

## Los Angeles Regional Water Quality Control Board

October 15, 2013

### VIA EMAIL ONLY

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IN RE PETITIONS CHALLENGING 2012 LOS ANGELES MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) PERMIT (ORDER NO. R4-2012-0175): LOS ANGELES WATER BOARD RESPONSE TO PETITIONS  
**SWRCB/OCC FILES A-2236(a) THROUGH (kk)**

Dear Ms. Wadhvani:

On November 8, 2012, the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) unanimously adopted Order No. R4-2012-0175, *Waste Discharge Requirements for MS4 Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4* (Los Angeles County MS4 Permit or Permit). The State Water Resources Control Board (State Water Board) received thirty-seven petitions for review of the Los Angeles County MS4 Permit. The State Water Board found the petitions were legally and factually related and consolidated them for review. The State Water Board provided the Los Angeles Water Board until October 15, 2013 to submit written responses to the issues raised in the petitions. The Los Angeles Water Board's response to the petitions is attached to this letter.

The Los Angeles Water Board is also filing a Request for Administrative Notice under separate cover, requesting that the State Water Board consider evidence that was not part of the administrative record before the Los Angeles Water Board.

We look forward to the State Water Board's review of the administrative record and the Los Angeles Water Board's response to the petitions. If you have any questions, please contact me at [Samuel.Unger@waterboards.ca.gov](mailto:Samuel.Unger@waterboards.ca.gov) or Renee Purdy at [Renee.Purdy@waterboards.ca.gov](mailto:Renee.Purdy@waterboards.ca.gov).

Sincerely,



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Enclosures: Response to Petitions  
Exhibit A – Petitioners and their Counsel of Record Contact List  
Exhibit B – MS4 Dischargers Mailing List

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**LOS ANGELES WATER BOARD’S RESPONSE TO PETITIONS  
CHALLENGING 2012 LOS ANGELES COUNTY MS4 PERMIT  
SWRCB/OCC FILES 2236(a)-(kk)**

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## **I. INTRODUCTION**

On November 8, 2012, the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) unanimously adopted Order No. R4-2012-0175, *Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4* (Los Angeles County MS4 Permit or Permit). The Permit is the fourth iteration of the MS4 permit for Los Angeles County. While most requirements of the Permit were carried over from the previous iteration, the Permit also contains new requirements and implementation alternatives.

As required by federal law, one of the most significant additions to the fourth iteration of the Permit was the incorporation of water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs). By incorporating these TMDL provisions, the Board recognized the need to provide linkages between the water quality-based requirements of the Permit (i.e., receiving water limitations (RWLs) and TMDL provisions) and the programmatic elements of the Permit (i.e., storm water management program and non-storm water discharge prohibitions) by crafting the integrative framework of the watershed management program (WMP)/enhanced watershed management program (EWMP) implementation alternative that provides compliance mechanisms. Another way that the Board formed these connections is through the addition of outfall monitoring in order to better establish the linkage between MS4 discharges and receiving water quality. In addition to being integrative, WMPs/EWMPs are designed to facilitate collaboration, prioritize actions, and ensure improved water quality and restoration of beneficial uses in high priority impaired water bodies within Los Angeles County, as well as maintain water quality in non-impaired water bodies. Lessons learned over two decades of managing MS4 discharges through NPDES permits, observing successes from implementation of TMDLs, and the distinct physical and regulatory factors present in Los Angeles County informed the development of this Permit.

The Board's responses to the petitions are organized into the following sections below: (II) Summary Response, (III) Background on the Los Angeles County MS4 Permit, (IV) Specific Responses to Contentions Raised by Petitions, and (V) Conclusion.

## **II. SUMMARY RESPONSE**

As explained in the specific responses to the contentions raised in the petitions, the Los Angeles Water Board disagrees with all of the contentions raised. The Los Angeles Water Board requests that the State Water Board deny the petitioners' requests to: vacate the Los Angeles County MS4 Permit, remand the Permit to the Los Angeles Water Board for further proceedings, and/or to revise specific provisions of the Permit. In response to the petitioners' contentions, the Los Angeles Water Board urges the State Water Board to uphold the Permit in its entirety, retaining all of the provisions of the Permit.

The Board complied with all applicable laws, regulations, and policies in adopting the Permit. MS4 discharges in the Los Angeles Region have severely impacted water quality and beneficial uses. In accordance with the federal Clean Water Act and its implementing regulations, the Permit requires MS4 permittees to implement management practices and conduct monitoring and reporting to prevent or minimize the discharge of waste from MS4s to ensure that these discharges are not polluting waters of the United States. The Permit protects beneficial uses and is reasonable given the severity of the impacts resulting from MS4 discharges. In so doing, the Permit also provides permittees flexibility on how to implement and demonstrate compliance

with the Permit. The Permit provides flexibility and time to support collaboration leading to efficient and cost-effective solutions and significant water quality improvement is possible using the approaches provided. The Permit is responsive to the distinct attributes and conditions of the Los Angeles Region, which is characterized by the need to implement 33 TMDLs, coordinate a patchwork of 85 municipal jurisdictions, augment local water supplies, and a willingness among permittees and other stakeholders to collaborate in developing watershed-scale solutions. The Los Angeles Water Board is confident that actions implemented by the permittees of the Los Angeles County MS4 Permit in compliance with the Permit will result in improvements in water quality conditions in the Los Angeles Region.

Further, contrary to the assertions of several petitioners, the process leading to adoption of the Permit was consistent with the Clean Water Act, the Administrative Procedures Act, and due process principles.

Many petitioners raised identical contentions to both the Los Angeles Water Board during the written comment period of the Permit adoption process and to the State Water Board in their petitions. The Los Angeles Water Board responded to all significant comments received prior to issuing the Permit. In most cases where the petitioners simply repeat the same comments made to the Los Angeles Water Board, they make no attempt to address the Board's responses or explain why the Board's responses were inadequate.

While many permittees submitted petitions on the Permit, many requested that the petitions be placed in abeyance. Though the State Water Board chose to keep all petitions active, these permittees have reiterated their continuing commitment to watershed solutions and are aggressively moving forward with Permit implementation. During the 18 month Permit development process, permittees began to come together and create positive working relationships with one another and with the Board. Since the Permit was issued, permittees and the Board have continued to build these partnerships and are already making significant strides in Permit implementation. The Los Angeles Water Board urges the State Water Board to uphold the Permit in its entirety to allow this positive momentum to continue.

### **III. BACKGROUND ON THE LOS ANGELES COUNTY MS4 PERMIT**

Los Angeles is one of the most populous counties in the country. This dense population and associated infrastructure, including impervious surfaces, applies tremendous pressure on water, both in terms of quality and quantity, within the Los Angeles Region. The area covered by the Permit encompasses more than 3,000 square miles and contains a vast drainage network totaling over 4,300 miles in length.

In the early part of the 20<sup>th</sup> century, the focus of storm water management in Los Angeles County was flood control, with little consideration given to water quality. The Los Angeles County's Mediterranean climate, large land area, and steep topographic relief, taken together, generate large volumes of runoff from precipitation events that are concentrated within a few months each year. Without a flood conveyance system to channel storm water to the ocean, these intense precipitation events would cause major flooding. As Los Angeles County urbanized during the 20<sup>th</sup> century there was a substantial increase in impermeable land area (i.e., hardscape) that further increased the volume of storm water that was conveyed to the ocean and other water bodies in County. In response to the increasing flood control needs, many of the natural streams and rivers in Los Angeles County were armored in concrete to more efficiently convey storm water to the ocean.

Unfortunately, the hardscaping of watersheds and armoring of water bodies also increased the mobilization of pollutants into, and ultimately from, the MS4 such that discharges from the MS4 caused or contributed to impairments of beneficial uses and loss of habitat in water bodies throughout Los Angeles County. These include estuaries and other coastal waters that provide critical habitat and beaches that are one of the cornerstones of the Los Angeles County economy. When the federal Clean Water Act was amended in 1987 to include discharges of storm water under the NPDES program, management of storm water quality became a federal mandate. Initially, MS4 permits were focused on general program activities that municipalities were required to implement, including programs for public information and participation; industrial/commercial facilities; public agency activities; illicit connections and illicit discharge elimination; construction activities; and planning and land development. However, years of experience have shown that water quality impairments require more focused measures to restore water quality and beneficial uses.

In the intervening years since the previous Los Angeles County MS4 permit was issued in 2001, best management practices (BMPs) for storm water have greatly improved and many TMDLs have been adopted by the Los Angeles Water Board to guide their implementation. In particular, Los Angeles County MS4 permittees have gained experience successfully implementing structural BMPs such as full capture systems for trash, low flow diversions, urban runoff recycling facilities, regional multi-benefit projects, and site and neighborhood level low impact development (LID) features to address specific water quality impairments.

Proof of the effectiveness of watershed based implementation has been demonstrated after the Los Angeles Water Board (in 2006, 2007, and 2009) reopened the previous permit to incorporate provisions to implement a few TMDLs, including ones addressing bacteria at various beaches and trash in the Los Angeles River. The incorporation of these TMDLs resulted in implementation of BMPs that have greatly improved water quality in these water bodies. An entire industry of vendors, and in some cases, the permittees themselves, developed myriad trash capture devices. In light of the numerous TMDLs and the successes garnered through incorporating those TMDLs, the Board recognized the importance of a permit that contained water quality-based requirements that led permittees to design and implement their programs and BMPs on a watershed scale. The Permit builds on these successes; however, coordinating the implementation of 33 TMDLs on a watershed scale is a significant challenge. The Los Angeles Water Board therefore included implementation alternatives that foster early planning and coordination to facilitate success in meeting the stringent requirements that will remedy impairments and restore the waters within the Los Angeles Region.

The Los Angeles Water Board was also informed in drafting the Permit by nationwide advances in storm water management including innovative frameworks for integrating storm water, wastewater, and water supply management; an increased focus on limiting impermeable area and retaining storm water onsite; and cost effective watershed-based actions to effect water quality improvements. Further, in Southern California, which is ever more dependent on local groundwater for municipal supplies, storm water is increasingly acknowledged as a valuable resource to recharge aquifers and, in some cases, to improve or maintain water quality in groundwater basins. For large urban areas such as Los Angeles County, this largely untapped storm water resource, in combination with recycled water, is key to the sustainability of local water supplies. This integration across local agencies that deal with water quality and water supply will take time. The Los Angeles County MS4 Permit provides such time to plan and implement multi-benefit regional projects that both address storm water quality and promote sustainable water supplies for Southern California.

As such, the Permit strongly supports a paradigm shift from viewing storm water as a liability to viewing it instead as a regional asset. The Los Angeles Water Board has long been at the forefront of this movement; it first introduced incentives for MS4 permittees to develop an integrated water resources approach to TMDL implementation in 2002. This approach emphasizes integrated planning for storm water management, flood control, and water supply. MS4 permittees in the Los Angeles Region are particularly well positioned to take advantage of these incentives by partnering with local water suppliers who are looking for opportunities to increase local water supplies. Increasing storm water capture and use is also a priority of the State Water Board, as stated in its Strategic Plan<sup>1</sup> and Recycled Water Policy.<sup>2</sup> Additionally, numerous local non-profit organizations are supporting policy, research and demonstration projects to showcase the feasibility and benefits of storm water capture and use.

It is against this backdrop of realizing water quality improvements through implementing TMDLs, greater understanding of BMP capabilities and watershed approaches, and the potential for regional, multi-benefit projects to promote sustainable water supplies in the Los Angeles Region that the Board undertook reissuance of the Permit.

During development of the Permit, many of the MS4 permittees self-organized into ad-hoc groups to provide comments and testimony at workshops regarding their commitment to support the Permit and develop comprehensive programs and multi-benefit regional projects to facilitate implementation of Permit requirements. However, the permittees made clear that they could not support a commitment to these programs with the uncertainty of unclear permit compliance mechanisms. Due to the extensive Permit requirements, permittees asked for a reasonable assurance approach for meeting water quality based effluent limitations (WQBELs) and a short, but reasonable period of time to pull together as watershed groups in order to plan for comprehensive efforts under a WMP or EWMP. The WMP/EWMP provisions resolve the uncertainty that previously existed regarding compliance with water quality based requirements, while retaining the fundamental requirement to control MS4 discharges such that they will not cause or contribute to exceedances of water quality standards.

In sum, the Permit advances regulation of MS4 discharges by: including rigorous requirements such as the incorporation of wasteload allocations from 33 TMDLs as numeric WQBELs; encouraging watershed collaboration to achieve cost effective solutions; providing incentives to implement multi-benefit regional projects; and incentivizing efforts that result in concrete actions with measurable water quality improvements. To accomplish this, the new Permit provides clear compliance metrics and timeframes and affords a short (conditioned) planning horizon to develop effective WMPs/EWMPs.

#### **A. Permit Requirements and Compliance Mechanisms**

The most significant addition to the fourth iteration of the permit is the requirement to implement 33 watershed-based TMDLs.<sup>3</sup> The number of TMDLs in the Los Angeles Region, and the number of impaired water bodies addressed by these TMDLs, far exceeds that of other regions in California. These TMDLs address the highest priority water quality issues in the region. The Board recognized that the key to successful implementation of these TMDL requirements was to

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<sup>1</sup> State Water Board Resolution No. 2008-0063 (*Strategic Plan Update*).

<sup>2</sup> State Water Board Resolution No. 2009-0011 (*Policy for Water Quality Control for Recycled Water*).

<sup>3</sup> In contrast, when the Board adopted the 2001 Los Angeles County MS4 permit, there were no TMDLs in effect with wasteload allocations assigned to MS4 dischargers.

link the traditional programmatic requirements of the Permit to the new TMDL water quality based requirements such that permittees' storm water management programs would be driven by specific required water quality outcomes. The Board created this linkage by crafting the integrative framework of the WMPs/EWMPs and allowing for customization of minimum control measures within this framework.

The WMP/EWMP framework is driven by strategic planning and development, which will result in more cost effective implementation. The WMP/EWMP framework allows permittees to meet the requirements of the Permit in an integrated, tailored, and collaborative fashion to best address their specific water quality problems. This watershed-based framework comports with the State and Regional Water Boards' Watershed Management Initiative<sup>4</sup> and the requirements of watershed-based TMDLs. It also comports with amendments to the Los Angeles County Flood Control Act, which divided the flood control district into watershed areas to carry out projects and provide services "to improve water quality and reduce storm water and urban runoff pollution."<sup>5</sup>

Additionally, the WMP/EWMP framework is supported by section 402(p) of the federal Clean Water Act and 40 C.F.R. section 122.26. The United States Environmental Protection Agency (USEPA) has identified a number of important benefits of watershed based permitting, including more environmentally effective results; the ability to measure the effectiveness of targeted actions on improvements in water quality; reduced cost of improving water quality; and more effective implementation of TMDLs, among others. The WMP/EWMP provisions in the Los Angeles County MS4 Permit are already fostering extensive collaboration among permittees to develop programs to implement regional integrated water resources approaches such as storm water capture and use to improve water quality and achieve other benefits.

The RWLs provisions in the Permit are the same as those included in the previous 2001 Los Angeles County MS4 permit, and are based on precedential State Water Board Order WQ 99-05. However, because the TMDLs incorporated into the Permit include implementation plans, the Los Angeles Water Board was in a position to be able to provide compliance mechanisms with RWLs provisions in this Permit. The TMDL implementation schedules provide the necessary time for MS4 permittees to achieve compliance with water quality standards.<sup>6</sup> The TMDLs also require MS4 permittees to develop detailed implementation and monitoring plans and submit these plans for approval by the Board. Over the last several years, the Board and MS4 permittees have spent significant time and resources in developing, reviewing, and implementing those plans. Many permittees have already been collaborating on a watershed scale to successfully implement actions identified in these TMDL implementation plans.

As mentioned previously, the effectiveness of these TMDL implementation programs was exhibited during the previous permit cycle when the Board reopened the permit to include provisions to implement a few TMDLs. In each case, BMPs were implemented to address the water quality impairments and notable water quality improvements were attained. These examples, among others, provided proof to the Board that an approach that allowed

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<sup>4</sup> Watershed Management Initiative Chapter, December 2007 (Section 10.I., RB-AR22526 - 22732).

<sup>5</sup> Stats. 2010, ch. 602.

<sup>6</sup> During Board workshops and hearings, MS4 permittees described the municipal process to implement BMPs to achieve TMDLs, including planning, funding, design, contracting, implementing, and testing. These steps largely take place sequentially. Therefore, sufficient time is required to implement water quality improvement projects.

municipalities to target BMPs on a watershed basis could provide far more effective results than a permit focused on a standardized programmatic approach.

These extensive and enforceable implementation alternatives for addressing the highest priority water quality issues in the Los Angeles Region, coupled with more robust core provision requirements and commitments to implement watershed solutions to address all impairments in regional waters, allowed the Board to consider compliance mechanisms for the RWL provisions. For compliance with the RWLs provisions, the previous permit solely utilized a so-called “iterative approach.” However, this approach was not well defined and was reactive rather than proactive; hence, progress in improving water quality under that approach has been minimal in the Los Angeles Region and compliance determination has been difficult. The WMP/EWMP compliance mechanisms in the Permit provide an incentive and robust framework for permittees to craft comprehensive programs to achieve compliance with RWLs, both those addressed by TMDLs and those not addressed by TMDLs. The Los Angeles Water Board recognizes that, in the case of impaired waters subject to a TMDL, the Permit’s RWLs for the pollutants addressed by the TMDL may be exceeded during the period of TMDL implementation. Therefore, the Permit provides that a permittee’s compliance with the applicable TMDL requirements and corresponding compliance schedules constitutes compliance with the RWLs provisions for the particular TMDL pollutant. This is similar to compliance schedules allowed in traditional NPDES permits.

While there is general consensus among permittees and other stakeholders regarding compliance mechanisms for the RWLs provisions where a TMDL is in place, permittees and environmental organizations expressed strong, but opposing, opinions regarding compliance mechanisms for RWLs related to non-TMDL pollutants. The Board considered at length these opposing opinions as well as alternative RWLs proposals, including written proposals by the California Stormwater Quality Association (CASQA) and the City of Los Angeles, and the option of retaining the status quo.<sup>7</sup> Ultimately, the Board decided that the most productive approach was to allow permittees the opportunity to address non-TMDL pollutants in the same manner and with the same rigor as TMDL pollutants in their WMP/EWMP. This allows for permittees to look at all impairments, prioritize, and plan for success.

Permittees must identify enforceable requirements with milestones and dates for their achievement that are consistent with implementation deadlines adopted as part of a TMDL or that are as short as possible in their WMP/EWMP. If the expected date for achieving the RWLs will occur beyond the term of the Permit, permittees are required to either initiate development of a TMDL for Clean Water Act section 303(d) listed pollutants or, if permittees are pursuing an EWMP and can feasibly retain the required storm water volume, they must continue to target implementation of storm water control measures to address these RWLs as they construct the regional multi-benefit storm water retention facilities.

Permittees must also conduct an adaptive management process at least twice during the term of the Permit, adapting their WMP/EWMP to become more effective based on outfall and receiving water monitoring results. Permittees must implement the modifications to the WMP/EWMP upon approval by the Los Angeles Water Board. This process is consistent with the “iterative approach” to implementing BMPs that was employed in the previous Los Angeles County MS4 permit in that progress toward compliance with RWLs may occur over the course

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<sup>7</sup> See City of Los Angeles, Proposed Approaches to Receiving Water Limitations Provisions of the MS4, Feb. 15, 2012 and CASQA, Receiving Water Limitations Provision to Stormwater NPDES Permits, Feb. 21, 2012 (Section 10.V, RB-AR24962 – 24969).

of many years. While it is consistent with the goal of the previous approach, the WMP/EWMP process set forth in the 2012 Permit is more proactive and robust because of the following requirements: an up-front identification and analysis of the watershed control measures necessary to achieve the RWLs and WQBELs (referred to as a “reasonable assurance analysis”); commitments to measurable requirements and milestones associated with implementing those watershed control measures with dates for their achievement; and outfall monitoring in addition to receiving water monitoring to allow an ongoing evaluation of the effectiveness of the WMP/EWMP. This more robust process will ensure measurable reductions in pollutant discharges from the MS4, resulting in progressive water quality improvements and ultimately leading to attainment of RWLs.

The additional compliance mechanism for final WQBELs and associated RWLs, provided solely as part of an EWMP, was created to support the paradigm shift from viewing storm water as a liability to viewing it as a local asset. Technically, the additional EWMP compliance mechanism is an outgrowth of extensive work, beginning in 2005, to develop “design storm criteria” to facilitate implementation of wet weather wasteload allocations assigned to MS4 discharges.<sup>8</sup> Through this work and other complementary efforts, the Board determined it appropriate to establish a storm water retention standard that would constitute compliance with final numeric WQBELs and associated RWLs. In particular, the Permit specifies that in drainage areas where permittees retain all the non-storm water and all the storm water runoff up to and including the volume equivalent to the 85<sup>th</sup> percentile, 24-hour event, permittees shall be deemed in compliance with the final WQBELs and associated RWLs for the TMDL pollutant(s).<sup>9</sup>

A final issue that the Board considered was the timing of the compliance mechanisms provided as part of a WMP/EWMP. Permittees commented that in order to focus on development of robust WMPs/EWMPs, it was critical to provide the compliance mechanism for non-TMDL RWLs not just after approval of a WMP/EWMP, but also during their development. After careful consideration, the Board supported the compliance mechanism during the short, interim period prior to approval of permittees’ WMP/EWMP on the condition that permittees meet all requirements (described below) and interim deadlines for development of a WMP/EWMP, and that permittees continue to target implementation of watershed control measures in their existing storm water management plan to address known contributions of pollutants from MS4 discharges that cause or contribute to RWLs exceedances during this time.

All of the compliance mechanisms in the Permit are contingent upon participating permittees being in full compliance with the requirements articulated in the Permit, including submitting a WMP/EWMP that complies with Permit requirements and, once approved, complying with all actions and corresponding schedules in their WMP or EWMP. If a permittee fails to meet any requirement or date for its achievement beginning with adequate notification and documentation of a permittee’s intent to develop a WMP/EWMP, and continuing with implementation of an approved WMP/EWMP, the permittee is subject to the RWLs provisions as set forth in Part V.A. of the Permit. Permittees that do not elect to develop a WMP/EWMP are required to demonstrate compliance with RWL provisions as set forth in Part V.A.

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<sup>8</sup> See, for example, Section 10.VI.C, RB-AR29487 - 29502, 30096 - 30141.

<sup>9</sup> Note that this compliance mechanism does not apply to final trash WQBELs as the most effective compliance strategies for trash are somewhat different than those for other storm water pollutants. (See Order No. R4-2012-0175, Parts VI.E.2., subsections d.i.(4)(d) and e.i.(4).)



In summary, over the 18 month Permit development period, the watershed based framework for implementing Permit requirements was refined based on extensive discussions with permittees and stakeholders. By the time of the Board hearings, this framework had gained wide support by permittees. Elements of the watershed based framework, particularly the EWMP implementation alternative with a focus on multi-benefit regional storm water retention projects, were also strongly supported by many other stakeholders.

Since the Board issued the Permit, permittees have been actively forming collaborative watershed groups and diligently working to meet deadlines for draft low impact development ordinances, green streets policies, and memorandums of understanding/agreement for WMP/EWMP development. Eighty-five of the 86 permittees have opted to develop a WMP/EWMP and in June 2013 provided timely notice of their intention to do so.<sup>10</sup> Eighteen watershed groups have formed, including 86 percent of permittees. Two-thirds of these groups have elected to develop EWMPs. Permittees participating in EWMPs have also notified the Board of the specific projects they have committed to carry out in order to meet the Permit requirements to implement a structural BMP or suite of BMPs that will provide meaningful water quality improvement within the watershed, concurrently with their EWMP development process. Further, the Board has convened a technical advisory committee as required in the Permit, held three monthly meetings, and formed a subcommittee to specifically address the reasonable assurance analysis requirements.

## **B. Permit Development Process**

The process to issue the updated Los Angeles County MS4 Permit began in April 2011, and was the most intensive public process in the history of the Los Angeles Water Board. Over the 18 months between April 2011 and Permit adoption, the Board held nine workshops, released five “staff working proposals” for public review and comment, participated in hundreds of discussions with stakeholders, and held three days of hearing.<sup>11</sup> Beginning in January 2012, Board staff held, on average, weekly to biweekly meetings with the Los Angeles County Flood Control District (LACFCD); a coalition of over 60 of the 86 permittees that called themselves the “LA Permit Group”; key environmental organizations (Heal the Bay, Los Angeles Waterkeeper and Natural Resources Defense Council); and the City of Los Angeles. Additionally, after the May 2012 Board workshop, at the direction of the Board, staff convened a series of 10 meetings among key stakeholders in an effort to find consensus on several key issues such as incorporation of TMDLs; elements of WMPs/EWMPs; and RWLs provisions as they related to TMDL provisions and WMP/EWMP provisions. While consensus was not achieved on all of these topics, there were significant areas of agreement that resulted from this dialogue, which are reflected in the Permit.

Additionally, during the process, the Los Angeles Water Board received hundreds of comment letters and heard oral testimony from numerous stakeholders, including MS4 permittees, environmental organizations, trade organizations, and the general public. Over the development

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<sup>10</sup> See Request for Official Notice, October 15, 2013, Exhibits D through SS, Los Angeles County MS4 permittees’ Notices of Intent to develop a WMP or EWMP, summary lists, and maps.

<sup>11</sup> Most of these workshops were designed to facilitate focused discussion on key elements or sections of the Permit. Individual workshops were held on the following topics: permit structure, non-storm water discharge provisions, core programmatic requirements, TMDLs and WQBELs, RWLs provisions, watershed management program provisions, and monitoring and reporting requirements. See Section 2, RB-AR427 - 2920 (Staff and Board Workshops), Section 3, RB-AR2921 - 3543 (Staff/Stakeholder Meeting), Section 7, RB-AR17889 - 18908 (Materials from October 4-5, 2012 Hearing), and Section 9, RB-AR20963 - 21603 (Regional Board Hearing on November 8, 2012).

period, the Board evaluated many alternative proposals submitted by permittees and other stakeholders. Throughout, the Board made changes and refinements to the draft Permit, the majority of which were in response to comments from permittees and stakeholders. As a result of this intensive public process, many of the concerns of permittees and stakeholders were addressed.

#### **IV. SPECIFIC RESPONSES TO CONTENTIONS RAISED BY PETITIONS**

The petitioners (SWRCB/OCC File A-2236(a)-(kk)) raised a number of contentions that are technical, legal, and/or procedural in nature. Many contentions are common to multiple petitions. The Los Angeles Water Board prepared responses to the specific contentions, organized by topic. In the responses, the Board first notes the specific contention raised, and then includes in parenthesis the specific petitioners that raised that contention. The contentions/responses are generally organized by the order of the Permit for ease of reference. When appropriate, the Los Angeles Water Board cites to specific documents and/or references included in the administrative record.

##### **A. Hearing Process and Procedures**

###### **1. Contention: The timing and procedures of the Permit adoption were contrary to law and denied the permittees' due process rights (Petitioners (a)-(h), (j), (n)-(t), (v), (w), (aa), (bb), (dd), (ee), (hh), and (jj))**

The Los Angeles Water Board disagrees. The Board previously addressed various requests and contentions by permittees concerning the length of the public comment period, as well as other hearing processes and procedures for the Permit proceedings, in written responses to multiple permittees' requests for extensions of the public comment period from July 13, 2012 to July 30, 2012,<sup>12</sup> the Board's "Order on Objections and Requests Concerning Hearing Procedures and Process" dated September 26, 2012,<sup>13</sup> the Board's "Second Order on Objections and Requests Concerning Hearing Procedures and Process" dated October 3, 2012,<sup>14</sup> in written responses to comments,<sup>15</sup> and in the Board's "Order on Objections Regarding Revised Tentative Order and Responses to Comments" dated November 7, 2012.<sup>16</sup>

Petitioners contend that the review and comment period established by the Board was unreasonably short. The Board disagrees. The review and comment period was adequate and in excess of what federal and state law requires. Permittees and stakeholders were provided forty-five days to review and comment on the tentative permit dated June 6, 2012 (Tentative Order). Federal regulations implementing the Clean Water Act only require that the Board provide thirty days for public comment.<sup>17</sup> California Water Code section 13167.5 also prescribes a notice and public comment period of at least thirty days prior to the adoption of waste

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<sup>12</sup> See generally Regional Board Response Letters to Requests for Extension of Comment Period (Section 4, RB-AR4556 - 4585).

<sup>13</sup> See pp. 8-9 (Section 5, RB-AR4886 - 4898).

<sup>14</sup> See pp. 2-4 (Section 5, RB-AR5047 - 5050).

<sup>15</sup> See Responses to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-1 to H-5 (Section 8, RB-AR19916 - 19920).

<sup>16</sup> See pp. 2-4 (Section 8, RB-AR20946 - 20949).

<sup>17</sup> 40 C.F.R. § 124.10(b).

discharge requirements, including NPDES permits. Accordingly, permittees and stakeholders were provided with more time than federal and state law requires. As a result of the public review and comment period, the Board received thousands of pages of comments from permittees on the Tentative Order.<sup>18</sup> The extensive nature of the comments submitted by the permittees also demonstrates that the permittees had sufficient time to review and comment on the Tentative Order.

The Board clearly provided permittees and stakeholders with a reasonable and meaningful opportunity to review and comment on the Permit. During the Permit development process, the Board made extraordinary efforts to provide opportunities for permittees and stakeholder participation. The process to renew the Los Angeles County MS4 Permit began in April 2011, and has been the most extensive public process in the history of the Los Angeles Water Board. From April 2011 to November 2012, the Board worked diligently to provide an open and transparent permit development process, realizing the importance of having permittees and stakeholders closely involved. The Board provided numerous opportunities for permittees and stakeholders to present issues and concerns, ask questions, and engage in dialogue with Board staff regarding permit provisions. The Board held five staff-level workshops and three Board-level workshops.<sup>19</sup> The workshops were topical in format and permittees and stakeholders were provided time to present their issues/concerns to the Board and/or Board staff. Board staff also routinely met with permittees and stakeholders, either individually or jointly, during the permit development process, affording permittees and stakeholders hours to discuss their concerns with Board staff in detail.<sup>20</sup>

Permittee and stakeholder input was also considered in the drafting of the Tentative Order. Board staff had recognized the value of providing permittees and stakeholders with working proposals of the Permit prior to issuing the Tentative Order in June 2012. In March and April 2012, Board staff distributed to permittees and stakeholders five working proposals of the permit provisions, covering the five principal sections of the permit, to facilitate the understanding of the permit on a section by section basis.<sup>21</sup> For each working proposal, Board staff provided permittees and stakeholders with a three-week informal written comment period as well as the opportunity to make oral comments to the Board on the working proposals at workshops held on April 5, 2012 and May 3, 2012. As a result, the draft Tentative Order was revised to address many of the concerns raised by permittees and stakeholders during meetings, as well as the written and oral comments received on the working proposals. The Tentative Order that was released for a 45-day public comment period on June 6, 2012 already reflected changes based on a consideration of the comments received at that point in time.

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<sup>18</sup> See generally written comments received from permittees on the June 6, 2012 Tentative Order (Section 6, RB-AR5642 - 17888).

<sup>19</sup> See generally Section 2 of the Los Angeles Water Board's administrative record entitled "Staff and Board Workshops" (Section 2, RB-AR427 - 2920).

<sup>20</sup> See generally Section 3 of the Los Angeles Water Board's administrative record entitled "Staff/Stakeholder Meetings" (Section 3, RB-AR2921 - 3544).

<sup>21</sup> See generally Staff Working Proposals on minimum control measures distributed March 21, 2012 (Section 2, RB-AR1318 - 1399), non-storm water discharge provisions distributed March 28, 2012 (Section 2, RB-AR1411 - 1460), watershed management programs distributed April 23, 2012 (Section 2, RB-AR2132 - 2144), TMDLs distributed April 23, 2012 (Section 2, RB-AR2145 - 2242), and RWLs distributed April 23, 2012 (Section 2, RB-AR2243 - 2244).

Lastly, the Board held three days of hearings to consider the Permit.<sup>22</sup> At the hearings, permittees and stakeholders were provided opportunities to make oral comments to the Board.<sup>23</sup> The Board made every effort to provide permittees and stakeholders a reasonable and meaningful opportunity to review and comment on the Permit, as well as participate in the Permit development process. These efforts far exceeded the minimum requirements of State and federal law, which require only a single 30-day comment period.

The deadlines and procedures established by the Board complied with the Administrative Procedure Act and due process requirements. California Government Code section 11425.10, subdivision (a)(1), requires that an administrative agency provide "the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." The Law Revision Commission Comments to that subdivision further states:

Subdivision (a)(1), providing a person the opportunity to present and rebut evidence, is subject to reasonable control and limitation by the agency conducting the hearing, including the manner of presentation of evidence, whether oral, written, or electronic, limitation on lengthy or repetitious testimony or other evidence, and other controls or limitations appropriate to the character of the hearing.

California Government Code section 11425.10, subdivision (a)(1), also does not establish the specific procedures that constitute "notice and an opportunity to be heard."<sup>24</sup> Consistent with this principle, in the Water Boards' adjudicatory proceedings, hearing officers have substantial discretion and explicit authority to waive any requirement relating to adjudicative proceedings, except where in conflict with statutory or constitutional guarantees.<sup>25</sup> This regulatory flexibility to control a proceeding is consistent with the statutory right to "notice and an opportunity to be heard" and the due process principles underlying the Administrative Procedure Act.

Courts have likewise acknowledged the authority of agencies to streamline hearings without violating the right to notice and comment. As the U.S. Supreme Court has held, what constitutes a fair hearing before an administrative body varies with the circumstances.<sup>26</sup> Courts should also give "substantial weight" to the good-faith judgments of the hearing officer.<sup>27</sup> This is particularly

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<sup>22</sup> In addition, at the request of several permittees, the Board postponed the hearing on the Permit from September 6-7, 2012 to October 4-5, 2012 in order to avoid a scheduling conflict with the Annual League of Cities Conference and Expo. See Notice of Change to Date of Board Hearing on the Tentative LA MS4 Permit dated August 7, 2012 (Section 4, RB-AR4599).

<sup>23</sup> See generally Transcript of Proceedings on October 4-5, 2012 (Section 7, RB-AR18297 - 18908) and Transcript of Proceedings on November 8, 2012 (Section 9, RB-AR21190 - 21603).

<sup>24</sup> Due process does not require any particular method of procedure. A statute need only provide for reasonable notice and a reasonable opportunity to be heard. (*Drummey v. State Bd. of Funeral Directors & Embalmers* (1939) 13 Cal.2d 75, 80-81; see also, *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212-14.)

<sup>25</sup> Cal. Code Regs., tit. 23, section 648, subd. (d); Cal. Code Regs., tit. 23, section 648.5., subd. (a). ("Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board.")

<sup>26</sup> See, e.g., *Gilbert v. Homar* (1997) 520 U.S. 924, 930.

<sup>27</sup> *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 46 (quoting *Mathews v. Eldridge* (1976) 424 U.S. 319, 349).

true where the permit process, which grants a privilege, is only subject to minimal due process.<sup>28</sup> Consistent with these standards, and based on the permit development process above, the permittees had adequate notice and opportunity to be heard.

Petitioners take issue with the fact that they were not provided with revisions to the Tentative Order or written responses to comments prior to commencement of the hearing on October 4, 2012. Neither was required prior to commencement of the hearing. The Board structured its hearing on the Permit as a two-part hearing.<sup>29</sup> On October 4-5, 2012, the Board held a hearing on the Tentative Order circulated on June 6, 2012. The October hearing provided an opportunity for the Board to hear oral comments from permittees and stakeholders, consider oral responses by Board staff to many of the significant comments received, and ask questions of Board staff, permittees, and stakeholders. At that time, the Board was not required, nor did the Board consider it necessary, to provide written responses to comments or revisions to the Tentative Order prior to the commencement of the hearing. Pursuant to federal regulations, the Los Angeles Water Board was "only required to issue a response to comments when a final permit is issued."<sup>30</sup> Because the Board was not going to make a final decision during the October 4-5, 2012 hearing, the Board was permitted to commence the hearing without complete written responses to comments or revisions to the Tentative Order were available for public review. Shortly after the October 4-5, 2012 hearing, Board staff circulated revisions to the Tentative Order. The Revised Tentative Order contained revisions that were made as a result of written and oral comments received by the Board, including oral comments made during the hearing held on October 4-5, 2012. On November 5, 2012, Board staff circulated a Second Revised Tentative Order with proposed additional changes to the Revised Tentative Order for the Board's consideration. Board staff also proposed minor clarifying changes in a change sheet to the Second Revised Tentative Order the morning of the hearing on November 8, 2012. At the hearing, permittees and stakeholders were provided with an opportunity to make oral comments on all changes to the Tentative Order circulated on June 6, 2012. The process established by the Board was transparent, fair, and exceeded legal requirements.

