

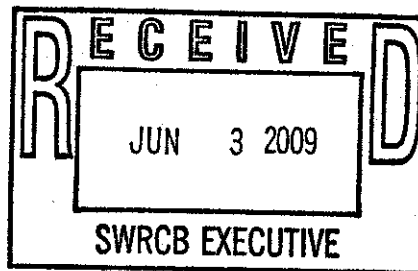
6/16/09 Bd Mtg Item 13
A-1780
Deadline: 6/3/09 by 12 noon

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June 3, 2009



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

Re: *Comments on Draft Order, File No. A-1780; June 16, 2009 Board Meeting*

Dear Ms. Townsend:

Enclosed please find the comments of the County of Los Angeles and the Los Angeles County Flood Control District on the draft State Water Resources Control Board Order in the *Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District, SWRCB/OCC File A-1780*. Please forward these comments to the chairman and members of the board.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Howard Gest".

Howard Gest

HDG:da

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 COUNTY OF LOS ANGELES and
 LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

BEFORE THE
 STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)	SWRCB/OCC FILE A-1780
)	
THE COUNTY OF LOS ANGELES)	COMMENTS OF THE COUNTY
AND THE LOS ANGELES COUNTY)	OF LOS ANGELES AND THE
FLOOD CONTROL DISTRICT)	LOS ANGELES COUNTY
CALIFORNIA REGIONAL WATER)	FLOOD CONTROL DISTRICT
QUALITY CONTROL BOARD, LOS)	ON THE PROPOSED DRAFT
ANGELES, REGION ORDER NO.)	ORDER
R4-2006-74)	
)	

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I. INTRODUCTION

This Petition seeks review of a Los Angeles Regional Water Quality Control Board ("Regional Board") order amending the Los Angeles County Municipal Stormwater Permit ("Permit"). In adopting this amendment, the Regional Board for the first time required municipal dischargers to strictly comply with a set of water quality objectives outside of the "iterative process." The Regional Board took this action without regard to this State Board's prior precedents, the recommendations of this State Board's panel of experts, and EPA guidance. The amendment unlawfully imposed requirements on the permittees even though water quality in Santa Monica Bay was already improving through the efforts of the permittees, the permittees offered to work cooperatively with the Regional Board to meet its goals, and there was uncontradicted evidence that compliance could not be achieved under the terms of the amendment as adopted.

The purpose of the amendment is to reflect the provisions of the Dry Weather Santa Monica Bay Beaches Bacteria TMDL (the "Dry Weather SMB TMDL"). Although petitioners share the goals of the TMDL, there are six deficiencies in the Regional Board's amendment and the procedure used to adopt it, all of which were raised at the hearing:

1. The amendment is inconsistent with two other TMDLS adopted by the Regional Board, the Malibu Creek and the Ballona Creek Bacteria TMDLs.
2. The Regional Board failed to clearly state that the amendment applied solely to non-storm water discharges.

3. The Regional Board erroneously excluded the amendment's requirements from the iterative process that governs compliance with receiving water quality limitations.

4. The amendment appears to make petitioners responsible for discharges of other permittees, in direct contradiction of this Board's order approving the Dry Weather SMB TMDL.

5. The amendment is not supported by the findings and evidence at the hearing. Specifically, there is no finding that it is technically feasible to comply with the terms of the amendment, that the amendment can be achieved through the adoption of controls or programs that reduce pollutants to the maximum extent practicable ("MEP"), or that compliance is reasonably achievable, and there is no evidence to support such findings.

6. The Regional Board's hearing was not conducted in compliance with the California Administrative Procedures Act and the California Code of Regulations.

Based on these deficiencies, the State Board should vacate the amendment and remand the matter back to the Regional Board for further hearings. This will allow the Regional Board to revise the amendment in light of this Board's direction. It will also allow the Regional Board to consider new evidence about sources of bacteria at northern Santa Monica Bay Beaches, such as the evidence described in the Regional Board's response to this petition (see Regional Board's Opposition at 20-21). This new evidence was not before the Regional Board when it adopted the amendment.

Because the draft order addresses only the second and third issues identified above, these comments will address those issues first. These comments will then address why the other issues are also substantial and appropriate for this Board's review.

