

August 15, 2013

VIA EMAIL

Ms. Emel G. Wadhvani
Senior Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: SWRCB/OCC Files A-2236(a)-(kk) Los Angeles Municipal Separate Storm Sewer System Permit - Receiving Water Limitations Language

Dear Ms. Wadhvani:

In its July 8, 2013 letter, the State Water Resources Control Board (“State Water Board”) suggested that the “Los Angeles MS4 Permit appears to provide a compliance alternative to the State Water Board’s precedential receiving water limitations for Municipal Separate Storm Sewer Systems (“MS4s”). Under the Los Angeles MS4 Permit, dischargers that are in compliance with the requirements and milestones of an approved watershed management program/enhanced watershed management program are also generally deemed to be in compliance with the Permit’s receiving water limitations.” Then, comments were requested to address the following two questions:

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

In later July 29, 2013 correspondence, the State Water Board clarified that it “is generally seeking all information that would assist it in determining whether these approaches constitute appropriate revisions or additions to the existing receiving water limitations language in MS4 Permits.”

On behalf of our California municipal and industrial stormwater clients that are regulated by Receiving Water Limitations (“RWL”) language in stormwater permits including, among others, the Cities of Tracy and Atascadero and the Port of Stockton, we provide the following comments.

In general, stormwater permits have become overly complicated and confusing through the years. Historic permits, which complied with the federal minimum standards for such permits, contained just 20-25 pages of requirements. The recent Los Angeles MS4 permit, Order No. R4-2012-0175, stands at 154 pages just for the permit, with approximately 500 pages of complicated and confusing provisions when all attachments are included. The RWL-related requirements themselves in the Los Angeles MS4 permit span nearly 27 pages (see Attachment A). Since courts have had difficulty accurately analyzing and interpreting the last round of RWL language that was much shorter, determining the requirements of and compliance with this new version may be close to impossible. Therefore, the Los Angeles MS4 Permit should not be used as the template going forward.

Instead, the State Water Board should take a leadership role to encourage Regional Boards statewide to make the stormwater program and permits, including any RWL language included therein, much more streamlined. MS4 and other stormwater permits should focus on the constituents of concern for the particular discharge and the local watershed, not require every possible action and Best Management Practice (“BMP”) all of the time. Cities and small businesses do not have the resources to do it all, and must be allowed to succeed instead of fail and suffer through expensive and resource-intensive enforcement actions where the permit holder is trying very hard to comply and do the right thing with the limited resources available.

The State Water Board must remember that RWL language is ***NOT required*** by federal law. This language is the result of state law requirements that have been inserted into stormwater permits because of U.S. EPA Region IX’s historic and erroneous interpretation of the Clean Water Act in the 1990s related to such “requirements,” which was overruled by the Ninth Circuit Court of Appeals in 1999. (*See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166.¹) Thus, the decision to include RWL requirements in MS4 permits in California represents a policy choice, to either require strict and immediate compliance with water quality standards, or not. Our clients urge the State Water Board to confirm that, in the past and still today, the State Water Board has already made the proper policy choice to allow applicable water quality standards to be met through an iterative process implemented over time. Because the previous language derived with that intent has recently been held by federal courts to mean something else, changes to that language are imperative to make the language comport with the State Water Board’s consistently stated intent.

Just this month, the Ninth Circuit Court of Appeals, in a one hundred and eighty degree reversal of its previous decision in the *NRDC v. Los Angeles County* case for the Santa Clara River and Malibu Creek, has now read the 2001 MS4 Permit for Los Angeles County to mean that if

¹ See Attachment B, *Historical Summary of Stormwater RWL Regulation in California* contained in Downey Brand LLP’s letter of November 13, 2012, a copy of which is provided with this letter, and which is also hereby incorporated by reference.

pollutants in the San Gabriel River or the Los Angeles River exceed water quality standards at the mass emission stations, then the stormwater permit's RWL provisions have been violated and all co-permittees are potentially subject to enforcement actions by the Regional Board, U.S. EPA, or citizens groups. This result cannot have been intended by the State Water Board (notwithstanding the *ex post facto* arguments to the contrary submitted on behalf of the Los Angeles Regional Water Quality Control Board in its amicus brief filed in the companion *NRDC v. City of Malibu* case).

Where water quality standards are routinely exceeded in a waterbody like the San Gabriel River or the Los Angeles River, the proper response is to list that waterway on the State's 303(d) List, adopt a Total Maximum Daily Load ("TMDL") for that pollutant, and impose Waste Load Allocations ("WLAs") on all dischargers demonstrated to have a reasonable potential to cause or contribute to that impairment (*see accord* 40 C.F.R. §122.44(d)(1)(i) and (vii)(B)), not to subject stormwater dischargers to fines and penalties on a daily basis until the impairment is resolved.

Where exceedances are sporadic, the proper approach is an iterative one, allowing the local dischargers to adjust their BMPs to address that particular pollutant more directly and then allowing time to implement those modified BMPs. Placing someone in compliance jeopardy whenever a new constituent of concern emerges and exceedances occur does nothing except divert limited resources from the water quality issue at hand. Further, for many pollutants, MS4 permits statewide have included findings recognizing the following:

"2. Certain pollutants present in storm water and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over. Examples of such pollutants and their respective sources are: PAHs which are products of internal combustion engine operation, nitrates, bis (2-ethylhexyl) phthalate and mercury from atmospheric deposition, lead from fuels, copper from brake pad wear, zinc from tire wear, dioxins as products of combustion, and natural-occurring minerals from local geology. However, the implementation of the measures set forth in this Order is intended to reduce the entry of these pollutants into storm water and their discharge to receiving waters."

(2001 LA MS4 Permit, Order No. 01-182 at pg. 1, Finding 2). This acknowledgement that certain pollutants may not be capable of feasibly being controlled argues against a strict liability approach for any exceedance of water quality standards in the receiving water. The current RWL construct also does not work well for pollutants like bacteria that are alive and may not be part of stormwater, but grow on organic matter naturally and emanate from natural sources, such as birds and wildlife. Thus, the RWL construct ultimately adopted must take into account each unique type of pollutant and how to best control what can actually be controlled.

While the construct suggested by the California Stormwater Quality Association ("CASQA") is certainly an improvement over the current template, that suggestion is also complicated and

constrained by trying to stay within the boundaries of the State's former approach originally adopted in the 1990s. Perhaps now a complete rethinking of the approach is in order to replace the RWL construct with a watershed planning approach more fully incorporated into stormwater permits as a required BMP. Then, the specifics of that program for the pollutants at issue in that area are incorporated into the permittee's Storm Water Management Plan, which becomes an enforceable part of the permit.² This approach moves water quality regulation forward, makes substantial further progress toward improved water quality for the constituents of concern, but doesn't bog permittees down with endless do-loops of less targeted BMPs done just to check a box, and doesn't subject permittees to unnecessary enforcement for enforcement's sake. The end game should be a cleaner environment, not more a longer list of completed enforcement actions.

We stand ready to assist the Water Boards in any way that would move the stormwater program forward in the manner described herein.

Respectfully submitted,

DOWNEY BRAND LLP



Melissa A. Thorme

cc: Email Lists per SWRCB Notice

² For instance, the following simpler construct could replace the traditional RWL language:

RECEIVING WATER LIMITATIONS

- A. Receiving water limitations are site-specific interpretations of water quality standards from applicable water quality control plans. As such, they are required under state law to be addressed as part of the permit. However, a receiving water condition not in conformance with a receiving water limitation is not necessarily a violation of this Order, and may be better addressed through a Total Maximum Daily Load or other watershed planning process.
- B. Through the proper planning and timely implementation of BMPs and other requirements of the SWMP/SWPPP, which may be done on a jurisdictional or watershed-wide basis, dischargers/permittees shall ensure that:
1. Storm water discharges and authorized non-storm water discharges do not cause or contribute to an in-stream exceedance of any applicable WQS in any affected receiving water.
 2. Storm water discharges and authorized non-storm water discharges do not contain pollutants in quantities that cause a condition of pollution or a public nuisance.
- C. If the discharger/permittee is found to have discharges notwithstanding the prohibitions in this permit, or discharges causing or contributing to an exceedance of an applicable water quality objective, waste/wasteload allocation, or receiving water limitation in Section B above, the discharger/permittee will not be determined to be in violation of this Order unless it fails to comply with the requirements to report such discharge(s), revise its BMPs/SWMP/SWPPP for the pollutant(s) at issue, and timely implement additional and more effective BMPs.

The 154-page Los Angeles MS4 Permit (not including Attachments) contains the following language related to the Receiving Water Limitations provisions:

Pages 38-39 - V. RECEIVING WATER LIMITATIONS

A. Receiving Water Limitations

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible²⁰, shall not cause or contribute to a condition of nuisance.

[²⁰ - Pursuant to 40 CFR § 122.26(a)(3)(vi), a Permittee is only responsible for discharges of storm water and non-storm water from the MS4 for which it is an owner or operator.]

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. The storm water management program and its components shall be designed to achieve compliance with receiving water limitations. If exceedances of receiving water limitations persist, notwithstanding implementation of the storm water management program and its components and other requirements of this Order, the Permittee shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure:

a. Upon a determination by either the Permittee or the Regional Water Board that discharges from the MS4 are causing or contributing to an exceedance of an applicable Receiving Water Limitation, the Permittee shall promptly notify and thereafter submit an Integrated Monitoring Compliance Report (as described in the Program Reporting Requirements, Part XVIII.A.5 of the Monitoring and Reporting Program) to the Regional Water Board for approval. The Integrated Monitoring Compliance shall describe the BMPs that are currently being implemented by the Permittee and additional BMPs, including modifications to current BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of receiving water limitations. The Integrated Monitoring Compliance Report shall include an implementation schedule. This Integrated Monitoring Compliance Report shall be incorporated in the annual Storm Water Report unless the Regional Water Board directs an earlier submittal. The Regional Water Board may require modifications to the Integrated Monitoring Compliance Report.

b. The Permittee shall submit any modifications to the Integrated Monitoring Compliance Report required by the Regional Water Board within 30 days of notification.

c. Within 30 days following the Regional Water Board Executive Officer's approval of the Integrated Monitoring Compliance Report, the Permittee shall revise the

storm water management program and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.

d. The Permittee shall implement the revised storm water management program and its components and monitoring program according to the approved implementation schedule.

4. So long as the Permittee has complied with the procedures set forth in Part V.A.3. above and is implementing the revised storm water management program and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to modify current BMPs or develop additional BMPs.

Page 44 - VI.A. 13. Enforcement

a. Violation of any of the provisions of this Order may subject the violator to any of the penalties described herein or in Attachment D of this Order, or any combination thereof, at the discretion of the prosecuting authority; except that only one kind of penalty may be applied for each kind of violation.

b. Failure to comply with provisions or requirements of this Order, or violation of other applicable laws or regulations governing discharges through the MS4 to receiving waters, may subject a Permittee to administrative or civil liabilities, criminal penalties, and/or other enforcement remedies to ensure compliance. Additionally, certain violations may subject a Permittee to civil or criminal enforcement from appropriate local, state, or federal law enforcement entities.

