



RICHARDS | WATSON | GERSHON

ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101
Telephone 213.626.8484 Facsimile 213.626.0078

RICHARD RICHARDS
(1916-1988)

GLENN R. WATSON
(1917-2010)

HARRY L. GERSHON
(1922-2007)

STEVEN L. DORSEY
WILLIAM L. STRAUZ
MITCHELL E. ABBOTT
GREGORY W. STEPANICICH
ROCHELLE BROWNE
QUINN M. BARROW
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MICHAEL ESTRADA
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B. TILDEN KIM
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JAMES L. MARKMAN
CRAIG A. STEELE
T. PETER PIERCE
TERENCE R. BOGA
LISA BOND
JANET E. COLESON
ROXANNE M. DIAZ
JIM G. GRAYSON
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WILLIAM P. CURLEY III
MICHAEL F. YOSHIBA
REGINA N. DANNER
PAULA GUTIERREZ BAEZA
BRUCE W. GALLOWAY
DIANA K. CHUANG
PATRICK K. BOBKO
NORMAN A. DUPONT
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LOLLY A. ENRIQUEZ
KIRSTEN R. BOWMAN
GINETTA L. GIOVINCO
TRISHA ORTIZ
CANDICE K. LEE
BILLY D. DUNSMORE
AMY GREYSON
DEBORAH R. HAKMAN
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MARICELA E. MARROQUÍN
GENA M. STINNETT
JENNIFER PETRUSIS
STEVEN L. FLOWER
CHRISTOPHER J. DIAZ
ERIN L. POWERS
TOUSSAINT S. BAILEY
SERITA R. YOUNG
SHIRI KLIMA
DIANA H. VARAT
JULIE A. HAMILL
ANDREW J. BRADY
MOLLY R. MCLUCAS
AARON C. O'DELL
BYRON MILLER
SPENCER B. KALLICK

OF COUNSEL
MARK L. LAMKEN
SAYRE WEAVER
JIM R. KARPIAK
TERESA HO-URANO

SAN FRANCISCO OFFICE
TELEPHONE 415.421.8484

ORANGE COUNTY OFFICE
TELEPHONE 714.990.0901

TEMECULA OFFICE
TELEPHONE 951.695.2373

December 10, 2012

VIA ELECTRONIC MAIL

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
P.O. Box 100
Sacramento, California 95812-0100
Facsimile: (916) 341-5199
jbashaw@waterboards.ca.gov

Re: City of Vernon Petition for Review Re: LARWQCB Order No. R4-2012-0175

Dear Ms. Bashaw:

The City of Vernon (“City” or “Petitioner”) hereby submits this Petition for Review (“Petition”) to the California State Water Resources Control Board (“State Board”) pursuant to section 13320(a) of the California Water Code (“Water Code”), requesting that the State Board review an action by the California Regional Water Quality Control Board, Los Angeles Region (“Regional Board”). Specifically, Petitioner seeks review of the Regional Board’s November 8, 2012 Municipal Separate Storm Sewer System (“MS4”) Permit, Order No. R4-2012-0175, reissuing NPDES Permit No. CAS004001 (“Permit”).

Petitioner requests that this Petition be held in abeyance at this time pursuant to 23 C.C.R. § 2050.5(d). As an initial matter, Petitioner has every intention in abiding by the Permit in good faith and is genuinely optimistic about working with the Regional Board to assess and implement the strategies and requirements necessary for compliance. Nevertheless, the Permit contains significant issues that concern Petitioner, and other aspects that the Petitioner believes are flawed. Thus, while Petitioner has every hope that it will not need to request that the State Board act on any of the issues raised herein, as a matter of prudence and protection against the uncertainty of such a momentous and unprecedented Permit and other potential legal challenges that may ultimately alter the Permit, the Petitioner wishes to file this Petition and have it held in abeyance until such time as Petitioner requests the State Board to act on the Petition, if ever.

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1. Names, Addresses, Telephone Numbers and E-mail Addresses of Petitioner

City of Vernon
c/o City Manager
4305 South Santa Fe Avenue
Vernon, CA 90058
Phone: (323) 583-8811
Fax: (323) 826-1438
carellano@ci.vernon.ca.us

With copies to Petitioner's Counsel to:

Lisa Bond
Candice K. Lee
Andrew J. Brady
Richards, Watson & Gershon
355 South Grand Ave., 40th Floor
Los Angeles, CA 90071
Phone: (213) 626-8484
Fax: (213) 626-0078
lbond@rwglaw.com
clee@rwglaw.com
abrady@rwglaw.com

2. The Specified Action of the Regional Board Upon Which Review is Sought

By this Petition, the City is challenging the Regional Board's November 8, 2012 adoption of the "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," Order No. R4-2012-0175, reissuing NPDES Permit No. CAS004001 ("Permit").

3. The Date of the Regional Board's Action

The Regional Board approved the challenged Permit on November 8, 2012.

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4. Statement of Reasons the Action of the Regional Board was Inappropriate and Improper

Petitioner believes the Permit generally embodies a workable approach to improving water quality in the County, while reflecting the work the permittees have initiated during the prior permit terms and the work they have committed to perform in the future. However, several provisions of the Permit – including the imposition of numeric standards in the Receiving Water Limitations provisions, the manner of the incorporation of various Total Maximum Daily Loads (“TMDL”) and numeric Water Quality Based Effluent Limitations (“WQBEL”) provisions, the Permit’s monitoring requirements, the Permit’s economic considerations, provisions on joint liability, and certain minimum control measures – are inappropriate or improper in that, among other things, they impose obligations on Petitioner that are not mandated or supported by the Clean Water Act (“CWA”), the Porter-Cologne Water Quality Control Act (“Porter-Cologne”), or other applicable law. A more detailed discussion of these issues is provided in the Statement of Points and Authorities below.

5. The Manner in Which the Petitioner Has Been Aggrieved

Petitioner is a permittee under the Permit. It, along with the other permittees, is responsible for compliance with the Permit. Failure to comply with the Permit exposes Petitioner to administrative liability under the CWA and Porter-Cologne and potential lawsuits by the Regional Board and/or third parties under the CWA’s citizen suit provision. To the extent that certain provisions in the Permit are improper or inappropriate, Petitioner should not be subject to such actions.¹

6. The Specific Action Requested of the State Board With This Petition

The issues raised in this Petition may be resolved or rendered moot by actions to be taken by the permittees, Regional Board staff actions, amendment of the Permit, and/or developments in other jurisdictions. Accordingly, Petitioner requests the State Board hold this Petition in abeyance at this time pursuant to 23 C.C.R. § 2050.5(d). Depending on the outcome of these actions, Petitioner will, if necessary, request the

¹ Petitioner may provide the State Board with additional information concerning the manner in which it has been aggrieved by the Regional Board’s action in adopting the Permit. Any such additional information will be submitted to the State Board as an amendment to this Petition.

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State Board to act on all or some of the issues raised in the Petition and schedule a hearing. Petitioner will provide a complete list of specific actions requested if and when the Petitioner requests the State Board to act on this Petition.

7. Statement of Points and Authorities in Support of Legal Issues Raised in the Petition

The following is a brief discussion of the issues Petitioner raises in this Petition. In addition to the issues discussed below, to the extent not addressed or inadequately addressed by the Regional Board in its responses to comments, Petitioner also seeks review of the Permit on the grounds raised in Petitioner's previous written comments, copies of which are attached hereto as Exhibits "A" and "B." Petitioner will submit to the State Board a complete statement of points and authorities in support of this Petition, as necessary, if and when Petitioner requests the State Board to take the Petition out of abeyance and act upon it.

a. The Permit Should Be Revised To Be Consistent with the Maximum Extent Practicable Standard and State Policy by Allowing Compliance Through an Iterative Management Process and Not Require Strict Adherence to Numeric Standards in Receiving Waters and for QBELs

Consistent with both State and Federal standards, and in particular the Federal Maximum Extent Practicable ("MEP") standard applicable to municipal storm water permits, permittees should be able to achieve compliance with the entire Permit through good faith adherence to a best management practice ("BMP")-based iterative approach. The Permit, on the other hand, and contrary to controlling policy, appears to require adherence to strict numeric standards in receiving water bodies and for QBELs.

The Federal MEP standard for MS4 Permits is a BMP-based, iterative process that does not require adherence to strict numeric standards. *See* Permit, Attachment A, p. A-11; 2003 EPA Memo, "Guidance on Definition of Maximum Extent Practicable"; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Divers Environmental Conservation Organization v. State Water Resources Control Board*, 145 Cal.App.4th 246, 256 (2006); *BIA v. State Water Quality Resources Control Board*, 124 Cal.App.4th 866, 889-90 (2004); 1993 State Board

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Memorandum, “Definition of Maximum Extent Practicable.” Accordingly, the Permit’s imposition of numeric standards exceeds the Federal MEP, which has numerous legal ramifications discussed further below.

Under a regime of enforceable numeric standards, even if the permittees are doing all they can by implementing required BMPs in good faith, they can still be held in violation of the Permit, for reasons that are entirely beyond their control. Such an outcome is unfair, and contrary to law. *BIA, supra*, 124 Cal.App.4th at 889 (MEP standard requires showing of technical and economic feasibility); *Hugley v. JMS Dev. Corp.*, 78 F.3d 1523, 1529-30 (11th Cir. 1996) (The CWA does not require permittees to achieve the impossible). The MS4 is too large, too complicated, and there is no model to assess and track the movement of pollutants into, through, and out of it. Accordingly, numeric standards are simply inappropriate at this time.

i. The Receiving Water Limitations Language’s Numeric Standards

The Receiving Water Limitation (“RWL”) provisions of the Permit indicate that strict adherence to the numeric water quality standards is required in receiving waters for permittees, regardless of whether a permittee adheres to a BMP-based iterative approach in good faith or not. *See, e.g.*, Permit, part V.A.1; Fact Sheet pp. F-36-37.

In prior permits, the RWL standard, despite having similar (but not identical) language, was understood to be an iterative process where compliance would not be measured according to numeric water quality exceedances, but through a BMP-based iterative process. *See* State Board Order No. 99-05; State Board Order No. 2001-15.

The RWL language in the Permit is inconsistent with State Board Water Quality Order No. 99-05 and other prior precedents and Orders. State Board Water Quality Order No. 99-05 unequivocally requires compliance with storm water management plans as a means of complying with receiving water limitations and, therewith, water quality standards. In State Water Quality Order No. 2001-15, the State Board affirmed the iterative approach in stating that “we will generally not require ‘strict adherence’ with water quality standards through numeric effluent limitations and we continue to follow an iterative approach.” State Board Order No. 2001-15, p. 8. Finally, most recently, the State Board, on September 7, 2012, found that “[i]t is not feasible at this time to set enforceable numeric effluent criteria for

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municipal BMPs and in particular urban discharges.” *See* Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG.

Although these latter items regard numeric effluent limitations, the same logic is even more applicable to receiving water limitations, over which individual permittees maintain even less control. Imposing numeric standards for the receiving water body is infeasible, unachievable, and will require the development of BMPs that violate and exceed the requirements of law. *See* Permit, Attachment A, p. A-11 (the Permit’s own definition of MEP states that BMP’s must be effective, have public support, exhibit reasonable relationship between cost and benefit achieved, and be technically feasible).

ii. The Provisions in the Permit Requiring Adherence to Numeric WQBELs Exceed Federal Requirements and Violate State and Federal Law and Policy

1. The Permit’s WQBELs Were Improperly Formulated

The Regional Board failed to provide adequate justification for incorporating numeric water quality based effluent limitations (“WQBELs”) in the Permit for each of the 33 incorporated Total Maximum Daily Loads (“TMDL”) to which they apply. A WQBEL is an enforceable translation in an MS4 permit for attaining compliance with a TMDL Waste Load Allocation (“WLA”), which serves to protect beneficial uses of a receiving water. 40 C.F.R. § 130.2. The Permit fails to establish that an adequate requisite Reasonable Potential Analysis (“RPA”) has been conducted.

The Permit fails to establish if discharges from any individual permittee’s MS4 have the reasonable potential to cause or contribute to an excursion above any “State water quality standard including State narrative criteria for water quality.” *See* EPA’s November 12, 2010 Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs” (“EPA Memorandum”), which states:

Where the NPDES authority determines that MS4 discharges *have the reasonable potential to cause or contribute to a water quality excursion*, EPA

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recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards.

EPA Memorandum, p. 2 (emphasis added).

There are two generally accepted approaches to conducting an RPA. According to USEPA guidance, “A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques, as described above, or using a non-quantitative approach.” NPDES Permit Writers’ Manual, September 2010, page 6-23.

Neither the administrative record nor the Permit’s Fact Sheet contains any evidence of the Regional Board having performed an RPA in accordance with the two foregoing approaches. Regarding the first approach, such an analysis would in any case have been impossible to perform given that no outfall (“effluent”) monitoring has been required for any Los Angeles County MS4 permit since the MS4 program began in 1990. No modeling appears to have been conducted either. Furthermore, the absence of any reference to WQBELs or RPA in any of the Regional Board’s TMDL documents counters its assertion that the TMDL development process satisfied the RPA requirement for establishing a numeric WQBEL in this instance.