II. THE WORDS "NON-STORM WATER" SHOULD BE ADDED TO MAKE THE AMENDMENT CONSISTENT WITH THE REGIONAL BOARD'S FINDINGS, THE STAFF'S STATED INTENT AND THE EVIDENCE PRESENTED AT THE HEARING

Petitioners requested that the Regional Board add the words "non-storm water" to Part 2.5 and, if the Regional Board were to adopt Part 1.B, to that paragraph also on the grounds that without this addition, Parts 1.B and 2.5 are ambiguous and there is no evidence in the record to support these parts as written.

In this regard, the draft order recognizes that Parts 1.B and 2.5 apply solely to non-storm water. According to the draft order, "the challenged permit provisions do not apply to storm water flows." (Draft Order at 7.) The draft order, however, declines to order the Regional Board to make the requested changes. Instead, the draft order states that the amendment's provisions "are sufficiently clear." (Draft Order at 6.)

To the contrary, Parts 1.B and 2.5 (as well as Part 2.6, which applies to Marina del Rey) are not clear. Parts 1.B and 2.5 refer to "Dry Weather flows" and "Dry Weather," not "non-storm water." No reader, including the public, agencies, courts, or subsequent Regional Board members or staff, would know that these provisions apply solely to non-storm water based on their current wording. Neither the public nor the regulated community should be required to comb through this Board's decision in order to know that these two paragraphs apply only to non-storm water. This is especially important because parties other than the Regional Board can seek to enforce the Permit, *see* 33 U.S.C. § 1365, and third parties and the permittees are entitled to a clear statement

of the Permit's requirements. If Parts 1.B and 2.5 apply only to non-storm water, as Regional Board staff testified (R.T. 282:11-14, 285:2-8, 360:18-24)¹ and as this draft order finds, then the Parts 1.B and 2.5 should clearly so state.

Nevertheless, the Draft Order seeks to justify reference solely to dry weather on the basis that the meaning of "Dry Weather" in the SMB TMDL is equivalent to non-storm water (Draft Order at 7). To the contrary, it is both factually and legally erroneous to equate "Dry Weather" within the meaning of the Dry Weather SMB TMDL with "non-storm water" for the following reasons:

a. As a factual matter, "dry weather" flows under the Dry Weather SMB TMDL could include storm water. The Dry Weather SMB TMDL defines "dry weather" as those days with less than 0.1 inch of rain and those days not less than three days after a rain day. "Rain days" are defined as those with greater than 0.1 inch of rain. *See* Dry Weather SMB TMDL, Table 7-4.2a. These definitions are incorporated into the Permit (Permit at 62 and 66).² Accordingly, discharges of rainwater from an MS4 during days where there has been rain, but less than 0.1 inch, or where there are discharges of water composed of rain more than three days after a rain day, are discharges of stormwater that occur during days defined to be "dry weather" within the meaning of the Dry Weather SMB TMDL. Petitioners have requested this Board to consider the evidence set forth in the Declaration of Oliver Galang, submitted herewith. Mr. Galang verifies that there can

¹ R.T. refers to the reporter's transcript of the Regional Board hearing. It is followed by the page and line of the cited testimony.

² Because of a subsequent amendment, the numbering of the pages in the current version of the Permit are now different from the pagination of the Permit when it was amended in 2006. Petitioners will cite to the pagination of the Permit in its current form.

be stormwater flows from precipitation events in storm drains in the Los Angeles basin, even on a day defined to be a "dry weather" day within the meaning of the TMDL.

b. To the extent rainfall is held in dams or reservoirs and then released during dry weather, that water comes from rainfall and is thus "storm water." Again, this means that there can be a discharge of storm water that is still subject to the Dry Weather SMB TMDL.

c. As a legal matter, "storm water" is defined in the federal regulations to include "surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) defines stormwater to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." If the Clean Water Act definition of "storm water" was meant to include only rainfall, then the reference to "surface runoff" and "drainage" would be superfluous.

The draft order further states that it declines to add the word "non-storm water" in Parts 1.B and 2.5 because that language would deviate from the underlying Dry Weather SMB TMDL wasteload allocation. That would only be the case, however, if the wasteload allocation under the Dry Weather SMB TMDL includes something more than "non-storm water." Of course, that was precisely the petitioners' argument at the Regional Board hearing. Petitioners argued to the Regional Board that it must consider whether the permit amendment can be achieved through the application of the MEP standard, and must be subject to the iterative process, because the allocation covered more than simply non-storm water.