Pages 47-53 - VI. PROVISIONS

C. Watershed Management Programs

1. General

a. The purpose of this Part VI.C is to allow Permittees the flexibility to develop Watershed Management Programs to implement the requirements of this Order on a watershed scale through customized strategies, control measures, and BMPs.

b. Participation in a Watershed Management Program is voluntary and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part V.A. (Receiving Water Limitations), Part VI.E (Total Maximum Daily Load Provisions) and Attachments L through R, by customizing the control measures in Parts III.A.4 (Prohibitions – Non-Storm Water Discharges) and VI.D (Minimum Control Measures).

c. Customized strategies, control measures, and BMPs shall be implemented on a watershed basis, where applicable, through each Permittee's storm water management program and/or collectively by all participating Permittees through a Watershed Management Program.

d. The Watershed Management Programs shall ensure that discharges from the Permittee's MS4: (i) achieve applicable water quality-based effluent limitations in Part VI.E and

Attachments L through R pursuant to the corresponding compliance schedules, (ii) do not cause or contribute to exceedances of receiving water limitations in Parts V.A and VI.E and Attachments L through R, and (iii) do not include non-storm water discharges that are effectively prohibited pursuant to Part III.A. The programs shall also ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP) pursuant to Part IV.A.1.

e. Watershed Management Programs shall be developed either collaboratively or individually using the Regional Water Board's Watershed Management Areas (WMAs). Where appropriate, WMAs may be separated into subwatersheds to focus water quality prioritization and implementation efforts by receiving water.

f. Each Watershed Management Program shall be consistent with Part VI.C.5-C.8 and shall:

- i. Prioritize water quality issues resulting from storm water and non-storm water discharges from the MS4 to receiving waters within each WMA,
- ii. Identify and implement strategies, control measures, and BMPs to achieve the outcomes specified in Part VI.C.1.d,
- iii. Execute an integrated monitoring program and assessment program pursuant to Attachment E – MRP, Part IV to determine progress towards achieving applicable limitations and/or action levels in Attachment G, and
- iv. Modify strategies, control measures, and BMPs as necessary based on analysis of monitoring data collected pursuant to the MRP to ensure that applicable water quality-based effluent limitations and receiving water limitations and other milestones set forth in the Watershed Management Program are achieved in the required timeframes.
- v. Provide appropriate opportunity for meaningful stakeholder input, including but not limited to, a permit-wide watershed management program technical advisory committee (TAC) that will advise and participate in the development of the Watershed Management Programs and enhanced Watershed Management Programs from month 6 through the date of program approval. The composition of the TAC may include at least one Permittee representative from each Watershed Management Area for which a Watershed Management Program will be developed, and must include a minimum of one public representative from a non-governmental organization with public membership, and staff from the Regional Water Board and USEPA Region IX.

g. Permittees may elect to develop an enhanced Watershed Management Program (EWMP). An EWMP is one that comprehensively evaluates opportunities, within the participating Permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among Permittees and other partners on multi-benefit regional projects that, wherever feasible, retain (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood control and water supply, among others. In drainage areas within the EWMP area where retention of the 85th percentile, 24-hour storm event is not feasible, the EWMP shall include a Reasonable Assurance Analysis to demonstrate that applicable water quality based effluent limitations and receiving water limitations shall be achieved through implementation of other watershed control measures. An EWMP shall:

- i. Be consistent with the provisions in Part VI.C.1.a.-f and VI.C.5-C.8;
- ii. Incorporate applicable State agency input on priority setting and other key implementation issues;
- iii. Provide for meeting water quality standards and other CWA obligations by utilizing provisions in the CWA and its implementing regulations, policies and guidance;
- iv. Include multi-benefit regional projects to ensure that MS4 discharges achieve compliance with all final WQBELs set forth in Part VI.E. and do not cause or contribute to exceedances of receiving water limitations in Part V.A. by retaining through infiltration or capture and reuse the storm water volume from the 85th percentile, 24-hour storm for the drainage areas tributary to the multi-benefit regional projects.;
- v. In drainage areas where retention of the storm water volume from the 85th percentile, 24-hour event is not technically feasible, include other watershed control measures to ensure that MS4 discharges achieve compliance with all interim and final WQBELs set forth in Part VI.E. with compliance deadlines occurring after approval of a EWMP and to ensure that MS4 discharges do not cause or contribute to exceedances of receiving water limitations in Part V.A.;
- vi. Maximize the effectiveness of funds through analysis of alternatives and the selection and sequencing of actions needed to address human health and water quality related challenges and non-compliance;
- vii. Incorporate effective innovative technologies, approaches and practices, including green infrastructure;
- viii. Ensure that existing requirements to comply with technology-based effluent limitations and core requirements (e.g., including elimination of nonstorm water discharges of pollutants through the MS4, and controls to reduce the discharge of pollutants in storm water to the maximum extent practicable) are not delayed;
- ix. Ensure that a financial strategy is in place.

2. Compliance with Receiving Water Limitations Not Otherwise Addressed by a TMDL through a WMP or EWMP

a. For receiving water limitations in Part V.A. associated with water body-pollutant combinations not addressed through a TMDL, but which a Permittee elects to address through a Watershed Management Program or EWMP as set forth in this Part VI.C., a Permittee shall comply as follows:

i. For pollutants that are in the same class²¹ as those addressed in a TMDL for the watershed and for which the water body is identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:

[²¹ Pollutants are considered in a similar class if they have similar fate and transport mechanisms, can be addressed via the same types of control measures, and within the same timeline already contemplated as part of the Watershed Management Program for the TMDL.]

(1) Permittees shall demonstrate that the Watershed Control Measures to achieve the applicable TMDL provisions identified pursuant to Part VI.C.5.b.iv.(3) will also adequately address contributions of the pollutant(s) within the same class from MS4 discharges to receiving waters, consistent with the assumptions and requirements of the corresponding TMDL provisions, including interim and final requirements and deadlines

for their achievement, such that the MS4 discharges of the pollutant(s) will not cause or contribute to exceedances of receiving water limitations in Part V.A.

(2) Permittees shall include the water body-pollutant combination(s) in the Reasonable Assurance Analysis in Part VI.C.5.b.iv.(5).

(3) Permittees shall identify milestones and dates for their achievement consistent with those in the corresponding TMDL.

ii. For pollutants that are not in the same class as those addressed in a TMDL for the watershed, but for which the water body is identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:

(1) Permittees shall assess contributions of the pollutant(s) from MS4 discharges to the receiving waters and sources of the pollutant(s) within the drainage area of the MS4 pursuant to Part VI.C.5.a.iii.

(2) Permittees shall identify Watershed Control Measures pursuant to Part VI.C.5.b. that will adequately address contributions of the pollutant(s) from MS4 discharges to receiving waters such that the MS4 discharges of the pollutant(s) will not cause or contribute to exceedances of receiving water limitations in Part V.A.

(3) Permittees shall include the water body-pollutant in the Reasonable Assurance Analysis in Part VI.C.5.b.iv.(5).

(4) Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.

(5) Where the final date(s) in (4) is beyond the term of this Order, the following conditions shall apply:

(a) For an EWMP, in drainage areas where retention of (i) all nonstorm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event will be achieved, each participating Permittee shall continue to target implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges that are a source of pollutants to receiving waters.

(b) For a WMP and in areas of a EWMP where retention of the volume in (a) is technically infeasible and where the Regional Water Board determines that MS4 discharges cause or contribute to the water quality impairment, participating Permittees may initiate development of a stakeholder proposed TMDL upon

approval of the Watershed Management Program or EWMP. For MS4 discharges from these drainage areas to the receiving waters, any extension of this compliance mechanism beyond the term of this Order shall be consistent with the implementation schedule in a TMDL for the waterbody pollutant combination(s) adopted by the Regional Water Board.

iii. For pollutants for which there are exceedances of receiving water limitations in Part V.A., but for which the water body is not identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:

(1) Upon an exceedance of a receiving water limitation, based on data collected pursuant to the MRP and approved IMPs and CIMPs, Permittees shall assess contributions of the pollutant(s) from MS4 discharges to the receiving waters and sources of the pollutant(s) within the drainage area of the MS4 pursuant to Part VI.C.5.a.iii.

(2) If MS4 discharges are identified as a source of the pollutant(s) that has caused or contributed to, or has the potential to cause or contribute to, the exceedance(s) of receiving water limitations in Part V.A., Permittees shall address contributions of the pollutant(s) from MS4 discharges through modifications to the WMP or EWMP pursuant to Part VI.C.8.a.ii.

(a) In a modified WMP or EWMP, Permittees shall identify Watershed Control Measures pursuant to Part VI.C.5.b. that will adequately address contributions of the pollutant(s) from MS4 discharges to receiving waters such that the MS4 discharges of the pollutant(s) will not cause or contribute to exceedances of receiving water limitations in Part V.A.

(b) Permittees shall modify the Reasonable Assurance Analysis pursuant to Part VI.C.5.b.iv.(5) to address the pollutant(s).

(c) Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.

(d) Where the final date(s) in (4) is beyond the term of this Order, the following conditions shall apply:

(i) For an EWMP, in drainage areas where retention of (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event will be achieved, each participating Permittee shall continue to target implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges that are a source of pollutants to receiving waters.

(ii) For a WMP and in areas of a EWMP where retention of the volume in (a) is technically infeasible, for newly identified exceedances of receiving water limitations, a Permittee may request that the Regional Water Board approve a modification to its WMP or EWMP to include these additional water body-pollutant combinations.

b. A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the specific water body pollutant combinations addressed by an approved Watershed Management Program or EWMP.

c. If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement.

d. Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. not otherwise addressed by a TMDL, if all the following requirements are met:

- i. Provides timely notice of its intent to develop a WMP or EWMP,
- ii. Meets all interim and final deadlines for development of a WMP or EWMP,
- iii. For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations, and
- iv. Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

3. Compliance with Receiving Water Limitations Addressed by a TMDL through a WMP or EWMP

a. A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with provisions pertaining to applicable interim water quality based effluent limitations and interim receiving water limitations in Part VI.E. and Attachments L-R for the pollutant(s) addressed by the approved Watershed Management Program or EWMP.

b. Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A., if all the following requirements are met:

- i. Provides timely notice of its intent to develop a WMP or EWMP,
- ii. Meets all interim and final deadlines for development of a WMP or EWMP,
- iii. For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations, and
- iv. Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

c. Subdivision b. does not apply to receiving water limitations corresponding to final compliance deadlines pursuant to TMDL provisions in Part VI.E. that have passed or will occur prior to approval of a WMP or EWMP.

Pages 53-58 - VI.C.4. Process

a. Timelines for Implementation

i. Implementation of the following requirements shall occur per the schedule specified in Table 9 below:

Table 9. Watershed Management Program Implementation Requirements

(Table not included here)

b. Permittees that elect to develop a Watershed Management Program or EWMP must notify the Regional Water Board no later than six months after the effective date of this Order.

i. Such notification shall specify if the Permittee(s) are requesting a 12-month or 18-month submittal date for the draft Watershed Management Program, per Part I.C.4.c.i – ii, or if the Permittees are requesting a 18/30-month submittal date for the draft EWMP per Part VI.C.4.c.iv.

ii. As part of their notice of intent to develop a WMP or EWMP, Permittees shall identify all applicable interim and final trash WQBELs and all other final WQBELs and receiving water limitations pursuant to Part VI.E. and the applicable attachment(s) with compliance deadlines occurring prior to approval of a WMP or EWMP. Permittees shall identify watershed control measures, where possible from existing TMDL implementation plans, that will be implemented by participating Permittees concurrently with the development of a Watershed Management Program or EWMP to ensure that MS4 discharges achieve compliance with applicable interim and final trash WQBELs and all other final WQBELs and receiving water limitations set forth in Part VI.E. and the applicable attachment(s) by the applicable compliance deadlines occurring prior to approval of a WMP or EWMP.

iii. As part of their notification, Permittees electing to develop an EWMP shall submit all of the following in addition to the requirements of Part VI.C.4.b.i.- ii.:

- (1) Plan concept and geographical scope,
- (2) Cost estimate for plan development,

(3) Executed MOU/agreement among participating Permittees to fund plan development, or final draft MOU among participating Permittees along with a signed letter of intent from each participating City Manager or head of agency. If a final draft MOU is submitted, the MOU shall be fully executed by all participating Permittees within 12 months of the effective date of this Order.

(4) Interim milestones for plan development and deadlines for their achievement,

(5) Identification of, and commitment to fully implement, one structural BMP or a suite of BMPs at a scale that provides meaningful water quality improvement within each watershed covered by the plan within 30 months of the effective date of this Order in addition to watershed control measures to be implemented pursuant to b.ii. above. The structural BMP or suite of BMPs shall be subject to approval by the Regional Water Board Executive Officer, and

(6) Demonstration that the requirements in Parts VI.C.4.c.iv.(1) and (2) have been met.

c. Permittees that elect to develop a Watershed Management Program shall submit a draft plan to the Regional Water Board as follows:

i. For Permittees that elect to collaborate on the development of a Watershed Management Program, Permittees shall submit the draft Watershed Management Program no later than 18 months after the effective date of this Order if the following conditions are met in greater than 50% of the land area covered by the WMP:

(1) Demonstrate that there are LID ordinances in place and/or commence development of a Low Impact Development (LID) ordinance(s) meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and

(2) Demonstrate that there are green streets policies in place and/or commence development of a policy(ies) that specifies the use of green street strategies for transportation corridors within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.

(3) Demonstrate in the notification of the intent to develop a Watershed Management Program that Parts VI.C.4.c.i(1) and (2) have been met in greater than 50% of the watershed area.

ii. For a Permittee that elects to develop an individual Watershed Management Program, the Permittee shall submit the draft Watershed Management Program no later than 18 months after the effective date of this Order if the following conditions are met:

(1) Demonstrate that there is a LID ordinance in place for the Permittee's jurisdiction and/or commence development of a Low Impact Development (LID) ordinance for the Permittee's jurisdiction meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and

(2) Demonstrate that there is a green streets policy in place for the Permittee's jurisdiction and/or commence development of a policy that specifies

the use of green street strategies for transportation corridors within the Permittee's jurisdiction within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.