Accordingly, the public review and comment period, as well as the hearing procedures, established by the Board were consistent with the Clean Water Act, the Administrative Procedure Act, and due process principles.

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<sup>28</sup> See, e.g., *Sucn. Suarez v. Gelabert* (D.P.R. 1982) 541 F.Supp. 1253, 1264 (citing *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 335); see also Cal. Wat. Code, § 13263 ("All discharges of waste into waters of the state are privileges, not rights.").

<sup>29</sup> See generally Order of Proceedings for the October 4-5, 2012 Public Hearing dated September 26, 2012 (Section 5, RB-AR4884 - 4885), Notice of Opportunity for Public Comment and Notice of Adoption Meeting dated October 18, 2012 (Section 8, RB-AR18927 - 18929), and Order of Proceedings for the Public Hearing on the Tentative Los Angeles County MS4 Permit on November 8, 2012 dated November 6, 2012 (Section 8, RB-AR20931 - 20932).

<sup>30</sup> 40 C.F.R. § 124.17.

**2. Contention: The Los Angeles Water Board violated the Administrative Procedure Act (APA) when it issued a revised tentative order on October 18, 2012, which included substantial changes that should have triggered a new 45-day review and comment period**  
(Petitioners (l), (u), (x)-(z), (ff), (gg), and (kk))

The Los Angeles Water Board disagrees. The Board previously addressed this contention in the Board's "Order on Objections Regarding Revised Tentative Order and Responses to Comments" dated November 7, 2012.<sup>31</sup> The revisions to the Tentative Order did not rise to the level of significance that required a new notice and comment period. The revisions were made in direct response to written and oral comments received by the Board and concern matters that the permittees and stakeholders knew to be at issue.

Both state and federal law require a notice and comment period prior to the adoption of an NPDES permit. California Water Code section 13167.5 prescribes a notice and public comment period of at least thirty days prior to the adoption of waste discharge requirements, including NPDES permits. The section explicitly states, however, that it does not require a regional board "to provide more than one notice or more than one public comment period prior to the adoption of waste discharge requirements ...."<sup>32</sup> State law therefore did not require a new notice and comment period.

Federal regulations promulgated pursuant to the Clean Water Act also require a thirty day public comment period on draft NPDES permits. "[P]ublic notice of the preparation of a draft permit ... shall allow at least 30 days for public comment."<sup>33</sup> Nowhere do the regulations suggest that revisions to a draft permit, however significant, require an additional public comment period. In fact, section 124.14(b) of title 40 of the Code of Federal Regulations (40 C.F.R.) grants discretion to the USEPA Regional Administrator to either "reopen or extend the comment period," "prepare a new draft permit, appropriately modified," or both, "if any data information or arguments submitted during the public comment period ... appear to raise substantial new questions concerning a permit." Although not directly controlling on the State's authority, 40 C.F.R. section 124.14 illustrates that USEPA views the decision to reopen the comment period as discretionary, even if the comments raise substantial new questions concerning the permit. Though the comments may trigger the permit drafters to modify the permit, as was the case with this Permit, a new comment period is permissible but not required.<sup>34</sup>

No new comment period is required when changes to a draft permit are within the scope of the noticed permit and are responsive to comments and information received.<sup>35</sup> "If that were the case, an agency could 'learn from the comments on its proposals only at the peril of' subjecting itself to rulemaking [here, permitting] without end. Instead, renewed notice is required only if the

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<sup>31</sup> See pp. 2-4 (Section 8, RB-AR20946 - 20949).

<sup>32</sup> Cal. Wat. Code, § 13167.5.

<sup>33</sup> 40 C.F.R. § 124.10(b).

<sup>34</sup> See, e.g., *In re Dominion Energy Brayton Point, L.L.C.* (Feb. 1, 2006) NPDES Appeal 03-12, 2006 WL 3361084 (12 E.A.D. 490).

<sup>35</sup> State Water Board Order WQ 2012-0013 (*Sacramento Regional Wastewater Treatment Plant*), pp. 39-40.

final rule [here, permit] cannot be viewed as a ‘logical outgrowth’ of the initial proposal”<sup>36</sup> This “logical outgrowth” rule originated in the context of administrative rulemaking. Even a substantial variation does not necessitate a new comment period so long as the final regulation is “in character with the original proposal.”<sup>37</sup> Analogously, in a permit proceeding, a new comment period is only required if the revised permit is essentially a *new* draft permit because the revisions are not the logical outgrowth of or in character with the permit as initially proposed. Here, the revisions to the Tentative Order were the direct consequence of the written and oral comments received. The revisions to the Tentative Order addressed particular comments and did not fundamentally alter the character of the Tentative Order.

The purpose of the notice and comment requirements is not to lead to the absurd result that agency proceedings are subject to a new round of comments with every substantive revision. That result is particularly absurd where the agency has already provided a lengthy process to inform the public and solicit early input during permit development. One of the purposes of the comment period is to provide the agency with additional information upon which it may choose to revise draft language. Where the character and issues raised by the tentative permit remain the same, however, as was true here, there is no additional right to comment on those revisions.<sup>38</sup>

The changes Board staff made to the Tentative Order concerning the WMP and the addition of the EWMP were a logical outgrowth of the Tentative Order initially proposed in June 2012, as the changes were made in direct response to written and oral comments received by the Board.<sup>39</sup> The County of Los Angeles first proposed the concept of an EWMP to Board staff in the summer of 2012. The County of Los Angeles also presented details regarding the EWMP concept to the Los Angeles Water Board for its consideration during the first public hearing on October 4-5, 2012.<sup>40</sup> The EWMP proposal was further refined in a collaborative set of meetings and conference calls in October 2012 among Board staff, permittees, and environmental organizations.<sup>41</sup>

Lastly, petitioners contend that the Board should not have adopted the Permit because it did not comply with California Government Code section 11346.8, subdivision (c). That reference, however, is not applicable to the Permit proceedings. California Government Code section 11346.8, subdivision (c) is contained in Chapter 3.5 of the Administrative Procedure Act, which is entitled “Administrative Regulations and Rulemaking.” As the Permit is not a regulation, the Permit proceeding was not a rulemaking proceeding, but rather, an adjudicative proceeding.

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<sup>36</sup> *First American Discount Corp. v. Commodity Futures Trading Com’n* (D.C. Cir. 2000) 222 F.3d 1008, 1015 (quoting *International Harvester Co. v. Ruckelshaus* (D.C. Cir. 1973) 478 F.2d 615, 632 n. 51) (internal citations omitted); see also *Natural Resources Defense Council v. EPA* (9th Cir. 2002) 279 F.3d 1180, 1186-88.

<sup>37</sup> *Hodge v. Dalton* (9th Cir. 1997) 107 F.3d 705, 712 (quoting *Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1288).

<sup>38</sup> See *Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1286.

<sup>39</sup> See, e.g., comments from County of Los Angeles and LACFCD on working proposals presented at May 3, 2012 Board workshop (Section 2, RB-AR2753 - 2771), comments from the County of Los Angeles and LACFCD on the June 6, 2012 Tentative Order (Section 6, RB-AR12451 - 13673), and documentation of meeting with Los Angeles County and LACFCD on September 27, 2012 (Section 3, RB-AR3437 - 3439).

<sup>40</sup> See Presentation of County of Los Angeles and LACFCD during October 4-5, 2012 hearing (Section 7, RB-AR18164 - 18202); Transcript of Proceedings on October 4-5, 2012 (Section 7, RB-AR18592 - 18621, 18817-18823).

<sup>41</sup> See meetings/conference calls with permittees on October 9, 2012 (Section 3, RB-AR3440 - 3462), October 10, 2012 (Section 3, RB-AR3468 - 3532), October 30, 2012 (Section 3, RB-AR 3538), and October 31, 2012 (Section 3, RB-AR3542 - 3544).

Section 648 of title 23 of the California Code of Regulations, entitled “Laws Governing Adjudicative Proceedings,” specifically states that adjudicative proceedings before the regional water boards shall be governed by Chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code). Because Chapter 3.5 of the Administrative Procedure Act was not applicable to the Permit proceedings, the petitioners’ reference to California Government Code section 11346.8 is misplaced.

**3. Contention: The Los Angeles Water Board’s forced recusal of former Board member Mary Ann Lutz was improper and prejudiced the municipal permittees**

(Petitioners (a)-(h), (j), (p)-(t), (v), (w), (aa), (dd), (ee), (hh), and (jj))

The Los Angeles Water Board disagrees. The petitioners have provided no evidence that the Board, Board staff, or Board counsel “forced” or had the ability to force Ms. Lutz to do anything. Furthermore, no such evidence exists. The hearing transcript is clear that Ms. Lutz decided to recuse herself despite her misgivings about the advice she had received.<sup>42</sup> Nor is there any evidence that the advice given by Board counsel for the purpose of stacking the Board against the permittees, or motivated by anything other than a straightforward interpretation of applicable law.

Petitioners do not claim that Ms. Lutz or any other board member was prejudiced against them.<sup>43</sup> The Board conducted extensive workshops and hearings prior to adoption of the permit and considered thousands of pages of written evidence and public comment. This provided ample opportunities for the petitioners and others to present the permittees’ perspective. There is no constitutional or statutory requirement that a board member have personal experience with a permittees’ particular perspective.

California Water Code section 13201 establishes the requirements for regional water board membership:

Each board shall consist of the following seven members appointed by the Governor, each of whom shall represent, and act on behalf of, all the people and shall reside or have a principal place of business within the region.<sup>44</sup>

A quorum of the regional board membership is required to take action.<sup>45</sup> Since all regional board members are required to “represent, and act on behalf of, all the people”, so long as a quorum of the members are present to act, there is no prejudice to any party to the proceeding as a result of the board’s membership.

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<sup>42</sup> See Transcript of Proceedings on October 4, 2012 (Section 7, RB-AR18309 - 18316). Legal advice provided by counsel to the Board in confidence regarding a board member’s participation is subject to the attorney-client privilege.

<sup>43</sup> See *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 732, 737 (“Unless they have a financial interest in the outcome, adjudicators are presumed to be impartial.”) (internal citations omitted).

<sup>44</sup> Senate Bill 1018 removed prior associational requirements from section 13201 effective June 27, 2012. (Statutes 2012, Chapter 39 (S.B. 1018), section 117.) The Permit was issued in November 2012. But even under the superseded version of the statute, all Board members represented all of the people of the region.

<sup>45</sup> Cal. Civ. Code, § 12; Cal. Code of Civ. Proc., § 15; 94 Ops. Cal. Atty. Gen. 100 (2011).



It was not improper for Ms. Lutz to recuse herself in light of the Administrative Procedure Act and California Water Code requirements that applied to her participation. The Board's action to renew the Permit began in 2006 upon the Board's receipt of applications for renewal of the Permit. At that time, California Water Code section 13207 subdivision (a) stated:

No member of a regional board shall participate in any board action pursuant to Article 4 (commencing with Section 13260) of Chapter 4, or Article 1 (commencing with Section 13300) of Chapter 5, of this division *which involves himself or herself or any waste discharger with which he or she is connected as a director, officer or employee*, or in which he or she has a financial interest in the decision within the meaning of Section 87103 of the Government Code.  
(Emphasis added.)

Thus, Ms. Lutz was prohibited from participating in actions concerning the Permit because she was connected to a waste discharger—the City of Monrovia—as an officer due to her position as a City Council member and later as mayor. As allowed by the prior version of section 13207, she participated in meetings with other permittees regarding the Permit and received other communications from them in her capacity as a council member and then mayor.

On June 27, 2012, during the pendency of the Permit proceeding, amendments to California Water Code section 13207, subdivision (a), became effective pursuant to Senate Bill 1018. That provision now reads:

A member of a regional board shall not participate in any board action pursuant to Article 4 (commencing with Section 13260) of this chapter, or Article 1 (commencing with Section 13300) of Chapter 5, in which he or she has a disqualifying financial interest in the decision within the meaning of Section 87103 of the Government Code.

The amendment removed the conflict of interest provisions directed at board members that were waste dischargers or connected to waste dischargers with regard to waste discharge requirements (including NPDES permits), waivers of waste discharge requirements, and certain other decisions. California Water Code section 13207 continues to prohibit board members from participating in a decision if they have a disqualifying financial interest in the decision under the Political Reform Act.

As amended, California Water Code section 13207 did not prohibit Ms. Lutz from participating in actions concerning the Permit based on her connection to a waste discharger. And she did not have a disqualifying financial interest in decisions concerning the Permit as the salary of \$400 per month she received from the City of Monrovia is not subject to the financial conflict requirements of the Political Reform Act. As a result, as of June 27, 2012, Ms. Lutz could potentially participate in the Permit proceeding. Notwithstanding section 13207, a board member's ability to participate in a Board action remains subject to other applicable laws, such as the Administrative Procedure Act (APA) and constitutional due process requirements.<sup>46</sup>

After the changes to California Water Code section 13207 took effect, Board counsel provided a memorandum to the Los Angeles Water Board discussing the change in the law, which created the possibility that Ms. Lutz could participate in the proceedings on the Permit. Before Ms. Lutz

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<sup>46</sup> See Email dated July 6, 2012 and Memorandum dated July 6, 2012, from Frances McChesney to Regional Board Members, "Amendment to Water Code Section 13207(a)." (Section 2, RB-AR2848 - 2849).

could participate in the Permit proceedings, however, the Administrative Procedure Act requires her to disclose any ex parte communications concerning the Permit that occurred while the matter was pending<sup>47</sup> but before she was eligible to serve as a presiding officer, provide an opportunity for public comment on those communications, and include those communications in the record.<sup>48</sup> Specifically, California Government Code section 11430.50 requires the following procedure:

- Notify all parties that a communication has been made a part of the record.
- If the communication is written, include in the record the writing and any written response of the board member to the communication.
- If the communication is oral, include in the record a memorandum stating the substance of the communication, any response made by the board member, and the identity of each person from whom the presiding officer received the communication.
- If requested, provide the parties with an opportunity to comment on the communication.

Because the ex parte communications were not disclosed in the manner required under the Administrative Procedure Act, Ms. Lutz properly recused herself from the Permit proceedings.<sup>49</sup>

**4. Contention: The same attorneys unlawfully advised both the Los Angeles Water Board staff and the Board itself, both before and during the adjudicative hearing, and thus violated the permittees' rights to due process of law**  
(Petitioner (k))

The Los Angeles Water Board disagrees. This issue was first addressed by the Board in the "Notice of Opportunity for Public Comment and Notice of Public Hearing" dated June 6, 2012.<sup>50</sup> There, the Board stated the following:

Los Angeles Water Board staff is not a party to this proceeding. This is a proceeding to consider adoption of a permit, which does not involve investigative, prosecutorial, or advocacy functions. Staff's proposals, recommendations, and their participation in this proceeding exist for the purpose of advising and assisting the Los Angeles Water Board. Likewise, attorneys for the Los Angeles Water Board will advise and assist the Los Angeles Water Board, which includes the board members and its entire staff. Given the nature of this proceeding and the limited facts in dispute, assigning a separate staff to "advocate" on behalf of a particular position would not further the development of the issues before the Los Angeles Water Board.

This contention was also raised to the Board prior to adoption of the Permit and was addressed in the Board's "Order on Objections and Requests Concerning Hearing Procedures and Process" dated September 26, 2012.<sup>51</sup>

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<sup>47</sup> A permitting matter becomes pending upon submittal of a report of waste discharge. (See Cal. Gov. Code § 11430.10, subd. (c).)

<sup>48</sup> Cal. Gov. Code, § 11430.40.

<sup>49</sup> Transcript of Proceedings on October 4, 2012 (Section 7, RB-AR18311 - 18312).

<sup>50</sup> See p. 5 (Section 4, RB-AR3545 - 3551).

Petitioners' contention fails because of the nature of the proceedings and the function of the Board's staff and attorneys. California Government Code section 11425.10 provides that "[t]he adjudicative function shall be separated from the *investigative, prosecutorial, and advocacy functions* within the agency..." (emphasis added). The proceedings on the Permit involved none of these functions. The proceedings were to issue a new permit for MS4 discharges, as required by federal law. The proceedings were not an investigation. No investigative order was under consideration, and no investigation functions were involved in the proceedings. Likewise, a permit proceeding did not involve a prosecution. Neither sanctions, liability, nor criminal, civil, or administrative penalties of any sort were being sought during the proceedings. There was nothing to prosecute, and, therefore, no prosecutorial function was involved.

Board staff and attorneys also had no advocacy function in the Permit proceedings. Petitioners assert that Board staff is a party because it "drafted the Permit terms, made recommendations, responded to countless written comments, and advocated the Permit's adoption in a 'formal adjudicative' hearing conducted over three days of hearings." This is incorrect. Here, as in virtually all permit proceedings, staff's proposals, recommendations, and their participation is for the purpose of advising and assisting the Los Angeles Water Board. Likewise, attorneys for the Board advise and assist the Board, which includes the Board members and its entire staff. Board attorneys may properly advise the Board on procedural, evidentiary, and other legal issues. These issues include advising the Board on the admissibility of evidence, on procedures for an orderly and efficient hearing, and on the substantive legal requirements and/or interpretations.

*Howitt v. Superior Court* held that, "[b]y definition, an advocate is a partisan for a particular client or point of view."<sup>52</sup> Petitioner provides no factual basis for its conclusions, other than counsel's disagreement with some of the permittees' positions. Petitioner appears to equate providing legal advice with advocating a position merely because counsel disagreed with some of its positions or procedural objections. Yet providing this type of neutral advice is precisely the role the board advisor plays even in matters where the prosecutorial and advisory functions are separate. Likewise, a judge does not become an advocate merely by finding in favor of one side and against the other. A law clerk does not become a party representative merely by recommending that one side should prevail. And a board advisor is not disqualified for providing unbiased advice about legal or technical issues in a permit proceeding.

Given the nature of the Permit proceedings and the limited facts in dispute, assigning a separate staff to "advocate" on behalf of a particular position would not have furthered the development of the issues before the Board. In a non-prosecutorial, non-investigative proceeding, staff merely advises the Board members about policy choices, technical facts, and legal issues. Unlike an advocate, Board staff and attorneys provide neutral evaluations and explanations of the pros and cons of all options. This role is distinct from that of an advocate, who picks a particular view and advocates only for that view. Neither staff nor counsel served as advocates, investigators, or prosecutors, and there was no reason to provide separate counsel to staff and the board.

Petitioners take issue with the Board's assertion that the adoption of the Permit involved "limited facts in dispute." Petitioners seem to assert that the "sheer number of factual and legal

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<sup>51</sup> See pp. 5-8 (Section 5, RB-AR4886 - 4898).

<sup>52</sup> (1992) 3 Cal.App.4th 1575, 1585.

comments and objections made by various parties to the Permit, and by the need for three days of public hearing” indicate that there were not limited facts in dispute. The Board disagrees. While many permittees and stakeholders expressed disagreement with certain findings and/or requirements of the Permit, the Board was required to issue a NPDES permit and to include terms in the Permit based on requirements in the Clean Water Act and its implementing regulations, the California Water Code, and/or regulations and policies of the Los Angeles Water Board and the State Water Board. Many requirements in the Permit were also carried over from the previous permit. At any rate, whether there were limited disputed facts or a large number of factual and legal disputes, it is the character, not the magnitude, of counsel’s role that determines whether counsel is acting as a partisan advocate.

The petitioners point to three specific instances to suggest that the role of the Board’s attorneys constituted advocacy. The petitioners first refer to statements made by former Board member Mary Ann Lutz prior to commencement of the hearing on October 4, 2012. Ms. Lutz stated that she decided to recuse herself from participating in the Permit proceedings based on advice from Board attorneys in response to objections made by NRDC and Los Angeles Waterkeeper.<sup>53</sup> From this, petitioners asserted that “Board staff and their attorneys advocated in favor of the objections of one group of parties over another, and took a position contrary to the interest of Permittees.” Petitioners have no basis whatsoever to make this assertion. Board attorney Frances McChesney explained to the Board at the hearing on October 4, 2012 that state law required Ms. Lutz to disclose ex parte communications that had occurred prior to her participation in the hearing and provide an opportunity for public comment on those communications.<sup>54</sup> This explanation of a straightforward statutory requirement by the Board’s attorney did not constitute advocacy.

The petitioners also specifically point to statements made by Executive Officer Samuel Unger and Board attorney Frances McChesney to support their contention that Board staff and attorneys had an advocacy role at the Permit proceedings. Petitioners appear to assert that anytime a Board staff or attorney advises the Board on a factual or legal issue that is contrary to positions held by permittees, the Board staff or attorney is advocating a position. As explained above, this assertion is incorrect and, not surprisingly, petitioners provide no legal citations for this novel theory. Notably, petitioners make no assertions of advocacy where the Board staff or attorneys advice *is* consistent with a particular position of a permittee. Board staff and attorneys provide advice to the Board on factual and legal issues consistent with their own experience and interpretations of the law, and regardless of whether that advice is consistent or inconsistent with a particular permittee’s point of view. As previously noted, the Board staff and attorneys’ recommendations are for the purpose of advising and assisting the Los Angeles Water Board.

Even if the Board were a party to the Permit proceedings, California Government Code section 11430.30 expressly allows Board staff to advise the presiding officer in non-prosecutorial adjudicative proceedings. The provisions of California Government Code sections 11430.10 to 11430.80 apply in non-prosecutorial proceedings such as this one. Subject to limited exceptions, section 11430.10 generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency. One such exception is found at section 11430.30, which provides in relevant part:

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<sup>53</sup> Transcript of Proceedings on October 4-5, 2012 (Section 7, RB-AR18309 - 18316), As previously addressed, the Board disagrees with contentions that Board member Lutz was improperly forced to recuse herself.

<sup>54</sup> See Transcript of Proceedings on October 4-5, 2012 (Section 7, RB-AR18397 - 18400).

A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

...(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is non-prosecutorial in character:

...(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

The Law Revision Commission noted that this special exemption was necessary and appropriate.<sup>55</sup> It stated:

Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as...proceedings...setting water quality protection...requirements. The provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of this article, given limited staffing and personnel.

Thus, express statutory authority specifically authorizes involved Board staff to provide ex parte advice to the presiding officer concerning any issues in a pending adjudicative proceeding that is non-prosecutorial in character. As the California Supreme Court has recognized, separation of functions is inextricably linked with the prohibition on ex parte communications.<sup>56</sup> But the Legislature has recognized that communications that would customarily be prohibited are appropriate for Board staff during a non-prosecutorial adjudicative proceeding.<sup>57</sup> Nothing in the Administrative Procedure Act makes such communications contingent on the board appointing separate counsel for staff.

Further, Petitioners are incorrect in their assertion that the Board violated the writ of mandate in *County of Los Angeles and LACFCD v. State Water Resources Control Board and Los Angeles Regional Water Quality Control Board*, Los Angeles County Superior Court Case No. BS122724. In that case, the Court held that a former Los Angeles Water Board attorney acted as both an advocate and an advisor to the Board during the proceedings in 2006 to consider incorporation of provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles County MS4 Permit, Order No. 01-182. In concluding that the former attorney acted as an advocate, the Court found that the attorney directly examined witnesses from the Board's staff, cross-examined witnesses called by permittees, made a closing argument on behalf of Board staff, and made objections to questions asked by permittees.<sup>58</sup>

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<sup>55</sup> Recommendation: Administrative Adjudication by State Agencies (Jan. 1995) 25 Cal. Law. Revision Com. Rep. (1995) p. 166.

<sup>56</sup> See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

<sup>57</sup> Cal. Gov. Code, § 11430.30, subd. (c)(2).

<sup>58</sup> See *County of Los Angeles et al. v. State Water Resources Control Board et al.* (L.A. Super. Ct., No. BS122724), Minute Order, June 2, 2010, pp. 2-3 (Section 10.II., RB-AR23665 - 23666).

The writ of mandate did not require the Board to assign separate attorneys for Board staff and the Board itself for the Permit proceedings that took place in 2012. The Court's Peremptory Writ of Mandate,<sup>59</sup> dated July 23, 2010, states:

Should [the Los Angeles Water Board] choose to conduct any further hearing upon remand, at such hearing the same person shall not act as both an advocate before the Los Angeles Regional Water Quality Control Board and an advisor to the Los Angeles Water Quality Control Board, and, the individual who participated as Regional Board counsel in the last Regional Board hearing shall not participate.

The Board chose not to conduct any further hearing(s) upon remand to amend the 2001 Los Angeles County MS4 permit, Order No. 01-182.<sup>60</sup> The 2012 permit proceeding was a separate proceeding and was not the remand of the 2001 permit. The Board's issuance of a new MS4 permit was required by federal law and was not done at the order of the Los Angeles County Superior Court. This permit's proceedings were completely new, and the writ of mandate is inapplicable to the proceedings. Further, the Board's attorney at the 2006 proceedings did not participate in the permit reissuance, and (for reasons unrelated to the 2001 or 2012 permit) no longer works for the Water Boards. Unlike in 2006, none of the attorneys who advised the Board during the 2012 Permit proceedings directly examined Board staff, cross-examined witnesses called by permittees, made a closing argument, or objected to questions asked by permittees. While attorneys did provide advice on the parties' objections, providing procedural advice is one of the primary functions of the board's advisors.

Petitioners' reliance on *Nightlife Partners, LTD. V. City of Beverly Hills* is also misplaced.<sup>61</sup> *Nightlife Partners* involved a city attorney who served in conflicting functions in different phases of a proceeding about the plaintiff's application for a cabaret license. The attorney advocated to the decision maker (in that case, the executive staff) that it should determine the application was incomplete, and the decision maker rejected the application on that basis. Thereafter, the same attorney also served as the advisor to the hearing officer during the plaintiffs' subsequent administrative appeal of that ruling. Unlike the city attorney in *Nightlife Partners*, the Board's attorneys neither advocated for a particular result before the Los Angeles Water Board nor advised any appellate body (the State Water Board, in this case) on how to resolve an appeal. *Nightlife Partners* did not involve the exercise of dual functions in the same proceeding and it certainly did not rule that a public body was required to task separate staff with an advocacy function when it issues a permit.<sup>62</sup>

In conclusion, the Board did not violate the permittees' procedural rights by not assigning separate attorneys to Board staff and the Board. Board staff and attorneys did not serve as

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<sup>59</sup> See *County of Los Angeles et al. v. State Water Resources Control Board et al.* (L.A. Super. Ct., No. BS122724), Peremptory Writ of Mandate, July 23, 2010, p. 2 (Section 10.II., RB-AR23671 - 23672).

<sup>60</sup> See *County of Los Angeles et al. v. State Water Resources Control Board et al.* (L.A. Super. Ct., No. BS122724), Regional Board's Supplemental Return to the Peremptory Writ of Mandate, April 27, 2011, pp. 3-4 (Section 10.II., RB-AR23675 - 23676). Notably, in response to the Los Angeles Water Board's Supplemental Return, the Court discharged the writ as to the Board on May 10, 2011. See *County of Los Angeles et al. v. State Water Resources Control Board et al.* (L.A. Super. Ct., No. BS122724), Order Discharging Writ as to Respondent Regional Water Quality Control Board, Los Angeles Region, May 10, 2011 (Section 10.II., RB-AR23677 - 23678).

<sup>61</sup> (2003) 108 Cal.App.4th 81.

<sup>62</sup> Due process requirements do not prevent an agency from dispensing with separate adversarial advocates. (*Today's Fresh Start, Inc.*, *supra*, 57 Cal.4th at 220.)

advocates in the Permit proceedings. The permittees were provided with a fair and meaningful hearing that fully complied with all applicable legal requirements.

## **B. Permit Structure**

### **1. Contention: The Los Angeles Water Board acted in excess of its jurisdiction when it approved a system-wide permit that included Signal Hill (Petitioner (ii))**

The Los Angeles Water Board disagrees. The Board provided its rationale for issuing a single system-wide permit in Finding C of the Permit,<sup>63</sup> in Attachment F (Fact Sheet) of the Permit,<sup>64</sup> and in its written responses to comments.<sup>65</sup> As previously explained, while federal regulations do allow individual MS4 owners/operators to *apply* for individual permits, the Board retains the discretion as the permitting authority to determine whether to issue an individual permit. Clean Water Act section 402(p)(3)(B)(i) and implementing regulations at 40 C.F.R. section 122.26, subdivisions (a)(1)(v), (a)(3)(ii), and (a)(3)(iv) allow the permitting authority to issue permits for MS4 discharges on a system-wide or jurisdiction-wide basis taking into consideration a variety of factors. Such factors include the location of the discharge with respect to waters of the United States, the size of the discharge, the quantity and nature of the pollutants discharged, and other relevant factors. Federal regulations at 40 C.F.R. section 122.26(a)(3)(ii) identify a variety of possible permitting structures, including one system-wide permit covering all MS4 discharges or distinct permits for appropriate categories of MS4 discharges including, but not limited to, all discharges owned or operated by the same municipality, all discharges located within the same jurisdiction, all discharges within a system that discharge to the same watershed, all discharges within a MS4 that are similar in nature, or for individual discharges from MS4s.

USEPA's responses to comments on its regulations pertaining to large and medium MS4s also make it clear that the permitting authority has the flexibility to establish system or region-wide permits. In the final rule published in the Federal Register and containing responses to comments, USEPA noted that section 122.26(a)(3)(iv) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit.<sup>66</sup> USEPA also indicated that many commenters wanted to allow permitting authorities broad discretion to establish system-wide permits, and that USEPA believed that section 122.26, subdivisions (a)(1)(v) and (a)(3)(ii), allowed for such broad discretion.<sup>67</sup>

Petitioner relies, in part, on 40 C.F.R. section 122.26(a)(3)(iii) as support for its assertion that the Board has no authority to issue a system-wide permit to a MS4 discharger that applied for an individual permit. However, section 122.26(a)(3)(iii), by its plain language, only pertains to the permit application requirements of a MS4 discharger. Section 122.26(a)(3)(iii) does specifically allow an MS4 discharger to submit a "distinct permit application." However, it does not, as the petitioner asserts, require a permitting authority to take any specific action, including issuing an individual permit, in response to receiving an individual application. As mentioned

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<sup>63</sup> See Order No. R4-2012-0175, pp. 14-15.

<sup>64</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-15 to F-18.

<sup>65</sup> See Responses to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-15 to H-23 (Section 8, RB-AR19930 - 19938).

<sup>66</sup> 55 Fed. Reg. 47990, 48042.

<sup>67</sup> *Id.* pp. 48039-48043.

above, the Board retains the discretion as the permitting authority to determine whether to issue an individual permit.

Petitioner also relies on 40 C.F.R. sections 122.30 through 122.37 pertaining to small MS4 dischargers as support for its contention. However, the federal regulations pertaining to small MS4s are not applicable to the Permit. Signal Hill is appropriately regulated under the regulations pertaining to large and medium MS4s. Under the Phase I regulations, USEPA required NPDES permit coverage for discharges from medium and large MS4s with populations of 100,000 or more. USEPA and the Los Angeles Water Board have classified the Greater Los Angeles County MS4 as a large MS4 pursuant to 40 C.F.R. section 122.26(b)(4) due to the total population of Los Angeles County, including that of unincorporated and incorporated areas, and the interrelationship between the MS4s throughout Los Angeles County. The total population of the cities and County unincorporated areas covered by the 2001 permit was 9,519,338 in 2000 and has increased to 9,818,605 in 2010, according to the United States Census.<sup>68</sup>

Even assuming that the regulations pertaining to small MS4 dischargers are relevant to the Permit, it must be noted again that the specific provisions relied upon by the petitioner only discuss the permit application requirements for an MS4 discharger. By its plain language, 40 C.F.R. section 122.33 does specifically allow an MS4 discharger to submit an application for an individual permit. However, it does not, as the petitioner asserts, require a permitting authority to take any specific action, including issuing an individual permit, in response to receiving an individual application. The Board retains the discretion as the permitting authority to determine whether to issue an individual permit.

**2. Contention: Both USEPA and the Los Angeles Water Board have explicitly acknowledged the absolute right of any individual MS4 operator to apply for and obtain its own separate permit**  
(Petitioner (ii))

The Los Angeles Water Board disagrees. Petitioner relies on specific language in USEPA's 1990 responses to comments for its regulations pertaining to large and medium MS4s as support for its assertion that USEPA has explicitly acknowledged the absolute right of any individual MS4 operator to apply for and obtain its own permit. Petitioner points to language where USEPA states that the permit application requirements allow an individual municipal entity within a MS4 to "submit permit applications and obtain a permit for that portion of the storm sewer system for which they are responsible."<sup>69</sup> While USEPA did, indeed, make this particular statement, USEPA made other statements in its 1990 responses to comments that make it clear that the permitting authority has the flexibility to establish system or region-wide permits. As mentioned above, USEPA noted that section 122.26(a)(3)(iv) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit.<sup>70</sup> USEPA also indicated that many commenters wanted to allow permitting authorities broad discretion to establish system-wide permits, and that USEPA believed that section 122.26, subdivisions (a)(1)(v) and (a)(3)(ii), allowed for such broad discretion.<sup>71</sup> The simple fact is that there is no requirement in the Clean Water Act or its implementing regulations that

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<sup>68</sup> See Data from the U.S. Census Bureau, 2010 (Section 10.VII., RB-AR44648 - 44660).

<sup>69</sup> 55 Fed. Reg. 47990, 48043.

<sup>70</sup> *Id.* p. 48042.

<sup>71</sup> *Id.* pp. 48039-48043.



explicitly requires a permitting authority to issue a separate permit to an MS4 discharger that requests one. And petitioner has cited to no such requirement. The Clean Water Act and its implementing regulations do, however, specifically authorize the Board, as the permitting authority, to issue permits to MS4 dischargers on a system-wide or jurisdiction-wide basis.<sup>72</sup>

The petitioner also relies on statements made by the Los Angeles Water Board in an amicus brief filed in the case of *Santa Monica Baykeeper v. City of Malibu*<sup>73</sup> for its contention that the Board has explicitly acknowledged the absolute right of an individual MS4 operator to apply for and obtain its own permit. Petitioner is misinterpreting the Board's statements. In the Board's amicus brief, the Board explained to the court that a permittee "could ask for particular situations/discharges to have their own conditions imposed" and that a permittee "may also seek its own permit with permit terms that are specific to its MS4," but that the City had not done so.<sup>74</sup> The Board did not take the position that the City had a right to obtain an individual MS4 permit, or that that the Board would issue an individual permit if the City had requested one. The Board's position was that, in spite of opportunities to do so, the City had not sought an individual permit and therefore, that the City was not in a position to object to the terms of the system-wide permit that it had sought and received.

Moreover, the doctrine of judicial estoppel does not apply to these statements in the Board's brief. First, the Board was not a party to the case. Second, the issue-at-hand concerning whether an MS4 discharger is entitled to its own permit was not a litigated matter. The U.S. District Court hearing the case certainly did not make any determination on the issue in response to the Board's amicus brief. And, as previously mentioned, the Board's position in its brief is not inconsistent with the position it asserts with respect to this Permit. Therefore, the petitioner's assertion of judicial estoppel is misplaced.

**3. Contention: With respect to the decision to include Signal Hill in the Permit, the Los Angeles Water Board failed to make findings based on evidence that bridge the analytical gap between the evidence and what is being required**  
(Petitioner (ii))

The Los Angeles Water Board disagrees. The Board provided its rationale for issuing a single system-wide permit in Finding C of the Permit,<sup>75</sup> in the Fact Sheet of the Permit,<sup>76</sup> and in its written responses to comments.<sup>77</sup> As explained in detail in the Fact Sheet, in evaluating the five separate reports of waste discharge received by the Board and the structure of the Permit, the Board considered a number of factors.