Regional Board staff and the Regional Board rejected that position, insisting that the amendment was intended only to apply to non-storm water. Indeed, Regional Board staff was very clear that the amendment was intended to address only non-storm water

discharges. To that end, they testified that the amendment could be adopted without reference to 33 U.S.C. § 1342(p)(3)(B)(iii) and its maximum extent practicable standard because the amendment applied only to non-storm water. They further testified that the iterative process was not applicable because the amendment applied only to non-storm water. (R.T. 74:14-22; 79:2-7; 79:22-80:2.)

In summary, if the amendment applies only to non-storm water, then the addition of this word would not add any confusion, but would clarify what the Regional Board did. On the other hand, if, as petitioners have demonstrated, the dry weather allocation of the Dry Weather SMD TMDL includes more than non-storm water, and if it was the Regional Board's intention to incorporate into the Permit a wasteload allocation that includes all flows present on dry weather days, *i.e.*, both non-storm water and storm water flows, then the record is insufficient to support the amendment. No evidence was submitted by Regional Board staff on whether the amendment could properly apply to stormwater, including evidence on the MEP standard and the iterative process.

In order to make the amendment consistent with the Regional Board's findings, the staff's stated intent, and the evidence presented at the hearing, the word "non-storm water" should be added to both Parts 1.B and 2.5. Alternatively, the resolution should be vacated and the matter remanded to the Regional Board for further proceedings.

III. THE AMENDMENTS TO PARTS 1.B AND 2.5 ARE NUMERIC EFFLUENT LIMITATIONS AND, UNDER THIS BOARD'S PRIOR PRECEDENTS AND EPA GUIDANCE, SHOULD BE SUBJECT TO THE PERMIT'S ITERATIVE PROCESS

At the hearing before the Regional Board and in this petition, petitioners requested that compliance with the amendment be achieved through the Permit's iterative process. The draft order declines to make the amendment subject to the iterative process

and declines to recognize that the amendment imposes numeric effluent limits. The draft order is erroneous in both respects.

A. The Amendment Should Be Subject To the Iterative Process

In *In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*, State Board Order No. WQ 2001-15 (“BIA”), the State Board was called upon to address the incorporation of water quality objectives into municipal stormwater permits. In that decision this Board held:

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

Id. at 8 (emphasis added, footnotes omitted).

EPA, in guidance entitled “*Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) For Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*” issued on November 22, 2002, recommended the same approach. EPA recognized that numeric limits are neither feasible nor appropriate given the variability of storm water runoff and the lack of knowledge as to sources of pollutants and the effective treatment for those pollutants. *Id.* at 4-5.

The draft order proposes to find these authorities inapplicable on the grounds that Parts 1.B and 2.5 apply solely to non-storm water and that they are receiving water limitations, not numeric effluent limitations (Draft Order at 9-10).

First, the draft order evidences an apparent lack of understanding about the hydrology of the Los Angeles Water Basin. The draft order appears to reason that because non-storm water is supposed to be "effectively prohibited," there should be no flows to Santa Monica Bay on Summer Dry Weather days that are variable and not easily controlled, one of the main reasons for application of an iterative process.

In the Los Angeles basin, however, flows still exist during the summer in the storm drains and water courses. Evidence of these flows is before this Board. As set forth in the staff report that was prepared in support of the Dry Weather SMB TMDL, "[m]any of the canyon creeks and storm drains to Santa Monica Bay flow during both wet and dry weather. Dry weather flows are not directly attributable to precipitation, but rather to natural springs, over-irrigation of lawns and other activities in the watershed." (Staff Report at 17.)

Second, as petitioners testified before the Regional Board, petitioners and other permittees have implemented an extensive program to achieve bacteria water quality objectives, including source identification and construction of 20 low-flow diversions in the Santa Monica Bay watershed for summer dry weather. Simply installing a diversion structure, however, does not assure immediate compliance and there are many locations where diverting the discharge is not possible because no sanitary sewer line exists for a diversion structure to tie into (R.T. 126:14-24; 129:15-130:9, 144:19-148:10). Moreover, the sources of bacteria present at many of the compliance locations are unknown, making elimination of the bacteria from the discharge difficult (R.T. 130:10-16; 198:11-19, 199:7-22, 202:7-17, 202:18-204:2). The iterative approach is protective of water quality

while at the same time recognizing the technical difficulties and unknowns faced by petitioners and other permittees in achieving full compliance.

