
Los Angeles Regional Water Quality Control Board

February 23, 2017

VIA EMAIL ONLY

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PETITIONS OF LOS ANGELES WATERKEEPER AND NATURAL RESOURCES DEFENSE COUNCIL, INC. FOR REVIEW OF THE APPROVAL OF THE NORTH SANTA MONICA BAY ENHANCED WATERSHED MANAGEMENT PROGRAM, IN ACCORDANCE WITH THE LOS ANGELES COUNTY MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT, ORDER R4-2012-0175 AS AMENDED BY STATE WATER BOARD ORDER WQ 2015-0075; BY THE LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD: LOS ANGELES WATER BOARD RESPONSE TO PETITION AND REVISION OF ADMINISTRATIVE RECORD
SWRCB/OCC FILES A-2477 AND A-2508

Dear Ms. Wadhvani:

Please find enclosed the Los Angeles Regional Water Quality Control Board's (Los Angeles Water Board) response to Natural Resources Defense Council and Los Angeles Waterkeeper's Petition for Review of (1) the Los Angeles Water Board Executive Officer's Action to Approve the North Santa Monica Bay Enhanced Watershed Management Program (NSMB EWMP) pursuant to the Los Angeles County MS4 Permit and 2) the Los Angeles Water Board's September 7, 2016 vote to take no further action to review the Executive Officer's approval of the NSMB EWMP pursuant to the Los Angeles County MS4 Permit.

Also enclosed is a Revised Administrative Record Index. In preparing the Los Angeles Water Board's response, we discovered that Attachments A-R of Order No. R4-2012-0175 in Section 1 were inadvertently omitted from the administrative record submitted to the State Water Resources Control Board (State Water Board) on February 6, 2017. Attachments A-R are now included as a new Section 31 at the end of the record in order to preserve the original Bates numbering. Changes included in the enclosed Revised Administrative Record Index are indicated in red text. The Los Angeles Water Board has already posted the Revised Administrative Record Index and new Section 31 on the Los Angeles Water Board's website at: http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/watershed_management/Consideration_of_petition/north_santa_monica.shtml

We apologize for this omission and any inconvenience this may have caused to the State Water Board and interested persons.

We look forward to the State Water Board's review of the administrative record and the Los Angeles Water Board's response to the Petition. If you have any questions, please contact me at Samuel.Unger@waterboards.ca.gov, Renee Purdy at Renee.Purdy@waterboards.ca.gov, or Jennifer Fordyce at Jennifer.Fordyce@waterboards.ca.gov.

Sincerely,



Samuel Unger, P.E.
Executive Officer

Enclosures: Response to Petition
Revised Administrative Record Index

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LOS ANGELES WATER BOARD'S RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL AND LOS ANGELES WATERKEEPER'S PETITIONS FOR REVIEW OF (1) THE LOS ANGELES WATER BOARD EXECUTIVE OFFICER'S ACTION TO APPROVE THE NORTH SANTA MONICA BAY EWMP PURSUANT TO THE L.A. COUNTY MS4 PERMIT AND (2) THE LOS ANGELES WATER BOARD'S SEPTEMBER 7, 2016 VOTE TO TAKE NO FURTHER ACTION TO REVIEW EXECUTIVE OFFICER'S APPROVAL OF THE NORTH SANTA MONICA BAY EWMP PURSUANT TO THE L.A. COUNTY MS4 PERMIT

SWRCB/OCC Files A-2477 and A-2508

February 23, 2017

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I. INTRODUCTION

This response has been prepared for the State Water Resources Control Board's (State Water Board) consideration of petitions for review of the Los Angeles Regional Water Quality Control Board's (Los Angeles Water Board or Board) approval of the North Santa Monica Bay Coastal Watersheds Enhanced Watershed Management Program (NSMB EWMP) in accordance with the Los Angeles County Municipal Separate Storm Sewer System Permit, Order No. R4-2012-0175 as amended by State Water Board Order WQ 2015-0075 (LA County MS4 Permit or Permit) that were filed by Los Angeles Waterkeeper and Natural Resources Defense Council (collectively, Petitioners) on May 19, 2016 and October 7, 2016. In its letter dated January 5, 2017, the State Water Board indicated that the petition dated October 7, 2016 should be treated as the operative petition for the purposes of responses to the petitions and the administrative record, since the latter petition contained all of the issues raised in the earlier petition.¹

As the State Water Board is aware from prior proceedings, Part VI.C of the LA County MS4 Permit provides Permittees with an alternative compliance option by developing and implementing Enhanced Watershed Management Programs (EWMPs).² In Order WQ 2015-0075, the State Water Board upheld the watershed management program provisions in the Permit, including those provisions related to EWMPs specifically, as a reasonable alternative compliance option for meeting receiving water limitations. In doing so, the State Water Board recognized that the "success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order."³ This includes "the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved."⁴ In regards to rigor and accountability in the EWMP development process, the State Water Board found that three components of the EWMPs are essential to ensuring that proposed EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame: 1) the EWMPs are subject to a public review and comment period; 2) the requirement for a reasonable assurance analysis (RAA) ensures that Permittees are choosing appropriate controls and milestones for the EWMP; and 3) the adaptive management provisions of the Permit ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving water quality-based effluent limitations and other total maximum daily load (TMDL)-specific limitations.⁵

The North Santa Monica Bay Coastal Watersheds group, which includes the City of Malibu, the County of Los Angeles, and the Los Angeles County Flood Control District (collectively,

¹ Unless otherwise noted, all references herein to the "Petition" are to the petition dated October 7, 2016, but to the version filed on October 14, 2016 with the Notice of Errata to Petition, Petition for Review, Memorandum of Points and Authorities, and Designation of Exhibits.

² As the State Water Board knows, the Permit also provides Permittees with the option of developing and implementing a Watershed Management Program (WMP). However, this matter concerns only the Los Angeles Water Board's approval of the NSMB EWMP. Accordingly, this response focuses on the development, review, and approval of this specific EWMP.

³ State Water Board Order WQ 2015-0075, p. 7 (Section 1, RB-AR 161).

⁴ *Id.* at 52 (Section 1, RB-AR 206).

⁵ See *id.* at 37-38 (Section 1, RB-AR 191 - 192).

Permittees), agreed to collaborate on the development of an EWMP for the North Santa Monica Bay subwatersheds. Pursuant to Part VI.C.4.c of the LA County MS4 Permit, the Permittees submitted a draft NSMB EWMP to the Los Angeles Water Board on June 29, 2015 for review. As with all of the other EWMPs, the NSMB EWMP was subject to a public review and comment period and the Board's review and approval of the NSMB EWMP was informed by stakeholder input, including that of the Petitioners. In response to Board staff's comments, the NSMB EWMP Permittees submitted a revised EWMP per the schedule set forth in Part VI.C of the Permit. Los Angeles Water Board staff evaluated the revised EWMP to ensure that the Board's comments were appropriately addressed. Pursuant to delegated authority, the Board's Executive Officer determined that the revised NSMB EWMP met the requirements of the Permit, was based on well accepted technical approaches, and was a sound and reasonable program. On April 19, 2016, the Executive Officer approved, on behalf of the Los Angeles Water Board, the NSMB EWMP pursuant to Part VI.C of the LA County MS4 Permit.