Beyond this, federal regulations not only require that an RPA be performed to determine an excursion above a water quality standard, but also that the storm water discharge must be measured against an “allowable” ambient concentration. 40 C.F.R. §122.44(d)(iii).

While wet and dry weather monitoring data have been generated relative to some TMDLs, such data cannot singularly serve to determine an excursion above a TMDL, even where such data does exist, which is not in every case. Outfall monitoring data would have to have been evaluated against in-stream generated ambient (dry weather) data to make such a determination. As for the second, non-quantitative approach, the Regional Board also failed to provide information in the Permit, its accompanying documents, or the administrative record indicating that it had performed a non-quantitative analysis based on recommended criteria described in USEPA guidance.

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In lieu of conducting either a quantitative or non-quantitative RPA, the Regional Board concluded that reasonable potential can be demonstrated in several ways, one of which is through the TMDL development process. Fact Sheet, p. F-34. No citation to any authority was provided for this proposition. In essence, the Regional Board appears to claim that the same analysis it used to establish a TMDL constitutes a type of RPA. The logic it used to arrive at this conclusion is, however, faulty. A WQBEL is a means of attaining a TMDL WLA, a translation of a WLA into prescribed actions or limits which has in the past been typically expressed as a BMP. Before a WQBEL can be developed, however, a need for it must be established. As the Writers' Manual points out:

The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where required by federal and state regulations. *A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.*

NPDES Permit Writers' Manual, September 2010, page 6-23 (emphasis added).

No such rationale is provided in the Regional Board's Fact Sheet, which in the absence of effluent data derived from outfall monitoring, would have been absolutely necessary to justify the need for a numeric WQBEL. It is possible that outfall monitoring could demonstrate that existing BMPs implemented through a MS4 permittee's storm water management plan is already meeting a TMDL WLA, thereby obviating the need for any WQBELs. But that was not done, and simply translating a TMDL WLA directly into a numeric WQBEL without the requisite analysis is a clear violation of permit-writing standards, applicable law and good practice.

Furthermore, and finally, the EPA Memorandum is clear that reliance on numerics should be coupled with the "disaggregation" of different storm water sources within permits. *See* EPA Memorandum at pp. 3-4. The Permit fails to adequately disaggregate storm water sources within applicable TMDLs regarding numeric WQBELs and for receiving water limitations, further making the imposition of numeric standards inappropriate.

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2. The Permit's Numeric QBELs Violate the Requirements of Law Because They are Infeasible

The Regional Board's numeric QBELs are not feasible. The 2010 EPA Memorandum recommends "*where feasible*, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards." EPA Memorandum, p. 2 (emphasis added). This position is based on 40 CFR §122.44(k), which authorizes the use of BMPs "when numeric limitations are infeasible." In 1991, the State Board concluded that "numeric effluent limitations are infeasible as a means of reducing pollutants in municipal storm water discharges, at least at this time." State Water Resources Control Board Water Quality Order 91-03, page 49.

Although this determination was made over twenty years ago, the State Board's position on this issue has not changed since then, as evidenced by its adoption of the Caltrans MS4 permit in September of 2012. Citing the fact sheet for the Caltrans MS4 permit, the State Board affirmed that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-XX-DWG, September 7, 2012, page 9.

The Caltrans MS4 permit's fact sheet also supports the use of BMP-based QBELs as a means of meeting TMDLs and other quality standards. The Caltrans MS4 permit is also subject to TMDLs adopted by the Regional Board and USEPA. If this aspect of the Permit is not corrected, Los Angeles County MS4 permittees will be compelled to comply strictly with numeric QBELs and receiving water limitations while Caltrans need only implement QBEL BMPs to achieve compliance with the same TMDLs. This inconsistency lacks any justification.

In addition, when comparing the Permit to the General Industrial and General Construction Storm Water Permits that are within the Petitioner's MS4 (but are the primary enforcement responsibility of the Regional Board), the Permit clearly imposes excessive, unfair, and infeasible requirements onto the Petitioner. Imposing general BMP-based QBEL compliance requirements onto a General Industrial and General Construction Storm Water permittee's discharge while imposing enforceable numeric QBELs on to the Petitioner who is receiving the discharge is plainly unjustifiable. Here again, if this aspect of the Permit is not corrected, the Petitioner

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will be compelled to comply strictly with numeric WQBELs and receiving water limitations while General Industrial and General Construction Storm Water permittees need only implement BMP based WQBELs to achieve compliance.

Moreover, the Permit allows the use of BMPs to meet federal TMDLs. Having two different compliance standards, one for State adopted TMDLs that require meeting numeric WQBELs and one for USEPA adopted TMDLs that require BMP-based WQBELs is improper and inappropriate. Furthermore, while the State may impose requirements more stringent than federal regulations, it must provide a justification and conduct required analysis that has not been done in the Permit, its accompanying documents, or elsewhere in the administrative record. Water Code § 13241; *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

b. Various TMDLs and TMDL Requirements Incorporated into the Permit Are Contrary to State and Federal Law and Policy

Various TMDLs incorporated into the Permit establish compliance with WLAs in the receiving water contrary to Federal storm water regulations and State Law. In addition to complying with TMDL WLAs at the outfall, the Permit also improperly requires compliance with TMDL WLAs (dry and wet weather) in the receiving water as a “limitation.”

Examples include, but are not limited to, the metals TMDLs for the Los Angeles River adopted by the State, the metals TMDL for the San Gabriel River adopted by USEPA, the Los Angeles River Bacteria TMDL and the Dominguez Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants. The affected TMDLs all require in-stream monitoring to determine compliance with waste load allocations.

As will be addressed further below, Federal regulations only require two types of monitoring – effluent and ambient – for compliance: “The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards.” 40 C.F.R. §122.44(d)(viii)(B).

USEPA defines effluent as outfall discharges. Ambient monitoring is defined by USEPA to mean the “natural concentration of water quality constituents prior to

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mixing of either point or nonpoint source load of contaminants. Reference ambient concentration is used to indicate the concentration of a chemical that will not cause adverse impacts to human health.” See EPA Glossary of Terms (<http://water.epa.gov/scitech/datait/tools/warsss/glossary.cfm>).

All TMDLs and other water quality standards are supposed to be ambient standards, as the noted in a USEPA commissioned report: “EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution.”²

Although some of the TMDLs specify ambient monitoring such as the Los Angeles River Metals and Bacteria TMDLs, the Regional Board has misunderstood ambient monitoring to be a form of in-stream compliance monitoring, along with TMDL effectiveness monitoring. For example, the Los Angeles River Metals TMDL requires Los Angeles County MS4 permittees and Caltrans to submit a Coordinated Monitoring Plan (“CMP”), which includes both “TMDL effectiveness monitoring and ambient monitoring.”³

The CMP that was submitted to and approved by the Regional Board proposed a monitoring plan that essentially treats TMDL effectiveness monitoring and ambient monitoring as being one of the same, and which collectively serve the purpose of determining compliance with dry and wet weather WLAs based on in-stream monitoring.

It is unclear why the Regional Board established two compliance standards, one of which (*viz.*, wet weather WLAs) is clearly not authorized under federal law. One explanation is that it did so because previously adopted TMDLs, some of which date back a few years, assumed that compliance would be determined by in-stream monitoring. The Regional Board was either not aware or ignored, at the time of the TMDLs adoption, that attainment of waste load allocations should be determined by

² National Research Council, Assessing the TMDL Approach to Water Quality Management Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, Water Science and Technology Board, page 12.

³Total Maximum Daily Loads for Metals and Los Angeles River and Tributaries, U.S. Environmental Protection Agency, Region 9, California Regional Water Quality Control Board, Los Angeles Region, May 27, 2005, page 79.

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outfall monitoring. More recently-adopted TMDLs, such as the Machado Lake Nutrients TMDL, do not require compliance in the receiving water (the lake in this case), but instead compliance at the outfall. The Regional Board has not explained why certain TMDLs are required to comply at the outfall while others are required to comply in the receiving water.

The purpose of ambient monitoring is to evaluate the health of receiving waters determined during normal states – not when it rains. State-sponsored Surface Water Ambient Monitoring Programs (SWAMPs) recognize that ambient monitoring is only performed during dry weather. As mentioned above, ambient monitoring sets a reference point against which storm water discharges are measured to determine attainment of water quality standards. While the State and federal-adopted TMDLs call for both dry and wet weather WLAs, federal regulations do not recognize either. It is the ambient standard that is supposed to operate as a TMDL WLA.

c. The Regional Board Failed to Adequately Consider Economic Impacts Pursuant to Water Code Section 13241

The Regional Board's failure to adequately consider the economic impacts of the Permit, as required by Water Code Sections 13000 and 13241, render the Permit invalid. Water Code Section 13623 requires the Regional Board to include "[e]conomic considerations" under Water Code Section 13241 with its consideration of the Permit. The Regional Board incorrectly asserts that consideration of economics is not required in this Permit. *See* Permit, p. 26. Because, as demonstrated above and throughout, the Permit requirements exceed the Federal MEP standard for storm water permits in numerous key regards, consideration of economic factors is necessary. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

The alleged facts in the economic consideration section of the Fact Sheet misrepresent the permittees' data and fail to consider the economic impact of new, costly aspects of the Permit. The Permit's economic analysis uses the 2001 permit as its basis. Accordingly, the Permit fails to take into account 33 new TMDLs, new Minimum Control Measures ("MCMs"), Watershed Management Programs, and the loss of the County of Los Angeles as principal permittee, among other factors.

It is also premature and improper to assume that permittees will obtain funding from proposed ballot measures and other sources of funding which have not

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even been approved, much less voted on by the public. *See* Permit, Fact Sheet, p. F-153. If the Regional Board wants to rely on initiatives, such as the Los Angeles County Flood Control District's Water Quality Funding Initiative, as sources of funding to offset the costs of storm water management, it should have delayed its public hearing and approval of the Permit until after the voters have actually voted on such initiatives. Otherwise, if such initiatives fail to pass, the co-permittees will be left to implement the Permit's requirements without these much-needed funds. Even if the Water Quality Funding Initiative is approved by the voters, the funds generated by the Initiative would not even be available until 2014 – well after the deadline for certain compliance deadlines set forth in the Permit. Moreover, the Water Quality Initiative will not cover all the costs imposed on all permittees by the Permit.

d. The Permit's Monitoring Program Exceeds the Requirements of Law

The Permit's Receiving Water Monitoring Program is improper for exceeding the scope of monitoring requirements authorized under Water Code Sections 13267 and 13383. Water Code Section 13267 states:

“(b) (1) In conducting an investigation . . . the regional board may require that . . . any . . . political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.”

The Regional Board's failure to conduct and communicate the requisite cost-benefit analysis pursuant to the monitoring requirements in the Permit constitutes an abuse of discretion. Water Code §§ 13267 and 13225(c).

The relevant portions of Water Code Section 13383 state:

“(a) The . . . regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements . . . for any person who discharges, or proposes to discharge, to navigable waters. . . .

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(b) The . . . or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required.”

The Permit goes far beyond a requirement that a permittee “monitor” the effluent from its own storm drains. The Permit’s Receiving Water Monitoring Program seems to require a complete hydrogeologic model found in the receiving water body, which will in many cases be miles away from many of the individual permittees’ jurisdictions. To the extent the Permit requires individual permittees to compile information beyond their jurisdictional control, they are unauthorized. Although Water Code Section 13383(b) permits the Regional Board to request “other information”, such requests can only be “reasonably” imposed. Cal. Water Code § 13383(b). The Permit requires co-permittees to analyze discharges and make assumptions regarding factors well beyond their individual boundaries. This is not reasonable, and is therefore not permitted under Water Code Sections 13225, 13267, and 13383. It is equally unreasonable to require the monitoring of authorized or unknown discharges. *See* Permit at p. 108. The monitoring program also exceeds federal requirements which, in line with state requirements, do not require monitoring beyond the MS4. *See* 40 C.F.R. §122.26.

e. Provisions in the Permit Imposing Joint or Joint and Several Liability for Violations are Contrary to Law

The Permit appears to improperly impose joint liability and joint and several liability for water quality based effluent limitations and receiving water exceedances. The Permit states that “Permittees with co-mingled MS4 discharges are jointly responsible for meeting the water quality-based effluent limitations and receiving water limitations assigned to MS4 discharges in this Order.” Permit, p. 23. The Permit then states that permittees are responsible for implementing programs within their jurisdictions “to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.” *Id.*

It is both unlawful and inequitable to make a permittee liable for the actions of other permittees over which it has no control. A party to an MS4 Permit is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004). Because

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the City cannot prevent another permittee from failing to comply with the Permit, the Regional Board cannot, as a matter of law, hold the City jointly or jointly and severally liable with another permittee for violations of water quality standards in receiving water bodies or for TMDL violations. Under the Water Code, the Regional Board issues waste discharge requirements to “the person making or proposing the discharge.” Cal. Water Code § 13263(f). Enforcement is directed towards “any person who violates any cease and desist order or cleanup and abatement order . . . or . . . waste discharge requirement.” Cal. Water Code § 13350(a). In similar fashion, the CWA directs its prohibitions solely against the “person” who violates the requirements of the Act. 33 U.S.C. § 1319. Thus, there is no provision for joint liability under either the California Water Code or the CWA.

