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August 15, 2013

VIA ELECTRONIC AND U.S. MAIL

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State Water Resources Control Board
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Re: **SWRCB/OCC File A-2236(a) through (kk): Comment Letter
Addressing Receiving Water Limitations Language**

Dear Ms. Wadhvani,

This letter is being submitted on behalf of 20 municipal co-permittees and petitioners (the “Commenters”)¹ to the new Los Angeles Municipal Separate Storm System Sewer Permit, Order No. R4-2012-0175, NPDES Permit No. CAS004001 (“LA MS4 Permit”), adopted on November 8, 2012. The Commenters greatly appreciate the opportunity to provide feedback on the appropriate receiving water limitations standard for MS4 permits. The Commenters are very pleased to offer their combined perspective to the State Water Resources Control Board (“State Board”) regarding this crucial issue.

The State Board has asked the following two questions, which the Commenters will address below:

1. Is the watershed management program/enhanced watershed management program alternative contained in the LA MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?

¹ City of San Marino (A-2236(a)); City of Rancho Palos Verdes (A-2236(b)); City of South El Monte (A-2236(c)); City of Norwalk (A-2236(d)); City of Artesia (A-2236(e)); City of Torrance (A-2236(f)); City of Beverly Hills (A-2236(g)); City of Hidden Hills (A-2236(h)); City of Westlake Village (A-2236(p)); City of La Mirada (A-2236(q)); City of Manhattan Beach (A-2236(r)); City of Covina (A-2236(s)); City of Vernon (A-2236(t)); City of Monrovia (A-2236(v)); City of Agoura Hills (A-2236(w)); City of Commerce (A-2236(aa)); City of Downey (A-2236(dd)); City of Inglewood (A-2236(ee)); City of Culver City (A-2236(hh)); and City of Redondo Beach (A-2236(jj)).

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2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 Permits?

I. INTRODUCTION

The Commenters sincerely appreciate the efforts of the Los Angeles Regional Water Quality Control Board (“LA Regional Board”) and its staff in developing the LA MS4 Permit. Although the Commenters believe the LA MS4 Permit’s watershed management compliance approach is a step in the right direction insofar as it utilizes a modified iterative/adaptive management approach, they also believe that: (1) a pure iterative/adaptive management approach as set forth in State Board Precedential Orders 99-05 and 2001-15 remains the most appropriate one for MS4 permits; (2) to the extent the State Board is inclined to use the LA MS4 Permit’s watershed management approach, there are certain compliance gaps that should be addressed in a statewide receiving water limitations policy, as discussed below.

Compliance with receiving water limitations should be determined only through good faith adherence to an iterative/adaptive management process. Such a process generally consists of implementing best management practices (“BMPs”) and other control measures and programs geared toward limiting the loading of pollutants into and out of storm drains, conducting monitoring to measure their effectiveness, and adjusting those BMPs if the monitoring shows that water quality standards are not being met. This process continues until water quality standards are met, and stays in place to the extent necessary to ensure they are maintained. As long as the iterative/adaptive management process is being followed in good faith, a permittee is deemed in compliance with the entire permit, including receiving water limitations.

The LA MS4 Permit’s watershed management approach is unworkable because of the likelihood that it will result in permit violations by requiring compliance with numeric “enforceable benchmarks” and final Total Maximum Daily Load (“TMDL”) and receiving water targets set at levels beyond what permittees can accomplish even with best efforts. Modifications to the LA MS4 Permit’s watershed management approach will be necessary to avoid the potential legal liability and never-ending litigation that enforcing these numeric limits will invariably create.