On May 19, 2016, Petitioners filed a petition for review challenging the Los Angeles Water Board Executive Officer's action to approve the NSMB EWMP. That petition sought review by both the Los Angeles Water Board and the State Water Board and sought invalidation of the approval. The main contentions raised in the petition center around the fact that approximately half of the coastal zone in the NSMB EWMP has special status as an "Area of Special Biological Significance" (ASBS). The Laguna Point to Latigo Point ASBS is also referred to as ASBS 24. The Los Angeles Water Board considered the May 19, 2016 petition at its meeting on September 7, 2016, where it determined not to review the merits of the petition. On October 7, 2016, Petitioners filed an additional petition for review with the State Water Board challenging the Los Angeles Water Board's action on September 7, 2016. The Petitioners seek an order by the State Water Board: 1) vacating the vote taken at the Los Angeles Water Board's September 7, 2016 proceeding, 2) invalidating the Los Angeles Water Board Executive Officer's approval of the NSMB EWMP, and 3) remanding the matter to the Los Angeles Water Board with instructions to require compliance with Permit requirements. It is important to note that while the Petitioners seek an order invalidating the approval of the NSMB EWMP as a whole, the Petition only alleges inadequacies related to the narrow issue of how the NSMB EWMP addresses MS4 discharges of pollutants not addressed by TMDLs to the ASBS portion of the EWMP area.

The Los Angeles Water Board's response to the Petition is organized as follows. Section II provides a summary response to the contentions raised in the Petition. Section III provides background on the EWMP provisions in the LA County MS4 Permit and on the development, review, and approval of the NSMB EWMP. Section IV provides an overview of the geography of the NSMB EWMP and Laguna Point to Latigo Point ASBS (a.k.a. ASBS 24), which partially overlaps with the NSMB EWMP area. Section V provides responses to Petitioners' technical contentions related to the Los Angeles Water Board's approval of the NSMB EWMP. Section VI provides responses to Petitioners' procedural contentions related to the Los Angeles Water Board's September 7, 2016 meeting. Section VII concludes the Los Angeles Water Board's response to the Petition.

II. SUMMARY RESPONSE

As explained in the specific responses below, the Los Angeles Water Board disagrees with all of the technical and procedural contentions raised in the Petition. The Board determined that the NSMB EWMP met the requirements of the Permit, was based on well accepted technical

approaches, and was a sound and reasonable program. The NSMB EWMP appropriately applied the State Water Board's Ocean Plan ASBS standards to stormwater discharges to ASBS 24 and the Ocean Plan's prohibition against non-stormwater discharges to ASBS. The NSMB EWMP also appropriately considered stormwater and non-stormwater data for discharges to ASBS 24 generated by the Permittees. The Los Angeles Water Board also did not deny Petitioners a fair "hearing" or due process when the Board considered the Petitioners' May 19, 2016 petition at its September 7, 2016 meeting.

The Los Angeles Water Board requests that the State Water Board deny the Petitioners' requests for an order by the State Water Board: 1) vacating the vote taken at the Los Angeles Water Board's September 7, 2016 meeting, 2) invalidating the Los Angeles Water Board Executive Officer's approval of the NSMB EWMP, and 3) remanding the matter to the Los Angeles Water Board with instructions to require compliance with Permit requirements. In response to the Petitioners' contentions, the Los Angeles Water Board urges the State Water Board to uphold the Los Angeles Water Board's actions in their entirety, retaining the final approval of the NSMB EWMP. Retaining the approval of the NSMB EWMP would allow the significant collaborative planning efforts that have occurred to date continue so that actions to address water quality priorities are timely implemented.

III. BACKGROUND ON NSMB EWMP DEVELOPMENT, REVIEW, AND APPROVAL

A. The WMP/EWMP Provisions in the LA County MS4 Permit

The LA County MS4 Permit includes detailed watershed management program provisions that establish a watershed approach as a central tenet of permit implementation. Part VI.C of the Permit allows permittees the option to develop either a WMP or an EWMP to implement permit requirements on a watershed scale through customized strategies, control measures, and best management practices (BMPs). Development of a WMP or EWMP is voluntary and may be developed individually or as part of a group. The watershed management program provisions provide a framework for permittees to implement the requirements of the LA County MS4 Permit in an integrated and collaborative fashion to address the highest water quality priorities on a watershed scale, including complying with the requirements of Part V.A (Receiving Water Limitations) and Part VI.E and Attachments L through R (Total Maximum Daily Load Provisions).

The watershed management program provisions of Part VI.C.5 describe the required elements of a WMP or EWMP.⁶ These elements include:

- Identification of Water Quality Priorities, supported by Water Quality Characterization, Water Body-Pollutant Classification, Source Assessment, and Prioritization (Part VI.C.5.a);
- Selection of Watershed Control Measures, including Minimum Control Measures [as defined in Part VI.D.4 to Part VI.D.10], Non-Storm Water Discharge Measures, and TMDL Control Measures (Part VI.C.5.b);

⁶ The LA County MS4 Permit includes other requirements pertaining to EWMPs only, the most significant of which is to comprehensively evaluate opportunities for multi-benefit stormwater retention projects as a means of addressing the water quality requirements of the Permit. These requirements, however, are not directly relevant to the Petitioners' claims.

- A Reasonable Assurance Analysis (RAA) for each water body-pollutant combination addressed by the Watershed Management Program (Part VI.C.5.b.iv(5)); and
- Compliance Schedules that are adequate for measuring progress on a watershed scale once every two years, consistent with compliance deadlines for all applicable interim and/or final water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R of the Permit, and as short as possible (Part VI.C.5.c)

One of the most sophisticated requirements of a WMP or EWMP is the RAA. The RAA is a modeling exercise, for the most part, the purpose of which is to demonstrate that the watershed control measures that will be implemented through the EWMP have a reasonable assurance of resulting in the required pollutant reductions necessary to achieve applicable water quality-based effluent limitations and receiving water limitations in the Permit. The RAAs represent the most extensive use of stormwater modeling to implement a MS4 permit to date. In its RAA, the NSMB EWMP used the Structural BMP Prioritization and Analysis Tool (SBPAT) developed under contract for the City of Los Angeles, Heal the Bay, and County of Los Angeles.⁷ This model is specifically identified in Part VI.C.5.b.iv.(5) of the Permit as one of the peer-reviewed models that may be used to conduct a RAA.

Pursuant to Part VI.C.7, Permittees in each Watershed Management Area must also develop a monitoring program in conjunction with an EWMP to support an assessment of progress toward achieving the water quality-based effluent limitations and receiving water limitations addressed by the EWMP, and to support the required adaptive management process for EWMPs set forth in Part VI.C.8.

B. The NSMB EWMP Development, Review, and Approval Process and Stakeholder Participation

As stated above, the North Santa Monica Bay Coastal Watersheds group agreed to collaborate on the development of an EWMP for the North Santa Monica Bay subwatersheds. The Permit contains detailed requirements regarding the elements of EWMPs and deadlines for the development, review, and approval of these programs.⁸ The NSMB EWMP development, review, and approval process was an extensive process that occurred over a nearly three-year period. The NSMB EWMP was reviewed using the same process as for the other 11 EWMPs submitted to and approved by the Los Angeles Water Board. The process included review of the Notice of Intent,⁹ Workplan,¹⁰ draft EWMP,¹¹ and revised EWMP¹² by a multidisciplinary team of Los Angeles Water Board staff, including engineers, scientists, modelers and planners. Active participation in, and oversight of, the reviews was provided by the MS4 Unit Chief and by the Regional Programs Section Chief.

⁷ SBPAT Software & Manual (Section 10, RB-AR 2679).

⁸ See, generally, Part VI.C and Table 9 of the Permit (Section 1, RB-AR 47 - 67).

⁹ See, generally, Section 3, RB-AR 816 - 954.

¹⁰ See, generally, Section 8, RB-AR 2121 - 2226.

¹¹ See, generally, Sections 10 - 15, RB-AR 2324 - 3964.

