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VIA ELECTRONIC MAIL

State Water Resources Control Board
Office of Chief Counsel
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Re: City of Covina Petition for Review Re: LARWQCB Order No. R4-2012-0175

Dear Ms. Bashaw:

The City of Covina ("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 Stormwater 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.

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

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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.

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.

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," "B" and "C." 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 WQBELs

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 WQBELs.

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

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 permitees 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

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

> 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.

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.

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

The Regional Board's numeric WQBELs 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 WQBELs 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 WQBELs and receiving water limitations while Caltrans need only implement WQBEL 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 WQBEL compliance requirements onto a General Industrial and General Construction Storm Water permittee's discharge while imposing enforceable numeric WQBELs 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

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

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

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[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.
[3] Total 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.

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

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. . . .

> (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

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

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 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 "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 do, 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 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

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.

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 WQBELs 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
Facsímile: (916) 341-5199
jbashaw@waterboards.ca.gov

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 Covina

Enclosure

cc: Kevin Stapleton, Mayor, City of Covina
Walt Allen, Council Member, City of Covina
Peggy Delach, Council Member, City of Covina
John King, Council Member, City of Covina
Bob Low, Council Member, City of Covina
Daryl Parrish, City Manager, City of Covina
Kalieh Honish, Interim Public Works Director, City of Covina
Dan McMeekin, Planning Commissioner, City of Covina
Win Patterson, Planning Commissioner, City of Covina
John Connors, Planning Commissioner, City of Covina
Chuck Hodapp, Planning Commissioner, City of Covina

Brad Manning, Planning Commissioner, City of Covina
Vivian Castro, Environmental Services Manager, City of Covina

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CITY OF COVINA

125 East College Street ● Covina, California 91723-2199

Public Works Department
Development Services Division
Environmental Services Section
(626) 384-5480 • FAX (626) 384-5479

July 23, 2012

Mr. Ivar Ridgeway
320 W 4th Street, Suite 200
Los Angeles, CA 90013
(213) 620-2150
Via email to: LAMS42012@waterboards.ca.gov; ridgeway@waterboards.ca.gov; rpurdy@waterboards.ca.gov

Subject: Comments on Tentative Order No. R4-2012-XXXX NPDES Permit No. CAS004001

Dear Mr. Ridgeway:

The City of Covina is pleased to submit the attached comments regarding Tentative Order No. R4-2012-XXXX NPDES Permit No. CAS004001.

Please note that the City of Covina is also in support of the comment letter submitted by the Los Angeles Stormwater Permit (LASP) Group, of which the City is an active participant, and incorporates the LASP comments by reference (Attachment C). The City's comments are intended to be complimentary and more specific to the issues raised in the LASP group letter. The City's comment letter also contains additional issues not addressed in the LASP group letter.

Also, please replace the City of Covina's Facility Contact name listed in the Tentative Order with my name, Vivian Castro, Environmental Services Manager. The other contact information listed for the City, including my email, is correct.

Thank you for the opportunity to submit comments on this very important matter. Please direct any questions regarding this letter to me at (626) 384-5480.

Sincerely,

Vivian Castro

Vivian Castro
Environmental Services Manager

cc: Covina City Council Members
Daryl Parrish, City Manager
Steve Henley, Director of Public Works
Kalieh Honish, Deputy Director of Public Works

Attachments: (A) City of Covina Comments on Tentative Order No. R4-2012-XXXX NPDES Permit No. CAS004001.

(B) CASQA Proposed Receiving Water Limitation Provision

(C) LAPG Comments re_Tentative LA MS4 Order No.R4-2012-XXXX_7-13-12 FINAL

CITY OF COVINA COMMENTS ON TENATIVE ORDER NO. R4-2012-XXXX

1. **Numeric Water Quality Based Effluent Limitations (WQBELs) applied to dry and wet weather Total Maximum Daily Load (TMDLs) waste load allocations (WLAs) and to stormwater and non-stormwater municipal action levels (MALs) are not authorized under federal stormwater regulations and are not in keeping with State Water Resources Control Board (State Board) water quality orders (WQOs)**.

   The Tentative Order specifies that "*Each Permittee shall comply with applicable WQBELs as set forth in Part VI.E of this Order, pursuant to applicable compliance schedules*." The Tentative Order specifies two categories of WQBELs, one for USEPA adopted TMDLs and one for Regional Board/State adopted TMDLs. Regarding USEPA adopted TMDLs, it appears that BMP-WQBELs may be used to meet TMDL WLAs in the receiving water. For Regional Board/State-adopted TMDLs, however, the Tentative Order specifies a different compliance method -- meeting a "numeric" WQBEL that is derived directly from the TMDL waste load allocation. For example, the wet weather numeric WQBEL for dissolved copper for the Los Angeles River is 17 ug/l.

   a. Issue: *Regional Board staff is premature in requiring any kind of WQBEL because no exceedance of any TMDL WLA at the outfall has occurred*. This is because outfall monitoring is not a requirement of the current MS4 permit or previous MS4 permits.

      The Regional Board's setting of WQBELs – any WQBEL – to translate the TMDL WLA for compliance at the outfall is premature. Regional Board staff does not appear to have 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, <u>have the reasonable potential t</u>o 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 – despite that USEPA guidance requires it as part of documenting the calculation of WQBELs in the <u>NPDES permit's fact sheet</u>. According to USEPA's NPDES Permit Writers' Manual:

      > *Permit writers should document in the NPDES <u>permit fact sheet</u> 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 <u>public a transparent, reproducible, and defensible description</u> of how the permit writer properly derived WQBELs for the NPDES permit.*[1]

      The fact sheet accompanying the Tentative Order contains no reference to a reasonable potential analysis – a consequence of the fact that no outfall monitoring has been required of the Regional Board either in the current or previous MS4 permits for Los Angeles County.

[1] United States Environmental Protection Agency, *NPDES Permit Writers' Manual*, September, 2010, page 6-30.

Outfall monitoring is a mandatory requirement under federal regulations at CFR 40 122.22, §122.2 and §122.26. CFR 40 §122.22(C)(3) requires effluent and ambient monitoring:
*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.*

Effluent monitoring, according to Clean Water Act §502, 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.*

Conclusion: Because Regional Board staff has not required outfall monitoring, it could have not have detected an excursion above a water quality standard (includes TMDL WLAs). Therefore, it could not have conducted a reasonable potential analysis and, as further consequence, cannot require compliance with a WQBEL (numeric or BMP-based) or with any TMDL or MAL until those burdens have been met.

Recommended Correction: Eliminate all reference to comply with WQBELs until outfall monitoring and a reasonable potential analysis have been performed.

b. Issue: Even if Regional Board staff conducted outfall monitoring and detected an excursion above a TMDL WLA and performed the requisite reasonable potential analysis, it cannot require a <u>numeric</u> WQBEL strictly derived from the TMDL WLA.

USEPA's 2010 guidance memorandum mentions that numeric WQBELs are permissible only if feasible.[2] This conclusion was reinforced by a memorandum from Mr. Kevin Weiss, Water Permits Division, USEPA (Washington D.C.). He explains:

> *Some stakeholders are concerned that the 2010 memorandum can be read as advising NPDES permit authorities to impose end-of-pipe limitations on each individual outfall in a municipal separate storm sewer system. In general, <u>EPA does not anticipate that end-of-pipe effluent limitations on each municipal separate storm sewer system outfall will be used frequently.</u> <u>Rather, the memorandum expressly describes "numeric" limitations in broad terms, including "numeric parameters acting as surrogates for pollutants such as stormwater flow volume or percentage or amount of impervious cover."</u> <u>In the</u>*

[2]Memorandum from James A. Hanlon, Director, Office of Waste Management, Revisions to the November 22, 2002 Memorandum *Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,* November 12, 2010.

> *context of the 2010 memorandum, the term "numeric effluent limitation" should be viewed as a significantly broader term than just end-of-pipe limitations, and could include limitations expressed as pollutant reduction levels for parameters that are applied system-wide rather than to individual discharge locations, expressed as requirements to meet performance standards for surrogate parameters or for specific pollutant parameters, or could be expressed as in-stream targets for specific pollutant parameters. Under this approach, NPDES authorities have significant flexibility to establish numeric effluent limitations in stormwater permits.*[3]

Reading the 2010 USEPA memorandum, together with Mr. Weiss's memorandum, creates the conclusion that (1) numeric WQBELs are permissible if "feasible" and (2) numeric WQBELs cannot be construed to only mean strict effluent limitations at the end-of-pipe (outfall) but more realistically must include surrogate parameters and other variants as well. Regional Board staff failed to examine alternative numeric WQBELs, along with BMP WQBELs, as a consequence of not conducting the appropriate analysis.

In any case, the feasibility of numeric WQBELs, whether strictly derived from TMDL WLAs or of the surrogate parameter type, the State Water Resources Control Board has determined that numeric effluent limitations are not feasible. 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.*

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.*

Conclusion: The Regional Board does not have the legal authority to require numeric WQBELs.

Recommended Correction: Eliminate all references to comply with numeric WQBELs.

[3]Memorandum from Kevin Weiss, Water Permits Division, USEPA (Washington D.C.), March 17, 2011.

c. Issue: There cannot be a WQBEL to attain a dry weather TMDL WLA nor a WQBEL that addresses a non-stormwater municipal action level (MAL).

The foundation for this argument lies in the federal limitation of non-stormwater discharges to the MS4 – not from or through it as the Tentative Order concludes. Federal stormwater regulations only prohibit discharges to the MS4 and limits outfall monitoring to stormwater discharges. This is explained in greater detail under **4. Non-stormwater Discharge Prohibitions.**

Conclusion: The Regional Board does not have the legal authority to compel compliance with dry weather WQBELs or non-stormwater MALs.