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<sup>72</sup> Clean Water Act § 402(p)(3)(B)(i) ; 40 C.F.R. § 122.26, subds. (a)(1)(v), (a)(3)(ii), and (a)(3)(iv).

<sup>73</sup> United States District Court, Central District of California, Case No. CV 08-1465-AHM.

<sup>74</sup> See Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in Support of Plaintiffs' Motion for Partial Summary Judgment and Opposing Defendant's Motion for Judgment on the Pleadings (Jan. 29, 2010), p. 20 (emphasis added).

<sup>75</sup> See Order No. R4-2012-0175, pp. 14-15.

<sup>76</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-15 to F-18.

<sup>77</sup> See Responses to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-15 to H-23 (Section 8, RB-AR19930 - 19938).

The first factor was the nature and complexity of the permittees' MS4s, which comprise a large interconnected system, controlled in large part by the LACFCD, among others, and used by multiple cities along with Los Angeles County. The discharges from these entities frequently commingle in the MS4 prior to discharge to receiving waters. Contrary to Signal Hill's assertion, the Board did not find this factor to "preclude" Signal Hill from having its own permit. The Board simply has the authority to issue a jurisdiction-wide or system-wide permit instead. In issuing this system-wide Permit, the Board considered *all* of the factors identified in the Fact Sheet.

The second factor was the requirement to implement 33 largely watershed-based TMDLs in the Permit. A number of permittees had already established jurisdictional groups on a watershed or subwatershed basis for TMDL implementation. Many of the TMDLs apply to multiple watersheds and the jurisdictional areas of multiple permittees. While the Board acknowledges that Signal Hill has led and implemented programs to comply with TMDLs, the Board generally determined that having separate permits would make implementation of the TMDLs more cumbersome.<sup>78</sup>

The third factor was the passage of Assembly Bill 2554 in 2010, which amended the Los Angeles County Flood Control Act.<sup>79</sup> This statute divided the flood control district into watershed areas to carry out projects and provide services "to improve water quality and reduce stormwater and urban runoff pollution" and allows the LACFCD to assess a property-related fee or charge for storm water and clean water programs.<sup>80</sup> Funding is subject to voter approval in accordance with Proposition 218. Fifty percent of funding is allocated to nine watershed authority groups to implement collaborative water quality improvement plans.

The fourth factor was the results of the on-line survey administered to permittees by Board staff regarding permit structure.<sup>81</sup> The results indicated that a majority of permittees support a single MS4 permit for Los Angeles County. A significant minority supported multiple watershed-based permits. Overall, 85 percent of the permittees that responded to the on-line survey supported either a single MS4 permit or several individual watershed-based permits. A small number of permittees supported alternative groupings of adjacent municipalities instead of watershed-based groupings. Only four permittees expressed a preference for individual MS4 permits.

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<sup>78</sup> In its petition, Signal Hill notes in support of its position that separate permits have no impact on the ability of permittees to work together as Long Beach and Caltrans are subject to many of the same TMDLs as Signal Hill. The Board decided in 1999, over a decade ago, to issue a separate MS4 permit to Long Beach in response to that city's request and its submittal of a complete ROWD. Long Beach is also located geographically at the end of the Los Angeles River, so the individual permit did not significantly impact the Board's regional approach to MS4 regulation. The Board's decision to issue a separate permit to Long Beach was part of a settlement agreement that resolved litigation filed by Long Beach against the Los Angeles Water Board concerning the 1996 Los Angeles County MS4 Permit, Order No. 96-054. Over the last decade, Long Beach has developed and implemented a robust individual monitoring and reporting program to characterize water quality and track implementation of permit requirements within Long Beach. The Board found that Long Beach's proven track record in implementing its individual permit over the past decade and its readiness to work cooperatively with permittees in the Los Angeles County MS4 Permit on watershed based implementation supported Long Beach's continued desire to operate under an individual permit. Moreover, as Signal Hill notes, the Caltrans MS4 permit was not issued by the Los Angeles Water Board, but rather the State Water Board. Further, the requirements of the Caltrans MS4 permit differ from those of the Los Angeles County MS4 Permit, since the permit is more narrowly crafted to address storm water and non-storm water discharges specific to the nature of Caltrans' facilities and activities.

<sup>79</sup> See Assembly Bill No. 2554, Chapter 602, An act to amend Sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the LACFCD. Sept. 30, 2010 (Section 10.VI.C., RB-AR29172 - 29179).

<sup>80</sup> *Id.*

<sup>81</sup> See Summary of Survey Results (Section 1, RB-AR308 - 411).

The fifth factor considered by the Board was the 2006 and 2010 reports of waste discharge (ROWDs) submitted by the Los Angeles County MS4 permittees. Eight permittees submitted individual or small group ROWDs, including Signal Hill. As the Board noted in the Fact Sheet, the Board determined in 2006 that Signal Hill's ROWD did not satisfy federal regulations contained in the USEPA Interpretive Policy Memorandum on Reapplication Requirements for MS4s.<sup>82</sup> The Board also found that the information presented in the ROWD did not reflect the current status of program elements for MS4 permits developed over the past decade. As the ROWD did not satisfy federal requirements, the Board deemed Signal Hill's ROWD incomplete in a letter dated July 12, 2006.<sup>83</sup> The Board acknowledges that Signal Hill responded to the Board's July 12, 2006 letter on September 12, 2006, and it appears that the Board did not respond in writing to Signal Hill's letter. Board staff did, however, meet with Signal Hill representatives and explained that the city must submit a complete ROWD, consistent with the Clean Water Act and implementing regulations, that outlined the programs that Signal Hill would implement. Signal Hill had to submit a complete ROWD before Board staff could consider recommending issuance of a separate permit. Had Signal Hill submitted a complete ROWD, the Board could have taken that information into consideration in issuing the Permit. However, as previously noted, even if Signal Hill did submit a complete ROWD, the Board, as the permitting authority, retains the discretion to decide whether to issue a system-wide or jurisdiction-wide permit based on the factors described above.

Because of the complexity and networking of the MS4 within Los Angeles County, which often results in commingled discharges, the Board had previously adopted a system-wide approach to permitting Los Angeles County MS4 discharges. In evaluating the separate ROWDs and the factors described in 40 C.F.R. section 122.26(a)(1)(v) during the Permit development process, the Board again considered the appropriateness of permitting discharges from MS4s within Los Angeles County on a system-wide or jurisdiction-wide basis, or a combination of both. Based on that evaluation, as detailed in the Fact Sheet, the Board again determined that because of the complexity and networking of the MS4 within Los Angeles County, one system-wide permit was appropriate.

To provide individual permittees with specific requirements, the Permit includes terms specific to each Watershed Management Area (WMA), such as TMDL implementation provisions. This structure is supported by section 402(p) of the Clean Water Act and 40 C.F.R. sections 122.26, subdivisions (a)(1)(v), (a)(3)(ii), and (a)(3)(iv). A single permit also ensures consistency and equitability in regulatory requirements within Los Angeles County, while watershed-based sections within the single permit provide flexibility to tailor permit provisions to distinct watershed characteristics and water quality issues. Additionally, an internal watershed-based structure comports with the State and Regional Water Boards' Watershed Management Initiative,<sup>84</sup> its watershed-based TMDL requirements, and the LACFCD's funding initiative passed in Assembly Bill 2554. Watershed-based sections will promote watershed-wide solutions to address water quality problems, which in many cases are the most efficient and cost-effective means to address storm water and urban runoff pollution. Further, watershed-based sections encourage collaboration among permittees to implement regional integrated water resources approaches such as storm water capture and re-use to achieve multiple benefits.

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<sup>82</sup> Final Rule, August 9, 1996, 61 Fed.Reg. 41698. Footnote 1 of Signal Hill's petition correctly notes that the citation to USEPA's Interpretive Policy Memorandum on Reapplication Requirements for MS4s in Finding C of the Permit and in the Fact Sheet on page F-15 is incorrect. The Board inadvertently cited 61 Fed.Reg. 41697. The appropriate citation is 61 Fed. Reg. 41698.

<sup>83</sup> Letter to Mr. Kenneth Farfsing, City Manager, City of Signal Hill, July 12, 2006 (Section 1, RB-AR165 - 166).

<sup>84</sup> Watershed Management Initiative Chapter, December 2007 (Section 10.I., RB-AR22526 - 22732).

Accordingly, while the Board determined that Signal Hill and other permittees that applied for an individual permit should be included in the system-wide permit, the Board adopted specific provisions within the Permit that address many of the City's arguments for an individual permit.

### **C. Non-Storm Water Discharges**

#### **1. Contention: The definition of "storm water" includes "dry weather" runoff (Petitioners (a)-(h), (j), (k), (p)-(t), (v), (w), (aa), (dd), (ee), (hh), and (jj))**

The Board disagrees. The Board addressed this contention in its written responses to comments.<sup>85</sup> As previously explained by the Board in its response, the definition of "storm water" appropriately excludes "dry weather" runoff. The definition of storm water in the Permit is consistent with USEPA's regulations, which define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage."<sup>86</sup> While "surface runoff and drainage" is not defined in federal law, USEPA's preamble to the federal regulations demonstrates that the term is limited to the types of runoff that are the result of precipitation events, such as rain and/or snowmelt.<sup>87</sup> In fact, USEPA specifically rejected the notion that storm water, as defined at 40 C.F.R. section 122.26(b)(13), includes dry weather flows. In its preamble to the regulations, USEPA stated:

In response to the comments [on the proposed rule] which requested EPA to define the term "storm water" broadly to include a number of classes of discharges which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation under the NPDES program of such non-storm water discharges . . . . Consequently, the final definition of storm water has not been expanded from what was proposed.<sup>88</sup>

Contrary to the petitioners' insinuation, storm water does not include any water that flows into storm drains that is incident to urban living. Petitioners repeatedly use the term "urban runoff" as support for its assertion. However, urban runoff is not a federally defined term, and the word "urban" does not appear in USEPA's definition of storm water. By introducing the word urban, the petitioners apparently seek to redefine the federal definition of storm water, contained in 40 C.F.R. section 122.26(b)(13), to include runoff and drainage that is not associated with precipitation events but with activities of urban living. This approach is not supported by legal authority, and is inconsistent with USEPA's regulations that specifically identify numerous categories of discharges including landscape irrigation, diverted stream flows, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, and street wash water as non-storm water.<sup>89</sup> Thus, USEPA has made clear that the varieties of urban discharges that are unrelated to precipitation are deemed by USEPA to be "non-storm water" discharges. While these types of non-storm water discharges may be

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<sup>85</sup> Response to Comments on the Tentative Order - Non-Storm water Discharges Matrix, pp. A-1 to A-3 (Section 8, RB-AR19541 - 19543).

<sup>86</sup> 40 C.F.R. § 122.26(b)(13).

<sup>87</sup> 55 Fed. Reg. 47990, 47995-96.

<sup>88</sup> *Id.*

<sup>89</sup> 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

regulated under MS4 permits since they enter the MS4, they are not considered storm water discharges.<sup>90</sup>

Further, while non-storm water is not defined in the Clean Water Act or federal regulations, the federal regulations define “illicit discharge” as “any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate sewer) and discharges resulting from fire fighting activities.”<sup>91</sup> This definition is the most closely applicable definition of non-storm water contained in federal law and the terms are often used interchangeably. USEPA added the illicit connection and illicit discharge elimination program requirement to its regulations with the stated intent of implementing the Clean Water Act’s provision requiring permits to “effectively prohibit non-storm water discharges.”<sup>92</sup>

Lastly, Duarte and Huntington Park incorrectly assert that the Los Angeles Water Board and the State Water Board have admitted that the definition of storm water includes dry weather urban runoff in prior orders of the State Water Board and briefing in prior litigation. These petitioners attempt to use several statements from prior orders and briefs as support for their assertion. Such statements are taken out-of-context and do not stand for the propositions that these petitioners assert. While the Los Angeles Water Board and/or State Water Board have occasionally used the term urban runoff when referring to some discharges regulated by an MS4 permit,<sup>93</sup> neither the Los Angeles Water Board nor the State Water Board have stated that the definition of storm water includes dry weather urban runoff.

## **2. Contention: The maximum extent practicable (MEP) standard applies to discharges of both “non-storm water” and “storm water” from the MS4 (Petitioner (k))**

The Board disagrees. The Board addressed this contention in its written responses to comments.<sup>94</sup> As previously explained by the Board in its response, the MEP standard was intended to apply to municipal storm water discharges only. The Clean Water Act assigns different performance requirements for municipal storm water and non-storm water discharges. Clean Water Act section 402(p)(3)(B)(ii) requires that all MS4 permits shall include a requirement to effectively prohibit non-storm water discharges from entering the MS4. The subsequent provision, section 402(p)(3)(B)(iii), requires that all MS4 permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” To make sense of both provisions, if non-storm water discharges must be

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<sup>90</sup> See generally 40 C.F.R. § 122.26(d)(2)(iv)(B).

<sup>91</sup> 40 C.F.R. § 122.26(b)(2).

<sup>92</sup> 55 Fed. Reg. 47990, 47995.

<sup>93</sup> To the contrary, as far back as 1991, the State Water Board clearly made the distinction. See, e.g., State Water Board Order No. WQ 91-03 (*Citizens for a Better Environment*), p. 3 (“While there is some confusion in the terminology which is used in the regulatory documents, the former type of discharge, which occurs as a direct result of storm events, is usually referred to as ‘storm water discharge,’ while the latter form of dry weather discharge is referred to as ‘urban runoff.’”).

<sup>94</sup> Response to Comments on the Tentative Order - Non-Storm water Discharges Matrix, pp. A-3 to A-5 (Section 8, RB-AR19543 - 19545).

effectively prohibited then the following requirement to reduce the discharge of pollutants must be limited to storm water discharges only. MS4 permits must require controls that will reduce storm water pollutants to the MEP, yet also require that non-storm water discharges be effectively prohibited from entering the MS4.

The argument that non-storm water discharges need comply only with the less stringent MEP standard once the non-storm water discharges exit the MS4 is contrary to and potentially renders the “effectively prohibit” requirement in section 402(p)(3)(B)(ii) meaningless. Unless non-storm water discharges to the MS4 are authorized by a separate NPDES permit or are specifically exempted under federal regulations, non-storm water discharges are subject to the effective prohibition requirement in the Clean Water Act and the Los Angeles Water Board is not limited by the MEP standard in crafting appropriate requirements for non-storm water discharges.

Non-storm water discharges from the MS4 that are not authorized by separate NPDES permits, nor specifically exempted, are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations, and WQBELs.<sup>95</sup> USEPA’s preamble to its regulations also supports the interpretation that regulation of non-storm water discharges through an MS4 is not limited to the MEP standard in Clean Water Act section 402(p)(3)(B)(iii):

Today’s rule defines the term “illicit discharge” to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the [Clean Water Act]. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to “effectively prohibit” non-storm water discharges from the municipal separate storm sewer.... Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit.<sup>96</sup>

This process would be wholly unnecessary if MEP were the governing standard for non-storm water discharges. USEPA further stated that, “[p]ermits for such [non-storm water] discharges must meet applicable technology-based and water-quality based requirements of Section 402 and 301 of the [Clean Water Act].”<sup>97</sup> In addition, California law requires NPDES permits to apply “any more stringent effluent standards or limitations necessary to implement water quality control plans....”<sup>98</sup> Accordingly, numeric WQBELs may be imposed on dry weather, non-storm water discharges from an MS4 that are regulated under an MS4 permit.

Further, even assuming that the petitioner is correct that non-storm water and storm water discharges are treated equally once they are in the MS4 and are to be discharged to receiving waters, it does not necessarily mean that non-storm water discharges would always be subject to the MEP standard. In addition to establishing the MEP standard for municipal storm water discharges, Clean Water Act section 402(p)(3)(B)(iii) allows the Los Angeles Water Board, as

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<sup>95</sup> 40 C.F.R. § 122.44.

<sup>96</sup> 55 Fed. Reg. 47990, 47995.

<sup>97</sup> 55 Fed. Reg. 47990, 48037.

<sup>98</sup> Cal. Wat. Code, § 13377.

the permitting agency, to include in the MS4 permit “such other provisions as the [Board] determines appropriate for the control of such pollutants.” Thus, under this provision alone, the Board has the authority to, and could, determine that the MS4 permit should include provisions to control non-storm water discharges, including discharge prohibitions, technology-based effluent limitations, and WQBELs.

**3. Contention: The Permit’s prohibition of non-storm water discharges “through the MS4 to receiving waters” is inconsistent with the Clean Water Act and USEPA’s regulations**

(Petitioners (a)-(h), (j), (l), (n)-(bb), (dd)-(hh), (jj), and (kk))

The Los Angeles Water Board disagrees. The Board addressed this comment in its written responses to comments.<sup>99</sup> As previously explained by the Board in its response, the Board acknowledges that Clean Water Act section 402, subdivision (p)(3)(B)(ii), requires that MS4 permits include a requirement to effectively prohibit non-storm water discharges “into the storm sewers.” However, the Permit’s prohibition of non-storm water discharges “through the MS4 to receiving waters” is wholly consistent with this mandate and USEPA’s regulations. Part 1.A. of the 2001 Los Angeles County MS4 permit, Order No. 01-182, required that permittees shall effectively prohibit non-storm water discharges “into the MS4 and watercourses.” During the litigation on Order No. 01-182, the language in Part 1.A. was challenged by several permittees. The Los Angeles County Superior Court upheld the language in Order No. 01-182 and rejected the “into” versus “from” argument that petitioners make here again. The court stated:

[A]lthough this Court recognizes that it may not always be possible to prevent something from going into the system, it probably is the cheapest method. If something does not go in, then there is no concern about it coming out the other end. If the contaminant does not enter the system, there is no need to process it at the end of the system.<sup>100</sup>

The court further stated that the permit’s “regulation of what goes ‘into’ the storm drain does not take away from the Petitioners’ rights and needs to control the process” and set regional controls.<sup>101</sup>

The Board disagrees with the petitioners’ contention that the Permit’s non-storm water discharge prohibition was significantly revised (or constituted a “radical revision”) from Order No. 01-182. Part 1.A. of Order No. 01-182 required permittees to effectively prohibit non-storm water discharges “into the MS4 and watercourses.” The Permit’s language of “through the MS4 to receiving waters” is consistent with the language in Order No. 01-182. The slight variation in terminology between Order No. 01-182 and the Permit does not alter the substantive requirement but simply serves to provide greater clarity. In the end, there is no meaningful difference between the phrasing of “into the MS4 and watercourses” from Order No. 01-182, and “through the MS4 to receiving waters” in the Permit. Both requirements prohibit non-storm

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<sup>99</sup> Response to Comments on the Tentative Order - Non-Storm water Discharges Matrix, pp. A-5 to A-8 (Section 8, RB-AR19545 - 19548).

<sup>100</sup> *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, p. 16 (Section 10.II., RB-AR23172).

<sup>101</sup> *Id.*, p. 17 (Section 10.II, RB-AR23173).

water discharges from reaching receiving waters, which is wholly consistent with Congress' ultimate intent in the Clean Water Act and USEPA's regulations that such non-storm water discharges not reach receiving waters.<sup>102</sup> In addition, it can be logically concluded that if non-storm water discharges are detected leaving the MS4, they must have entered the MS4. Further, when referring to or discussing the effective prohibition on non-storm water discharges, USEPA's preamble to its regulations governing MS4 permits frequently use the terms "to the MS4," "from the MS4," and "through the MS4," interchangeably.<sup>103</sup> In fact, "illicit discharge" is defined by USEPA in the preamble as "any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit."<sup>104</sup> Congress' intent and USEPA's phraseology in its own regulations therefore support the Board's interpretation that there is no meaningful difference with these terms, and that permittees must have adequate legal authority to control discharges into and from a portion of an MS4 for which it is an owner or operator.

Even if the State Water Board were to accept the petitioners' argument that there is a meaningful difference in the phrasing, the difference favors the permittees. The Board is authorized to prohibit all non-storm water discharges from entering the MS4. However, as written, "through the MS4 to receiving waters" provides permittees greater flexibility to not only use controls to prevent non-storm water from reaching the MS4 in the first instance, but also to use controls within the MS4 so that non-storm water does not reach receiving waters. For example, the language provides permittees flexibility to use regional solutions, such as low-flow diversions where non-storm water enters the MS4 but is diverted within the MS4 (prior to discharge to the receiving water) to the sanitary sewer, as well as catch-basin inserts or other controls in the MS4 designed to prevent trash from entering receiving water. If the Board were to use the exact language in the Clean Water Act, permittees would not be afforded this flexibility.

Many of the petitioners who raised this contention assert that all MS4 permits in California "adhere" to Clean Water Act section 402, subdivision (p)(3)(B)(ii), including the State Water Board's recently adopted Caltrans MS4 permit and its Phase II MS4 permit, while this Permit does not. In fact, the permits that petitioners specifically reference are consistent with the Los Angeles Water Board's Permit. For example, in the State Water Board's Caltrans MS4 permit, Order No. 2012-0011-DWQ, the State Water Board defines "non-storm water discharges" as "all discharges *from an MS4* that do not originate from precipitation events."<sup>105</sup> In addition, in that same permit, the State Water Board prohibits "[d]ischarge of material other than storm water, or discharge that is not composed entirely of storm water, *to waters of the United States* or another permitted MS4..."<sup>106</sup> The State Water Board's Phase II MS4 permit, Order No. 2013-0001-DWQ, includes similar language. In that permit, the State Water Board states that "[n]on-storm

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<sup>102</sup> 55 Fed. Reg. 47990, 47997 ("The entire thrust of today's regulation is to control pollutants that enter receiving water from storm water conveyances.").

<sup>103</sup> See, e.g., 55 Fed. Reg. 47990, 47995 ("Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to 'effectively prohibit' non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit") (emphasis added); *Id.* at 47996 ("The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States*.")) (emphasis added).

<sup>104</sup> 55 Fed.Reg. 47990, 47995.

<sup>105</sup> State Water Board Order No. 2012-0011-DWQ, p. 6 (emphasis added).

<sup>106</sup> *Id.* at 19 (emphasis added).



water discharges consist of all discharges *from an MS4* that do not originate from precipitation events. This Order effectively prohibits non-storm water discharges *through an MS4* into waters of the U.S.”<sup>107</sup> The State Water Board also effectively prohibits “[d]ischarges *through the MS4* of material other than storm water to waters of the U.S.”<sup>108</sup> And, lastly, the State Water Board requires that permittees of the Phase II MS4 permit have adequate legal authority to “[e]ffectively prohibit non-storm water discharges *through the MS4*.”<sup>109</sup> Thus, it is clear that the petitioners’ assertions in this regard are incorrect.

Further, as noted above, the Board is not limited by the MEP standard in crafting appropriate requirements for non-storm water discharges. Accordingly, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits, nor specifically exempted, are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations, and WQBELs.<sup>110</sup> Thus, the Board may appropriately establish requirements that are designed to reduce pollutants in non-storm water from the MS4 to receiving water. In accordance with federal regulations, this includes establishing numeric WQBELs that are consistent with the assumptions and requirements of all available TMDL wasteload allocations.

The petitioners also contend that the Board relies on 40 C.F.R. section 122.26(a)(3)(vi)<sup>111</sup> to support its non-storm water discharge prohibitions. This is incorrect and the Board does not understand how petitioners came to this conclusion. The Permit is clear that the Board is relying on the Clean Water Act, federal regulations in 40 C.F.R. section 122.26 (other than the subdivision specifically referenced above), and Order No. 01-182 as support for its prohibition. If the Board did make reference to 40 C.F.R. section 122.26(a)(3)(vi), it was to clarify that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators. As this clarification is helpful to permittees, it is unclear why petitioners take issue with this. Nevertheless, the Permit appropriately requires that permittees prevent or control non-exempt non-storm water discharges “for the portion of the MS4 for which it is an owner or operator.”<sup>112</sup>

Many petitioners also assert that the Permit’s so-called “revised” non-storm water discharge prohibition is now inconsistent with or in conflict with the Permit’s requirement to establish an illicit connection and illicit discharge elimination program, or USEPA’s guidance on this program. The Board disagrees. Petitioners seem to believe that the non-storm water discharge prohibition and the illicit connection and illicit discharge elimination program are identical requirements. This is incorrect. While the two requirements work hand-in-hand to achieve the same goal (i.e., prevent polluted non-storm water from reaching receiving waters), they are distinct. The non-storm water discharge prohibition provision in the Permit fulfills the requirement in Clean Water Act section 402(p)(3)(B)(ii) that permits “effectively prohibit non-storm water discharges into the

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<sup>107</sup> State Water Board Order No. 2013-0001-DWQ, pp. 10-11 (emphasis added).

<sup>108</sup> *Id.* at 17 (emphasis added).

<sup>109</sup> *Id.* at 20 (emphasis added).

<sup>110</sup> See 55 Fed. Reg. 47990, 48037 (“Permits for such [non-storm water] discharges must meet applicable technology-based and water-quality based requirements of Section 402 and 301 of the [Clean Water Act].”); 40 C.F.R. § 122.44.

<sup>111</sup> The petitioners incorrectly cite to 40 C.F.R. § 122.26(a)(3)(iv) in their petitions.

<sup>112</sup> Order No. R4-2012-0175, p. 27.

storm sewers.”<sup>113</sup> The illicit connection and illicit discharge elimination program, on the other hand, is the means to implement that prohibition by requiring the development of procedures to investigate and eliminate illicit discharges.<sup>114</sup> The Board sees no conflict with these requirements.

Lastly, petitioners’ assertions concerning difficulties it will face complying with and/or enforcing the non-storm water discharge prohibitions in the Permit are largely misplaced. As discussed above, the slight variation in terminology between Order No. 01-182 and the Permit did not alter the substance of the requirement. Therefore, permittees should have already been implementing programs to prevent non-storm water from reaching receiving waters since at least 2001. In addition, as stated by the court in the litigation on Order No. 01-182, “[i]f something does not go in, there is no concern about it coming out the other end.”<sup>115</sup> Therefore, it is unclear to the Board how the slight change in the language of the Permit’s non-storm water discharge prohibition from that of Order No. 01-182 alters the responsibility of permittees to prevent non-storm water discharges from reaching receiving waters or requires permittees to modify their existing IC/IE program. However, in the event it does, the Permit clearly states that each permittee is responsible “for the portion of the MS4 for which it is an owner or operator.” To the extent that there are commingled flows, permittees should work with each other to ensure that the non-exempted non-storm water discharges do not reach receiving waters. If a permittee identifies that the source of a significant non-storm water discharge originates within an upstream jurisdiction, the Permit establishes a procedure to notify the Los Angeles Water Board and the upstream jurisdiction.<sup>116</sup> In addition, the Permit established non-storm water action levels that are used as triggers for permittees to evaluate the efficacy of their illicit connection and illicit discharge elimination program and to verify that their program is effectively controlling unauthorized non-storm water from entering the MS4 and ultimately being discharged to receiving waters.

Accordingly, the Permit’s prohibition of non-storm water discharges “through the MS4 to receiving waters” is consistent with the Clean Water Act and USEPA’s regulations.

#### **D. Receiving Water Limitations**

##### **1. Contention: The inclusion of numeric RWLs in the Permit exceeds the Clean Water Act’s MEP standard and state law and policy**

(Petitioner (a)-(h), (j)-(k), (p)-(t), (v)-(w), (aa)-(bb), (dd)-(ee), (hh), and (jj))

The Los Angeles Water Board disagrees. The RWLs provisions in Part V.A. of the Permit are nearly identical to those adopted by the Board in the 2001 permit, including both the prohibition on discharges from the MS4 that cause or contribute to violations of RWLs and the process for

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<sup>113</sup> In its 1990 rulemaking, USEPA explained that the illicit discharge detection and elimination program requirement was intended to implement the Clean Water Act’s provision requiring permits to “effectively prohibit non-storm water discharges.” 55 Fed.Reg. 47990, 47995.

<sup>114</sup> 55 Fed. Reg. 47990, 47995.

<sup>115</sup> *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, p. 16 (Section 10.II., RB-AR23172).

<sup>116</sup> At that point, the upstream jurisdiction would have the responsibility to further investigate and address the discharge as appropriate.

addressing discharges from the MS4 that have caused or contributed to violations of RWLs. These provisions were included to comply with requirements of the State Water Board's precedential order, Order No. WQ 99-05. The RWLs are the water quality standards for a specific water body, which are generally expressed numerically. In the judicial litigation concerning the 2001 permit, the Los Angeles County Superior Court found that the terms of the 2001 permit, including the RWLs, were consistent with the MEP standard.<sup>117</sup>

Further, Clean Water Act section 402(p)(3)(B)(iii) requires permits for discharges from MS4s to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added.) The Clean Water Act provides the Board, to the same extent as the Administrator of USEPA, the discretion to determine what controls are appropriate to protect water quality.<sup>118</sup> The Board has determined compliance with the RWLs provisions is necessary for receiving waters to attain compliance with water quality standards.

## **2. Contention: Compliance with the RWLs in the prior permit was understood to be through an iterative process**

(Petitioner (a)-(i), (j)-(k), (p)-(t), (v)-(w), (aa)-(ee), (hh), and (jj))

Many petitioners assert that the RWLs provisions in the previous permit, which remain in the 2012 permit, were understood to be an iterative process where compliance would be measured through a BMP-based iterative process. These petitioners generally assert that recent court decisions, namely the Ninth Circuit Court of Appeal in its decision in *NRDC v. County of Los Angeles*, created a new interpretation of the RWLs provisions and held, for the first time, that the process to address RWLs exceedances caused by MS4 discharges was not a safe harbor for compliance with the RWLs provisions. This is incorrect. The recent decision in *NRDC v. County of Los Angeles* did not create a new interpretation of the RWLs provisions. Rather, the Ninth Circuit's decision merely confirmed what the Los Angeles County Superior Court decided in 2005. In 2005, well before the Ninth Circuit decision, the Los Angeles County Superior Court upheld the RWLs provisions in the 2001 permit, stating: "In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."<sup>119</sup> In addition, the RWLs provisions do not ignore precedential case law or State Water Board policies. The Los Angeles County Superior Court also specifically found that the RWLs provisions in the 2001 permit were consistent with State Water Board Orders WQ 99-05 and 2001-15.<sup>120</sup> The Ninth Circuit's decision in *NRDC v. County of Los Angeles* in 2011 was thus not a fundamental change in how the RWLs provisions in the 2001 permit have been interpreted. In addition, it is important to note that many of the petitioners who make this contention were parties to the litigation on the 2001 permit and thus were aware that no such safe harbor existed in the 2001 permit.

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<sup>117</sup> See *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-9 (Section 10.II., RB-AR23160 - 23165).

<sup>118</sup> See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (1999).

<sup>119</sup> In *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7 (Section 10.II., RB-AR23160 - 23161, 23163).

<sup>120</sup> *Id.*, p. 6 (Section 10.II., RB-AR23162).

Some petitioners also contend that the Ninth Circuit Court of Appeal, and/or the Board, ignored the statement of former chair of the Board, Francine Diamond, in a letter dated January 30, 2002. The petitioners' reference to this letter is misplaced and is not indicative of any change in the Board's interpretation of the 2001 permit. In the litigation concerning the 2001 permit, the Los Angeles County Superior Court specifically found that the RWLs provisions in the 2001 permit were consistent with Board member Diamond's letter and State Water Board Orders WQ 99-05 and 2001-15.<sup>121</sup> This letter expressed the then-Chairperson's intention that the Board would continue to work with permittees in the hope that the new provisions would enable continuous progress toward improved MS4 discharge quality. It also sought to assure dischargers that adoption of the 2001 Permit did not necessarily mean the Board would immediately impose penalties based on strict liability. To this extent, the memo was a statement of intent with respect to how the Board would exercise its enforcement discretion. It did not, however, alter the permit requirements or revoke the Board's enforcement authority.

### **3. Contention: The Permit should allow compliance with RWLs through a BMP-based iterative approach**

(Petitioner (a)-(h), (j)-(k), (p)-(t), (v)-(w), (aa)-(ee), (hh), and (jj))

The Permit includes the same provisions as in the 2001 permit that outlines the process for responding where discharges from the MS4 have caused or contributed to exceedances of RWLs. This provision follows the language of the State Water Board's precedential decision in Order No. WQO 99-05.

The Board, however, has provided permittees with implementation alternatives in the Permit that provide compliance mechanisms.<sup>122</sup> For example, the majority of pollutants of concern from permittees' MS4s are addressed by TMDLs. The Permit provides that RWL exceedances for pollutants addressed by TMDLs will be addressed per TMDL specific compliance schedules, which are consistent with Board-adopted and fully approved TMDL implementation schedules. These TMDL implementation schedules were developed to accommodate permittees' efforts to achieve compliance with standards over time.<sup>123</sup>

For waterbody-pollutant combinations not addressed by a TMDL, the Permit allows permittees to develop and implement a WMP to address RWLs not otherwise addressed by a TMDL. The WMP must include, at the outset, a reasonable assurance analysis for the water body-pollutant combination(s) addressed by the program that demonstrates that the watershed control measures proposed in the program will be sufficient to control MS4 discharges such that they do not cause or contribute to an exceedance of the applicable receiving water limitation(s). Additionally, the WMP must identify enforceable requirements and milestones and dates for their achievement to address the pollutants within a timeframe that is as short as possible. For pollutants that are in a similar class to those already addressed by a TMDL for the water body, the requirements, milestones and dates for their achievement must align with those established in the TMDL implementation schedule.<sup>124</sup> Permittees must also comply with an adaptive

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<sup>121</sup> *Id.*, p. 6 (Section 10.II., RB-AR23162).

<sup>122</sup> See generally Order No. R4-2012-0175, Part VI.C and VI.E.

<sup>123</sup> See Order No. R4-2012-0175, Part VI.C.3 and VI.C.5.c.

<sup>124</sup> See Order No. R4-2012-0175, Part VI.C.2 and VI.C.5.c.

management process, whereby a permittee reviews and updates, if necessary, its WMP based on monitoring data.<sup>125</sup> A permittee's full compliance with all requirements (including applicable early actions to be completed during the planning period) and dates for their achievement in an approved WMP will constitute compliance with the RWLs in Part V.A. addressed by the program. Permittees that do not elect to develop a WMP are required to demonstrate compliance with RWLs pursuant to Part V.A. of the Permit.

The Permit also allows permittees to develop an EWMP. An EWMP is one that comprehensively evaluates opportunities, with the participating permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among permittees and other partners on multi-benefit regional projects to control MS4 discharges of storm water by, wherever feasible, retaining 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.<sup>126</sup> 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 WQBELs and RWLs shall be achieved through implementation of other watershed control measures. Permittees who elect to participate in such a program will be provided with a longer time period to develop an EWMP in recognition of the time necessary to establish partnerships, provide opportunities for meaningful stakeholder involvement and plan regional, multi-benefit projects. However, these programs must ensure that requirements to comply with: (1) technology based standards (i.e. MEP), (2) other core provisions (e.g., elimination of non-storm water discharges of pollutants), and (3) WQBELs and RWL pursuant to TMDL compliance schedules with deadlines occurring prior to final approval of the EWMP, are not delayed. Further, permittees must implement early actions prior to approval of their EWMP that are related to LID and green streets strategies as well as construct a structural BMP or suite of structural BMPs at a scale that provides meaningful water quality improvement in the area covered by the EWMP in order to be afforded the additional time to develop an EWMP.<sup>127</sup>

Thus, in many respects, the Permit WMP provisions allow permittees to comply with a "BMP-based iterative compliance approach," albeit through a more defined, rigorous process.

#### **4. Contention: The RWLs provisions are impossible to achieve**

(Petitioner (a)-(h), (j)-(k), (p)-(t), (v)-(w), (aa)-(bb), (dd)-(ee), (hh), and (jj))

The Los Angeles Water Board disagrees. The RWL sections in the Permit are consistent with the RWLs in the 2001 permit. Those RWLs provisions in the 2001 permit have been upheld by both a state court and a federal court.<sup>128</sup> Moreover, the Los Angeles County Superior Court found that "there was no issue of impossibility" in the requirements of the 2001 permit, including the RWLs.<sup>129</sup>

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<sup>125</sup> See Order No. R4-2012-0175, Part VI.C.8.

