**State Water Resources Control Board**

November 21, 2014

**VIA EMAIL ONLY**

**TO ALL PETITIONERS AND THEIR COUNSEL OF RECORD AND TO ALL INTERESTED PERSONS:**

IN RE PETITIONS CHALLENGING 2012 LOS ANGELES MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT (ORDER NO. R4-2012-0175): TRANSMITTAL OF PROPOSED ORDER, NOTICE OF PUBLIC WORKSHOP, AND NOTICE OF WRITTEN PUBLIC COMMENT PERIOD
**SWRCB/OCC FILES A-2236(a) THROUGH (kk)**

Enclosed is a copy of the proposed order in the above-entitled matter. The State Water Resources Control Board (State Water Board) will hold a workshop on the proposed order on **Tuesday, December 16, 2014**, commencing at **9:00 a.m.** at the **Metropolitan Water District of Southern California Headquarters** at **700 North Alameda Street in Los Angeles**. The purpose of this workshop is to solicit comments from petitioners and interested persons regarding the proposed order. The State Water Board will take no final action on the proposed order at this workshop.

The State Water Board is also soliciting written public comments on the proposed order. Written comments must be received by **12:00 noon, Wednesday, January 21, 2015**. Please indicate in the subject line, "Comments to A-2236(a)-(kk)." Electronic submission of written comments is encouraged. Written comments must be addressed to:

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
(tel) 916-341-5600
(fax) 916-341-5620
(email) commentletters@waterboards.ca.gov

After consideration of comments received at the workshop and through the written public comment period, the State Water Board will schedule the matter for final action at a subsequent State Water Board meeting.

**PROCEDURAL MATTERS**

All comments shall be based solely upon evidence contained in the record or upon legal argument. Supplemental evidence will not be permitted except under the limited circumstances described in California Code of Regulations, title 23, section 2050.6.

To ensure a productive and efficient public workshop in which all participants have an opportunity to participate, oral statements will be time-limited. Parties and interested persons are encouraged to prepare panel presentations. Petitioners and interested persons proposing a panel must contact Senior Staff Counsel Emel Wadhwani by e-mail at Emel.Wadhwani@waterboards.ca.gov by 12:00 noon on Monday, December 8, 2014, with the proposed panel and requested amount of time for presentation (not to exceed 20 minutes). Non-panel presentations are expected to be limited to five minutes per speaker.

The State Water Board will circulate an order of proceedings prior to the workshop with final determinations on panels and allotted speaking time based on the number of panels and speakers expected. Any materials to be presented at the workshop, including power point presentations and other visual displays must be submitted to Ms. Jeanine Townsend at the address above by 9:00 am on Monday, December 15, 2014.

**PROHIBITION ON EX PARTE COMMUNICATIONS**

The 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175) is subject to the prohibition on ex parte communications.[1] Interested persons, therefore, may not communicate with State Water Board members regarding the proposed order except through oral comments at the workshop and at subsequent, noticed meetings and through submission of timely written comments.

If you have any questions regarding this letter, please contact Emel G. Wadhwani, Senior Staff Counsel, in the Office of Chief Counsel, at (916) 322-3622 or at Emel.Wadhwani@waterboards.ca.gov.

Sincerely,

FOR MAMC

Michael A.M. Lauffer
Chief Counsel
Enclosure

cc: See next page

[1] Gov. Code, § 11430.10 et seq.

cc: **[via email only]**
Exhibit A – Petitioners and Their Counsel of Record

**[via email only]**
Exhibit B – MS4 Dischargers List

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(Continued next page)

Cc: (Continued)

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# DRAFT

11/21/14

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ 2015-**

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In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

**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**

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

***SWRCB/OCC FILES A-2236 (a)-(kk)***

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BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews Order No. R4-2012-0175 (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the "Los Angeles MS4 Order" or the "Order." We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

## I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water

Board in accordance with section 402(p)(3)(B) of the Clean Water Act[1] and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),[2] as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board Order No. 01-182 (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;[3] however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.[4] Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the

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[1] 33 U.S.C. § 1342(p)(3)(B).

[2] Wat. Code, §§ 13263, 13377.