Recommended Correction: Eliminate all references to comply with numeric WQBELs.

2. **The Tentative Order has altered Receiving Water Limitation (RWL) language causing it to be overbroad and inconsistent with RWL in the current MS4 permit, the Ventura MS4 permit, State Board WQO 99-05, the draft Caltrans MS4 permit, and RWL language recommended by CASQA.**

a. Issue: The proposed RWL language changes the "exceedance" determinant from water quality standards and objectives to receiving water limitations, thereby increasing the stringency of the requirement. The Tentative Order RWL version reads: "*Discharges from the MS4 that cause or contribute to the violation of* ***receiving water limitations*** *are prohibited.*"

Compare this with what is in the current MS4 permits for Los Angeles and Ventura Counties: "*Discharges from the MS4 that cause or contribute to a violation of* ***water quality standards*** *are prohibited.*"

Whereas standard RWL language limits water quality standards to what is in the basin plan, and includes water quality objectives (relates to waters of the State), the Tentative Order uses revised language that replaces water quality standards with the following receiving water limitation criteria:

> *Any applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR § 131.38.*

It is unclear why Regional Board staff has removed water quality standards, which is a USEPA and State Board requirement, and replaced them with the more global receiving water limitation language that include additional compliance criteria (e.g., "or federal regulations including but not limited to 40 CFR § 131.38"). Other "federal regulations" could include CERCLA (Comprehensive Environmental Remediation and Compensation Liability Act).

Enlarging the scope of the RWL from water quality standards to a universe of other regulatory requirements exceeds RWL limitation language established in State Board WOQ

99-05, a precedential decision. The order bases compliance on discharge prohibitions and receiving water limitations on the *timely implementation of control measures and other action in the discharges in accordance with the SWMP (stormwater management plan) and other requirements of the permit's limitations*. It goes on to say that if exceedances of water quality standards or water quality objectives, collectively referred to as water quality standards continues, the SWMP shall undergo an iterative process to address the exceedances. It should be noted that this language was mandated by USEPA.

It should be noted that the draft Caltrans MS4 permit is scheduled for adoption in September, as well as CASQA, proposes RWL language that is in keeping with WQO 99-05.

Conclusion: Regional Board does not have the legal authority to re-define RWL language to the extent it is proposing.

Recommended Correction: Replace RWL contained in the Tentative Order with the CASQA model (Attachment B) or with language contained in the draft Caltrans MS4 permit.

b. Issue: By eliminating water quality standards, the Tentative Order has created a separate compliance standard for TMDLs and for non-TMDLs. Standard RWL language in other MS4 permits designates the SWMP[4] as the exclusive determinant for achieving water quality standards in the receiving water. Since TMDLs are enhanced water quality standards, the SWMP (or in this case the SQMP) should enable compliance with TMDLs. Instead, the Tentative Order specifies compliance through implementation plans – including plans that were discussed in several State/Regional Board adopted TMDLs (e.g., the Los Angeles River Metals TMDL). The absence of water quality standards also creates a separate compliance standard for non-TMDLs. According to Regional Board staff, minimum control measures (MCMs) which make up the SQMP, are intended to meet non-TMDLs pollutants. Unclear is what defines non-TMDL pollutant. If there are no water quality standards referenced in the RWL then what are the non-TMDL pollutants that the MCMs are supported to address?

   There is no authority under federal stormwater regulations to comply with any criterion other than water quality standards. The RWL language called-out in WQO 99-05, which was in response to a USEPA directive, makes it clear that water quality standards represent the only compliance criteria, not an expanded definition of receiving water limitations that exclude such criteria.

   MS4 permits throughout the State include TMDL WLAs. None of them, however, has created a compliance mechanism that excludes water quality standards as a means of attaining them. Further, the State Board has, through the draft Caltrans MS4 permit and the draft Phase II MS4 permit, articulated its policy on compliance with water quality standards: they are to be met through the implementation of stormwater management programs. Equally noteworthy is that State Board has not created a dual standard for dealing with TMDLs and non-TMDLs. This is an obvious consequence of its adherence to WQO 99-05.

   With regard to implementation plans contained in TMDLs, the Regional Board has no legal authority to include them into the MS4 permit. This issue discussed in greater detail later in these comments.

[4]USEPA and federal stormwater regulations use stormwater management program whereas the Los Angeles County MS4 permit uses stormwater quality management plan (SQMP). In effect they are the same. They consist of 6 core programs that must be implemented through MS4 permit.

Conclusion: The Tentative Order must be revised to restore water quality standards in RWL language and, by extension, enable compliance with TMDLs and other water quality standards through the SQMP/MCMs.

Recommended Correction: Revise the Tentative Order to eliminate any reference to complying with anything else except water quality standards through the SQMP; and, therewith, eliminate any reference to complying with implementation plans contained in State/Regional Board TMDLs.

3. **The Tentative Order does not include the iterative process, a mechanism that is integral to RWL language which serves to achieve compliance with water quality standards**.

   a. Issue: The absence of the iterative process disables a safeguard to protect permittees against unjustifiably strict compliance with water quality standards – or in this case the expanded definition of receiving water limitations – that is a requisite feature in all MS4 permits issued in California. The Tentative Order circumvents the iterative process by creating an alternative referred to as the adaptive/management process which is only available to those permittees that opt for a watershed management program.

   Despite the fact RWL language in MS4 permits since the 90's have provided a description of an iterative process (the BMP adjustment mechanism), the term "iterative process" has only recently been specifically mentioned in them. The absence of this term resulted in the 9th Circuit Court Appeal's conclusion in *NRDC v. Los Angeles County Flood Control District* that there is no "textual support" in the current MS4 permit for the existence of an iterative process. This resulted in the court's conclusion that the LACFCD had exceeded water quality standards in the hardened portions of the Los Angeles and San Gabriel Rivers. More recent MS4 permits issued in the State contain clear references to the iterative process.

Notwithstanding the absence of water quality standards in the Tentative Order, the iterative process must be included as required by Water Quality Orders 2001-15 and 2009-0008, wherein 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*".

Moreover, both the draft Caltrans MS4 permit and the draft Phase II MS4 permit contain references to the iterative process. The draft Caltrans MS4 permit refers to the iterative process in two places: finding 20, Receiving Water Limitations and in the Monitoring Results Report. Finding 20 states:

> *The effect of the Department's storm water discharges on receiving water quality is highly variable. For this reason, this Order requires the Department to implement a storm water program designed to achieve compliance with water quality standards, over time through an iterative approach. If discharges are found to be causing or contributing to an exceedance of an applicable Water Quality Standard, the Department is required to revise its BMPs (including use of additional and more effective BMPs).*[5]

Under the Monitoring Results Report section, the draft Caltrans MS4 permit reiterates the iterative process within the context of the following: *The MRR shall include a summary of sites*

[5]See draft *Caltrans MS4 permit (Tentative Order No. 2012-XX-DWQ NPDES No. CAS000003),* page 10.

requiring corrective actions needed to achieve compliance with this Order, and a review of any iterative procedures (where applicable) at sites needing corrective actions.[6]

The draft Phase II MS4 references the iterative process in two places, in finding 35 and under its definition of MEP. Finding 35 states:

> *This Order modifies the existing General Permit, Order 2003-0005-DWQ by establishing the storm water management program requirements in the permit and defining the minimum acceptable elements of the municipal storm water management program. Permit requirements are known at the time of permit issuance and not left to be determined later through iterative review and approval of Storm Water Management Plans (SWMPs).*

The draft Phase II MS4 permit also acknowledges the iterative process through the definition of maximum extent practicable (which is also included in the draft Caltrans MS4 permit), to the following extent:

> *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."*[7]

It should be clearly understood that the State Board is articulating clear policy on the iterative process through these two draft MS4 permits and that they must be followed by Regional Boards as subordinate jurisdictions.

Conclusion: The Regional Board has no authority to alter the iterative process/procedure by making a revised and diluted version of it available only to those MS4 permittees that wish to opt for watershed management program participation. Quite the contrary, the Regional Board is legally compelled to make the iterative process, as described herein, an undeniable requirement in the Tentative Order.

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[6]Ibid., page 35.

[7]See State Water Resources Control Board Water Quality Order No. XXXX-XXXX-DWQ, NPDES General Permit No. CASXXXXXX, page

Recommended Correction: Regional Board staff should incorporate the iterative process into the Tentative Order in the findings section and in the RWL section. It should also be referenced again under a revised MEP definition.

4. **The Tentative Order incorrectly articulates the non-stormwater discharge prohibition to the MS4 to include discharges from and through it.**

   a. Issue: The Tentative Order mentions prohibiting non-stormwater discharges not only to the MS4 but from and through it as well. Federal regulations did not authorize the non-stormwater discharge prohibition to go beyond "to" the MS4. This is a serious issue because extending the prohibition from or through the MS4 would subject non-stormwater discharges (including dry weather TMDL WLAs and non-stormwater municipal action levels) to pollutant limitations at the outfall.

   The Tentative Order attempts to justify interpreting federal stormwater regulations to mean that non-stormwater discharges are prohibited not only to the MS4 but from it and through it as well by: (1) incorrectly stating the Clean Water Act §402(p)(B)(ii) of the Clean Water Act requires permittees effectively prohibit non-storm water discharges into watercourses (means receiving waters) as well as to the MS4; and (2) a misreading of Federal Register Volume 55, No. 222, 47990 (federal register) which contains an error with regard to the non-stormwater discharge prohibition.

