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Public Workshop (11/20/12)
Receiving Water Limitations Language
Deadline: 11/13/12 by 12 noon

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

November 13, 2012

VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov

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

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

Dear State Water Resources Control Board Members:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.

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

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

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

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

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

The State Water Board determined that, based on EPA's interpretation of the law that would be later overruled by the Ninth Circuit in 1999,[8] municipal stormwater permits must include effluent limitations necessary to achieve water quality standards, but that BMPs[9] constituted valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements. (*See* State Water Board Orders WQ 91-03 and WQ 91-04; Order 98-01 at pg. 5.) The State Water Board also recognized its flexibility in water quality planning to provide *compliance schedules* for storm water dischargers to come into compliance and emphasized source reduction of toxic pollutants and development of best management practices before costly end-of-the-pipe treatment was required. (State Water Board Order No. WQ 91-03 at pg. 36.)

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

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

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

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

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

The State Water Board *disagreed* with petitioner's contention that the above quoted language was unlawful. (State Water Board Order 98-01 at pgs. 9-10.) Citing Order WQ 96-13, the State Water Board reiterated that it had reviewed and approved the storm water permit for certain
permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Water Board that contained similar receiving water limitations language. The State Water Board further noted that use of the phrase that the permittees will not be in violation of... complies with the CWA and, in fact, used that same phrase in State Water Board Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS00000l) (the General Industrial Permit), which is still in use today. (*Id.*) The State Water Board clearly held that permittees may achieve compliance with water quality standards through the implementation of BMPs on a phased basis, over time. (State Water Board Order 98-01 at pg. 12.) The State Water Board also set forth precedential language to be used in stormwater permits that recognized these points.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, **does not require strict compliance with water quality standards**. Our language requires that **storm water management plans be designed to achieve compliance with water quality standards**. Compliance is to be achieved **over time**, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations....
>
> While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. **We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time**. [FN omitted] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.

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

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

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

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

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

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

[14] The terms of the 2001 MS4 Permit also stated:

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

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

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

> [T]he first step to correct water quality violations that occur, even if a permittees' [*sic*] SQMP has been designed to achieve standards and BMPs have been timely implemented, is set forth in subpart 2.3, the "iterative" process. Should that not be sufficient, the parties would move to subpart 2.4, Best Management Practices (BMP) requirements. The process requires cooperation from the Regional Board, State Board and local government entities and impliedly requires that all parties work together in good faith.
>
> This reading is consistent with the requirements of the Clean Water Act generally and section 402 specifically, as well as the Porter-Cologne Act. (See 33 U.S.C. § 1342(p)(3)(B)(iii); 33 U.S.C. §§1341(a)(1)-(2), 1342(a)(2), 1342(p)(3)(B)(ii); 40 C.F.R. §122.4(d); Cal. Water Code §§13000, 13263(a).) It is also consistent with State Board orders WQ 2001-15 and WQ 99-05 and the Francine Diamond letter. . . .
>
> Reading the Receiving Water Limitations language in this manner, there is no tension between the subparts and no ambiguity. . . . The Court emphasizes the importance of good faith on the part of all parties in implementing Part 2.

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

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

> "Receiving Water Limitation B.2 [equivalent to Part 2.3 of the LA MS4 Permit] describes the process that the dischargers must follow to obtain compliance with water quality standards. Where the Permittee causes or contributes to violations of water quality standards, the Permittee must implement the iterative process specified. Specifically, where there are discharges of pollutants that cause or contribute to exceedances of water quality standards, the Permittee must submit a report that describes existing and additional best management practices that will be implemented to prevent or reduce any pollutants contributing to the exceedances of water quality standards. The Permittee must then incorporate new BMPs into its storm water management plan and implement the plan. The permit clarifies that if the Permittee complies with this procedure, the procedure does not have to be repeated for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.
>
> The Regional Board expects this iterative process to improve BMPs over time, and, therefore, the permit does not require strict compliance with WQS [Water Quality Standards]. **If the Permittee complies with this iterative process, it would be considered in compliance** with Discharge Prohibition A.1. and A.2 and Receiving Water Limitations B.1 and B.2. In the event that a Permittee has, in the judgment of the Regional Board, failed to properly implement the iterative process, the Regional Board may take appropriate enforcement action to address such failures and others...."