Furthermore, joint liability is proper only where joint tortfeasors act *in concert* to accomplish some common purpose or plan in committing the act causing the injury, which will generally never be the case regarding prohibited discharges. *Kesmodel v. Rand*, 119 Cal. App. 4th 1128, 1144 (2004); *Key v. Caldwell*, 39 Cal. App. 2d 698, 701 (1940). For any such discharge, it would be unlawful to impose joint liability and especially joint and several liability. Furthermore, the issue of imposing liability for contributions to “commingled discharges” of certain constituents, such as bacteria, is especially problematic because there is no method of determining who has contributed what to an exceedance.

Permittees should not be required to prove they did not do something when the Regional Board has failed to raise even a rebuttable presumption that the contamination results from a particular permittee’s actions. Yet, by stating that the Permit “allows a Permittee to clarify and distinguish their individual contributions and demonstrate that its MS4 discharge did not cause or contribute to exceedances of applicable water quality-based effluent limitations and/or receiving water limitations,” that is precisely what the Permit does. Permit, p. 24. Such a reversed burden of proof is contrary to law, and illicitly creates a presumption of “guilty until proven innocent.” *See* Cal. Evid. Code § 500; *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1667-1668 (2003).

The Regional Board has the burden of proof to establish a CWA violation, and requiring permittees to prove a negative in the case of a commingled discharge is unfair and unlawful. *Rapanos v. United States*, 547 U.S. 715, 745 (2006); *Sacket v. E.P.A.*, 622 F.3d 1139, 1145-47 (9th Cir. 2010) (“We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only

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after the EPA proves, in district court, and according to traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the manner alleged in the compliance order.”)

f. The Permit Improperly Intrudes on Permittees’ Local Land Use Authority

To the extent that this Permit relies on federal authority under the CWA to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. Furthermore, to the extent the Permit requires a municipal permittee to modify its city ordinances in a specific manner, it also violates the Tenth Amendment. According to the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Article XI, section 7 of the California Constitution also guarantees municipalities the right to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.” *See also City of W. Hollywood v. Beverly Towers*, 52 Cal. 3d 1184, 1195 (1991). Furthermore, the United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

Even so, both the CWA and the Porter-Cologne Act provisions regarding NPDES permitting do not indicate that the Legislature intended to preempt local land use authority. *Sherwin Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 1309 (1998) (Preemption of police power does not exist unless “Legislature has **removed** the constitutional police power of the City to regulate” in the area); *see* Water Code §§ 13374 and 13377 and 33 U.S.C. § 1342 (b)(1)(B).

The Permit essentially establishes the Regional Board as a “super municipality” responsible for setting zoning policy and requirements throughout Los Angeles County. In response to this objection, the Regional Board stated that “the permit does not impose land use regulations, nor does it restrict or control local land-use decision-making authority. Rather, the Permit requires the permittees to fulfill

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CWA requirements and protect water quality in their land use decisions.” Responses to Comments H-53. This is simply not the case, as the permit improperly imposes numerous mandatory land use requirements, including but not limited to the adoption of low impact development (“LID”) ordinances. *See, e.g.*, Ex. A at pp. 96-115 (Planning and Land Development Program).

g. The Permit Exceeds the Regional Board’s Authority by Requiring the City to Enter Into Contracts and Coordinate With Other Co-permittees

The Regional Board cannot require the City to enter into agreements or coordinate with other co-permittees. The requirements that permittees engage in interagency agreements (Permit at p. 39) and coordinate with other co-permittees as part of their storm water management program (Permit at p. 56-58) are unlawful and exceed the authority of the Regional Board. The Regional Board lacks the statutory authority to mandate the creation of interagency agreements and coordination between permittees in an NPDES Permit. *See* Water Code §§ 13374 and 13377. The Permit creates the potential for City liability in circumstances where the permittee cannot ensure compliance due to the actions of third party state and local government agencies over which the City has no control. Such requirements are not reasonable regulations, and thus violate state law. *Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal. App. 4th 1313, 1330 (2005) (regulation pursuant to NPDES program must be reasonable.)

h. Various Aspects of the Permit’s Non-Stormwater Discharge Provisions Are Inconsistent with Federal Law and Contrary to State Law

The Permit contains a significant revision to non-stormwater discharge prohibitions: “Each 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 ...” Permit, p. 27. The previous 2001 permit, however, required MS4 permittees to “effectively prohibit non-storm water discharges *into* the MS4.” The previous Permit also provided for several exceptions of non-stormwater discharges that could be legally discharged to the MS4. Non-stormwater discharges that were not exempted were deemed illicit discharges. The adopted Permit, on the other hand, revises the non-stormwater discharge prohibition by replacing “to” the MS4 with

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“through” the MS4 and in the case of TMDL discharges “from the MS4” to a receiving water.

The Regional Board’s revised non-stormwater provision is not authorized under Federal storm water regulations. Nevertheless, the Regional Board attempts to rely on 40 C.F.R. §122.26(a)(3)(iv) to assert that an MS4 permittee is only responsible for discharges of storm water and non-storm water from the MS4. The Regional Board’s citation mentions nothing about permittees being responsible for storm water and non-stormwater from the MS4. Instead, it states that co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewer system. But the term “discharges” as used in the regulation refers to storm water discharges only.

To the contrary, Section 402(p)(B)(ii) of the CWA, clearly specifies that MS4 permits “shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers.” Nothing in this section or anywhere else in the CWA authorizes a prohibition of non-stormwater discharges “through” or “from” the MS4. In fact, the Regional Board cites no legal authority either in the Permit or the Fact Sheet to support changing the discharge prohibition from “to” or “into” the MS4 to “through” or “from” the MS4. By doing so, the Regional Board has illicitly expanded the non-stormwater discharge requirements beyond their permissible or reasonable scope, and beyond the MEP standard.

Additionally, the Permit improperly defines non-stormwater to expansively include all dry-weather runoff. This is contrary to State and Federal definitions of storm water, which include “surface runoff,” “drainage,” and “urban runoff.” 40 C.F.R. § 122.26(b)(13); *see also* State Water Board Order No. 2001-15, pp. 7-8. This further expansion of the non-stormwater provisions exceeds the Federal requirements and places an additional, unfair burden on permittees forced to try to prohibit these discharges.

**i. The Timing and Procedures of the Permit Adoption Were
Contrary to Law and Deny the Permittees’ Due Process Rights**

The period provided to review and comment on the Permit was unreasonably short given the breadth of the Permit. Furthermore, the “dual” procedure the Regional Board adopted whereby part of the Permit could be discussed on October 4 and 5, 2012, without the benefit of seeing a revised draft tentative Permit or responses

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to comments, and then only allowing comments on “changes” to the Permit at the November 8, 2012 hearing, unreasonably limited the ability of the permittees to comment on the Permit as a whole based on the changes to the permittees’ original comments. *See* Regional Board 9/26/12 “Order on Proceedings.” By denying the permittees a meaningful opportunity to review and comment on a Permit that so drastically affects the permittees’ rights and finances, the Regional Board has denied the permittees due process rights under state and federal law. *See Spring Valley Water Works v. San Francisco*, 82 Cal. 286 (1890) (reasonable notice and opportunity to be heard are essential elements of “due process of law,” whatever the nature of the power exercised.) Furthermore, under the CWA, a reasonable and meaningful opportunity for stakeholder participation is mandatory. *See, e.g., Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994) (“the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA.”)

j. The Regional Board’s Forced Recusal of Board Member Mary Ann Lutz was Improper and Prejudiced the Municipal Permittees

Ms. Lutz was, at the time of the hearings, the Board member appointed to reflect the perspective of municipal governments. She was improperly forced by the Regional Board to recuse herself from the proceedings. By improperly forcing her recusal, the Regional Board staff and counsel purposefully and unduly prejudiced the municipal permittees by denying the Board, the permittees, and the public Ms. Lutz’ valuable perspective as a municipal representative, public servant and Mayor.

k. The Permit as a Whole Constitutes an Unfunded State Mandate, Which Is Not Permitted by the California Constitution Unless Funding is Provided by the State

The Permit contains mandates imposed at the Regional Board’s discretion that are unfunded and go beyond the specific requirements of either the CWA or the USEPA’s regulations implementing the CWA, and thus exceed the MEP standard. Accordingly, these aspects of the Permit constitute non-federal state mandates. *See City of Sacramento v. State of California*, 50 Cal. 3d 51, 75-76 (1990). Indeed, the Court of Appeal has previously held that NPDES permit requirements imposed by the Regional Board under the Clean Water and Porter-Cologne Acts can constitute state

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mandates subject to claims for subvention. *County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898, 914-16 (2007).

i. The Permit's Minimum Control Measure Program is an Unfunded State Mandate

The Permit's Minimum Control Measure program ("MCM Program") qualifies as a new program or a program requiring a higher level of service for which State funds must be provided. The particular elements of the MCM Program that constitute unfunded mandates are:

- The requirements to control, inspect, and regulate non-municipal permittees and potential permittees;
- The public information and participation program;
- The industrial/commercial facilities program;
- The public agency activities program; and
- The illicit connection and illicit discharge elimination program.

See Permit, p. 69-143.

The MCM Program requirement that the permittees inspect and regulate other, non-municipal NPDES permittees is especially problematic and clearly constitutes an unfunded mandate. *See, e.g.*, Permit at pp. 38-40. These are unfunded requirements which entail significant costs for staffing, training, attorney fees, and other resources. Notably, the requirement to perform inspections of sites already subject to the General Construction Permit is clearly excessive. Permittees would be required to perform pre-construction inspections, monthly inspections during active construction, and post-construction inspections. The Regional Board is requiring a higher level of service in this Permit than in prior permits.

Furthermore, there are no adequate alternative sources of funding for inspections. User fees will not fully fund the program required by the Permit. Cal. Gov't Code, § 17556(d). NPDES permittees already pay the Regional Water Quality Control Board fees that cover such inspections in part. It is inequitable to both cities and individual permittees for the Regional Board to charge these fees and then require cities to conduct and pay for inspections without providing funding.

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ii. The Permit's Imposition of Numeric Standards Render it an Unfunded Mandate

If strict compliance with numeric state water quality standards is required in the form of QBELs and Receiving Water Limitations, the entire Permit will constitute an unfunded mandate because such a requirement clearly exceeds both the Federal standard and the requirements of prior permits, despite the fact no funding will be provided to help meet targets. *See Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866, 873, 884-85 (2004) (though the State and Regional Boards may require compliance with California state water quality standards pursuant to the CWA and state law, these requirements exceed the Federal Maximum Extent Practicable standard.)

8. Statement that the Petition Has Been Sent to the Regional Board

A copy of this Petition is being served upon the Executive Officer of the Regional Board.

9. Statement that Issues/Objections Were Raised Before the Regional Board

The substantive issues raised in this Petition were all raised to the Regional Board before the Regional Board acted on November 8, 2012.

10. Service of Petition

This Petition is being served upon the following parties via electronic mail:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
P.O. Box 100
Sacramento, CA 95812-0100
Facsimile: (916) 341-5199
jbashaw@waterboards.ca.gov

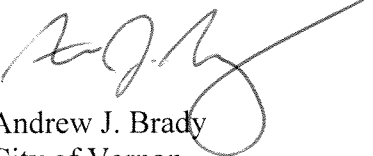
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California Regional Water Quality Control Board
Los Angeles Region
Samuel Unger, Executive Officer
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Facsimile: (213) 576-6640
sunger@waterboards.ca.gov

11. Conclusion

For the reasons stated herein, Petitioner has been aggrieved by the Regional Board's action in adopting the Permit. Issues raised in this Petition, however, may be resolved or rendered moot by Regional Board actions or developments in other jurisdictions. Accordingly, until such time as Petitioner requests the State Board to consider this Petition, Petitioner requests the State Board hold this Petition in abeyance.