   §402(p)(B)(ii) does not (as the Tentative Order's fact sheet asserts) include watercourses, which according to Regional Board staff, means waters of the State and waters of the United States, both of which lie outside of the MS4. The original text of §402(p)(B)(ii) actually reads as follows: *Permits for discharges from municipal storm sewers "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers*.[8] There is no mention of watercourses.

   The Tentative Order's fact sheet also relies on the afore-cited federal register which states: *402(p)(B)(3) requires that permits for discharges from municipal storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal storm sewer.* The fact sheet is correct about this. The problem is that the federal register is wrong here. It confuses 402(p)(B)(3), which addresses stormwater (not non-stormwater) discharges from the MS4, with 402(p)(B)(2), which once again prohibits non-stormwater discharges to the MS4. It should be noted that in the same paragraph above the defective federal register language, it says that " *permits are to effectively prohibit non-storm water discharges to the municipal separate storm sewer system*.

   In any case, this issue has been resolved since the federal register was published in November of 1990. All MS4 permits in the United States issued by USEPA prohibit non-stormwater discharges only to the MS4. USEPA guidance, such as the *Illicit Discharge Detection and Elimination: A Guidance Manual* bases investigation and monitoring on non-stormwater discharges being prohibited to the MS4. And, with the exception of Los Angeles Regional Board MS4 permits, MS4 permits issued by other Regional Boards also limit the MS4 discharge prohibition to the MS4. Beyond this, the draft Caltrans MS4 permit and draft Phase II MS4 permits also limit the non-stormwater prohibition to the MS4.

[8]Municipal storm sewers is a truncated version of municipal separate stormwater system (MS4).

Conclusion: The Regional Board does not have the legal authority to extend the non-stormwater discharge prohibition from or through the MS4.

Recommended Correction: Revise the non-stormwater discharge prohibition to be limited to the MS4 only and delete all requirements that are based on the prohibition from or through the MS4. This includes the non-stormwater prohibition that is linked to CERCLA.

5. **The Tentative Order proposes to incorporate TMDL implementation plans, schedules, and monitoring requirements without legal authority.**

a. Issue: Placing Regional Board/State Board TMDLs into the MS4 would result in serious consequences for permittees. For one thing, permittees subject to TMDLs that contain an implementation schedule with compliance dates for interim waste load allocations that have not been met, based on Los Angeles County mass emissions station or other data (e.g., from the Coordinated Monitoring Plan for the Los Angeles River Metals TMDL), will be in automatic non-compliance once the MS4 permit takes effect.

The Tentative Order proposes a safeguard in this event: coverage under a time schedule order (TSO). Essentially, a TSO is an enforcement action authorized under Porter-Cologne, the State's water code. The problem is that the Regional Board, at its discretion, could issue a clean-up and abatement order that could link permittees in the Dominguez Channel, Los Angeles River, and San Gabriel River Watersheds to the remediation of the Los Angeles and Long Beach Harbors which are currently CERCLA sites (caused by DDT, pesticides, metals, which are considered toxics, and other pollutants). Furthermore, the TSO, which is a State enforcement action, will not help with respect to a federal violation because of preemption. An exceedance will expose subject permittees to third party litigation under the Clean Water Act. NRDC would be able to take the matter straight to federal court.

In any case, the Regional Board has no legal authority under the Clean Water Act to incorporate implementation plans, schedules, or monitoring requirements into the MS4 permit. CWA §402(p)(B)(iii) simply states that controls are required *to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.* The application of this provision is limited to: (1) the implementation of BMPs specified in a stormwater management plan appropriated through the six core programs; and (2) outfall monitoring. Monitoring, as mentioned earlier, is limited to outfall and ambient monitoring. Ambient monitoring, which is receiving water-based, has been assumed by the Regional Board and is funded through a stormwater ambient monitoring program (SWAMP) surcharge on the annual MS4 permit fee. Federal stormwater regulations mention nothing about TMDL implementation plans and schedules in an MS4 permit.

In fact, the Regional Board/State Board TMDL implementation plans, implementation schedules, and monitoring should be voided and prevented from being placed into the MS4 permit because (1) they set compliance determinant in the receiving water instead of the outfall; and (2) although the TMDL monitoring program requirements specify ambient monitoring that is to performed by MS4 permittees, including Caltrans, the Regional Board has approved plans that treat wet weather monitoring as ambient monitoring, even though they are mutually exclusive. The Clean Water Act definition of ambient monitoring is the:

Natural concentration of water quality constituents prior to 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 impact to human health.

The natural concentration of water quality constituents can only mean the state of a receiving water when it is not raining. This is further supported by the phrase "prior to mixing of either point or non-point source load of contaminants," which can only mean stormwater discharges from an outfall. In other words, stormwater discharges from an outfall cannot be mixed with a receiving water during a storm event because the ambient condition would be lost. Outfall monitoring of stormwater discharges is evaluated against the ambient condition of pollutant constituents in the receiving water for the ostensible purpose of determining its pollutant contribution.

Conclusion: The Tentative Order lacks the legal authority to include TMDL implementation plans, schedules, or monitoring plans adopted as basin plan amendments. No permittee, subject to any TMDL that requires an implementation plan, schedule, or monitoring plan can be compelled to comply with any of them. Further, even if it were legally permissible for these TMDL elements to be incorporated into the MS4 permit, no permittee could be placed into a state of non-compliance because the legitimate compliance point is in the outfall. Because no outfall monitoring has occurred, no violation could arise and, therefore, there would be no need for a TSO.

Recommended Correction: Eliminate requiring TMDL implementation plans, schedules, and monitoring to be incorporated into the Tentative Order.

6. **The Tentative Order contains references to the federal Comprehensive Environmental Remediation Compensation and Liability Act (CERCLA) that would make them additional regulatory requirements**.

   a. Issue: The non-stormwater discharge prohibition under the Tentative Order states:

      Non-storm water discharges through an MS4 are prohibited unless authorized under a separate NPDES permit; authorized by USEPA pursuant to Sections 104(a) or 104(b) of the federal comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

   At first blush, the CERCLA provision appears innocuous. But what if non-stormwater discharge is not authorized under CERCLA? Conceivably the MS4 permittee could be held responsible for those discharges. And 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 one covered under CERCLA?

   Conclusion: CERCLA is an unnecessary reference in the MS4 permit and has the potential to expose permittees to third party litigation. Further, the non-stormwater discharge prohibition only "to" the MS4 makes this issue academic. 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.

7. **The Tentative Order, under the effluent limitations section, contains technical effluent based limitations (TBELs) which typically are not included in MS4 permits and, in this particular case, does not appear to be purposeful.**

   a. Issue: Part IV.A.1 of the Tentative Order states that TBELs shall reduce pollutants in storm water discharges from the MS4 to the maximum extent practicable (MEP).

      It is not clear as to the reason for including TBELs into the Tentative Order because they are generally not required of Phase MS4 permits. TBELS are referenced in the Tentative Order, but are not found under section 402(p), which addresses storm water, nor anywhere else in federal regulations. It is a term used to collectively refer to best available technologies, but again not in 402(p).

      TBEL is a term USEPA uses to denote the following: (1) Best Practical Control Technology Currently Available (BPT); (2) Best Conventional Pollutant Control Technology (BCT); and (3) Best Available Technology Economically Achievable (BAT). Since these provisions were established prior to stormwater provisions of the CWA §402(p), they were applied to industrial waste-water discharges (including construction activity which is an industrial category sub-set). A clarifier connected to the sewer system is a type of TBEL. POTWs are subject to TBELs example primary and secondary treatment.

      According USEPA guidance:

      > *WQBELs are designed to protect water quality by ensuring that water quality standards are met in the receiving water. On the basis of the requirements of Title 40 of the Code of Federal Regulations (CFR) 125.3(a), additional or more stringent effluent limitations and conditions, such as WQBELs, are imposed when TBELs are not sufficient to protect water quality*.[9]

   Since the MS4 permit proposes WQBELs (adapted to meet water quality standards at the outfall), it would appear that TBELs are irrelevant. In essence, the proposed WQBELs is an admission from Regional Board staff that TBELs are not sufficient to protect water quality.

   Please note that the draft Caltrans and Phase II MS4 permits do not reference TBELs.

   Conclusion: Clarification is needed to determine the purpose of referencing TBELs in the Tentative Order.

   Recommended Correction: Either provide clarification and a justification requiring TBELs given that the Tentative Order requires WQBELs, a more stringent requirement. If clarification or justification cannot be provided, the TBEL provision should be removed.