[3] See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

[4] By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefor appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,[5] consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as "receiving water limitations." Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board Order WQ 99-05 (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit's receiving water limitations as "receiving water limitations provisions.") We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).[6]

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions

[5] Cal. Code Regs., tit. 23, § 2054.

[6] Information on that workshop is available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml> (as of Nov 18, 2014).

(October 15, 2013 Responses).[7] We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.[8] However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.[9] On April 1, 2014, we adopted Order WQ 2014-0056 taking up review of the issues in the petitions on our own motion.[10]

We now resolve the issues in the petitions with this order.

## II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.[11]

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

*Requests to Take Official Notice or Supplement the Record with Additional Evidence*

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)[12] and a number of requests to

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[7] We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

[8] Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

[9] See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

[10] To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

[11] *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

[12] The Administrative Record was prepared by the Los Angeles Water Board and is available at <http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml> (as of Nov. 18, 2014).

admit supplemental evidence not considered by the Los Angeles Water Board. We reviewed the requests with consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings[13] and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8 and 9:[14]

1. Order No. 2013-0001-DWQ, NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;[15]
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;[16]
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;[17]
4. Chapter 7 of the NPDES Permit Writer's Manual, updated by USEPA, September 2010;[18]

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[13] For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

[14] We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writer's Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

[15] County of Los Angeles October 15, 2013 Response, Att. C; also available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf> (as of Nov. 18, 2014).

[16] Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf> and <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf> (as of Nov. 18, 2014).

[17] Los Angeles Water Board Request for Official Notice, Exh.C; also available at <http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf> (as of Nov.18, 2014).

[18] Chapter 7 of the NPDES Permit Writer's Manual was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm> (as of Nov.18, 2014).

5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;[19]
6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;[20]
7. "Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12," issued by USEPA, Region 9, June 3, 1987;[21]
8. Order WQ 2014-0077-DWQ, amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, Order 2012-0011-DWQ, adopted by State Water Board, May 20, 2014;[22]
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.[23]

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.[24]

Among other requests, we are not granting the request to supplement the Administrative Record with the notices of intent to develop a WMP/EWMP and associated documents filed by Permittees following adoption of the Los Angeles MS4 Order. With regard to factual evidence regarding actions taken by Permittees to comply

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[19] Environmental Petitioners' Request for Official Notice, Exh.B, available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[20] Environmental Petitioners' Request for Official Notice, Exh.D; also available at <http://www.epa.gov/npdes/pubs/owm0231.pdf> (as of Nov. 18, 2014).

[21] Environmental Petitioners' Request for Official Notice, Exh.E; available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[22] Available at <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf> (as of Nov. 18, 2014).

[23] Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).

[24] The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml>.

with the LA MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order.

*City of El Monte's Amended Petition*

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.[25] The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.[26]

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[25] See also Cal. Code Regs., tit. 23, § 2050.

[26] We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009[27] when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.[28]

We reject El Monte's amended petition as untimely.

*Environmental Petitioners' Motion to Strike*

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,[29] and Sierra Madre, incorporated a response to the collateral estoppel argument.

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[27] Wat. Code, § 16100 et seq.

[28] In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

[29] The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

We stated in a July 15, 2013 letter that"[i]nterested persons may not use the [October 15][30] deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach." We clarified further in a July 29, 2013 letter: "[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language."

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners' collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues. [31]

Having resolved the procedural issues, we turn to the merits of the Petitions.

## A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

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

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[30] The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

[31] In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino's motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

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

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .[32]

The petitioners that are permittees (hereinafter referred to as "Permittee Petitioners")[33] argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the "iterative process," constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners' position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.[34] In the context of NPDES permits for MS4s, however, the Clean Water Act does not reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP), but requirements to meet water quality standards are at the discretion of the permitting agency.[35] Specifically the Clean Water Act states as follows:

> Permits for discharges from municipal storm sewers –
>
> . . .

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[32] Los Angeles MS4 Order, Part V.A, pp. 38-39.

[33] For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

[34] 33 U.S.C. §§ 1311, 1342(a).

[35] 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants.[36]

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.[37] In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, "water boards") have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.[38] Accordingly, the State Water Board has discretion under both federal and state law as to whether and how to require compliance with water quality standards for MS4 discharges.