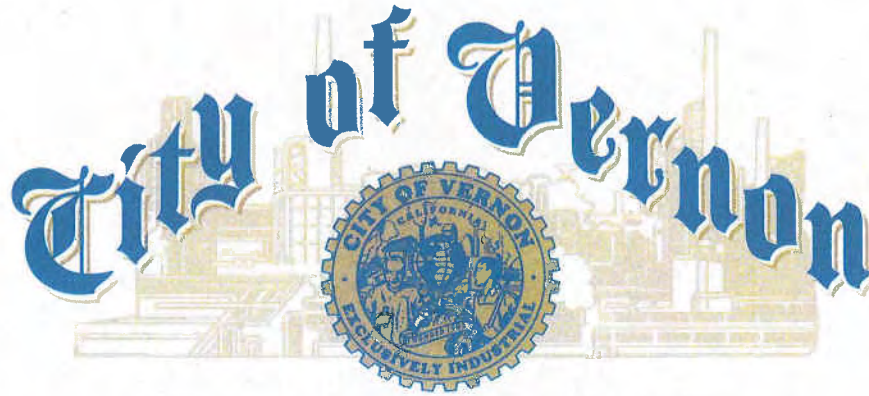
Very truly yours,



Andrew J. Brady
City of Vernon

Enclosure

cc: Samuel Unger
Kevin Wilson
Nicholas Rodriguez
Jerrick Torres
Claudia Arellano



4305 Santa Fe Avenue, Vernon, California 90058
Telephone (323) 583-8811

July 23, 2012

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, California 90013
Attn: Mrs. Renee A. Purdy, Regional Programs Section Chief
Mr. Ivar Ridgeway, Stormwater Permitting Section Chief

ELECTRONIC MAIL

SUBJECT: Comments to Tentative Municipal Separate Storm Sewer System (MS4) Discharges within the Los Angeles County Flood Control District

Dear Ms. Purdy and Mr. Ridgeway:

The City of Vernon appreciates this opportunity to provide comments on the subject Tentative Municipal Separate Storm Sewer System Discharges within the Los Angeles County Flood Control District (Tentative Permit). With strong support from our City Council and City Administration, both the Health and Environmental Control and Community Services and Water Departments are committed to protecting the environment and appreciate the efforts of the Los Angeles Regional Water Quality Control Board (LARWQCB) and its staff in developing this next iteration of the Los Angeles County Municipal Stormwater Permit.

However, the City of Vernon is disappointed with LARWQCB staff's decision to deny our requests for a time extension. The time extension would have provided a fair opportunity to review the 500+ page Tentative Permit, which would have allowed us to adequately evaluate the logistical, legal, and financial impacts of this permit. As the LARWQCB staff has made it very clear, this permit is not like the current permit and certainly does not resemble any of the other statewide general National Pollutant Discharge Elimination System (NPDES) permits. The requested time extension has even greater importance if you consider the Anti-Backsliding Requirement listed in Section II.M of the Tentative Order. We feel that it is a great injustice that Water Board Staff

have not granted the time extension. This Tentative Permit affects every person in Los Angeles County. The public should have the right and be provided fair opportunity to adequately review and comment on the Tentative Permit.

To fully understand the potential impact of this Tentative Permit, each Permittee and affected public must research beyond the 500+ page document and also review the following related documents:

- The federal Clean Water Act
- Porter Cologne Act
- General Industrial Activity Stormwater Permit
- General Construction Permit
- Cal Trans Permit
- CAL FIRE, Office of the State Fire Marshal's Water-Based Fire Protection Systems Discharge Best Management Practices Manual (September 2011)
- All pending and adopted TMDL related documents
- Key court case decisions
- APWA BMP Manual
- SWAMP
- The Ventura County MS4 Permit
- The current Los Angeles County MS4 Permit

It is the City of Vernon's opinion that a time extension was, and still is, necessary. A time extension would not mean that the Permittees would operate without a permit. As you know the existing permit will stay in effect until a new permit is adopted. As the current NPDES timeline stands, the Tentative Permit is six years overdue. What would a time extension have truly jeopardized? The City of Vernon would like to express, despite the submittal of this comment letter, that our request for a time extension still stands.

The City of Vernon would like to also express our disappointment with the contents of the Tentative Permit. Despite our efforts to work with LARWQCB staff, it is clear our comments and concerns have been ignored. The City of Vernon is not requesting a "safe harbor". We are simply looking for a permit that will recognize our efforts and provides a fair and fiscally sustainable opportunity to achieve compliance with the Clean Water Act. Unlike the current General Industrial, General Construction, and Cal Trans stormwater permits, this Tentative Permit does not provide a fair opportunity to achieve compliance. As this tentative permit is written, all permittees will be in violation of the permit if the receiving water exceeds the numeric effluent limits. There is no real opportunity for individual cities to prove that they did not contribute to the exceedance unless all outfalls, regardless of size, are monitored continuously and simultaneously.

The state of the municipalities with respect to the financial situation is such that numeric effluent limits would thrust the Permittees to further financial peril. With many cities now going through unprecedented cutbacks it is imperative that the LARWQCB be sensitive to the financial consequences and re-draft the Tentative Permit to hold the Permittees accountable to those regulations that are financially feasible.

The Los Angeles Regional Water Quality Control Board's Public Notice No. 12-022 states that the Public Hearing for this item has been set for September 6-7, 2012. As communicated at the July 12, 2012 Regional Board meeting by our colleagues the well-anticipated League of California Cities Annual Conference is scheduled for the same dates. The League's conference was scheduled well in advance of Public Notice No. 12-022 and registrations/reservations have been paid for on behalf of our City Administrator and City Council. Reimbursements are not granted from the League for non-attendance. As such, this scheduling conflict does not afford our elected officials the opportunity to attend the Public Hearing and to provide comments on this enormously intricate and economically challenging permit.

Based on our cursory review, the City of Vernon has the following general concerns and comments for the LARWQCB:

1. The Tentative Permit does not provide a compliance standard that is consistent with other National Pollutant Discharge Elimination System (NPDES) permits located statewide or within Los Angeles County. For example, the General Construction and Industrial Permits are not held to the Maximum Extent Practicable (MEP) standard. Nor do they contain Numeric Effluent Limits. To that extent, the current and proposed Caltrans Permits also do not contain Numeric Effluent Limits. We insist that the LARWQCB revise the Tentative Permit to establish a compliance standard that is consistent with (not more stringent than) other current NPDES permits located statewide and within Los Angeles County. The Tentative Permit should provide Permittees fair and equal opportunity to achieve compliance.
2. The Tentative Permit proposes to establish Total Maximum Daily Loads (TMDL) Waste Load Allocations (WLA) as numeric effluent limits. We insist that WLA be translated to Water Quality Based Effluent Limitations (WQBEL), expressed as best management practices (BMPs), and implementation of the BMPs will place the permittees into compliance with WLA. In other words, we insist that the LARWQCB establish TMDL Waste Load Allocations as Numeric Action Levels only, not Numeric Effluent Limits. Should the LARWQCB resolve not to translate TMDL WLA to WQBEL the Permittees will be faced with an economic burden that will require cutbacks in City staff and services.
3. The Tentative Permit neglects economic feasibility and fiscal responsibility. We request that the LARWQCB acknowledge the realistic challenge that all public agencies must be accountable for the use of limited public funds. The permit requirements should be economically feasible and sustainable.
4. We request that the permit provide equal compliance options and "flexibility". The Tentative Permit clearly provides "flexibility" through the Watershed Management Program; however, the Minimum Control Measures option does not provide any "flexibility".
5. The Tentative Permit fails to establish or define a compliance storm event for wet weather compliance. It is irresponsible for the LARWQCB to compel

Permittees to comply with Numeric Effluent Limits at all costs and without any consideration of a storm event's magnitude.

In addition, we have several more specific concerns and would like to express the following concerns and comments:

Tentative Order

1. Part II.M. describes the Anti-Backsliding Requirements as:

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 or other conditions in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations or conditions may be relaxed. All effluent limitations and conditions in this Order are at least as stringent as the effluent limitations and conditions in the previous permit.

Concern- This section does not provide any options that would allow any reconsideration of any requirement of this order. This is a very serious issue considering some existing requirements have problems and not to mention the 45 days provided to review and comment on a 500 + page technical document. For example, the language in this Tentative Permit in regards to Trash WLA does not specify the 5 mm. size threshold as specified in the Trash TMDL. It can be argued that all trash, not withstanding particle size, is prohibited and would be a violation of this permit.

This section is also a concern because of the outfall monitoring compliance determinant. We understand that the LARWQCB staff assumes they are providing compliance options to the permittees in terms of outfall monitoring for Receiving Water Limitation exceedances; however, a permittee cannot prove that they did not cause or contribute to an exceedance if not every outfall, regardless of size, was not monitored at exactly the same time.

Proposed Solution- The LARWQCB staff should fully evaluate each requirement with a reasonable assurance that the requirements are realistically achievable and without errors. Most importantly, the LARWQCB must grant the Permittees a practical timeline to adequately review and comment on the Tentative Permit.

2. Part III.A.1. describes the following:

Each 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...

Under the current LA MS4 permit, Part 1 describes the following:

Permittees shall effectively prohibit non-stormwater discharges into the MS4 and watercourses.....

Concern- Section 402(p)(B)(ii) of the federal Clean Water Act dictates that MS4 permits:

shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers,

not through or from it.

The modified discharge prohibition language implies that the permittees are the source of all discharges. Most pollution does not originate from City property or City activities. There must be a distinction as to where the discharges are originating from. Permittees have amended their codes to enforce illicit discharges to City property and the storm drain system. This provision is inconsistent with the discharge prohibition that was required in previous permits. Is the intent of this provision to increase the Permittees risk of permit violation or is the intent to improve water quality? There is more than enough research and literature proving that source control is more effective than treatment control.

In addition, Sections III.A.2., III.3, and III.4.f. also use the words “through the MS4” or “from the MS4”.

Proposed Solution- Revise the provision language to ensure that it is consistent with the federal Clean Water Act prohibiting discharges “to the MS4”.

3. Part III.A.1.b. states as follows:

Temporary non-storm water discharges authorized by USEPA³ pursuant to sections 104(a) or 104(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)...

Concern – At first glance, the CERCLA provision appears innocuous. Except what if non-stormwater discharge is not authorized under CERCLA? Conceivably the MS4 permittee could be held responsible for those discharges. Hence, because CERCLA is referenced in the MS4 permit, it could become a potential third party litigation issue. The inclusion of the CERCLA provision is even more suspect when considering that no other MS4 in the State contains such a reference. Beyond this, how would a permittee know if a discharge is covered under CERCLA? CERCLA is an unnecessary reference in the MS4 permit and more importantly, has the potential to expose permittees to third party litigation. Further, the non-stormwater discharge prohibition “to” the MS4 makes this issue moot. A permittee’s only responsibility is to prohibit impermissible non-stormwater to the MS4, not through or from it; or to require the discharger to obtain permit coverage.

Proposed Solution - Maintain Discharge Prohibitions language consistent with current Permit Order No. 01-182.

4. Part III.A.2.a.i. of the Tentative Permit, indicates the following:

Discharges from essential non-emergency fire fighting activities⁷ provided appropriate BMPs are implemented based on the CAL FIRE, Office of the State Fire Marshal's Water-Based Fire Protection Systems Discharge Best Management Practices Manual (September 2011) for water-based fire protection system discharges, and based on Riverside County's Best Management Practices Plan for Urban Runoff Management (May 1, 2004) or equivalent BMP manual for fire training activities and post-emergency fire fighting activities.

Part 2:1 of the CAL FIRE, Office of the State Fire Marshal's Water-Based Fire Protection Systems Discharge Best Management Practices Manual (September 2011)

Notification and Recordkeeping

- a. A single discharge of less than 1,500 gallons – Discharger does not need to give prior notification.*
- b. A single discharge equal to or greater than 1,500 gallons but less than 10,000 gallons – Discharger does not need to give prior notification for any single discharge, but would need to maintain records of those discharges.*
- c. A single discharge equal to or greater than 10,000 gallons – Discharger does need to give prior notification and maintain records of the discharge.*

In addition, Table 8 specifies the following for all authorized discharge categories:

Whenever there is a discharge of one acre-foot or more into the MS4, the Los Angeles County Flood Control District shall require advance notification by the discharger to the potentially affected MS4 Permittees, including at a minimum the District and the Permittee with jurisdiction over the land area from which the discharge originates.

The Tentative Permit appears to offer relief under Section III.A.5:

If a Permittee demonstrates that the water quality- characteristics of a specific authorized or conditionally exempt essential non-storm water discharge resulted in an exceedance of applicable receiving water limitations and/or water quality based effluent limitations during a specific sampling event, the Permittee shall not be found in violation of applicable receiving water limitations and/or water quality-based effluent limitations for that specific sampling event. Such demonstration must be based on source specific water quality monitoring data

from the authorized or conditionally exempt essential non-storm water discharge and other relevant information regarding the specific non-storm water discharge as identified in Table 8.

Concern- One acre foot equals a total of 325,851 gallons. This section of the Tentative Permit specifically increases a Permittees risk of violation for the discharge of non-emergency fire fighting activities with less than 10,000 gallons and all other authorized discharges with less than 325,851 gallons. Not only is the permit allowing any amount to be discharged through the MS4, Permittees are not required to be notified for any discharges under 325,851 gallons. With no requirement to notify the Permittee, it will be the Permittee that will carry the burden of a permit violation.

Proposed Solution- There does not appear to be a specific volume threshold that would not pose a risk of violation for Permittees. The only solution is for LARWQCB establish TMDL Waste Load Allocations as Numeric Action Levels only, not Numeric Effluent Limits. Imposing Numeric Action Levels only will minimize the potential for Permittees to be in violation of the permit from these under-the-radar discharges but still require Permittees to take action.

5. Part III.A.2.a.ii. – Discharge Prohibitions and Page 29, Part III.A.4.a. – Permittee Requirements respectively, state as follows:

...Additionally, each Permittee shall work with potable water suppliers that may discharge to the Permittee's MS4 to ensure: (1) notification at least 72 hours prior to a planned discharge and as soon as possible after an unplanned discharge; (2) monitoring of any pollutants...