8. **Minimum Control Measures (MCMs)**

   a. Issue: Generally, MCMs should not be detailed in the Tentative Order. Instead, specific BMPs and other information should be placed in the Stormwater Quality Management Plan (SQMP), which is the case under the current MS4 permit. Federal guidance specifies that the core programs are to be implemented through the SQMP as a means of meeting water quality standards. More importantly, placing the specifics in the SQMP makes it easier to

[9] *NPDES Permit Writers' Manual*, September, 2010, page 5-40.

revise. If specific BMPs remain in the Tentative Order, and they are in error or need to be revised (e.g., to set BMP-WQBELs), a re-opener would be required. For example, in Part I. *Facility Information, Table 2.,* the permittee contact information is out of date. It would be better to place this and other detailed information in the SQMP where it can be updated regularly without having to re-open the permit.

b. Issue: SUSMP

The Tentative Order replaces the Development Planning/SUSMP with Planning and Land Development Program. However, the SUSMP is mandated through a precedent-setting WQO issued by the State Board. Nothing in the order's fact sheet provides an explanation of why the SUSMP needs to be replaced. So doing would incur an unnecessary cost to revise the SQMP and SUSMP guidance materials. This is not to suggest that the Regional Board may not, in the final analysis, have the legal authority to the change the SUSMP to its MCM equivalent. Nevertheless, it would be helpful from an administrative convenience standpoint to explain the need for the change in the fact sheet. It could be argued that the low impact development (LID) techniques have been successful implemented through the SUSMP program for over five years.

c. Issue: Retrofitting existing developments through the Land Use Development Program is not authorized under federal stormwater regulations. CFR 40 122.26 only authorizes retrofitting with respect to flood control devices which is to be explained in the MS4 permit as the following indicates:

> *A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible.*

d. Issue: The MCMs in the Tentative Order require off-site infiltration for groundwater recharge purposes. The Tentative Order is a stormwater permit, not a groundwater permit. As mentioned, 402(p)(3)(iii) of the Clean Water Act:

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

The use of other infiltration controls that do not promote groundwater recharge have already demonstrated effectiveness in significantly reducing pollutants to the maximum extent practicable (MEP). Requiring infiltration anywhere for the purpose of recharging groundwater exceeds the scope of the MS4 since infiltrating to such an extent would add costs to the developer or permittee without significantly improving pollutant removal performance. Further, this requirement is unwarranted and premature because of the absence of outfall monitoring data that would demonstrate the need for groundwater-recharge oriented infiltration controls to address water quality standards and TMDLs vis-à-vis their intended purpose of protecting beneficial uses in a receiving water.

Conclusion: Requiring infiltration controls to facilitate groundwater recharge is not authorized under federal stormwater regulations. Further, many permittees are situated

upstream of spreading grounds and other macro-infiltration basins that would obviate the need for this requirement.

Recommended Correction: Eliminate this requirement from the order.

9. **The Maximum Extent Practicable (MEP) definition needs to be revised to reflect is updated definition found in the draft Phase II MS4 permit and in the draft Caltrans MS4 permit.**

   a. Issue: The order'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 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."[10]

   Conclusion: The order's MEP is out of data and inconsistent with State Board policy.

   Recommended Correction: Replace order's MEP definition with the above-mentioned language.

10. **Tentative Order incorrectly asserts that its provisions do not constitute unfunded mandates under the California Constitution.**

    a. Issue: Contrary to what the order asserts, it contains provisions that exceed federal requirements in several places, thereby creating potential unfunded mandates. They include: (1) requiring wet and dry weather monitoring in the receiving water; (2) requiring numeric WQBELs; (3) requiring compliance with TMDL-related implementation plans, schedules, and monitoring; (4) requiring the non-stormwater discharge prohibition to include through and from the MS4; (5) revising the receiving water limitation language to include overbroad compliance requirements; (6)

[10]Op. Cit., page 35.

requiring groundwater recharge; and (7) monitoring for non-TMDL constituents at completed development project sites.

Conclusion: The order patently proposes requirements that create unfunded mandates.

Recommended Correction: Delete all of the aforementioned requirements that exceed federal regulations.

Section: V. Receiving Water Limitations				
No.	**Page**	**Section**	**April 2012 Comment (LASP)**	**July 2012 Comment**
1	37-38	All	Currently the State Board is considering a range of alternatives 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 at the same time allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. It is imperative that the Regional Board works with the State Board on this very important issue	There are several NPDES Permits, including the CalTrans Permit and others, that adjust the Receiving Water Limitation language in response to new interpretations. Currently the State Board is considering a range of alternatives 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 at the same time allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. LASP has provided the Regional Board staff with sample language. It is imperative that the Regional Board works with the State Board on this very important issue. It is critical that the LA draft Tentative Order Receiving Water Limitation language be adjusted to ensure cities working in good faith are not subject to enforcement and third party litigation.
Section: VI. C. Watershed Management Programs				
No.	**Page**	**Section**	**April 2012 Comment (LASP)**	**July 2012 Comment**
1	48	3.a.ii	Pollutants in category 4 should not be included in this permit term, request elimination of any evaluation of category 4. Request elimination of category 3, as work should focus on the first two categories at this point.	Thank you for removing category 4. Category 3 puts a burden on cities during this permit cycle. In the next permit term, when permittees have a better understanding of sources and location of the high priority pollutant additional actions may be warranted. At this time including category 3 adds an investigative burden that is unwarranted given the substantial increase in requirements and monitoring that are already included in this draft Tentative Order.
2	46-53	Various	The Table (TBD) on page 2 states implementation of the Watershed Program will begin upon submittal of final plan. Page 11, section 4 Watershed Management Program Implementation states each Permittee shall implement the Watershed Management Program upon approval by the Executive Officer. Page 13 section iii says the Permittee shal implemenet moduifications to the storm water management program upon acceptance by the Executive Officer. All three of these elements should be consistent and state upon approval by the Executive Officer. The item on page 13 should be changed to reflect the Watershed Management Program, or clarify that the Watershed Management Program is the storm water management program.	Table 9 and Watershed Management Implementation are still inconsistent. The table says submittal and the Watershed Management Program Implementation states upon approval. Please make these consistent

3	46-47	Table 9 and Process	Please allow 24 months for development of the Watershed Management Program to provide sufficient time for callibration and the political process to adopt these programs.	Same comment. However, there co which a permittee could submit ea timeline, while more time is offere aspects.
4	47	Program Development	Please include a paragraph that Permittees are not responsible for pollutant sources outside the Permittees authority or control, such as aerial deposition, natural sources, sources permitted to discharge to the MS4, and upstream contributions.	Same comment
5	52	Reasonable Assurance Analysis	Reasonable assurance analysis and the prioritization elements should also include factors for technical and economic feasibilty.	Same comment
6	46	Process	Please clarify that Permittees will only be responsible for continuing existing programs and TMDL implementation plans during the iterim 18 month period while developing the Watershed Management Program and securing approval of those programs.	Same comment
7	General	General	While it may be appropriate to have an overall design storm for the NPDES Permit and TMDL compliance, this element seems to address individual sites. Recommend developing more prominently in the areas of the Permit that deals with compliance that the overall Watershed Management Program should deal with the 85th percentile storm and that beyond that, Permittees are not held responsible for the water quality from the much larger storms. However, requiring individual projects to meet this standard is limiting as there may be smaller projects implemented that individually would not meet 85th percentile, but collectively would work together to meet that standard. Please clearly indicate cities are only responsible for the 85th percentile storm for compliance and that individual projects may treat more of less than number.	Changes made but unclear that the collectively only held to the 85th p multiple areas, and individual sites Management Program states that i responsible.

8	112	E.2.b.iii	For the "group of Permittees" having compliance determined as a whole, this should only be the case if the group of Permittees have moved forward with shared responsibilities (MOAs, cost sharing, a Watershed Management Program). It would not be fair to have one entity not be a part of the "group" and be the main cause of exceedances/violations.	In the Tentative Order, permittees Board 6 months after the Order's e plans to participate in the developr Management Program. Given this, know whether all permittees will p noted that allowed non-stormwate NPDES permit discharges may be t exceedances/violations and not the

VI. D. Minimum Control Measures

No.	Page	Citation	Comment
Discharge Prohibition			
1	26	III.A.	RB staff proposed language requires the permittees to □prohibit non-stormwater discharg receiving waters□except where authorized by a separate NPDES permit or conditionally. This may overstep the required legal authority provisions in the federal regulations since requires legal authority to control discharges to the MS4 but not from the MS4. Additional definition of an illicit discharge at 40CFR122.26(b)(2), an illicit discharge is defined as □a d composed entirely of stormwater□ In issuing its final rulemaking for stormwater discharg 1990[1], USEPA states that: *Section 405 of the WQA alters the regulatory approach to control pollutants in stor a phased and tiered approach. The new provision phases in permit application requirements, compliance with permit conditions for different categories of storm water discharges. The ap water discharges associated with industrial activity must comply with sections 301 and 402 the discharge of pollutants that utilize the Best Available Technology (BAT) and the Best Con Technology (BCT) and where necessary, water quality-based controls), but permits for **disch** storm sewer systems must require controls to the maximum extent practicable, and where ne controls, and must include a requirement to effectively prohibit non-stormwater **discharges*** This is further illuminated by the section on Effective Prohibition on Non- Stormwater Dis □*Section 402(p)(3)(B)(ii) of the amended CWA requires that permits for discharges shall include a requirement to effectively prohibit non-storm water discharges **into the storr** legislative history of section 405 of the WQA, EPA does not interpret the effective prohibition to municipal separate storm sewers to apply to discharges that are not composed entirely of discharge has been issued a separate NPDES permit. Rather, an □effective prohibition□would for non-storm water discharges to municipal storm sewers□* The rulemaking goes on to say that the permit application: □*requires municipal applicants to develop a recommended site-specific managemen illicit discharges (or ensure they are covered by an NPDES permit) and to control improper d*