(3) Demonstrate in the notification of the intent to develop a Watershed Management Program that Parts VI.C.4.c.ii.(1) and (2) have been met.

iii. For Permittees that elect not to implement the conditions under Part VI.C.4.c.i. or Part VI.C.4.c.ii., Permittees shall submit the draft Watershed Management Program no later than 12 months after the effective date of this Order.

iv. For Permittees that elect to collaborate on the development of an EWMP, Permittees shall submit the work plan for development of the EWMP no later than 18 months after the effective date of this Order, and shall submit the draft program no later than 30 months after the effective date of this Order if the following conditions are met in greater than 50% of the land area in the watershed:

(1) Demonstrate that there are LID ordinances in place and/or commence development of a Low Impact Development (LID) ordinance(s) meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and

(2) Demonstrate that there are green streets policies in place and/or commence development of a policy(ies) that specifies the use of green street strategies for transportation corridors within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.

(3) Demonstrate in the notification of the intent to develop an EWMP that Parts VI.C.4.c.iv.(1) and (2) have been met in greater than 50% of the watershed area.

d. Until the Watershed Management Program or EWMP is approved by the Regional Water Board or by the Executive Officer on behalf of the Regional Water Board, Permittees that elect to develop a Watershed Management Program or EWMP shall:

i. Continue to implement watershed control measures in their existing storm water management programs, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv),

ii. Continue to implement watershed control measures to eliminate non-storm water discharges through the MS4 that are a source of pollutants to receiving waters consistent with CWA section 402(p)(3)(B)(ii), and

iii. Implement watershed control measures, where possible from existing TMDL implementation plans, to ensure that MS4 discharges achieve compliance with interim and final trash WQBELs and all other final WQBELs and receiving water limitations pursuant to Part VI.E. and set forth in Attachments L through R by the applicable compliance deadlines occurring prior to approval of a WMP or EWMP.

e. Permittees that do not elect to develop a Watershed Management Program or EWMP, or that do not have an approved WMP or EWMP within 28 or 40 months, respectively, of the effective date of this Order, shall be subject to the baseline requirements in Part VI.D and shall

demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3).

f. Permittees subject to the Middle Santa Ana River Watershed Bacteria Indicator TMDL shall submit a Comprehensive Bacteria Reduction Plan (CBRP) for dry weather to the Regional Water Board Executive Officer no later than nine months after the effective date of this Order. The CBRP shall describe, in detail, the specific actions that have been taken or will be taken to achieve compliance with the dry weather water quality-based effluent limitations and the receiving water limitations for the Middle Santa Ana River Watershed Bacteria Indicator TMDL by December 31, 2015. The CBRP shall also establish a schedule for developing a CBRP to comply with the water quality-based effluent limitations and the receiving water limitations for the Middle Santa Ana River Bacteria TMDL during wet weather by December 31, 2025. The CBRP may be developed in lieu of the Watershed Management Program for MS4 discharges of bacteria within the Middle Santa Ana River Watershed.

Pages 58- - VI.C.5. Program Development

a. **Identification of Water Quality Priorities** - Permittees shall identify the water quality priorities within each WMA that will be addressed by the Watershed Management Program. At a minimum, these priorities shall include achieving applicable water quality-based effluent limitations and/or receiving water limitations established pursuant to TMDLs, as set forth in Part VI.E and Attachments L through R of this Order.

i. **Water Quality Characterization.** Each plan shall include an evaluation of existing water quality conditions, including characterization of storm water and non-storm water discharges from the MS4 and receiving water quality, to support identification and prioritization/sequencing of management actions.

ii. **Water Body-Pollutant Classification.** On the basis of the evaluation of existing water quality conditions, water body-pollutant combinations shall be classified into one of the following three categories:

(1) **Category 1 (Highest Priority):** Water body-pollutant combinations for which water quality-based effluent limitations and/or receiving water limitations are established in Part VI.E and Attachments L through R of this Order.

(2) **Category 2 (High Priority):** Pollutants for which data indicate water quality impairment in the receiving water according to the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (State Listing Policy) and for which MS4 discharges may be causing or contributing to the impairment.

(3) **Category 3 (Medium Priority):** Pollutants for which there are insufficient data to indicate water quality impairment in the receiving water according to the State's Listing Policy, but which exceed applicable receiving water limitations contained in this Order and for which MS4 discharges may be causing or contributing to the exceedance.

iii. **Source Assessment.** Utilizing existing information, potential sources within the watershed for the water body-pollutant combinations in Categories 1 - 3 shall be identified.

(1) Permittees shall identify known and suspected storm water and nonstorm water pollutant sources in discharges to the MS4 and from the MS4 to receiving waters and any other stressors related to MS4 discharges causing or contributing to the water quality priorities. The identification of known and suspected sources of the highest water quality priorities shall consider the following:

- (a) Review of available data, including but not limited to:
 - (i) Findings from the Permittees' Illicit Connections and Illicit Discharge Elimination Programs;
 - (ii) Findings from the Permittees' Industrial/Commercial Facilities Programs;
 - (iii) Findings from the Permittees' Development Construction Programs;
 - (iv) Findings from the Permittees' Public Agency Activities Programs;
 - (v) TMDL source investigations;
 - (vi) Watershed model results;
 - (vii) Findings from the Permittees' monitoring programs, including but not limited to TMDL compliance monitoring and receiving water monitoring; and
 - (viii) Any other pertinent data, information, or studies related to pollutant sources and conditions that contribute to the highest water quality priorities.

(b) Locations of the Permittees' MS4s, including, at a minimum, all MS4 major outfalls and major structural controls for storm water and non-storm water that discharge to receiving waters.

(c) Other known and suspected sources of pollutants in non-storm water or storm water discharges from the MS4 to receiving waters within the WMA.

iv. Prioritization. Based on the findings of the source assessment, the issues within each watershed shall be prioritized and sequenced. Watershed priorities shall include at a minimum:

(1) TMDLs

(a) Controlling pollutants for which there are water quality-based effluent limitations and/or receiving water limitations with interim or final compliance deadlines within the permit term, or TMDL compliance deadlines that have already passed and limitations have not been achieved.

(b) Controlling pollutants for which there are water quality-based effluent limitations and/or receiving water limitations with interim or final compliance deadlines between September 6, 2012 and October 25, 2017.

(2) Other Receiving Water Considerations

(a) Controlling pollutants for which data indicate impairment or exceedances of receiving water limitations in the receiving water and the

findings from the source assessment implicates discharges from the MS4 shall be considered the second highest priority.

b. Selection of Watershed Control Measures

i. Permittees shall identify strategies, control measures, and BMPs to implement through their individual storm water management programs, and collectively on a watershed scale, with the goal of creating an efficient program to focus individual and collective resources on watershed priorities.

ii. The objectives of the Watershed Control Measures shall include:

(1) Prevent or eliminate non-storm water discharges to the MS4 that are a source of pollutants from the MS4 to receiving waters.

(2) Implement pollutant controls necessary to achieve all applicable interim and final water quality-based effluent limitations and/or receiving water limitations pursuant to corresponding compliance schedules.

(3) Ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations.

iii. Watershed Control Measures may include:

(1) Structural and/or non-structural controls and operation and maintenance procedures that are designed to achieve applicable water quality-based effluent limitations, receiving water limitations in Part VI.E and/or Attachments L through R;

(2) Retrofitting areas of existing development known or suspected to contribute to the highest water quality priorities with regional or subregional controls or management measures; and

(3) Stream and/or habitat rehabilitation or restoration projects where stream and/or habitat rehabilitation or restoration are necessary for, or will contribute to demonstrable improvements in the physical, chemical, and biological receiving water conditions and restoration and/or protection of water quality standards in receiving waters.

iv. The following provisions of this Order shall be incorporated as part of the Watershed Management Program:

(1) Minimum Control Measures.

(a) Permittees shall assess the minimum control measures (MCMs) as defined in Part VI.D.4 to Part VI.D.10 of this Order to identify opportunities for focusing resources on the high priority issues in each watershed. For each of the following minimum control measures, Permittees shall identify potential modifications that will address watershed priorities:

(i) Development Construction Program

(ii) Industrial/Commercial Facilities Program

(iii) Illicit Connection and Illicit Discharges Detection and Elimination Program

(iv) Public Agency Activities Program

(v) Public Information and Participation Program

(b) At a minimum, the Watershed Management Program shall include management programs consistent with 40 CFR section 122.26(d)(2)(iv)(A)-(D).

(c) If the Permittee(s) elects to eliminate a control measure identified in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 because that specific control measure is not applicable to the Permittee(s), the Permittee(s) shall provide a justification for its elimination. The Planning and Land Development Program is not eligible for elimination.

(d) Such customized actions, once approved as part of the Watershed Management Program, shall replace in part or in whole the requirements in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 for participating Permittees.

(2) Non-Storm Water Discharge Measures. Where Permittees identify non-storm water discharges from the MS4 as a source of pollutants that cause or contribute to exceedance of receiving water limitations, the Watershed Control Measures shall include strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A and VI.D.10. These may include measures to prohibit the non-storm water discharge to the MS4, additional BMPs to reduce pollutants in the nonstorm water discharge or conveyed by the non-storm water discharge, diversion to a sanitary sewer for treatment, or strategies to require the non-storm water discharge to be separately regulated under a general NPDES permit.

(3) TMDL Control Measures. Permittees shall compile control measures that have been identified in TMDLs and corresponding implementation plans. Permittees shall identify those control measures to be modified, if any, to most effectively address TMDL requirements within the watershed. If not sufficiently identified in previous documents, or if implementation plans have not yet been developed (e.g., USEPA established TMDLs), the Permittees shall evaluate and identify control measures to achieve water quality-based effluent limitations and/or receiving water limitations established in this Order pursuant to these TMDLs.

(a) TMDL control measures shall include where necessary control measures to address both storm water and non-storm water discharges from the MS4.

(b) TMDL control measures may include baseline or customized activities covered under the general MCM categories in Part VI.D as well as BMPs and other control measures covered under the non-storm water discharge provisions of Part III.A of this Order.

(c) The WMP shall include, at a minimum, those actions that will be implemented during the permit term to achieve interim and/or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines within the permit term.

(4) Each plan shall include the following components:

(a) Identification of specific structural controls and non-structural best management practices, including operational source control and pollution prevention, and any other actions or programs to achieve all

water quality-based effluent limitations and receiving water limitations contained in this Part VI.E and Attachments L through R to which the Permittee(s) is subject;

(b) For each structural control and non-structural best management practice, the number, type, and location(s) and/or frequency of implementation;

(c) For any pollution prevention measures, the nature, scope, and timing of implementation;

(d) For each structural control and non-structural best management practice, interim milestones and dates for achievement to ensure that TMDL compliance deadlines will be met; and

(e) The plan shall clearly identify the responsibilities of each participating Permittee for implementation of watershed control measures.

(5) Permittees shall conduct a Reasonable Assurance Analysis for each water body-pollutant combination addressed by the Watershed Management Program. A Reasonable Assurance Analysis (RAA) shall be quantitative and performed using a peer-reviewed model in the public domain. Models to be considered for the RAA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP Prioritization and Analysis Tool (SBPAT). The RAA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis. Data on performance of watershed control measures needed as model input shall be drawn only from peer-reviewed sources. These data shall be statistically analyzed to determine the best estimate of performance and the confidence limits on that estimate for the pollutants to be evaluated. The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees' MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.

(a) Permittees shall demonstrate using the RAA that the activities and control measures identified in the Watershed Control Measures will achieve applicable water quality-based effluent limitations and/or receiving water limitations in Attachments L through R with compliance deadlines during the permit term.

(b) Where the TMDL Provisions in Part VI.E and Attachments L through R do not include interim or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines during the permit term, Permittees shall identify interim milestones and dates for their achievement to ensure adequate progress toward achieving interim and final water quality-based effluent limitations and/or receiving water limitations with deadlines beyond the permit term.

(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.

(6) Permittees shall provide documentation that they have the necessary legal authority to implement the Watershed Control Measures identified in the plan, or that other legal authority exists to compel implementation of the Watershed Control Measures.

c. Compliance Schedules - Permittees shall incorporate compliance schedules in Attachments L through R into the plan and, where necessary develop interim milestones and dates for their achievement. Compliance schedules and interim milestones and dates for their achievement shall be used to measure progress towards addressing the highest water quality priorities and achieving applicable water quality-based effluent limitations and/or receiving water limitations.

i. Schedules must be adequate for measuring progress on a watershed scale once every two years.

ii. Schedules must be developed for both the strategies, control measures and BMPs implemented by each Permittee within its jurisdiction and for those that will be implemented by multiple Permittees on a watershed scale.

iii. Schedules shall incorporate the following:

(1) Compliance deadlines occurring within the permit term for all applicable interim and/or final water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R of this Order,

(2) Interim milestones and dates for their achievement within the permit term for any applicable final water quality-based effluent limitation and/or receiving water limitation in Part VI.E and Attachments L through R, where deadlines within the permit term are not otherwise specified.