Develop and implement procedures to ensure that a discharger, if not a named Permittee in this Order, fulfills the following for non-storm water discharges to the Permittee's MS4:

Concern – It is assumed that Permittees will have a fully executed Memorandum of Understanding (MOU) with each potable water suppliers in our jurisdiction. It is further assumed that an MOU will provide the Permittees with the authority to require potable water suppliers to comply with such requirements.

Proposed Solution – Permittees do not have any authority over potable water suppliers. On the basis that the LARWQCB staff is authorizing this exemption to the discharger, procedures to minimize the discharge should remain with the LARWQCB.

6. Part III.A.4. specifies that each Permittees shall complete the following tasks:

a. Develop and implement procedures to ensure that a discharger, if not a named Permittee in this Order, fulfills the following for non-storm water discharges to the Permittee's MS4:

- i. *Notifies the Permittee of the planned discharge in advance, consistent with requirements in Table 8 or recommendations pursuant to the applicable BMP manual;*
- ii. *Obtains any local permits required by the MS4 owner(s) and/or operator(s);*
- iii. *Provides documentation that it has obtained any other necessary permits or water quality certifications for the discharge;*
- iv. *Conducts monitoring of the discharge, if required by the Permittee;*
- v. *Implements BMPs and/or control measures as specified in Table 8 or in the applicable BMP manual(s) as a condition of the approval to discharge into the Permittee's MS4; and*
- vi. *Maintains records of its discharge to the MS4, consistent with requirements in Table 8 or recommendations pursuant to the applicable BMP manual.*

Concern- These discharge notification requirements are not a standard provision that is contained in each NPDES permit within Los Angeles County.

Proposed Solution - These discharge notification requirements must be inserted into each NPDES permit that is located within the effective area of this Tentative Permit, whether general or individual. Also, there are some entities that Permittees have very limited authority over (i.e. railroad companies, school districts and Cal Trans).

7. Page 30, Part III.A.4.b. - Permittee Requirements, states as follows:

Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs.

Concern – This is not a water conservation permit. This is an imposition, albeit with good intentions, unnecessary for the improvement of water quality standards.

Proposed Solution – Defer water conservation responsibilities to the appropriate water purveyor(s). It should be noted that the City of Vernon has implemented a water conservation ordinance.

8. Part III.A.5 of the Tentative Order indicates the following:

If a Permittee demonstrates that the water quality characteristics of a specific authorized or conditionally exempt essential non-storm water discharge resulted in an exceedance of applicable receiving water limitations and/or water quality based effluent limitations during a specific sampling event, the Permittee shall not be found in violation of applicable receiving water limitations and/or water quality-based effluent limitations for that specific sampling event. Such demonstration must be based on source specific water quality monitoring data from the authorized or conditionally exempt essential non-storm water discharge and other relevant information regarding the specific non-storm water discharge

as identified in Table 8.

Concern- This section does not provide Permittees relief from violation for illicit discharges from an NPDES permitted facility. The primary responsibility for regulating the many other permits (Industrial, Commercial, individual, Cal Trans, etc.) lies upon the respective Regional Water Quality Control Board. If a Permittee encounters a owner/operator of an NPDES permitted facility/property, the Permittee should not be exposed to possible Permit violation if the permittee can show a good-faith-effort to mitigate the discharge and initiates enforcement action. If a Permittee is in violation of the permit due to a NPDES permitted facility, then the primary regulatory agency responsible for the enforcement of the permit is equally at fault of the violation.

Proposed Solution- Expand this relief from violations to include illicit discharges from all NPDES permitted facilities.

9. Part IV.A.1 erroneously indicates the following:

Technology Based Effluent Limitations- each Permittee shall reduce pollutants in stormwater discharges from the MS4 to the maximum extent practicable (MEP).

Concern- A technology-based effluent limitation (TBEL) is established on the basis of the capabilities of available technologies, as opposed to the MEP, to control and reduce discharges of pollutants. The TBEL is established in accordance with technological standards set forth in the CWA: the best practicable control technology currently available (BPT), applicable to discharges of any constituents defined as pollutants under the Clean Water Act; the best available technology economically achievable (BAT), applicable to discharges of pollutants listed as toxic under the CWA; and best conventional pollutant control technology (BCT), applicable to discharges of pollutants listed as conventional under the CWA. [33 U.S.C Section 1314(b).]

Proposed Solution- Revise the Tentative Permit to provide accurate and non-conflicting provisions that are consistent with the federal Clean Water Act.

10. Part IV.A.2 specifies the following:

Water Quality-Based Effluent Limitations (WQBELs). This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL waste load allocations assigned to discharges from the Los Angeles County MS4.

- a. *Each Permittee shall comply with applicable WQBELs as set forth in Part VI.E of this Order, pursuant to applicable compliance schedules.*

Part VI.E further indicates the following:

- c. *The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL.*

Concern- This section effectively establishes the TMDL WLAs as numeric effluent limitations despite 40 Code of Federal Regulation section 122.44(K)(2) & (3) allowing the State Water Board to impose BMPs for control of stormwater discharges in lieu of numeric effluent limitations.

Regional Board Staff has ignored the November 12, 2010 USEPA issued revision to a November 22, 2002 memorandum in which it had “affirmed the appropriateness of an iterative BMP approach” for improving stormwater management over time.

Regional Board Staff has also ignored the June 19, 2006 report by a blue ribbon panel assembled by the State Water Board to address the feasibility of including numeric effluent limit as part of NPDES municipal, industrial, and construction stormwater permits.

Shouldn't the statewide General stormwater permits be stricter first since they are true point sources? Is it that difficult to comprehend that permits from true point sources should be stricter before area-wide permits are held to the highest standard for compliance?

The Regional Board Staff have failed to provide evidentiary support that WLAs can be achieved.

The Regional Board staff has failed to comprehend how the General Industrial, Construction, and proposed Cal Trans permit will have a detrimental affect to the Permittees of this MS4 Tentative Permit.

There are other sites such as the railroads and Cal Trans that are likely sources but a municipality does not have jurisdiction over.

Proposed Solution- WLAs must be translated to Water Quality Based Effluent Limitations, expressed as BMPs, and implementation of the BMPs will place the permittees into compliance with WLA.

11. Page 37, Part V.A. – Receiving Water Limitations

Concern – Receiving Water Limitations (RWL) language does not afford the Permittees the protection required to employ an effective program that will meet the water quality objectives. Not to mention, draft RWL language effectively exposes the Permittees to 3rd party lawsuits. RWL is a statewide issue, and as such RWL language should be consistent across all NPDES permits.

Proposed Solution – We support CASQA’s proposed RWL language and recommend that the RWL language contained in the tentative order be replaced with the CASQA model as described on the attached June 26, 2012 comment letter with the following revision:

3. In instances where discharges from the MS4 for which the permittee is responsible, ***and are persistent in a 60-month period***, (1) causes or contributes...

Anything less than the aforementioned proposed solution to this provision will place the Permittee out of compliance immediately.

12. Part VI.A.2.a. specifies the following:

Each Permittee must establish and maintain adequate legal authority, within its respective jurisdiction, to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. This legal authority must, at a minimum, authorize or enable the Permittee to:

- i. *Control the contribution of pollutants to its MS4 from storm water discharges associated with industrial and construction activity and control the quality of storm water discharged from industrial and construction sites. This requirement applies both to industrial and construction sites with coverage under an NPDES permit, as well as to those sites that do not have coverage under an NPDES permit. Grading ordinances must be updated and enforced as necessary to comply with this Order;*

Concern- The authority to *control* (which suggests discretionary authority to authorize discharges) the contribution of pollutants from both industrial and construction sites, through an NPDES permit, is bestowed upon the SWRCB and RWQCBs. It appears that although these facilities are under a State General Stormwater Permit which specifically regulates stormwater and prohibits non-stormwater run-off from these sites, this requirement will unlawfully grant each municipal permittee duplicative authority to authorize any contribution of pollutants from NPDES permitted facilities to stormwater.

In addition, a failure of a construction or industrial permittee to prevent discharge of pollutants (violation of the State stormwater permit) would likely result in a violation for the Municipal Permittee. If this is indeed a joint effort of the Water Board and the Municipal Permittee (as stated by LARWQCB during the July 9, 2012 workshop), why are the permit fees not shared with the Municipal Permittees and why is the Municipal Permittee the only culpable agency receiving a violation?

Proposed Solution- The current MS4 permit specifies “*permittees shall possess the necessary legal authority to prohibit non-stormwater discharges to the storm drain system*”. We insist that the current permit language corresponding to Legal Authority

remain unchanged. Furthermore, the authority and responsibility to regulate NPDES permitted industrial and construction sites should remain with the SWRCB and RWQCBs. The risk of violation should not be deferred onto the shoulders of Municipal Permittees.

13. Part VI.A.2.a.i., iv., vii., and viii. specify that each permittee must *control* the contribution of pollutants, the discharge of spills, and the contribution of pollutants to its MS4 as well as from one MS4 to another MS4.

Concern- The word “control” erroneously suggests permittees have discretionary authority to authorize the contribution of pollutants, discharge of spills, and the contribution of pollutants to its MS4. In addition, these sections also conflict with Parts VI.A.2.a.ii., iii., ix., and the Illicit Discharge/Connection Elimination Program which cite the word “prohibit”.

Proposed solution- Replace the word “control” with the word “prohibit” to be consistent with Section 402(p)(B)(ii) of the federal Clean Water Act.

14. Part VI.A.3.a. directs each Permittee to complete the following:

Each Permittee shall exercise its full authority to secure the fiscal resources necessary to meet all requirements of this Order.

Concern- As you are aware, the County of Los Angeles is proposing a “stormwater tax” to be voted on by LA County property owners. In the current global economic recession, it would be foolish to anticipate the voting public will support a countywide stormwater tax. Evidence of such an undertaking is illustrated in Contra-Costa’s recent failure of their 2012 Clean Water Initiative. A fee-for-service (i.e. stormwater plan check, inspection fee, etc.) would only cover those specific costs but cannot be expected to support the improvement of water quality to levels in compliance of the proposed numeric effluent limitations. Permittees are already searching for and pursuing opportunities to secure fiscal resources necessary to meet the proposed requirements of this Order. This provision is superfluous.

Additionally, in Page F-31 of the Fact Sheet Maximum Extent Practicable is defined in part and states that, “in selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. This means choosing effective BMPs, BMPs will serve the same purpose, the applicable BMPs would not be technically feasible, or the cost would be prohibitive.” In this instance costs are a consideration in selecting BMPs. Given the current financial condition of many cities and the fact that the Water Quality Initiative may not be approved by the voters, the Regional Board must consider the cost of implementing all regulations in determining if these requirements are feasible given the financial constraints of the Permittees.

Proposed Solution- The City of Vernon suggests that this provision be omitted. In addition, the SWRCB and LARWQCB should initiate and support a proposal for a statewide stormwater tax. Furthermore, the SWRCB should distribute funds collected through the General Industrial and Construction Activity Stormwater Permits to the Permittees to support the required inspections of these permitted facilities.

15. Page 45, Part VI, C.1-6 – Watershed Management Programs, in part states the following:

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

2.a.i. states as follows, “Each Permittee shall ensure implementation of the following requirements per the schedule specified in Table 9 below:...”

Table 9. Watershed Management Program Implementation Requirements

Part	Provision	Due Date
VI.C.2.b	Notify Regional Water Board of intent to develop Watershed Management Program	6 months after Order effective date
VI.C.2.b	Submit draft plan to Regional Water Board Executive Officer	1 year after Order effective date
VI.C.2.c	Submit final plan to Regional Water Board Executive Officer	3 months after receipt of Regional Water Board comments on draft plan
VI.C.4	Begin implementation of Watershed Management Program	Upon submittal of final plan
VI.C.6.a.ii	Evaluation of Watershed Management Program and submittal of revisions to plan	Annually, beginning in 2015

Concern – The schedule grants the Permittee only 6 months to submit a Notice of Intent and a total of 12 months to submit a draft comprehensive watershed management program. This is not only insufficient but unrealistic time to organize the watershed cities and other agencies, develop cooperative agreements (MOUs), initiate the studies, collaborate and run the models based on relevant data, draft the plans, and obtain necessary approvals from municipal leadership. The timeline described in the draft permit is not sensible and is economically challenging for this great effort. It has been previously communicated that as a comparison, the City of Torrance required two years to prepare a comprehensive water quality plan that addressed a suite of TMDLs, similar to what is being considered in the watershed management program. This effort involved only one Permittee.

Conversely, the Regional Board staff has placed great efforts in reiterating to the Regional Board members that they are offering flexibility, so as to provide the Permittees with options. The Permittee must review the implications of implementing its own MCM program or submit to a watershed (WMP) effort. The monitoring efforts in the WMP could only be effective if all monitoring is done at all outfalls and at exactly the same time. This would include monitoring intervals and efforts of all NPDES permits. This is not conceivably realistic, such as the Tentative Permit (as drafted) is unrealistic.