Third, making the amendment subject to the iterative process also is consistent with this Board's decision in *BIA*. *BIA* was directed to the implementation of receiving waters limitations. It did not distinguish between storm water and non-storm water discharges, and there is no reason to introduce that distinction where the issue is achievement of receiving water limitations in complex systems.

This Board in *BIA* also explicitly rejected the concept that the iterative process should not apply to a discharge prohibition simply because it related to a receiving water limitation. In *BIA*, the discharge prohibition prohibited discharges that "cause or contribute to exceedances of receiving water quality objectives." (*BIA*, at 5). Part 1.B, at issue here, is similar. It prohibits "discharges of summer dry weather . . . that cause or contribute to exceedances of the bacteria receiving water limitations in Part 2.5 . . ." As this Board held in *BIA*, the iterative process must apply to such a prohibition. *Id.* at 9.

Finally, contrary to the draft order's assertion, making compliance with the permit amendment subject to the iterative process does not conflict with federal law. As noted, EPA has issued guidance in which it specifically recommends that wasteload allocations not be reflected in stormwater permits as numeric effluent limits, but instead as best management practices with an "iterative", adaptive management BMP approach. *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit requirements based on those WLAs* (November 22, 2002) at 5. The Clean Water Act requires municipal permits to include a provision that effectively prohibits "discharges of non-storm water discharges into the storm

sewers." 33 U.S.C. § 1342(p)(3)(B)(ii) (emphasis added). This section of the statute does not address discharges *from* an MS4 into receiving waters. Similarly, it is the discharge *from* the MS4, not *into* it, that is the subject of this Board's *BIA* decision. Here, there is the potential for flows from storm drains and water courses to enter into Santa Monica Bay even during Dry Weather. The iterative process recognized in *BIA* is properly applicable to those flows.

B. The Amendment Does Impose Numeric Effluent Limitations

The draft order is also incorrect when it states that the amendment does not impose numeric effluent limitations. Part 1.B prohibits discharges of Summer Dry Weather flows into Santa Monica Bay that cause or contribute to an exceedance of the receiving water limitations in Part 2.5 (Permit at 22). Part 2.5 states:

During Summer Dry Weather there shall be no discharge of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash of the applicable bacteria objectives. The applicable bacteria objectives include both single sample and geometric bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use, as set forth in the Basin Plan.

Permit at 24.

The applicable bacteria objectives are numeric: They are

1. Geometric Mean Limits (Thirty Day)
 - a. Total coliform density shall not exceed 1,000/100 ml.
 - b. Fecal coliform density shall not exceed 200/100 ml.
 - c. Enterococcus density shall not exceed 35/100 ml.
2. Single Sample Limits
 - a. Total coliform density shall not exceed 10,000/100 ml.
 - b. Fecal coliform density shall not exceed 400/100 ml.
 - c. Enterococcus density shall not exceed 104/100 ml.
 - d. Total coliform density shall not exceed 1,000/100 ml, if the ratio of fecal-to-total coliform exceeds 0.1.

Regional Board Resolution No. 01-018 (October 25, 2001).

In other words, Parts 1.B and 2.5 prohibit discharges that result in exceedances of the following numeric bacteria densities: (a) on a rolling thirty day geometric mean, total coliform density in excess of 1,000/100 ml; fecal coliform density in excess of 200/100 ml; enterococcus density in excess of 35/100 ml; and (2) single samples with total coliform density of excess of 10,000/100 ml; fecal coliform density in excess of 400/100 ml; enterococcus density in excess of 104/100 ml; and total coliform density in excess of 1,000/100 ml if the ratio of fecal-to-total coliform exceeds 0.1.

Nevertheless the draft order states that these are not numeric limitations because they are directed at the quality of the receiving water and not discharges to it (Draft Order at 10). According to the draft order, "the contested provisions do not impose a numeric limitation measured at a point source outfall."

This statement is incorrect. The amendment specifically does impose a numeric limitation measured at a point source outfall, namely the point at which a storm drain empties into the ocean. As the draft order recognizes, under the amendment compliance is measured at the wave wash. The Dry Weather SMB TMDL and the Permit define the "wave wash" to mean "*the point at which a storm drain or creek empties and the effluent from the storm drain initially mixes with the receiving ocean water.*" (Permit at 70 (emphasis added).) Thus, with respect to at least some storm drains, the limitation is being enforced precisely at a point source outfall, i.e., where the storm drain empties into

Santa Monica Bay.³ This is a numeric limitation imposed on these storm drains at their point of discharge.

