the RAA – the basis for development, implementation, and evolution of the
24 pollution control measures to be implemented via the WMPs – will provide *any* level of assurance
25 that the WMP implementation will achieve compliance with WQSs and the CWA, let alone the

27 ⁴³ *Id.*

28 ⁴⁴ *Id.*

1 “reasonable” assurance that the 2012 MS4 Permit and the State Board require. For this reason
2 alone, the WMPs must be denied.

3 **2. Substantive Program Requirements**

4 In addition to the RAA-related deficiencies, Regional Board staff’s review of the draft
5 WMPs identified basic failures to comply with the program development requirements pursuant to
6 the 2012 MS4 Permit. Unfortunately, similar to the RAA-related deficiencies, many of the other
7 inadequacies that Regional Board staff originally identified in their October 2015 comments were
8 not addressed by the conditional approvals. Notably, there is a lack of specificity with regards to
9 types and locations of structural projects, as well as schedules for implementation in the Lower
10 San Gabriel River and Lower Los Angeles River WMPs. The initial Regional Board staff
11 comments on the WMPs directed the Permittees to at least “commit to the construction of the
12 necessary number of projects to ensure compliance with permit requirements per applicable
13 compliance schedules” and to “clarify that sufficient sites were identified so that the remaining
14 necessary BMP volume can be achieved...”;⁴⁵ however, no changes were made in response to
15 either of these comments, and the conditional approvals did not require any additional response.
16 This lack of specificity makes it near impossible to track whether Permittees are making adequate
17 effort towards compliance, or even to assess whether the WMPs present a path to compliance.

18 A comprehensive list of the substantive requirements of the Permit that the conditional
19 approvals fail to address is provided in Exhibit D. The failure of the revised WMPs to address
20 these deficiencies should have resulted in denial of the WMPs.

21 **IV. CONCLUSION**

22 For all the foregoing reasons, the instant Petition for Review should be GRANTED, and all
23 nine WMPs that were conditionally approved on April 28, 2015 should be DENIED.

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28 ⁴⁵ See Exhibit A: Regional Board Staff Review of Draft WMPs.

1 Respectfully submitted,

2 Dated: May 28, 2015

NATURAL RESOURCES DEFENSE COUNCIL, INC.

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11 Dated: May 28, 2015

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