<sup>126</sup> See Order No. R4-2012-0175, Part VI.C.1.g.

<sup>127</sup> See Order No. R4-2012-0175, Part VI.C.4.a and VI.C.4.c.

<sup>128</sup> *Id.*, pp. 4-5, 7 (Section 10.II., RB-AR23160 - 23161, 23163); *NRDC v. County of Los Angeles* (2011) 673 F.3d 880, 886.

<sup>129</sup> *Id.*, p. 9 (Section 10.II, RB-AR23165).

Further, permittees have the necessary authority and ability to control discharges of pollutants from their MS4s to implement these provisions. The Board, however, acknowledges that compliance with many water quality standards is likely not to occur during the term of this Permit. As such, the Board has provided permittees with implementation alternatives that provide compliance mechanisms, such as the WMP and EWMP.

**5. Contention: Permittees have little control over the sources of pollutants that cause exceedances of water quality standards**  
(Petitioner (a)-(h), (j), (p)-(t), (v)-(w), (aa)-(ee), (hh), and (jj))

The petitioners contend that they will be exposed to enforcement actions, even though they have little control over the sources of pollutants that enter their MS4. The Board disagrees. The permittees have ultimate authority and responsibility to prohibit, prevent, or otherwise control discharges that enter and exit the portions of the MS4 for which they are owners and/or operators, even where the permittees discharge to a common conveyance system and receiving waters. Even if the permittees do not themselves generate the pollutants entering/exiting their MS4s, the permittees are nevertheless responsible for ensuring that the pollutants do not reach receiving waters through their MS4. As recently stated by the Ninth Circuit Court of Appeals, “the Clean Water Act does not distinguish between those who add and those who convey what is added by others - the Act is indifferent to the originator of water pollution.”<sup>130</sup> Thus, the Clean Water Act, and the Permit, appropriately places responsibility for preventing or controlling MS4 discharges on the permittees.

Notwithstanding the above, the majority of pollutants of concern from the Los Angeles County MS4 are addressed by the 33 TMDLs that are included in the Permit. The Permit provides that RWLs exceedances for pollutants addressed by TMDLs will be addressed per TMDL specific compliance schedules, which are consistent with Board-adopted and fully approved TMDL implementation schedules. Therefore, permittees will not be in non-compliance on day one of the permit with WQBELs and RWLs for which compliance deadlines occur in the future.

The Board, however, also does not expect that any measured numeric exceedance would necessarily constitute a permit violation by a particular permittee. In determining whether a numeric exceedance constitutes a permit violation by any one permittee, the Los Angeles Water Board would consider all the available information, including other sources and the nature of the exceedance and the applicable requirement of the permit.

**6. Contention: The RWLs are confusing, unclear, overbroad, and exceed State Water Board Order WQ 99-05**  
(Petitioners (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

The Los Angeles Water Board disagrees. The RWL language in the Permit is consistent with the State Water Board’s precedential order WQ 99-05 and is nearly identical to the language of the 2001 permit. The change from “Water Quality Standards or water quality objectives” used in the 2001 Permit to “receiving water limitations” in Part V.A. of the Permit does not represent a substantive change or expansion of the State Water Board’s precedential language, and was made for clarity. The Permit defines “receiving water limitation” as “any applicable numeric or

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<sup>130</sup> *NRDC v. County of Los Angeles* (2011) 673 F.3d 880, 900.

narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 C.F.R. § 131.38.”<sup>131</sup> This definition clearly identifies a receiving water limitation as any applicable water quality objective or criterion. To avoid any confusion over the different terminology used by USEPA and the State of California for regulatory thresholds for water quality established pursuant to Clean Water Act section 303(c), i.e., “water quality criteria” and “water quality objectives,” respectively, the Board chose to refer to these thresholds collectively as “receiving water limitations.” Because the Permit applies to discharges to waters of the state that are also waters of the United States, water quality objectives set forth in the Basin Plan and applicable State Water Board plans and policies and water quality criterion adopted by USEPA apply to the receiving waters.

The petitioners assert that the definition is overbroad in that it can include basin plans adopted by other regional water boards since the State Water Board must also approve all Basin Plans. This is incorrect. The definition only includes water quality control plans or policies adopted by the State Water Board. When another regional water board adopts a Basin Plan, or an amendment thereto, the State Water Board does not also adopt the Basin Plan or amendment. Rather, the State Water Board considers whether to approve the Basin Plan or amendment. Further, the reference to water quality control plans or policies adopted by the State Water Board is necessary because in some cases the State Water Board has established water quality objectives through policies rather than water quality control plans.

Further, the petitioners misread the scope of the reference to federal regulations; the reference is to federal regulations that promulgate water quality criteria such as 40 C.F.R. section 131.38 (that promulgated federal water quality criteria for priority pollutants applicable to California).

The petitioners also assert the definition is vague because it requires compliance with Chapter 3 or 7 of the Basin Plan. The Board disagrees. Chapter 3 includes the numeric or narrative water quality objectives or criteria, while Chapter 7 includes limitations to implement the applicable water quality objective or criterion.

Thus, the RWLs in the Permit are equivalent to State adopted or federally promulgated water quality standards applicable to the water body, or limitations to implement the applicable water quality standards such as receiving water conditions established through TMDLs.

**7. Contention: The iterative process is not per se included in the Permit**  
(Petitioners (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

The petitioners contend that the Permit needs to explicitly identify the iterative process by name as an “iterative process.” They contend that the Ninth Circuit Court of Appeal in *NRDC v. County of Los Angeles* held there is no textual support for the iterative process in the 2001 permit and that the court’s decision invalidates an iterative process unless it is specifically referenced as an iterative process. This is an incorrect interpretation of the Ninth Circuit Court of Appeal’s decision. As discussed above, the Ninth Circuit Court of Appeal did not determine that the 2001 permit lacked an iterative process, or invalidated an iterative process in future permits

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<sup>131</sup> Attachment A (Definitions) to Order No. R4-2012-0175, p. A-16.

unless specifically identified as such. Rather, the Ninth Circuit Court of Appeal affirmed what the Los Angeles County Superior Court held in 2005, which is that each of the provisions in the RWLs provisions are independently applicable. While the Ninth Circuit Court of Appeal acknowledged that RWLs provisions interact, the Court concluded that the iterative process in Part V.A.3. “offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.”<sup>132</sup> The 2012 Permit contains the same iterative process in Part V.A.3 that the 2001 Permit contained. This iterative process 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 Parts V.A.1. and V.A.2. are achieved as soon as possible. However, consistent with prior court decisions, compliance with the iterative process in Part V.A.3. does not provide a “safe harbor” from compliance with the provisions in Parts V.A.1. or V.A.2.

**8. Contention: The Permit’s RWLs language creates unnecessary liability for Sierra Madre**  
(Petitioner (cc))

The RWLs provisions in Part V.A. of the Permit are nearly identical to those adopted by the Board in the 2001 permit, including both the prohibition on discharges from the MS4 that cause or contribute to violations of RWLs and the process for addressing discharges from the MS4 that have caused or contributed to violations of RWLs. These provisions were included to comply with requirements of a precedential order adopted by the State Water Board, Order No. WQ 99-05. As noted above, the Ninth Circuit Court of Appeal’s decision did not alter the Board’s interpretation of its 2001 permit. Rather, the Ninth Circuit Court of Appeal affirmed what the Los Angeles County Superior Court held in 2005, which is that each of the provisions in the RWLs provisions are independently applicable. In fact, Sierra Madre was a party to the litigation challenging the 2001 permit and therefore was aware that the compliance with the process did not provide a “safe harbor.”

While the Ninth Circuit Court of Appeal acknowledged that RWLs provisions interact, the Court concluded that the iterative process in Part V.A.3. “offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.”<sup>133</sup> The 2012 Permit contains the same iterative process in Part V.A.3 that the 2001 Permit contained. This iterative process 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 Parts V.A.1. and V.A.2. are achieved as soon as possible. However, consistent with prior court decisions, compliance with the iterative process in Part V.A.3. does not provide a safe harbor from compliance with the provisions in Parts V.A.1. or V.A.2.

The Board, however, has provides permittees with implementation alternatives that provide compliance mechanisms in the Permit, as discussed above.

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<sup>132</sup> *NRDC v. County of Los Angeles*, 673 F.3d 880, 886.

<sup>133</sup> *Ibid.*



**9. Contention: The RWLs language is at odds with the WMP**  
(Petitioner (cc))

The Los Angeles Water Board disagrees. There is no conflict between the WMPs and the RWL language as long as permittees include the pollutant in their WMP either initially or by modifying their WMP. The Permit sets forth a process for prioritizing water quality issues and acknowledges implementation of TMDLs as the highest priority followed by actions to address water quality impairments that are identified on the State's Clean Water Act section 303(d) list, but which are not yet addressed by a TMDL. The Permit also establishes a category for 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 RWLs and for which MS4 discharges may be causing or contributing to the exceedance. For this category, the Permit states that a permittee's full compliance with all requirements and dates for their achievement in an approved WMP or EWMP shall constitute a permittee's compliance with the RWLs provisions for the specific water body-pollutant combinations addressed by an approved WMP or EWMP. One of these requirements must be achievement of RWLs by a date certain.<sup>134</sup> The Permit also allows a permittee to modify its WMP or EWMP to include additional water body-pollutant combinations where exceedances of RWLs are newly identified during the Permit term.<sup>135</sup> Regarding the timeframe for addressing such exceedances, the Permit states that 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 RWLs 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.<sup>136</sup> Accordingly, the RWLs language is not at odds with the WMP provisions.

**E. Standard Provisions**

**1. Contention: The Permit exceeds the Los Angeles Water Board's authority be requiring permittees to enter into interagency agreements and coordinate with other co-permittees**  
(Petitioners (a)-(h), (j), (n)-(t), (v)-(x), (aa), (bb), (dd), (ee), (hh), (jj), and (kk))

The Los Angeles Water Board disagrees. The Board previously addressed this comment in its written responses to comments.<sup>137</sup> As previously explained, the Board is not requiring permittees to enter into interagency agreements or coordinate with other co-permittees. The Board, however, is requiring that permittees have the legal authority to do so. Consistent with federal regulations at 40 C.F.R. § 122.26(d)(2)(i)(D), permittees must have legal authority to "[c]ontrol through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system." In addition, 40 C.F.R. § 122.26(d)(2)(iv) requires that permittees include in their storm water management program "a comprehensive planning process which involves public participation

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<sup>134</sup> See Order No. R4-2012-0175, Part VI.C.5.c.iii.(3)(c).

<sup>135</sup> See Order No. R4-2012-0175, Part VI.C.2.a.iii.(2).

<sup>136</sup> See Order No. R4-2012-0175, Part VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c).

<sup>137</sup> Responses to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-28 to H-29 (Section 8, RB-AR19943 - 19944).

and where necessary intergovernmental coordination...” Given the interconnected nature of the permittees’ MS4s within Los Angeles County, the Board expects, and encourages, co-permittees to work cooperatively and coordinate their actions to facilitate compliance efforts through such inter-agency agreements or other formal arrangements. As the MS4 is a system shared by several permittees, cooperation and coordination between co-permittees would result in efficient and cost-effective actions to comply with the Permit.

## F. Monitoring

- 1. Contention: The monitoring and reporting program requirements were not developed in accordance with law as the Los Angeles Water Board failed to conduct a cost-benefit analysis required by California Water Code sections 13165, 13225, and 13267**  
(Petitioner (k))

The Los Angeles Water Board disagrees. The Board addressed this contention in its written responses to comments.<sup>138</sup> As the Board previously explained, the Board was not required to conduct a cost-benefit analysis before including monitoring and reporting requirements in the Permit. The monitoring and reporting requirements are included in the Permit pursuant to the Board’s authority under the Clean Water Act and its implementing regulations, as well as California Water Code section 13383. Section 308(a) of the federal Clean Water Act and sections 122.41(h), (j)-(l), 122.44(i), and 122.48 of Title 40 of the Code of Regulations require that all NPDES permits specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s also require monitoring and reporting.<sup>139</sup> Thus, federal law mandates that the Board require a monitoring and reporting program, and the federal authority does not suggest or require an additional cost/benefit analysis in imposing the monitoring and reporting program.

The California Porter-Cologne Water Quality Control Act contains a special chapter, Chapter 5.5, which addresses permits issued pursuant to the Clean Water Act, i.e., NPDES permits. As part of this Chapter, California Water Code section 13383 governs monitoring and reporting requirements. Section 13383, like the federal Clean Water Act, does not mention or suggest or require a cost/benefit analysis to justify the inclusion of monitoring and reporting provisions in an NPDES permit. In fact, California Water Code section 13383 mentions nothing of costs at all. Thus, while Board members did express concerns about costs at the hearings on the Permit, the Board members were properly advised by Board attorneys that the Board was not required to conduct a cost-benefit analysis.

Contrary to petitioner’s assertion, California Water Code sections 13165, 13225, and 13267 do not apply to the monitoring and reporting requirements in the Permit. Instead, California Water Code section 13383 governs the Permit. The general authority to require monitoring and reporting afforded by California Water Code sections 13165, 13225, and 13267 does not trump the more specific authority the Board has in the context of issuing NPDES permits. Because the monitoring and reporting program requirements are required by federal law, any conflicting state

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<sup>138</sup> Response to Comments on the Tentative Order – Monitoring and Reporting Program Matrix, pp. C-1 to C-2 (Section 8, RB-AR19618 - 19619).

<sup>139</sup> See 40 C.F.R. §§ 122.26(d)(2)(i)(F) & (d)(2)(iii)(D), 122.42(c).

law is preempted.<sup>140</sup> Therefore, the Board was not required to determine that the burden, including the costs of the reports, bear a reasonable relationship to the need for the report and the benefits to be obtained prior to including monitoring and reporting requirements in the Permit.

During the litigation on the 2001 Los Angeles County MS4 permit, Order No. 01-182, similar arguments concerning the monitoring and reporting program were made by several permittees. The Los Angeles County Superior Court specifically considered and rejected these arguments, and upheld the Board's authority to require monitoring and reporting without a cost/benefit analysis.<sup>141</sup>

In conclusion, the monitoring and reporting requirements were included in the Permit pursuant to the Board's authority under the Clean Water Act and its implementing regulations, as well as California Water Code section 13383, and no cost-benefit analysis by the Board was required.

## **2. Contention: The Permit's receiving water monitoring program exceeds the requirements of law**

(Petitioners (a)-(h), (j), (p)-(t), (v)-(x), (aa), (bb), (dd), (ee), (hh), (jj), and (kk))

The Los Angeles Water Board disagrees. The Board previously addressed this comment in its written responses to comments.<sup>142</sup> As the Board previously explained, like the other monitoring and reporting requirements in the Permit, the receiving water monitoring program is included in the Permit pursuant to the Board's authority under the Clean Water Act and its regulations,<sup>143</sup> as well as California Water Code section 13383. Clean Water Act section 308, subdivision (a)(2), specifically requires monitoring and reporting to determine whether any person is in violation of any effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance. Permittees are also required to: "Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions...."<sup>144</sup>

As described in the previous contention, California Water Code sections 13225 and 13267 do not apply to the monitoring requirements in the Permit. Instead, California Water Code section 13383 governs the permitting process for NPDES permits. The general authority to require monitoring and reporting afforded by California Water Code sections 13225 and 13267 does not trump the more specific authority the Board has in the context of issuing NPDES permits. Because the monitoring and reporting program requirements are required by federal law, any

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<sup>140</sup> See *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 248 ["[S]tate law is still preempted . . . where the state law stands as an obstacle of the full purposes and objectives of Congress."]; see also Cal. Wat. Code, §§ 13370, 13377.

<sup>141</sup> See *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, pp. 19-20 (Section 10.II., RB-AR23197 - 23198).

<sup>142</sup> Response to Comments on the Tentative Order – Monitoring and Reporting Program Matrix, pp. C-25 to C-27 (Section 8, RB-AR19642 - 19644).

<sup>143</sup> Clean Water Act § 308(a); 40 C.F.R. §§ 122.26(d)(2)(i)(F) & (d)(2)(iii)(D), 122.41(h), (j), (l),, 122.42(c), 122.44(i), and 122.48.

<sup>144</sup> 40 C.F.R. § 122.26(d)(2)(i)(F).

conflicting state law is preempted.<sup>145</sup> In addition, neither the Clean Water Act and its regulations, or California Water Code section 13383, require a cost-benefit analysis prior to imposing monitoring and reporting requirements.

The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in Section VII.C. of the Fact Sheet to the Permit.<sup>146</sup> The receiving water monitoring program is necessary to determine compliance with terms of the Permit. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.<sup>147</sup> As explained in the Fact Sheet, the purposes of receiving water monitoring are to measure the effects of a permittee's storm water and non-storm water discharges from the MS4 to the receiving water, to identify water quality exceedances, to evaluate compliance with TMDL waste load allocations and RWLs, and to evaluate whether water quality is improving, staying the same, or declining. Thus, the requirement for permittees to assess impacts of its MS4 discharges on receiving waters is consistent with the Clean Water Act.

The petitioners suggest that only permittees with receiving waters located within their jurisdiction should be responsible for receiving water monitoring. The Board disagrees. permittees may be required to compile and submit information based on monitoring of receiving waters regardless of whether those receiving waters are located within the jurisdiction of the permittee. Regardless of whether receiving waters are located within the jurisdiction of a permittee, a permittee is responsible for discharges from their MS4 and any resulting impacts to receiving waters. Requiring only permittees with receiving waters within their jurisdiction to monitor such receiving waters would unfairly place the burden and costs of such monitoring on a select number of permittees, even though discharges originating from permittees outside the jurisdiction would be reaching receiving waters. Accordingly, the receiving water monitoring requirements in the Permit are reasonable.

The requirement to monitor unauthorized or unknown discharges is also not unreasonable and is required by federal law. In accordance with section 402(p)(3)(B)(ii) of the Clean Water Act, the Permit prohibits the discharge of unauthorized non-storm water to receiving waters. Federal regulations also require that permittees implement a program "to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer."<sup>148</sup> This program shall include: "A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system...."<sup>149</sup>

Accordingly, the Permit's receiving water monitoring program does not exceed the requirements of law and are reasonable.

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<sup>145</sup> See *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 248 ["state law is still preempted . . . where the state law stands as an obstacle of the full purposes and objectives of Congress."]; see also Cal. Wat. Code, §§ 13370, 13377.

<sup>146</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, p. F-114.

<sup>147</sup> Clean Water Act § 101(a).

<sup>148</sup> 40 C.F.R. § 122.26(d)(2)(iv)(B).

<sup>149</sup> 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

**3. Contention: Federal regulations only require two types of monitoring – effluent and ambient – for compliance.**

(Petitioners (a)-(h), (j), (l), (n)-(bb), (dd)-(hh), and (jj)-(kk))

The Los Angeles Water Board disagrees that monitoring requirements relative to MS4 permits must be limited to effluent and ambient monitoring, where ambient monitoring is defined by the petitioners as monitoring to evaluate the health of receiving waters during “normal states” – “not when it rains”. The Board previously addressed this contention in its written responses to comments.<sup>150</sup> Monitoring by the owners and/operators of MS4s is required pursuant to Clean Water Act section 308(a) and 40 C.F.R. sections 122.41(h), (j)-(l), 122.44(i), 122.48, 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D) and 122.42(c). 40 C.F.R. section 122.26(d)(2)(iii)(D) identifies monitoring at outfalls, field screening points, and in-stream stations, and requires representative data collection. Wet weather receiving water monitoring (i.e., wet weather in-stream monitoring) is fundamentally necessary to assist in the evaluation of the effects of *storm water* discharges on in-stream water quality. Wet weather receiving water monitoring is also necessary to assess trends in the effect of storm water discharges on in-stream water quality over time as permittees implement additional and/or enhanced storm water control measures. Ambient monitoring conducted under the Surface Water Ambient Monitoring Program (SWAMP) does not support this type of evaluation and would not be representative of the impacts of storm water discharges on the receiving waters. In-stream monitoring, referred to in the Permit as receiving water monitoring, is also well established and supported by USEPA’s Part 2 MS4 permit application guide<sup>151</sup> and has been a part of the Los Angeles County MS4 program for more than ten years.

Further, the petitioners’ reference to 40 C.F.R. section 122.44(d)(1)(vi)(C)(3)<sup>152</sup> is not applicable to this matter. That section applies to situations where a State has not established a water quality objective for a pollutant present in effluent and establishes effluent limitations for an indicator parameter for the pollutant of concern. In the Permit, the RWLs and WQBELs are derived from state or federally established water quality criteria and objectives. Therefore, the petitioners’ reference offers no support for their assertion.

Lastly, permittees may demonstrate compliance with the RWLs provisions through either outfall monitoring or receiving water monitoring. If a permittee’s discharge quality as measured at the outfall does not exceed applicable WQBELs or RWLs limitations, this demonstrates that the MS4 discharge did not cause or contribute to an exceedance of RWLs.

**4. Contention: Monitoring requirements exceed federal requirements**

(Petitioners (l), (n)-(o), (u), (x)-(z), (bb), (ff)-(gg), and (kk))

The Los Angeles Water Board disagrees. The petitioners make various arguments contending that the monitoring requirements in the Permit exceed federal requirements. The petitioners’

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<sup>150</sup> Response to Comments on the Tentative Order – Monitoring and Reporting Program Matrix, pp. C-5 to C-6 (Section 8, RB-AR19622 - 19623).

<sup>151</sup> Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems, EPA 833-B-92-002, (November 1992) (See specifically, for example, Section 10.VI.B.. RB-AR25913 - 25915).

<sup>152</sup> Please note that the petitioners incorrectly cite to 40 C.F.R. § 122.44(d)(viii)(B). The correct cite for the quoted language in their petitions is 40 C.F.R. section 122.44(d)(1)(vi)(C)(3).

primary argument is that federal regulations only require outfall monitoring to evaluate MS4 discharges against so-called “ambient” standards in the receiving water to determine exceedances, and that any other type of monitoring (such as receiving water monitoring) requirements exceeds federal law. As explained in the responses above, neither the Clean Water Act nor federal regulations limit monitoring requirements to outfall monitoring. Like the other monitoring and reporting requirements in the Permit, the receiving water monitoring program is included pursuant to the Board’s authority under the Clean Water Act and its regulations,<sup>153</sup> as well as California Water Code section 13383. For example, Clean Water Act section 308, subdivision (a)(2), specifically requires monitoring and reporting in NPDES permits to determine whether any person is in violation of any effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance. 40 C.F.R. section 122.26(d)(2)(i)(F) requires MS4 permittees to: “Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.” 40 C.F.R. section 122.26(d)(2)(iii)(D) requires MS4 permittees to provide information characterizing the quality and quantity of discharges covered in the Permit including representative data collection for the term of the permit. 40 C.F.R. section 122.41, subdivisions (h) and (j), require all NPDES permittees to provide any information that the permitting agency requests to determine compliance with the permit and take samples and measurements that are representative of monitored activity. 40 C.F.R. section 122.48 requires all NPDES permits to specify monitoring including type, intervals, and frequency sufficient to yield data that is representative of the monitored activity. Monitoring “outside of the MS4” is necessary in order to determine compliance with Permit requirements.

The Board disagrees with the petitioners’ argument that the “end of the regulatory line” for MS4 permits is storm water discharges from the outfall. The petitioners first argue that the Board has no regulatory authority over non-storm water discharges that exit the MS4 to receiving waters. As previously explained in Section C above, this is simply incorrect. The petitioners also argue that once a storm water discharge exits a permittee’s MS4, the permittee is no longer responsible, and the Board has no regulatory authority over that discharge. This interpretation is also incorrect and goes against the express requirements of the Clean Water Act and its regulations. A permittee is responsible for discharges from their MS4 and any resulting impacts to receiving waters. As such, the Board may appropriately require permittees to perform monitoring outside of the MS4 to determine a permittee’s impacts on receiving water.

The petitioners assert that the Permit fails to require illicit connection and discharge field screening. This is incorrect. Part VI.D.10. of the Permit establishes the Illicit Connections and Illicit Discharges Elimination (IC/IDE) Program requirements, while Attachment E, Section IX of the Permit establishes requirements for non-storm water outfall based screening and monitoring. As part of the IC/IDE program, permittees are required to conduct source investigations for illicit connections and illicit discharges, including identifying the source, nature, and volume of discharge, as well as the responsible party. The Permit also establishes two types of action levels – non-storm water action levels (NALs) and municipal action levels (MALs). NALs are derived from water quality objectives and are used where there is no applicable TMDL-based WQBEL for the pollutant in a particular receiving water. NALs are used as triggers for permittees to verify that their illicit connection/illicit discharge elimination program is effectively controlling unauthorized non-storm water. The NALs were established in the Permit after evaluating dry weather data collected by the permittees from 2005-2011. These data

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<sup>153</sup> Clean Water Act § 308(a); 40 C.F.R. §§ 122.26(d)(2)(i)(F) & (d)(2)(iii)(D), 122.41(h), (j), (l), 122.42(c), 122.44(i), and 122.48.

indicate frequent exceedances of RWLs during dry weather. Pursuant to Section IX (Non-Storm Water Outfall Based Screening and Monitoring) of the Permit's Monitoring and Reporting Program (Attachment E), permittees are also required to screen for significant non-storm water discharges, conduct a source identification process, and finally, monitor those outfalls with continuing significant non-storm water discharges for a suite of parameters as identified in Section IX.G.1 of the Monitoring and Reporting Program.

The petitioners also assert that monitoring of MALs is duplicative of TMDL monitoring. The Board disagrees. MALs are based on nationwide Phase I MS4 monitoring data for pollutants in storm water, and computed as the upper 25<sup>th</sup> percentile concentration – representing an “upset” value, i.e. a pollutant concentration in the storm water discharge that is significantly higher than the average concentration in storm water. MALs are used as a trigger to determine the efficacy of storm water BMPs and, in particular, to identify drainages with below average storm water discharge quality that should be prioritized for additional or enhanced BMPs. MALs have been endorsed by the State Water Board's Blue Ribbon Panel as an effective tool for identifying “bad actor” catchments that should receive additional attention. Because MALs are derived from a statistical analysis of actual storm water quality, they do not have any relationship, in terms of their derivation, to WQBELs, which are derived from water quality standards. Therefore, MALs cannot replace the WQBELs established to implement TMDL wasteload allocations. MALs are not consistent with the assumptions and requirements of TMDL wasteload allocations, and are derived in a completely different manner, and for a very different purpose than the numeric WQBELs. The Board included MALs in the Permit as a tool for prioritizing implementation of storm water controls and as one metric for evaluating storm water discharges relative to the MEP standard. It is therefore not duplicative of TMDL monitoring.

The petitioners also contend that the Board included the New Development/Re-Development Tracking requirements in the Permit without justification. The Board disagrees. The Board provided its rationale for these monitoring requirements in the Fact Sheet of the Permit.<sup>154</sup> The data required in Part X of the Monitoring and Reporting Program is necessary to evaluate the effectiveness of the Planning and Land Development provisions of the Permit in terms of storm water retention, biofiltration, and offsite mitigation. This effectiveness monitoring is designed to assess and track whether post construction operation of the LID designs are effective in retaining the design storm runoff volume. Further, permittees are only required to track new development and redevelopment subject to the provisions of the Planning and Land Development provisions in the Permit, not actual water quality monitoring of BMP effluent to determine BMP effectiveness.

In conclusion, all of the monitoring requirements in the Permit are within the scope of the Board's authority under the Clean Water Act and its implementing regulations. It is the obligation of the permittees that discharge to receiving waters to monitor its compliance with Permit requirements as well as its impacts on receiving water.

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<sup>154</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, p. F-133.

## **G. Watershed Management Program (WMP)/Enhanced Watershed Management Program (EWMP)**

### **1. Contention: The WMP/EWMP provisions create “safe harbors” that exempt compliance with RWLs in some circumstances (Petitioner (m))**

The Los Angeles Water Board disagrees that the WMP/EWMP provisions create so-called “safe harbors” that exempt compliance with RWLs. Petitioners first assert that the Board did not maintain the 2001 Los Angeles County MS4 Permit’s prohibition against discharges that cause or contribute to an exceedance of water quality standards. This is incorrect. The Board did not revise or otherwise modify the RWLs provisions in the Permit. The RWLs provisions in Part V.A. of the 2012 Los Angeles County MS4 Permit are the same as those included in the 2001 Los Angeles County MS4 Permit.<sup>155</sup> Thus, as with the 2001 permit, permittees are still required to comply with water quality standards.

Contrary to the petitioners’ assertion, the WMP/EWMP provisions do not excuse non-compliance. Rather, the provisions create a “compliance mechanism” for permittees to implement the RWLs provisions with a higher likelihood of success in a shorter period of time, and builds on information obtained over the last ten plus years. Consistent with federal law, the Los Angeles Water Board has provided permittees the flexibility on how to achieve and demonstrate compliance with RWLs provisions through rigorous requirements. The WMP/EWMP provisions are designed to work in connection with the existing RWLs provisions, as well as the TMDL provisions and other programmatic sections of the Permit.<sup>156</sup> The WMP/EWMP approach allows permittees the flexibility to customize the programmatic elements of the Permit based on the required water quality outcomes, which is compliance with water quality standards and applicable WQBELs. The Permit requires that WMPs/EWMPs ensure that discharges from the permittee’s MS4: (1) achieve applicable WQBELs in the TMDL provisions pursuant to the corresponding compliance schedules; (2) do not cause or contribute to exceedances of RWLs; and (3) do not include non-storm water discharges that are a source of pollutants.<sup>157</sup> WMPs/EWMPs must also ensure that controls are implemented to the maximum extent practicable by implementing the minimum control measures that comprise a permittee’s baseline storm water management program.<sup>158</sup> In sum, achieving water quality standards remains the centerpiece of the WMP/EWMP approach.

The petitioners downplay the amount of work that a permittee who opts to develop and implement a WMP/EWMP will have to do to be deemed in compliance with the RWLs and/or WQBELs. In fact, the amount of work required by a permittee opting to develop and implement a WMP/EWMP is extensive and more rigorous when compared to the 2001 Permit. The WMP/EWMP provisions require permittees to establish a clear linkage between their MS4 discharges and receiving water quality. The WMP/EWMP provisions provide much more specific language than that of State Water Board Order WQ 99-05, such as requiring an upfront quantitative “reasonable assurance” analysis (through modeling) that demonstrates that the

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<sup>155</sup> Los Angeles Water Board Order No. R4-2012-0175, Part V.A., pp. 38-39.

<sup>156</sup> See generally *id.*, Part VI.C., pp. 47-66.

<sup>157</sup> *Id.*, Part VI.C.1.d., p. 47.

<sup>158</sup> *Ibid.*



proposed actions will achieve the required water quality outcomes.<sup>159</sup> Before permittees start implementing BMPs and control measures, they are required to do a technical analysis so that BMPs and control measures are selected and designed with the required water quality outcomes in mind. In this regard, this is not a strict “trial and error” approach. Rather, permittees must evaluate, in advance, what approach they think will work and then target resources to implement those measures. The WMP/EWMP framework also requires clear, specific timeframes that are as short as possible and measurable milestones to ensure progress toward water quality requirements.

Permittees must also execute an integrated monitoring and assessment program to determine progress towards achieving RWLs and WQBELs.<sup>160</sup> The WMP/EWMP provisions work in conjunction with outfall and receiving water monitoring to ensure that the program is resulting in the anticipated water quality outcomes and requires adaptive management when anticipated outcomes are not achieved. As part of the adaptive management process, permittees must modify strategies, control measures, and BMPs, as necessary, based on analysis of monitoring data to ensure that applicable WQBELs and RWLs and other milestones set forth in the WMP/EWMP are achieved in the required timeframes.<sup>161</sup>

The WMP/EWMP provisions provide an incentive and clear framework for permittees to craft comprehensive pathways to achieve compliance with RWLs – both those addressed by TMDLs and those not addressed by TMDLs. Specifically, the WMP/EWMP approach allows permittees to demonstrate compliance with interim TMDL deadlines (interim WQBELs and applicable interim RWLs) through implementation of actions in an approved WMP/EWMP.<sup>162</sup> Further, the EWMP approach allows permittees to demonstrate compliance with final WQBELs and associated RWLs within a drainage area by implementing regional, multi-benefit retention projects that capture the runoff volume from the 85<sup>th</sup> percentile, 24-hour storm event, as well as all non-storm water that would otherwise discharge through the MS4 to receiving waters.<sup>163</sup> The Permit also allows permittees to identify and address other waterbody pollutant combinations not covered by a TMDL in the same manner, including requirements to conduct: (1) an upfront reasonable assurance analysis that the proposed actions will be adequate to achieve the RWLs; (2) monitoring; and (3) adaptive management based on monitoring results.<sup>164</sup> In this way, the Permit provides a mechanism for water quality improvement without the administrative delay of developing and approving a TMDL.

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<sup>159</sup> *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

<sup>160</sup> *Id.*, Part VI.C.7., p. 66.

<sup>161</sup> *Id.*, Part VI.C.8., pp. 66-67.

<sup>162</sup> *Id.*, Part VI.C.3., p. 53 and Part VI.E.2.d.i.(4), pp. 143-144. In addition, regardless of a permittee’s participation in a WMP or EWMP, the Los Angeles County MS4 Permit provides that a permittee’s full compliance with the applicable TMDL requirements pursuant to the compliance schedules in the permit constitutes a permittee’s compliance with the RWLs for the particular pollutant addressed by the TMDL. The Los Angeles Water Board recognized that, in the case of impaired waters subject to a TMDL, the RWLs for the pollutants addressed by the TMDL may be exceeded during the period of TMDL implementation. *Id.*, Part VI.E.2.c., p. 143.

<sup>163</sup> *Id.*, Part VI.C.1.g., pp. 48-49 and Part VI.E.2.e.i.(4), pp. 144-145. In drainage areas within the EWMP area where retention of the 85<sup>th</sup> percentile, 24-hour storm event is not feasible, permittees shall demonstrate compliance with final WQBELs and RWLs through monitoring data, just as is required in a WMP. *Id.*, Part VI.C.1.g.v., p. 49 and Part VI.E.2.e.i.(1)-(3), pp. 144-145.

<sup>164</sup> See generally *id.*, Part VI.C.2., pp. 49-53.

The WMP/EWMP compliance mechanisms are contingent upon participating permittees being in *full compliance* with all requirements and dates for their achievement articulated in the Permit and in an approved WMP/EWMP. These also include specific actions that permittees are required to implement during development of their WMP/EWMPs (up until WMP/EWMP approval), as follows: (1) a permittee must provide timely notice of its intent to develop a WMP or EWMP and include all required information and associated documentation in its notice; (2) a permittee must meet all interim and final deadlines for development of a WMP or EWMP; (3) for the area to be covered by the WMP or EWMP, a permittee must target 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 RWLs*; and (4) a permittee receives final approval of its WMP or EWMP within 28 or 40 months, respectively.<sup>165</sup> If a permittee fails to meet any requirement or date for its achievement, the permittee is subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the WMP/EWMP.<sup>166</sup> In sum, the WMP/EWMP approach allows permittees to implement approved control measures that are expected to ultimately achieve WQBELs and RWLs and provides permittees with the certainty that, if they do so in accordance with approved schedules, their interim actions will constitute compliance with applicable interim and, under certain conditions, final WQBELs and RWLs.

Further, until a WMP/EWMP is approved by the Los Angeles Water Board, permittees that elect to develop a WMP/EWMP shall: (1) 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 C.F.R. section 122.26(d)(2)(iv); (2) 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 Clean Water Act section 402(p)(3)(B)(ii); and (3) implement watershed control measures from existing TMDL implementation plans to ensure that MS4 discharges achieve compliance with interim and final trash WQBELs and all other final WQBELs and RWLs pursuant to Part VI.E. and set forth in Attachments L through R of the Permit by the applicable compliance deadlines occurring prior to approval of a WMP/EWMP.<sup>167</sup>

From the above, it is clear that the WMP/EWMP provisions do not create safe harbors that exempt compliance with RWLs, but rather are detailed provisions designed to ensure compliance with RWLs.