(3) For watershed priorities related to addressing exceedances of receiving water limitations in Part V.A and not otherwise addressed by Part VI.E:

(a) Milestones based on measureable criteria or indicators, to be achieved in the receiving waters and/or MS4 discharges,

(a) A schedule with dates for achieving the milestones, and

(b) A final date for achieving the receiving water limitations as soon as possible.

(c) The milestones and implementation schedule in (a)-(c) fulfill the requirements in Part V.A.3.a to prepare an Integrated Monitoring Compliance Report.

Pages 65- 66 - 6. Watershed Management Program Implementation

Each Permittee shall begin implementing the Watershed Management Program or EWMP immediately upon approval of the plan by the Regional Water Board or the Executive Officer on behalf of the Regional Water Board.

a. Permittees may request an extension of deadlines for achievement of interim milestones established pursuant to Part VI.C.4.c.iii.(3) only. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions shall be subject to approval by the Regional Water Board Executive Officer.

7. Integrated Watershed Monitoring and Assessment

Permittees in each WMA shall develop an integrated monitoring program as set forth in Part IV of the MRP (Attachment E) or implement a customized monitoring program with the primary objective of allowing for the customization of the outfall monitoring program (Parts VIII and IX) in conjunction with an approved Watershed Management Program or EWMP, as defined below. Each monitoring program shall assess progress toward achieving the water quality-based effluent limitations and/or receiving water limitations per the compliance schedules, and progress toward addressing the water quality priorities for each WMA. The customized monitoring program shall be submitted as part of the Watershed Management Program, or where Permittees elect to develop an EWMP, shall be submitted within 18 months of the effective date of this Order. If pursuing a customized monitoring program, the Permittee(s) shall provide sufficient justification for each element of the program that differs from the monitoring program requirements as set forth in Attachment E. Monitoring programs shall be subject to approval by the Executive Officer following a public comment period. The customized monitoring program shall be designed to address the Primary Objectives detailed in Attachment E, Part II.A and shall include the following program elements:

- Receiving Water Monitoring
- Storm Water Outfall Monitoring
- Non-Storm Water Outfall Monitoring
- New Development/Re-Development Effectiveness Tracking
- Regional Studies

Pages 66-67 - 8. Adaptive Management Process

a. Watershed Management Program Adaptive Management Process

i. Permittees in each WMA shall implement an adaptive management process, every two years from the date of program approval, adapting the Watershed Management Program or EWMP to become more effective, based on, but not limited to a consideration of the following:

- (1) Progress toward achieving interim and/or final water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R, according to established compliance schedules;
- (2) Progress toward achieving improved water quality in MS4 discharges and achieving receiving water limitations through implementation of the watershed control measures based on an evaluation of outfall-based monitoring data and receiving water monitoring data;
- (3) Achievement of interim milestones;
- (4) Re-evaluation of the water quality priorities identified for the WMA based on more recent water quality data for discharges from the MS4 and the receiving water(s) and a reassessment of sources of pollutants in MS4 discharges;
- (5) Availability of new information and data from sources other than the Permittees' monitoring program(s) within the WMA that informs the effectiveness of the actions implemented by the Permittees;
- (6) Regional Water Board recommendations; and
- (7) Recommendations for modifications to the Watershed Management Program solicited through a public participation process.

ii. Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate new compliance deadlines and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP in the Annual Report, as required pursuant to Part XVIII.A.6 of the MRP (Attachment E), and as part of the Report of Waste Discharge (ROWD) required pursuant to Part II.B of Attachment D – Standard Provisions.

(1) The adaptive management process fulfills the requirements in Part V.A.4 to address continuing exceedances of receiving water limitations.

iii. Permittees shall implement any modifications to the Watershed Management Program or EWMP upon approval by the Regional Water Board Executive Officer or within 60 days of submittal if the Regional Water Board Executive Officer expresses no objections.

Page 141-147 - VI.E. Total Maximum Daily Load Provisions

1. The provisions of this Part VI.E. implement and are consistent with the assumptions and requirements of all waste load allocations (WLAs) established in TMDLs for which some or all of the Permittees in this Order are responsible.

a. Part VI.E of this Order includes provisions that are designed to assure that Permittees achieve WLAs and meet other requirements of TMDLs covering receiving waters impacted by the Permittees' MS4 discharges. TMDL provisions are grouped by WMA (WMA) in Attachments L through R.

b. The Permittees subject to each TMDL are identified in Attachment K.

c. The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR §122.44(d)(1)(vii)(B); Cal. Wat. Code §13263(a)).

d. A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means.

2. Compliance Determination

a. General

iii. Pursuant to Part VI.C, a Permittee may, individually or as part of a watershed based group, develop and submit for approval by the Regional Water Board Executive Officer a Watershed Management Program that addresses all water quality-based effluent limitations and receiving water limitations to which the Permittee is subject pursuant to established TMDLs.

b. Commingled Discharges

i. A number of the TMDLs establish WLAs that are assigned jointly to a group of Permittees whose storm water and/or non-storm water discharges are or may be commingled in the MS4 prior to discharge to the receiving water subject to the TMDL.

ii. In these cases, pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.

iii. Where Permittees have commingled discharges to the receiving water, compliance at the outfall to the receiving water or in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart v. below.

iv. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of an applicable water quality-based effluent limitation(s) at the outfall or receiving water limitation(s) in the target receiving water.

v. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of an applicable water quality-based effluent limitation or receiving water limitation in any of the following ways:

(1) Demonstrate that there is no discharge from the Permittee's MS4 into the applicable receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation; or

(2) Demonstrate that the discharge from the Permittee's MS4 is controlled to a level that does not exceed the applicable water quality-based effluent limitation; or

(3) For exceedances of bacteria receiving water limitations or water quality based effluent limitations, demonstrate through a source investigation pursuant to protocols established under California Water Code section 13178 or for exceedances of other receiving water limitations or water quality-based effluent limitations, demonstrate using other accepted source identification protocols, that pollutant sources within the jurisdiction of the Permittee or the Permittee's MS4 have not caused or contributed to the exceedance of the Receiving Water Limitation(s).

c. Receiving Water Limitations Addressed by a TMDL

i. For receiving water limitations in Part V.A. associated with water body pollutant combinations addressed in a TMDL, Permittees shall achieve compliance with the receiving water limitations in Part V.A. as outlined in this Part VI.E. and Attachments L through R of this Order.

ii. A Permittee's full compliance with the applicable TMDL requirement(s), including compliance schedules, of this Part VI.E. and Attachments L through R constitutes compliance with Part V.A. of this Order for the specific pollutant addressed in the TMDL.

iii. As long as a Permittee is in compliance with the applicable TMDL requirements in a time schedule order (TSO) issued by the Regional Water Board pursuant to California Water Code sections 13300 and 13385(j)(3), it is not the Regional Water Board's intention to take an enforcement action for violations of Part V.A. of this Order for the specific pollutant(s) addressed in the TSO.

d. Interim Water Quality-Based Effluent Limitations and Receiving Water Limitations

i. A Permittee shall be considered in compliance with an applicable interim water quality-based effluent limitation and interim receiving water limitation for a pollutant associated with a specific TMDL if any of the following is demonstrated:

(1) There are no violations of the interim water quality-based effluent limitation for the pollutant associated with a specific TMDL at the Permittee's applicable MS4 outfall(s),³⁸ including an outfall to the receiving water that collects discharges from multiple Permittees' jurisdictions;

[³⁸ An outfall may include a manhole or other point of access to the MS4 at the Permittee's jurisdictional boundary.]

(2) There are no exceedances of the applicable receiving water limitation for the pollutant associated with a specific TMDL in the receiving water(s) at, or downstream of, the Permittee's outfall(s);

(3) There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant associated with a specific TMDL; or

(4) The Permittee has submitted and is fully implementing an approved Watershed Management Program or EWMP pursuant to Part VI.C.

(a) To be considered fully implementing an approved Watershed Management Program or EWMP, a Permittee must be implementing all actions consistent with the approved program and applicable compliance schedules, including structural BMPs.

(b) Structural storm water BMPs or systems of BMPs should be designed and maintained to treat storm water runoff from the 85th percentile, 24-hour storm, where feasible and necessary to achieve applicable WQBELs and receiving water limitations, and maintenance records must be up-to-date and available for inspection by the Regional Water Board.

(c) A Permittee that does not implement the Watershed Management Program in accordance with the milestones and compliance schedules shall demonstrate compliance with its interim water quality-based effluent limitations and/or receiving water limitations pursuant to Part VI.E.2.d.i.(1)-(3), above.

(d) Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with provisions pertaining to interim WQBELs with compliance deadlines occurring prior to approval of a WMP or EWMP. This subdivision (d) shall not apply to interim trash WQBELs.

(1) Provides timely notice of its intent to develop a WMP or EWMP,
 (2) Meets all interim and final deadlines for development of a WMP or EWMP,

(3) For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to

address known contributions of pollutants from MS4 discharges that cause or contribute to the impairment(s) addressed by the TMDL(s), and

(4) Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

e. Final Water Quality-based Effluent Limitations and/or Receiving Water Limitations

i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:

(1) There are no violations of the final water quality-based effluent limitation for the specific pollutant at the Permittee's applicable MS4 outfall(s)³⁹;

[39 Ibid. {An outfall may include a manhole or other point of access to the MS4 at the Permittee's jurisdictional boundary.}]

(2) There are no exceedances of applicable receiving water limitation for the specific pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);

(3) There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL; or

(4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24-hour event is retained for the drainage area tributary to the applicable receiving water. This provision (4) shall not apply to final trash WQBELs.

3. USEPA Established TMDLs

TMDLs established by the USEPA, to which Permittees are subject, do not contain an implementation plan adopted pursuant to California Water Code section 13242. However, USEPA has included implementation recommendations as part of these TMDLs. In lieu of inclusion of numeric water quality based effluent limitations at this time, this Order requires Permittees subject to WLAs in USEPA established TMDLs to propose and implement best management practices (BMPs) that will be effective in achieving compliance with USEPA established numeric WLAs. The Regional Water Board may, at its discretion, revisit this decision within the term of this Order or in a future permit, as more information is developed to support the inclusion of numeric water quality based effluent limitations.

a. Each Permittee shall propose BMPs to achieve the WLAs contained in the applicable USEPA established TMDL(s), and a schedule for implementing the BMPs that is as short as possible, in a Watershed Management Program or EWMP.

b. Each Permittee may either individually submit a Watershed Management Program, or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the USEPA established TMDL.

c. At a minimum, each Permittee shall include the following information in its Watershed Management Program or EWMP, relevant to each applicable USEPA established TMDL:

- i. Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
 - ii. A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
 - iii. A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
 - iv. A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s);
 - (1) For the Malibu Creek Nutrient TMDL established by USEPA in 2003, in no case shall the time schedule to achieve the final numeric WLAs exceed five years from the effective date of this Order; and
 - v. If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.
- d. Each Permittee subject to a WLA in a TMDL established by USEPA shall submit a draft of a Watershed Management Program or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.
- e. If a Permittee does not submit a Watershed Management Program, or the plan is determined to be inadequate by the Regional Water Board Executive Officer and the Permittee does not make the necessary revisions within 90 days of written notification that plan is inadequate, the Permittee shall be required to demonstrate compliance with the numeric WLAs immediately based on monitoring data collected under the MRP (Attachment E) for this Order.

4. State Adopted TMDLs where Final Compliance Deadlines have Passed

- a. Permittees shall comply immediately with water quality-based effluent limitations and/or receiving water limitations to implement WLAs in state-adopted TMDLs for which final compliance deadlines have passed pursuant to the TMDL implementation schedule.
- b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.
- c. Permittees may either individually request a TSO, or may jointly request a TSO with all Permittees subject to the water quality-based effluent limitations and/or receiving water limitations, to implement the WLAs in the state-adopted TMDL.
- d. At a minimum, a request for a time schedule order shall include the following:
 - i. Data demonstrating the current quality of the MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
 - ii. A detailed description and chronology of structural controls and source control efforts, since the effective date of the TMDL, to reduce the pollutant load in the MS4 discharges to the receiving waters subject to the TMDL;
 - iii. Justification of the need for additional time to achieve the water quality-based effluent limitations and/or receiving water limitations;

- iv. A detailed time schedule of specific actions the Permittee will take in order to achieve the water quality-based effluent limitations and/or receiving water limitations;
- v. A demonstration that the time schedule requested is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the effluent limitation(s); and
- vi. If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and the date(s) for their achievement. The interim requirements shall include both of the following:
 - (1) Effluent limitation(s) for the pollutant(s) of concern; and
 - (2) Actions and milestones leading to compliance with the effluent limitation(s).