The draft order is therefore in error when it states that the amendment does not establish numeric limitations at the point of discharge to the receiving water. The amendment imposes precisely that limitation: with respect to at least some storm drains, it imposes a numeric standard that can not be exceeded at the specific point where the storm drain empties into Santa Monica Bay.

Finally, as set forth in Petitioners' Statement of Points and Authorities, this Board's panel of experts on numeric effluent limits in storm water permits specifically concluded that numeric effluent limits should not be included in stormwater permits. See Statement of Points and Authorities at 15-16. This recommendation should not be ignored the first time its application is at issue.

IV. IT IS NECESSARY AND APPROPRIATE FOR THIS BOARD TO MAKE THE AMENDMENT CONSISTENT WITH OTHER TMDLS⁴

The relationship between the dry weather SMB TMDL and the Malibu Creek and Ballona Creek Bacteria TMDLs was raised by petitioners at the hearing on the amendment. Three of the Dry Weather SMB TMDL monitoring sites are located at the mouth of Malibu Creek, and one monitoring site is located at the mouth of Ballona Creek. Petitioners requested that these four sites, and any others impacted by discharges from these creeks, be excluded from the amendment because compliance at these sites could be dependent on the reduction of bacteria discharge from the creeks themselves and

³ As defined by the federal regulations, "outfall" means a point source as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States" 40 C.F.R. § 122.26(b)(9).

compliance with the Malibu Creek and Ballona Creek Bacteria TMDLs was not required until 2009 and no earlier than 2012, respectively.

This was not the first time that petitioners had raised this issue. The Regional Board adopted the Malibu Creek Bacteria TMDL in 2004 and the Ballona Creek Bacteria TMDL in 2006, and petitioners raised the interrelationship between these TMDLs and the Dry Weather SMB TMDL at those hearings. The Regional Board at those hearings said it would address this relationship. For example, in adopting the Malibu Creek Bacteria TMDL, the Regional Board said that, "to be consistent with the Santa Monica Bay (SMB) Beaches TMDLs, the Regional Board intends to reconsider this TMDL in coordination with a reconsideration of the SMB Beaches TMDLs." See Attachment A to Resolution No. 2004-19, p. 6 (December 13, 2004). Ballona Creek Bacteria TMDL contains a similar statement. See Regional Board Resolution No. 2006-011, Attachment A, p. 7 (June 6, 2006). At the hearing on the amendment, however, the Regional Board declined to make any modification to the compliance monitoring sites impacted by Malibu or Ballona Creeks. Thus, even though compliance at the mouth of Malibu and Ballona Creeks is addressed in the Malibu Creek and Ballona Creek TMDLs, which require compliance in 2009 and 2012 or later, the amendment requires current compliance at the mouths of Malibu Creek and Ballona Creek.

To eliminate this inconsistency, petitioners requested that the amendment be modified to exclude from the Dry Weather SMB TMDL the monitoring sites at the mouth

⁴ On December 23, 2007 petitioners' filed a request to file a reply pleading. In that request, petitioners responded to several assertions made by the Regional Board and the Santa Monica Baykeeper in their opposition papers on this and the other issues. Petitioners request that the Board consider petitioners request and the arguments made therein in conjunction with this and the other issues.

of Malibu and Ballona Creeks. This inconsistency among the TMDLs is a substantial issue and appropriate for review by the State Board.

It should be noted that in the Regional Board's response to this petition, the Regional Board argues that there is new evidence that the monitoring sites at the mouth of Malibu and Ballona Creek are not impacted by the creeks themselves (Regional Board Response at 20-22). There is no citation to the record for these assertions. Indeed, there is no evidence in the record to support these assertions because no such evidence was presented at the hearing. The fact that this new evidence exists supports the petitioners' request that the State Board vacate the Regional Board order and remand it for further proceedings. If the State Board does so, the Regional Board can then take this evidence into consideration in determining how to incorporate the TMDL into the permit.