## **2. Contention: The WMP/EWMP's "safe harbor" provisions violate federal anti-backsliding requirements** (Petitioner (m))

The petitioners assert that the WMP/EWMP provisions concerning compliance with RWLs violate federal anti-backsliding requirements found in Clean Water Act sections 303(d)(4) and 402(o), as well as federal regulations at 40 C.F.R. section 122.44(l). The Los Angeles Water

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<sup>165</sup> *Id.*, Part VI.C.2.d, pp. 52-53, and Part VI.C.3.b., p. 53. A permittee's compliance with these requirements will be evaluated at various junctures, including through review of the permittee's annual reports.

<sup>166</sup> *Id.*, Part VI.C.2.c., p. 52 and Part VI.E.2.d.i.(4)(c), pp. 143-144.

<sup>167</sup> Part VI.C.4.d., pp. 57-58.

Board disagrees that the WMP/EWMP provisions violate these federal anti-backsliding requirements.

First, the anti-backsliding requirements found in Clean Water Act sections 303(d)(4) and 402(o), by their plain language, are not applicable to the RWLs in the Permit. These sections only refer to “effluent limitations.” “Effluent limitations,” by definition, are not RWLs. The Clean Water Act defines the term “effluent limitation” as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are *discharged from point sources* into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.”<sup>168</sup> Conversely, the Permit defines “receiving water limitation” as “any applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, *for the receiving water* as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 C.F.R. section 131.38.”<sup>169</sup> Thus, while “effluent limitations” restrict the amount of a pollutant from a point source to a receiving water, the “receiving water limitations” are the applicable water quality objectives or criteria that the receiving water itself must meet. Lastly, even assuming that receiving water limitations are considered effluent limitations, Clean Water Act section 402(o) is limited to effluent limitations established on the basis of Clean Water Act section 402(a)(1)(B), 301(b)(1)(C), 303(d), or 303(e). The RWLs in the permit were not established on any of these bases, but rather were included in the permit pursuant to Clean Water Act section 402(p)(3)(B).

Second, the anti-backsliding requirements found at 40 C.F.R. section 122.44(l) are also not applicable to RWLs. The petitioners contend that RWLs are “standards” or “conditions” subject to section 122.44(l). While the Board recognizes that 40 C.F.R. section 122.44, subdivision (l)(1), initially refers to “effluent limitations, standards, or conditions,” the Board notes that all further references in subdivision (l)(2) only refer to “effluent limitations.” In fact, after its initial use in subdivision (l)(1), the words “standards” and “conditions” are found nowhere else in subdivision (l)(2). The most probable explanation for this is that the term “effluent” modifies “limitations, standards, or conditions.” As such, the terms “standards” or “conditions” in subdivision (l) means “standards” or “conditions” associated with effluent limitations, and not simply any standard or condition in an NPDES permit. If one were to read these terms as petitioners do, by reading each term separately, the purpose of the regulation would run afoul as it would prohibit backsliding of “standards” or “conditions,” but would provide no exceptions as it does for “effluent limitations.” Such a reading would lend itself to an illogical result.<sup>170</sup>

Third, to the extent that the federal anti-backsliding provisions in the Clean Water Act or its implementing regulations apply, the WMP/EWMP provisions do not violate the anti-backsliding provisions. There are no effluent limitations in the 2012 Permit that are less stringent than the comparable limitations in the 2001 permit. And, contrary to the petitioners’ assertion, the Los Angeles Water Board did not “weaken” the RWLs by including the WMP/EWMP provisions in the Permit. As explained above, consistent with the 2001 Los Angeles County MS4 permit, the 2012 Los Angeles County MS4 permit continues to require compliance with RWLs in Part V.A.

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<sup>168</sup> Clean Water Act § 502(11) (emphasis added).

<sup>169</sup> Attachment A to Order No. R4-2012-0175, p. A-16 (emphasis added).

<sup>170</sup> The Board acknowledges that Chapter 7.2.2. of USEPA’s NPDES Permit Writers’ Manual (2010) appears to take an expansive view of the scope of its anti-backsliding regulations. However, such an expansive view is not supported by the text of the regulations.

of the permit. Thus, Los Angeles County MS4 permittees are still required to comply with water quality standards, although the Board, consistent with federal law, has provided permittees the flexibility to achieve and demonstrate compliance with RWLs provisions through a WMP/EWMP. Further, as described above, the WMP/EWMP provisions are prescriptive (more prescriptive than the 2001 Permit), and achieving water quality standards remains the centerpiece of the WMP/EWMP approach.

Fourth, there are several statutory and regulatory exceptions to the anti-backsliding provisions. One of these exceptions is relaxation of limitations based on new information that was not available at the time the previous permit was issued.<sup>171</sup> In addition, the anti-backsliding requirements in 40 C.F.R. section 122.44, subdivision (l)(1), do not apply if the circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause for permit modification or revocation or reissuance under 40 C.F.R. section 122.62. Like section 122.41(l), section 122.62 includes new information not available at the time the previous permit was issued as a cause for modification.

To the extent that the anti-backsliding provisions apply and backsliding has occurred, the 2012 Permit is based on new information learned since issuance of the previous permit. When the previous permit was adopted in 2001, there were no TMDLs in effect with wasteload allocations assigned to MS4 discharges. The 2012 Los Angeles County MS4 Permit includes new provisions implementing 33 watershed-based TMDLs adopted since 2001 that are applicable to MS4 discharges. During the development of these TMDLs, the Board gained new information, such as MS4 discharges' impacts to receiving waters, the control measures available to reduce or prevent MS4 discharges, and the time needed for permittees to implement those measures. Over the last ten plus years, the Board also gained information from monitoring and analysis by implementing the permit, including information about which methods were successful in improving water quality and which were not.

Unfortunately, the RWLs provisions in State Water Board Order WQ 99-05 alone did not result in the water quality outcomes the Board had hoped for. Rather, the Board saw greater improvement to water quality through inclusion of three TMDLs in the previous permit in 2006, 2007, and 2009. In the Santa Monica Bay, a series of low-flow diversions were implemented into the MS4 to divert dry weather flows to the sanitary sewer system. This was a new technology, entailed re-engineering of portions of the MS4, and has been proved to be very effective in improving beach water quality. Also, the Los Angeles River Trash TMDL has resulted in development of full capture and partial capture devices that have achieved measurable water quality improvements. Through the Board's experience in developing and implementing these TMDLs, the Los Angeles Water Board has learned that time to plan, design, fund, operate and maintain BMPs is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale.<sup>172</sup>

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<sup>171</sup> Clean Water Act § 402(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(2)(i)(B)(1).

<sup>172</sup> The Board notes that USEPA and the State Water Board have deemed BMPs to be a type of an effluent limitation. In State Water Board Order 96-13 (*Save San Francisco Bay Association*), the petitioner claimed that Clean Water Act section 402(o) was violated because the permit in question deleted some of the activities specifically listed in the earlier permit. The State Water Board concluded otherwise, stating: "The EPA has also acknowledged that the process of developing the SWMP will result in revising BMPs as new information becomes available. (Reapplication Policy.) It is absurd to assume that such revisions would violate the antibacksliding prohibitions." *Id.*, p. 10.

Lastly, in terms of water supply, since issuance of the previous permit, there has been a paradigm shift from viewing storm water as a liability to viewing it instead as a regional asset. Had this information been known in 2001, the 2001 Los Angeles County MS4 Permit might have included different provisions. The WMP/EWMP approach emphasizes integrated planning for storm water management, flood control, and water supply. The WMP/EWMP plans that will be submitted to the Board, and eventually approved, will be based on new information from modeling and monitoring of the effectiveness of BMPs and other control measures. And, as previously noted, the permittees will have to periodically reevaluate and revise their WMPs/EWMPs based on new information learned through the adaptive management process.

As support for their contention that the federal anti-backsliding requirements apply to RWLs, the petitioners cite to a letter from USEPA Region III to the Maryland Department of the Environment concerning a Phase I MS4 permit. In that letter, USEPA states that allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against backsliding. The specific provisions referenced by USEPA Region III, however, did not concern RWLs or compliance with water quality standards. In fact, USEPA Region III recently adopted a Phase I MS4 permit for the District of Columbia that specifically provided additional time for MS4 permittees to comply with water quality standards.<sup>173</sup> Part 1.4.1. of that permit requires the District of Columbia to “[e]ffectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS).”<sup>174</sup> Part 1.4.2. requires the District of Columbia to “[a]ttain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body...”<sup>175</sup> Part 1.4. further states that “[c]ompliance with the provisions contained in Parts 2 through 8 of this permit, including milestones and final dates for attainment of applicable WLAs, shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.”<sup>176</sup> Parts 2 through 8 of that permit establish a variety of control measures and BMPs that the District of Columbia shall comply with. In its Fact Sheet, USEPA Region III provided the following rationale for this language<sup>177</sup>:

Today’s Final Permit is premised upon EPA’s longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance. *See generally*, “National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges,” 55 F.R. 47990 (Nov. 16, 1990).

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<sup>173</sup> See NPDES Permit No. DC0000221. USEPA Region III adopted the District of Columbia MS4 permit on September 30, 2011. The September 30, 2011 version of this permit and its corresponding Fact Sheet is in the Los Angeles Water Board’s administrative record for this matter. As a result of an appeal of the permit, USEPA made limited modifications to the permit on November 9, 2012, including minor language changes to Part 1.4. The language quoted is the language of the existing permit, with the modifications. The Los Angeles Water Board is requesting that the State Water Board take official notice of the November 9, 2012 final version of the District of Columbia permit.

<sup>174</sup> See Request for Official Notice, October 15, 2013, Exhibit A, NPDES Permit No. DC0000221, as modified on November 9, 2012. Note that this language did not change between September 30, 2011 and November 9, 2012.

<sup>175</sup> *Ibid.* Note that this language did not change between September 30, 2011 and November 9, 2012.

<sup>176</sup> *Ibid.* Note that this the language as it exists today. The language had been slightly modified between September 30, 2011 and November 9, 2012. However, the existing language still provides that compliance with certain provisions constitutes adequate progress toward compliance with water quality standards.

<sup>177</sup> Fact Sheet for District of Columbia MS4 Permit, pp. 5-6. (RB-AR53390 - 53427).

EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles. Rather the attainment of applicable water quality standards as an incremental process is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, which requires an MS4 permit “to reduce the discharge of pollutants to the maximum extent practicable” (MEP) “and such other provisions” deemed appropriate to control pollutants in municipal stormwater discharges. To be clear, the goal of EPA’s stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District’s MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase stringency until such time as standards are met in all receiving waters. Therefore today’s Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that “compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term” (Section 1.4).

Some commenters on the District of Columbia permit also raised the issue of anti-backsliding to USEPA. Specifically, USEPA noted that commenters stated that “by not including language requiring the District [of Columbia] to meet water quality standards, the Permit is backsliding from inferred requirements to do so included in the 2004 Permit.”<sup>178</sup> USEPA responded that the final permit for the District of Columbia “does require standards attainment” and that “[i]f the District does not comply with [Part 1.4], it would be in violation of the Permit.”<sup>179</sup> However, USEPA also acknowledged that “such standards attainment may not occur in its entirety during this Permit cycle.”<sup>180</sup> Further, USEPA stated that: “As to the suggestion that the previous Permit was more stringent by requiring standards attainment during the Permit cycle, and therefore the current Permit is backsliding, EPA contends that the requirements have not changed. Both the 2004 Permit and current reissuance require incremental standards attainment. Therefore, backsliding has not occurred since the current Permit is no less stringent than the prior one.”<sup>181</sup> Like the MS4 permit for the District of Columbia, the Los Angeles County MS4 Permit also requires compliance with water quality standards, but recognizes that actual attainment of water quality standards may not occur during the term of the Permit.

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<sup>178</sup> See Request for Official Notice, October 15, 2013, Exhibit B, USEPA Responsiveness Summary for NPDES Permit No. DC0000221, p. 110.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Id.*, p. 111.

<sup>181</sup> *Ibid.*

For the reasons above, the WMP/EWMP provisions do not violate federal anti-backsliding requirements.

### **3. Contention: The WMP/EWMP’s “safe harbor” provisions violate state and federal anti-degradation requirements**

(Petitioner (m))

The petitioners assert that the WMP/EWMP provisions violate the federal and state anti-degradation policies found at 40 C.F.R. section 131.12 and in State Water Board Resolution No. 68-16, respectively. The Los Angeles Water Board disagrees.

Petitioners raise both a procedural and a substantive objection. First, Petitioners claim that the Board did not conduct appropriate analyses of the WMP/EWMP provisions as required by the antidegradation policies. But the Board’s conclusion that the provisions will protect and *enhance* water quality (i.e., will not lead to degradation), and therefore do not require additional analysis, is supported by the weight of the evidence in the record. Second, Petitioners allege that the WMP/EWMP provisions allow the continuation of a permit regime that degrades receiving water quality. To assert that the WMP/EWMP provisions allow ongoing degradation of receiving waters is to disregard the Permit’s overall structure—the provisions temporarily allow alternate methods of compliance with the Permit’s numeric RWLs pending approval and implementation of the WMP/EWMP. Permittees that opt to comply with the Permit through a WMP/EWMP must meet stringent requirements. The permittee must submit an approvable WMP/EWMP to the Board that provides assurances that the proposed program will enhance water quality and meet all applicable RWLs by a date certain.<sup>182</sup> Prior to approval of the WMP/EWMP, the permittee must continue to implement its existing storm water management program and target control measures to address discharges that cause exceedances of RWLs. And finally, the permittee must successfully implement its approved WMP/EWMP within the required time frame.

#### **i. The state and federal antidegradation policies require impaired waters to meet water quality standards and prohibit degradation of waters that exceed the standards.**

The federal and state antidegradation policies impose alternate levels of protection for receiving waters depending on the baseline quality of the water. The baseline quality is the best quality of the receiving water since 1968, the year of adoption of California’s antidegradation policy, unless a lower level of water quality is due to regulatory action that was itself consistent with the antidegradation policies. In that situation, the lower permitted water quality is the baseline. Here, the baseline quality of the receiving waters is the best quality since 1968 unless a current lower quality is due to activities in compliance with the 2001 Los Angeles County MS4 permit.

If the baseline quality of the receiving water is equal to or less than applicable water quality standards, the receiving water is considered “Tier I.” Water quality must be maintained or improved to meet the standard. A permit for waste discharge must include terms and conditions that ensure that the discharge will not cause or contribute to the continuing exceedance of water quality standards. If the baseline quality of a receiving water is higher than applicable water

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<sup>182</sup> Based on research and evidence, the Board has concluded that retention of the storm water volume associated with the 85<sup>th</sup> percentile, 24-hour event within a drainage area along with targeted implementations of permittees’ SWMPs will ensure that MS4 discharges do not cause or contribute to exceedances of RWLs.

quality standards, the receiving water is “high quality” or “Tier II.” The baseline quality of Tier II receiving waters must be maintained, unless lowering the water quality is consistent with maximum benefit to the people of the State and is necessary to accommodate important economic or social development.<sup>183</sup>

**ii. The Los Angeles Water Board conducted an appropriate analysis of the Permit to determine that its terms complied with the antidegradation policies.**

The Los Angeles Water Board appropriately considered whether the WMP/EWMP provisions of the Permit comply with the antidegradation policies. Guidance from the State Water Board requires regional boards to identify high quality waters and degradation based on individual pollutants and particular beneficial uses.<sup>184</sup> But the Board is not always required to adopt exhaustive findings for every pollutant and beneficial use in each waterbody. “A Regional Board may determine that it is not necessary to do a complete antidegradation analysis. The Regional Board may reach this determination if, using its best professional judgment and all available pertinent information, the Regional Board decides that the discharge will not be adverse to the intent and purpose of the State and federal antidegradation policies.”<sup>185</sup>

Here, the Board considered the quality of the receiving waters in Los Angeles County; the likelihood that the WMP/EWMP provisions will prevent additional impacts to receiving waters; and other provisions in the Permit that protect receiving water quality. Based on these factors, the Board determined that the Permit will prevent any degradation of receiving waters and therefore that further analysis under the antidegradation policies is not warranted. The Board appropriately considered the Permit as a whole when assessing the expected impact on water quality, rather than considering individual provisions in isolation. The Board’s findings are procedurally sufficient to satisfy the state and federal policies and are based on the weight of the evidence found in the administrative record.

**iii. The WMPs control MS4 discharges to prevent them from causing or contributing to exceedances of RWLs.**

The terms in the Permit referenced by the Petitioners as “safe harbor” provisions allow permittees to implement permit requirements on a watershed scale through cooperative programs with co-permittees. To select this option, permittees must submit a proposal for a WMP/EWMP for approval by the Board. During the program development process and after approval, permittees may remain in compliance with the Permit’s RWLs by meeting the deadlines in their WMP/EWMP. These deadlines include waterbody-pollutant specific compliance schedules that must be consistent with Board-adopted TMDL implementation schedules. For waterbody-pollutant combinations not addressed by a TMDL, permittees may

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<sup>183</sup> State Water Board Resolution No. 68-16, also requires a discharge to high quality waters to use “best practicable treatment or control ... necessary to assure that (a) a pollution or nuisance will not occur, and (b) the highest water quality consistent with maximum benefit of the people of the state will be maintained.” The Board made findings based on the weight of the evidence in the record that these requirements were also satisfied. These findings are documented in Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-19 to F-20. The petitioners did not challenge satisfaction of these elements of Resolution 68-16 in their petition to the State Water Board.

<sup>184</sup> See State Water Resources Control Board, Questions and Answers, Resolution No. 68-16, p. 4 (Feb. 16, 1995); see also State Water Board Order WQ 91-10.

<sup>185</sup> See Request for Official Notice, October 15, 2013, Exhibit C, State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004, at 2.



propose an appropriate compliance schedule that is as short as possible, ultimately leading to compliance with RWLs. The WMP/EWMP must include a reasonable assurance analysis for the water body-pollutant combinations addressed in the program, to demonstrate that the program will adequately control MS4 discharges and prevent them from causing or contributing to an exceedance of RWLs.

Petitioners object that the WMP/EWMP provisions exempt permittees from compliance with RWLs and thereby allow water quality to degrade. First, the Board notes that the potential for degradation is not assessed based on individual permit provisions, but on the impact to receiving waters from the permit as a whole. The WMP/EWMP provisions must be considered in the context of the many other terms and conditions in the Permit. Second, the WMP/EWMPs do not exempt or excuse permittees from complying with RWLs. As described above, the WMP/EWMP provisions create a mechanism for permittees to comply with the RWLs provisions with a higher likelihood of success over a shorter period of time. The WMP/EWMP provisions require permittees to meet stringent requirements and specific deadlines, and develop and implement a plan demonstrated to result in sustainable improvements to water quality.<sup>186</sup> The provisions also provide permittees requisite time to develop programs necessary to satisfy the RWLs provisions. But during program development, permittees must maintain the control measures in their existing storm water management plans and TMDL implementation plans, and comply with other Permit terms.<sup>187</sup> When considered in this context, the WMP/EWMP provisions do not lower the bar for compliance. They provide options for compliance. There is ample evidence in the record to support the Board's determination that these options enhance the likelihood that water quality standards will ultimately be achieved.<sup>188</sup>

Petitioners compare the WMP/EWMP provisions to the permit terms at issue in *Asociacion de Gente Unida por el Agua v. Central Valley*. There, the court held that the regional board's antidegradation analysis was inadequate because, "[t]o the extent that the Order allows historic practices to continue without change, degradation will continue."<sup>189</sup> In distinct contrast, this Permit does not allow permittees' historical practices to continue where those practices are inadequate to protect water quality. Either the permittee must implement a WMP/EWMP that is demonstrated to achieve water quality standards, or the permittee must meet stringent RWLs. In neither instance does the Permit allow a continuation of a status quo that fails to meet applicable standards.

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<sup>186</sup> Transcript of Proceedings on November 8, 2012, pp. 56-57 (RB-AR 21245 - 21246).

<sup>187</sup> Specifically, permittees must: (1) 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 C.F.R. section 122.26(d)(2)(iv); (2) 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 Clean Water Act section 402(p)(3)(B)(ii); and (3) implement watershed control measures, where possible from existing TMDL implementation plans, to ensure that MS4 discharges achieves compliance with interim and final trash WQBELs and all other final WQBELs and RWLs pursuant to Part VI.E. and set forth in Attachments L through R of the Permit by the applicable compliance deadlines occurring prior to approval of a WMP/EWMP. Los Angeles Water Board Order No. R4-2012-0175, Part VI.C.4.d., pp. 57-58. See also, Transcript of Proceedings on November 8, 2012, p. 318 (RB-AR21507).

<sup>188</sup> "[S]taff has concluded ... that [the Watershed Management Programs] would provide an effective approach for addressing MS4 contributions to exceedances of receiving water limitations in a proactive and robust manner..." Transcript of Proceedings on November 8, 2012, p. 61 (RB-AR21250).

<sup>189</sup> (2012) 210 Cal.App.4th 1255, 1273.

The Board has the discretion to grant the permittees time to comply with RWLs. The cooperative watershed-based approach, and temporary alternatives for compliance, allows permittees to focus their resources on developing an effective program.<sup>190</sup> Neither the Clean Water Act nor the antidegradation policies demand storm water permitting to produce immediate compliance. As stated by USEPA, “the goal of EPA’s stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.”<sup>191</sup> Affording permittees a reasonable time to plan and implement controls is a necessity, particularly in waterbodies that have consistently fallen short of water quality standards. A start-up period for planning, while maintaining the existing storm water management programs and TMDL implementations plans, does not run afoul of the antidegradation policies.

**iv. The Permit’s terms will not allow degradation of high quality waters.**

The Board’s conclusion that the terms and conditions of the Permit will prevent degradation of existing high quality waters has four major supports.

First, the receiving waters of the discharges regulated by the Permit have long been heavily impacted by storm water, and most of these waterbodies are impaired for multiple constituents.<sup>192</sup> The receiving waters are not “high quality.” To the extent that data is available from 1968, there were few high quality receiving waters in Los Angeles County even at that time.<sup>193</sup>

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<sup>190</sup> “The Watershed Management Programs will provide permittees with the flexibility to customize some of the core permit requirements within the stormwater management program where appropriate and also sequence their implementation actions to reduce pollutants in MS4 discharges in the most cost-effective manner, to achieve water quality based effluent limitations consistent with the compliance schedules, and also address exceedances of receiving water limitations that are not addressed by a TMDL.” Transcript of Proceedings on November 8, 2012, p. 53 (RB-AR21242), p. 59 (RB-AR212480), and pp. 84-85, (RB-AR21273 - 21274).

<sup>191</sup> Fact Sheet, NPDES Permit No. DC0000221 (RB-AR53394).

<sup>192</sup> Impaired waterbodies are listed on the 1998 and 2010 Clean Water Act section 303(d) List approved by USEPA. (RB-AR35684 - 35785) “Despite years of stormwater program implementation, many, if not most, of the waterbodies of Los Angeles County have been listed as impaired.” Transcript of Proceedings on October 4-5, 2012, p. 32 (RB-AR18328).

<sup>193</sup> See e.g., Water Resources Control Board, State of California, Toxic Substances Monitoring Program, Ten Year Summary Report 1978-1987 (August 1990) (Administrative Record, Order No. 01-082, R0044666 - 44669); The Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indicator Organisms and Human Enteric Viruses from Two Santa Monica Storm Drains (June 1990) (Administrative Record, Order No. 01-082, R0047130 - 47174); Santa Monica Bay Restoration Project, Pathogens and Indicators in Storm Drains Within the Santa Monica Bay Watershed (June 1992) (Administrative Record, Order No. 01-082, R0047688 - 47748); Santa Monica Bay Restoration Project, Storm Drains as a Source of Surf Zone Bacterial Indicators and Human Enteric Viruses to Santa Monica Bay (August 1991) (Administrative Record, Order No. 01-082, R004779 - 47780); James M. Danza, Water Quality and Beneficial Use Investigation of the Los Angeles River: Prospects for Restored Beneficial Use (1994) (Administrative Record, Order No. 01-082, R0048073 - 48204); Southern California Coastal Water Research Project, Annual Report (1987) (Administrative Record, Order No. 01-082, R0048205 - 48304); National Research Council, Monitoring Southern California’s Coastal Waters (1990) (Administrative Record, Order No. 01-082, R0048306 - 48473); Southern California Coastal Water Research Project, Annual Report (1988-89) (Administrative Record, Order No. 01-082, R0048476 - 48482); City of Los Angeles, Wastewater Program Management Division, Santa Monica Bay Stormwater Pollutant Reduction Study (December 1987) (Administrative Record, Order No. 01-082, R0048485 - 48561); Santa Monica Bay Restoration Project, Santa Monica Bay Characterization Study Chapter 7, Urban Runoff (1993) (Administrative Record, Order No. 01-082, R0048714 - 48733); To California Regional Water Quality Control Board, Stormwater Runoff in Los Angeles and Ventura Counties (June 1988) (Administrative Record, Order No. 01-082, R0050795 - 50888); Heal the Bay’s State of the Marina Report, Marina del Rey (July 9, 1993) (Administrative Record, Order No. 01-082, R0050999 - 0051022); County of Los Angeles, Department of Beaches and Harbors, The Marine Environment of Marina del Rey (October 1991 – June 1992) (Administrative Record, Order No. 01-082,

Second, and as discussed in Section G.2. (anti-backsliding) above, the terms of this Permit are at least as stringent, and in most respects more stringent, than those of the prior permit. “[T]he [Permit] does not authorize any new practices that would increase the amount of pollutant loading from the MS4 and it continues to require implementation of control measures to the maximum extent practicable as required by federal law.”<sup>194</sup> Given factors one and two, degradation of high quality waters could only occur under this Permit where baseline water quality is higher than both the water quality standards and the levels achieved under the 2001 Los Angeles County MS4 permit. Because the baseline water quality in most instances is at the level of control achieved under the prior permit, there is simply no application of the policies’ protection of high quality waters.

Even so, a third reason that degradation is unlikely to occur is because measures that control impacts from storm water discharges are typically effective across multiple pollutants. For example, retention basins and low-impact development controls avert storm water from reaching the receiving water at all—preventing degradation to the receiving water from all types of constituents. Though the WMP/EWMPs may be primarily designed to achieve water quality standards for those constituents for which the receiving water is impaired, the programs will likely result in similar improvements in levels of other pollutants, even those for which the receiving water may be “high quality.”

Lastly, and as a final backstop against degradation, the Permit includes an extensive monitoring program and reopener provisions to identify changes in water quality and to allow amendment of the Permit as necessary to add preventative provisions if a threat of degradation is suspected. The monitoring program required by this Permit distinguishes it from the permit at issue in *Asociacion de Gente Unida por el Agua v. Central Valley*.<sup>195</sup> There, the court found that the antidegradation policy applied to and was not met by the permit because, among other issues, “the monitoring requirements of the Order are inadequate to detect groundwater degradation, much less prevent it.”<sup>196</sup> Here, the monitoring requirements are sufficient to identify changes in water quality so that a solution may be implemented.

The possibility that high quality waters would be degraded because of this Permit is remote. In such a situation, the Board is not required to conduct a detailed antidegradation analysis. There simply is no reasonable likelihood that the Permit is not consistent with the purpose and intent of the policies.

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R0051023 - 51344); Prepared for American Oceans Campaign, Chemical Contaminant Release into the Santa Monica Bay, A Pilot Study (June 12, 1993) (Administrative Record, Order No. 01-082, R0051345 - 51557; Report to the Department of Beaches and Harbors, County of Los Angeles, The Marine Environment of Marina del Rey, October 1989 to September 1990 (March 1991) (Administrative Record, Order No. 01-082, R0052394 - 52721).

<sup>194</sup> Transcript of Proceedings on November 8, 2012, p. 63 (RB-AR21252).

<sup>195</sup> (2012) 210 Cal.App.4th 1255.

<sup>196</sup> *Id.* at 1273.

**4. Contention: The decision to adopt the Permit, including its safe harbor provisions, is not supported by the findings or the evidence in the administrative record**  
(Petitioner (m))

The Los Angeles Water Board disagrees. The Permit is fully supported by the findings of the Permit, the text of the Permit itself, and the evidence in the administrative record.

The petitioners first assert that there is a lack of findings and evidentiary support in the record for the Board's determination that the Permit does not violate federal anti-backsliding requirements. The Board explicitly addressed the federal anti-backsliding requirements in the Permit,<sup>197</sup> in the Fact Sheet to the Permit,<sup>198</sup> in written responses to comments,<sup>199</sup> and during the hearing on the Permit.<sup>200</sup> The Board determined that no backsliding had occurred since all effluent limitations from the 2001 permit were carried over to the 2012 Permit. The 2012 Permit includes the same discharge prohibitions (Part III) as the previous permit. The only numeric effluent limitations contained in the 2001 permit, as amended in 2009, were those implementing the Los Angeles River Trash TMDL; these trash effluent limitations were carried over without alteration into the 2012 Permit. In addition, as discussed above, to the extent that the anti-backsliding provisions apply to RWLs; provisions that prohibit MS4 discharges from causing or contributing to violations of water quality standards or a condition of nuisance remain in their entirety in the 2012 Permit.<sup>201</sup> Additionally, the permit condition that requires permittees to undertake a process to address RWL exceedances remains – both as a part of Part V.A and as a part of the WMP/EWMP provisions. In fact, the WMP provisions add greater rigor regarding timing, by requiring that water quality impairments be addressed as soon as possible; whereas no parameters on the timeframe were provided in the 2001 Permit. Further, the WMP provisions state that if the MS4 discharges that are causing the water quality impairment cannot be addressed within the 5-year permit term, then permittees must initiate development of a TMDL.<sup>202</sup>

In fact, the requirements of the 2012 Permit as a whole are more stringent than the 2001 permit. In addition to the numerous new WQBELs added to the 2012 Permit to implement the provisions of 33 TMDLs,<sup>203</sup> the minimum control measures that comprise the baseline "stormwater management program" in Part VI.D of the Permit are also as stringent and, in some cases, more stringent than those in the 2001 Permit. The Planning and Land Development provisions require retention of the storm volume associated with the 85<sup>th</sup> percentile, 24-hour event or  $\frac{3}{4}$  inch, *whichever is greater*; whereas, the 2001 permit only required treatment of the first  $\frac{3}{4}$  inch of storm water. If retention is not feasible, biofiltration of  $1\frac{1}{2}$  times this volume is required or treatment of the required volume with additional off-site mitigation; this was not required in the 2001 permit. In the 2012 Permit, the scope of the Development Construction Program is expanded to require more frequent inspection of construction sites and more

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<sup>197</sup> Order No. R4-2012-0175, p. 25.

<sup>198</sup> Attachment F (Fact Sheet) to Order No. R4-2012-0175, p. F-20.

<sup>199</sup> Responses to Comments on the Tentative Order – Receiving Water Limitations Matrix, pp. B-10 to B-13 (RB-AR19596 - 19599).

<sup>200</sup> Transcript of Proceedings on November 8, 2012, pp. 312-319 (RB-AR21501 - 21508).

<sup>201</sup> See Order No. R4-2012-0175, Part V.A.

<sup>202</sup> See Order No. R4-2012-0175, Part VI.C.2.a.ii.(5)(b).

<sup>203</sup> *Id.*, Part IV.A.2.

rigorous BMPs for sites greater than one acre. In the Public Agency Activities provisions in the 2012 Permit, in areas that are not subject to a trash TMDL, each permittee must install trash excluders, or equivalent devices, on or in catch basins or outfalls to prevent the discharge of trash to the MS4 or receiving water no later than four years after the effective date in areas defined as Priority A; whereas in the 2001 permit, these trash controls were not required.<sup>204</sup> Additionally, more specific BMPs are required for “conditionally exempt” non-storm water discharges in Part III.A. of the Permit. Overall, the MEP technology standard remains in the Permit and its evolution as a result of technological advancements is reflected in new or more stringent requirements in the storm water management program minimum control measures, as described above.<sup>205</sup>

The petitioners also assert that there is a lack of findings and evidentiary support in the record for the compliance demonstration provisions associated with retention of the volume associated with the 85<sup>th</sup> percentile, 24-hour event under the EWMP approach. The Board disagrees.

The decision of the Los Angeles Water Board to allow permittees to implement regional multi-benefit storm water retention projects, sized to capture the 85<sup>th</sup> percentile, 24-hour storm for contributing drainage areas, as a means of demonstrating compliance with TMDL permit provisions is supported by the weight of evidence in the administrative record. There is significant history associated with the development of a design storm. A design storm is a storm of specific size, intensity, and/or duration that can be used to design storm water controls to achieve desired water quality outcomes. Work to determine an appropriate water quality design storm began over seven years ago as a result of the Los Angeles Water Board’s 2005-2007 triennial review process.

The Los Angeles Water Board contracted with the Southern California Coastal Water Research Project (SCCWRP) using TMDL contract funds to develop potential design storm criteria and evaluate these concepts and study findings with the project steering committee. The Los Angeles Water Board, SCCWRP, and the project steering committee met eight times over a period of two years. The initial phase of the design storm project resulted in a conceptual framework and pilot modeling application. The results of the initial phase were presented to the Los Angeles Water Board at its regularly scheduled meeting in December 2007, and were also presented to SCCWRP Commission’s Technical Advisory Group (CTAG). Key findings of this phase of the project indicated that if bioretention basins were sized to capture a rainfall volume of ¾ inch for the catchment area (i.e., the 85<sup>th</sup> percentile, 24-hour event applicable to the central portion of Los Angeles County), less than 5% of storm events would exceed the dissolved copper criterion and 94% of the annual pollutant load would be removed. In the final technical report for the initial phase of the design storm project, SCCWRP recommended that the pilot modeling application be expanded to incorporate other water quality constituents, land uses, and watersheds. This first phase of the project is documented in the administrative record.<sup>206</sup>

Following completion of the initial phase, the Los Angeles County Department of Public Works (County) expressed interest in continuing to expand the project based on the recommendations in the concept development report prepared by SCCWRP. Staff from the Los Angeles Water Board and USEPA participated in a technical advisory committee to provide input to the County as they developed their Watershed Management Modeling System (WMMS), effectively

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<sup>204</sup> *Id.*, Part VI.D.9.h.iii.(1).

<sup>205</sup> *Id.*, Part IV.A.1.

<sup>206</sup> See Section 10.VI.C, RB-AR29312 - 29328, 29487 - 29502, and 30036 - 30141.

expanding the evaluation of the design storm criteria to other water quality constituents, land uses, and watersheds. The County met with Board staff and management multiple times during the development of the WMMS and ultimately presented an overview of the WMMS to the Board at its regularly scheduled meeting in May 2010. Documentation on the County's development of the WMMS is included in the administrative record.<sup>207</sup>

Additionally, Geosyntec Consultants, on behalf of various clients within and outside of California, and the California Department of Transportation have evaluated design storm criteria for storm water controls and have proposed similar design storm thresholds, which were considered by Los Angeles Water Board staff during the initial phase of the design storm project. Presentations by Geosyntec Consultants and the California Department of Transportation are included in the administrative record.<sup>208</sup>

In the summer of 2012, during permit development, the County proposed the concept of an EWMP to Los Angeles Water Board staff. The key objective of an EWMP would be to maximize retention of the storm water runoff associated with the 85<sup>th</sup> percentile, 24-hour storm event. In light of this proposal, the Board considered region-specific studies evaluating storm water recharge feasibility, including The Green Solution Project developed by Community Conservancy International and the Stormwater Recharge Feasibility and Pilot Project Development Study prepared by the Council of Watershed Health, Geosyntec Consultants, and the Santa Monica Bay Restoration Project, to assess the feasibility and opportunities to capture the storm water volume associated with the design storm in drainage areas throughout the region. These region-specific studies are included in the administrative record.<sup>209</sup>

The EWMP proposal (i.e. the concept for permit compliance and the water quality and other environmental benefits of retaining the volume of storm water associated with the 85<sup>th</sup> percentile, 24-hour storm event) was presented to, and endorsed by, several permittees and environmental organizations, including the LA Permit Group, City of Los Angeles, Heal the Bay, LA Waterkeeper, NRDC, and Lawyers for Clean Water. The EWMP proposal was further refined in a collaborative set of meetings and conference calls in October 2012 among the Los Angeles Water Board staff, Los Angeles County, City of Los Angeles, and environmental organizations. This refinement included providing: (1) a consensus based definition of an EWMP, found in Part VI.C.1.g of the Permit, including the 85<sup>th</sup> percentile, 24-hour storm event design criterion for regional storm water retention projects, as well as (2) parameters for modeling the effectiveness of watershed control measures in achieving specific water quality outcomes. A key meeting was held on October 17, 2012 via conference call to discuss the County's WMMS and, specifically, the proposal to require to the maximum extent feasible retention of the storm water volume associated with the 85<sup>th</sup> percentile, 24-hour storm event within a drainage area. Dr. Richard Horner, a modeling expert retained by the environmental organizations to assist in providing input on the tentative permit, was a key participant in this meeting and endorsed this retention-based approach to storm water management. Documentation of this conference call is in the administrative record.<sup>210</sup>

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<sup>207</sup> See Section 10.VI.C, RB-AR30548 - 30569 and 30695 - 32210.