¹² See, generally, Sections 17 - 21, RB-AR 4022 - 5980.

During this time, there were numerous opportunities for stakeholder input on the EWMP through three public workshops hosted by Permittees,¹³ three Los Angeles Water Board public workshops,¹⁴ numerous technical advisory committee (TAC) and RAA subcommittee meetings,¹⁵ written comments,¹⁶ and individual meetings among Board staff, Permittees, and stakeholders, including Petitioners. In addition, Los Angeles Water Board staff collaborated with stakeholders, including Petitioners, to release *Guidelines for Conducting Reasonable Assurance Analysis in a Watershed Management Program, including an Enhanced Watershed Management Program* to assist Permittees in RAA development, circulating draft and revised draft versions for review and comment.¹⁷

Pursuant to Part VI.C.4.c of the LA County MS4 Permit, the Permittees submitted a draft NSMB EWMP to the Los Angeles Water Board on June 29, 2015 for review.¹⁸ Beginning on July 1, 2015, the Los Angeles Water Board provided a 61-day public review and written comment period on the draft NSMB EWMP along with the other EWMPs.¹⁹ During the written comment period, the Los Angeles Water Board held a public workshop at its regularly scheduled Board meeting on July 9, 2015 and provided permittees and interested persons an opportunity to make oral comments on the draft EWMPs submitted to the Board, including the draft NSMB EWMP.²⁰ The Petitioners (with Heal the Bay) as well as other interested persons submitted comments on the draft EWMPs.²¹ The Petitioners and Heal the Bay submitted their joint comment letter on August 31, 2015, which included written comments specific to the draft NSMB EWMP.²²

Los Angeles Water Board staff considered the written comments received during its review of the draft NSMB EWMP. Where Board staff agreed with the written comments, those comments were incorporated into the Board's October 2015 review letter to the Permittees on the draft NSMB EWMP to ensure that the public's comments were addressed in the revised EWMP.²³ The Los Angeles Water Board held a second public workshop on the draft EWMPs during the Board's regularly scheduled meeting on November 5, 2015, where permittees and interested

¹³ See Section 9, RB-AR 2227 - 2323.

¹⁴ See Section 12 (RB-AR 2687 - 3032), Section 15 (RB-AR 3086 - 3964), and Section 18 (RB-AR 4654 - 4708).

¹⁵ See Sections 4-5, RB-AR 955 - 1320. Part VI.C.1.f.v of the LA County MS4 Permit requires the formation and meeting of a TAC "that will advise and participate in the development of the Watershed Management Programs and enhanced Watershed Management Programs from month 6 through the date of program approval." The TAC included Los Angeles Water Board staff, permittees representing each of the WMPs and EWMPs, and representatives from non-governmental organizations, including the Petitioners.

¹⁶ See Section 6 (RB-AR 1321 - 1341), Section 7 (RB-AR 1919 - 2120), Section 11 (RB-AR 2680 - 2686), and Section 13 (RB-AR 3033 - 3067).

¹⁷ See, generally, Section 7, RB-AR 1919 - 2120.

¹⁸ See Section 10, RB-AR 2324 - 2679.

¹⁹ Section 11, RB-AR 2682 - 2686.

²⁰ Section 12, RB-AR 2687 - 3032.

²¹ Section 13, RB-AR 3033 - 3067.

²² Section 13, RB-AR 3036 - 3067.

²³ See Section 14, RB-AR 3068 - 3085. The Board's October 2015 review letter on the draft NSMB EWMP included comments pertaining to the nexus between the NSMB EWMP and ASBS 24 and, in particular, the draft ASBS Compliance Plan developed by the Permittees pursuant to the requirements of the Ocean Plan General Exception provisions for discharges to an ASBS.

persons were provided an opportunity to make further oral comments on the draft EWMPs, including the NSMB EWMP.²⁴

The Permittees submitted a revised draft NSMB EWMP on January 19, 2016.²⁵ Both before and after submittal of the revised draft NSMB EWMP, Board staff participated in meetings, phone calls, and email exchanges with the Permittees.²⁶ Between March 2016 and April 19, 2016, the Permittees provided three additional iterations of the revised draft NSMB EWMP to address minor remaining issues; two more sets of Board staff reviews of the EWMP were also conducted.²⁷ Board staff also met with Petitioners and Heal the Bay in February 2016 regarding the revised draft NSMB EWMP among other revised EWMPs.²⁸ The Los Angeles Water Board held a third and final public workshop on March 3, 2016 for permittees and interested persons to specifically discuss the revised draft EWMPs, including the NSMB EWMP, with Board members (which were invited to attend) and Board staff, including the Executive Officer.²⁹

Per Part VI.C.4.c of the LA County MS4 Permit, the Los Angeles Water Board, or the Executive Officer on behalf of the Board, was scheduled to approve or deny the revised draft NSMB EWMP within three months of its submittal. Part VI.C.4.e specifies that Permittees that do not have an approved EWMP within 40 months of the Permit's effective date (thus, by April 28, 2016) shall be subject to the baseline requirements of the Permit and shall demonstrate compliance with receiving water limitations pursuant to Part V.A and with applicable interim and final water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3).

After reviewing the revised draft NSMB EWMP in relation to the Board's written comments, Board staff concluded that the final NSMB EWMP satisfied the requirements of the LA County MS4 Permit and recommended approval to the Executive Officer. On April 19, 2016, on behalf of the Los Angeles Water Board, the Executive Officer approved the NSMB EWMP pursuant to the LA County MS4 Permit.

In consideration of the public interest in the EWMPs, the Los Angeles Water Board prepared written responses to the written comments received on the draft EWMPs.³⁰ For the NSMB EWMP, these responses were made available on May 11, 2016.³¹

C. Petition for Review by the Los Angeles Water Board

On May 19, 2016, Petitioners filed a petition with both the Los Angeles Water Board and the State Water Board, seeking review and invalidation of the Los Angeles Water Board Executive Officer's approval of the NSMB EWMP. Petitioners sought review by the Los Angeles Water Board pursuant to Part VI.A.6 of the LA County MS4 Permit, which provides that any permittee

²⁴ Section 15, RB-AR 3086 - 3964.

²⁵ Section 17, RB-AR 4022 - 4653.

²⁶ Section 16, RB-AR 3965 - 4020.

²⁷ See Sections 19 - 20, RB-AR 4709 - 5973.

²⁸ See Section 16, RB-AR 4021.

²⁹ Section 18, RB-AR 4654 - 4695.

³⁰ Section 21, RB-AR 5981 - 6021.

³¹ Section 21, RB-AR 5987 - 6021.

or interested person may request review by the Los Angeles Water Board of any formal determination or approval made by the Executive Officer pursuant to the Permit. A permittee or interested person may request such review by the Los Angeles Water Board upon petition within 30 days of the notification of such decision to the permittee(s) and interested persons on file at the Board.³²

Petitioners' main contentions raised in their May 19, 2016 petition center around the fact that approximately half of the coastal zone in the NSMB EWMP area has special status as an "Area of Special Biological Significance" (ASBS). As such, discharges in this portion of the EWMP area are subject to not only the general water quality objectives in the Los Angeles Water Board's *Water Quality Control Plan for the Los Angeles Region* (Basin Plan) and the State Water Board's *Water Quality Control Plan for Ocean Waters of California* (Ocean Plan), but also the specific water quality objectives applicable to discharges to an ASBS. These specific objectives are set forth in Attachment B of State Water Board Resolution No. 2012-0012. These ASBS objectives and additional requirements contained in the Ocean Plan are the focus of many of the Petitioners' contentions.