V. THE AMENDMENT IS INCONSISTENT WITH THIS BOARD'S ORDER APPROVING THE DRY WEATHER SMB TMDL

The State Board approved the Dry Weather SMB TMDL on September 19, 2002. State Board Resolution No. 2002-0149. In response to comments made by parties at that time, this Board specifically addressed whether one permittee could be held responsible for another permittee's discharges. This Board held it could not. This Board stated, "[Wasteload Allocations] are only enforced for a discharger's own discharges, and then only in the context of its National Pollutant Discharge Elimination System (NPDES) permit . . . State Board Resolution No. 2002-0149, ¶ 9 (emphasis added).

The Regional Board ignored this Board's order. Current footnote 3 (numbered as footnote 4 in 2006) provides that "All Permittees within a subwatershed of the Santa Monica Bay watershed management area . . . are jointly responsible for compliance

with the limitations imposed in Table 7-4.1 Permit, footnote 3, p. 22 (emphasis added).

The Dry Weather SMB TMDL applies to municipal dischargers, Caltrans, and three POTWs (Regional Board Resolution No. 2002-04, Attachment A, p. 4). Petitioners do not have authority or control over these dischargers. The footnote nevertheless appears to make petitioners responsible for exceedances in the watershed management area regardless of whether they have any responsibility for the cause of the exceedance. This provision is directly contrary to State Board Resolution No. 2002-0149. (This provision in footnote 3 is also unlawful for the reasons stated in Petitioner's Statement of Points and Authorities in support of Petition for Review at 19.) This Board should order the Regional Board to strike the last sentence of current footnote 3 from the Permit or this Board should strike the provision itself.

VI. THE AMENDMENT IS NOT ADEQUATELY SUPPORTED BY THE FINDINGS AND THE FINDINGS ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE

Any amendment to the Permit must be supported by adequate findings and those findings must be supported by the weight of the evidence. Water Code § 13330 and Code of Civil Procedure § 1094.5. This amendment does not meet this requirement.

The Regional Board was required to make the following findings to support the amendment:

1. A finding identifying the source of the bacteria that is causing any exceedance.
2. A finding that it is technically feasible for the permittees to comply with the terms of this amendment.

3. A finding that the terms of the amendment can be met through cost-effective programs that will be accepted by the public.

4. A finding that the amendment will not require the permittees to adopt controls or implement programs that go beyond the maximum extent practicable standard applicable to municipal stormwater permits, 33 U.S.C. § 1342(p)(3)(B)(iii) in order to comply with the amendment.

5. A finding that the terms of the amendment are reasonably achievable.

6. To the extent the Regional Board finds that compliance would require programs or controls that go beyond the MEP standard, a finding that the Regional Board has considered all factors set forth in Water Code Section 13241, including (a) the environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto, (b) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area, and (c) economic considerations.

7. A finding that the amendment is reasonable in light of the Water Code Section 13241 factors.

Xavier Swamikannu of Regional Board staff testified that, from the staff's perspective, it was not necessary to identify the source of bacteria, to determine whether it was technically feasible to comply with the amended Permit, to determine that compliance could be achieved in accordance with the MEP standard, or to determine that compliance with the amendment was reasonably achievable. He testified that none of these findings were necessary because the amendment was simply adopting the TMDL

(R.T. 291:10-24; 23:5-15; 293:20-24; 294:21-295:6). The Regional Board apparently accepted this view because no such findings were included in the amendment.

To the extent that Dr. Swamikannu testified that these matters were considered when the TMDL was adopted, however, he was clearly wrong. It is the position of the State Board and the Regional Board that compliance with MEP and these other considerations are not required when adopting a TMDL. The Court of Appeal accepted this position in *City of Arcadia v. State Water Resources Control Board*, 135 Cal.App.4th 1392, 1429. The Regional Board staff confirmed that MEP was not a consideration when the Regional Board adopted the Dry Weather SMB TMDL (R.T. 280:17-20).