Proposed Solution - We believe that it will require at least 36 months to develop a draft plan that is comprehensive, analytically supported, and implementable. Alternatively we would suggest a phased approach where some initial efforts (e.g. MOUs) could be completed and submitted within 12 months but allow a 36-month timeline for the more complicated or resource intensive efforts.

16. Page 56, Part VI.D.b.i. – Storm Water Management Program Minimum Control Measures

General Requirements – 1.b. Timelines for Implementation, states as follows: “ Unless otherwise noted in Part VI.D, each Permittee shall ensure implementation of the requirements contained in Part VI.D within 30 days after the effective date of this Order.”

Concern – Although Permittees have the option to implement the program individually, it is not realistic for a Permittee to accomplish this task in 30 days from the effective date of the permit. For example, Part VI.D.3., requires each permittee to modify its storm water management programs. Simply placing an agenda item on our City Council meeting may take at least 30 days, not to mention the resources and time this entails. Needless to state, this timeline conflicts with the Watershed Management Program Implement Timelines. Conversely, a Permittee would have to effectively decide to tackle this program individually before even having to submit a Notice of Intent within the timeline described in VI.C.2.a.i.

In the Fact Sheet it specifies that a detailed source assessment in the contributing drainage area will be prepared. This makes sense however, until this work is complete and the source of the pollutant is identified it is inappropriate to prepare an implementation plan. Once the source is identified only then can a functional implementation plan be prepared. The implementation may consist of BMP controls or may propose legislative changes to ban the source of pollutant, similar to the Brake Pad Initiative.

Proposed Solution – Provide Permittees, who opt for the MCM option, consistent timelines/deadlines as for Permittees who opt for the Watershed Management Program.

17. Part VI.D.5.e.i.(2) specifies the following:

Each Permittee shall review the State Water Board's Storm Water Multiple Application and Report Tracking System (SMARTS) database at defined intervals to determine if an industrial facility has recently been inspected by the Regional Water Board.

Concern- Despite the LARWQCB staff's stated understanding that the inspection of General Industrial Permitted facilities is a common effort shared by both the LARWQCB and the Permittees, this provision clearly appears to be a one-way and one sided effort.

Proposed Solution – Revised language stating that LARWQCB should notify the respective Permittee of inspections performed by its staff, especially if there are findings that may cause or contribute to an exceedance of water quality objectives and result in a violation to the Municipal Permittee.

18. Part VI.D.6.c.i.(4) indicates the following:

When evaluating the potential for on-site retention, each Permittee shall consider the maximum potential for evapotranspiration from green roofs and rainfall harvest and use.

Concern- It is the City of Vernon's understanding that the purpose of MS4 Permit is to regulate water quality; however, the purpose of this particular provision is questionable if not suspect because it does not relate to water quality. Water reuse may be a result of this permit, but by no means should be a permit compliance requirement. In addition, the Los Angeles County region is an arid climate area which would certainly create a sustainability challenge for green roofs.

Proposed Solution- The City of Vernon suggests that this provision be omitted.

19. Part VI.D.6.d.iv.(1)(d) specifies the following:

For post-construction BMPs operated and maintained by parties other than the Permittee, the Permittee shall require annual reports by the other parties demonstrating proper maintenance and operations.

Concern- This requirement appears to be superfluous and without substance in addition to lacking the technical details required to be included in such a report.

Proposed Solution- Monitor and regulate the BMP maintenance through the Commercial/Industrial Inspection Program.

20. Part VI.D.7.a.iii. indicates the following:

Each Permittee shall develop, implement, and enforce a construction program that:

iii. Reduces construction site discharges of pollutants to the MS4 to the MEP.

Concern- The permittees of the General Construction Permit are held to a Best Available Technology (BAT) and Best Conventional Technology (BCT) compliance standard. The Municipal Permittees are held to the Maximum Extent Practicable (MEP) standard. A discharge that is within the compliance standard of BAT & BCT can still be a violation under the MEP standard. This is very disconcerting that a discharge would be within compliance for General Construction Permit permittees but be in immediate violation for the Municipal Permittee.

Proposed solution- Establish TMDL Waste Load Allocations as Numeric Action Levels only, not Numeric Effluent Limits in the Tentative Permit.

21. Part VI.D.7.b. specifies the following:

Each Permittee shall establish for its jurisdiction an enforceable erosion and sediment control ordinance for all construction sites that disturb soil.

Concern- The receiving water for the City of Vernon is not impacted by, nor has a TMDL listed for sediment. This appears to be a superfluous provision for Permittees not impacted by sediment in their respective receiving water.

Proposed Solution- The City of Vernon recommends that this provision be omitted.

22. Part VI.D.7.h.ii. describes the following:

(1) Prior to issuing a grading or building permit, each Permittee shall require each operator of a construction activity within its jurisdiction to prepare and submit an ESCP prior to the disturbance of land for the Permittee's review and written approval. The construction site operator shall be prohibited from commencing construction activity prior to receipt of written approval by the Permittee. Each Permittee shall not approve any ESCP unless it contains appropriate site-specific construction site BMPs that meet the minimum requirements of a Permittee's erosion and sediment control ordinance.

(2) ESCPs must include the elements of a Storm Water Pollution Prevention Plan (SWPPP). SWPPPs prepared in accordance with the requirements of the Construction General Permit can be accepted as ESCPs.

Concern- This provision is clearly an attempt to relinquish SWPPP review and approval responsibility from the LARWQCB staff to the Permittees without allocating any funds collected through the State General Construction Permit to support the requirement. What is even more troubling is that the LARWQCB would

like it to be a permit violation if we are unable to find the resources to implement this provision. This is obvious abuse of permitting authority.

Proposed Solution- The City of Vernon insists that this provision be omitted.

23. Part VI.D.7.j.ii.(4) requires each Permittee to develop, implement, and revise as necessary, the Inspection and Enforcement Standard Operating Procedures which includes the following:
- a. Verification of GCASP coverage
 - b. Review of ESCP/SWPPP in addition to inspection of construction sites
 - c. Assessment of compliance, including the implementation and maintenance of minimum BMPs and their effectiveness.
 - d. Assessment of the appropriateness of the planned BMPs and their effectiveness.
 - e. Visual observation and record keeping
 - f. Develop a written or electronic inspection report
 - g. Tracking of the number of inspections for the inventoried construction sites to verify that the sites are inspected at the minimum frequencies required in this Order.

Concern- This inspection and enforcement provision engenders an unnecessary layer of authority and duplicates procedures that should have already been established by the General Construction Permit administering agency.

Proposed Solution- We suggest that this provision be omitted and maintain the Inspection and Enforcement Standard Operating Procedures, intended to monitor compliance with the General Construction Permit, with the LARWQCB inspection and enforcement staff.

24. Page 106, Part VI.D.9.a-f. - Illicit Connections and Illicit Discharges Elimination Program

Concern – While Permittees are being tasked with controlling and enforcing illicit discharges, the Tentative Permit expects permittees to prevent and control all illicit discharges. This is not practical or possible. In the world of criminal activity, no local, State or Federal agency can prevent every crime or terrorist attack from occurring – it is the same situation with social behaviors and being tasked with preventing all illicit discharge activity. For instance, an industrial facility can wash down their parking lot during a weekend and wash down the oil, grease and metals deposits while in residential communities feces from lawns could be washed down versus a dog-owner picking it up and throwing it in the trash.

Proposed Solution – Language needs to be consistent throughout the permit and clearly state that the CWA provision requires this permit to “effectively prohibit non-

storm water discharges.” As long as the Permittee is implementing appropriate BMPs the Permittee will not be in violation of this permit.

25. Page 111, Part VI.E. – Total Maximum Daily Load Provisions and Attachment O. TMDLs in Los Angeles River Watershed Management Area

Concern – The critical driver in this permit is the insertion of TMDLs. The exponential rate in which TMDLs were inserted into this permit, cause great alarm for not only the Los Angeles County Permittees but state-wide and may be even nation-wide because this Tentative Permit will set a precedent. We recognize that the Consent Decree had a deadline to approve TMDLs however, Regional Board staff needs to recognize that they have the discretion to not insert numeric effluent limitations. The Tentative Permit (as drafted) establishes impossible to meet numeric limits on pollutants (TMDLs). For example, it sets a numeric determinant for copper during wet weather for the Los Angeles and San Gabriel rivers. For the entire period of the TMDL compliance schedule, Permittees will be required to demonstrate compliance with interim WLAs by implementing actions that have been estimated, to the best of their knowledge, should result in achieving the WLAs and water quality standards.

Again, we acknowledge that TMDLs must be incorporated in such a way as to require action to improve water quality however, the Regional Board must not ignore that Permittees have been active to achieve water quality objectives. For example, the Permittees have participated in the Brake Pad Partnership legislation and were successful. Needless to say, said legislation will be in effect 15-20 years from now which is after the final compliance WLA deadline of January 2028 in the Los Angeles River Metals TMDL. Implementation of this legislation will provide significant metals removal effectiveness. Assuming the average copper content in brake pads could be reduced to approximately 5-percent by the 2028 compliance milestone, brake pad replacement could greatly reduce the copper content of brake pads and achieve a load reduction.

Because the WLA deadline occurs prior to the Brake Pad regulations taking effect, hundreds of millions of dollars will be required to be spent on treatment controls in order to achieve compliance. Instead, the deadline for compliance should be extended to correspond with the source control initiative ultimately saving taxpayer dollars on programs that may not be necessary.

Proposed Solution - This illustration of the Permittees action in participating in such legislation for source control should continue during this next permit term so as to continue to develop the best management practices. Further, consideration should be granted to consider the challenges of trying to address the non-point source nature of stormwater using the iterative approach to achieve the goals. Your attention is called to EPA’s 2010 memorandum pertaining to the incorporation of TMDL WLAs in NPDES Permits. This memorandum, although currently under reconsideration by EPA, states that “EPA recommends that, where feasible, the NPDES permitting

authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards.” The operative word here being, **discretion**. Albeit that the Regional Board can insert numeric effluent limitations, does not mean it should. Supplementary to the aforementioned, in Water Quality Orders 2001-15 and 2009-0008 the State Board made it clear that, ...”we will generally not require “strict compliance” with water quality standards through numeric effluent limitations,” and instead “we will continue to follow an iterative approach, which seeks compliance over time” with water quality standards. As such, we insist that you to translate the numeric effluent limitations to BMP-based water quality based effluent limitations or Numeric Action Levels as described in the General Construction, Industrial, and Cal Trans Permits.

Notwithstanding the above, the Fact Sheet (Attachment F) contains no reference to a Reasonable Potential Analysis, as required in the USEPA’s NPDES Permit Writers’ Manual. Federal regulations require monitoring at the outfall, and again no reference is contained in the Fact Sheet documenting the calculation of WQBELs. Did the Regional Board perform a Reasonable Potential Analysis?

26. Page 111, Part VI.E.2.a.i. – Compliance Determination, states as follows:

A Permittee shall demonstrate compliance at compliance monitoring points established in each TMDL or, if not specified in the TMDL, at locations identified in an approved TMDL monitoring plan or in accordance with an approved integrated monitoring program per Attachment E. Part VI.C.5 (Integrated Watershed Monitoring and Assessment).

Concern – Compliance determination must take into account pollutant sources outside of the Permittees control such as aerial deposition, natural resources, etc.

Proposed Solution – Insert language that clearly does not place the Permittees out of compliance if there is an exceedance(s) due to aerial deposition, natural sources, or causes that are out of the control of the Permittee, etc.

27. Page 111, Part VI.E.2.b.ii. – Compliance Determination, states as follows:

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

Concern – The LACFCD is owner to at least half of the MS4 in our jurisdiction. Does this mean that the LACFCD needs to control the contribution of pollutants in a portion of our jurisdiction?

Proposed Solution – Provide clarification.

28. Page 114, Part VI.E.2.e.i.(1). - Final Water Quality Based Effluent Limitations and/or Receiving Water Limitations, states as follows:

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

(1) There are no violations of the final water quality-based effluent limitation for the specific pollutant at the Permittee's applicable MS4 outfall(s)²; ...

Concern – As stated under comment number 10 above, this section effectively establishes the TMDL WLAs as numeric effluent limitations despite 40 Code of Federal Regulation section 122.44(K)(2) & (3) allowing the State Water Board to impose BMPs for control of stormwater discharges in lieu of numeric effluent limitations. Opportunity should also be provided to the Permittees for source control.

Regional Board Staff has ignored the November 12, 2010 USEPA issued revision to a November 22, 2002 memorandum in which it had “affirmed the appropriateness of an iterative BMP approach” for improving stormwater management over time. Also, Regional Board Staff has ignored the June 19, 2006 report by a blue ribbon panel assembled by the State Water Board to address the feasibility of including numeric effluent limit as part of NPDES municipal, industrial, and construction stormwater permits.

Shouldn't the statewide General stormwater permits be stricter first since they are true point sources? Is it that difficult to comprehend that permits from true point sources should be stricter before area-wide permits are held to the highest standard for compliance?

The Regional Board Staff have failed to provide evidentiary support that WLAs can be achieved.