			storm sewer systems. Nowhere in the rulemaking is the subject of prohibiting discharges *from* the MS4 discusse Furthermore, USEPA provides model ordinance language on the subject of discharge prohi http://www.epa.gov/owow/NPS/ordinance/mol5.htm. Section VII Discharge Prohibition provides discharge prohibition language as follows: *No person shall discharge or cause to be discharged into the municipal storm drain materials, including but not limited to pollutants or waters containing any pollutants that ca of applicable water quality standards, other than storm water.* Thus we recommend that staff eliminate the from language at both Part III.A.1.a. and Par
2			*No person shall discharge or cause to be discharged into the municipal sto watercourses any materials, including but not limited to pollutants or waters conta cause or contribute to a violation of applicable water quality standards, other than* Thus we recommend that staff eliminate the from language at both Part III.A.1.a
3	28	III.A.2.b.iv	The conditional exemption of street/sidewalk water is inconsistent with the requ industrial/commercial MCM section that street washing must be diverted to the s water should definitely be conditionally exempt, but so also should patios and po washing has to be diverted to the sanitary sewer for industrial/commercial facilit facilities and so should parking lot wash water as they are similar in their pollutan
4	-	General	It is appropriate to have an exemption for a Permittee from a violation of RWL an non-stormwater discharge from a potable water supply or distribution system no permit but required by state or federal statute; this should clearly apply to all NP others within, or flow through, the MS4 permittees jurisdiction. We would reque category should be emergency releases caused by water line breaks which are no unexpected and have to be dealt with as an emergency. MS4 permittees should be WQBEL violations associated with any permitted NPDES discharges that are effec LARWQCB under the Clean Water Act.
5	Table 8	General	Enforcing NPDES permits issued for the various NSWDs referenced in this table s of the State/Regional Board, not the MS4 permittee. Therefore, it is inappropriat places a responsibility on the MS4 permittee to ensure requirements of NPDES pe implemented or effective in order for the pertaining NSWD category to be exempt the various NPDES permits mentioned in this table should ensure impacts from th negligible.

General			
1	-	-	The Definition of: "Development", "New Development" and "Re-development" sho definitions in the existing permit should be used: ***Development****means any construction, rehabilitation, redevelopment or reconstr private residential project (whether single-family, multi-unit or planned unit develo commercial, retail and other non-residential projects, including public agency proje future construction. It does not include routine maintenance to maintain original li capacity, or original purpose of facility, nor does it include emergency construction immediately protect public health and safety.* ***New Development****means land disturbing activities; structural development, inc installation of a building or structure, creation of impervious surfaces; and land sub* ***Redevelopment****means land-disturbing activity that results in the creation, addi square feet or more of impervious surface area on an already developed site. Redev limited to: the expansion of a building footprint; addition or replacement of a struct impervious surface area that is not part of a routine maintenance activity; and land to structural or impervious surfaces. It does not include routine maintenance to ma grade, hydraulic capacity, or original purpose of facility, nor does it include emerge required to immediately protect public health and safety.* The last of the three "routine maintenance" activities listed above should exclude streets since typically you are not changing the "purpose" of the street to carry ve altered.
Legal Authority			
1	38	A.2.a.i	Staff proposal states: "Control the contribution of pollutants to its MS4 from storm associated with industrial and construction activity and control the quality of sto industrial and construction sites." It appears the intent of this language is to transfer the State's inspection and enfo municipalities through the MS4 permit. When a separate general NPDES permit i State Board it should be the responsibility of that agency collecting such permit fe contribution of pollutants, not MS4 permittees.

2	39	A.2.a.vii	Staff proposal states: "Control the contribution of pollutants from one portion of t MS4 to another portion of the MS4 through interagency agreements among Co-pe The intention of this statement is unclear and should be explained, and a definitio be provided. How would an inter-agency agreement work with an upstream and is not practical - this agreement should have been done before the interconnectio An example of this agreement should be provided within the Permit. The permitt responsibility of an exceedance without first having evidence of the source and its words, an IC/ID is a private "culprit" and not the cause of the City).
3	39	A.2.a.xi	Staff proposal states: "Require that structural BMPs are properly operated and ma MS4 agencies can control discharges through an illicit discharge program, and co new/redevelopment to ensure mitigation of pollutants. Unless the existing devel owners/tenants are willing or in the process of retrofitting its property, the instal not practical and cannot be legally enforceable against an entity that does not ow such as a municipal entity.
4	39	A.2.a.xii	Staff proposal states: "Require documentation on the operation and maintenance their effectiveness in reducing the discharge of pollutants to the MS4." It is difficult, if not impossible, to accurately quantify the exact effectiveness of a p reducing the discharge of pollutants. Some discharges may be reduced over time industrial activity, population in a particular portion of the community feeding in reasons not directly related to implementation of structural BMPs. Given that the urbanized and thus impervious, a lethargic economic climate (meaning developm not occurring in an expeditious manner), and that several pollutants do not have removing/reducing the content (i.e., metals, toxics, pesticides), the effectiveness o required and instead should only be used for research, development, and progres
5	40	2.b	Staff proposal states: Permittee must submit a statement certified by its chief cou the legal authority to implement and submit this certification annually To sign this statement, chief counsel will have to analyze this 500 page Permit, an and prepare a statement as to whether actions can be commenced and completed annual certification is redundant and unnecessary in addition to being extraordin analysis should be done once during the Permit term. Otherwise, please delete thi

Fiscal Resources			
1	40	A.3	The staff proposal includes a section on Fiscal Resources. Most MS4's do not have funding source, and even those that do have a funding source are not structured t the proposed MS4 requirements (for instance, development funds may be collecte detention basin, but not for street sweeping, catch basin cleaning, public right-of-
2	40	A.3.c	Staff proposal states: "Each permittee shall exercise its full authority to secure fis meet all requirements of this Order" This sentence has no legally enforceable standard. What exactly does the exercise when the exercise of a city's right to tax comes with consequences and no guaran entities must adjust for a variety of urgent needs, some federally mandated in a m ignored. So, if we seek the fiscal resources to fund the programs required in the p "No", then a municipality will have a limited ability to comply with "all requireme language be changed to state: "Each permittee shall make its best efforts given ex constraints to secure fiscal resources necessary to meet all requirements of this C
3	40	A.3.c	Staff proposal states: "Each permittee shall conduct a fiscal analysis" to impleme order." Most MS4's do not have an adequate funding to meet all requirements of the Tent requirement to secure funding is overreach. Please delete this section.
Public Information and Participation Program			
1	58	D.4.a.i	Staff proposal states: "To measurably change the waste disposal and stormwater behavior of target audiences" Define the method to be used to measure behavior change. As written, this requi interpretation.
2	60	D.4.d.i.(2).(b)	Staff proposal states: "" including personal care products and pharmaceuticals)" The stormwater permit should pertain only to stormwater issues. Pharmaceutica US are typically a result of waste treatment processes. All references to pharmace from this MS4 permit.
3	60	D.4.d.i.(3)	The Regional Board assumes that all of the listed businesses will willingly allow t containing the various BMP educational materials in their businesses. If the busi installations then the City must monitor the availability of the handouts because t monitor or keep the display full or notify the City when the materials are running allow the City to display the educational material must we document that denial? that the City is not in compliance?

Industrial/Commercial Facilities Program			
1	63	D.5.d-f	These sections pertain to inspecting critical source facilities where it appears the State's Industrial General Permit inspection and enforcement responsibilities to r MS4 permit. We request eliminating these sections OR revise to exclude all MS4 p NPDES permitted industrial facilities.
2	63	D.5.e.i	Staff proposal states: "in the event a Permittee determines that a BMP is infeasi implementation of similar BMPs" Judging a BMP to be infeasible or ineffective this requirement.
Development Planning Program			
1		General	Since it could take 6 months for an agency to decide if they want to join in the dev Management Plan or just modify their current Stormwater Management Program permit MCMs, the implementation of the new MCMs should follow this timeline. permittees will be required to continue implementing their current Stormwater M
2	67	D.6.a.i.3	The stated objective of mimicking the predevelopment water balance is not consi that the entire design storm be managed onsite. Please consider allowing subtrac runoff from the design volume or flow.
3	69	D.6.b.ii.1.a	Please clarify of this paragraph apply to what is existing on the site or what is pro
4	70	D.6.c.i.2	Consider removing the whichever is greater wording. The two methods are con 85th percentile was calculated to be the 0.75-inch for downtown Los Angeles. Cu criterion has been used throughout the County for uniformity. While requiring th instead appears more technically appropriate, requiring calculating both criteria appears punitive.
5	70	D.6.c.i.4	Consider deleting this sentence since it is redundant with item VI.D.6.c.i.1 and gre only based on the provisions of this order but also due to regional climate and im considerations.
6	70	D.6.c.ii.2	Add lack of opportunities for rainwater use as one of the technical infeasibility c fact that most of the type of development projects cannot utilize the captured volu
7	71	D.6.c.ii.1.b.ii	The requirement for raised underdrain placement to achieve nitrogen removal is industry designs and is based on limited evidence that this change will improve n Furthermore by raising the underdrain, other water quality problems may result oxygen and bacterial growth due to the septic conditions that will be created.
8	72	D.6.c.iii.2.b	The requirement to provide treatment for the project site runoff when an offsite r punitive and unfair considering that an alternative site needs to be retrofitted to r volume. Please consider removing on-site requirement when mitigation occurs in
9	72	D.6.c.iii.4	The conditions listed for offsite projects are overly restrictive. Also considering lo constrains regarding offsite mitigation, this alternative is not very feasible.