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II. THE LA MS4 PERMIT'S WATERSHED MANAGEMENT COMPLIANCE APPROACH

A. Permit Background

The pertinent aspect of the LA County MS4 Permit's watershed management program is the language that provides that compliance with all the requirements for a Watershed Management Plan ("WMP") or an Enhanced Watershed Management Plan ("EWMP") constitutes compliance with TMDL numeric targets, non-exempt non-stormwater discharge prohibitions, and receiving water limitations ("WMP Compliance Option").² A permittee who fails to adhere to any of the watershed management program requirements loses the benefit of the WMP Compliance Option and becomes subject to the receiving water limitations provision of the LA MS4 Permit in part V.A., which includes the prohibition on any discharges that cause or contribute to violations of receiving water limitations.³

Another major component of the LA MS4 Permit's watershed management compliance approach is the requirement that a permittee that creates a WMP or EWMP must conduct a "reasonable assurance analysis" as part of the plan.⁴ This analysis must utilize computer modeling for every water body-pollutant combination dealt with in the plan to *guarantee* compliance with TMDL interim and final targets and receiving water limitations. Permittees must ensure they will hit "interim milestones"—which have been referred to by the Regional Board as "enforceable benchmarks"—and achieve actual final numeric targets to maintain the WMP Compliance Option. Thus, numeric targets are part of the LA MS4 Permit, but their enforceability only occurs upon completion of a "reasonable assurance analysis" and at the time as interim and final targets are scheduled to be achieved.

The WMP Compliance Option also requires MS4 permittees to address 303(d)-listed water body-pollutant combinations that are not the subject of TMDLs or in the same class as TMDL-listed water body-pollutant combinations. Such combinations are thus to be addressed in the reasonable assurance analysis, and are therefore also treated as enforceable numeric targets in the EWMP or WMP implementation

² LA MS4 Permit, part VI.C.2.b. and .d., at pages 52-53.

³ *Id.* at part V.A., at pages 38-39.

⁴ *Id.* at part VI.C.5.b.iv., at pages 63-64.

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process.⁵ The same is true of pollutants that are not 303(d)-listed but for which there have been past exceedances of receiving water limitations.⁶

The watershed management program also utilizes an iterative/adaptive management process that requires permittee participants to assess the progress of the plan every two years and ramp up watershed control measures where necessary to meet the enforceable benchmarks.⁷ Thus, adaptive management is part of the process, but a permittee can still arguably be found in violation of the permit for numeric standard violations even if it engages in the process in good faith.

B. The LA MS4 Permit's Watershed Management Approach, Without Adjustments, Will Result in Permit Violations

Maintaining compliance with the LA MS4 Permit's WMP Compliance Option will be impossible for at least some LA MS4 permittees. First, the WMP Compliance Option does not cover portions of a watershed not covered by a WMP or EWMP. The LA MS4 permittees still must first demonstrate compliance through computer modeling, and then actually meet phased interim and final numeric TMDL targets and receiving water limitations. If there is any failure to meet these limits, the WMP Compliance Option is inapplicable. Furthermore, the numeric limits otherwise imposed are, in some instances, unrealistic. It is thus inevitable that, despite best efforts and good faith adherence to a WMP or EWMP, some Watershed Management Groups will fail to meet applicable numeric water quality standards.

Los Angeles County's MS4 is a gigantic interconnected structure consisting of storm drains, pipes, culverts, gutters, and catch basins for which no comprehensive maps exist. Even its exact size is unknown. Storm drains line every major thoroughfare and thousands of side-streets in Los Angeles County and collect rainwater runoff from virtually every inch of a largely urban, industrialized landscape consisting of 89 independent governmental jurisdictions. Further, rainwater runoff does not follow municipal boundaries; storm water enters Los Angeles County along its entire boundary adding to the volumes discharged and the complexity of regulation. The LA MS4 system contains millions of inputs and tens of thousands of outputs. The notion of effectively managing this giant interconnected system and effectively regulating the runoff caused by Los Angeles County's nearly 10 million human residents and tens of thousands of businesses is daunting.

⁵ LA MS4 Permit, parts VI.C.2.a.i. and ii., at pages 49-51.

⁶ *Id.* at part VI.C.2.a.iii., at pages 51-52.

⁷ *Id.* at part VI.C., at pages 66-67.