In their May 19, 2016 petition, Petitioners alleged that the Los Angeles Water Board Executive Officer improperly approved the NSMB EWMP despite its failure to: 1) "comply with the relevant terms of the MS4 Permit," 2) "comply with the conditions of State Board Resolution No. 2012-0012 ('ASBS Exception')," and 3) "consider relevant, available ASBS stormwater and non-stormwater data and to comply with the ASBS Exception's prohibition against non-stormwater discharges."³³ Petitioners sought an order by the Los Angeles Water Board to invalidate the Executive Officer's April 19, 2016 final approval of the NSMB EWMP, and an order remanding the matter to the Board with instructions for staff to require compliance with Permit requirements.³⁴

On July 19, 2016, the Los Angeles Water Board publicly noticed the Petition, provided an opportunity for Permittees and interested persons to respond to the Petition, and indicated that it would hold a public meeting on September 8, 2016 to consider the petition.³⁵ The Board's notice indicated that such consideration includes whether the Board will review the petition or not and that the Board may either: 1) decide to review the petition on its merits (at a later date) or 2) decide not to review the petition. If the Board decided to review the petition, there would be no further proceedings on the petition.

³² See Order No. R4-2012-0175 as amended by Order WQ 2015-0075, p. 42 (Section 1, RB-AR 277).

³³ May 19, 2016 Petition for Review of Los Angeles Regional Water Quality Control Board Executive Officer's Action to Approve the North Santa Monica Bay EWMP Pursuant to the LA County MS4 Permit (Section 22, RB-AR 6024 - 6025).

³⁴ May 19, 2016 Memorandum of Points and Authorities in Support of Petition for Review of Los Angeles Regional Water Quality Control Board Executive Officer's Action to Approve the North Santa Monica Bay EWMP Pursuant to the LA County MS4 Permit, p. 16 (Section 22, RB-AR 6047). In the case that the Los Angeles Water Board denied Petitioners' request, Petitioners sought "an order by the State Board to invalidate the Regional Board Executive Officer's April 19, 2016 final approval of the NSMB EWMP, any approval by the Regional Board thereof, and an order remanding the matter to the Regional Board with instructions for staff to require compliance with Permit requirements."

³⁵ See Notice of Opportunity to Respond to Petition and Notice of Public Meeting (Section 24, RB-AR 6256 - 6260). On August 18, 2016, a notice was issued changing the date of the meeting from September 8, 2016 to September 7, 2016 and location of the meeting from Los Angeles to Agoura Hills. See Notice of Change in Location, Date, and Time for Consideration of a Petition for Review of the Executive Officer's Action to Approve the North Santa Monica Bay Enhanced Watershed Management Program Pursuant to the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Section 24, RB-AR 6261).

Three responses to the petition were submitted to the Los Angeles Water Board.³⁶ To aid in the Los Angeles Water Board's review of the petition, Board staff provided the Board with materials pertaining to the development, review, and approval of the NSMB EWMP. This included the petition, responses to the petition, and documents pertaining to the NSMB EWMP.³⁷ The Executive Officer also prepared a memorandum to the Board that explained the EWMP review and approval process and provided responses to the contentions raised in the petition to give the Board necessary background and context for the contentions.³⁸

On August 18, 2016, Petitioners submitted a "Request to Appoint Separate Counsel for Adjudicative and Prosecutorial/Advocacy Functions" for the September 7, 2016 meeting.³⁹ On September 6, 2016, the Chair of the Los Angeles Water Board denied the Petitioners' request to appoint separate counsel, noting that the Los Angeles Water Board's consideration of the petition was not an "appeal," the September 7, 2017 proceeding was not an evidentiary hearing, and that, even if it were, no separation of functions was required or warranted.⁴⁰

The Los Angeles Water Board considered the May 19, 2016 petition at its meeting on September 7, 2016.⁴¹ The Board heard a brief introduction by its counsel on the background and context for the Board's consideration of the Petition, a summary of the contentions that were raised in the petition, and an explanation of the Board's options for consideration of the petition.⁴² Board staff then provided background information on the relationship of the NSMB EWMP to ASBS 24, as well as the Ocean Plan and the ASBS discharge requirements it contains, including preparation of ASBS Compliance Plans. Petitioners made a joint presentation summarizing the contentions in their petition and requesting that the Board review the merits of the petition. Board staff then provided an overview of the NSMB EWMP development, review, and approval process and provided Board staff's responses to the contentions raised in the petition. The Executive Officer concluded staff's presentation explaining why he approved the NSMB EWMP. The NSMB EWMP Permittees then provided their responses to the petition. After Board members asked questions and made statements, the Los Angeles Water Board unanimously voted to decline review of the petition.⁴³

³⁶ See generally Responses to Petition for Review (Section 25, RB-AR 6262 - 6276).

³⁷ See generally Materials Provided to the Los Angeles Water Board for its Consideration of the Petition for Review: Agenda Package for Item 6 on September 7, 2016 Agenda (Section 28, RB-AR 6394 - 6462).

³⁸ See Memorandum from Samuel Unger, Executive Officer, to Regional Water Board Members, "Regional Water Board Staff Response to Los Angeles Waterkeeper and Natural Resources Defense Council's Petition for Review of Approval of the North Santa Monica Bay EWMP Pursuant to the LA County MS4 Permit" dated August 29, 2016 (Section 27, RB-AR 6355 - 6372).

³⁹ Section 26, RB-AR 6280 - 6348.

⁴⁰ Section 26, RB-AR 6350 - 6353.

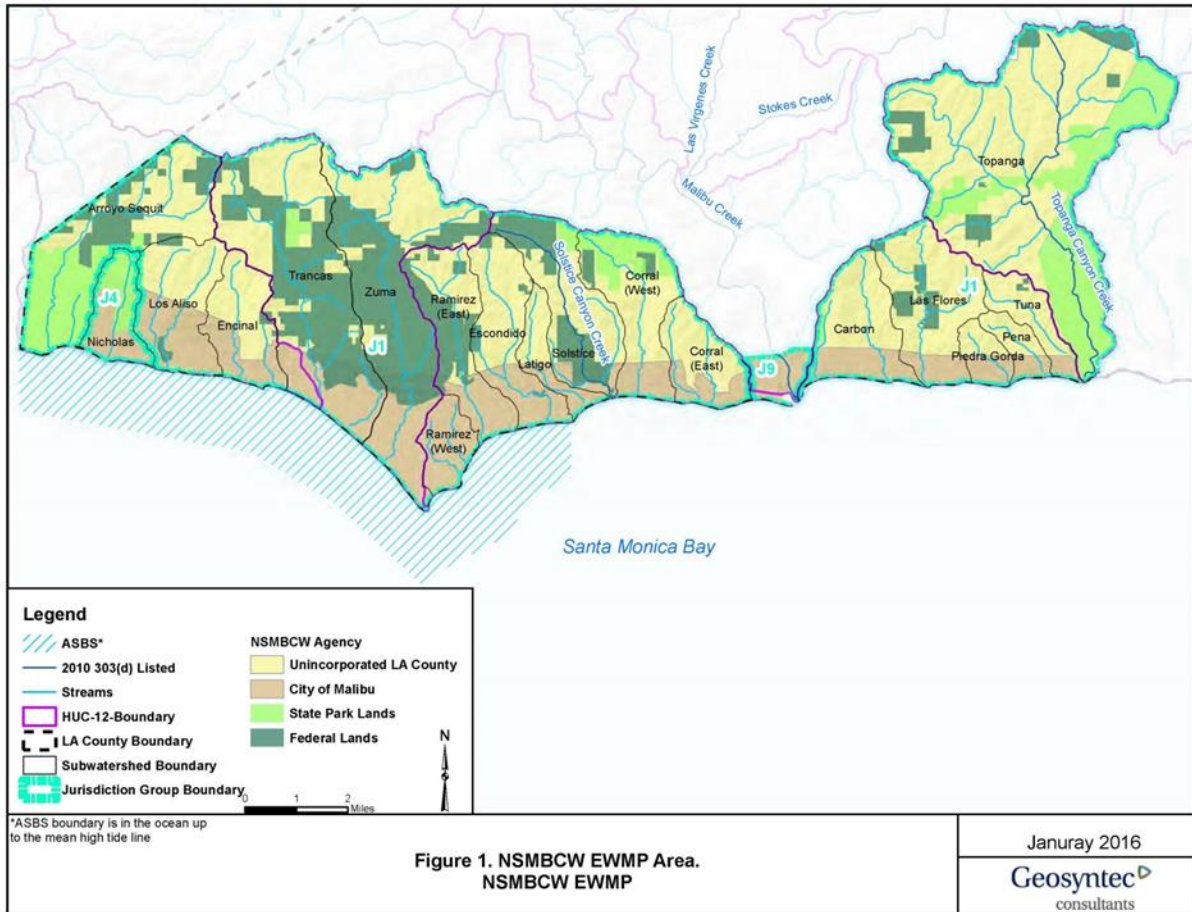
⁴¹ See generally Transcript for September 7, 2016 Board Meeting (Section 28, RB-AR 6522 - 6606); Audio File of September 7, 2016 Meeting (on the audio file Item 6 was recorded from 00:18:50 to 2:25:00) (Section 28, RB-AR 6661) (included as a separate .mp3 format file); PowerPoint Presentations by Regional Board Staff and NRDC/Los Angeles Waterkeeper (Section 28, RB-AR 6469 - 6499); and September 7, 2016 and September 8, 2016 Board Meeting Minutes (Section 28, RB-AR 6663 - 6664).