As mentioned above, we have previously exercised this discretion in support of requiring compliance with water quality standards, by directing, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters.[39] In particular, in State Water Board Order WQ 99-05, we established precedential language that required compliance with receiving water limitations. However, in lieu of "strict compliance" with water quality standards, we also established receiving water limitations provisions that prescribed an iterative process whereby an exceedance of a water

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[36] 33 U.S.C. § 1342(p)(3)(B).

[37] Wat. Code, § 13263. The term "water quality standards" encompasses the beneficial uses of the water body and the water quality objectives (or "water quality criteria" under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state anti-degradation policy.

[38] Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

[39] State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition)*, WQ 2001-15 (*Building Industry Association of San Diego*).

quality standard triggers a process of BMP improvements: reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs.[40]

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."[41] The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit

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[40] State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. *See* State Water Board Orders WQ 91-03 (*Citizens for a Better Environment)*, WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

[41] *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal's decision.

brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.[42] The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.[43]

While we reiterate that the judicial rulings have been consistent with the water boards' intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, we have discretion under both federal and state law as to whether and how to require compliance with water quality standards for MS4 discharges. In each of the discussed court cases, the court's decision is based on the specific permit language; the cases do not constrain our discretion as to whether to require compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise that discretion as we decided in State Water Board Order WQ 99-05. We have the flexibility to reverse[44] our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance

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[42] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

[43] *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

[44] Of course any change of direction would be subject to ordinary principles of administrative law. See Code Civ. Proc., § 1094.5, subd. (b).

with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.[45]

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. Such an approach is consistent with the Porter-Cologne Act's emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act's expectation that waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.[46]

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[45] As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

[46] We disagree with Permittee Petitioners' argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines "receiving water" as "[a] 'water of the United States' in to which waste and/or pollutants are or may be discharged." (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines "receiving water limitations" as "[a]ny 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 CFR §131.38." (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify *(Continued)*

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges. Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

### B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or

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*(continued from previous page)*
objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")[47] pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.[48]

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85$^{th}$ percentile 24-hour storm event (hereinafter "storm water retention approach") for the drainage areas tributary to the projects.[49]

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the

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[47] Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

[48] Los Angeles MS4 Order, Part VI.C., pp. 49-67.

[49] *Id.*, Part VI.C.1.g., pp. 48-49.

receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.[50]

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.[51]

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.[52]

4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL, [53] provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.[54]

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

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[50] *Id.*, Part VI.C.2.b., p. 52.

[51] *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

[52] *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.

[53] *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

[54] *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

### 1. Anti-backsliding

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.[55] The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.[56]

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(*l*). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.[57] The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed

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[55] 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(*l*).

[56] The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

[57] 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).[58] The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.[59] The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),[60] and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions 40 Code of Federal Regulations section 122.44(*l*), the non-applicability is less clear cut. USEPA promulgated 40 of the Code of Federal Regulations section 122.44(*l*)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.[61] We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(*l*) in the context of municipal storm water permits.[62] Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-quantitative, non-

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[58] *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

[59] The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal anti-degradation policy. (33 U.S.C. § 1313(d)(4)(B).)

[60] *Defenders of Wildlife*, supra, 191 F.3d at pp. 1165-1166.

[61] See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).)

[62] As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(*l*)(1), but the letter has no regulatory effect and, further, is devoid of any analysis.

numeric requirements such as BMPs and plans.[63] It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.[64] The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and the general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that "time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale."[65] The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

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[63] See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(*l*). (In passing, we note that the order appears to assume that the permit's water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

[64] See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(*l*)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(*l*)(2)(i)(B)(1).