10	75	Table 11	The effluent concentration benchmarks for treatment BMPs will not be attainable selected from the median of the stormwater BMP database site. This costly requi constantly modifying BMPs without any chance of compliance.
11	75	D.6.c.v.1.a.i	Erosion Potential (Ep) is not a widely used term in our region, and may not be the be used as an indicator of the potential hydromodification impacts.
12	76	D.6.c.v.1.a.iv	The requirement for development of a new Interim Hydromodification Control Cr considering there is already peak storm control requirements in the existing MS4 Water Board is finalizing the statewide Hydromodification Policy.
13	77	D.6.c.v.1.c.i	The requirement to retain on site the 95th percentile storm is excessive and incor design parameters that appear in this order. It may also not be an appropriate st for the soil deprived streams such as Santa Clara Creek. Again consider referring consistent and technical basis of the hydromodification requirements.
14	80	D.6.d.i.1	The requirement of 180 days for the Local Ordinance Equivalence may be diffic typical processing and public review period for changes to local municipal codes.
15	A-1	Definitions	The biofiltration definition limits the systems that allow incidental infiltration. M and established engineering practices will not allow even incidental infiltration if located adjacent to a building structure. Thus this definition will exclude the mos boxes which logically have to be placed next to the building to collect roof runoff. allowing biofiltration to include planter boxes without incidental infiltration since applicable BMPs.
Development Construction Program			
1	83	D.7.a.iii	MEP should be changed to BAT and BCT for consistency with the State General C (GCASP).
2	83	D.7.d	Consider introducing a minimum threshold for construction sites such as those fo proposed, minor repair works or trivial projects will be considered construction p unnecessarily be subject to these provisions.
3	83	Table 12	Some of the listed BMPs will not be applicable for all construction sites. Consider Table 12 to Applicable Set of BMPs for Construction Sites
4	84	D.7.e-j	All these provisions refer to the construction sites of greater than one acre. These General Construction Permit provisions and within the authority of the State ager compliance with these regulations, the State is collecting a significant fee that cov of these facilities. We are disputing the need to establish an unnecessary parallel these sites. This is consistent with the RWQCB member(s) voice at one of the wor
5	84	D.7.g-j	Refer to the State GCASP and its SWPPP requirements to avoid duplication or co
6	85	D.7.g.ii.9	There is no need to introduce a new term/document of Erosion and Sediment Cor sites that are already subject to GCASP SWPPP requirements.
7	87	Table 13	Delete. This table is the same as Table 12.
8	90	Table 17	The suggested inspections could not be possibly accommodated based on current concurrent need to visit all sites. However if the GACSP funding is transferred for a reduced number of inspections may be accommodated. See item 4.

9	90	D.7.j.ii.2.a	Consider deleting this requirement as being unnecessary. The placement of BMP on the season of construction and the planned phases.
Public Agency Activities Program			
1	94	D.8.d	If there is a specific pollutant to address, retrofitting or any other BMP would bes TMDL, which is for the Permittees to determine rather than a prescribed blanket too broad of a requirement with unknown costs that is attempting to solve a prob problem. Please delete this VI.C.10.d.
2	94	D.8.d	Staff proposal states: "Each Permittee shall develop an inventory of retrofitting op requirements of this Part. The goals of the existing development retrofitting inver impacts of existing development through retrofit projects that reduce the dischar pollutants into the MS4 and prevent discharges from the MS4 from causing or cor water quality standards." This process would require land acquisition, a feasibility analysis, no impacts to e proper soils, and support of various interested stakeholders. Additionally, if a pro developed/redeveloped, retrofitting the site for water quality purposes makes se where no development/redevelopment is planned. Finally, the LID provisions ha provisions for off-site mitigation, in which we recommend that regional water qu in lieu of local-scale water quality projects that will prove difficult to upkeep, mai have existing sites evaluated as feasible. For these reasons, this requirement shou
3	95	D.8.d.v	Any retrofit activities should be the result of either an illicit discharge investigatio follow-up and will need to be addressed on a site-by-site basis. A blanket effort a urbanized area is simply not feasible at this time.
4	96	D.8.e.ii	Staff proposal states: "Each Permittee shall implement the following measures for management projects" Flood management projects need to be clearly defined.
5	102	D.8.h.vii.1	This requirement appears to be an ?end-run?around the lack of catch basin struc covered by Trash TMDLs. The requirement has the potential to be extraordinarily If an area is NOT subjected to a Trash TMDL, then the need for any mitigation dev permit requirements should not circumvent nor minimize the CWA 303(d) proce
6	103	D.8.h.ix	Staff proposal requires: "Infiltration from Sanitary Sewer to MS4 / Preventive Ma The State Water Board has implemented a separate permit for sewer maintenanc sewer maintenance requirements are redundant and unnecessary. Please delete
Illicit Connection and Illicit Discharge Elimination Program			
1	-	D.9	A definition of ?outfall?is required for clarity. An ?outfall?for purposes of ?non-st monitoring program?should be defined as ?major outfall?pursuant to Clean Wate revise each mention of ?*outfall*?to read ?major outfall?when discussing ?non-stor monitoring program?

2	106	D.9.a	Some small cities do not have digital maps. In the General category of Section 1 time schedule for cities to create digital maps OR provide the municipality the abi comprehensive maps of the storm sewer system in any format.
3	107	D.9.b.i.1	Omit the comment, *Each mapped MS4 outfall shall be located using geographical p photographs of the outfall shall be taken to provide baseline information to track op needs over time*. This requirement is cost prohibitive and of little value because m underground and could not be accurately located or photographed. Photographs little value since data required is already included on As-Built drawings. Geogra be obtained using Google Earth or existing GIS coordinate systems. The contributing drainage area for each outfall should be clearly discernable " requirement would involve thousands of records of drainage studies. The Regiona that this requirement would be very labor intensive, time consuming, and very co
4	107	D.9.b.iii	Storm drain maps should show watershed boundaries which by definition provid the receiving water body. Please revise (3) to read The name of all receiving wat major outfalls identified in (1).
5	108	D.9.c.i	The LA Permit Group proposes non-stormwater outfall-based monitoring progra monitoring. Please revise item (4) of 11., c. i. to read (4) monitoring flow of unid stormwater discharges, and
6	108	D.9.c.i.4	"Monitoring of unknown or authorized discharges" "Authorized" discharges are exempted for various reasons. Monitoring authorized discharges is monitoring fo and offers no clear goal or water quality benefit. Please delete this requirement. I is unknown, then monitoring may be used as an optional tool to identify the culpr
7	109	D.9.d.i	Please revise the proposed language to Permitte/Permittes shall develop written investigations to identify the source of **suspected** illicit discharges, including pro discharge once source is located. It is not known if a discharge is illicit until the i
8	109	D.9.d.iii.1	"Illicit discharges suspected of sanitary sewage shall be investigated first." ICID allowed to make the determination of which event should be investigated first. Fo spill or a truck full of gasoline spill should take precedence over a sewage spill. Th amended to the most toxic or severe threat to the watershed shall be investigat

Section: VI. E. TMDLs				
No.	**Page**	**Citation**	**April 2012 Comments**	**July 2012 Comments**
1	pages 111 - 123 and Attach ments K - R	TMDL	Santa Monica Bay Beaches Bacteria TMDL (SMBBB TMDL) is currently being reconsidered. As part of that reconsideration the summer dry weather targets must be revised to be consistent with the reference beach/anti-degradation approach established for the SMBBB TMDL and with the extensive data collected over that past seven years since original adoption of the SMBBB TMDL. This data clearly shows that natural and non-point sources result in 10% exceedances during dry weather. Data collected at the reference beach since adoption of the TMDL, as tabulated in Table 3 of the staff report of the proposed revisions to the Basin Plan Amendment, demonstrate that natural conditions associated with freshwater outlets from undeveloped watersheds result in exceedances of the single sample bacteria objectives during both summer and winter dry weather on approximately 10% of the days sampled.	This is a critical issue that was not addressed Statement that permittees are not responsib their control, including natural sources, need
	pages 111 - 123 and Attach ments K - R	TMDL	(continued from above) Thus the previous Source Analysis in the Basin Plan Amendment adopted by Resolution No. 02-004 which stated that historical monitoring data from the reference beach indicate no exceedances of the single sample targets during summer dry weather and on average only three percent exceedance during winter dry weather was incorrect and based on a data set not located at the point zero compliance location. Continued allocation of zero summer dry weather exceedances in the proposed Basin Plan Amendment is in direct conflict with the stated intent to utilize the reference beach/anti-degradation approach and ignores the scientifically demonstrated reality of natural causes and non-point sources of indicator bacteria exceedances.	This is a critical issue that was not addressed The reference beach approach and the overr are not responsible for pollutants outside th natural sources, needs to be included

2	pages 111 - 123 and Attachments K - R	TMDL	Continued use of the zero summer dry weather exceedance level will make compliance the SMBBB TMDL impossible for the Jurisdictional agencies. This is also in conflict with the intent of the Regional board as expressed in finding 21 of Resolution 2002-022 "that it is not the intent of the Regional Board to require treatment or diversion of natural coastal creeks or to require treatment of natural sources of bacteria from undeveloped areas"	This is a critical issue that was not addressed The reference beach approach and the overr are not responsible for pollutants outside th natural sources, needs to be included
3	pages 111 - 123 and Attachments K - R	TMDL	The SMBBB TMDL Coordinated Shoreline Monitoring Plan (CSMP)was approved by the Regional Board staff and that CSMP should be incorporated into the TMDL monitoring requirements of the next MS4 Permit. The CSMP established that compliance monitoring would be conducted on a weekly basis, and although some monitoring sites are being monitored on additional days of the week, none of the sites are monitored seven days per week, thus it is highly confusing and misleading to refer to "daily monitoring" The CSMP established that compliance monitoring would be conducted on a weekly basis, and although some monitoring sites are being monitored on additional days of the week, none of the sites are monitored seven days per week.	The problem with sites monitored two days corrected. Please provide clarification that th and would supersede the TMDL if submitted monitoring plan. This is critical for summer week sites.
4	pages 111 - 123 and Attachments K - R	TMDL	This discussion in this section devoted to the SMBBB TMDL seems to create confusion regarding the meaning of the terms "water quality objectives or standards, and "receiving water limitations" and "water quality-based effluent limitations". Water quality objectives or water quality standards are those that apply in the receiving water. Water Quality Effluent Based Limits apply to the MS4. So the "allowable exceedance days" for the various conditions of summer dry weather, winter dry weather and wet weather should be referred to as "water quality-based effluent limitations" since those are the number of days of allowable exceedances of the water quality objectives that are being allowed for the MS4 discharge under this permit. While the first table that appears under this section at B.1 (b) should have the	In effect the effluent limitations are stricter t standards. This is inconsistent with law and which permittees are out of compliance at th permit. Please adjust so that limits are consi not exceeding standards.