⁴² Counsel stated that staff was not going to make a recommendation as to whether the Board should review the merits of the petition or not. (See Regional Board Staff Presentation [Section 28, RB-AR 6470]; Transcript for September 7, 2016 Board Meeting, p. 30 [Section 28, RB-AR 6529]; Audio File of September 7, 2016 Meeting (from 00:27:40 to 00:28:10) [Section 28, RB-AR 6661].)

⁴³ See Transcript for September 7, 2016 Board Meeting (Section 28, RB-AR 6578 - 6606); Audio File of September 7, 2016 Meeting (from 01:44:00 to 02:25:00) (Section 28, RB-AR 6661); and September 7, 2016 and September 8, 2016 Board Meeting Minutes (Section 28, RB-AR 6663 - 6664).

IV. GEOGRAPHY OF THE NSMB EWMP AND ASBS 24

The NSMB EWMP area is the westernmost coastal area in Los Angeles County. It encompasses 86 square miles, including 20 subwatersheds and 28 freshwater coastal streams as identified in Chapter 2 of the Los Angeles Water Board's Basin Plan. All receiving water bodies in the NSMB EWMP are ultimately tributary to Santa Monica Bay, and thus the regulations set forth in the Ocean Plan are also applicable to the NSMB EWMP. Ten of these subwatersheds drain to the Laguna Point to Latigo Point ASBS, also referred to as ASBS 24.⁴⁴ **Figure 1** below shows the overall NSMB EWMP area as well as the portion that drains to ASBS 24.⁴⁵



⁴⁴ The geographic boundaries of ASBS 24 are defined as the “Ocean water within a line originating from Laguna Point at 34° 5’ 40” north, 119° 6’30” west, thence southeasterly following the mean high tideline to a point at Latigo Point defined by the intersection of the mean high tide line and a line extending due south of Benchmark 24; thence due south to a distance of 1000 feet offshore or to the 100 foot isobath, whichever distance is greater; thence northwesterly following the 100 foot isobath or maintaining a 1,000-foot distance from shore, whichever maintains the greater distance from shore, to a point lying due south of Laguna Point, thence due north to Laguna Point.” (State Water Board Resolution No. 74-28.)

⁴⁵ North Santa Monica Bay Coastal Watersheds Enhanced Watershed Management Program, Fig. 1, p. 9 (Section 20, RB-AR 5375). All references to the NSMB EWMP refer to the final EWMP dated March 2016 unless otherwise indicated.

ASBS 24 was established in 1974 by the State Water Board to preserve sensitive marine habitat. It stretches 24 miles, spanning the westernmost portion of Los Angeles County and the southeastern part of Ventura County. Approximately 12.8 miles border the NSMB EWMP area in Los Angeles County. It contains 11,842 marine acres and is the largest ASBS along the mainland of Southern California. A wide range of sandy substrate, rocky reef, and coastal pelagic species can be found within ASBS 24.

The southern and central portions of ASBS 24 that are located in Los Angeles County are subject to direct discharges from roads, landscape runoff, homes, and small businesses. In general, the near-coast stormwater runoff along ASBS 24 within Los Angeles County is conveyed through storm drains and/or natural drainage courses before it is discharged at multiple locations along the beach. There are 26 identified outfalls owned, operated/maintained, or monitored by the NSMB EWMP Permittees that are located within the ASBS 24 drainage area; ten of these outfalls have been identified as major outfalls.⁴⁶ The requirements set forth in the State Water Board's Resolution No. 2012-0012, "Exceptions to the California Ocean Plan for Selected Discharges into Areas of Special Biological Significance, Including Special Protections for Beneficial Uses" (hereafter, ASBS Special Protections or General Exception) apply to MS4 discharges to ASBS 24.⁴⁷

V. RESPONSES TO TECHNICAL CONTENTIONS RELATED TO APPROVAL OF THE NSMB EWMP

The Petition raises two primary areas of contention. First, the Petitioners contend that the NSMB EWMP fails to apply the Ocean Plan General Exception standards to stormwater discharges to ASBS 24 and the General Exception's prohibition against non-stormwater discharges. Second, the Petitioners contend that the NSMB EWMP fails to consider, and utilize in the RAA, stormwater and non-stormwater data for discharges to ASBS 24 generated by the Permittees. Because of these alleged deficiencies, the Petitioners conclude that the Executive Officer's April 19, 2016 approval of the NSMB EWMP and the Los Angeles Water Board's September 7, 2016 vote to decline to review the merits of the petition was "an abuse of discretion, inappropriate and improper, not based on substantial evidence, contrary to law, and therefore must be overturned."⁴⁸

Prior to presenting their argument, Petitioners describe the regulatory background that they view as pertinent to their allegations. Thus, before providing the Los Angeles Water Board's responses to the specific technical contentions, some discussion of the regulatory background is provided. In Part II.B of Petitioners' Memorandum of Points and Authorities, Petitioners describe regulatory requirements related to the ASBS Special Protections. The LA County MS4 Permit includes provisions that implement the ASBS Special Protections, including the ASBS standards applicable to stormwater and ASBS prohibition of non-stormwater discharges. These provisions in the LA County MS4 Permit include, but are not limited to:

⁴⁶ See NSMB EWMP, Table 32, p. 143 (Section 20, RB-AR 5509). Within the entire NSMB EWMP area, there are a total of 48 identified outfalls owned, operated/maintained, or monitored by NSMB EWMP Permittees.

⁴⁷ Minor modifications to Resolution No. 2012-0012 were made through State Water Board Resolution No. 2012-0031.

⁴⁸ Petition, Memorandum of Points and Authorities, at p. 2. Note that the Memorandum of Points and Authorities incorrectly states the date of the Executive Officer's approval of the NSMB EWMP; the date of approval was April 19, 2016.