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

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

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

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

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

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

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

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

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

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

> the regulatory agencies to enforce the water quality standards during this process,[16] the Water Boards have made it clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. §122.47.) **There is nothing in this record to show that the Municipalities will be subject to immediate penalties for violation of water quality standards**....
>
> Moreover, although we do not reach the enforcement issue in this case, we note **the Permit makes clear that the iterative process is to be used for violations of water quality standards**....[17]

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

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

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

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

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

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

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

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

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

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

2. *Making the Right Policy Choice Going Forward*

Instead of requiring strict compliance with water quality standards (arguably reflected in Alternatives 1 and 2 in the Issue Paper), which will only lead to legal finger-pointing and years of litigation trying to painstakingly determine each discharge point and each municipalities' specific contribution to a particular water quality exceedance (which is difficult[19] and does

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

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

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

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

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

3. *Conclusion*

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

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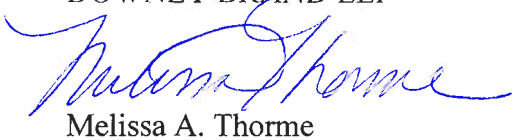
point source dischargers, such as industrial or municipal wastewater treatment plants or direct discharges to the Bay for pollutants such as bacteria from boats, bathers, and wildlife. Trying to determine each source's specific contribution to each water quality impairment would take an inordinate amount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

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

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

Very truly yours,

DOWNEY BRAND LLP



Melissa A. Thorme

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Exhibit A

Alternative RWL Language

Language similar to the following has been included in at least one adopted MS4 permit without being appealed by environmental organizations or vetoed by U.S. EPA. The State Water Board should consider the following language as an additional alternative to those provided in its RWL Language Issue Paper:

C. Receiving Water Limitations

1. Receiving water limitations are site-specific interpretations of water quality standards from applicable water quality control plans. As such, they are required to be addressed as part of the permit. However, a receiving water condition not in conformance with the limitation is not necessarily a violation of this Order. The Central Valley Water Board may require an investigation to determine cause and culpability prior to asserting a violation has occurred.

Discharges from MS4s shall not cause the following in receiving waters:

{List of Receiving Water requirements, including TMDL WLAs omitted}

2. The discharge shall not cause an exceedance of any applicable water quality standards.

3. The Permittee shall comply with Discharge Prohibitions and Receiving Water Limitations C.1 and C.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SWMP and other requirements of this Order, including any modifications. The SWMP shall be designed to achieve compliance with the above mentioned Discharge Prohibitions and Receiving Water Limitations C.1 and C.2. If exceedance(s) of WQS persist notwithstanding implementation of the SWMP and other requirements of this Order, the Permittee shall assure compliance with Discharge Prohibitions and Receiving Water Limitations C.1 and C.2 by complying with the following procedure:

a. The Permittee shall prepare Notification of Water Quality Exceedances ("NWQE") pursuant to notification requirements set forth in the Monitoring and Reporting Program of this Order.

b. The Permittee shall submit a Report of Water Quality Exceedance ("RWQE") annually to the Executive Officer for reporting discharges that cause or contribute to an exceedance of applicable water quality standards. The RWQE shall describe BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants in the Permittee's discharge that are demonstrated to be causing or contributing to the exceedance of WQSs. The RWQE shall be incorporated in the Annual Report. The report shall include proposed revisions to the SWMP and an implementation schedule containing milestones and performance standards for new or improved BMPs, if applicable. The RWQE shall also include a monitoring program and the rationale for new or improved BMPs, including a discussion of expected pollutant reductions and how implementation of additional BMPs will prevent future exceedance of WQSs. The Central Valley Water Board may require modifications to the RWQE.

c. Within 30 days following approval of the RWQE by the Executive Officer, the

Permittee shall revise the SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, implementation schedule, and any additional monitoring required.

d. The Permittee shall implement the revised SWMP and monitoring program in accordance with the approved schedule after Central Valley Water Board approval of the revised SWMP.

If the Permittee has complied with the procedures set forth above and is implementing the revised SWMP, 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 Executive Officer to develop additional BMPs.

4. If the Permittee is found to have discharges notwithstanding the prohibitions in Provision A, or discharges causing an exceedance of an applicable water quality objective, waste/wasteload allocation, or receiving water limitation in Provision C, the Permittee will not be determined to be in violation of this Order unless it fails to comply with the requirement to report such discharge (Provision C.3.a.), and to revise its BMPs to include additional and more effective BMPs, and to implement the same (Provision C.3.b-d).

D. Provisions

1. <u>Compliance with Discharge Prohibitions and Receiving Water Limitations</u>

As reflected in the findings, the effect of the Permittee's storm water discharges on receiving water quality is highly variable. For this reason, this Order requires that, within its geographic jurisdiction, the Permittee shall design its storm water program to achieve compliance with water quality standards over time through compliance with the following, which reflects an iterative approach:

a. Comply with the requirements of this Order, the SWMP, any modifications to the SWMP, and directives of the Executive Officer concerning this Order;

b. Facilitate the implementation of the requirements of the SWMP applicable to such Permittee in an efficient and cost-effective manner;

c. Prepare an annual fiscal analysis identifying the expenditures for the storm water management program. This summary shall identify the storm water budget for the following year, using estimated percentages and written explanations where necessary, for the specific categories noted below:

i. Program management (administrative costs)
ii. SWMP Development

{subcategories omitted}