The Regional Board staff has failed to comprehend how the General Industrial, Construction, and proposed Cal Trans permit will have a detrimental affect to the Permittees of this MS4 Tentative Permit.

There are other sites such as the railroads and Cal Trans that are likely sources but a municipality does not have jurisdiction over.

Proposed Solution – WLAs must be translated to Water Quality Based Effluent Limitations, expressed as BMPs, and implementation of the BMPs will place the permittees into compliance with WLA.

29. Page 115, Part VI.E.4.a. - State Adopted TMDLs where Final Compliance Deadlines have Passed, states as follows:

Permittees shall comply immediately with water quality-based effluent limitations and/or receiving water limitations to implement WLAs in state-adopted TMDLs for which final compliance deadlines have passed pursuant to the TMDL implementation schedule.

Concern – The reference made here to comply **immediately** is arbitrary. Opportunity is not provided for a strategic plan that will focus on BMP implementation. This requirement will automatically result in permit violation in addition to fruitless expenditures and waste of limited public resources.

Proposed Solution – Revise language to provide Permittees the opportunity (without the risk of obstructions from permit violations) to produce a plan, perform pilot projects and implement BMPs to ensure limited resources and funds are not being wasted on programs that may not provide the benefits that were initially calculated.

30. Page 115, Part VI.E.4.a. - State Adopted TMDLs where Final Compliance Deadlines have Passed, states as follows:

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

Concern – A TSO is an enforcement action and requires that the Board make findings of a discharge or threat of a discharge that will violate prescribed requirements. The language implies that the Permittee is admitting guilt. Additionally, TSO's do not protect Permittees from third-party litigation.

Proposed Solution – TSO's need to be interchanged with Permit reopeners. Reconsiderations of TMDLs are absolutely necessary so as to re-set the compliance schedules to align with the Watershed Management Plans. This would minimize the risk of third-party litigation and unnecessary loss of limited public resources by the Permittees.

31. Page E-12, Attachment E, V. TMDL Monitoring Plans – Monitoring and Reporting Program

Table E-1. Approved TMDL Monitoring Plans by Watershed Management Areas states that the Los Angeles River Nitrogen Compounds and Related Effects TMDL Monitoring Plan was due on March 23, 2005. The County as Principle Permittee submitted a letter to the Regional Board that they would include nutrient testing at the L.A. River mass emissions monitoring station in Long Beach and this would fulfill

monitoring requirements. Regional Board accepted this as the permittees' monitoring plan.

Concern – The LARWQCB nor the Tentative Permit has acknowledged receipt of the subject monitoring plan.

Proposed Solution – The Permit should acknowledge receipt and approval of said Monitoring Plan.

32. Page O-7, Attachment O.D.2., TMDLs in Los Angeles River Watershed Management Area

D.2. Los Angeles River Watershed Bacteria TMDL states, "Permittees shall comply with the following final water quality-based effluent limitations for discharges to the Los Angeles River and its tributaries during dry weather according to the schedule in Table O-1, and during wet weather no later than March 23, 2037."

Concern – Deadlines placed on segments are contradictory with the flow of the river. Segment B/Reach 2 is near the middle to lower end of the River. It is difficult to grapple how it makes any sense to clean the middle of the River when the upper Segments may still be contributing bacteria into the River. Hence, contribution will flow down the River to Segment B and A. The Bacteria TMDL Staff Report dated July 15, 2010 states on page 64, Section 9.4.6, Prioritization of segments; MS4 dry weather implementation, ... "The concepts used in prioritization of TMDL implementation segments were evaluated during a September 2009 CREST stakeholder workshop. Through extensive discussions involving a broad spectrum of stakeholders, four primary locations where water contact activities are known or likely to occur were categorized as the highest priority." "Segment A and B of the Los Angeles River: Much of this portion of the Los Angeles River has a path on the bank of the River⁵, and *while entering the channel is not permitted*, water contact has been observed in these segments." Further language in this section reiterates that presumptions were made and based on discussions.

The criteria used to select the order of segments for implementation purposes was flawed. Reaches north of Segment B are much more likely to be used for recreational purposes. The fact that one or two individuals were observed entering the river in Segment B does not compare with the number of individuals entering the river north of Segment B. Much of the river in Segment B contains vertical walls making it nearly impossible to enter the river at these locations. In addition, the beaches in Long Beach will be improved no matter which segment is brought into compliance first. Lastly, there is a concern with environmental justice issues by targeting low income neighborhoods with the initial stage of implementation.

Proposed Solution – A reopener of the Los Angeles River Bacteria TMDL is imperative. We recognize that Permittees should assist in the reduction of bacteria in this concrete-lined channel; however, it makes most sense to treat segments starting

from the top and continuing downstream. It does not make sense to expend public resources in cleaning the middle to lower ends of the River when contributions of bacteria are likely from the upper segments. The Permittees do not have an unlimited source of funds.

33. The economic costs for compliance with the Tentative Permit

Concern - Requirements above and beyond that of the Maximum Extent Practicable that add significant additional costs such that an action would not be financially feasible would be considered impracticable. Such requirements would place a financial burden on the Permittees that has a significant negative impact on our annual General Fund budget would be considered impracticable (not consistent with the cost criterion and the logistics criterion with respect to the difficulty of local agencies to increase taxes to cover additional expenses).

Proposed Solution - The Maximum Extent Practicable (MEP) definition needs to be revised to reflect an updated definition found in the draft Phase II MS4 permit and in the draft Caltrans MS4 permit. The Tentative Permit's MEP reference is a carry-over from the 2001 MS4 permit. A great deal has happened over the decade to warrant an update. Fortunately, the State Water Resources Control Board, through the draft Phase II and Caltrans MS4 permits, has revised the MEP definition to be in keeping with current realities. To that end, it has proposed the following definition:

MEP standard requires Permittees apply Best Management Practices (BMPs) that are effective in reducing or eliminating the discharge of pollutants to the waters of the U.S. MEP emphasizes pollutant reduction and source control BMPs to prevent pollutants from entering storm water runoff. MEP may require treatment of the storm water runoff if it contains pollutants. The MEP standard is an ever-evolving, flexible, and advancing concept, which considers technical and economic feasibility. BMP development is a dynamic process and may require changes over time as the Permittees gain experience and/or the state of the science and art progresses. To do this, the Permittees must conduct and document evaluation and assessment of each relevant element of its program, and their program as a whole, and revise activities, control measures/BMPs, and measurable goals, as necessary to meet MEP. MEP is the cumulative result of implementing, evaluating, and creating corresponding changes to a variety of technically appropriate and economically feasible BMPs, ensuring that the most appropriate BMPs are implemented in the most effective manner. This process of implementing, evaluating, revising, or adding new BMPs is commonly referred to as the "iterative approach."¹

¹Op. Cit., page 35.

Attachment A- Definitions

34. The current MS4 Permit defines Authorized Discharge as:

“any discharge that is authorized pursuant to an NPDES permit or meets the conditions set forth in this Order”.

The Tentative Permit defines Authorized Non-Stormwater Discharge as:

“discharges that are not composed entirely of storm water and that are either: (1) separately regulated by an individual or general NPDES permit and allowed to discharge to the MS4 when in compliance with all NPDES permit conditions; (2) authorized by USEPA49 pursuant to sections 104(a) or 104(b) of CERCLA that either (i) will comply with water quality standards as applicable or relevant and appropriate requirements (“ARARs”) under section 121(d)(2) of CERCLA or (ii) are subject to (a) a written waiver of ARARs by USEPA pursuant to section 121(d)(4) of CERCLA or (b) a written determination by USEPA that compliance with ARARs is not practicable considering the exigencies of the situation, pursuant to 40 CFR section 300.415(j); or (3) necessary for emergency responses purposes, including flows from emergency fire fighting activities.

Concern- The changing of definitions appears to be arbitrary and capricious.

Proposed Solution- Maintain the current definition of Authorized Discharge as identified on the current MS4 Permit.

Attachment D- Standard Provisions

35. Part I.A.2. directs Permittees to complete the following:

Dischargers must comply with effluent standards or prohibitions established under section 307(a) of the CWA for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions, even if this Order has not yet been modified to incorporate the requirement [40 CFR section 122.41(a)(1)].

Concern- This provision, or any similar provision, is not in the current MS4 Permit. This provision establishes standards and prohibitions Permittees must comply with which are not specified in this Order. As the Tentative Permit is currently written (without the subject provision) it will already be an economical, logistical, scientific, legal, and likely “impossible” challenge to achieve compliance. Responsible planning and spending of limited public resources cannot be performed for items outside of the Tentative Permit. This provision is not sustainable.

Proposed Solution- The City of Vernon insists that this provision be omitted.

36. Part I.F. specifies the following:

Dischargers shall allow the Regional Water Board, State Water Board, USEPA, and/or their authorized representatives (including an authorized contractor acting as their representative), upon the presentation of credentials and other documents, as may be required by law, to [40 CFR section 122.41(i); California Water Code sections 13267 and 13383]:

4. *Sample or monitor, at reasonable times, for the purposes of assuring Order compliance or as otherwise authorized by the CWA or the California Water Code, any substances or parameters at any location [40 CFR section 122.41(i)(4); California Water Code sections 13267 and 13383].*

Concern- Because of the dynamic variability of stormwater and non-stormwater discharges, the City of Vernon would like an opportunity to witness and/or acquire duplicate samples during any RWQCB, SWRCB, or US EPA sampling operations. In addition, if sampling operations will be performed on City of Vernon property, an encroachment permit is required prior to sampling activity.

Proposed Solution- Staff (or duly authorized representatives) of the RWQCBs, SWRCB, and US EPA shall obtain proper encroachment permits in addition to providing a minimum of 72-hour notification to the appropriate Permittees Stormwater Program Manager prior to any sampling operations within the jurisdiction of the Permittee.

Attachment E- Monitoring & Reporting

37. Part II.A. describes the following:

The primary objectives of the Monitoring Program are to:

1. *Assess the chemical, physical, and biological impacts of discharges from the municipal storm water sewer system (MS4) on receiving waters.*

Concern- It is the City of Vernon's understanding that the purpose of MS4 Permit is to regulate water quality. It is the role of the State EPA and Water Quality Control Board, not municipal governments, to assess biological impacts of discharges and to set water quality regulations to prevent adverse biological impacts. The imposing of State and federal responsibilities on local municipal governments is an unfunded mandate.

Proposed Solution- Provide legal justification for this transfer of jurisdiction or omit as a primary object to assess the "biological impacts" of discharges from the MS4.

38. Part II.E.1.a indicates the objective of the receiving water monitoring is to:

determine whether the receiving water limitations are being achieved.

Concern- The Regional Board has no legal authority to compel compliance with receiving water limitations through in-stream monitoring. Monitoring requirements relative to MS4 permits are limited to effluent discharges and the ambient condition of the receiving water, as §122.22(C)(3) clearly indicates:

The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameters continues to attain water quality standards.

According to Clean Water Act §502, effluent monitoring is defined as outfall monitoring:

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

40 CFR §122.2 defines a point source as:

... the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

In short, effluent monitoring in a receiving water cannot be required because it lies outside the bounds of the outfall.

Regarding monitoring purposes "b" and "c" no argument is raised here provided that it is understood that assessing trends in pollution concentrations would be: (1) limited to ambient water quality monitoring; and (2) permittees shall be not responsible for funding such monitoring. With respect to the latter, the Regional Board's surface water ambient monitoring program (SWAMP) should be charged with this responsibility. MS4 permittees fund SWAMP activities through an annual surcharge levied on annual MS4 permit fees.

Proposed Solution- Omit section 1.a and make it clear that 1.b relates to ambient monitoring that is not the responsibility of MS4 Permittees.

39. Part II.E.1.c specifies that the objective of the receiving water monitoring is to:

Determine whether the designated beneficial uses are fully supported as determined by water chemistry, as well as aquatic toxicity and bioassessment monitoring.

Concern- It is the City of Vernon's understanding that the purpose of MS4 Permit is to regulate water quality. It is the role of the State EPA and Water Quality Control Board, not municipal governments, to assess biological impacts of discharges and to set water quality regulations to prevent adverse biological impacts. The imposing of State and federal responsibilities on local municipal governments is an unfunded mandate.

Proposed Solution- Provide legal justification for this transfer of jurisdiction or omit as a primary object to assess the "biological impacts" of discharges from the MS4.

40. Part II.E.2.b. indicates the following:

Storm water outfall based monitoring; including TMDL monitoring requirements specified in approved TMDL CMPs (see Table E-1). The objectives of the storm water outfall based monitoring program include the following:

b. Determine whether a Permittee's discharge is in compliance with applicable wet weather WQBELs derived from TMDL WLAs,

Concern- Monitoring cannot be used to determine compliance with wet weather WQBELs based on TMDL WLAs for the following reasons:

1. The wet-weather WQBEL is based on a TMDL WLA in the receiving water that is non-ambient. As mentioned, federal regulations only require ambient monitoring in the receiving water, which by definition can never be deemed the same as wet weather monitoring. They are mutually exclusive. Regional Board staff has also incorrectly determined that a WQBEL may be the same as the TMDL WLA, thereby making it a "numeric effluent limitation." Although numerous arguments may be marshaled against the conclusion, the most compelling of all is the State Water Resources Control Board's clear opposition to numeric effluent limitations.