- Part III.A “Prohibitions – Non-Storm Water Discharges,” including Part III.A.3, pertaining to non-stormwater discharges to ASBS 24 specifically;
- Part V.A “Receiving Water Limitations;”
- Part VI.C “Watershed Management Program Provisions;” and
- Part VI.E “Total Maximum Daily Load Provisions,” including Part VI.E.5.a.ii-iii “Water Quality-Based Effluent Limitations for Trash.”

The NSMB EWMP implements all of these requirements of the LA County MS4 Permit. As discussed further below, nothing in the NSMB EWMP modifies compliance deadlines in the ASBS Special Protections. In particular, the EWMP does not change the requirement that compliance with the non-stormwater discharge prohibition was required immediately upon adoption of the ASBS Special Protections.

Petitioners also provide some excerpts from the LA County MS4 Permit regarding RAA. With regard to the Permit’s RAA requirements, as the State Water Board is aware, RAAs involve complex hydrologic and water quality modeling with very specific hydrologic and water quality data requirements. For many EWMPs, including the NSMB EWMP, there were available subwatershed data sets collected within the last 10 years, which were considered by Permittees in EWMP development. However, not all of these data sets met the criteria for use in the RAA. This was the case with the ASBS stormwater and non-stormwater data as further discussed below.

Finally, Petitioners discuss the draft “Area of Special Biological Significance 24 Compliance Plan For The County of Los Angeles and City of Malibu” prepared by the County of Los Angeles and the City of Malibu pursuant to the ASBS Special Protections. While not mentioned by the Petitioners, as the State Water Board is aware, the Permittees submitted a revised ASBS Compliance Plan in September 2015 in response to State Water Board comments on the draft ASBS Compliance Plan. The revised ASBS Compliance Plan dated September 20, 2015 is included in the NSMB EWMP and is an integral part of the overall program set forth in the EWMP.⁴⁹ The revised ASBS Compliance Plan includes a detailed evaluation of available, relevant receiving water, stormwater and non-stormwater data for ASBS 24, and presents a detailed program of implementation to address MS4 discharges to the ASBS in compliance with the requirements of the ASBS Special Protections.⁵⁰

Detailed responses to the specific technical contentions raised in the Petition are provided below. The Petitioners first raise contentions regarding consideration of ASBS stormwater and non-stormwater data, followed by contentions regarding the application of ASBS standards.

⁴⁹ Final NSMB EWMP, Appendix E (Section 20, RB-AR 5735 - 5969). It should be noted that, for the most part, Petitioners’ refer to the *draft* ASBS Compliance Plan dated September 2014, which was included as Appendix D to the *draft* NSMB EWMP. However, the final NSMB EWMP incorporates the revised ASBS Compliance Plan dated September 2015, which was submitted to address the State Water Board’s March 17, 2015 comments (Section 30, RB-AR 7254 - 7257) on the draft ASBS Compliance Plan. The revised ASBS Compliance Plan is Appendix E of the final NSMB EWMP.

⁵⁰ Petitioners state that, “[t]he draft Compliance Plan includes some, but not all of the sampling required by the ASBS Exception.” (Petition, Memorandum of Points and Authorities, at p. 7.) It should be noted that the County of Los Angeles and the City of Malibu conducted additional ASBS monitoring in 2016, since they were not able to complete all the required monitoring during the 2013-14 period. The results of the 2016 ASBS monitoring have been provided to the State Water Board in two separate reports submitted by the County of Los Angeles and the City of Malibu in October 2016, and were included in the Permittees’ LA County MS4 Permit Annual Report for 2015-16. The results were consistent with those of the 2013-14 sampling events.

However, the discussion of the application of ASBS standards helps inform the discussion of the use of the ASBS data. The Los Angeles Water Board addresses the contentions related to stormwater and non-stormwater separately. Therefore, this response is organized as follows. Subsection A addresses the contentions related to the application of the ASBS standards to stormwater, followed by the consideration of relevant and available ASBS stormwater data. Subsection B addresses the contentions related to the application of ASBS standards for non-stormwater discharges and then the consideration of ASBS non-stormwater data.

A. Application of ASBS Stormwater Standards and Consideration of ASBS Stormwater Data

1. Response to Petitioners' Contention that the NSMB EWMP and RAA Fail to Utilize Applicable ASBS Stormwater Standards

The "ASBS Exception standards" referenced by the Petitioners include the Ocean Plan narrative objective that there shall be no alteration of natural ocean water quality in an ASBS due to a stormwater discharge and the instantaneous maximum numeric water quality objectives in Table 1 of the Ocean Plan. Specifically, the ASBS Special Protections require dischargers to evaluate compliance with the Ocean Plan narrative objective regarding alteration of natural ocean water quality using a two-step process:

- An evaluation of ocean water quality within the ASBS relative to natural ocean water quality; and
- If ocean water quality in the ASBS is altered compared to natural ocean water quality, an evaluation to determine whether there is a linkage between altered ocean water quality and the quality of MS4 stormwater discharges to the ocean in the vicinity.

Attachment 1 to Attachment B to State Water Board Resolution No. 2012-0012 (hereafter, Attachment 1) provides a flowchart that illustrates this compliance evaluation process. Per this decision framework, pollutant concentrations in post-storm ocean receiving water are compared to those in pre-storm ocean receiving water. They are also compared to the 85th percentile threshold of unimpacted ocean reference site concentrations. When post-storm ocean water concentrations are greater than pre-storm concentrations *and* are greater than the 85th percentile threshold for two or more consecutive storm events, the constituent(s) are classified as causing exceedances of natural ocean water quality.

For these constituents, the MS4 outfall stormwater data for the discharge closest to the ocean receiving water site are then evaluated. If the MS4 outfall data exceed the Table 1 objectives, then the Permittees must propose BMPs to control their MS4 stormwater discharges to achieve, on average, the following target levels: (1) Table 1 objectives, or (2) a 90% reduction in pollutant loading during storm events, for the Permittee's total discharges.

The Receiving Water Limitations contained in Part V.A of the LA County MS4 Permit include the numeric objectives in Table 1 of the Ocean Plan and the Ocean Plan narrative objective that there shall be no alteration of natural ocean water quality in an ASBS due to a discharge.⁵¹ The

⁵¹ Per Attachment A of the LA County MS4 Permit, "Receiving Water Limitation" means "[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles

NSMB EWMP utilizes these water quality objectives from the Ocean Plan. The EWMP states that, “[t]he water bodies listed in Table 3 are subject to *water quality objectives in the Ocean Plan*, Basin Plan and Basin Plan Amendments, including Waste Load Allocations (WLAs) developed through TMDLs. ... additional information on associated water quality objectives can be found in the Ocean Plan and Basin Plan” (emphasis added).⁵² These Ocean Plan water quality objectives are also identified and utilized in the comprehensive data assessments for the ASBS presented in Attachment E of the NSMB EWMP.⁵³

Contrary to Petitioners’ allegation that ocean samples collected for the ASBS Compliance Plan confirm that the Permittees’ MS4 stormwater discharges alter natural ocean water quality, the 2013-2014 ASBS stormwater data were not found to correlate with the paired ocean receiving water data using the flowchart in Attachment 1; therefore, MS4 discharges were not found to be contributing to receiving water limitation exceedances in ASBS 24. A brief summary of this analysis is provided below.