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The unfortunate reality is that in largely urban counties such as Los Angeles, exceedances of water quality standards in receiving water bodies happen with regularity, despite the 20-plus years of regulation under MS4 Permits and untold millions of dollars spent on improving water quality. Monitoring conducted by the Los Angeles County Flood Control District under Los Angeles County's prior MS4 permit, which showed regular numeric water quality violations for numerous constituents at each of four mass-emissions stations placed in different receiving waters around the county, identified 1,105 violations of numeric water quality standards for various pollutants since 2003. Even with good faith efforts and noted water quality improvements, the permittees under the former permit were simply not able to consistently achieve the then water quality standards. Imposing numeric limits will virtually guarantee some numeric standard violations, and thus set permittees up to fail.

The LA MS4 Permit implemented 33 new TMDLs in addition to the numerous TMDLs already in place and forthcoming TMDLs. These TMDLs were created because of the failure of specified receiving waters to meet water quality standards for certain pollutants. These are thus bodies of water where, by definition, pervasive violations of water quality standards exist and will, at least for some, continue to exist even despite best efforts. Beyond the TMDLs, the LA MS4 Permit regulates 140 pollutants in total, for which water quality standards exist and can be exceeded at any time. The sheer number of TMDLs and other regulated pollutants makes compliance with all numeric limits for all 140 pollutants, including those for which interim and final TMDL targets exist, a practical impossibility.

Furthermore, it is clear that numeric limits are often set at unrealistic levels. For one example, the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL sets the numeric limit for certain toxic materials such as DDT at a "non-zero" level, which means it is *less than zero*, and a level that is lower than the rate of DDT introduced to the water bodies by aerial deposition. In other words, the receiving water limitation for DDT for the harbor and channel is less than what comes into it from the sky.

The LA Regional Board's response to this fact was: "...Staff acknowledges the DDT TMDL is smaller than the air deposition load for certain water bodies; however, staff does not find that this will require constant remediation of bed sediments. Rather a

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more extensive DDT flux study within these waters will help clarify these results and perhaps provide a more accurate characterization.”⁸

As the LA Regional Board clearly stated, the numeric standard was set with the understanding that a more accurate figure would be achieved as further studies are conducted. Under a pure numeric standard receiving water standard, until such time as the TMDL can be re-opened and *potentially* changed, however, the non-zero standard stands as a receiving water limitation, subjecting the permittees to open-ended potential liability for violations that can be caused entirely by aerial deposition. Even under the LA MS4 Permit’s compliance approach, there is still no guarantee that an achievable numeric target will be set and, if it is, that it will be achievable within the given timeframes, even with best efforts by permittees.

For another example, in the Santa Monica Bay Bacteria TMDL, the summer dry weather receiving water standards for indicator bacteria are set at zero exceedances. This zero exceedance standard does not take into account natural background conditions such as bird droppings and other sources aside from MS4s which may cause exceedances. Data collected at the reference beach since adoption of the TMDL in 2006 demonstrates that natural conditions associated with freshwater outlets transporting runoff from undeveloped watersheds results in exceedances of the single sample bacteria limits during both summer and winter dry weather on approximately 10% of the days sampled. The numeric limit simply does not take into consideration the scientifically proven reality of natural and non-point sources of indicator bacteria that are entirely beyond the ability and legal authority of any permittee to control. Imposing interim or final numeric limits will almost certainly result in violations, because sources outside the permittees’ control cause exceedances all on their own. Again, even if more reasonable numeric limits are imposed, permittees still may need more time to comply than is provided for in the TMDL, and may similarly be unable to meet “enforceable benchmarks” along the way.

The legal uncertainties created for many MS4 permit holders have been highlighted by two seemingly irreconcilable appellate decisions issued just this year. In January 2013, the U.S. Supreme Court ruled in favor of an MS4 permit holder, the Los Angeles County Flood Control District. The Supreme Court held that the County could not be held liable for a “discharge” under the Clean Water Act when the water was discharged from one part of a lined portion of the Los Angeles River to an unlined portion of the same river. The Supreme Court then remanded the case for

⁸ Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants TMDL, Regional Board Responses to All Comments, April 26, 2011, at page 107.