Fact Sheet, pages F-35 to F-39.

V. RATIONALE FOR RECEIVING WATER LIMITATIONS

A. Receiving Water Limitations

Receiving water limitations are included in all NPDES permits issued pursuant to CWA section 402. Section 402(p)(3)(B)(iii) of the CWA authorizes the inclusion of “such other provisions as the Administrator or the State determines appropriate for the control of [] pollutants.” This requirement gives USEPA or the State permitting authority discretion to determine what permit conditions are necessary to control pollutants. In its Phase I Stormwater Regulations, Final Rule, USEPA elaborated on these requirements, stating that, “permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls” (see 55 Fed. Reg. 47990, 47994 (Nov. 16, 1990)). USEPA reiterated in its Phase II Stormwater Regulations, Final Rule, that MS4 “permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.”²⁶

[²⁶ See, e.g., Phase II Stormwater Regulations, Final Rule, 64 Fed. Reg. 68722, 68737.]

USEPA Region IX has also affirmed the agency’s position that MS4 discharges must meet water quality standards in a series of comment letters on MS4 permits issued by various California regional water boards.²⁷

[²⁷ See, e.g., letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.]

California Water Code section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Both the State Water Board and Regional Water Board have previously concluded that discharges from the MS4 contain pollutants that have the reasonable potential to cause or contribute to excursion above water quality standards. As such, inclusion of receiving water limitations is appropriate to control MS4 discharges.

The inclusion of receiving water limitations is also consistent with the Ninth Circuit Court of Appeal’s ruling in *Defenders of Wildlife v. Browner* (191 F.3d 1159, 1166 (1999)) that the permitting authority has discretion regarding the nature and timing of requirements

that it includes as MS4 permit conditions to attain water quality standards. The Ninth Circuit Court of Appeals recently explained that, “[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels” (*NRDC v. County of Los Angeles* (2011) 673 F.3d 880, 886). Receiving water limitations are included in this Order to ensure that individual and collective discharges from the MS4 do not cause or contribute to exceedances of water quality standards necessary to protect the beneficial uses of the receiving waters.

The receiving water limitations in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations to implement the applicable water quality objectives or criteria, for receiving waters as contained in Chapters 3 and 7 of the Basin Plan, or in water quality control plans or policies adopted by the State Water Resources Control Board, including Resolution No. 68-16, or in federal regulations, including but not limited to, 40 CFR sections 131.12 and 131.38. The water quality objectives in the Basin Plan and other State Water Board plans and policies have been approved by USEPA and combined with the designated beneficial uses constitute the water quality standards required under federal law.

The receiving water limitations provisions in this Order are the same as those included in the previous Los Angeles County MS4 Permit provisions, and are based on precedential State Water Board Orders WQ 98-01 and WQ 99-05. This Order includes three main provisions related to receiving water limitations. First, consistent with CWA section 402(p)(B)(3)(iii) and 40 CFR section 122.44(d)(1), it includes a provision stating that discharges from the MS4 that cause or contribute to an exceedance of receiving water limitations are prohibited. This is also in accord with the State Water Board’s finding in Order WQ 98-01 (“The [State Water Board] agrees that the NPDES permit must prohibit discharges that “cause” or “contribute” to violations of water quality standards.”). Second, it includes a provision stating that discharges from the MS4 of stormwater or non-stormwater, for which a Permittee is responsible, shall not cause or contribute to a condition of nuisance.²⁸

²⁸ Wat. Code, § 13377 (“the state board or the regional boards shall . . . issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the [CWA], thereto, together with any more stringent effluent standards or limitations necessary to implement waste quality control plans, or for the protection of beneficial uses, or to prevent nuisance”).

Third, it includes a provision that states that Permittees shall achieve these two prohibitions “through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications.” This third provision elucidates the process by which Permittees are expected to achieve the first two provisions and then outlines the so-called “iterative process” whereby certain actions are required when exceedances of receiving water limitations occur and discharges from the MS4 are implicated. This iterative process includes submitting a Receiving Water Limitations Compliance Report; revising the storm water management program and its components to include additional BMPs, an implementation schedule and additional monitoring to address the exceedances; and implementing the revised storm water management program. The inclusion of this protocol for estimating BMP effectiveness and taking additional actions such as implementing additional BMPs and/or modifying BMPs to improve their effectiveness when monitoring demonstrates

that they are necessary to protect water quality is consistent with USEPA's expectations for MS4 permits.²⁹

[²⁹ See, e.g., USEPA 2002 memorandum, "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs."]

The State and Regional Water Boards have stated that each of the three provisions are independently applicable, meaning that compliance with one provision does not provide a "safe harbor" where there is non-compliance with another provision (i.e., compliance with the third provision does not shield a Permittee who may have violated the first or second provision from an enforcement action). Rather, the third provision is intended to ensure that the necessary storm water management programs and controls are in place, and that they are modified by Permittees in a timely fashion when necessary, so that the first two provisions are achieved as soon as possible. USEPA expressed the importance of this independent applicability in a series of comment letters on MS4 permits proposed by various regional water boards. At that time, USEPA expressly objected to certain MS4 permits that included language stating, "permittees will not be in violation of this [receiving water limitation] provision ..." (if certain steps are taken to evaluate and improve the effectiveness of the Drainage Area Management Plan (DAMP)), concluding that this phrase would not comply with the CWA.³⁰

[³⁰ See note 20. [which reads: "40 CFR §§ 122.44(d)(1)(i); 122.44(d)(1)(iii)"]]

The Receiving Water Limitations provisions of Order No. 01-182 have been litigated twice, and in both cases the courts have upheld the language and the State and Regional Water Board's interpretation of it. Both courts ruled that the first two provisions are independently applicable from the third provision that establishes the "iterative process" requirements and no "safe harbor" exists.

The provisions were first litigated in 2005 where the Los Angeles County Superior Court stated, "In sum, the Regional [Water] 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." (*In re L.A. Cnty. Mun. Storm Water Permit Litig.* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7.).

The provisions were again litigated in 2011. In that case, the Ninth Circuit Court of Appeal in *NRDC v. County of Los Angeles* (673 F.3d 880, 886) affirmed that the iterative process (in Part 2.3 of the 2001 Order) does not "forgive" violations of the discharge prohibitions (in Parts 2.1 and 2.2 of the 2001 Order). The court acknowledged that Part 2.3 clarifies that Parts 2 and 3 interact, but the court concluded that Part 2.3 "offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions." The Ninth Circuit further concluded that, "[a]s opposed to absolving noncompliance or exclusively adopting the MEP standard, the iterative process ensures that if water quality standards 'persist,' despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP. Given that Part 3 of the [2001] Permit states that SQMP implementation is the 'minimum' required of each Permittee, the discharge prohibitions serve as additional requirements that operate as enforceable water-quality-based performance standards required by the Regional Board."

Nonetheless, the Regional Water Board is in a unique position to be able to offer multiple paths to compliance with receiving water limitations in this MS4 permit. The Regional Board has worked closely with the US EPA in implementing the requirements of the 1999 consent decree between EPA and the environmental groups. The requirements of the consent decree are nearly complete and 33 of these TMDLs addressing hundreds of waterbody-pollutant combinations covering every coastal watershed in Los Angeles County will be implemented in this Order. The number of TMDLs, and hundreds of water quality issues that the TMDLs address, is unprecedented anywhere else in California. These extensive and enforceable implementation programs for addressing myriad water quality issues throughout the County, coupled with more robust core provision requirements, and commitments to implement watershed solutions to address all impairments in regional waters, allows this Board to consider the compliance mechanisms described below. These compliance mechanisms provide an incentive and robust framework for Permittees to craft comprehensive pathways to achieve compliance with receiving water limitations – both those addressed by TMDLs and those not addressed by TMDLs. This compliance mechanism is contingent upon participating Permittees being in full compliance with all requirements articulated in the permit and approved Watershed Management Program or EWMP in order to take advantage of these provisions.

This Order includes requirements in Part VI.E of this Order to implement WLAs assigned to MS4 discharges from 33 TMDLs. Those TMDLs adopted through the State's basin planning process include programs of implementation pursuant to California Water Code section 13242, including implementation schedules, for attaining water quality standards. The TMDL provisions in Part VI.E and attachments include compliance schedules for TMDLs adopted by the Regional Water Board consistent with the TMDL implementation schedule to achieve the final receiving water limitations. The Regional Water Board recognizes that, in the case of impaired waters subject to a TMDL, the permit's receiving water limitations for the pollutants addressed by the TMDL may be exceeded during the period of TMDL implementation. Therefore, this Order provides, in Part VI.E.2.c, that a Permittee's full compliance with the applicable TMDL requirements pursuant to the compliance schedules in this Order constitutes a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the particular pollutant addressed by the TMDL.

For water body-pollutant combinations not addressed by a TMDL, the Regional Water Board has included provisions in Part VI.C. to allow Permittees to develop a Watershed Management Program or EWMP to address receiving water limitations not otherwise addressed by a TMDL. The Watershed Management Program must include a Reasonable Assurance Analysis (RAA) that is quantitative and performed using a peer reviewed model in the public domain. Models to be considered for the RAA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP Prioritization and Analysis Tool (SBPAT). The RAA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis. Data on performance of watershed control measures needed as model input shall be drawn only from peer-reviewed sources. These data shall be statistically analyzed to determine

the best estimate of performance and the confidence limits on that estimate for the pollutants to be evaluated. The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and enhanced Watershed Management Programs (where retention of the 85th percentile, 24-hour event is not technically feasible) to ensure that Permittees' MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.

A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or enhanced Watershed Management Program constitutes compliance with the receiving water limitations provisions in Part V.A. of the Order for the specific water body-pollutant combinations addressed by an approved Watershed Management Program or enhanced Watershed Management Program. However, if a Permittee fails to meet any requirement or date for its achievement beginning with notification of a Permittee's intent to develop a Watershed Management Program or EWMP, and continuing with implementation of an approved Watershed Management Program or enhanced Watershed Management Program, the Permittee is subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. Permittees that do not elect to develop a Watershed Management Program or EWMP are required to demonstrate compliance with receiving water limitations pursuant to Part V.A.

Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
916/444-1000 Main
916/444-2100 Fax
downeybrand.com

November 13, 2012

VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov

State Water Resources Control Board Members
and Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: **Comment Letter – Receiving Water Limitations Language Workshop**

Dear State Water Resources Control Board Members:

Our firm represents numerous municipal stormwater permittees in California including, to name just a few, the cities of Atascadero and Tracy, and the Port of Stockton. Our firm is also defending the County of San Joaquin (and previously defended the City of Malibu) in citizen suit litigation that included allegations that the Receiving Water Limitations (“RWL”) in the applicable municipal separate storm sewer system (“MS4”) permit had been violated. Our clients throughout California work very hard to control, capture, and/or re-use stormwater for both urban, landscape, and agricultural purposes. Our clients are concerned about the potential movement by the State Water Resources Control Board (“State Water Board”) away from their legislative charge to enact reasonable water quality regulations and to reasonably protect beneficial uses. (Cal. Water Code §§13000, 13263(a).) The hope is that reasonable RWL language reflective of the State Water Board’s original intent to meet water quality standards over time through an iterative process can be drafted and adopted as a result of the upcoming workshop before the State Water Board on this issue on November 20, 2012.

The purpose of this letter is to inform or remind the current State Water Board members of the history of the MS4 program and the various iterations of the State’s RWL language so that a better path may be chosen for moving forward. Most importantly, the State Water Board must acknowledge that, under federal law, States are clearly **not required** to impose strict compliance with water quality standards on municipal storm water discharges, and instead may require a Best Management Practices (“BMP”) approach. (*See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166.); *see also* 40 C.F.R. §122.44(k)(2)-(4).) Further, nothing in federal law requires the imposition of receiving water limitations.¹

¹ Federal law requires technology-based and water quality-based *effluent* limitations for some discharges. (*See* CWA, 33 U.S.C. §1311; 40 C.F.R. §122.44.)

Thus, the decision to include RWL requirements in MS4 permits in California represents a policy choice, to either require strict and immediate compliance with water quality standards, or not. Our clients urge the State Water Board to confirm that, in the past and still today, the State Water Board has already made the policy choice to allow municipalities to meet applicable standards through an iterative process implemented over time. Because the previous language derived with that intent has recently been held by federal courts to mean something else, changes to that language are imperative to make the language comport with the State Water Board's consistently stated intent.