Post-storm ocean receiving water samples from the ASBS indicated that natural ocean water quality was altered due to selenium, mercury, and polycyclic aromatic hydrocarbons (PAHs). However, an evaluation of the paired outfall (“core discharge”) data relative to the applicable Ocean Plan objectives in Table 1 found that the Permittees’ MS4 discharges *were not* causing the observed alteration of natural ocean water quality for these pollutants.⁵⁴ The ASBS Compliance Plan concludes, “[t]he results of the comparison indicate the discharges to the ASBS from point sources (outfalls) are currently achieving, and significantly below, the target levels.”⁵⁵ Additionally, while MS4 outfall samples collected by the Permittees demonstrated exceedances of Ocean Plan objectives for ammonia, cadmium, chromium, copper, lead, nickel, and zinc, monitoring results for the adjacent receiving water *did not show alteration of natural ocean water quality* for these pollutants.⁵⁶

Regarding the application of these standards in the RAA, as stated by the Permittees’ consultant, Geosyntec, in its response to Petitioners’ May 19, 2016 petition, for the water body-pollutant combinations modeled in the RAA, the Ocean Plan Table 1 objectives were used, consistent with requirements of the ASBS Special Protections.⁵⁷ Further, Part VI.E.5.a of the LA County MS4 Permit, along with Part B.2 of Attachment M, implements the ASBS Special Protections provision prohibiting the discharge of trash.⁵⁸ The NSMB EWMP indicates in Table 5 that the final receiving water limitation and water quality-based effluent limitation for trash is zero trash discharged from the MS4 into water bodies within the Santa Monica Bay Watershed

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.” (Section 31, RB-AR 9799.)

⁵² See NSMB EWMP, Section 2.1.1, p. 30 (Section 20, RB-AR 5396).

⁵³ See NSMB EWMP, Appendix E, Tables ES-1-1, 4-1, 4-2, 4-3, 4-4, 5-1, 5-2, 5-3, 5-4, and 5-5, as well as Section 4.2, p. 69 (Section 20, RB-AR 5742, 5816 - 5821, 5823 - 5824, 5827 - 5831).

⁵⁴ See NSMB EWMP, Appendix E, Section 5.0 (Section 20, RB-AR 5825 - 5832). The EWMP applies the Ocean Plan Table 1 objectives in a comparison to MS4 outfall data in Table 5-5 as well as Tables ES-1, 5-1, 5-2, 5-3 and 5-4 of Appendix E. Table 1 does not include instantaneous maximum limits for PAHs; therefore, no comparison is included for PAHs.

⁵⁵ NSMB EWMP, Appendix E, p. 81 (Section 20, RB-AR 5447).

⁵⁶ See NSMB EWMP, Appendix E, Tables 4-1 to 4-4, pp. 65 - 70 (Section 20, RB-AR 5431 - 5436).

⁵⁷ See Geosyntec Consultants’ Response to Petition for Review (Section 25, RB-AR 6276).

⁵⁸ See Resolution No. 2012-0012, Attachment B, Part I.A.1.b-c (Section 30, RB-AR 7051).

Management Area and then into Santa Monica Bay or along the shoreline of Santa Monica Bay.⁵⁹ Petitioners' allegation that, "the RAA and EWMP consider and apply the Santa Monica Bay Beaches Bacteria TMDL standards *only*" is simply not true.⁶⁰

2. Response to Petitioners' Contention that the NSMB EWMP Fails to Consider Relevant, Available ASBS Stormwater Data

For their contention that the NSMB EWMP fails to consider relevant available ASBS stormwater data, Petitioners largely rely on a single sentence in the NSMB EWMP that "no MS4 discharge monitoring data were available at the time of this assessment."⁶¹ The sentence referenced by the Petitioners is included in Part 2.1.3 "MS4 Discharge Quality" of the NSMB EWMP's Water Quality Characterization, which states:

Stormwater and non-stormwater discharges have not yet been characterized within the NSMBCW EWMP Area. *No MS4 discharge monitoring data were available at the time of this assessment*, but discharge characterization will occur as part of the implementation of the CIMP (NSMBCW EWMP Group, 2014d). Since outfall monitoring data from the CIMP were not available at the time of EWMP development, information from regional MS4 land use studies (e.g., Los Angeles County, 2000) and/or TMDL technical reports were used in Section 2.2 for the water body-pollutant prioritization.

(NSMB EWMP, p. 43⁶²) (emphasis added).

The Petitioners state that the "express language of the NSMB EWMP itself that *no* stormwater or receiving water data for ASBS 24 were considered in the EWMP assessment directly contradicts" Los Angeles Water Board staff's statement in response to comments that appropriate data were reviewed and considered.

First, a plain reading of the sentence, and in the context of the section in which it is included, does not indicate that "no stormwater or receiving water data for ASBS 24 were considered in the EWMP assessment." This section only addresses MS4 outfall monitoring data, not receiving water data, which are addressed in Section 2.1.2 of the EWMP.⁶³ Neither is this section specific to ASBS 24 MS4 discharge data, but rather the EWMP area as a whole. Los Angeles Water Board staff has interpreted this as recognition that there are limited MS4 outfall monitoring data for the EWMP area, since outfall monitoring was not required in the previous MS4 permit for the non-ASBS area of the EWMP.

Second, the relevant, available subwatershed data that the Petitioners assert were not considered are included and evaluated in detail in Appendix E of the NSMB EWMP, which is an integral part of the EWMP. Appendix E is the revised ASBS Compliance Plan that the

⁵⁹ See NSMB EWMP, Table 5, p. 32 (Section 20, RB-AR 5398).

⁶⁰ Petition, Memorandum of Points and Authorities, at p. 3.

⁶¹ NSMB EWMP, p. 43 (Section 20, RB-AR 5409).

⁶² Section 20, RB-AR 5409.

⁶³ Section 2.1.2 "Receiving Water Quality" lists Bight '08 data among the monitoring data reviewed and analyzed to characterize receiving water quality within the EWMP area. The Bight '08 monitoring program included sites in ASBS 24. See NSMB EWMP, pp. 36 - 43 (Section 20, RB-AR 5402 - 5409).

Permittees prepared pursuant to the ASBS Special Protections in the Ocean Plan. It includes a detailed evaluation of MS4 stormwater discharge data as well as ocean receiving water data, which were collected during the Bight 2008 monitoring program and in 2013-14, for ASBS 24 as compared to ASBS standards.⁶⁴

3. Response to Petitioners' Contention that the RAA Fails to Consider Relevant, Available ASBS Stormwater Data

Petitioners take issue with the use of generalized land use data to conduct the RAA, and suggest that the RAA should have used the ASBS data described above. The use of the generalized land use pollutant loading data is consistent with the RAA requirement in Part VI.C.5.b.iv.(5) of the LA County MS4 Permit: "The RAA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis."⁶⁵ Use of these data is also consistent with the RAA guidelines prepared by the Los Angeles Water Board staff with input from the TAC and RAA subcommittee, which Petitioners were members of.⁶⁶ Table 3.2 of the RAA guidelines identifies the model parameters for empirically based BMP models such as SBPAT. For water quality parameters, the RAA guidelines state that "[t]he estimated pollutant loading and/or concentrations shall be consistent with event mean concentrations (EMCs) obtained from different land use site as referenced in dependable sources..." Table 3.3 of the RAA guidelines specifies the suggested average EMCs from the SBPAT User's Guide.⁶⁷ The NSMB EWMP Workplan describes the proposed RAA approach and presents in Table 6-2 the water quality parameters (i.e., EMCs) for the NSMB watersheds.⁶⁸ These land use EMCs are consistent with those presented in Table 3.3 and are based on the most up-to-date, relevant data collected EMC data for southern California as allowed by the RAA guidelines. The ASBS 24 stormwater data did not meet the criteria for use as water quality parameters in SBPAT.