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further proceedings to the Ninth Circuit, whose earlier opinion to the contrary was reversed.⁹ Then, in an entirely different opinion issued earlier this month, a three-judge panel of the Ninth Circuit concluded that as a matter of law the same MS4 permit holder, the County, was liable under an arguably different theory—that a mere exceedance of a permit limit at a mass-emissions monitoring point in the Los Angeles River was sufficient to hold it liable under the Clean Water Act.¹⁰

Whatever might be said about these two dramatically different legal opinions involving the same permit and the same permit holder, one must conclude that a current permittee must be very wary of any receiving water limitation that sets an absolute numeric standard. Various third parties not directly affected by the LA MS4 Permit could, if they otherwise qualified, use the current judicial uncertainty to sue a number of permittees, alleging strict liability for any exceedance of a numeric limit.

Moreover, it is no secret that the financial situation of municipalities and other government agencies in California is a dire one. This is an era of shrinking government budgets, layoffs, reduced staff hours and services, and, for some government entities, the possibility of bankruptcy. The LA MS4 Permit has already caused many permittees to double or more-than-double their projected expenses for stormwater regulation from FY 2012-2013 to FY 2013-2014, and that period merely encompasses the expense of developing the WMPs, EWMPs, and monitoring plans, which will generally cost between \$750,000 and \$1.3 million dollars to develop per watershed. The burdensome cost of implementing the plans will far exceed the development costs each year thereafter. Under California Proposition 218, securing additional funding for storm water programs will be left up to the voters, so permittees that are unable to convince voters to increase taxes will likely have to cut core municipal functions such as police, fire, libraries, public works, and programs for children and the elderly. If administrative liability and the huge expenses associated with third party lawsuits are added to this equation, a truly untenable situation will be created, and funds that should go toward improving water quality will be diverted to costly legal battles that provide no benefit to the public.

⁹ *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013).

¹⁰ *Natural Resources Defense Council, Inc. v. Los Angeles County Flood Control Dist.*, ___ F.3d ___, 2013 U.S. App. LEXIS 16416 (Aug. 8, 2013).

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C. MS4 Permits Have Always Utilized the Iterative/Adaptive Management Process For Compliance With MS4 Permits While Numeric Limits Contravene Federal Law and Are Infeasible

The iterative/adaptive management process has long been the compliance standard for receiving water limitations in MS4 Permits and continues to be used in permits throughout the State and around the nation. Therefore, characterizing the iterative/adaptive management process as a “safe harbor” as the Natural Resources Defense Council has done in its Petition for Review of the LA MS4 Permit is not accurate.

Under the Clean Water Act, MS4 permittees are required to reduce pollutant loading into an MS4 and to a receiving water body to the Maximum Extent Practicable (“MEP”).¹¹ In practice and through guidance memoranda, the federal MEP standard has been defined as an iterative, BMP-based standard that does not impose numeric limits on MS4 permittees.¹²

The LA MS4 Permit’s own definition of MEP, which is derived from a 1993 State Board memorandum, does not require achieving numeric water quality standards.¹³ Rather, the State’s MEP definition is *solely* a BMP-based standard that factors in: (1) effectiveness; (2) compliance with applicable regulations; (3) public support; (3) whether the cost of the BMP will have a reasonable relationship to the pollution control benefits; and (4) technical feasibility.¹⁴ Simply requiring adherence to numeric standards without reference to the BMP-based MEP factors would clearly exceed MEP, and thus trigger the requirement to conduct a full economic impact analysis under California Water Code sections 13241, 13263, and 13000.¹⁵

¹¹ Clean Water Act § 402(p)(3) (33 U.S.C. § 1342(p)(3)).