			heading "water quality standards" or "water quality objectives" rather than the term "effluent limitations".	
5	pages 111 - 123 and Attachments K - R	TMDL	While it makes sense for the Jurisdictional Groups previously identified in the TMDLs to work jointly to carry out implementation plans to meet the interim reductions, only the responsible agencies with land use or MS4 tributary to a specific shoreline monitoring location can be held responsible for the final implementation targets to be achieved at each individual compliance location. An additional table is needed showing the responsible agencies for each individual shoreline monitoring location.	A table is still needed and should be develop this section but placed in the Watershed Ma approved by Executive Officer with the plan
6	pages 111 - 123 and Attachments K - R	TMDL	The Santa Monica Bay DDT and PCB TMDL issued by USEPA assigns the waste load allocation as a mass-based waste load allocation to the entire area of the Los Angeles County MS4 based on estimates from limited data on existing stormwater discharges which resulted in a waste load allocation for stormwater that is lower than necessary to meet the TMDL targets, in the case of DDT far lower than necessary. EPA stated that "If additional data indicates that existing stormwater loadings differ from the stormwater waste load allocations defined in the TMDL, the Los Angeles Regional Water Quality Control Board should consider reopening the TMDL to better reflect actual loadings." [USEPA Region IX, SMB TMDL for DDTs and PCBs, 3/26/2012]	Same comment
7	pages 111 - 123 and Attachments K - R	TMDL	In order to avoid a situation where the MS4 permittees would be out of compliance with the MS4 Permit if monitoring data indicate that the actual loading is higher than estimated and to allow time to re-open the TMDL if necessary, recommend as an interim compliance objective WQBELs based on the TMDL numeric targets for the sediment fraction in stormwater of 2.3 ug DDT/g of sediment on an organic carbon basis, and 0.7 ug PCB/g sediment on an organic	Same comment

			carbon basis.	
8	pages 111 - 123 and Attachments K - R	TMDL	Although the Santa Monica Bay DDT and PCB TMDL issued by USEPA assigns the waste load allocation as a mass-based waste load allocation to the entire area of the Los Angeles County MS4, they should be translated as WQBELs in a manner such that watershed management areas, subwatersheds and individual permittees have a means to demonstrate attainment of the WQBEL. Recommend that the final WLAs be expressed as an annual mass loading per unit area, e.g., per square mile. This in combination with the preceding recommendation for an interim WQBEL will still serve to protect the Santa Monica Bay beneficial uses for fishing while giving the MS4 Permittees time to collect robust monitoring data and utilize it to evaluate and identify controllable sources of DDT and PCBs.	Please clarify this situation would be covere for USEPA established TMDLs opens the doo address this through their plans
9	pages 111 - 123 and Attachments K - R	TMDL	The Machado Lake Trash WQBELs listed in the table at C.2.c) in the staff working proposal appear to have been calculated from preliminary baseline waste load allocations discussed in the July 11, 2007 staff report for the Machado Lake Trash TMDL, rather than from the basin plan amendment. In some cases the point source land area for responsible jurisdictions used in the calculation are incorrect because they were preliminary estimates and subsequent GIS work on the part of responsible agencies has corrected those tributary areas. In other cases some of the jurisdictions may have conducted studies to develop a jurisdiction-specific baseline generation rate. The WQBELs should be expressed as they were in the adopted TMDL WLAs, that is as a percent reduction from baseline and not assign individual baselines to each city but leave that to the individual city's trash reporting and monitoring plan to clarify.	Same comment
10	pages 111 - 123	TMDL	The WLAs in the adopted Machado Lake Trash TMDL were expressed in terms of percent reduction of trash from Baseline WLA with the	Same comment

	and Attachments K - R		note that percent reductions from the Baseline WLA will be assumed whenever full capture systems are installed in corresponding percentages of the conveyance discharging to Machado Lake. As discussed in subsequent city-specific comments, there are errors in the tributary areas originally used in the staff report, but in general, tributary areas are available only to about three significant figures when expressed in square miles. Thus the working draft should not be carrying seven significant figures in expressing the WQBELs as annual discharge rates in uncompressed gallons per year. The convention when multiplying two measured values is that the number of significant figures expressed in the product can be no greater than the minimum number of significant figures in the two underlying values. Thus if the tributary area is known to only three or four significant figures, and the estimated trash generation rate is known to four significant figures, the product can only be expressed to three or four significant figures.	
11			(continued from above) Thus there should be no values to the right of the decimal place and the whole numbers should be rounded to the correct number of significant figures.	
12	pages 111 - 123 and Attachments K - R	TMDL	The Machado Lake Nutrient TMDL provides for a reconsideration of the TMDL 7.5 years from the effective date prior to the final compliance deadline. Please include an additional statement as item: 3.c)(3)"By September 11, 2016 Regional Board will reconsider the TMDL to include results of optional special studies and water quality monitoring data completed by the responsible jurisdictions and revise numeric targets, WLAs, LAs and the implementation schedule as needed."	Same comment

13	pages 111 - 123 and Attachments K - R	TMDL	Table C is not provided in the section on TMDLs for Dominguez Channel and Greater LA and Long Beach Harbors Toxic Pollutants. Please clarify and reference that Attachment D Responsible Parties Table RB4 Jan 27, 12 which was provided to the State Board and responsible agencies during the SWRCB review of this TMDL, and is posted on the Regional Board website in the technical documents for this TMDL, is the correct table describing which agencies are responsible for complying with which waste load allocations, load allocations and monitoring requirements in this VERY complex TMDL. Attachment D should be included as a table in this section of the MS4 Permit.	Partially addressed--the table provided in th detailed Attachment D which clarifies which for which portions of the TMDL--need to inc
14	pages 111 - 123 and Attachments K - R	TMDL	The Dominguez Channel and Greater LA and Long Beach Harbor Waters Toxic Pollutants TMDL provides for a reconsideration of the TMDL targets and WLAs. Please include an additional statement as item: 4.e) "By March 23, 2018 Regional Board will reconsider targets, WLAs and LAs based on new policies, data or special studies. Regional Board will consider requirements for additional implementation or TMDLs for Los Angeles and San Gabriel Rivers and interim targets and allocations for the end of Phase II."	Same comment
15	pages 111 - 123 and Attachments K - R	TMDL	City of Hermosa Beach is only within one watershed, the Santa Monica Bay Watershed, and so should not be shown in italics as a multi-watershed permittee.	Same comment

16	113	E.2.d.i.1.	Recommend clarifying this item by incorporating the footnote into the text and modifying this item to read as follows: "There are no violations of the interim water quality-based effluent limitation for the pollutant(s) associated with a specific TMDL at the Permittee's applicable MS4 outfall(s) which may include: a manhole or other point of access to the MS4 at the Permittee's jurisdictional boundary, a manhole or other point of access to the MS4 at a subwatershed boundary that collects runoff from more than one Permittee's jurisdiction, or may be an outfall at the point of discharge to the receiving water that collects runoff from one or more Permittee's jurisdictions."	Same comment
17	113	E.2.d.i.4.b.	Is this in effect setting a design storm for the design of structural BMPs to address attainment of TMDLs, or is it simply referring to SUSMP/LID type structural BMPs? If it is in effect setting a design storm, there needs to be some sort of exception for TMDLs in which a separate design storm is defined, e.g., for trash TMDLs where the 1-year, 1-hour storm is used.	This is not clarified, but it is still a problem a which might be used to address TMDLs may 85th percentile 24-hour storm, there should doing this through a combination of BMPs, e
18	pages 111 - 123 and Attachments K - R	TMDL	Recommend not listing specific water bodies in E.5.b.(c) because then it risks becoming obsolete if new TMDLs are established for trash, or if they are reconsidered. Furthermore, it is not clear why Santa Monica Bay was left out of this list since the Marine Debris TMDL allows for compliance via the installation of for full capture devices.	Not addressed, still don't know why Santa M was not included in the list at E.5.b.(c) but it Attachment M B.
19	116-123	E.5.a - c	Recommend not listing specific waterbody/trash TMDLs here, but simply leave the reference to Attachments to identify the Trash TMDLs. Otherwise this may have to be revised in the future. Again, Santa Monica Bay Marine Debris TMDL was not included in this list, not sure whether it was an oversight or intentional?	Same comment