Contrary to Dr. Swamikannu's testimony, the adoption of a municipal stormwater permit, including any amendment thereto, is governed by 33 U.S.C. § 1342(p)(3)(B)(iii), which includes the MEP standard. To the extent that the Permit includes requirements that go beyond the Clean Water Act's requirements, the Regional Board must also consider all the factors set forth in Water Code § 13241. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 618.⁵

The issue of whether municipal stormwater permit amendment is supported by the findings and the evidence is a substantial one, and clearly one appropriate for review by this Board. This is a substantial issue because the permit or permit amendment hearing is the only time that the Regional Board is called upon to determine whether the permit's

⁵ In light of the Regional Board staff's position that the Regional Board did not need to make findings with regard to the source of bacteria, feasibility, MEP, whether the amendment's terms were reasonably achievable, or the factors under Water Code § 13241, Regional Board staff introduced no evidence on these points. In contrast, petitioners submitted evidence that the source of bacteria is not yet known and therefore it is not known how or whether the amendment terms can be achieved. Thus, there is no evidence on which the Regional Board could have made these findings, even if it desired to do so.

terms are consistent with the MEP. As noted above, MEP is not considered when the TMDL is adopted. If MEP is not the subject of consideration when a TMDL is adopted, and this Board is going to take the further position that MEP is also not a proper subject when the TMDL is incorporated into a permit, then a permittee will *never* have the opportunity to have the Regional Board address whether the incorporation of the TMDL is consistent with the MEP standard.

As noted above, the MEP standard applies to *all* discharges from an MS4. 33 U.S.C. § 1342(p)(3)(B)(iii). Additionally, as set forth above, dry weather discharges within the meaning of the Dry Weather SMB TMDL could contain more than just "non-storm water." It was therefore incumbent upon the Regional Board to make findings on the issues set forth above.

In this regard, it is not clear whether the last paragraph in the draft order is directed solely to the iterative process or whether it has broader implications. The draft order states that the proposed result would not necessarily be different for municipal stormwater discharges subject to a TMDL. To the extent that this paragraph is intended to be construed as providing that a TMDL applicable to stormwater discharges could be amended into a municipal stormwater permit without regard to MEP and without the Regional Board making the findings set forth above, such an implication is error.

VII. THE REGIONAL BOARD'S HEARING WAS NOT CONDUCTED IN ACCORDANCE WITH THE APPLICABLE SECTIONS OF THE CALIFORNIA ADMINISTRATIVE PROCEDURES ACT AND THE CALIFORNIA CODE OF REGULATIONS

Title 23, Section 648 of the California Code of Regulations provides that all adjudicative proceedings before the regional boards shall be governed by the California Code of Regulations, Chapter 4.5 of the Administrative Procedure Act ("APA")

(commencing with Section 11400 of the Government Code), Sections 801-805 of the Evidence Code, and Section 11513 of the Government Code. 23 Cal.Code Reg. 648(b). As set forth in Petitioner's Statement of Points and Authorities in Support of Their Petition and Petitioner's Supplemental Statement of Points and Authorities, the hearing was not conducted in accordance with these statutes and regulations.

Specifically:

(1) The Regional Board's counsel simultaneously served as counsel to the Regional Board and as counsel to Regional Board staff, actively advocating for the proposed amendment. This dual capacity violated both the APA and due process and, in itself requires the permit amendment to be set aside and a new hearing held. *E.g.*, *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-93, 98.

(2) Petitioners were denied the right to present evidence and to cross examine witnesses; and

(3) The Regional Board did not disclose the record it intended to rely on until three business day before the hearing.

VIII. CONCLUSION

As petitioners stated at the hearing before the Regional Board, petitioners share the goals of the Dry Weather SMB TMDL. To that end, petitioners have been working to achieve compliance with the TMDL since before it became effective. Petitioners' efforts have included constructing many low-flow diversions and assisting other jurisdictions to install low-flow diversions or to otherwise comply with the TMDL.

In order for the TMDL to be effective, municipal permittees and the Regional Board should join together in its implementation. Such a partnership will not exist, however, if permit amendments are punitive.

For the foregoing reasons, the draft order should be modified to provide that the permit amendment be set aside and the matter remanded to the Regional Board for further proceedings. Alternatively, the State Board should revise the permit amendment by (1) eliminating or modifying Part 1.B, including footnote 4; (2) providing that Part 2.5, and Part 1.B if it is not deleted, are subject to the iterative process; (3) adding the words "non-storm water" to Parts 1.B and 2.5; (4) clarifying that sites impacted by discharges from Malibu and Ballona Creeks are not to be used as monitoring sites for determining compliance with the Dry Weather SMB TMDL; and (5) providing that any further permit amendment proceedings be full and fair and in compliance with the applicable statutes and regulations.