[65] Los Angeles Water Board October 15, 2013 Response, p. 51.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board's new understanding regarding how to make progress toward achieving water quality standards as well as supporting the development of new water supplies. The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

**Finding II.N:**

**N. Anti-Backsliding Requirements.** Section 402(o)(2) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit. **The Fact Sheet of this Order contains further discussion regarding anti-backsliding.**

**Attachment F, Fact Sheet, Part III.D.4:**

**4. Anti-Backsliding Requirements.** Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in40 Code of Federal Regulations section 122.44(*l*), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for**

**traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).**

**2. Antidegradation**

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.[66] The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.[67]

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.[68] In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that "existing instream uses and the level of water quality necessary to protect

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[66] 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

[67] *Ibid.*

[68] State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

the existing uses" is maintained and protected.[69] Second, if the baseline quality of a water body for a given constituent "exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected" through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is "necessary to accommodate important economic or social development in the area in which the waters are located;" (2) "water quality adequate to protect existing uses fully" is assured; and (3) "the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control" are achieved.[70]

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.[71] In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure "best practicable treatment and control" of the discharges."[72] The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.[73]

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[69] 40 C.F.R. § 131.12(a)(1); State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.

[70] 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for "outstanding national resources." (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

[71] See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

[72] State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using "best efforts." (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District)*, WQ 90-6 (*Environmental Resources Protection Council*).) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: "To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . .The costs of the treatment or control should also be considered . . . ." (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

[73] APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4th 1255.

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.[74] The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).[75] The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario contradicted by the available data,[76] the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that

[74] Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

[75] APU 90-004, p. 2.

[76] We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct.11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E, RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no evidence presented to the Los Angeles Water Board of high quality waters in the region. We recognize, however, that the determination of whether a water is high quality is made on a constituent-by-constituent, as well as water body-by-water body, basis, and that any generalized conclusions are therefore problematic.

are equally or more stringent than those of the 2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that strict compliance with the receiving water limitations of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.[77] The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.[78] In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968. We acknowledge that the evidence in

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[77] In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

[78] *See Asociacion de Gente Unida,* supra, 210 Cal.App.4th at p. 1278.

the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.[79]

Despite this conclusion, we will not remand the anti-degradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete anti-degradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate anti-degradation analysis for a discrete discharge or facility. It has limited value when considering anti-degradation in the context of storm water discharges for a large region, with multiple pollutants and multiple water bodies, especially given that reliable data on the baseline water quality from 1968 is not available.[80]

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state anti-degradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

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[79] See fn. 76.

[80] We note that USEPA did not conduct a detailed anti-degradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons.

**Finding II. M.**

**M. Antidegradation Policy**

40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 **as set out in the Fact Sheet.**

**Attachment F, Fact Sheet Part III.D.3.**

**3. Antidegradation Policy.** 40 CFR section 131.12[4] requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State **unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected,**

**and must ensure best practicable treatment and control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.** ~~until it is demonstrated that any change in quality will be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:** ~~.~~

**1.** ~~Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p).~~ Many of the waters within the area covered by this Order are impaired ~~and~~ **for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are** listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. **This Order ensures that water quality necessary to protect beneficial uses is maintained and protected**. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. **This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by showing immediate compliance or by implementing Watershed Management Programs/EWMPs with a compliance schedule.** This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.

2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:

a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. Some discharge of storm water is essential for maintaining instream flows that support beneficial uses, flood control, and public safety as well as to accommodate development in the area. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment and control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

### 3. Compliance Schedules and the Appropriateness of Enforcement Orders

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the

WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already requires Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations to request a time schedule order.[81] Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution

[81] Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order requires a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.[82] We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also require a Permittee to request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

**b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may within 45 days of the final compliance**

[82] *Ibid.*

**deadline request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.**

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption**, or within 45 days of the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

**4. Rigor and Accountability in the WMPs/EWMPs**

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.[83] We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.[84]

*a. Milestones and Compliance Deadlines*

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

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[83] From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

[84] We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.[85] A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.[86] For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.[87] A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.[88] We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as "as soon as possible."[89] Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of "as soon as possible:"

> Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do

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[85] Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

[86] *Id.*, Part VI.E.2.d.i(4)(c), p.144.

[87] *Id.*, Part VI.C.2.a.i., pp. 49-50.

[88] *Id.*, Part VI.C.2.c., p.52.

[89] *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.)

> not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.[90]

We will make a revision to the compliance schedule provisions to make it clear that the term "as soon as possible" is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its Executive Officer,[91] we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

> (b) A final date for achieving the receiving water limitations as soon as possible**, consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c)**.

*b. Constraints on Extension of Deadlines*

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.[92] The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.[93]

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[90] *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

[91] *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, "[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment."