These changes are also necessary to acknowledge that water quality standards for many pollutants cannot be met immediately, if ever, until significant changes in product ingredients, social behaviors, or water quality standards themselves are made (e.g., adoption of site specific objectives, reference watersheds, or wet weather standards). (*See accord "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater,"* recommendations by Panel of Experts to State Water Board (2006).)

For example, the stringent copper standards that might be applied to urban stormwater runoff, and particularly from roadways, cannot be consistently achieved until the products used in the manufacturing of automobile brake pad linings are modified no later than 2025. (*See S.B. 346 (2010).*) Short of installing large retention basins and/or package treatment plants along roads and freeways statewide *in the interim*, it is unclear that there are any BMPs that will consistently reduce copper levels below the extremely low aquatic life criteria set in the California Toxics Rule or regional Basin Plans. The same problem exists for zinc from tire wear and other pollutants as well. Thus, the adoption of an immediate and strict compliance approach will likely leave MS4 owners and operators in immediate and sustained non-compliance for copper for 13 years, and other pollutants for an unknown amount of time. Placing MS4s in this unnecessary compliance jeopardy subjects MS4s to millions of dollars in federal and state penalties, and millions of dollars in attorneys' fees for citizen suits, not unlike the ones to which several agencies, businesses, and municipalities have already been subjected to in federal lawsuits brought by environmental organizations. Municipalities are no longer "crying wolf" when it comes to stormwater citizen suits, which have been plaguing small businesses in California for years under the Industrial General Stormwater Permit.

Municipalities are particularly concerned about where the RWL language is headed, especially in light of the State Water Board's Response to Comments on the Caltrans permit at pg. 64, which stated (emphasis added):

"The Ninth Circuit held in *Natural Resources Defense Council, Inc. v. County of Los Angeles* ((2011) __ F.3d __, 2011 WL 2712963) that engagement in the iterative process does not provide a safe harbor from liability for violations of permit terms prohibiting exceedances of water quality standards. The Ninth Circuit holding is consistent with the position of the State Water Board and Regional Water Boards that exceedances of water

quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Boards or through a citizen suit. While the Boards have generally directed dischargers to achieve compliance by improving control measures through the iterative process, the Board retains the discretion to take other appropriate enforcement and the iterative process does not shield dischargers from citizen suits. **No changes will be made to the relevant provisions of the Order** in response to this comment.”

To demonstrate that making no modifications to the currently utilized RWL language in MS4 permits would actually represent a large policy shift, a thorough review of the history of stormwater regulation would be beneficial. This history makes clear that the State Water Board has not taken the express position that stormwater permittees should be subject to citizen enforcement while time and resources are spent in good faith implementing ever more effective BMPs² and ever more stringent source control programs over time. (See Regional Board Order No. 96-054, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, at page 12, Part II (“Timely and complete implementation by a Permittee of the storm water management programs prescribed in this Order shall satisfy the requirements of this [Receiving Water Limitations] section and constitute compliance with receiving water limitations.”)³ (emphasis added); see also *Carson Harbor Village Ltd. v. Unocal Corp.*, 990 Fed. Supp. 1188, 1197 (C.D. Ca. 1997)(case involving a citizen suit alleging violation of the 1996 MS4 Permit, which was denied on summary judgment due in part to the clear compliance provisions in that permit)⁴; *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d 914, 920 (C.D. Cal., 2009)(“A facility operator will not be in violation of [receiving water] limitation C.(2) if (1) the facility operator has implemented

² “Best Management Practices” are defined as “schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the United States. BMPs include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” 40 C.F.R. §122.2. The legislative history of the MEP language indicates that the relevant factors in determining whether MEP is met include technical feasibility, cost, and state and public acceptance. See Conference Report on H.R. 2005, Superfund Amendments and Reauthorization Act of 1986, 132 Cong. Rec. H 9561 (Oct. 8, 1986)(“In determining whether these technologies are practicable, the Administrator may take into account technical feasibility, cost, State, and public acceptance of the remedy, and other appropriate criteria. Where these remedies are not practicable or cost effective, another remedy which meets the requirements of this section must be selected.”). Because the Clean Water Act legislative history does not provide a clear definition of MEP, this reference to other definitions from other federal environmental laws is warranted.

³ It should be noted that this 1996 MS4 permit was not subject to extensive litigation as was its 2001 successor, nor was the 1996 MS4 permit vetoed by the United States Environmental Protection Agency (“EPA”). Clearly, this language was a lawful alternative that could be re-considered for use in MS4 permits.

⁴ While the RWL Issue Paper at page 2 states that “[t]he Water Boards’ decisions to decline to include a safe harbor in MS4 permits have been upheld by courts of appeal,” that statement ignores that an iterative process that protects against direct water quality standards enforcement when a discharger is in good faith implementing an iterative approach to compliance has also been upheld.

BMPs that achieve BAT/BCT and (2) the facility operator appropriately submits a report that describes the current BMPs and revisions to those BMPs and the SWPPP.”)(emphasis added); accord *Santa Monica Baykeeper v. International Metals Ekco, Ltd.*, 619 F.Supp.2d 936, 941 (C.D. Cal., 2009); see also accord State Water Board Order No. 2001-12 DWQ, Aquatic Pesticides NPDES Permit at page 9 (stating “A discharger will not be in violation of receiving water limitation [] as long as the discharger has implemented BMPs required by this general permit and the following procedure is followed:”).)

Thus, prior to convening the November 20, 2012 workshop on RWL language, the State Water Board should consider its past history and consider other alternative approaches, besides those set forth in the Issue Paper, that will protect water quality while at the same time limiting potential liability for stormwater dischargers that are actively and in good faith undertaking progressive BMPs under the iterative process. Limited state and municipal funds would be better served implementing BMPs than paying for protracted litigation, which only serves to divert financial resources to legal battles instead of improving stormwater quality.

1. *Historical Summary of Stormwater RWL Regulation in California*

Since its inception in 1972, the Federal Water Pollution Control Act (more commonly known as the “Clean Water Act” or “CWA”), 33 U.S.C. §1251 *et seq.*, has prohibited the discharge of any pollutant to waters of the United States from a point source unless authorized by an National Pollutant Discharge Elimination System (“NPDES”) permit. (See 33 U.S.C. §§1311(a) and 1342(a) (CWA §§301 and 402(a)).)

Initially, the NPDES permit program focused on the reduction of pollutants in discharges from industrial facilities and publicly owned wastewater treatment works (“POTWs”). (See 64 Fed. Reg. 68,722, 68,723 (Dec. 8, 1999); 33 U.S.C. §1311(b)(1)(A)-(B) (CWA §301(b)(1)(A)-(B)).) As a result, the United States Environmental Protection Agency (“EPA”) initially determined that all stormwater discharges were exempt from the requirements of the CWA. (*Id.*)

However, in 1977, the Court of Appeals for the District of Columbia ruled that EPA could not exempt stormwater discharges from the NPDES permitting program under CWA section 402 because stormwater discharges constituted a discharge of pollutants from a point source.⁵ (See *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).)

Following the *Costle* decision, EPA issued several proposed and final rules between 1980 and 1988 to regulate stormwater discharges. However, these rules were successfully challenged at the administrative level and in the courts. (See *Am. Mining Congress v. U.S. EPA*, 965 F.2d 759, 762-63 (9th Cir. 1992).)

⁵ A “point source” is defined under the CWA as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . from which pollutants are or may be discharged.” 33 U.S.C. §1362(14); see also 40 C.F.R. §122.2.

In 1987, Congress amended the CWA, authorizing for the first time the specific regulation of stormwater discharges. (*See* 33 U.S.C. §1342(p) (CWA §402(p).) CWA section 402(p) sets forth the basic program for regulating municipal and industrial stormwater discharges and establishes priorities, deadlines, and application requirements. (*Id.*) Instead of requiring that stormwater be subject to the general permitting rules for other traditional point sources, Congress created separate and distinct regulatory programs for controlling pollutants in stormwater.

Under CWA section 402(p), Congress established two different standards for the regulation of stormwater discharges—one for discharges of stormwater from areas of industrial activity, and one for municipal separate storm sewer system (“MS4”) discharges. (33 U.S.C. §1342(p)(3).) Stormwater discharges associated with industrial activity are required to comply with NPDES permits containing technology-based effluent limitations or more stringent water quality based effluent limitations set forth in CWA section 301, 33 U.S.C. §1311, yet still incorporating the concepts of practicability and economic achievability.⁶

In contrast, municipal stormwater discharges from MS4s were to be regulated by NPDES permits that:

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) 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 State determines appropriate for the control of such pollutants.

(33 U.S.C. §1342(p)(3)(B)(i)-(iii) (CWA §402(p)(3)(B)(i)-(iii)) (emphasis added).) The reduction to the “maximum extent practicable” language contained in CWA section 402(p)(3)(B)(iii) is more commonly referred to as the “MEP” standard. MEP represents a different, technology-based standard requiring municipalities to pursue sound pollutant control techniques that are technically and economically feasible.

Importantly, the CWA does not prescribe water quality-based requirements for municipal stormwater. Water quality-based requirements differ from technology-based requirements in

⁶ *See* 33 U.S.C. §1342(p)(3)(A) (CWA §402(p)(3)(A)); 33 U.S.C. §1311(b)(1)(A) and (C) (requiring best practicable control technology (“BPT”) *or* “any more stringent limitation, including those necessary to meet water quality standards”); 33 U.S.C. §1311(b)(2) (CWA §301(b)(2)) (requiring best available technology that is economically achievable (“BAT”) for toxic pollutants and best conventional pollutant control technology (“BCT”) for conventional pollutants).

that water quality-based requirements are set based on the ambient water quality of, and the applicable water quality standards for, a particular water body, while technology-based standards focus on the water quality achievable by particular pollution control measures or technologies. This partial exemption from water quality-based requirements is not unusual as the CWA also totally exempts some types of discharges from the permitting requirements of the Act.⁷

In 1991, the State Water Board ruled on a first-round MS4 permit for the Santa Clara Valley. (*See In the Matter of the Petition of Citizens for a Better Environment, et al*, SWRCB Order No. WQ 91-03, 1991 WL 135460 (May 16, 1991).) Based on guidance from EPA at that time (*which later turned out to be erroneous*), the State Water Board ruled that Sections 301 and 402 of the Clean Water Act required MS4s to meet MEP and to *also* achieve compliance with water quality standards. (*Id.* at pg. *16.)

The State Water Board determined that, based on EPA's interpretation of the law that would be later overruled by the Ninth Circuit in 1999,⁸ municipal stormwater permits must include effluent limitations necessary to achieve water quality standards, but that BMPs⁹ constituted valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements. (*See State Water Board Orders WQ 91-03 and WQ 91-04; Order 98-01 at pg. 5.*) The State Water Board also recognized its flexibility in water quality planning to provide compliance schedules for storm water dischargers to come into compliance and emphasized source reduction of toxic pollutants and development of best management practices before costly end-of-the-pipe treatment was required. (State Water Board Order No. WQ 91-03 at pg. 36.)

The next contentious stormwater issues arose in California in September of 1996, when the State Water Board received a petition from the Environmental Health Coalition on the Waste Discharge Requirements Order 96-03, NPDES Permit No. C4SO108740 for storm water

⁷ *See, e.g.*, 33 U.S.C. §1342(l)(1)-(2) (CWA §402(l)(1)-(2)) (exempting agricultural return flows from irrigated agriculture and discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).

⁸ It should be noted that these early Orders were premised on a *mistaken legal conclusion* that municipal stormwater discharges were required to comply with CWA section 301(b)(1)(C) and the regulations that implement this statutory provision. (33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.44(d)(1); Order No. 91-03 at 33-36; Order No. 98-01 at pg. 8), but this conclusion was later overturned by the Ninth Circuit in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).

⁹ In 1993, the State Water Board issued a memo on the meaning of MEP. *See State Water Board Memorandum, "Definition of 'Maximum Extent Practicable'"* from Elizabeth Miller Jennings, Office of Chief Counsel (Feb. 11, 1993). This memo stated that "if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard." *Id.* at pg. 3.

discharge from the MS4 for the incorporated cities of Orange County within the San Diego Regional Water Board's boundaries (Orange County permit), contesting certain provisions of the NPDES permit. (See State Water Board Order 98-01 at 1-2). The State Water Board took up this matter on its own motion to determine the validity of the RWL language stating that “The permittees will not be in violation of this provision so long as they are in compliance with the requirements set forth [in the following {iterative process} provisions]” (emphasis added).