<sup>208</sup> See Section 10.VI.C, RB-AR29329 - 29367 and 30570 - 30658.

<sup>209</sup> See Section 10.VI.C, RB-AR29180 - 29248, 29263 - 29311, and 32360 - 32593.

<sup>210</sup> See Section 3, RB-AR3516 - 3530.

The County presented details regarding the EWMP concept to the Los Angeles Water Board for its consideration during the first day of the public hearing on the Tentative Order in October 2012, and again in November 2012 on the last day of the hearing. The County's presentations, as well as a transcript of the presentations, are in the administrative record.<sup>211</sup>

Additionally, as discussed in the Board's other responses, in drainage areas addressed by retention of this design storm volume, permittees will still be required to implement the other elements of their storm water management program. Additionally, the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed modifications to the approach.

**5. Contention: The WMP requirements within the Permit lack definition and thus must be revised to provide additional specificity on the contents of such programs**  
(Petitioner (k))

The Los Angeles Water Board disagrees. Far from lacking specificity, the Permit includes approximately eight pages of provisions (Parts VI.C.5 and VI.C.7, in particular) that enumerate the required contents and program elements of an acceptable WMP. Part VI.C.5.a enumerates requirements regarding water quality characterization, water body-pollutant classification, source assessment, and prioritization. Specific categories are defined for classifying water bodies (Part VI.C.5.a.ii); specific data sources and mapping are itemized for conducting the source assessment (Part VI.C.5.a.iii); and specific parameters and dates are identified for prioritizing water body-pollutant combinations (Part VI.C.5.a.iv). Part VI.C.5.b establishes requirements for evaluating and selecting watershed control measures to address the priorities identified in Part VI.C.5.a, and also specifies which other provisions of the Permit are to be incorporated in the WMP, including the Minimum Control Measures set forth in Parts VI.D.4 to VI.D.10; provisions addressing non-storm water discharges consistent with Parts III.A and VI.D.10; and watershed control measures from TMDL implementation plans (Part VI.C.5.b.iv). Part VI.C.5.b.iv(5) sets forth the requirements regarding the technical evaluation of the proposed watershed control measures (i.e., the reasonable assurance analysis). Part VI.C.5.c establishes requirements for schedules of implementation and associated milestones. Finally, Part VI.C.7 sets forth requirements for monitoring as part of a WMP, which are further specified in the Monitoring and Reporting Program of the Permit. These provisions far exceed the specificity of previous permits, while at the same time providing new opportunities for permittees to customize their WMP to address the water quality priorities specific to their watershed or subwatershed area.

Further, it should be noted that nothing in Board member Munoz' comments, quoted in part by the petitioner, suggest that the WMP provisions lack specificity. Ms. Munoz was simply encouraging a sharing of ideas and experience by those who have previously developed similar programs. In response to Ms. Munoz' statements, Board staff stated that they would reach out to smaller permittee cities and help them understand the WMP and the benefits in getting involved in a larger collaborative WMP.<sup>212</sup>

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<sup>211</sup> See Section 7, RB-AR18164 - 18202, 18297 - 18908, 21109 - 21127, and 21190 - 21603.

<sup>212</sup> See Transcript of Proceedings on November 8, 2012, pp. 351-353 (RB- AR21540 - 21542).

Lastly, the Permit establishes a technical advisory committee (TAC) specifically related to the WMPs. The TAC, at a minimum, consists of representatives from permittees, USEPA, environmental non-governmental organizations, and the Los Angeles Water Board. The TAC is tasked with overseeing the development of the WMPs to ensure that the programs, prior to approval by the Board, meet the requirements of the Permit. As such, Board staff will be providing considerable guidance to permittees who chose to develop a WMP.

**6. Contention: The adaptive management process does not comply with the iterative process required of State Water Board orders**  
(Petitioners (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

Federal regulations at 40 C.F.R. section 122.26(d)(2)(iv) requires MS4 permittees to have a management program that includes a continuing planning process. Additionally, the MEP technology standard applied to storm water pursuant to Clean Water Act section 402(p)(3)(B)(iii) has been described as an “ever evolving” standard; adaptive management is therefore necessary to achieve the MEP standard.

The adaptive management process outlined in Part VI.C.7 of the Permit is similar to the iterative process in Part V.A.3. In the case of water body-pollutant combinations addressed by a TMDL, the adaptive management process is directed and governed by any interim WQBELs and associated compliance schedules. For water body-pollutant combinations not addressed by a TMDL, the Permit allows permittees to develop and implement a WMP to address RWLs not otherwise addressed by a TMDL. The WMP must include, at the outset, a reasonable assurance analysis for the water body-pollutant combination(s) addressed by the program that demonstrates that the watershed control measures proposed in the program will be sufficient to control MS4 discharges such that they do not cause or contribute to an exceedance of the applicable receiving water limitation(s). Where exceedances of RWLs are newly identified after approval of a WMP, permittees are required to address these during the adaptive management process by evaluating the sources of the exceedances, identifying watershed control measures to address MS4 contributions of the pollutant to receiving waters, conduct a reasonable assurance Analysis to ensure that the watershed control measures will be sufficient to control the discharge of the pollutant, and identify requirements and milestones and dates for their achievement that will result in compliance with RWLs as soon as possible.

A permittee’s full compliance with all requirements and dates for their achievement in an approved WMP will constitute compliance with the RWLs in Part V.A. of the Permit addressed by the WMP, including the “iterative process” in Part V.A.3. Additionally, Part VI.C.7.a.ii.(1) states that the WMP adaptive management process fulfills the requirements in Part V.A.4 to address continuing exceedances of RWLs.

**7. Contention: WMPs and EWMPs are premature and cannot provide an alternative compliance approach**  
(Petitioner (l), (u), (x)-(z), (ff)-(gg), and (kk))

The Los Angeles Water Board disagrees. As an initial matter, the WMP approach is voluntary. Permittees have the option to develop a WMP individually on a jurisdictional basis or collaboratively with other permittees on a broader watershed scale. In addition, it is important to note that the petitioners who raise this contention have all chosen to develop a WMP despite this contention.



The petitioners contend that the WMP approach is unwarranted because none of the MS4s have been characterized. This is incorrect. Though the previous Los Angeles County MS4 permit did not require outfall monitoring, the monitoring included in the previous permit was specifically intended to characterize the impact of MS4 discharges on receiving waters. Previous iterations of the permit have required not only monitoring at mass emissions stations, but also land use, critical source, and tributary monitoring, the results of which served to further characterize the impacts of MS4 discharges on receiving waters. TMDL development has also led to further characterization of the impact of MS4 discharges on receiving waters through multi-year monitoring programs and modeling efforts. The petitioners state that because the MS4s have not been characterized, in their opinion, that the WMP and EWMP should be treated as storm water management program options. In many ways, a WMP is a storm water management program. The Permit clearly specifies that the Minimum Control Measures in Part VI.D.4 to VI.D.10, which formed the standard urban storm water management programs (SUSMPs) of the previous permit, must be incorporated into a permittee's WMP, albeit with the option to customize these measures based on the water quality issues specific to the area covered by the WMP.<sup>213</sup>

**8. Contention: The Permit does not allow sufficient time for Sierra Madre to develop a WMP/EWMP**  
(Petitioner (cc))

The Los Angeles Water Board disagrees. Prior to adoption of the Permit, the Board sought input from permittees and other stakeholders regarding the time provided to develop WMPs and EWMPs. The timeframes provided in the Permit take into account the availability of existing TMDL implementation and monitoring plans in many watersheds, which will form a strong foundation for WMPs/EWMPs, as well as the availability of locally developed and calibrated models that can be used to conduct the required reasonable assurance analysis. In the case of an EWMP, the timeframe accounts for the greater planning and collaboration that is required by providing an additional 12 months for planning beyond that of a WMP. Given these considerations, the Board determined that 2½ years for program development provided a reasonable balance of planning time with the need to make progress on implementation during the term of the Permit. It should be noted that this timeframe is consistent with that requested by Sierra Madre in its notification of intent to develop an EWMP; Sierra Madre requested 24 months to develop an EWMP.<sup>214</sup>

Sierra Madre contends that inadequate time is provided to submit the notification of intent and to submit the draft WMP/EWMP. Regarding the notification of intent, by the June 28, 2013 deadline, 84 of 86 permittees submitted notifications of intent to develop a WMP or EWMP. Notably, Sierra Madre was among those permittees that provided a timely notification of intent. In fact, Sierra Madre successfully coordinated with seven other permittees on its submittal notifying the Board of the group's commitment to an EWMP. Sierra Madre also expressed concerns that the necessary technical input on the development of the WMPs/EWMPs would not be possible in the timeframe(s) provided. Since Permit adoption, the Board has formed the technical advisory committee and it has scheduled monthly meetings through June 2014. To date, the TAC has met three times and will have met 12 times by June 2014. Additionally, a

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<sup>213</sup> See Order No. R4-2012-0175, Part VI.C.5.b.iv(1).

<sup>214</sup> See Request for Official Notice, October 15, 2013, Exhibit G, Notification of Intent submitted by the Rio Hondo/San Gabriel River Water Quality Group, dated June 27, 2013, which includes the City of Sierra Madre.

subcommittee of the TAC has formed, and, to date, has met once already to provide specific input on the reasonable assurance analysis.

## H. Minimum Control Measures

### 1. Contention: The Permit improperly intrudes on permittees' local land use authority

(Petitioners (a)-(h), (j), (n)-(t), (v)-(x), (aa), (dd), (ee), (hh), (jj), and (kk))

The Los Angeles Water Board disagrees. The Board previously addressed this comment in its written responses to comments.<sup>215</sup> As previously explained, the Permit does not improperly intrude on permittees' local land use authority. The Permit does not impose land use regulations, nor does it restrict or control local land-use decision-making authority. Rather, the Permit requires the permittees to fulfill Clean Water Act requirements and protect water quality in their land use decisions.

Federal law mandates that, at a minimum, permits issued to MS4s require management practices that will reduce pollutants to the maximum extent practicable. The state is required, by law, to select the BMPs to fulfill that mandate.<sup>216</sup> The Permit's Planning and Land Development Program is authorized by federal law. Federal regulations at 40 C.F.R. section 122.26(d)(2)(iv)(A)(2) require that MS4 permittees develop and implement a management program that includes: "A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plans shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed."

As explained in the Fact Sheet, poorly planned new developments and re-development may impact the hydrology of the watershed and the quality of the surface waters.<sup>217</sup> Development without proper controls often results in increased soil compaction, changes in vegetation, and additional impervious surfaces. These conditions may lead to a reduction in groundwater recharge and changes in the flow regime of the surface water drainages. For low impact development (LID) requirements, the Permit establishes criteria for the volume of storm water to be retained onsite as is necessary to meet water quality goals and to preserve pre-development hydrology in natural drainage systems. Ultimately, these requirements are appropriate and necessary to reduce the discharge of pollutants into receiving water.

The substantive regulatory requirements of the Clean Water Act are a valid exercise of the federal government's enumerated powers and authority over navigable waters.<sup>218</sup> "The power to protect navigable waters is part of the commerce power given to Congress by the Constitution,

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<sup>215</sup> Response to Comments on the Tentative Order – Minimum Control Measures Matrix, pp. H-53 to H-55 (Section 8, RB-AR19968 - 19970).

<sup>216</sup> See *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292; *Environmental Defense Center v. USEPA* (9th Cir. 2002) 344 F.3d 832, 855; *Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389.

<sup>217</sup> See generally discussion of the Planning and Land Development Program in Section VI.C.6. of the Fact Sheet, pp. F-63 to F-72.

<sup>218</sup> *NRDC v. USEPA* (9th Cir. 1998) 863 F.2d 1420, 1436.

and this power exists alongside the states' traditional police powers."<sup>219</sup> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."<sup>220</sup> Federal environmental regulation that is a proper exercise of Congress' commerce power does not infringe upon local authority over land use decisions.<sup>221</sup>

In addition, in issuing the Permit, the Board is acting as part of a joint state and federal process to enforce the Clean Water Act. The Clean Water Act requires states either to administer a federally-directed regulatory program or allow federal authorities to administer the program. In 1972, the California Legislature amended the Porter-Cologne Water Quality Control Act to implement the Clean Water Act and assume administrative responsibility for the issuance of NPDES permits. Termed "cooperative federalism," this type of federal-state partnership is an appropriate means for Congress to implement its enumerated authorities in compliance with the Tenth Amendment. By providing the states a choice, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."<sup>222</sup> Rather, the States, "within limits established by federal minimum standards, [] enact and administer their own regulatory programs, structured to meet their own particular needs."<sup>223</sup>

There is also a fundamental distinction between environmental regulation and land use planning. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."<sup>224</sup> The Permit does not mandate particular uses of land but directs that the use, whatever it may be, conform to certain requirements to minimize impacts to surface water. Where the Permit includes detailed requirements, it is to comply with the Clean Water Act and its regulations. USEPA's regulations direct that certain requirements be included in MS4 permits.<sup>225</sup> Federal law mandates that permits issued for MS4s require certain actions that will result in the elimination or reduction of the discharge of pollutants to receiving waters, and the state is required, by federal law, to select the controls necessary to meet this standard.<sup>226</sup>

Local land use planning must also be consistent with general statewide laws.<sup>227</sup> Article 11, section 7, of the California Constitution states that a county or city may not enact laws that conflict with general laws. The Porter-Cologne Water Quality Control Act contains the California Legislature's finding that water quality is a matter of state-wide concern, requiring a statewide

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<sup>219</sup> *United States v. Deaton* (4th Cir. 2003) 332 F.3d 698, 707.

<sup>220</sup> *New York v. United States* (1992) 505 U.S. 144, 156.

<sup>221</sup> See *California Coastal Commission v. Granite Rock* (1987) 480 U.S. 572; see also *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 13-16 (Section 10.II., RB-AR23169 - 23172).

<sup>222</sup> *Hodel v. Virginia Surface Min. and Reclamation Ass'n* (1981) 452 U.S. 264, 288.

<sup>223</sup> *Id.* at 289.

<sup>224</sup> *California Coastal Commission v. Granite Rock* (1987) 480 U.S. 572, 587.

<sup>225</sup> See, e.g., 40 C.F.R. § 122.26(d)(2)(iv).

<sup>226</sup> See *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292, 1308; *City of Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389-90.

<sup>227</sup> *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 1003.

program administered at a regional level.<sup>228</sup> The regional water boards are explicitly granted the authority to issue NPDES permit to implement the Clean Water Act. The Clean Water Act requires that permits include controls to reduce pollutant discharge in areas of new development and significant redevelopment.<sup>229</sup> The mandates in the Permit such as the Planning and Land Development Program requirements result from those express legislative provisions. Local land use authority is therefore preempted to the extent that its exercise conflicts with waste discharge requirements implemented for the protection of water quality pursuant to the Porter-Cologne Water Quality Control Act.

## **2. Contention: CEQA preempts the Permit's Planning and Land Development Program Requirements** (Petitioner (k))

The Los Angeles Water Board disagrees. The Board previously addressed this comment in its written responses to comments.<sup>230</sup>

As an initial matter, the Board notes that an action to adopt an NPDES permit is exempt from the provisions of Chapter 3 of CEQA pursuant to California Water Code section 13389. The California Court of Appeal in *County of Los Angeles v. State Water Resources Control Board* also held that California Water Code section 13389 exempted the Los Angeles Water Board from CEQA's obligations when adopting NPDES permits.<sup>231</sup>

The Planning and Land Development Program requirements in Section VI.D.7. of the Permit are included pursuant to the Board's federal regulatory authority.<sup>232</sup> Any conflicting state laws, including CEQA, are preempted by federal law "where the state law stands as an obstacle of the full purposes and objectives of Congress."<sup>233</sup> Applying CEQA to prevent inclusion of the Planning and Land Development Program in the Permit would stand as an obstacle to the accomplishment of the full purposes and objectives of the Clean Water Act.

Furthermore, the Planning and Land Development Program requirements do not conflict with and are not themselves obstacles to the full purposes and objectives of the Legislature in enacting CEQA. CEQA does not grant substantive regulatory authority to governmental agencies.<sup>234</sup> CEQA also explicitly states that none of its provisions "is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer ...."<sup>235</sup> The language of Public Resources Code section 21003 also demonstrates that the Legislature

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<sup>228</sup> See, e.g., Cal. Wat. Code, § 13000; see also generally *Southern California Edison v. State Water Resources Control Board* (1981) 116 Cal.App.3d 751, 758.

<sup>229</sup> 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

<sup>230</sup> Response to Comments on the Tentative Order – Minimum Control Measures Matrix, pp. E-68 to E-70 (Section 8, RB-AR19791 - 19793).

<sup>231</sup> (2006) 143 Cal.App.4th 985.

<sup>232</sup> See 40 C.F.R. § 122.26(d)(2)(iv)(A).

<sup>233</sup> *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238; see also Cal. Wat. Code, §§ 13370, 13377.

<sup>234</sup> 14 C.C.R. § 15040(b) and (e) ("CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws... [t]he exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws.").

<sup>235</sup> Cal. Pub. Res. Code § 21174.

intended CEQA to establish a minimum environmental review process, not the only process.<sup>236</sup> CEQA is not a bar to additional review that an agency may deem appropriate and that are within the agency's regulatory authority to demand. Given the powers vested in the Los Angeles Water Board to implement water quality control and coordination under the Porter-Cologne Water Quality Control Act, the Board can require additional environmental review consistent with this authority and can specify and require action to ameliorate the impacts of polluted runoff without offending CEQA.<sup>237</sup>

**3. Contention: The Permit imposes onerous inspection requirements on Sierra Madre**  
(Petitioner (cc))

The Los Angeles Water Board disagrees. The Board previously addressed this comment in its written responses to comments,<sup>238</sup> as well as in the Fact Sheet.<sup>239</sup> As previously explained, the legal authority and rationale for the requirements imposed on permittees related to pollutant control from industrial facilities and construction sites is described in the Fact Sheet, Parts VI.C.1.a, VI.C.5, and VI.C.7. In sum, federal regulations at 40 C.F.R. sections 122.26(d)(2)(iv)(A) and 122.26(d)(2)(iv)(C) require that MS4 permittees implement a program to monitor and control pollutants in discharges to the MS4 from industrial and commercial facilities that contribute pollutant loads to the MS4. Federal regulations at 40 C.F.R. section 122.26(d)(2)(iv)(D) also require a description of a program to implement and maintain structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4.

The inspection requirements contained in the Permit are based on the requirements found in the 2001 Los Angeles County MS4 Permit, Order No. 01-182. The inspection requirements in Order No. 01-182 for industrial/commercial facilities, as well as construction sites, were the subject of litigation between several permittees and the Los Angeles Water Board.<sup>240</sup> In that case, the Los Angeles County Superior Court upheld the inspection requirements for industrial/commercial facilities and construction sites in Order No. 01-182. The Court determined that:

The Permit contains reasonable inspection requirements for these types of facilities. [Citation.] The Permit requires each permittee to confirm that operators of these facilities have a current waste discharge identification number and is effectively implementing Best Management Practices (BMPs) in compliance with County and municipal ordinances, Regional Board Resolution 90-08 and the Stormwater Quality Management Plans (SQMPs). [Citation.] Addressing pollution after it has entered the storm sewer system is not working to meet legislative goals. More work is required at the source of pollution, and that is partially the

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<sup>236</sup> See Cal. Pub. Res. Code § 21003(a) ("Local agencies integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.")

<sup>237</sup> See, e.g., Cal. Pub. Resources Code, § 21174; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.

<sup>238</sup> Response to Comments on the Tentative Order – Minimum Control Measures Matrix, pp. E-1 to E-2 (Section 8, RB-AR19724 - 19725).

<sup>239</sup> See generally, Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-58 to F-76.

<sup>240</sup> *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548).

basis on which this Court finds that the Permit's inspection requirements are reasonable, and not onerous and burdensome.<sup>241</sup>

The Permit also provides the opportunity for permittees to prioritize their implementation of the minimum control measures through a WMP, which can assist the Sierra Madre in addressing its cost concerns. For permittees that elect to develop WMPs, between twelve to eighteen months is provided for permittees to submit a draft WMP.

For permittees that do not elect to develop WMP, the Permit extends the time period to commence implementation of new or enhanced measures in Part VI.D. of the Permit from thirty days after the effective date of the Permit to six months after the effective date.

Therefore, the Board disagrees that the Permit imposes onerous inspection requirements on Sierra Madre.

## I. TMDL PROVISIONS

### 1. **Contention: The inclusion of numeric WQBELs exceeds the Clean Water Act's MEP standard and state law and policy**

(Petitioners (a)-(l), (n)-(bb), (dd)-(hh), and (jj)-(kk))

The Los Angeles Water Board disagrees. The Board provided its rationale for including numeric WQBELs in the Fact Sheet to the Permit.<sup>242</sup>

WQBELs are required for point source discharges that have the reasonable potential to cause or contribute to an excursion of water quality standards and technology based effluent limitations or standards are not sufficient to achieve water quality standards. Where a wasteload allocation has been assigned to a discharge in a TMDL, it is concluded that there is reasonable potential for the discharge to cause or contribute to an excursion of water quality standards. Additionally, the Board found that, for waters identified as impaired and for which wasteload allocations have been assigned to MS4 discharges, that technology based effluent limitations or standards, in the form of storm water management programs (SWMPs) required pursuant to 40 C.F.R. section 122.26(d)(2)(iv) have not been sufficient to achieve water quality standards.

The inclusion of numeric effluent limitations is authorized by the Clean Water Act. Clean Water Act section 402(p)(3)(B)(iii) requires permits for discharges from MS4s to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design, and engineering methods, *and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*" (Emphasis added.) This statutory provision authorizes USEPA and state permitting authorities discretion to determine what permit conditions are necessary to control pollutants, including establishing numeric limitations.<sup>243</sup> In its Phase I Storm water 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

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<sup>241</sup> *Id.*, Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, p. 17 (Section 10.II., RB-AR23194).

<sup>242</sup> Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-32 to F-35.

<sup>243</sup> See *Defenders of Wildlife*, 191 F.3d 1159, 1166; *Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (Cal.App. 2004) 124 Cal.App.4th 866, 885-6.

maximum extent practicable, and where necessary water quality-based controls.”<sup>244</sup> WQBELs must be consistent with the assumptions and requirements of available wasteload allocations. WQBELs may be expressed narratively or numerically. Further, it should be noted that the State Water Board has expressed its strong intent that federally mandated TMDLs be given substantive effect in MS4 permits in order to improve the efficacy of MS4 permits. The State Water Board has stated that whether a future MS4 permit requirement appropriately implements a storm water wasteload allocation will need to be decided based on the Regional Water Board’s record supporting either the numeric or non-numeric effluent limitations contained in the permit.<sup>245</sup>

In addition, the inclusion of numeric limits does not cause the Permit to be more stringent than federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. Thus, the inclusion of numeric limits as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP-based requirements to achieve water quality standards. While expressed differently, both types of provisions have the same goal, which are to achieve compliance with water quality standards.

Lastly, to the extent the Board is exercising discretion in including numeric limits, which the Board has deemed appropriate to control pollutants in accordance with federal law, the Board is exercising discretion required and/or authorized by federal law, not state law.<sup>246</sup>

## **2. Contention: The Permit’s numeric WQBELs are infeasible** (Petitioners (a)-(h), (j)-(l), (n)-(hh), and (jj)-(kk))

The Los Angeles Water Board disagrees. The Board provided its rationale for including numeric WQBELs in the Fact Sheet, including the feasibility of such limits.<sup>247</sup>

WQBELs may be expressed narratively or numerically. While the permitting authority has some discretion in establishing permit requirements consistent with the assumptions and requirements of available wasteload allocations, this discretion is constrained in certain ways. 40 C.F.R. section 122.44(k) provides that BMPs may be used as permit requirements in lieu of numeric effluent limitations only when numeric effluent limitations are found to be infeasible. USEPA recommends the use of numeric effluent limitations where feasible in MS4 permits in order to clarify permit requirements and improve accountability during the permit term.<sup>248</sup> While BMPs are central to MS4 permits, permit requirements may only rely upon BMP based limitations in lieu of numeric WQBELs if: (1) there is reasonable assurance that the BMPs will achieve

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<sup>244</sup> See 55 Fed. Reg. 47990, 47994 (Nov. 16, 1990).

<sup>245</sup> See, e.g., State Water Board Order WQ 2009-0008 (*County of Los Angeles*), pp. 10-11. The Board acknowledges that this order was voided by the State Water Board for unrelated reasons. The State Water Board’s findings in the order are nonetheless relevant as indicating the State Water Board’s general views on incorporating TMDLs into MS4 permits.

<sup>246</sup> See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

<sup>247</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-32 to F-35.

<sup>248</sup> USEPA, Memorandum “Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations for storm water sources and NPDES permit requirements based on those WLAs”, Nov. 22, 2002 (Section 10.II., RB-AR23956), and Nov. 12, 2010. (Section 10.II., RB-AR23962).

numeric WQBELs and/or water quality standards, and (2) numeric effluent limitations are infeasible.<sup>249</sup>

The State Water Board has concluded that sole reliance on BMP based permit requirements is not sufficient to ensure the achievement of water quality standards.<sup>250</sup> The Los Angeles Water Board also supports this conclusion, which is evidenced by State established and USEPA established TMDLs in the Los Angeles Region indicating that MS4 discharges are a continuing source of pollutants to the impaired receiving water notwithstanding the implementation by permittees of storm water management programs that have been driven by the federal MEP standard for the last two decades. At the time the Board adopted the Permit, it found that there was insufficient data and information available on the prospective implementation of BMPs throughout the watersheds in Los Angeles County to provide the Board reasonable assurance that the BMPs would be sufficient to achieve the numeric WQBELs and/or water quality standards, with the exception of retention BMPs that capture all non-storm water and the volume of storm water from the 85<sup>th</sup> percentile, 24-hour storm event within a drainage area.<sup>251</sup>

The Los Angeles Water Board concluded that numeric WQBELs are feasible. It is important to note that expectations with regard to the application of numeric WQBELs in MS4 permit requirements have changed as the MS4 program has continued to mature since the early 2000s. This is especially apparent by examining the USEPA's guidance on the inclusion of TMDL wasteload allocations into MS4 permits from 2002 with more recent guidance from 2010; USEPA expresses its position in 2002 as one in which it expects numeric effluent limitations will only be used in rare instances, while in 2010, USEPA states that numeric effluent limitations should be used where feasible to improve the accountability of storm water programs.<sup>252</sup>

While a lack of data may have hampered the development of numeric WQBELs for MS4 discharges in earlier permit terms, in the last decade, 33 TMDLs have been developed for water bodies in Los Angeles County in which wasteload allocations are assigned to MS4 discharges. In each case, part of the development process entailed analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. As a result, the Board found it feasible to use these numeric wasteload allocations to derive numeric WQBELs for MS4 discharges.

Notably, the State Water Board, in Order WQ 2006-0012 (Boeing), has made clear that "infeasibility" refers to "the ability or propriety of establishing" numeric limits, as opposed to the feasibility of compliance. USEPA also testified before the Board during the hearing on October 4-5, 2012 that the feasibility of numeric effluent limitations refers to the ability to calculate the numeric effluent limitations not to the feasibility of compliance with such limitations.<sup>253</sup>

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<sup>249</sup> 40 C.F.R. §§ 122.44(d)(1); 122.44(k)(3); see also State Water Board Order 91-03; Memorandum from Elizabeth Miller Jennings to Bruce Fujimoto, "Municipal Storm Water Permits: Compliance with Water Quality Objectives," Oct. 3, 1995 (Section 10.IV., RB-AR24956).

<sup>250</sup> See State Water Board Order 2001-015 (BIA).

<sup>251</sup> In the case of permittees that opt to develop a WMP, the Permit requires that the WMP includes an analysis to demonstrate that proposed BMPs will achieve interim and final WQBELs, and monitoring and reanalysis of the effectiveness of the BMPs to validate the initial analysis.

<sup>252</sup> USEPA, Memorandum "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations for storm water sources and NPDES permit requirements based on those WLAs", Nov. 22, 2002 (Section 10.II., RB AR23956) and Nov. 12, 2010. (Section 10.II., RB AR23962).

<sup>253</sup> See Mr. John Kemmerer, USEPA, Transcript of Proceedings on October 5, 2012, pp. 233-226 (RB-AR18858 - 18861). "[W]e never talked about the idea of it being feasible to actually achieve the wasteload allocation. You have –



Some of the petitioners rely on the State Water Board's Blue Ribbon Panel as support for their contention that numeric effluent limitations in MS4 permits are infeasible. The petitioners have generally misconstrued the findings of the State Water Board's Blue Ribbon Panel. The Panel focused on concerns about unpredictability of BMP performance, which might suggest that calculating technology based effluent limitations is not feasible but does not impact the Board's ability to calculate WQBELs on the basis of the prevailing water quality standards and available wasteload allocations.

The Panel also raised concerns that "[e]ffluent limit approaches usually focus only on conventional water quality constituents that may not be solely or at all responsible for the receiving water beneficial use impairments in urban receiving waters."<sup>254</sup> However, the numeric WQBELs in the Permit are derived directly from TMDL wasteload allocations that have been developed to address exceedances of water quality standards that have a direct link to beneficial use impairments. The Panel also stated that, "[m]onitoring for enforcement of numeric effluent limits would also be challenging."<sup>255</sup> However, the Permit addresses the challenge of monitoring through a variety of approaches, including representative outfall monitoring (based on subwatersheds and land use), TMDL compliance monitoring per approved compliance monitoring plans, and BMP-based compliance demonstration for interim WQBELs. Finally, it is important to note that the Panel made no conclusions or recommendations with regard to the feasibility of numeric effluent limitations applicable to non-storm water discharges from MS4s, which must be effectively prohibited if they are a source of pollutants.

### **3. Contention: The State Water Board's recently adopted Caltrans MS4 permit is inconsistent with the Permit**

(Petitioners (a)-(h), (j), (l), (n)-(hh), and (jj) – (kk))

The petitioners assert that the recently adopted Caltrans MS4 permit (adopted by the State Water Board) is inconsistent with the Permit. The Board acknowledges that the State Water Board opted not to include numeric WQBELs in the Caltrans MS4 permit. However, the State Water Board did incorporate by reference the wasteload allocations assigned to Caltrans as contained in regional basin plans, including those contained in the Los Angeles Water Board's Basin Plan. These wasteload allocations are numeric. Additionally, 40 C.F.R. section 130.2(h) defines the term "wasteload allocation" and states, "WLAs constitute a type of water quality-based effluent limitation." At the time of adoption, the State Water Board also made it clear that it would reopen the Caltrans permit within one year to include detailed provisions implementing all TMDL wasteload allocations in the State applicable to Caltrans. At that time, the State Water Board may explicitly incorporate numeric WQBELs.

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the use of the term 'feasible; was to say is it feasible to translate the wasteload allocation into a numeric water quality based effluent limit." *Id.*, p. 225 (RB-AR18860).

<sup>254</sup> State Water Panel Recommendations to the California State Water Resources Control Board. The Feasibility of Numeric Effluent limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, June 19, 2006, p. 5 (RB-AR43509).

<sup>255</sup> *Id.*, p. 65 (RB-AR43510).

**4. Contention: The Permit should allow permittees to comply with numeric WQBELs through a BMP-based iterative approach**  
(Petitioners (a)-(h), (j)-(l), (n)-(hh), and (jj)-(kk))

The Permit provides the opportunity for permittees to demonstrate compliance with interim effluent limitations through a BMP based approach (i.e., development and implementation of a WMP), where permittees have provided a reasonable assurance through quantitative analysis that the control measures/BMPs to be implemented will achieve the interim effluent limitations in accordance with the compliance schedules provided in the Permit. The previously adopted TMDL implementation schedules, including the deadlines to achieve interim milestones, support a phased (“iterative”) approach to attaining the final TMDL requirements and allow permittees the flexibility to address multiple TMDLs within the watershed. These implementation schedules typically range from 18 to 25 years for storm water related requirements. It is premature to consider application of this BMP based compliance demonstration option to the final effluent limitations and final RWLs – most of which have deadlines outside the term of the Permit. More data are needed to validate assumptions and model results regarding the linkage among BMP implementation, the quality of MS4 discharges, and receiving water quality to have the necessary assurance that these BMPs will ultimately achieve the final effluent limitations.<sup>256</sup> The Board will evaluate the effectiveness of this BMP-based compliance determination approach in ensuring that interim effluent limitations for storm water are achieved during this Permit term. If this approach is effective, the Permit may be reopened to consider whether it would be appropriate to allow a similar approach for demonstrating compliance with final effluent limitations applicable to storm water. During the term of the Permit, there are very few final compliance deadlines for effluent limitations applicable to storm water, or RWLs applicable during wet weather conditions. Most deadlines during the term of the Permit are for interim effluent limitations applicable to storm water, or for final effluent limitations applicable to non-storm water discharges and final dry weather RWLs. For effluent limitations applicable to non-storm water discharges, a BMP-based approach to compliance demonstration is provided in the sense that a permittee may demonstrate that it has no non-storm water discharge to the receiving water. This may be demonstrated, for example, by providing documentation of the operation and maintenance of a low-flow diversion. This is consistent with the federal Clean Water Act requirement that non-storm water MS4 discharges must be effectively prohibited.

**5. Contention: The Board was required to conduct a reasonable potential analysis using outfall monitoring prior to incorporating numeric WQBELs in the Permit**  
(Petitioners (a)-(h), (j), (l), (n)-(bb), (dd)-(hh), and (jj)-(kk))

The Los Angeles Water Board disagrees. A reasonable potential analysis of the type described by the petitioners was not required prior to including numeric WQBELs in the Permit to implement TMDL wasteload allocations. NPDES permits must include WQBELs or other permit requirements consistent with the assumptions and requirements of any wasteload allocations that has been assigned to the discharge as part of an approved TMDL.<sup>257</sup>

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<sup>256</sup> This said, the Los Angeles Water Board did conclude that there was adequate evidence to support a BMP based compliance demonstration option for the final WQBELs and RWLs where permittees implemented BMPs to retain the volume of storm water from the 85<sup>th</sup> percentile, 24-hour event in an EWMP as discussed in Section G of this response.

<sup>257</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

WQBELs are required for point source discharges that have the reasonable potential to cause or contribute to an excursion of water quality standards and technology based effluent limitations or standards are not sufficient to achieve water quality standards. Reasonable potential can be demonstrated in several ways, one of which is through the TMDL development process. Where a point source is assigned a wasteload allocation in TMDL, the analysis conducted in the development of the TMDL provides the basis for the Board's determination than the discharge has the reasonable potential to cause or contribute to an exceedance of water quality standards in the receiving water. At the permitting stage, the Board determines reasonable potential through a qualitative assessment process consistent with the USEPA NPDES Permit Writers Manual, Chapter 6, section 6.3.3. As part of this process, the Permit Writers Manual reiterates that where there is a pollutant with a wasteload allocation from a TMDL, a permit writer must develop WQBELs or other permit requirements consistent with the assumptions and requirements of any wasteload allocation that has been assigned to the discharge as part of an approved TMDL as required by 40 C.F.R. section 122.44(d)(1)(vii)(B).