[92] *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

[93] *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to "milestones established pursuant to Part VI.C.4.c.ii.(3)," but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: "Based *(Continued)*

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,[94] and are accordingly, subject to a 30-day public comment period.[95] The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.[96] Of course, in cases where no extension is available, as with final deadlines established in TMDLs, [97] or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the

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*(continued from previous page)*
on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report . . . ." (Emphasis added.)

[94] *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer "expresses no objections" within 60 days. (*Id.,* Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

[95] *Id.*, Part VI.A.5.b, p. 42.

[96] *Id.*, Part VI.A.6, p.42.

[97] *Id.*, Part VI.C.8.a.ii., p.67.

WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension and instead require the Permittee to obtain a time schedule order, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination.[98]

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.

We shall amend Part VI.C.6.a as follows:

> a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.4**5**.c.iii.~~(3) only~~**, with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

*c. Rigor and Accountability in the Process*

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and

[98] *Id.*, Part VI.A.6, p.42.

comment period.[99] Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.[100] Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.[101]

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.[102]

While we are supportive of all of these measures, we find that they should be strengthened. In particular, given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,[103] we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term

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[99] See *id.*, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also id., Part VI.A.5., p. 42.

[100] *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

[101] We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

[102] Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014) .

[103] The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

WMPs/EWMPs will achieve relevant water quality goals. We will add a provision that requires Permittees to resubmit the WMP/EWMP, along with an updated reasonable assurance analysis, at an interval to be determined by the Los Angeles Water Board, but not to exceed every six years. Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittee will overhaul the reasonable assurance analysis and the WMP/EWMP at approximately every third iteration of the adaptive management, based on the previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMP/EWMP in many cases addresses water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and re-calibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data is essential. We recognize such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. We also recognize that the added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsection b. as follows:

**b. Watershed Management Program Six-Year Resubmittal Process**

**i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a, Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis at an interval to be determined by the Regional Board but not to exceed every six years for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data gathered in the prior years and, as appropriate, any new numeric analyses or other methods for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP within 120 days of submittal.**

**5. Determination of Compliance with Final Requirements**

*a. Compliance with Final TMDL Requirements*[104]

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if "[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water."[105] Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee's outfall, or (3) there is no direct or indirect discharge from the Permittee's MS4 to the receiving water during any relevant time period.[106] These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,[107] even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm

[104] The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the "Permittee has submitted and is fully implementing an approved" WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules "compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R," we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

[105] Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

[106] *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

[107] We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-pollutant combinations addressed in a TMDL.

water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.[108]

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.[109]

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[108] See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

[109] We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find *(Continued)*

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.[110] The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85th percentile, 24-hour storm event is not feasible.[111] The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.[112] In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language "[i]n drainage areas where Permittees are implementing an EWMP" in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order,

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*(continued from previous page)*
that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

[110] Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

[111] *Id.*, Part VI.C.1.g., p. 48.

[112] *Id.*, Att. F, Fact Sheet, p. F-39.

a Permittee's showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85th percentile, 24-hour event, establishes compliance, regardless of the results of the required monitoring and regardless of the requirement to engage in adaptive management in response to monitoring results. However, the Permittee must continue to conduct monitoring and adapt the EWMP in response to the monitoring in order for the Permittee to be in compliance with all provisions of the Order. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that "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."[113] We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85th percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

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[113] Los Angeles Water Board, October 15, 2013 Response, p. 62.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results. Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we will require that Permittees have an approved plan in place to close that gap with additional control measures in order to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that the plan will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures.

Our approach is in part already contemplated by the Los Angeles MS4 Order since Permittees must continue monitoring and adaptive management of their EWMP even where they have implemented the storm water retention approach. We clarify and strengthen that requirement. We emphasize here that the requirement to have a plan in place for additional control measures to reach compliance does not mean that the Los Angeles Water Board will require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP. Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with a clarification and revision regarding continued planning, monitoring and adaptive management.

We shall amend Part VI.E.2.e.i. as follows:

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

. . .

(4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water**, and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order**. **Where water quality monitoring under VI.C.7 shows that final water quality-based effluent limitations and final receiving water limitations are not in fact being achieved, the Permittee remains in compliance with the final water quality based effluent limitations and final receiving water limitations only if the Permittee proposes a plan for additional control measures for achievement of these final limitations and submits the plan to the Executive Officer for approval within 30 days of the final deadline.** This provision (4) shall not apply to final trash WQBELs.