In Water Quality Orders 2001-15 and 2009-0008 the State Board made it clear that:

we will generally not require "strict compliance" with water quality standards through numeric effluent limitations," and instead "we will continue to follow an iterative approach, which seeks compliance over time" with water quality standards.

[Please note that the iterative approach to attain water quality standards applies to the outfall and the receiving water.]

More recently, the State Board commented in connection with the draft Caltrans MS4 permit that numeric WQBELs are not feasible as explained in the following provision from its most recent Caltrans draft order:

Storm water discharges from MS4s are highly variable in frequency, intensity, and duration, and it is difficult to characterize the amount of pollutants in the discharges. In accordance with 40 CFR § 122.44(k)(2), the inclusion of BMPs in lieu of numeric effluent limitations is appropriate in storm water permits. This Order requires implementation of BMPs to control and abate the discharge of pollutants in storm water to the MEP.

2. The State Board's decision not to require numeric WQBELs in this instance appears to have been influenced by among other considerations, the *Storm Water Panel Recommendations to the California State Water Resources Control Board in re: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities.*

Regarding purpose "b" it should also be noted that the Regional Board's setting of WQBELs to translate the TMDL WLA in the receiving water to the outfall is premature. Regional Board staff apparently has not performed a reasonable potential analysis as required under § 122.44(d)(1)(i), which states:

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard, including [s]tate narrative criteria for water quality.

No such reasonable potential analysis has been performed – even though USEPA guidance requires it as part of documenting the calculation of WQBELs in the NPDES permit's fact sheet. According to USEPA's NPDES Permit Writers' Manual:

Permit writers should document in the NPDES permit fact sheet the process used to develop WQBELs. The permit writer should clearly identify the data and information used to determine the applicable water quality standards and how that information, or any applicable TMDL, was used to derive WQBELs and explain how the state's anti-degradation policy was applied as part of the process. The information in the fact sheet should provide the NPDES permit applicant and the

*public a transparent, reproducible, and defensible description of how the permit writer properly derived WQBELs for the NPDES permit.*²

The fact sheet accompanying the tentative order contains no reference to a reasonable potential analysis.

Complicating the performance of a reasonable potential analysis is the absence of (1) outfall monitoring data; and (2) ambient water quality standards. Though federal regulations require monitoring at the outfall, the Regional Board has not required it up until now. Even if outfall monitoring data were available to determine whether pollutants concentrations in the discharge exceeded the water quality standard is not possible. This is because, as mentioned earlier, TMDL WLAs are not expressed as ambient standards. A TMDL is an enhanced water quality standard. As noted in the National Research

Council's *Assessing the TMDL Approach to Water Quality Management*, a report commissioned by the United States Congress in 2001:

... EPA is obligated to implement the Total Maximum Daily Load (TMDL) program, the objective of which is attainment of ambient water quality standards through the control of both point and nonpoint sources of pollution.

Proposed Solution- Omit this provision.

41. Part XI.A., titled Pyrethroid Insecticides Study Requirements specifies the following:

Each Permittee shall perform a Pyrethroid Insecticides study to accomplish the following objectives:

- a. Establish baseline data for major watersheds*
- b. Evaluate whether Pyrethroid Insecticide concentrations are at or approaching levels known to be toxic to sediment-dwelling aquatic organisms.*
 - i. Determine if Pyrethroids discovered are from urban sources.*
 - ii. Assess any trends over the permit term.*

Concern- This provision is clearly an unfunded mandate. This provision is not part of the federal Clean Water Act; therefore, California Water Code section 13263 requires that the Water Boards consider economic factors described in section 13241 as they apply to these specific restrictions. Why does our MS4 permit require permittees to participate in a pyrethroid study if the pesticide is being banned? Also, the new regulations appear to ban the use of the pesticide in sanitary sewer.

²United States Environmental Protection Agency, NPDES Permit Writers' Manual, September, 2010, page 6-30.

Proposed Solution- Provide evidentiary support indicating a proper economic analysis was completed, distribute adequate funding to Permittees for the implementation and maintenance of this provision, or omit this provision from the Order.

Attachment H- Bioretention / Biofiltration Design Criteria

42. Part 5 indicates the following:

Waterproof barriers may not be placed on the bottom of the biofiltration unit, as this would prevent incidental infiltration which is critical to meeting the required pollutant load reduction.

Concern- Part VI.D.6.c.ii.(2) specifies that alternative compliance, such as biofiltration, can be allowed if technical infeasibility demonstrates the project is situated in a;

- (d) Brownfield development sites,*
- (e) location where pollutant mobilization is a documented concern.*

The purpose of this alternative compliance option is to avoid the creation of a groundwater contamination catastrophe; however, if a waterproof barrier on the bottom of a biofiltration unit is restricted in a location where pollutant mobilization is a documented concern, the Tentative Permit potentially will be creating an even greater environmental problem for generations to come.

Proposed Solution- Revise the Bioretention / Biofiltration Design Criteria to allow waterproof barriers to be placed on the bottom of biofiltration units.

Before the LARWQCB adopts this order, the City of Vernon requests a revised copy of the Tentative Order with an opportunity to comment after it has been revised.


The City of Vernon is one of 62 voting members of the Los Angeles Permit Group (LAPG). Please note that the City also supports comments submitted to you from the LAPG. The City's comments are intended to be complimentary and more specific to the issues raised in the LASP letter.

The City of Vernon appreciates the RWQCB's staff efforts in providing workshops with information as we progress with the next iteration of the Los Angeles County Municipal Stormwater Permit. The City will continue to cooperate with the RWQCB to protect the environment. Please contact Ms. Claudia Arellano at (323) 583-8811 extension 258 or Mr. Jerrick Torres at extension 204 if you have any questions or comments.

Sincerely,



Samuel Kevin Wilson, P.E.
Director of Community Services
& Water



Leonard Grossberg, MPA, R.E.H.S.
Interim Director/Health Officer
Health & Environmental Control Department

SKW/LG/jt/ca
Enclosure

c: City of Vernon Council
Los Angeles Regional Water Quality Control Board members
Senator Kevin De Leon, State Capital, Sacramento, California 95814
Los Angeles Permit Group



California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

June 26, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board

Subject: State of California Department of Transportation Municipal Separate Storm Sewer System Permit Second Revised Draft Tentative Order

Dear Ms. Townsend:

The California Stormwater Quality Association appreciates this opportunity to comment on the subject Caltrans Municipal Separate Storm Sewer System (MS4) Permit Second Draft Tentative Order (draft Tentative Order). CASQA typically comments on individual MS4 permits only when there is an issue of potential statewide significance. Accordingly, we are compelled to comment on the Receiving Water Limitations provisions incorporated into the draft Tentative Order.

The Draft Tentative Order in Provisions A and C will expose the Department to unwarranted and immediate liability.

CASQA believes the current revision of the receiving water limitations section is contrary to established Board policy and appears to create an inability for Caltrans to comply. Multiple constituents in stormwater runoff on occasion may be higher than receiving water quality standards before it is discharged into the receiving waters, and may create the potential for the runoff to cause or contribute to exceedances in the receiving water itself. Previously, MS4s have presumed that permit language like that expressed in Receiving Water Limitation D.4 in conjunction with Board Policy (WQ 99-05) established an iterative management approach and process as the fundamental, and technically appropriate, basis of compliance. The "iterative process language" now at issue in the draft Tentative Order, however, combined with General Discharge Prohibition A.4, renders the iterative process obsolete as a compliance strategy. Moreover, in the wake of the July 2011 Ninth Circuit Court of Appeal's decision, if this language is not revised, the precedent may be set for municipal permits that create unlimited liability for government entities across the State.

As you know, on July 13, 2011, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, Los Angeles County Flood Control District, et al.* (NRDC v. County of LA). The court's opinion addressed two key issues for California's MS4s, one of which is directly applicable here, that being whether a permittee who is in compliance with the iterative process is nevertheless still in violation of a MS4 permit that contains language like that proposed for Caltrans.

CASQA comments on Caltrans MS4 Permit Second Revised Draft Tentative Order

Like the Caltrans draft Tentative Order, the County of Los Angeles MS4 permit includes Receiving Water Limitations language that is consistent with the language developed by the State Water Board in its Order WQ 99-05. In previous State Water Board orders, the Board indicated that the language specified in Order WQ 99-05 did not require strict compliance with water quality standards. The language in question is often referred to as the “iterative process.”

However, contrary to the State Water Board’s stated intent and the understanding of CASQA, the Ninth Circuit Court of Appeals found that, because the iterative process paragraph did not explicitly state that a party who was implementing the iterative process was not in violation of the permit, a party whose discharge “causes or contributes” to an exceedance of a water quality standard is in violation of the permit, even though that party is implementing the iterative process in good faith.

As a result of the court’s decision, if the draft language is not changed, all discharges to receiving waters must meet water quality standards to avoid being in violation of permit terms. Although an important goal, no one reasonably expects Caltrans or any other municipal permittee to be able to meet this goal now. Indeed, the impossibility of meeting this goal is reflected by the hundreds of TMDLs across the state that specifically recognize that water quality standards cannot currently be met, often for reasons beyond Caltrans or other permittees’ control, and that instead an adaptive program over a span of several years or longer is necessary.

Thus, unless this language is changed, Caltrans may be vulnerable to enforcement actions by the state and third party citizen suits alleging violations of the permit terms in question. Indeed, the liability resulting from a failure to address these provisions may be a risk to Caltrans regardless of the current or future enforcement policy of the State or Regional Water Boards. For example, the City of Stockton was engaged in the iterative process per the terms of its Permit, but was nonetheless challenged by a third-party on the basis of the Receiving Water Limitations language. There is no regulatory benefit to imposing permit provisions that result in the potential of immediate non-compliance for the Permittee.

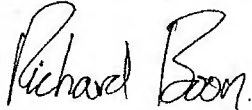
To avoid undercutting the regulatory benefits of the State Water Board’s program for Caltrans (and other MS4s), the Receiving Water Limitations language must be revised. In an attempt to avoid this undercutting we have attached proposed language for the Receiving Water Limitation provision. CASQA believes that our suggested Receiving Water Limitations language is drafted in a manner to clearly indicate that compliance with the iterative process provides effective compliance with the discharge prohibition (General Discharge Prohibition A.4), and the “shall not cause or contribute” receiving water limitations (Receiving Water Limitations D.2 and D.3). Furthermore the proposed language allows the MS4s to focus and prioritize their resources on critical water quality issues that will lead to water quality improvement, such as those reflected by the TMDLs. We therefore request further consideration of this or other alternative language so as to avoid a situation where, even if Caltrans is in complete compliance with the iterative process provisions, it could be subject to significant liability and lawsuits.

We thank you again for the opportunity to provide our comments and we ask that the Board carefully consider them and our suggested Receiving Water Limitations language for the

CASQA comments on Caltrans MS4 Permit Second Revised Draft Tentative Order

Caltrans permit. If you have any questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

A handwritten signature in black ink that reads "Richard Boon". The signature is written in a cursive style.

Richard Boon, Chair

cc: CASQA Board of Directors and Executive Program Committee

Attachment – CASQA Proposed Language for Receiving Water Limitation Provision





California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

February 21, 2012

Mr. Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Receiving Water Limitation Provision to Stormwater NPDES Permits

Dear Mr. Hoppin:

As a follow up to our December 16, 2011 letter to you and a subsequent January 25, 2012 conference call with Vice-Chair Ms. Spivy-Weber and Chief Deputy Director Jonathan Bishop, the California Stormwater Quality Association (CASQA) has developed draft language for the receiving water limitation provision found in stormwater municipal NPDES permits issued in California. This provision, poses significant challenges to our members given the recent 9th Circuit Court of Appeals decision that calls into question the relevance of the iterative process as the basis for addressing the water quality issues presented by wet weather urban runoff. As we have expressed to you and other Board Members on various occasions, CASQA believes that the existing receiving water limitations provisions found in most municipal permits needs to be modified to create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but also allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. To that end, we have drafted the attached language in an effort to capture that intent. We ask that the Board give careful consideration to this language, and adopt it as 'model' language for use statewide.

Thank you for your consideration and we look forward to working with you and your staff on this important matter.

Yours Truly,

Richard Boon, Chair
California Stormwater Quality Association

cc: Frances Spivy-Weber, Vice-Chair – State Water Board
Tam Doduc, Board Member – State Water Board
Tom Howard, Executive Director – State Water Board
Jonathan Bishop, Chief Deputy Director – State Water Board
Alexis Strauss, Director – Water Division, EPA Region IX

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.
2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.
3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:
 - a. Submit a report to the State or Regional Water Board (as applicable) that:
 - i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.
 - ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 to help inform Regional or State Water Board efforts to address such sources).
 - iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.
 - iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
 - v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.
 - vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

- b. Submit any modifications to the report required by the State or Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.
 - c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.
 - d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.
4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.
5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.