¹² See 2003 EPA Memorandum, “Guidance on Definition of Maximum Extent Practicable”; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Divers Environmental Conservation Organization v. State Water Resources Control Board*, 145 Cal.App.4th 246, 256 (2006); State Board Water Quality Order No. 2006-12, at page 17 (“Federal regulations do not require numeric effluent limitations for discharges of storm water.”)

¹³ LA MS4 Permit, Attachment A at page 11; February 11, 1993 State Board Memorandum, “Definition of Maximum Extent Practicable” at pages 4-5.

¹⁴ *Id.*

¹⁵ Cal. Water Code §§ 13241, 13263 and 13000; *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 625-27 (2005).]

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In 2010, the EPA reiterated its commitment to the iterative/adaptive management process as a means of permit compliance, and directed permit writers to impose numeric limits only “where feasible” and only as to “effluent limitations.”¹⁶ This position is based on the EPA’s Clean Water Act regulations, which authorize the use of the iterative/adaptive management process for MS4 permits “when numeric *effluent limitations* are *infeasible*.”¹⁷ Thus, the notion that federal authority authorizes the imposition of numeric limits for receiving waters, rather than through a permittee’s MS4 effluent, is incorrect. Any imposition of numeric receiving water limitations thus lacks support under the Clean Water Act, EPA’s Clean Water Act regulations and EPA’s TMDL guidance memoranda.

The iterative/adaptive management approach has always been the compliance standard for MS4 permit compliance in California as well. In 1991, the State Board concluded that “numeric effluent limitations are *infeasible* as a means of reducing pollutants in municipal storm water discharges, at least at this time.”¹⁸ In 2001, the State Board reiterated that the compliance standard for MS4 permits is to be an “iterative” one, and that “we will generally not require ‘strict compliance’ with water quality standards through numeric effluent limitations and we continue to follow an iterative approach, which seeks compliance over time.”¹⁹

The 2001 State Board precedential order followed the 1999 opinion of the Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner*. In that case, the Ninth Circuit clarified that the Clean Water Act section 301—which demands that industrial NPDES permittees meet numeric water quality standards through the imposition of the “best available” technology—*does not* apply to municipal MS4 permittees.²⁰ The 2001 order is the last State Board order issued on the subject.

¹⁶ See EPA’s November 12, 2010 Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs” at page 2 (“*where feasible*, the NPDES permitting authority exercises its discretion to include *numeric effluent limitations* as necessary to meet water quality standards.” (emphasis added)).

¹⁷ 40 C.F.R. §122.44(k) (emphasis added).

¹⁸ State Water Resources Control Board Water Quality Order No. 91-03, at page 49 (emphasis added).

¹⁹ State Board Water Quality Order No. 2001-15, at page 8.

²⁰ *Defenders of Wildlife v. Browner*, 191 F.3d 1159 at 1165-66 (9th Cir. 1999).

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More recently, in the Caltrans MS4 permit, the final version of which became effective on July 1, 2013, the State Board did not impose enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.²¹

Rather, the Caltrans MS4 permit's fact sheet notes that the permit contains an "iterative process [that] is modeled on receiving water limitations set out in State Water Board precedential Order WQ 99-05 and required by that Order to be included in all municipal storm water permits."²² The State Board should similarly conclude that imposing numeric receiving water limitations criteria on other MS4 permittees around the State is inconsistent and unjustifiable.

Furthermore, supporting documentation detailing the feasibility of imposing numeric limits for receiving water limitations has never been provided. Thus, the Permittees believe that the LA MS4 Permit's watershed management compliance approach, while laudable in its attempt to impose an achievable compliance standard, is still flawed because it applies strict numeric limits to permittees in the form of enforceable benchmarks, TMDL final targets, and receiving water limitations. Imposing such numeric limits as receiving water limitations is unsupported by federal law and will invariably set some permittees up to fail. Accordingly, the Commenters suggest two alternative approaches to the LA MS4 Permit's watershed management approach that will be consistent with controlling federal authority and create a workable approach that avoids open-ended liability while still working toward the shared goal of improving water quality.