Through the development of the TMDLs that were incorporated in the Permit, the Board found that discharges of pollutants from the permittees' MS4s cause, have the reasonable potential to cause, or contribute to an excursion above water quality standards. Therefore, wasteload allocations were assigned to the permittees' MS4 discharges during the adoption of those TMDLs. Additionally, the Board found that, for waters identified as impaired and for which wasteload allocations have been assigned to MS4 discharges, that technology based effluent limitations or standards, in the form of storm water management programs (SWMPs) required pursuant to 40 C.F.R. section 122.26(d)(2)(iv) have not been sufficient to achieve water quality standards. The analysis contained in the TMDLs and the Fact Sheet for the Permit provides the support and rationale for the determination that discharges from the MS4 have the reasonable potential to cause or contribute to excursion above water quality standards in the receiving water. Therefore, WQBELs were included in the Permit for those pollutants with TMDL wasteload allocations.

**6. Contention: Reliance on numerics should be coupled with the “disaggregation” of different storm water sources within permits**  
(Petitioners (a)-(h), (j), (p)-(t), (v), (w), (aa), (bb), (dd), (ee), (hh), and (jj))

The petitioners contend that the Permit fails to adequately disaggregate storm water sources within applicable TMDLs regarding numeric WQBELs and for RWLs. The Board disagrees. The permittees have ultimate authority and responsibility to prohibit, prevent, or otherwise control discharges that enter and exit the portions of the MS4 for which they are owners and/or operators, even where the permittees discharge to a common conveyance system and receiving waters. The Board does not expect that any measured numeric exceedance would necessarily constitute a permit violation by a particular permittee. In determining whether a numeric exceedance constitutes a permit violation by any one permittee, the Board would consider all available information, including other sources and the nature of the exceedance and the applicable requirement of the Permit. Further, the Permit provides alternative means for permittees to demonstrate compliance at jurisdictional boundaries and allows permittees who may have commingled discharges to establish a plan for determining compliance.

**7. Contention: Various TMDLs and TMDL requirements incorporated into the Permit are contrary to state and federal law and policy**  
(Petitioners (a)-(h), (j), (l), (n)-(bb), (dd)-(hh), and (jj)-(kk))

The Los Angeles Water Board disagrees. The petitioners assert that various TMDLs incorporated into the Permit establish compliance with wasteload allocations in the receiving water contrary to federal regulations and state law. Notably, the petitioners do not reference any state law or policy, or, for that matter, federal policy that the various TMDLs purportedly violate. The petitioners appear to base this contention on the argument that federal regulations only require two types of monitoring – effluent and ambient – for compliance. The Board addressed this specific contention above, in Section F.3.(Monitoring).

As required by federal regulations at 40 C.F.R. section 122.44(d)(1)(vii)(B), the Board included WQBELs and other permit requirements consistent with the assumptions and requirements of any wasteload allocations that have been assigned to the discharge as part of an approved TMDL, including in-stream or receiving water monitoring where required by the TMDL.<sup>258</sup> The Permit allows permittees to demonstrate compliance with these WQBELs at the MS4 outfall or in the receiving water.<sup>259</sup>

To the extent that the petitioners are somehow challenging the validity of a TMDL wasteload allocation as requiring compliance either at the outfall or in the receiving water, this contention was outside the scope of the Board's action to renew the Los Angeles County MS4 Permit. As the Board noted in its "Notice of Opportunity for Public Comment and Notice of Public Hearing" dated June 6, 2012, the validity of the TMDLs being incorporated into the Permit was not an issue before the Board at the Permit proceeding.<sup>260</sup>

**8. Contention: Permit requirements based on compliance with in-stream TMDL wasteload allocations must be voided**  
(Petitioner (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

The petitioners assert that several TMDLs include requirements to submit implementation plans, monitoring plans, and special studies that are based on compliance with TMDL wasteload allocations determined by in-stream monitoring, and that these TMDL-related requirements "must be voided and re-opened to remove the extra-legal requirements." The petitioners do not explain why these TMDL related requirements must be voided.

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<sup>258</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>259</sup> See Order No. R4-2012-0175, Parts VI.E.2.d.i.(1) and (2) and VI.E.2.e.i.(1) and (2).

<sup>260</sup> Specifically, the Board stated the following:

Please also be advised that several new requirements in the Draft Tentative Order concern incorporation of provisions that implement Total Maximum Daily Loads (TMDLs). These TMDLs are either duly adopted regulations of the Los Angeles Water Board or TMDLs established by the United States Environmental Protection Agency. The validity of these TMDLs are not an issue before the Los Angeles Water Board in this proceeding. As such, any evidence or argument attempting to challenge the validity of these TMDLs will not be considered or included in the administrative record for this matter. Comments and/or evidence concerning whether and how the Los Angeles Water Board incorporates the TMDL provisions into the Draft Tentative Order are appropriate and within the scope of this proceeding.

Notice of Opportunity for Public Comment and Notice of Public Hearing, June 6, 2012, p. 2 (Section 4, RB-AR3546).

The Board notes that TMDLs are adopted by the Board pursuant to Clean Water Act section 303(d) and California Water Code sections 13240 and 13242. TMDL implementation programs consist of a description of the nature of actions that are necessary to achieve wasteload allocations (and load allocations), a time schedule for the actions to be taken, and a description of the monitoring and reporting to be undertaken to determine compliance with the wasteload allocations. Because TMDLs and their programs of implementation are adopted through the basin plan amendment process in California, the TMDL implementation program contained in a regional water board's basin plan becomes a regulation upon approval by the State of California Office of Administrative Law. All permits must implement the applicable water quality control plan (i.e. Basin Plan), including any applicable TMDL implementation programs.<sup>261</sup> Accordingly, if a TMDL requires submittal of an implementation and/or monitoring plan, or special studies, then that requirement was included in the Permit, consistent with the TMDL. Further, USEPA has stated that, “[w]here a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority [in this case, the Regional Water Board] should consider the schedule as it decides whether and how to establish enforceable interim requirements and interim dates in the permit.”<sup>262</sup>

To the extent that the petitioners are somehow challenging the validity of a TMDL, including an implementation plan that requires such plans or studies, this contention was outside the scope of the Board's action to renew the Los Angeles County MS4 Permit. As the Board noted in its “Notice of Opportunity for Public Comment and Notice of Public Hearing” dated June 6, 2012, the validity of the TMDLs being incorporated into the Permit was not an issue before the Board at the Permit proceeding.<sup>263</sup>

#### **9. Contention: Numeric WQBEL compliance with TMDL wasteload allocations is improper and arbitrary**

(Petitioner (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

The petitioners first assert that the Permit's definition of a WQBEL is inconsistent with federal law as the Permit has defined a WQBEL to be the same as a TMDL wasteload allocation. Contrary to the petitioners' assertion, the Permit defines a WQBEL as “any restriction imposed on quantities, discharge rates, and concentrations of pollutants, which are discharged from point sources to waters of the U.S. necessary to achieve a water quality standard.”<sup>264</sup> In most cases, WQBELs are derived from TMDL wasteload allocations. While in some cases a numeric WQBEL may be the same as a TMDL wasteload allocation, the Permit does not define a WQBEL as equating to a TMDL wasteload allocation. However, it should be noted that USEPA's regulations state that “WLAs constitute a type of water quality-based effluent limitation.”<sup>265</sup>

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<sup>261</sup> Clean Water Act §§ 303(d), 402(p)(3)(B)(iii); Cal. Wat. Code §§ 13263, 13377.

<sup>262</sup> USEPA, Memorandum “Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations for storm water sources and NPDES permit requirements based on those WLAs”, Nov. 12, 2010. (Section 10.II., RB-AR23962).

<sup>263</sup> Notice of Opportunity for Public Comment and Notice of Public Hearing, p. 2 (Section 4, RB-AR3546).

<sup>264</sup> Attachment A (Definitions) to Order No. R4-2012-0175, p. 21.

<sup>265</sup> 40 C.F.R. § 130.2(h).

The petitioners next contend that a WQBEL cannot be a compliance standard in and of itself, but can only be a means of achieving a TMDL wasteload allocations or other water quality standard and cannot be used to determine an exceedance of a TMDL or any other water quality standard. The petitioners do not explain their rationale for this contention and the Board is unable to appropriately respond. The Board disagrees with any insinuation that a numeric WQBEL is not an enforceable limitation and cannot be used to determine compliance with permit limitations, including compliance with TMDL provisions.

The petitioners next contend that a WQBEL can only be a BMP or other action deemed appropriate to attain a TMDL or other water quality standard, and the Board's use of numeric WQBELs was arbitrary as the Board provided no discussion explaining why it chose a numeric WQBEL over a BMP WQBEL. The Board first disagrees that a WQBEL can only be expressed as a BMP. WQBELs may be expressed either narratively (such as a BMP) or numerically. Further, the Board explained why it chose numeric WQBELs over BMP-based WQBELs for State established TMDLs in the Fact Sheet to the Permit.<sup>266</sup> Likewise, the Board also explained in the Fact Sheet why it chose BMP-based WQBELs over numeric WQBELs to implement the wasteload allocations from USEPA established TMDLs.<sup>267</sup> Thus, the petitioners assertion that the administrative record contains no discussion is incorrect.

Lastly, the petitioners assert that the Board neglected to discuss other types of numeric WQBELs, including "numeric parameters acting as surrogates for pollutants such as storm water flow volume or percentage or amount of impervious cover." The Board addressed this contention in its written responses to comments.<sup>268</sup> Federal regulations state that effluent limitations must be consistent with the assumptions and requirements of available wasteload allocations. In its November 12, 2010 memo, USEPA stated that, "[w]here the WLA of a TMDL is expressed in terms of a surrogate pollutant parameter, then the corresponding permit can generally use the surrogate pollutant parameter in the WQBEL as well."<sup>269</sup> However, USEPA did not explicitly endorse the use of surrogate pollutant parameters where the wasteload allocation is not expressed in terms of the surrogate parameter. The wasteload allocations for the 33 TMDLs incorporated into the Permit are expressed as actual pollutant loads and concentrations, not in terms of surrogate parameters. Additionally, the State and Regional Water Boards have concluded that sole reliance on BMP based permit requirements has not been sufficient to ensure the achievement of water quality standards. Further, as explained above, there is insufficient data and information available at this time on the prospective implementation of BMPs throughout Los Angeles County to provide the Board reasonable assurance that the proposed BMPs would be sufficient to achieve the WQBELs, with the exception of BMPs that retain the storm water volume associated with the 85<sup>th</sup> percentile, 24-hour event within a drainage area. This storm water retention standard acts as a surrogate, in fact.

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<sup>266</sup> Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-32 to F-35.

<sup>267</sup> Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-109 to F-111.

<sup>268</sup> See Response to Comments on the Tentative Order - Total Maximum Daily Loads (General) Matrix, pp. F-36 to F-37 (Section 8, RB-AR19841 - 19842).

<sup>269</sup> See USEPA, Memorandum "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations for storm water sources and NPDES permit requirements based on those WLAs", Nov. 12, 2010, p. 3 (Section 10.II., RB-AR23964).

**10. Contention: The time schedule order provisions in the Permit are inappropriate**

(Petitioner (l), (n)-(o), (u), (x)-(z), (ff)-(gg), and (kk))

The Los Angeles Water Board disagrees. The Board provided its rationale for including the time schedule order provisions in the Fact Sheet of the Permit<sup>270</sup> and in its written responses to comments.<sup>271</sup>

The Permit includes WQBELs necessary to achieve applicable wasteload allocations assigned to MS4 discharges. In some cases, the deadline specified in the TMDL implementation plan for achieving the final wasteload allocation has passed.<sup>272</sup> Consistent with the Clean Water Act, the Permit requires that permittees comply immediately with WQBELs and/or RWLs for which final compliance deadlines have passed. Where a permittee determines that its MS4 discharge may not meet the final WQBELs for the TMDLs for which the deadline has passed, the Permit allows permittees to request a time schedule order from the Board. Time schedule orders are issued pursuant to California Water Code section 13300, whenever a Water Board "finds that a discharge of waste is taking place or threatening to take place that violates or will violate [Board] requirements." Permittees may individually request a time schedule order, or may jointly request a time schedule order with all permittees subject to the WQBELs and/or RWLs.

The petitioners contend that a time schedule order is not appropriate because a violation cannot arise if monitoring detects a wasteload allocation exceedance either at the outfall or in the receiving water. The Board disagrees with this statement. The Permit describes the purposes of the various types of monitoring and how the Board will use the monitoring results. As stated in the Fact Sheet, outfall based monitoring is also conducted to assess compliance with WQBELs.<sup>273</sup> The Board stated in the Fact Sheet that it does not intend to take enforcement action against a permittee for violations of specific WQBELs and corresponding RWLs for which the final compliance deadline has passed if a permittee is fully complying with the requirements of an applicable time schedule order for the particular WQBEL.

It is also important to note that a permittee is not required to request a time schedule order. The Board included the time schedule order provisions to allow permittees to request additional time to implement the control measures necessary to achieve compliance with WQBELs. Issuance of a time schedule order would also protect permittees from imposition of mandatory minimum penalties. If a permittee does not believe a time schedule order is appropriate, it does not have to request one from the Board.

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<sup>270</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-108 to F-111.

<sup>271</sup> See Responses to Comments on the Tentative Order – Total Maximum Daily Loads (General) Matrix, p. F-6, F-15 to F-16 (RB-AR19811, 19820 - 19821).

<sup>272</sup> See Table F-8 in the Fact Sheet.

<sup>273</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, p. F-116 to F-123.

**11. Contention: The Los Angeles Water Board failed to develop the requisite evidence or findings necessary for the establishment and imposition of a TMDL in an NPDES permit**  
(Petitioner (i))

The Los Angeles Water Board did not establish or impose a TMDL in the Los Angeles County MS4 Permit. Rather, the Permit includes provisions to implement previously established TMDLs with wasteload allocations assigned to MS4 discharges, as required by federal regulations.

**12. Contention: The Board failed to ensure that effluent limits imposed in the Permit are consistent with the assumptions and requirements of TMDL wasteload allocations as required by 40 C.F.R. § 122.44(d)(1)(vii)(B)**  
(Petitioner (i))

The Los Angeles Water Board disagrees. The WQBELs established in the Permit are consistent with the assumptions and requirements of all available wasteload allocations as required by 40 C.F.R. section 122.44(d)(1)(vii)(B). Claremont does not adequately explain the basis of, and provides no factual or legal support for, this contention. Further, Claremont does not explain which WQBELs are purportedly inconsistent with TMDL wasteload allocations. Accordingly, the Board is unable to adequately respond to this contention.

**13. Contention: The Permit illegally exempts dischargers from complying with interim and final numeric waste load allocations established in TMDLs**  
(Petitioner (m))

The Los Angeles Water Board disagrees. The petitioner first asserts that the EWMP provisions exempt permittees from complying with final TMDL wasteload allocations. The Permit does not exempt compliance with final TMDL wasteload allocations. The Permit provides permittees with a means of demonstrating compliance with an applicable final WQBEL for the pollutant(s) associated with a specific TMDL through an approved EWMP. In drainage areas where a permittee is implementing an approved EWMP, all non-storm water and storm water runoff up to and including the volume equivalent to the 85<sup>th</sup> percentile, 24-hour event must be retained for the drainage area tributary to the applicable receiving water to afford permittees this means of demonstrating compliance. This compliance mechanism is supported by several years of research, demonstrating, for example, that retention of this storm water volume reduces annual pollutant loads by 94 percent.<sup>274</sup> Notably, this compliance mechanism does not apply to final WQBELs for trash.

Furthermore, permittees must conduct monitoring to evaluate the effectiveness of their EWMP, including the effectiveness of retaining the 85<sup>th</sup> percentile, 24-hour event in conjunction with implementing the other required elements of their EWMP, including customized minimum control measures.

The petitioners also assert that the Permit excuses permittees from complying with final TMDL wasteload allocations for USEPA established TMDLs because the Board did not include numeric WQBELs for these TMDLs. This is incorrect. Clean Water Act section 402(p)(3)(B)(iii) requires permits for discharges from municipal storm sewers to “require controls to reduce the

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<sup>274</sup> See SCCWRP Technical Report 520, Concept Development: Design Storm for Water Quality in the Los Angeles Region, October 2007 (Section 10.VI.C, RB-AR30109 - 30110).



discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” The Clean Water Act provides the Board, to the same extent as the Administrator of USEPA, the discretion to determine what controls are appropriate to protect water quality.<sup>275</sup> While compliance with the TMDLs is necessary to achieve compliance with water quality standards, inclusion of numeric WQBELs is not required.

In the Fact Sheet to the Permit, the Board explained why it chose not to include numeric WQBELs for USEPA established TMDLs.<sup>276</sup> In contrast to State-adopted TMDLs, USEPA established TMDLs do not contain an implementation plan or schedule. Such decisions are generally left with the States. A regional water board could either: (1) adopt a separate implementation plan as a Basin Plan Amendment for each USEPA established TMDL, which would allow inclusion of compliance schedules in the permit where applicable, or (2) issue a permittee a schedule leading to full compliance in a separate enforcement order (such as a Time Schedule Order or a Cease and Desist Order). To date, the Board has not adopted a separate implementation plan or enforcement order for any of the USEPA-adopted TMDLs. As such, the final wasteload allocations in the seven USEPA established TMDLs in the Permit became effective immediately upon establishment by USEPA and placement in the Permit.

The Board’s decision as to how to express permit conditions for USEPA established TMDLs was based on an analysis of several specific facts and circumstances surrounding these TMDLs and their incorporation into the Permit. First, since these TMDLs do not include implementation plans, none of these TMDLs have undergone a comprehensive evaluation of implementation strategies or an evaluation of the time required to fully implement control measures to achieve the final wasteload allocations. Second, given the lack of an evaluation, the Board was not able to adequately assess whether permittees will be able to immediately comply with the wasteload allocations. Third, the majority of these TMDLs were established by USEPA recently (i.e., since 2010) and permittees have had limited time to plan for and implement control measures to achieve compliance with the wasteload allocations. Lastly, while federal regulations do not allow USEPA to establish implementation plans and schedules for achieving these wasteload allocations, USEPA has nevertheless included implementation recommendations regarding MS4 discharges as part of six of the seven of these TMDLs. The Board needs time to adequately evaluate USEPA’s recommendations. For these reasons, the Board determined that numeric WQBELs for these USEPA established TMDLs are infeasible at the present time. The Board, however, was clear that it may revisit this decision within the term of the Permit or in a future permit, as more information is developed to support the inclusion of numeric WQBELs for USEPA established TMDLs.

In lieu of including numeric WQBELs, permittees subject to wasteload allocations in USEPA established TMDLs the Permit are required to propose and implement BMPs that will be effective in achieving the numeric wasteload allocations. Permittees will propose these BMPs to the Board in a WMP.<sup>277</sup> As part of their WMP, permittees are also required to propose a schedule for implementing the BMPs that is as short as possible. This process mimics that followed by the Board when adopting TMDLs and programs for their implementation through the

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<sup>275</sup> See *Defenders of Wildlife*, 191 F.3d at 1166.

<sup>276</sup> Attachment F (Fact Sheet) to Order No. R4-2012--0175, pp. F-109 to F-111.

<sup>277</sup> If a permittee chooses not to submit a WMP, or the WMP is determined to be inadequate, the permittee will be required to demonstrate compliance with the numeric WLAs immediately based on monitoring data.

basin plan amendment process by providing the opportunity for permittees to evaluate implementation strategies and the time required to carry out these implementation measures and use this as the basis for compliance schedules to achieve the wasteload allocations in the USEPA established TMDLs in the Permit.

**14. Contention: Requiring different compliance standards for state established TMDLs and USEPA established TMDLs is improper and inappropriate**  
(Petitioners (a)-(h), (j),(l), (n)-(bb), (dd)-(hh), and (jj)-(kk))

The petitioners assert that it is improper for the Board to include numeric WQBELs to implement wasteload allocations from State established TMDLs and BMP-based WQBELs to implement wasteload allocations from USEPA established TMDLs. The Board disagrees. As explained immediately above, the Board provided its rationale in the Fact Sheet of the Permit for including BMP-based WQBELs in the Permit for USEPA established TMDLs, due to the specific circumstances concerning the USEPA established TMDLs. The Board sees no conflict in requiring permittees to comply with numeric WQBELs for State established TMDLs and BMP-based WQBELs for USEPA established TMDLs. In both cases, the objective is to achieve the wasteload allocations established in the TMDLs. Additionally, permittees will generally comply with both types of limitations through control measures and BMPs.

**15. Contention: The Permit incorporates illegal compliance schedules in violation of 40 C.F.R. section 122.47**  
(Petitioner (m))

The Los Angeles Water Board disagrees. The Board addressed the validity of compliance schedules in the Permit in the Fact Sheet and in written responses to comments on the Permit.<sup>278</sup> As previously explained, a regional water board may include a compliance schedule in an NPDES permit when the state's water quality standards or regulation include a provision that authorizes such schedules in an NPDES permit.<sup>279</sup> In California, TMDL implementation plans are typically adopted through Basin Plan amendments. All permits must implement the applicable water quality control plan (i.e. Basin Plan), including any applicable TMDL implementation programs.<sup>280</sup> As authorized and/or required by California Water Code sections 13263 and 13377, the compliance schedules in the Permit are consistent with the TMDL implementation plans set forth in the Los Angeles Water Board's Basin Plan.<sup>281</sup> The Permit contains interim requirements consistent with these plans, where appropriate. In addition, USEPA anticipates that MS4 permits will include compliance schedules based on an implementation plan: "Where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority should consider the schedule as it decides whether and how to establish enforceable

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<sup>278</sup> Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-103 to F-104; Response to Comments on the Tentative Order – Total Maximum Daily Loads (General) Matrix, pp. F-56 to F-58 (RB-AR19861 – 19863).

<sup>279</sup> See *In re Star-Kist Caribe, Inc.* (Apr. 16, 1990) 3 E.A.D. 172, 175, modification denied, 4 E.A.D. 33, 34 (EAB 1992).

<sup>280</sup> Cal. Wat. Code §§ 13263, 13377.

<sup>281</sup> To the extent that the petitioners are challenging certain TMDL implementation schedules as not requiring compliance as soon as possible or containing interim requirements, the Board notes that in its "Notice of Opportunity for Public Comment and Notice of Public Hearing" dated June 6, 2012, the validity of the TMDLs, including their implementation plans, being incorporated into the Permit was outside the scope of the Board's action to renew the Los Angeles County MS4 Permit.

interim requirements and interim dates in the permit."<sup>282</sup> In establishing the TMDL implementation plans, the Board had already determined that the timeframes in each implementation plan were as short as possible.

The petitioners also assert that compliance schedules set out in TMDLs implementing California Toxics Rule criteria, such as metals, are not authorized by the State Water Board's Inland Surface Water Plan. This is incorrect. First, the Inland Surface Water Plan is inapplicable as, by its own terms, it does not apply to storm water. Second, the State Water Board's Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits ("Compliance Schedule Policy" or "Policy ") also does not apply to MS4 permits because the Compliance Schedule Policy only applies to NPDES permits with effluent limitations established under Clean Water Act section 301(b)(1)(C): "[T]his Policy shall apply to all NPDES permits adopted by the Water Boards that must comply with [CWA] section 301(b)(1)(C) and that are modified or reissued after the effective date of the Policy." MS4 permits are not subject to Clean Water Act section 301(b)(1)(C). Rather, effluent limitations in MS4 permits are established pursuant to Clean Water Act section 402(p)(3)(B), and, if applicable, section 303(d).

**16. Contention: The Cities of Bradbury, El Monte, Pico Rivera, and South El Monte are incorrectly listed as parties to the Los Angeles River metals and trash TMDLs, which are both incorporated into the Permit**

(Petitioners (c), (o), (u), and (x))

This contention was outside the scope of the Board's action to renew the Los Angeles County MS4 Permit. As the Board noted in its "Notice of Opportunity for Public Comment and Notice of Public Hearing" dated June 6, 2012, the validity of the TMDLs being incorporated into the Permit was not an issue before the Board at the Permit proceeding.<sup>283</sup>

The Los Angeles River metals and trash TMDLs are duly adopted regulations of the Los Angeles Water Board, having both been approved by the State Water Board, the California Office of Administrative Law, and USEPA. Each TMDL identifies the cities of Bradbury, El Monte, Pico Rivera, and South El Monte as responsible jurisdictions and assigns them waste load allocations because the cities are located in the Rio Hondo Reach 2 watershed. Rio Hondo Reach 2 drains to Rio Hondo Reach 1, which in turn drains to the Los Angeles River. Rio Hondo Reach 1 and Los Angeles River Reach 1 are both impaired for metals and trash and are on the Clean Water Act section 303(d) list.<sup>284</sup> The Los Angeles River metals and trash TMDLs became effective on October 29, 2008 and September 23, 2008, respectively. The appropriate time to make comments on the responsible parties to the TMDL was at the time the Board considered adoption of the TMDL, not when the TMDLs were being incorporated into the Permit, as required by federal law.<sup>285</sup> Therefore, these contentions are not timely and were outside the scope of the Board's action to renew the Permit.

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<sup>282</sup> See USEPA "Memorandum, Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" dated November 12, 2010 (Section 10.II., RB-AR23964XXX).

<sup>283</sup> Notice of Opportunity for Public Comment and Notice of Public Hearing, p. 2 (Section 4, RB-AR3546).

<sup>284</sup> See Section 10.VI.E., RB-AR35684 - 35785.

<sup>285</sup> Federal regulations require that NPDES permits contain effluent limits consistent with the assumptions and requirements of all available wasteload allocations. (40 C.F.R. § 122.44(d)(1)(vii)(B)).

## J. Joint and Several Liability

### 1. Contention: Provisions in the Permit imposing joint or joint and several liability for violations, and requiring a permittee involved in a commingled discharge to prove it did not cause or contribute to an alleged exceedance, is contrary to law and violates basic tenants of due process of law.

(Petitioners (a)–(h), (j)–(k), (n)–(t), (v)–(x), (aa)–(ee), (hh), and (jj)–(kk))

The Los Angeles Water Board disagrees. The Board previously addressed these contentions in its written responses to comments.<sup>286</sup> The Board agrees that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators consistent with federal regulations at 40 C.F.R. § 122.26(a)(3)(vi). The Permit establishes effluent and RWLs that apply to co-permittees. Some of these limitations apply to all co-permittees and some apply only to a smaller subset of co-permittees. A permittee need only comply with the limitations that specifically apply to that permittee. Many of the co-permittees' discharges commingle in the MS4 with discharges from other co-permittees, prior to being discharged to the receiving water. A co-permittee continues to be responsible for its discharge even after the discharge commingles with that of another, if the discharge causes or contributes to an exceedance of a limitation. Further, a permittee retains responsibility for its discharge when the discharge leaves its jurisdiction and commingles with another discharge outside of its jurisdiction. All co-permittees that have commingled discharges that cause or contribute to exceedances of limitations are responsible for the violation. The Permit, however, appropriately provides that, to the extent a permittee can show that it did not cause or contribute to a violation, it will not be responsible for the violation.<sup>287</sup>

The joint liability framework set forth in the Permit is consistent with the Clean Water Act, which imposes strict liability and requires dischargers to establish and maintain records, sample, and monitor discharges and report the results to the Board.<sup>288</sup> This system of self-reporting is critical to the NPDES program, which “fundamentally relies” upon it.<sup>289</sup> In addition, the regulations that implement the Clean Water Act contemplate that co-permittees of MS4 permits will be responsible for developing management programs and controls involving inter-governmental coordination to reduce the discharge of pollutants,<sup>290</sup> must agree to accept roles and responsibilities necessary to ensure effective coordination,<sup>291</sup> and must have legal authority and agreement with other dischargers to control contribution of pollutants from one portion of the MS4 to another.<sup>292</sup> The Clean Water Act thus puts the onus on MS4 permittees to have sufficient control over its system to prevent discharges that are not compliant with permit requirements.<sup>293</sup>

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<sup>286</sup> See Responses to Comments on the Tentative Order - Total Maximum Daily Loads (General) Matrix, pp. F-25 to F-26, F-62 to F-67, G-19 to G-20 (Section 8, RB-AR19830 – 19831, 19867 – 19872, 19899 - 19900).

<sup>287</sup> See Order R4-2012-0175, Sections II.K.1 at pp. 21-24 and VI.E.2 at pp. 141-145.

<sup>288</sup> See, e.g., Clean Water Act §308(a); 40 C.F.R. §§ 122.41(j) and 122.48.

<sup>289</sup> *U.S. v. Brittain* (10th Cir.1991) 931 F.2d 1413, 1416 (citing *Sierra Club v. Union Oil Co.* (9th Cir. 1987) 813 F.2d 1480, 1491, *vacated and remanded on other grounds*, (1988) 485 U.S. 931).

<sup>290</sup> 40 C.F.R. § 122.26(d)(2)(iv).

<sup>291</sup> 40 C.F.R. § 122.26(d)(2)(vii).

<sup>292</sup> 40 C.F.R. § 122.26(d)(2)(i)(D).

<sup>293</sup> See, e.g., 40 C.F.R. § 122.26(d)(2)(iv)(B)(3) (application for permit must show how permittees will investigate any part of their system with a reasonable potential for contributing pollutants into the system from other sources).

The Permit's joint liability framework is supported by court and USEPA decisions. For example, the United States District Court recently held in *Citizens for Pennsylvania's Future v. Pittsburgh Water & Sewer Authority* (W.D. Pennsylvania) 2012 WL 6019058 that under a Phase II small MS4 permit "co-permittees may be held jointly and severally responsible for compliance with a permit. See, 40 C.F.R. § 122.35(a)(3) . . ." <sup>294</sup> Although this case involved regulations that apply to small MS4s, the same logic applies to medium and large MS4s. Co-permittees cannot shift responsibility to other co-permittees; each co-permittee remains responsible for compliance with its Permit obligations. In addition, in *Ingram v. City of Gridley* (1950) 100 Cal.App.2d 815, the California Court of Appeal held that when a party has built a conveyance system that discharges pollutants, it may be held jointly and severally responsible for the discharges. <sup>295</sup> Lastly, in *In Re Friendswood Development Company* (1976 WL 25237) E.P.A.G.C. Opinion No. 43. June 11, 1976, USEPA's Office of the General Counsel determined that industrial users of a private wastewater treatment plant are jointly and severally responsible with the owner of the plant for compliance with provisions of the NPDES permit. <sup>296</sup>

The Permit's joint liability framework is also consistent with the law regarding joint tortfeasors. <sup>297</sup> As discussed in §433A of the Restatement (Second) of Torts, where the harm is divisible and capable of apportionment, each contribution to the harm caused would be considered separate. <sup>298</sup> However, where "two or more causes combine to produce a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm," apportionment would not be appropriate. <sup>299</sup> In the case of commingled discharges, there may be harms that will be capable of apportionment, but in other situations, they may not. Where the causes of the harm cannot be apportioned, it would be unjust to other permittees and the public for a co-permittee to be allowed to avoid responsibility for the violations they have caused or contributed to where the co-permittee's discharges have commingled with other discharges creating an indivisible harm.

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<sup>294</sup> 2012 WL 6019058, at \*3.

<sup>295</sup> 100 Cal.App.2d 815, 818-819, 823-824.

<sup>296</sup> "A further question concerns whether it is appropriate to issue a single permit for a privately owned treatment works and its customers and to provide therein that the customers are parties to the permit and are jointly and severally responsible with the privately owned works for compliance. It certainly appears sensible to issue a joint permit under circumstances such as those present here, since the users of the Friendswood facility, and Friendswood itself, are so intertwined with one another. But the argument is made that imposition of joint and several liability for violation of the permit is improper. Region VI points out that the permit provides that joint and several responsibility attaches only 'for the compliance of such contributing facilities' individual or joint waste stream contribution with this permit.' Thus a particular customer's responsibility attaches only where noncompliance is at least in part attributable to the waste stream from that customer. I can find no legal impediment to such a provision, either in the FWPCA or in implementing regulations. I therefore find it within the power of the Agency to make a user of a privately owned treatment works a party to a joint permit and subject to joint and several liability for noncompliance with the terms of the permit attributable in whole or in part to the user's waste stream. Other arguments put forward by Friendswood and its customers concerning the issue referred go to factual matters beyond the scope of 40 CFR §125.36(m). In conclusion, I find that users of privately owned treatment works are subject to §§301(a), 402 and related provisions of the FWPCA, that they must obtain §402 permits, that such permits may be issued jointed to the privately-owned treatment works and its users, and that they may provide for joint and several responsibility to be imposed on users for noncompliance to the extent attributable to the waste stream from such users." 1976 WL 25237 (E.P.A.G.C.), at 6.

<sup>297</sup> See Restatement (Second) of Torts § 433A Apportionment of Harm to Causes (1965) (updated June 2013).

<sup>298</sup> See Restatement §433A, p. 3.

<sup>299</sup> See Restatement §433A, p. 4; see e.g., *Phillips Petroleum Co. v. Hardee* (5<sup>th</sup> Cir. 1951) 180 F.2d 205.

Contrary to the petitioners' assertion, *Jones v. E.R. Shell Contractor, Inc.* (N.D. Ga. 2004) 333 F.Supp. 2d 1344, 1348 does not support the petitioners' contention and is easily distinguishable. In that case, the plaintiff had asserted that a county was a discharger who was responsible for violations of the Clean Water Act. However, the court found that the county was not responsible for the violations because the county was not a "discharger" under the Clean Water Act and was therefore not required to obtain an NPDES permit. Here, the petitioners challenging the Permit are dischargers under the Clean Water Act and are required to obtain an NPDES permit. Further, the issue of joint and several liability would not even arise until the Los Angeles Water Board makes a *prima facie* showing that a co-permittee discharged pollutants. In addition, unlike the situation here, the *Jones* case did not involve co-permittees commingling their discharges to a common MS4.

Other cases cited by petitioners, *Kismodel v. Rand* (2004) 119 Cal.App.4th 1128, 1144 and *Key v. Caldwell* (1940) 39 Cal.App.2d 698, 701, also do not support their contentions. *Kismodel* involved the situation of civil conspiracy and intentional torts, not the situation of co-permittees subject to the same permit and many of the same conditions and discharging to a common MS4. *Key* involved a situation where a co-defendant was not even involved in the action subject to the litigation, not the situation of co-permittees discharging to a common MS4. If a discharger demonstrated that it did not discharge the pollutants in question, it would certainly not be responsible for causing or contributing to the exceedance.

Further, neither *Rapanos v. United States* (2006) 547 U.S. 715, 745 nor *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139, 1145-47, cited by petitioners, address the issue of co-permittees commingling discharges. *NRDC v. County of Los Angeles* (2011) 673 F.3d 880, 901, also does not directly address the liability of co-permittees for commingled discharges, but rather addresses the evidence needed to prove a co-permittee violated RWLs.

With respect to the contentions concerning burden of proof, the petitioners are confusing the Permit conditions with the burden of proof in an enforcement action. The Los Angeles Water Board agrees that, in an enforcement action, the Board generally has the burden to demonstrate that a permittee violated a permit condition, including, for example, causing or contributing to a violation of a receiving water limitation. Where an exceedance of a limitation has occurred, the Board must first demonstrate that a particular co-permittee discharged the pollutant in question through the MS4 to receiving waters. The burden then shifts to any co-permittee whose discharge is commingled with the discharges of other co-permittees to show that it did not cause or contribute to that exceedance. The Permit addresses this possibility by requiring outfall monitoring, requiring co-permittees to have the authority to establish interagency agreements regarding compliance with the Permit, and by providing the opportunity for permittees to demonstrate that it either did not discharge pollutants into the MS4 or that its discharge complied with Permit requirements.<sup>300</sup>

The petitioners rely on several cases, including *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 and *United States v. Range Prod. Co.* (N.D. Tx. 2011) 793 F.Supp.2d 814, to support their contention regarding the burden of proof. As noted above, the Board agrees that in an enforcement action it generally has the burden to demonstrate that there has been a violation of the Permit.

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<sup>300</sup> See Order No. R4-2012-0175, pp. 23-24, 39-41, and 141-142.

The Permit's approach to enforcement in a situation involving commingled discharges is also consistent with the Restatement of Torts §433B, which states the general rule that the plaintiff is required to produce evidence regarding the conduct of the defendant, but there is an exception where two or more actors combine to bring about the harm. In such cases, it is up to the defendant to provide evidence as to apportionment.<sup>301</sup> The Permit does not contradict the general rule, but rather provides the mechanism for co-permittees to provide evidence of apportionment once the Board provides evidence of the discharge.