*b. Compliance with Final Receiving Water Limitations*

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.[114] In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For Permittees that choose the WMP/EWMP approach, the WMP/EWMP

[114] Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

must incorporate "a final date for achieving the receiving water limitation."[115] To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has "fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP"[116] and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation, however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

> **c.** If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation in Part V.A. has been achieved.**

**6. "Safe Harbor" During the Planning Phase for the WMP/EWMP**

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program to address known contributions of

[115] *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

[116] *Id.*, Part VI.C.2.c., p. 52.

pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.[117]

The Environmental Petitioners object to the availability of a "safe harbor" during the planning phase. We disagree with the Environmental Petitioners that providing a "safe harbor" in the planning phase is disallowed by applicable law -- see our discussion of antibacksliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the "safe harbor" in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the "safe harbor" provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.[118] There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.[119] The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the

[117] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[118] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[119] *Id.*, Part VI.C.4.e., p. 58.

approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.[120]

Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies[121] and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,[122] but in a manner that is targeted to address known pollutants.[123]

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

**g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of**

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[120] *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.

[121] *Id.*, Part VI.C.4.c., pp. 56-57.

[122] *Id.*, Part VI.C.4.d.i.-ii., pp. 57-58.

[123] *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

**the WMP/EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.**

## 7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward. In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles:[124]

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

[124] In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

## C. Appropriateness of TMDL Requirements

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.[125] TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired

[125] 33 U.S.C. § 1313(d).

water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,[126] and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions[127] and are typically incorporated into the regional water board's water quality control plan.[128] TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.[129] Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload allocations.[130] The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.[131]

### 1. Inclusion of Numeric WQBELs

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation

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[126] 40 C.F.R. § 130.2(i).

[127] Wat. Code, §§ 13050, subd. (j), 13242.

[128] See 40 C.F.R. §§ 130.6(c)(1).

[129] *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

[130] *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

[131] We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

for the discharge.[132] In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,[133] including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to meet water quality standards are at the discretion of the permitting agency.[134] Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements

[132] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[133] Wat. Code, § 13263, subd. (a).

[134] 33 U.S.C. § 1342(p); *Defenders of Wildlife*, supra, 191 F.3d 1159.

of relevant wasteload allocations.[135] To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."[136] Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.[137]

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.[138] USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 12, 2010 (2010 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES

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[135] USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also 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,' " (Nov. 12, 2010) (2010 USEPA Memorandum).

[136] 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

[137] Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

[138] 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

Permits.[139] The 2002 USEPA Memorandum contemplated that "the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit."[140] The 2002 USEPA Memorandum further stated that "EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances."[141] The 2010 USEPA Memorandum, noting the increased information available to the permitting agencies after a decade of experience with setting wasteload allocations and effluent limitations, explained that "EPA now recognizes that where the NPDES authority determines that MS4 discharges . . . have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s . . . should contain numeric effluent limitations where feasible to do so."[142] However, the 2010 USEPA Memorandum added that the permitting authority's decision as to how to express WQBELs, i.e. as numeric effluent limitations or BMPs, would be based on an analysis of the specific facts and circumstances surrounding the permit.[143] Further, USEPA subsequently opened the 2010 USEPA Memorandum to public comment and has not to date issued a final version.[144]

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[139] 2002 USEPA Memorandum; 2010 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits" ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

[140] 2002 USEPA Memorandum, p. 5.

[141] *Id.*, p. 2.

[142] 2010 USEPA Memorandum, p. 3.