20	17	Findings	Not clear on what "discharges from the MS4 for which they are owners and/or operators" means.	Please clarify. The Tentative Order, states " maintain the necessary legal authority to co pollutants to its MS4 and shall include in its program a comprehensive planning process intergovernmental coordination, where nece basin is owned by the LACFCD, does this me control the contribution of pollutants?
21	112	E.2.b.iv	For "each Permittee responsible for demonstrating that its discharge did not cause or contribute to an exceedance," how is this going to be possible? There's allowed non-storm water discharges, a commingled system, and the LA County region is practically urbanized (impervious landscape). Additionally, a gas tanker on local freeways often discharges onto freeway drains, which connect to MS4 permittee drains - the point here is a private party as the actual discharger should be held responsible and not the MS4 permittee. Lastly, the Construction General Permit cannot establish numeric limitations without the Regional/State Boards clearly demonstrating how compliance will be achieved - the MS4 permit is overly conditioned in terms of achieving compliance and subjects MS4 permittees to violations/enforcement, and given these circumstances, the Boards need to clearly demonstrate how compliance will be achieved.	Same comment
22	116	E.4.a	This provision states "A Permittee shall comply immediately for which final compliance deadlines have passed pursuant to the TMDL implementation schedule." This provision is unreasonable. First, various brownfields/abandoned toxic sites exists, some of which were permitted to operate by State/Federal agencies - nothing has or will likely be done with these sites that contribute various pollutants to surface and sub-surface areas. Additionally, this permit is going to require a regional monitoring program - this program will yield results on what areas are especially prone to particular pollutants. Until these results are made known, MS4 Permittees will have a hard time knowing where to focus	Same comment

			its resources and particularly, the placement of BMPs to capture, treat, and remove pollutants. For these reasons, this provision should be revised to first assess pollutant sources and then focus on compliance with BMP implementation.	
23	116-123	E.5.c.i(1)	For reporting compliance based on Full Capture Systems, what is the significance of needing to know "the drainage areas addressed by these installations?" Unfortunately, record keeping in Burbank is limited to the location and size of City-owned catch basins. A drainage study would need to be done to define these drainage areas. As such, we do not believe this requirement serves a purpose in regards to full capture system installations and their intended function.	Same comment
24	116-123	E.5	Please clarify that cities are not responsible for retrofitting	Same comment
25	114	E. 2. e	Please add the language from interim limits E.2.d.4 a - c and EPA TMDLs to the Final Water Quality Based Effluent Limitations and/or Receiving Water Limitations to ensure sufficient coordination between all TMDLs and the timelines and milestones that will be implemented in the Watershed Management Program.	Same comment
26	Attachment L	D.3 a - c	Please change the Receiving Water Limitations for interim and final limits to the TMDL approved table. There should be no interpretation of the number of exceedance days based on daily for weekly sampling with, especially with no explanation of the ratio or calculations, and no discussion of averaging. Please revert to the original TMDL document.	The table was adjusted, but did not eliminat number of exceedance days that are not exp Santa Clara River TMDL. Remove all interpre exceedance days other than what has been e TMDL number of days of exceedances witho recalculation.
27	111	E.2	Please include a paragraph that Permittees are not responsible for pollutant sources outside the Permittees authority or control, such as aerial deposition, natural sources, sources permitted to discharge to the MS4, and upstream contributions	Same comment

28	116-123	5.b.ii.2	Define "partial capture devices", define "institutional controls". Permittees need to have clear direction of how to attain the "zero" discharges which will have varying degrees of calculations regardless of which compliance method is followed. Explain the Regional Board's approval process for determining how institution controls will supplement full and partial capture to attain a determination of "zero" discharge.	Same comment
29	116-123	5.b.ii.(4)	MFAC and TMRP should be an option available to the Los Angeles River	Same comment
30	pages 111 - 123 and Attachments K - R	TMDL	Substantial comments have been submitted for the Reopener of the SMBBB. Rather than restate these comments, please address these comments in the MS4.	Same comment
31	Attachment O	3.a)1	For the LA River metals, some permittees have opted out of the grouped effort. This section needs to detail how these mass-based daily limitations will be reapportioned.	Same comment
32	Attachment O, page 7	4.d	Why are "receiving Water Limitations" being inserted here? None of the other TMDLs seem to follow that format.	Same comment
33	Attachment P	P1-8	It is the permittees understanding that the lead impairment of Reach 2 of the San Gabriel River has been removed. It should be removed from the MS4 permit.	Same comment
34	pages 111 - 123 and Attachments K - R	1.c	Permittees under the new MS4 permit (those in LA County) need to be able to separate themselves from Orange County cities. Since the 0.941 kg/day is a total mass limit, it needs to be apportioned between the two counties. Also, The MS4 permit needs to contain language allowing permittees to convert grouped-base limitations to individual permittee based limitations	Same comment
35	pages 111 - 123 and Attach	Table K 8	Please remove, in its entirety, the Santa Ana River TMDLs	Same comment

	ments K - R			
36	general	general	Any TMDL, for which compliance with a waste load allocation (WLA) is exclusively set in the receiving water, shall be amended by a re-opener to also allow compliance at the outfall to allow that flexibility, or other end-of-pipe, that shall be determined by translating the WLA into non-numeric WQBELs, expressed as best management practices (BMPs). While the TMDL re-opener is pending, an affected Permittee shall be in compliance with the receiving water WLA through the implementation of permit requirements	Same comment
37	Attach ment N	N1 - N9	For the Freshwater portion of the Dominguez Channel: There are no provisions for BMP implementation to comply with the interim goals. The wording appears to contradict Section E.2.d.i.4 which allows permittees submit a Watershed Management Plan or otherwise demonstrate that BMPS being implemented will have a reasonable expectation of achieving the interim goals.	Same comment
38	Attach ment N	N1-N9	For Greater LA Harbor: Similar to the previous comment regarding this section. The Table establishing Interim Effluent Limitations, Daily Maximum (mg/kg sediment), does not provide for natural variations that will occur from time to time in samples collected from the field. Given the current wording the proposed Receiving Waters Limitations, even one exceedance could potentially place permittees in violation regardless of the permittees level of effort. Reference should be made in this section to Section E.2.d.i.4 which will provide the opportunity for Permittee to develop BMP-based compliance efforts to meet interim goals.	Same comment

39	Attachment N	N1-N9	For the freshwater portion of the Dominguez Channel: the wording should be clarified. Section 5.a states that "Permittees subject to this TMDL are listed in Table C." Then the Table in Section C.5.b.2 Table "Interim Effluent Limitations Sediment", lists all permittees except the Fresh water portion of the Dominguez Channel. For clarification purposes, we request adding the phase to the first row: "Dominguez Channel Estuary (below Vermont)"	Same comment
40	111	E.2.a.i	N/A	This provision creates confusion and inconsi the rest of the permit. By stating that the pe compliance through compliance monitoring preclude determining compliance through o other portions of the permit. This provision the other compliance provisions in the TMDL therefore be interpreted on its own as a sepa requirement. Additionally, the requirement t compliance monitoring locations regardless TMDL monitoring plan or Integrated plan ha consistent with the goal of integrated monito This provision would be more appropriate a reporting requirement for the TMDL section such as "Monitoring locations to be used for in accordance with Parts VI.E.2.d or VI.E.2.e compliance monitoring locations established locations identified in an approved TMDL mo accordance with an approved integrated mo Attachment E, Part VI.C.5 (Integrated Waters Assessment)."
41	112	E.2.b.v.(2)	N/A	This provision should not require that the pe the discharge from the MS4 **is treated** to a le the applicable water quality-based effluent l achieve the applicable WQBELs through mea and they should be able to demonstrate that exceed the applicable water quality-based ef monitoring or other means than demonstrat
42	pages 111 - 123 and Attachments K - R	pages 111 - 123 and Attachments K - R	N/A	Suggest wet weather compliance be partially

Additional Comments				
No.	**Page**	**Citation**	**April 2012 Comment**	**July 2012 Comment**
1	13-26	Findings	several related	Please add findings regarding iterative process. The iterative process is a process of implementing, e adding new BMPs to attain water quality standards, daily load (TMDL) waste load allocations (WLAs). T the iterative process, which has resulted in violatio County permittees and exposure to third party litiga Water Resources Control Board (State Board) has a precedential water quality orders (including WQ 99 inclusion of the iterative process in MS4 permits. As WQ 2001-15: This Board has already considered and upheld the r storm water discharges must not cause or contribut quality objectives in the receiving water. We adopte for complying with this requirement, wherein muni instances where they cause or contribute to exceeda and improve BMPs so as to protect the receiving wa The iterative process goes hand-in-hand with the Re provision of this order, which is intended to address exceedance. An MS4 permit is a point source permi CFR 122.2 to mean outfall or end-of-pipe. Attainme standard in stormwater discharge is achieved in the the MS4 through the implementation of BMPs conta Quality Management Plan (SQMP). If a water quality exceeded as determined by outfall monitoring relati of the receiving water (during the 5-year term of the be required to propose better-tailored BMPs to add process includes determining (1) if the exceedances and if so, would require the permittee to (2) identify exceedance; and (2) propose new or intensified BM next MS4 permit unless the Executive Officer dete immediate response is required.

				(continued from above) The iterative process does n stormwater discharges. Section 402(p)(3)(B)(ii) of t prohibits non-stormwater discharges to the MS4 an with stormwater discharges. This is because Congr MS4 discharges: one stormwater and one for non-s WQO 2009-008, the Clean Water Act and the federa assign different performance requirements for storn water discharges. These distinctions in the guidance Act, and the storm water regulations make it clear t for storm water - such as the iterative approach we is not necessarily appropriate for non-storm water.
2	146-149	Fact Sheet and Permit - Unfunded Mandate	several related	It is incorrect to assert an outcome on the unfunded this has nothing to do with protecting water quality process has not been completed and these assertion Sheet is part of the permit, remove this section. The incorrect assumptions, especially around the level o permit when compared to the current permit and th incorrect.

CASQA
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

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 MS4to 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 of 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.