III. ALTERNATIVE APPROACHES

A. Adaptive Management

For all the reasons stated above, the Permittees believe that the iterative/adaptive management process as spelled out in State Board Order No. 99-05 and further described in State Board Order 2001-15 should be established as the sole receiving water limitation compliance standard in California. The imposition of numeric

²¹ Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG, September 7, 2012, page 9.

²² Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-11-DWQ, at page 9.

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standards in receiving waters is not supported by law, sound public policy, or any indication of feasibility in terms of both cost and available technology.

A strong statement of clarification in this regard is called for at this time, and the language of State Board Order No. 99-05 should be altered to state that the prohibition on “causing or contributing” to a water quality standard violation in the receiving water can be complied with solely through good faith adherence to the iterative/adaptive management process. This is by far the simplest, most straightforward method of compliance and is well-supported by law.

B. Alternative “Compliance Gap” Language

To the extent the State Board is inclined to use the LA MS4 Permit watershed management compliance approach, there are certain compliance gaps that should be addressed in a statewide receiving water limitations policy. The following language should be included in the model permit language to provide a clearer and more stringent adaptive management procedure than is spelled out in prior State Board precedential orders for instances in which a permittee finds it is or will be unable to meet a WMP or EWMP requirement. The Commenters recommend that the following language be added to LA MS4 Permit, Part VI.C.1.²³:

“Where a Permittee demonstrates to the satisfaction of the Regional Board at a public meeting that it cannot achieve compliance with any requirement or date for its achievement in a draft or approved WMP or EWMP because the requisite BMPs are technically or economically infeasible (“Infeasible BMPs”), then the Permittee shall timely submit to the Regional Board in writing: (i) a description of the requirement that cannot be achieved and an analysis of why it could not be achieved; and (ii) a description of the BMPs the Permittee will implement in place of the Infeasible BMPs (“Alternative BMPs”), along with an implementation schedule with interim milestones and the date the requirement is projected to be achieved. A Permittee’s compliance with the Alternative BMP procedure shall constitute a Permittee’s compliance with the Receiving Water Limitations, Discharge Prohibitions and TMDL and related WQBEL provisions set forth in Parts V.A, III.A.1 and VI.E of this Order.”

²³ The proposed additions/revisions to the LA MS4 Permit will require additional language modifications throughout the LA MS4 Permit to ensure internal consistencies and avoid ambiguity within the WMP/EWMP program.

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IV. CONCLUSION

The iterative/adaptive management process has been and continues to be the only sensible approach to receiving water limitations compliance for MS4s. Numeric standards for receiving waters, as opposed to an MS4's effluent, are not supported by federal law. Furthermore, under controlling federal authority, numeric standards may only be imposed where "feasible." No study of feasibility has been made for the imposition of numeric limits in receiving waters, which the LA MS4 Permit's watershed management approach appears to ultimately impose.

A reservation of rights by the Water Boards to enforce numeric limits for receiving waters is unnecessary, because liability should exist only where a permittee is not engaging in the iterative/adaptive management process in good faith. Permittees who engage in the iterative/adaptive management process in good faith should not be liable for violations of MS4 permits' receiving water limitations when inevitable numeric violations occur, because adherence to the process is literally all permittees can do. So long as a permittee is doing all it can to comply, it should be allowed to be free of the lingering possibility of administrative liability and third-party lawsuits, to be instituted at any time at the complete discretion of the Water Boards or *any* third-party. Implementing the recommendations set forth in this letter will establish a workable approach to receiving water limitations compliance and allow permittees to focus all available resources on improving water quality in collaboration with the LA Regional Board.

Thank you again for the opportunity to comment on the receiving water limitations language. Please feel free to contact me or my colleague, Andrew Brady at (213) 626-8484 or via email at clee@rwglaw.com or abrady@rwglaw.com if you have any questions or would like to further discuss any of these issues.

Very truly yours,



Candice K. Lee

Enclosures (service lists—via email only)

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