[143] *Id.*, p. 4. Relying on the 2010 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2010 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process to the extent feasible based on available data and/or modeling projections. (*Id.*, pp. 4-5.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint liability, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

[144] USEPA Statement (March 17, 2011), available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014). The statement clarified that "[i]n general, EPA does not anticipate that end-of-pipe effluent limitations on each municipal separate storm sewer system outfall will be used frequently. Rather, the memorandum *(Continued)*

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.[145]

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),[146] we found BMP-based TMDL requirements to be "consistent with the assumptions and requirements of the WLAs" of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining

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expressly describes 'numeric' limitations in broad terms, including 'numeric parameters acting as surrogates for pollutants such as stormwater flow volume or percentage or amount of impervious cover. In the context of the 2010 memorandum, the term 'numeric effluent limitation' should be viewed as a significantly broader term than just end-of-pipe limitations, and could include limitations expressed as pollutant reduction levels for parameters that are applied system-wide rather than to individual discharge locations, expressed as requirements to meet performance standards for surrogate parameters or for specific pollutant parameters. Under this approach, NPDES authorities have significant flexibility to establish numeric effluent limitations in stormwater permits."

[145] The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8.

[146] State Water Board Order WQ 2014-0077-DWQ.

and standardizing control measure implementation throughout Caltrans' statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits.

**2. Requirement for Reasonable Potential Analysis**

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the "reasonable potential" to cause, or contribute to an excursion above water quality standards.[147] Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board's legal obligation was to develop WQBELs "consistent with the assumptions and requirements of any wasteload allocation" in the TMDLs,[148] and not to reconsider reasonable potential.[149]

**3. USEPA-Established TMDLs**

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,[150] with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a separate implementation plan as a water quality control

[147] 40 C.F.R. § 122.44(d)(1)(iii).

[148] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[149] See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

[150] See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A., supra,* 984 F. Supp. 2d at p. 314.

plan amendment[151] or issue the Permittee a compliance order with a compliance schedule.[152] For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.[153] Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.[154]

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2010 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in

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[151] Wat. Code, § 13242.

[152] *Id.*, See, e.g., § 13300.

[153] The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

[154] Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

the Los Angeles Water Board's water quality control plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

**D. Non-Storm Water Discharge Provisions**

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge "through the MS4 to the receiving waters" and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that "[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters" with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.[155] Permittee Petitioners take issue with the imposition of the prohibition "through the MS4 to receiving waters" because the language does not track the specific requirement of the Clean Water Act that the MS4 permit "include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*" (Emphasis added.)[156]

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.[157] The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively,

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[155] *Id.*, Part III.A, pp 27-33.

[156] 33 U.S.C. § 1342(p)(3)(B)(ii).

[157] The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges "into the MS4 and watercourses." The Board additionally asserts that phrasing the prohibition as "through the MS4 to receiving waters" provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

USEPA has used the terms "into," "from," and "through" interchangeably when describing the prohibition.[158]

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ."[159] Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4.[160] While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . .

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[158] See, e.g., 55 Fed. Reg. 47990, 47995-47996 ("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. . . . 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.))

[159] 33 U.S.C. § 1342(p)(3)(b)(iii).

[160] 40 C.F.R. § 122.26(d)(2)(iv)(B).

and discharges resulting from fire fighting activities."[161] Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage."[162] Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include "a number of classes of discharges which are not in any way related to precipitation events."[163] Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.

Second, the Los Angeles Water Board's legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require "such other provisions" as the permitting authority "determines appropriate for the control of such pollutants." We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board's authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections *to* the MS4.[164] On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of

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[161] *Id.*, § 122.26(b)(2). The preamble to the regulations states: "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. " (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

[162] 40 C.F.R. § 122.26(b)(13).

[163] 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

[164] Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order's Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.[165] Further, the Los Angeles Water Board states in its October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.[166] The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

**E. Monitoring Provisions**

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.[167] Further, under state law, Water Code section 13383, rather than Water Code 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.[168] In particular, we find that the receiving water monitoring requirements of

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[165] Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

[166] Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

[167] See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D), 122.41(h), 122.41(j), 122.41(*l*), 122.42(c),122.44(i), 122.48.

[168] The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.[169] In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.[170] Further, accepting such a constrained interpretation of the Clean Water Act's monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority's discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable

[169] See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards' authority to establish monitoring and reporting requirements.

[170] Permittee Petitioners reference language in the federal regulations concerning "effluent and ambient monitoring" (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.

component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

**F. Joint and Several Liability**

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee's MS4 frequently commingle with discharges from other Permittees' MS4s within or outside of the Permittee's jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes liability to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes "joint responsibility"[171] to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.[172] Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by affirmatively

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[171] "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 (defining "joint responsibility").)