The State Water Board disagreed with petitioner's contention that the above quoted language was unlawful. (State Water Board Order 98-01 at pgs. 9-10.) Citing Order WQ 96-13, the State Water Board reiterated that it had reviewed and approved the storm water permit for certain permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Water Board that contained similar receiving water limitations language. The State Water Board further noted that use of the phrase that the permittees will not be in violation of... complies with the CWA and, in fact, used that same phrase in State Water Board Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS000001) (the General Industrial Permit), which is still in use today. (*Id.*) The State Water Board clearly held that permittees may achieve compliance with water quality standards through the implementation of BMPs on a phased basis, over time. (State Water Board Order 98-01 at pg. 12.) The State Water Board also set forth precedential language to be used in stormwater permits that recognized these points.

In 1996, the State Water Board also ruled on the amended MS4 permit for the Santa Clara Valley. (See *In the Matter of the Petition of Save San Francisco Bay Association, et al*, SWRCB Order No. WQ 96-13, 1996 WL 549244 (Sept. 19, 1996).) In this ruling, the State Water Board held that “...the permitting approach, wherein the discharger is required to implement a SWMP [storm water management plan] with BMPs, has been found by EPA to be the most effective way to ensure compliance with water quality standards...” (*Id.* at pg. *5 (emphasis added).) In addition, this decision noted that EPA sanctioned the MS4 permit for Orange County that states that permittees would not be in violation of the permit if receiving water limitation exceedances are followed up with certain actions. (*Id.* at pg. 12 (“a similar approach taken by the RWQCB for the Santa Ana Region, was sanctioned by the EPA as follows:

The Orange County storm water permit states that receiving water limitations may not exceeded [sic], but then provides that if there are exceedances, [sic] the permittees would not be in violation of the permit if they follow up with certain actions. We appreciate the concerns . . . regarding the way the permit seems to say that ‘a violation is not a violation.’ However, the net effect of this condition is to focus on BMP implementation for now, and this is consistent with the draft national policy. (Letter from EPA Region 9.)”

In the following year, the State Water Board adopted statewide general permits for construction storm water and industrial storm water discharges, and many Regional Water Quality Control Boards (“Regional Boards” or “RWQCBs”) adopted individual NPDES permits for storm water. These permits often contained requirements related to water quality standards, but many MS4 permits included explicit protection for the permittees from unwarranted direct enforcement of water quality standards exceedances if the permittees were in compliance with the requirements of the permit and implementing the related and complex storm water management program.¹⁰ (See e.g., State Water Board Order No. 97-03-DWQ (Industrial Storm Water General Permit) at pg. 4, Provision C.3. (“A facility operator will not be in violation of Receiving Water Limitation C.2. as long as the facility operator has implemented BMPs that achieve BAT/BCT and the following procedure is followed: [outlining iterative process and reporting requirements].”) This language was also not vetoed by U.S. EPA and remains a valid part of the Industrial Storm Water General Permit. (*Ibid.*)

In 1998, the State Water Board confirmed in a precedential decision that the CWA and the California Water Code do not require strict compliance by MS4s with water quality standards. (See *Own Motion Review of the Petition of Environmental Health Coalition*, SWRCB Order No. WQ 98-01, 1998 WL 46162 (January 22, 1998).) Specifically at issue in that decision was the RWL section in the municipal NPDES storm water permit for portions of Orange County, which prohibited MS4 discharges that did not meet water quality standards, but also stated that the permittees “will not be in violation of receiving water limitations so long as they are in compliance with” an iterative process of successive BMPs. (*Id.* at pg. *3 (emphasis added).) Thus, this NPDES storm water permit clarified that permittees would be in compliance with the permit as long as they were in good faith implementing the permit’s iterative process of evaluating and improving BMPs where necessary to comply with water quality standards. (*Id.* at pg. *4.) The State Water Board found that “the use of BMPs to achieve both technology-based effluent limitations and water quality based effluent limits” complies with the CWA and the California Water Code. (*Ibid.*, citing earlier SWRCB Orders No. WQ 91-03 and No. 97-03-DWQ (Industrial Storm water General Permit).) Thus, the State Water Board approved the use of the “will not be in violation” language for NPDES storm water permits issued to MS4s. (*Id.* at pg. *7.) The State Water Board also held: “In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA.” (See Order 98-01 at pg. 5.)

¹⁰ The Issue Paper’s focus on the term “safe harbor” is not accurate since the permittee would have to be in good faith and timely compliance with all other provisions of the permit in order to attain a small piece of enforcement protection under the RWL language. A better term would be “compliance determination procedure” or “iterative compliance approach,” which would recognize that less than timely, complete, and good faith compliance with the remainder of the permit and the iterative process of the receiving water limitations would be subject to enforcement.

On March 17, 1998, EPA Region IX sent a letter to the State Water Board regarding State Water Board Order No. WQ 98-01. Despite the plain language of the CWA, EPA Region IX did an about-face and for the first time objected to the inclusion of “not in violation” language in MS4 permits that protected municipalities implementing their MS4 permit requirements, including BMPs to the MEP, from defending against enforcement actions and citizen suits if the municipalities’ storm water discharge or local waterways exceeded a water quality standard. Thereafter, despite its earlier approval of similar language, EPA Region IX also objected to similar language that had been placed in MS4 permits issued to the Vallejo Sanitation and Flood Control District and to Riverside. Relying on CWA section 301(b)(1)(C), which pursuant to CWA section 402(p)(3)(B) does not apply to municipal storm water discharges, EPA Region IX incorrectly interpreted the CWA to require that MS4s strictly comply with water quality standards.

As a result of EPA Region IX’s March 1998 letter, and subsequent objection by EPA Region IX to permits issued to the MS4s in Vallejo and Riverside,¹¹ the State Water Board amended its earlier Order No. 98-01 to reflect EPA Region IX’s erroneous interpretation of the CWA. (*See Own Motion Review of the Petition for Environmental Health Coalition*, SWRCB Order No. WQ 99-05, 1999 WL 458768 (June 19, 1999).) In this Order, the State Water Board removed the explicit “not in violation” language from the iterative BMP approach language. (*Id.* at pg. *1.) Order No. WQ 99-05 also formed the basis for the iterative approach language set forth in many MS4 permits around the State.¹² Thus, this modification was not the State Water Board’s choice, but was done at the behest of EPA Region IX and was based on EPA’s inaccurate legal analysis.

In September of 1999, the Ninth Circuit Court of Appeals overturned EPA Region IX’s erroneous interpretation of the law and explicitly held that the CWA does not require MS4s to strictly comply with water quality standards under Section 301 of the CWA, specifically rejecting the basis on which EPA Region IX had objected to the “not in violation” language at issue in SWRCB Order No. WQ 98-01 and the permits for Vallejo and Riverside. The Ninth Circuit Court of Appeals held that the proper statutory requirements for a municipal MS4 permit are set forth in CWA section 402(p) and the MEP standard, and that CWA section 301(b)(1)(C), requiring water quality-based effluent limitations (“WQBELs”) does not apply. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).) The Court held that the provisions of CWA Section 402(p)(B)(3) for municipal storm water permits replaced the requirements

¹¹ Additionally, the plain language of CWA §1311(b)(1)(C) required compliance by July 1, 1977. Since municipal storm water was not included in the CWA until 1987, compliance with this section could not logically be required.

¹² It should be noted, however, that the industrial general stormwater permit, and other general permits were not similarly modified and the “not in violation” language contained therein remains intact. Thus, some municipalities are being treated more stringently, which is clearly contrary to the Clean Water Act, 33 U.S.C. §1342(p). Furthermore, to the extent that the State Water Board is considering an alternative in its Issue Paper that would go back to this language in Order No. 99-05, the history and legally unsound basis for this order must be acknowledged.

under CWA Section 301. (*Id.* at 1165; *see also In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*, SWRCB Order No. WQ 2001-15, 2001 WL 1651932, at pg. *2 (Nov. 15, 2001).)

Since the Ninth Circuit’s opinion in *Defenders of Wildlife* was issued subsequent to EPA Region IX’s March 1998 objection letter, both EPA Region IX’s interpretation of the CWA, and State Water Board Order No. WQ 99-05 that was based on EPA’s interpretation, should have been invalidated and no longer declared to be precedential.

The State Water Board thus, in accordance with CWA section 402(p)(3)(B), should have explicitly clarified that MS4s are not required to strictly comply with promulgated water quality standards. Instead, MS4s must be regulated by NPDES permits that reduce the discharge of pollutants in the storm water to the MEP. (*See* 33 U.S.C. §1342(p)(3)(B)(iii); *see also Defenders of Wildlife* at pg. 1165.)

In 2001, the State Water Board issued Order No. WQ 2001-15 to resolve an appeal of the County of San Diego’s MS4 permit, which contained similar RWL language to the template language set forth in Order 99-05. In that decision, the State Water Board very clearly stated that the BMP/iterative approach applies:

“In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA’s permit language discussed in the *Browner* case, **does not require strict compliance with water quality standards**. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA’s general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations....

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require “strict compliance” with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time. [FN omitted] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.

[FN 17. While the BIA argues that the permit requires ‘zero contribution’ of pollutants in runoff, and ‘in effect’ contains numeric effluent limitations,¹³ this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for stormwater similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.]

(See Order No. WQ 2001-15 at pgs. 11-12 (emphasis added).)

Thus, the State Water Board made it very clear what the intent of MS4 Permitting was always intended to be an iterative process, with compliance over time, and not immediate and strict compliance with water quality standards. The Fact Sheets for MS4 permits adopted in this same time frame included a similar explanation of the meaning and proper interpretation of the MS4 Permit’s RWL language, consistent with the State Water Board’s Order No. WQ 2001-15:

“Next, the Receiving Water Limitations (Part 2, Permit) and lack of a ‘safe harbor’ clause were raised as issues during the public hearing. Some Permittees and other interested parties expressed concern that under the new permit municipalities will be in immediate violation due to exceedances of water quality standards which may occur during storm events. Counsel Lauffer referenced the State Board’s precedential decision on the San Diego County MS4 permit petition and the State Board’s rationale for not including some of the language requested by municipalities. [FN 83. State Board Order WQ 2001-15.] He explained that the Receiving Water Limitations language affirms that an iterative process is the preferred approach....”

(See LA County 2001 MS4 Permit Fact Sheet (underlining added).¹⁴) Thus, the contemporaneous explanation of the MS4 Permit provisions in the Fact Sheet alluded to an interpretation that the MS4 Permit did *not* require strict compliance with water quality standards and, instead, relied upon the iterative approach adopted in the precedential State Board decision in Order No. WQ 2001-15. (*Id.*)

¹³ BIA’s arguments claimed that, under the permit, stormwater discharges must essentially comply with Water Quality Standards at the end of the MS4 pipe, cannot make any contribution of the pollutants at issue, and are essentially to be considered as if regulated by numeric effluent limitations. These arguments were rejected by the State Water Board in this matter.

¹⁴ The terms of the 2001 MS4 Permit also stated:

“This permit, and the provisions herein [which includes the RWL language in Part 2], are intended to develop, achieve and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP from the permitted areas in the County of Los Angeles to the waters of the State.” (See MS4 Permit Part 4 at pg. 51 (bracketed text added).)

On January 30, 2002, soon after the initial adoption of the 2001 MS4 Permit for the Los Angeles Region, the Chair of the Los Angeles Regional Board, Francine Diamond, issued a letter to all permittees confirming the manner in which Part 2 of the MS4 Permit [the RWL language] was to be interpreted. This letter stated that the iterative approach is the means “by which the Regional Board will obtain Permittee compliance with receiving water standards,” and that so long as the permittee is engaged in “a good faith effort to implement the iterative process to correct the harm,” no violation would occur. No other interpretation was later set forth by the Regional Water Board despite amendments to Part 2 of the original permit in 2006 and 2007 to include new prohibitions related to Total Maximum Daily Loads (“TMDLs”) for bacteria.

In the state court appeal decision on that 2001 MS4 Permit, Judge Chaney held that:

[T]he first step to correct water quality violations that occur, even if a permittees’ [sic] SQMP has been designed to achieve standards and BMPs have been timely implemented, is set forth in subpart 2.3, the “iterative” process. Should that not be sufficient, the parties would move to subpart 2.4, Best Management Practices (BMP) requirements. The process requires cooperation from the Regional Board, State Board and local government entities and impliedly requires that all parties work together in good faith.

This reading is consistent with the requirements of the Clean Water Act generally and section 402 specifically, as well as the Porter-Cologne Act. (See 33 U.S.C. § 1342(p)(3)(B)(iii); 33 U.S.C. §§1341(a)(1)-(2), 1342(a)(2), 1342(p)(3)(B)(ii); 40 C.F.R. §122.4(d); Cal. Water Code §§13000, 13263(a).) It is also consistent with State Board orders WQ 2001-15 and WQ 99-05 and the Francine Diamond letter. . . .