Dated: June 3, 2009

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Attorneys for Petitioners
 COUNTY OF LOS ANGELES and
 LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

BEFORE THE
 STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
 THE COUNTY OF LOS ANGELES)
 AND THE LOS ANGELES COUNTY)
 FOR REVIEW OF CALIFORNIA)
 REGIONAL WATER QUALITY)
 FLOOD CONTROL DISTRICT)
 CONTROL BOARD, LOS ANGELES,)
 REGION, ORDER NO. R4-2006-74)
)
)
)

SWRCB/OCC FILE A-1780
 PETITIONERS REQUEST THAT
 THE STATE BOARD
 CONSIDER SUPPLEMENTAL
 EVIDENCE; DECLARATION
 OF OLIVER GALANG, P.E.
 [23 C.C.R. § 2050.6]

Petitioners County of Los Angeles and Los Angeles County Flood Control
 District hereby request that the State Board consider the evidence set forth in the attached
 Declaration of Oliver Galang, P.E.

Pursuant to 23 C.C.R. § 2050.6, petitioners state as follows:

1. The evidence presented demonstrates that stormwater from a precipitation related event can be present in storm drains in the Los Angeles County water basin even on a "dry day" within the meaning of the Santa Monica Bay Beaches Bacteria TMDL.

2. The State Board should accept the supplemental evidence for the following reasons:

(a) This evidence addresses a factual assertion set forth in the draft Order, which factual assertion is used to support the reasoning of the order. This factual assertion is that "[a]ny discharges during such dry weather days would not be precipitation-related." (Draft Order at 7). As set forth in the declaration, flows in the storm drain, and thus discharges, could occur from a precipitation related event, even though the day is defined to be a "dry weather" day.

(b) This evidence was not presented to the Regional Board because the witnesses before the Regional Board stated that the permit amendment was meant to address only non-stormwater. It was only when the Regional Board declined to include the word non-storm water in the permit amendment that the issue of whether the permit could be applied to both stormwater and non-storm water arose. The specific factual issue addressed by this additional evidence is raised by the State Board's draft order.

The State Board's decision should be based on a correct factual record. Accordingly, petitioners request that the State Board admit this supplemental evidence into the record.

Dated: June 3, 2009

ROBERT E. KALUNIAN, Acting County Counsel
JUDITH A. FRIES, Principal Deputy

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN

By: 
Howard Gest
Attorneys for Petitioners

DECLARATION OF OLIVER GALANG, P.E.

I, Oliver Galang, P.E. hereby declare:

1. I am a senior civil engineer employed by the Los Angeles County Department of Public Works. I am currently the section head of the Data Management Section of the Watershed Management Division of the Los Angeles County Department of Public Works. My duties as section head include overseeing the collection and analysis of water quality sampling data, including the data collected pursuant to the Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan. This includes determination of whether a day is to be considered a "dry weather" or "rain day" under that monitoring plan.

2. I have personal knowledge of the matters set forth herein and, if called to testify, could and would testify competently thereto.

3. The Dry Weather Santa Monica Bay Bacteria TMDL states that dry weather days are defined as those with less than 0.1 inch of rain and those days not less than three days after a rain day. Rain days are defined as those with greater than 0.1 inch of rain.

4. In a letter dated November 1, 2004 from the Executive Officer of the Los Angeles Regional Water Quality Control Board to the Santa Monica Bay Beaches Bacteria Technical Steering Committee, the Executive Officer directed that the rain gauge at the University of Southern California be used to determine whether there is a dry or wet weather condition under the Santa Monica Bay Beach Bacteria TMDL.

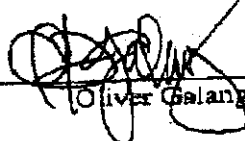
5. Given the location of the U.S.C. rain gauge, it is possible for there to be less than 0.1 inch of rain measured at the rain gauge, resulting in a "dry weather" day

within the meaning of the Santa Monica Bay Beaches Bacteria TMDL, but more than 0.1 inch of rain in other areas of the watershed. In such a case there could be flow in storm drains from rain even on a "dry day."

6. Accordingly, it is possible to have flows in storm drains that have resulted from a precipitation event, even though the day is considered to be a dry weather day within the meaning of the Dry Weather Santa Monica Bay Beaches TMDL.

I declare under the penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed this 3 day of June, 2009 at Alhambra, California.



Oliver Galang, P.E.