[172] Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, id., Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.")

demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.[173]

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out liability for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial liability. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis[174] and the federal regulations anticipate the need for inter-governmental cooperation.[175] Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.[176]

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4

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[173] *Id.*, Part VI.E.2., pp.141-42; see also id., Part II.K.1, pp. 23-24.

[174] 33 U.S.C. § 1342(p)(3)(B)(i).

[175] See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

[176] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194. 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

permits, we do not sanction "joint and several liability" that would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.[177]

The Los Angeles MS4 Order does not impose joint and several liability as discussed above. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law.[178] Moreover, this burden shifting represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

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[177] Because the Los Angeles MS4 Order does not impose joint and several liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint and several liability in the storm water context would be consistent with applicable law.

[178] While we agree that the Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred (see e.g. *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367), the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. We also note that the burden shifting approach is 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 that where two or more actors combine to bring about the harm, the defendant has the burden to provide evidence as to apportionment.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

**B. Monitoring and Reporting Program (MRP) Requirements**

1. Dischargers shall comply with the MRP and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E.

**2. Compliance Determination**

**a. A Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.**

**b. A Permittee shall demonstrate compliance with the requirements of Part V.A for commingled discharges as follows:**

**i. Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.**

**ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.**

**iii. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.**

**iv. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:**

**(1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;**

**(2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water; or**

**(3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, and that the pollutant is not typically associated with MS4 discharges.**

## G. Separation of Functions in Advising the Los Angeles Water Board

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.[179] Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency . . . ."[180] In accordance with this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an

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[179] See Cal. Code Regs., tit. 23, § 648, subd. (b).

[180] Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.[181] The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,[182] one exception provides that a communication "for the purpose of assistance and advice to the presiding officer," in this case the board, "from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage" is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

> (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:
>
> . . .
>
> (2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe

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[181] See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

[182] Government Code section 11430.10 prohibits communications between an employee that is a "party" to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a "party" to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.[183]

The fact that communications that would otherwise be considered prohibited ex parte communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,[184] holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.[185] Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

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[183] Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that "[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection...requirements.*" (Emphasis added.) The notes further state that "[t]he 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 [ex parte communications], given limited staffing and personnel." (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

[184] *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

[185] We also note that, although the writ directed that petitioners were entitled to a new hearing "in which the same person does not act as both an advocate before the Board and an advisor to the Board," the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.[186] In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding[187] and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

## H. Signal Hill's Inclusion in the Order

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.[188] We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.[189] However, the choice of application does not necessarily dictate the type of permit that the permitting authority

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[186] See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

[187] Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: "In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions." (*Morongo Band of Mission Indians,* supra, at pp. 741-742.)

[188] Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

[189] 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).

ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a jurisdictional or system-wide basis.[190] While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.[191] Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.[192] Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,[193] establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554[194] in 2010 provided a potential means for funding collaborative water

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[190] 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

[191] See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

[192] *Topanga Assn.*, supra, 11 Cal.3d at 515.

[193] Los Angeles MS4 Order, Part II.C., pp. 14-15; id., Att. F, Fact Sheet, pp. F-15-F-18.

[194] 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 Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the *(Continued)*

quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).[195] The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.[196] We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

> The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach. The Regional Water Board will continue to issue an individual permit to the City of Long Beach because the City of Long Beach has been permitted under an individual permit for over a decade and has a proven track record in implementation of permit requirements and**

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*(continued from previous page)*
Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

[195] Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

[196] Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

**development of a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** ~~i~~individually tailored permittee requirements are provided in this Order, where appropriate.

## III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.

2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPS.

4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.

5. We find that the WMP/EWMP provisions do not violate anti-degradation requirements; however, we find that the anti-degradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state anti-degradation policies.

6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.

7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.

9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, at least every six years, for approval by the Executive Officer.

10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to state that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee may continue to be considered in compliance with the relevant limitation only if the Permittee has an approved plan in place for additional measures to achieve the limitation.

11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the

planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.

12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program.

13. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.

14. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

15. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water "through the MS4 to receiving water" instead of "into" the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of "effective prohibition." However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.

16. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.

17. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.

18. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.

19. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area's MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe

that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

## I. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

## CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held _____.