Reading the Receiving Water Limitations language in this manner, there is no tension between the subparts and no ambiguity. . . . The Court emphasizes the importance of good faith on the part of all parties in implementing Part 2.

(In Re Los Angeles County Municipal Storm Water Permit Litigation, Los Angeles County Superior Court, Lead Case No. BS 080548, Statement of Decision from Phase I Trial on Petitions for Writ of Mandate.) Thus, Judge Chaney interpreted the MS4 Permit at issue in that case in a manner consistent with State Water Board’s Order No. WQ 2001-15 and Chair Diamond’s letter.

In response to similar concerns by permittees that the Sacramento County MS4 Permit’s very similar RWL language would be interpreted in the way that would allow citizen enforcement of water quality standards exceedances, the Chair of the Central Valley Regional Water Quality Control Board sent a letter in 2004 to assure the permittees that the iterative process was the proper interpretation. That letter, in pertinent part, stated:

“Receiving Water Limitation B.2 [equivalent to Part 2.3 of the LA MS4 Permit] describes the process that the dischargers must follow to obtain compliance with water quality standards. Where the Permittee causes or contributes to violations of water quality standards, the Permittee must implement the iterative process specified. Specifically, where there are discharges of pollutants that cause or contribute to exceedances of water quality standards, the Permittee must submit a report that describes existing and additional best management practices that will be implemented to prevent or reduce any pollutants contributing to the exceedances of water quality standards. The Permittee must then incorporate new BMPs into its storm water management plan and implement the plan. The permit clarifies that if the Permittee complies with this procedure, the procedure does not have to be repeated for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

The Regional Board expects this iterative process to improve BMPs over time, and, therefore, the permit does not require strict compliance with WQS [Water Quality Standards]. **If the Permittee complies with this iterative process, it would be considered in compliance** with Discharge Prohibition A.1. and A.2 and Receiving Water Limitations B.1 and B.2. In the event that a Permittee has, in the judgment of the Regional Board, failed to properly implement the iterative process, the Regional Board may take appropriate enforcement action to address such failures and others....”

This interpretation is also consistent with the Fact Sheet accompanying one of the most recently adopted MS4 permits in California, issued by the San Francisco Bay Regional Board on October 14, 2009 (as well as those from other regional boards around the California), which stated in pertinent part:

“The CWA and the Porter-Cologne Water Quality Control Act largely regulate stormwater with an even hand, but to the extent that there is any relaxation of this evenhanded regulation, it is in favor of the local agencies. Except for MS4s, the CWA requires point source dischargers, including discharges of stormwater associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165.) As discussed in prior State Water Board decisions, this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal stormwater more leniently than the discharge of waste from nongovernmental sources.”

(San Francisco Bay Region MS4 Fact Sheet at pg. 29 (App. I-13) (emphasis added); *see also* Santa Ana Regional Board Fact Sheet and North Coast Regional Board Fact Sheet.)

The 2009 San Francisco Regional Board’s Fact Sheet went on to say:

“State Water Resources Control Board (“State Water Board”) Order WQ 1999-05, is a precedential order requiring that municipal stormwater permits achieve water quality standards and water quality standard based discharge prohibitions through the implementation of control measures, by which Permittees’ compliance with the permit can be determined. The State Water Board Order specifically requires that Provision C.1 include language that Permittees shall comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in the discharges. State Water Board Order WQ 2001-15 refines Order 1999-05 by requiring an iterative approach to compliance with water quality standards that involves ongoing assessments and revisions.”

(San Francisco Bay MS4 Permit Fact Sheet (App. I-18) (emphasis added).) It is clear from these documents that the iterative process controls the Receiving Water Limitations language, and these provisions were not intended to be independently enforceable unless a permittee fails to implement its Stormwater Quality Management Plan and BMP programs.

Strict compliance with water quality standards is not and has never been required for municipal stormwater under federal law.¹⁵ Moreover, case law on California MS4 permits, before the recent federal court decision in the *NRDC v. County of Los Angeles* case, confirmed that strict compliance with water quality standards has been specifically tempered for municipal stormwater permit holders by the iterative process.

In fact, the case challenging the State Water Board’s precedential order in Order No. WQ 2001-15, the Court of Appeal upheld the State Water Board’s decision and held that the RWL language essentially equates to a form of prospective injunctive relief, by holding that this language “...qualifies the Water Quality Standards provisions by detailing a **procedure for enforcing violations of those standards through a step-by-step process of ‘timely implementation of control measures....’** known as an iterative process.” (*Building Industry Ass’n of San Diego County v. State Water Resources Control Board, et al*, 124 Cal. App. 4th 866, 877 (2004)(emphasis added).) The Court went on to hold:

“The Permit makes it clear the Municipalities are required to adhere to numerous specific controls (none of which are challenged in this case) and to comply with water quality standards through ‘timely implementation of control measures’ by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows

¹⁵ See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999)(holding that the CWA does not require MS4s to strictly comply with water quality standards).

the regulatory agencies to enforce the water quality standards during this process,¹⁶ the Water Boards have made it clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. §122.47.) **There is nothing in this record to show that the Municipalities will be subject to immediate penalties for violation of water quality standards....**

Moreover, although we do not reach the enforcement issue in this case, we note **the Permit makes clear that the iterative process is to be used for violations of water quality standards....**¹⁷

(*Id.* at pgs. 890-891 (emphasis added).) To hold otherwise merely forces financially strained state agencies subject to stormwater controls and permitting, such as Caltrans, and municipalities to pay civil penalties (and substantial attorneys fees in the case of citizen suits) instead of focusing their limited funding on the implementation of new and improved BMPs that would improve local water quality. Since many BMPs are testing the limits of technology, these BMPs must be given time to determine their effectiveness and whether additional BMPs are necessary.

Given this history, MS4 Permit holders throughout the state had believed themselves to be in compliance with their respective MS4 Permits by following the iterative process and its progressive BMP program, and the fact that courts had previously found that the “permit contemplates controlling the discharge of pollutants to the maximum extent practicable through a ‘cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards.’” (*Rancho Cucamonga*, 143 Cal. App. 4th at 1389 citing *Building Industry*, 124 Cal. App. 4th at pg. 889.) This was also consistent with what the cities were each told by the then Chairs of the Los Angeles and Central Valley Regional Water Boards after those regions had adopted MS4 permits.

“A violation of the permit would occur when a municipality fails to engage in a good faith effort to implement the iterative process to correct the harm. As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides

¹⁶ It should be noted that this San Diego MS4 permit contained language not present in other MS4 Permits, namely language stating that: “Nothing in this section shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report.” *BIA* at pg. 877. Thus, that San Diego permit arguably provided the San Diego Regional Water Board with additional power not authorized by other MS4 Permits, but potentially limited citizen enforcement.

¹⁷ This case goes on to discuss citizen enforcement and what would happen if citizen groups raced to the courthouse to file lawsuits against the Municipalities seeking penalties for violation of the Water Quality standards provisions, such as was the case with Caltrans previously and with Los Angeles County, holding:

“it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process.” *Id.* at pg. 891 (emphasis added).

that the Permittee is in compliance.... *Even if the water quality does not improve as a result of the implementation efforts, there is no violation of the permit's receiving water limitations provision as long as a good faith effort is underway to participate in the iterative process.* The basic premise is that an incremental effort is appropriate to identify additional best management practices that will ultimately result in improved storm water quality."

(See Francine Diamond Letter, which also answered the question "**Does the permit language put cities in violation of receiving water limitations immediately and open them to third party lawsuits?**") (emphasis added).) The Chair's letter went on to reiterate that:

"The receiving water compliance process outlined in the permit allows for each Permittee to work cooperatively with the Regional Board to identify additional measures, if required, to improve water quality to meet receiving water standards. If the measures adopted do not achieve that result, further measures can be developed. *This iterative approach is intended to gain progress over time.* The provision is expressly intended to serve as a vehicle by which the Regional Board will obtain Permittee compliance with receiving water standards. To that end, the key aspect is that a good faith effort be pursued by Permittees to utilize this process." (*Id.* at pg. 6 (pg. 2 of letter) (emphasis added).)

The clear history of the MS4 permitting program shows that the iterative process with ever more effective BMPs was always meant to be the linchpin of the program, not enforcement, penalties and the payment of attorney's fees. This all changed when Natural Resources Defense Council and others began suing over permit non-compliance by Caltrans and other MS4 dischargers, and a new interpretation of these permits was provided by Judge Matz in the Central District Court of California and upheld by the Ninth Circuit.¹⁸ The State Water Board needs to return to its initial rulings *before EPA Region IX got involved* in the late 1990s to short circuit an otherwise valid and workable municipal stormwater program.

2. *Making the Right Policy Choice Going Forward*

Instead of requiring strict compliance with water quality standards (arguably reflected in Alternatives 1 and 2 in the Issue Paper), which will only lead to legal finger-pointing and years of litigation trying to painstakingly determine each discharge point and each municipalities' specific contribution to a particular water quality exceedance (which is difficult¹⁹ and does

¹⁸ The U.S. Supreme Court has now taken up the *NRDC v. Los Angeles County* case for certiorari review and oral arguments will be heard on December 4, 2012.

¹⁹ The difficulty of this exercise cannot be over-emphasized. The 2001 Los Angeles MS4 Permit estimated that storm water discharges to just the Santa Monica Bay Watershed, in addition to the 84 cities and County of Los Angeles covered by the MS4 Permit, emanated from 147 dischargers covered under an industrial storm water permit, and 107 dischargers covered under a construction storm water permit. This did not include other permitted

nothing except create more legal challenges), the State Water Board should reiterate its commitment to the iterative process, and re-focus its attention on improving stormwater pollution control programs to incorporate better and better programs and practices to continue the mandated reduction of pollutants to the maximum extent practicable, and to continue to improve these programs over time as the science and technology progresses. This iterative process will also avoid the flawed view that all MS4 permittees are guilty until proven innocent because the iterative process envisioned a collaborative approach, where the Water Boards work together with regulated entities to improve their stormwater programs.

To accomplish this, the State Water Board should adopt new precedential language stating that if a permittee is complying with an adaptive management, iterative approach to address pollutants that have experienced local receiving water exceedances or for which Total Maximum Daily Loads (“TMDLs”) have been established, then the permittee will be deemed to be in compliance with the RWL provisions of the permit. (33 U.S.C. §1342(k)(compliance with permit deemed compliance with the Act); *City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region*, 135 Cal. App. 4th 1377, 1388 (2006)(finding no reason why this statutory protection had to be duplicated in the permit).) Water quality standards language should be more clearly tied to the pollutant reduction programs in the permit and specifically state that a permittee shall be deemed to be in compliance with the permit if it reports instances of water quality exceedance(s) and specifically takes steps to address the exceedance(s).

CASQA and others have submitted draft language that should be considered along with language previously considered by the State Water Board in the history of orders set forth above. Additionally, an alternative proposal has been attached as **Exhibit A**, which is similar to MS4 Permit language adopted by the Central Valley Regional Water Board in 2011, which was not petitioned by any environmental groups and was not vetoed by EPA. Alternatively, if the State Water Board chooses to go beyond the requirements of federal law, then the requirements of Water Code sections 13000, 13263, and 13241, including the water quality and economic impacts of doing so, must be considered.

3. *Conclusion*

We believe that the State Water Board should use the upcoming RWL workshop to strike an appropriate regulatory balance between reasonably protecting our state’s waterways and beneficial uses by steadily reducing pollution over time without bankrupting municipal stormwater dischargers in California. Adopted RWL language must make clear, as it did from the start, that timely and complete implementation by a Permittee of the numerous and varied storm water management programs prescribed in the MS4 permit satisfies the requirements of

point source dischargers, such as industrial or municipal wastewater treatment plants or direct discharges to the Bay for pollutants such as bacteria from boats, bathers, and wildlife. Trying to determine each source’s specific contribution to each water quality impairment would take an inordinate amount of scientific and financial resources and would not, in and of itself, do anything to improve water quality.

the Receiving Water Limitations section and constitutes compliance with the receiving water limitations. We stand ready to assist the State Water Board in its efforts to achieve this balance because the alternative – years and years of litigation over MS4 permit language and defending against enforcement of these permits – will do nothing to improve the quality of California’s waterways and coastline.

Thank you for the opportunity to present these comments prior to the upcoming RWL workshop.

Very truly yours,

DOWNEY BRAND LLP



Melissa A. Thorme

1286801.1