## K. Economic Considerations

### 1. Contention: The Los Angeles Water Board failed to adequately consider economic impacts of the Permit as required by California Water Code sections 13000, 13241, and/or 13263

(Petitioners (a)–(h), (j)–(l), (n)–(bb), (dd)–(hh), and (jj)–(kk))

The Los Angeles Water Board disagrees. The Board previously addressed this contention, as well as other contentions regarding economic impacts of the Permit, in its written responses to comments and in the Fact Sheet for the Permit.<sup>302</sup>

Contrary to petitioners' contentions, California Water Code section 13000 does not independently require the Board to consider economic impacts in adopting MS4 permits and incorporating TMDL requirements into it.<sup>303</sup> A statute containing "a general statement of legislative intent...does not impose any affirmative duty that would be enforceable...."<sup>304</sup>

California Water Code section 13241 requires the Board to consider certain factors, including economic considerations, in the adoption of water quality objectives. California Water Code section 13263 requires the Board to take into consideration the provisions of section 13241 in adopting waste discharge requirements. In *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, the California Supreme Court considered whether regional water boards must comply with section 13241 when issuing waste discharge requirements under section 13263(a) by taking into account the costs a permittee will incur in complying with the permit requirements. The Court concluded that whether it is necessary to consider such cost information "depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act."<sup>305</sup> The Court ruled that regional water boards may not consider the factors in section 13241, including economics, to justify imposing pollutant restrictions that are only equal to that required by applicable federal law.<sup>306</sup> However, when the pollutant restrictions

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<sup>301</sup> Restatement of Torts §433B, Burden of Proof (1965) (updated June 2013), p. 3.

<sup>302</sup> See generally Response to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-58 to H-63 (Section 8, RB-AR19973 - 19978); Attachment F (Fact Sheet) to Order No. R4-2012-0175, p. F-137 to F-155.

<sup>303</sup> *City of Arcadia v. State Water Resources Control Board* (2011) 191 Cal.App.4th 156, 176.

<sup>304</sup> *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 640-641; see also *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 444 ["the precatory declaration of intent expressed in the statute must be read in context" and "cannot be viewed as independently creating substantive duties...in addition to those imposed by the regulation"].

<sup>305</sup> 35 Cal.4th at 627.

<sup>306</sup> *Id.* at pp. 626-627 ("[Water Code s]ection 13377 specifies that [] discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. Because section 13263 cannot authorize what federal law

in an NPDES permit are more stringent than federal law requires, California Water Code section 13263 requires that the water boards consider the factors described in section 13241 as they apply to those specific restrictions.

The requirements in the Permit are not more stringent than necessary to meet minimum federal requirements. Federal law requires MS4 permits to include, among others, provisions to effectively prohibit non-storm water discharges through the MS4 to receiving waters; terms that mandate the implementation of controls to reduce the discharge of pollutants in storm water to the maximum extent practicable; and any other provisions that the permitting agency determines are necessary for the control of pollutants in MS4 discharges to achieve the goals of the Clean Water Act.<sup>307</sup> Federal regulations also require that NPDES permits contain effluent limitations consistent with the assumptions and requirements of all available TMDL wasteload allocations.<sup>308</sup> The requirements in the Permit may be more specific or detailed than those enumerated in federal regulations under 40 C.F.R. § 122.26 or in USEPA guidance. However, the requirements are consistent with and within the scope of the federal statutory mandates and authority provided by Clean Water Act section 402(p)(3)(B), subdivisions (ii) and (iii), and related federal regulations and guidance. Consistent with federal law, all of the provisions in the Permit could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits. The inclusion of numeric WQBELs in the Permit does not cause the Permit to be more stringent than the requirements of federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. The inclusion of WQBELs as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP-based permit limitations to achieve water quality standards.<sup>309</sup>

In addition, at a minimum, MS4 permittees are required to control the discharge of pollutants in storm water to the maximum extent practicable, which also precludes consideration of the factors in California Water Code section 13241. There is, however, an element of cost inherent in the MEP standard. While the term “maximum extent practicable” is not specifically defined in the Clean Water Act or its implementing regulations, USEPA, courts, and the State Water Board have addressed what constitutes MEP. MEP is not a one-size fits all approach. Rather, MEP is an evolving, flexible, and advancing concept, which considers practicability. This includes technical and economic practicability. Compliance with the MEP standard involves applying BMPs that are effective in reducing or eliminating the discharge of pollutants in storm water to receiving waters. BMP development is a dynamic process, and the menu of BMPs may require changes over time as experience is gained and/or the state of the science and art progresses. MEP is the cumulative effect of implementing, evaluating, and making corresponding changes to a variety of technically appropriate and economically practicable BMPs, ensuring that the most appropriate controls are implemented in the most effective manner. The State Water Board has held that “MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the costs would be prohibitive.”<sup>310</sup>

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forbids, it cannot authorize a regional board, when issuing a [] discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.”)

<sup>307</sup> Clean Water Act § 402(p)(3)(B).

<sup>308</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>309</sup> State Water Board Order No. WQ 2006-0012 (Boeing), p. 16 (“Whether the permit limitations are written as BMPs or as numeric effluent limitations, the legal standard is the same.”).

<sup>310</sup> State Water Board Order WQ 2000-11 (Cities of Bellflower), p. 20.



Notwithstanding the above, the Board did consider the factors set forth in California Water Code section 13241 in issuing the Permit.<sup>311</sup> The Board also considered evidence that was presented to the Board regarding costs in adopting the Permit. It is important to note that section 13241 does not require a “cost-benefit” analysis or dictate any course of action upon consideration; rather, where section 13241 applies, the Board is only required to *consider* economics.<sup>312</sup> Based on the consideration of the economic impact of new provisions of the Permit, the Board provided the permittees a significant amount of flexibility to meet the requirements of the Permit in a cost-effective manner, while maintaining the level of water quality protection mandated by the Clean Water Act and other applicable requirements. For example, the inclusion of a WMP option allows permittees to submit a plan, either individually or in collaboration with other permittees, for Board approval that would allow actions to be prioritized based on specific watershed needs. The Permit also allows permittees to customize monitoring requirements, which they may do individually or in collaboration with other permittees. In the end, it is up to the permittees to determine the effective BMPs and measures needed to comply with the Permit. Permittees can choose to implement the least expensive measures that are effective in meeting the requirements of the Permit. The Permit also does not require permittees to fully implement all requirements within a single permit term. Where appropriate, the Board has provided permittees with additional time outside of the Permit term to implement control measures to achieve final WQBELs and/or water quality standards, such that permittees can spread out costs over time.

In addition, there are instances outside of the Permit where the Board previously considered economics. First, when the Board adopted the water quality objectives that serve as the basis for several requirements in the Permit, it took economic considerations into account.<sup>313</sup> Second, the cost of complying with TMDL wasteload allocations was previously considered during the adoption of each TMDL. Thus, the costs of complying with the WQBELs and RWLs derived from the thirty-three TMDLs should not be added to determine the cost of compliance with all TMDLs. Further, the Board’s considerations of economics in developing each TMDL have often resulted in lengthy implementation schedules to achieve water quality standards. Where appropriate, these implementation schedules have been used to justify compliance schedules in the Permit.

Some petitioners contend that the Board’s consideration of economics misrepresent the permittees’ data. The Board considered cost estimates that were reported by the permittees in their annual reports during the term of the 2001 permit, as well as a State Water Board funded study that examined the costs of municipal MS4 programs statewide. As noted in the Fact Sheet, it is very difficult to determine the true costs of implementing MS4 management programs because of highly variable factors and unknown level of implementation among different municipalities and inconsistencies in reporting by permittees. In addition, it is difficult to isolate program costs attributable to permit compliance. Reported costs of compliance for the same program element can vary widely from permittee to permittee, often by a very wide margin that is not easily explained. Despite these problems, efforts were made to identify MS4 management costs. In so doing, the Board seriously considered the economic impact of new provisions of the Permit and established requirements that would allow permittees the flexibility

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<sup>311</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-139 to F-155.

<sup>312</sup> See *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, p. 22 (Section 10.II., RB-AR23199).

<sup>313</sup> See *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, p. 21 (Section 10.II., RB-AR23198).

to address critical water quality priorities in a focused and cost-effective manner while maintaining the level of water quality protection mandated by the Clean Water Act.

Some petitioners also contend that it was premature and improper for the Board to assume that permittees will obtain funding from proposed ballot measures, such as Assembly Bill (AB) 2554. The Board did not presume that permittees will obtain funding from proposed ballot measures, including AB 2554. In the Fact Sheet, the Board acknowledged that there is no guarantee that the funds from AB 2554 will be approved. The Permit simply describes possible funding sources that may be available to permittees. The Fact Sheet analyzes several other sources of funding including grants and loans.

With respect to the comments made by Los Angeles Water Board members during the hearings that are quoted by petitioners, it is important to note that the petitioners take these comments out of context. Some of the Board members did express concerns and ask questions regarding the costs to implement the Permit. In addition to written responses to comments, Board staff also provided oral responses to the questions and comments of both Board members and the permittees during the multiday hearing held on this matter.<sup>314</sup> In addition, as noted above, the Board provided detailed information in the Fact Sheet on economic considerations, both in terms of the economics associated with permittees complying with the Permit provisions, as well as the costs associated with the negative impacts of pollution on the economy and the positive impact of improved water quality. The Board approved the Permit unanimously after considering the information in the Fact Sheet, Board staff's responses, and the changes made to the Permit in response to concerns regarding costs.

## **L. Unfunded State Mandates**

### **1. Contention: The Permit as a whole, or portions thereof, exceed federal law and thus constitutes an unfunded state mandate in violation of the California Constitution**

(Petitioners (a)-(j), (l), (n)-(bb), (dd)-(hh), (jj), (kk))

The Los Angeles Water Board disagrees that the Permit as a whole, or portions thereof, constitutes an unfunded state mandate. The petitioners assert that the Permit, either as a whole or in certain requirements, exceeds federal law, but do not provide any evidentiary or legal support for those assertions. The Board addressed contentions concerning unfunded state mandates in Section IX of the Fact Sheet<sup>315</sup> and in written responses to comments.<sup>316</sup>

The Permit does not constitute an unfunded state mandate because it implements federally mandated requirements. The Porter-Cologne Water Quality Control Act requires that MS4 permits issued by the Los Angeles Water Board ensure compliance with the Clean Water Act.<sup>317</sup> The Clean Water Act and its implementing regulations require that MS4 permits mandate certain actions that will result in the elimination or reduction of pollutants to receiving waters.

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<sup>314</sup> See Transcript of Proceedings on November 8, 2012, at pp. 31- 46, 52 (Section 9, RB-AR21220 - 21235, 21241).

<sup>315</sup> See Attachment F (Fact Sheet) to Order No. R4-2012-0175, pp. F-15 to F-158 (Section 9, RB-AR21908 - 22051).

<sup>316</sup> See Response to Comments on the Tentative Order – General and Miscellaneous Matrix, pp. H-73 to H-90 (Section 8, RB-AR19988 - 20005).

<sup>317</sup> Cal. Wat. Code, §§ 13370(c), 13372(a), 13377.

These required actions include effectively prohibiting non-storm water discharges, reducing the discharge of pollutants in storm water to the maximum extent practicable, and including any other provisions that the Board determines appropriate for the control of pollutants discharged from the MS4.<sup>318</sup> In creating a permit system for discharges from MS4s, Congress intended to implement actual programs.<sup>319</sup> Accordingly, in implementing these federal requirements, the permitting authority must develop specific practices and programs that will ensure compliance with the Clean Water Act on a permit-by-permit basis.<sup>320</sup> The Los Angeles Water Board, as the permitting agency, has both the discretion and responsibility to decide what controls, practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants in accordance with federal law.

The Board has determined that all of the requirements in the Permit are necessary to protect water quality in accordance with federal law. This includes requirements pertaining to monitoring, numeric WQBELs, TMDLs, RWLs, non-storm water discharge prohibition through and from the MS4, and storm water management program minimum control measures, including those pertaining to construction and new and re-development requirements. The Board explained its rationale for these requirements in the Fact Sheet and in various responses to written comments. To the extent the Board is exercising discretion in including certain permit requirements, the Board is exercising discretion required and/or authorized by federal law.<sup>321</sup>

Several petitioners assert that new or more specific requirements in this Permit, which were not in the prior permit, impose a new program or a program requiring a higher level of service. The Board disagrees. The Board acknowledges that several elements of the Permit have been improved as compared to Order No. 01-182. The additional requirements and specificity may require modifications to the permittees existing storm water management programs. But this does not mean that the specific requirements constitute new programs or higher levels of service. The overarching requirement to prohibit or reduce pollutants in discharges from MS4s is dictated by the Clean Water Act and is not new to this Permit cycle. The relevant “activity” for purposes of state mandates law is the federal requirements contained in section 402(p)(3)(B) of the Clean Water Act. These requirements are not new and are imposed on all entities that own or operate a MS4. The inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the Clean Water Act,<sup>322</sup> and these new and advanced measures do not constitute a new program or higher level of service and, thus, no state mandate.

The incorporation of TMDLs into the Permit is both required by federal law and does not constitute a new program or higher level of service. Since at least 2001, the permittees have been required through Order No. 01-182 to ensure that their MS4 discharges do not cause or contribute to a violation of water quality standards. The Clean Water Act requires permitting

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<sup>318</sup> Clean Water Act § 402(p)(3)(B).

<sup>319</sup> *NRDC v. Costle* (D.C. Cir.1977) 568 F.2d 1369, 1375.

<sup>320</sup> See *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389-90 [“[t]he permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants”]; *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292, 1308; see also *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292, 1308.

<sup>321</sup> See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.- Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.

<sup>322</sup> 55 Fed. Reg. 47990, 48052.

authorities to develop TMDLs for waterbodies that are impaired (i.e., when water quality standards are not being achieved). Through adoption of the various TMDLs incorporated into the Permit, the Board determined that the permittees' MS4 discharges are causing or contributing to violations of water quality standards and assigned the MS4 discharges wasteload allocations.

Further, the MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness.<sup>323</sup> Such considerations change over time with advances in technology and with experience gained in storm water management.<sup>324</sup> Accordingly, a determination of whether the conditions contained in the Permit exceed the requirements of federal law cannot be based on a point by point comparison of the Permit conditions with federal law. Rather, the correct analysis in determining whether a MS4 permit constitutes a state mandate is to evaluate whether the permit as a whole -- and not a specific permit provision -- exceeds federal law.<sup>325</sup> Accordingly, the requirements of the Permit, taken as a whole, are necessary to protect water quality in accordance with federal law.

Further, notwithstanding the above, the Board has provided permittees a significant amount of flexibility to choose how to implement the Permit. The Permit provides permittees the flexibility to address critical water quality priorities, namely discharges to waters subject to TMDLs, but aims to do so in a focused and cost-effective manner while maintaining the level of water quality protection mandated by the Clean Water Act and other applicable requirements. The time afforded to permittees per compliance schedules (often lengthy) in the permit allow for stepwise improvements or time to develop and implement a single solution that will result in water quality improvement over time until water quality standards are achieved. In addition, the inclusion of a WMP option allows permittees to submit a plan, either individually or in collaboration with other permittees, for Board approval that would allow actions to be prioritized based on specific watershed needs. The Permit also allows permittees to customize monitoring requirements, which they may do individually or in collaboration with other permittees.

Lastly, unless and until a particular provision is determined by the Commission on State Mandates, through a Test Claim proceeding, to be an unfunded state mandate for which reimbursement is required, the Los Angeles Water Board was not precluded from adopting such provisions. The Commission on State Mandates does not determine the validity of any particular provision; it address only whether the state or the local governments will be required to pay for that provision.

**2. Contention: The Permit's minimum control measures (MCM) program is an unfunded state mandate**

Petitioners (a)-(h), (j), (n)-(t), (v)-(x), (aa), (bb), (dd), (ee), (hh), (jj), and (kk)

The Los Angeles Water Board disagrees. The MCM program is required by federal regulations at 40 C.F.R. § 122.26(d)(2)(iv). In addition, the MCM program is not a new program or a

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<sup>323</sup> *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 873, 874, 889.

<sup>324</sup> 55 Fed. Reg. 47990, 48052.

<sup>325</sup> *State of Cal. v. Comm. on State Mandates* (Super. Ct. Sacramento County, 2012, No. 34-2010-80000604) (Section 10.II., RB-AR23699), *State of Cal. v. County of Los Angeles* (Super. Ct. Los Angeles County, 2011, No. BS130730) (Section 10.II., RB-AR23681, 23688).

program requiring a higher level of service. The previous Los Angeles County MS4 Permit, Order No. 01-182, included most of the same MCM requirements, which have been carried over to the Permit.

As noted immediately above, the Board acknowledges that, as compared to Order No. 01-182, several elements of the MCM program in the Permit have been improved upon by including new or more specific requirements. However, the additional requirements and specificity does not mean that the specific requirements constitute new programs or higher levels of service as compared to the requirements contained in Order No. 01-182. While certain specific requirements are new to the Permit, the overarching requirements to prohibit or reduce pollutants in discharges from MS4s is dictated by the Clean Water Act and is not new to this Permit cycle. In addition, permittees are afforded the option to customize most minimum control measures to their particular needs.

**3. Contention: The MCM program requirement that the permittees inspect and regulate other, non-municipal NPDES permittees constitutes an unfunded mandate**

(Petitioners (a)-(h), (j), (n)-(t), (v)-(x), (aa), (bb), (dd), (ee), (hh), (jj), and (kk))

The Los Angeles Water Board disagrees. "Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-storm water discharges; permit compliance; and local ordinance compliance."<sup>326</sup> Federal regulations require that actions designed to reduce pollutants to the maximum extent practicable include management practices or controls, including priorities and procedures for inspections, of industrial facilities and construction sites.<sup>327</sup> Such inspections are necessary to confirm that BMPs are being effectively implemented in compliance with federal law.

The provisions contained in the Permit pertaining to the inspection and facility control program requirements for industrial and commercial facilities, as well as construction sites, are based on the requirements of Order No. 01-182. Those requirements, among others, were the subject of litigation between several permittees and the Los Angeles Water Board. In that case, the Los Angeles County Superior Court upheld the inspection and facility control program requirements for industrial/commercial facilities and construction sites in Order No. 01-182 as being consistent with federal law.<sup>328</sup> The Court also addressed the permittees' claims that the requirements in Order No. 01-182 shifted the Board's inspection responsibility under State Water Board issued general NPDES permits for these types of facilities onto the local agencies. The Court disagreed, stating:

The Court agrees with [the Los Angeles Water Board] and Intervenors that the United States EPA considered obligations under state-issued general permits to be separate and distinct. Despite the similarity between the general permits and the local storm water ordinances, both must be enforced. [Citations.] EPA

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<sup>326</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1390.

<sup>327</sup> See 40 C.F.R. § 122.26(d)(2)(iv), subdivisions (B), (C)(1), and (D).

<sup>328</sup> *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, pp. 16-19 (Section 10.II., RB-AR23193 - 23196).

requires permittees to conduct inspections of commercial and industrial facilities, as well as of construction sites. [Citation.]....This Court finds that the state-issued general permits do not preempt local enforcement of local storm water ordinances. (See State Board Order No. 99-08, [citation].) [¶] Therefore, this Court finds that requiring permittees to inspect commercial and industrial facilities and construction sites is authorized under the Clean Water Act, and both the Regional Board and the municipal permittees or the local government entities have concurrent roles in enforcing the industrial, construction and municipal permits. The Court finds that the Regional Board did not shift its inspection responsibilities to Petitioners. [¶] ... The Court further notes that the Permit issued to local entities, who are Petitioners here, does not refer to any inspection obligations related to state-issued permits. [Citation.] There is no duplication of efforts and no shifting of inspection responsibility in derogation of the Regional Board's responsibility here. The Regional Board is not giving up its own responsibilities, and there is nothing arbitrary or capricious about the Permit's inspection provisions."<sup>329</sup>

Moreover, contentions that the Board can collect a fee for state inspections required under the NPDES permits is not relevant as these inspections are independent from the obligations imposed on the MS4 permittees under the Permit. Further, USEPA has concluded that the inspection requirements in Order No. 01-182 are within the maximum extent practicable standard.<sup>330</sup> In addition to being required by federal law, the inspections requirements are existing requirements, and thus do not constitute a new program or a program requiring a higher level of service.

**4. Contention: Strict compliance with numeric state water quality standards renders the entire Permit an unfunded mandate**  
(Petitioners (a)-(h), (j), (n)-(t), (v)-(x), (aa), (bb), (dd), (ee), (hh), (jj), and (kk))

The Los Angeles Water Board disagrees. First, the inclusion of numeric WQBELs does not cause the Permit to be more stringent than federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. Thus, the inclusion of numeric WQBELs as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP based permit limitations to achieve water quality standards. While expressed differently, both types of limits have the same goal, which are to achieve compliance with water quality standards. The Board also notes that Order No. 01-182 required permittees to comply with RWLs. The RWLs are the water quality standards for a specific water body, which are generally expressed numerically. In the judicial litigation concerning Order No. 01-182, the Los Angeles Superior Court found that the terms of Order No. 01-182, including the RWLs, were consistent with the MEP standard.<sup>331</sup>

Second, the Permit does not require strict compliance with water quality standards in that it provides permittees with schedules, consistent with those adopted as part of TMDLs, that the Board has determined necessary to provide a path to compliance with water quality standards. Third, the Permit only establishes numeric WQBELs for pollutants that are subject to a TMDL.

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<sup>329</sup> *Id.* at 17-18 (Section 10.II., RB-AR23194 - 23195)..

<sup>330</sup> See Letter from Alexis Strauss (USEPA) dated April 10, 2008 (Section 10.VI.C., RB-AR34517).

<sup>331</sup> *Ibid.*

Notwithstanding the above, requiring strict compliance with state water quality standards does not exceed federal law. Section 402(p)(3)(B)(iii) of the Clean Water Act requires the Los Angeles Water Board to impose permit conditions, including: “management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator of the State determines appropriate for the control of such pollutants.” As determined by the Ninth Circuit Court of Appeal, “[u]nder [the] discretionary provision [of section 402(p)(3)(B)(iii)], the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants.”<sup>332</sup> The Board, which is authorized to enforce the Clean Water Act pursuant to California Water Code sections 13370 and 13377, can also require strict compliance with water quality standards. To date, the permittees have been unable to adequately protect water quality in the receiving waters, as demonstrated by the number of Clean Water Act section 303(d) listed impaired water bodies and the number of TMDLs with wasteload allocations assigned to MS4 discharges. Thus, requiring strict compliance with water quality standards would be federally authorized.

Such a requirement would also not exceed requirements in the prior permit. Since at least 2001, through Order No. 01-182, the permittees have been required to ensure that their MS4 discharges do not cause or contribute to a violation of water quality standards. Thus, such a requirement would be considered an existing requirement, and could not be considered a new program or a program requiring a higher level of service. In addition, in the judicial litigation concerning Order No. 01-182, the Los Angeles Superior Court found that the terms of Order No. 01-182, including the RWLs, were consistent with the MEP standard.<sup>333</sup>

**5. Contention: Permittees do not necessarily have the requisite authority to levy fees to pay for compliance with the Permit**  
(Petitioners (n), (o), (x), (bb), and (kk))

Section 6 of Article XIII B of the California Constitution requires subvention only when the costs in question can be recovered solely from tax revenues, and not if the costs can be reallocated or paid for with fees. Numerous activities contribute to the pollutant loading in the MS4. The permittees can levy fees on these activities, independent of real property ownership.<sup>334</sup> The permittees have the authority to levy fees to pay for compliance with the Permit within the meaning of California Government Code section 17556(d), even if adoption of a fee is contingent on the outcome of an election or vote.<sup>335</sup> When local agencies have the legal authority to levy fees, they do not have to spend tax proceeds to fund activities and no subvention is required.<sup>336</sup> The plain language of the exception in California Government Code

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<sup>332</sup> *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159, 1166.

<sup>333</sup> See *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-9 (Section 10.II., RB-AR23160 - 23165).

<sup>334</sup> See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 (upholding inspection fees associated with renting property).

<sup>335</sup> See California Constitution XIII D, section 6(c); see also *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App. 4th 1351, 1358-1359.

<sup>336</sup> *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987.

section 17556(d) is based on a claimant's authority, i.e., the right or power, to levy fees, not on the claimant's practical ability in light of surrounding economic circumstances to levy fees.<sup>337</sup>

In addition, additional fee authority was recently established through amendments to the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915, as amended by Assembly Bill 2554 (2010)) to provide funding for municipalities, watershed authority groups, and the LACFCD to initiate, plan, design, construct, implement, operate, maintain, and sustain projects and services to improve surface water quality and reduce storm water and non-storm water pollution within the LACFCD service area. A funding initiative measure in accordance with this fee authority is scheduled to be considered by the LACFCD Board of Supervisors in the near future. The Board acknowledges that there is no guarantee the measure will pass LACFCD Board of Supervisor and public approval. However, if approved, the initiative could create estimated annual revenue of \$300 million, which would directly support the permittees' implementation of the requirements in the Permit.

### **M. City of El Monte's Amended Petition**

On February 19, 2013, the City of El Monte filed an Amended Petition for review attempting to amend its original petition to include two additional arguments. In accordance with California Water Code section 13320 and California Code of Regulations, title 23, section 2050, petitions for review must be filed with the State Water Board within 30 days of a regional board action. The Los Angeles Water Board adopted the Los Angeles County MS4 Permit on November 8, 2012. Accordingly, petitions for review were required to be submitted to the State Water Board by December 10, 2012. While El Monte did file a timely petition raising several contentions by the statutory deadline, the issues raised in the Amended Petition were not raised in El Monte's original petition and therefore are untimely. Further, the State Water Board has not indicated to the Los Angeles Water Board that it has accepted El Monte's Amended Petition. Therefore, the Los Angeles Water Board is not required to respond to the contentions raised in the Amended Petition. However, in the event that the State Water Board does accept the Amended Petition, the Los Angeles Water Board has nevertheless provided responses below.

**1. Contention: The Permit does not comply with the U.S. Supreme Court's decision in *LACFCD v. NRDC*, which invalidates the Permits' requirement to comply with water quality standards, including TMDL wasteload allocations, based on receiving water monitoring.**

(Petitioner (u))

The Los Angeles Water Board disagrees with El Monte's interpretation of the U.S. Supreme Court's January 8, 2013 decision in *LACFCD v. Natural Resources Defense Council*.<sup>338</sup> This decision concerned a citizen suit action brought by several environmental groups to enforce the 2001 Los Angeles County MS4 Permit (Order No. 01-182, as amended). El Monte contends that the Court's decision invalidates the Permits' requirements to comply with water quality standards, including TMDL wasteload allocations, based on receiving water monitoring. This is not a correct interpretation of the Court's decision. The Court's decision was a narrow one. The Court concluded only that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of

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<sup>337</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401-402.

<sup>338</sup> 133 S.Ct 710 (2013).



pollutants under the CWA.”<sup>339</sup> The Court did not in any way rule on or invalidate any permit or TMDL (or portion thereof) adopted by the Los Angeles Water Board or the USEPA. The decision also did not impact any requirement(s) established under the Permit, or other NPDES permits, for complying with wasteload allocations in TMDLs and/or water quality standards, including monitoring requirements. Thus, the Court’s decision did not result in any changes to the Permit.

**2. Contention: The Permit does not comply with California Water Code Section 16100 as it relates to WMPs, which determine compliance with water quality standards and TMDLs.**

(Petitioner (u))

The Los Angeles Water Board disagrees with the substantive merits of this contention. As an initial matter, however, there are two procedural bars to El Monte’s contention. The State Water Board’s regulations pertaining to petitions require petitioners to include a statement that the substantive issues or objections raised in the petition were raised before the regional board, or an explanation of why the petitioner was not required or was unable to raise these substantive issues or objections before the regional board.”<sup>340</sup> First, the Board believes that this contention was not raised to the Los Angeles Water Board prior to adoption of the Permit. El Monte also provides no statement that it was. Second, El Monte claims in its Amended Petition that this argument is based on information that was not available prior to the deadline for filing petitions on the Permit, but fails to specify what information was not available prior to the petition deadline. The Board notes that the subject of El Monte’s contention, the California Watershed Improvement Act of 2009 (“Act”) (California Water Code section 16100-16104), became effective on January 1, 2010. This law was therefore in effect during the Permit development and adoption process. El Monte has made no attempt to explain why it was unable to raise this contention to the Los Angeles Water Board, or in its original petition to the State Water Board. Because El Monte failed to raise the issue in a timely manner, El Monte waived this argument. This contention is therefore not properly before the State Water Board for review.<sup>341</sup>

Setting aside these procedural flaws, El Monte’s argument is substantively without merit. El Monte alleges that the Los Angeles Water Board’s inclusion of the WMP provisions fails to conform to the Act. This is incorrect. The Act does not affect the Board’s authority to impose terms and conditions in an NPDES permit, and therefore the Board’s inclusion of the WMP provisions is not required to conform to the Act. The Act consists of authorizing legislation that grants powers and authorities to local government permittees. The Act authorizes a city, county, or special district that is a permittee under an NPDES permit for a municipal separate storm sewer system to develop and implement a watershed improvement plan to control sources of pollutants within the watershed. To fund improvements for water quality protection, the Act allows local government permittees to impose fees on activities that contribute to storm water runoff. Similar to the intent of the provisions in the Permit that encourage the creation of WMPs, the purpose of the Act is to facilitate the formation of cooperative watershed-based storm water management programs. In practice, it may be that permittees will develop WMPs that comply with the Act so that they may invoke the powers granted by California Water Code sections 16100 to 16104 to implement the programs. WMPs under the Permit and watershed

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<sup>339</sup> *Id.* at 713.

<sup>340</sup> Cal. Code. Regs., tit. 23, § 2050(a)(9).

<sup>341</sup> *Id.*, 2050(c) (“...the petition to the state board shall be limited to those substantive issues or objections that were raised before the regional board”)

improvement plans under the Act are, however, independent mechanisms for water quality planning that provide distinct benefits.

Further, contrary to El Monte's contention, the conditions in the Permit related to WMPs are consistent with the watershed improvement plans authorized by the Act. Los Angeles County MS4 permittees have the ability to comply with both the Permit provisions and the Act, and enjoy the benefits offered by each. In its Amended Petition, El Monte points to specific sections of California Water Code section 16101 that it alleges are inconsistent with the terms of the Permit. The Board responds to each of these elements in turn.

§ 16101(b) - The process of developing a watershed improvement plan shall be open and transparent, and shall be conducted consistent with all applicable open meeting laws....

The WMP provisions provide for an open and transparent process. Part C.1.f.v. of the Permit specifically provides that the development of WMPs shall include "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 ...". In addition, to the extent that open meeting laws are applicable to the process for developing WMPs, application of those laws are not exempted by the Permit and must be complied with.

§16101(d)(1) - A watershed improvement plan shall include a description of the watershed or subwatershed improvement plan area, the rivers, streams, or manmade drainage channels within the plan area, the agencies with regulatory jurisdiction over matters to be addressed in the plan, the relevant receiving waters within or downstream from the plan area, and the county, city, special district, or combination thereof, participating in the plan.

Part XVII of the Monitoring and Reporting Program requires the permittees to include in the WMP, or in the odd-year annual report, the following:

- A subwatershed map depicting the permittees' jurisdictional area and the MS4, including major outfalls and low flow diversions.
- A description of known hydromodifications to receiving waters and a description, including locations, of natural drainage systems.
- Maps and/or aerial photographs identifying the location of ESAs, ASBS, natural drainage systems, and groundwater recharge areas.
- Land use map of the subwatershed.
- A description of effective TMDLs, applicable WQBELs and RWLs, and implement and reporting requirements, and compliance dates.

§16101(d)(3) - A watershed improvement plan shall include recommendations for appropriate action by any entity, public or private, to facilitate achievement of, or consistency with, water quality objectives, standards, total maximum daily loads, or other water quality laws, regulations, standards, or requirements, a time schedule for the actions to be taken, and a description of appropriate measurement and monitoring to be undertaken to determine improvement in water quality.

Part VI.C.5.b.i. of the Permit requires that WMPs developed by the permittees must "identify strategies, control measures, and BMPs to implement through their individual storm water management programs, and collectively on a watershed scale." The objectives of these measures are, among other goals, to achieve all applicable WQBELs and RWLs. Pursuant to Part VI.C.5.c. of the Permit, permittees are required to incorporate compliance schedules into

their plans and, where necessary, interim milestones to measure progress towards addressing water quality priorities and applicable WQBELs and RWLs. Extensive monitoring requirements are included in the Permit's Monitoring and Reporting Program to measure improvement in water quality. Permittees must also implement an adaptive management process per Part VI.C.8. of the Permit, based on this information, to adapt the WMP to become more effective over time.

§16101(d)(4) - A watershed improvement plan shall include a coordinated economic analysis and financing plan that identifies the costs, effectiveness, and benefits of water quality improvements specified in the watershed improvement plan, and, where feasible, incorporates user-based and cost recovery approaches to financing, which place the cost of managing and treating surface runoff pollution on the generators of the pollutants.

Part VI.A.3. of the Permit requires each permittee to “conduct a fiscal analysis of the annual capital and operation and maintenance expenditures necessary to implement the requirements of this Order.” This information, in conjunction with monitoring data, can be utilized by the permittees to identify the costs, effectiveness, and benefits of water quality improvements specified in their plans. One of the strengths of this Permit is that permittees are afforded the flexibility to create tailored and cooperative approaches to water quality improvement so as to enhance cost-effectiveness. The Permit does not purport to direct the local government permittees as to sources or methods of financing, as such matters are most appropriately addressed by the permittee.

§16101(d)(5) - A watershed improvement plan shall include, to the extent applicable, a description of regional BMPs, watershed-based natural treatment systems, low-flow diversion systems, storm water capture, urban runoff capture, other measures constituting structural treatment BMPs, pollution prevention measures, low-impact development strategies, and site design, source control, and treatment control BMPs to promote improved water quality.

Part VI.C.5.b. of the Permit requires permittees who elect to submit a WMP or EWMP to include substantial information regarding BMPs and other control measures to improve water quality. For example, per Part VI.C.5.b.iv.(4) of the Permit, the WMP/EWMP must identify specific structural controls and non-structural BMPs, including operational source control and pollution prevention

§16101(d)(6) - A watershed improvement plan shall include a description of the proposed structure, operations, powers, and duties of the implementing entity for the watershed improvement plan.

As part of the notification of intent to develop a EWMP, permittees must submit an executed memorandum of understanding/agreement among participating permittees to fund plan development (or a final draft memorandum of understanding/agreement and a signed letter of intent from each participating City Manager or head of agency).<sup>342</sup> Part VI.C.5.b.iv.(4) of the Permit also requires the WMPs to clearly identify the responsibilities of each participating permittee for implementation of watershed control measures. Pursuant to Part VI.C.5.b.iv.(6) of the Permit, permittees must also document that they have the necessary legal authority to implement the Watershed Control Measures identified in the plan.

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<sup>342</sup> See Order No. R4-2012-0175, Part VI.C.4.b.iii.(3).

As explained herein, the WMP provisions are therefore not in conflict with California Water Code section 16101.

## **V. CONCLUSION**

The Los Angeles County MS4 Permit complies with all applicable law, regulations, and policies. Water quality in the Los Angeles Region is severely degraded, and there is substantial empirical evidence that MS4 discharges are a major cause of the pollution. Beneficial uses are affected, including recreation, aquatic and wildlife habitat, and municipal drinking water supply. The Permit complies with the federal Clean Water Act and its implementing regulations, and is consistent with the Los Angeles Water Board's Basin Plan and State water quality control plans and policies. The Board's public process to consider and adopt the Permit was also the most extensive process of its kind in the Board's history. The Los Angeles Water Board carefully considered hundreds of written comments and proposals and many hours of oral comments prior to adoption of the Permit.

The Los Angeles Water Board requests that the State Water Board deny the Petitioners' requests to: vacate the Los Angeles County MS4 Permit, remand the Permit to the Los Angeles Water Board for further proceedings, and/or to revise specific provisions of the Permit. In response to the Petitioners' contentions, the Los Angeles Water Board urges the State Water Board to uphold the Permit in its entirety, retaining all of the provisions of the Permit.

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