Regarding the issue of use of the ASBS stormwater data for purposes of RAA model calibration, the EWMP states that, "[t]he hydrology component of SBPAT was calibrated for the only

⁶⁴ See NSMB EWMP, Appendix E, Sections 4.0 and 5.0 as well as Tables ES-1-1, 4-1, 4-2, 4-3, 4-4, 5-1, 5-2, 5-3, 5-4, and 5-5, pp. 62 - 81 (Section 20, RB-AR 5813 - 5832). Note that the two years of stormwater sampling referenced by the Petitioners occurred over a 13-month period from February 2013 to February 2014 and consisted of three wet weather sampling events. As previously noted, additional ASBS stormwater monitoring events were conducted in 2016, two events by the City of Malibu and two by the County of Los Angeles; however, the sample results from these events were not available until late fall 2016 after approval of the NSMB EWMP. These sample results were submitted to the State Water Board and included in the Permittees' Annual Report submitted to the Los Angeles Water Board in December 2016.

⁶⁵ Much of the data collected in ASBS 24 in support of the Ocean Plan General Exception, which was presented in the Ocean Plan General Exception Program Environmental Impact Report (PEIR) (referred to by Petitioners as the "ASBS Exception EIS"), is older than 10 years (collected in spring 2004 and spring 2006) and was updated by the sampling effort in 2013-2014 for the ASBS Compliance Plan development. (See Section 30, starting at RB-AR 6703 for the PEIR.)

⁶⁶ See "Guidelines for Conducting Reasonable Assurance Analysis in a Watershed Management Program, Including an Enhanced Watershed Management Program" (RAA Guidelines) dated March 25, 2014 (Section 7, RB-AR 2086 - 2120). Petitioners participated as members of both the TAC and the RAA subcommittee. See, generally, documentation for TAC and RAA meetings (Section 4, RB-AR 955 - 1188; Section 5, RB-AR 1189 - 1320).

⁶⁷ See RAA Guidelines (Section 7, RB-AR 2104).

⁶⁸ See EWMP Workplan (Section 8, RB-AR 2163 - 2190).

location in the SMB watershed where *all* data requirements (daily flow, hourly precipitation, and daily beach bacteria concentrations) were met - the Topanga Creek subwatershed. No other SMB subwatersheds met the calibration data requirements.”⁶⁹ The Los Angeles County Flood Control District maintains a stream gauge in Topanga Creek; therefore, annual discharge volumes necessary for calibration were available for the period 2001-2012.⁷⁰ Annual discharge data were not available for the ASBS 24 monitoring sites.

Model validation was done using stream flow data and shoreline bacteria data from Arroyo Sequit and Leo Carrillo Beach by comparing predicted exceedance days for Leo Carrillo with the 17 exceedance days from the Santa Monica Bay Beaches Bacteria TMDL for Model Year 1993. A second model validation was conducted by comparing total modeled annual fecal coliform loads and total annual observed wet weather exceedance days at Topanga Canyon for the period 2005 to 2013. This subwatershed was selected for water quality validation due to it being the hydrologic calibration subwatershed and because it had daily shoreline bacteriological data, which was necessary in order to have a sufficiently robust dataset of annual wet weather exceedance days.⁷¹ The ASBS monitoring data, with only three wet weather events over two wet weather seasons and no daily measurement of flow/discharge, were insufficient to use in such a RAA validation exercise.

In the future, however, MS4 discharge data along with receiving water data collected under the NSMB EWMP Coordinated Integrated Monitoring Program (CIMP) may be used to help with model re-calibration, if necessary.

Second, even if the data were usable in the model for the RAA, it was not necessary to include the data in the model. Part VI.C.5.a.ii of the LA County MS4 Permit specifies the water body-pollutant categories that must be addressed in the RAA. These categories include: (1) water body-pollutant combinations addressed in a TMDL; (2) water body-pollutant combinations listed on the Clean Water Act section 303(d) list; and (3) pollutants which exceed applicable receiving water limitations *and for which MS4 discharges may be causing or contributing to the exceedance*. The category that the Petitioners focus on is category 3. The Permittees did not identify any category 3 pollutants to include in the RAA based on the ASBS data analysis in Appendix E of the NSMB EWMP (i.e., the ASBS Compliance Plan) as summarized in Part V.A.1, above.

No linkage was shown between the MS4 stormwater data and the ocean receiving water quality data collected in 2013-2014 pursuant to the ASBS Special Protections using the decision process in Attachment 1. The pollutants identified as altering natural ocean water quality were not observed in the MS4 stormwater discharge at levels exceeding the applicable Ocean Plan standards; and those pollutants identified as elevated in MS4 stormwater discharges were not observed at levels or a frequency in the receiving water that was deemed as altering natural ocean water quality. Given the outcome of the data evaluation per the ASBS Special Protections flowchart, it was not necessary for the NSMB EWMP's RAA to include these pollutants.

That notwithstanding, the RAA approach is designed to address multiple pollutants as follows. The RAA evaluates the simulated existing load for the priority (or controlling) pollutant for each

⁶⁹ See NSMB EWMP, Section 4.5.1, p. 91 (Section 20, RB-AR 5457 - 5459).

⁷⁰ See NSMB EWMP, Figure 11, p. 92 (Section 20, RB-AR 5458).

⁷¹ See NSMB EWMP, Section 4.6, pp. 94 - 96 (Section 20, RB-AR 5460 - 5462).

modeled NSMB subwatershed, then compares this value to the allowable load for the same pollutant.⁷² The controlling pollutant for most subwatersheds in the NSMB EWMP area is bacteria. The difference between the simulated existing load and the calculated allowable load is the amount of load that needs to be reduced within the modeled subwatershed to reach compliance. The RAA then identifies and evaluates BMP implementation scenarios within the NSMB EWMP area to meet the allowable load. As described in the EWMP, these BMP implementation scenarios maximize stormwater retention and, as a result, are expected to effectively address other pollutants, such as PAHs and metals, which may be elevated in MS4 discharges to ASBS 24.⁷³

Additionally, per the decision framework in Attachment 1, the Permittees are not required to implement additional non-structural and structural controls to address stormwater discharges to the ASBS. Therefore, the outcome of the data consideration in Appendix E of the NSMB EWMP did not require the Permittees to propose additional or different BMPs in the EWMP to protect ASBS 24. That notwithstanding, the Permittees commit to a goal of achieving additional reductions in pollutant loading in recognition of the value of ASBS 24. Specifically, the Permittees identify potential enhancements to non-structural controls for the purpose of further reducing pollutant loading to the ASBS in Appendices C and D to the ASBS Compliance Plan and provide an estimate of reductions in debris, total suspended solids (TSS), and copper loading.⁷⁴

B. Application of ASBS Non-Stormwater Standards and Consideration of ASBS Non-Stormwater Data

1. Response to Petitioners' Contention that the NSMB EWMP and RAA Fail to Utilize Applicable ASBS Non-Stormwater Standards

In addition to incorporating applicable ASBS stormwater standards as discussed earlier, the NSMB EWMP also incorporates applicable ASBS non-stormwater standards – namely, the prohibition on non-stormwater discharges to the ASBS. As required by the LA County MS4 Permit, the EWMP implements without modification the prohibition on non-stormwater discharges to the ASBS consistent with the Ocean Plan General Exception. Section 4.1.1 of the EWMP, Non-stormwater Discharge Screening, addresses this requirement to eliminate 100 percent of non-exempt non-stormwater discharges through the MS4.⁷⁵ In Section 5.3.2, Reasonable Assurance Analysis – Dry Weather, the Permittees commit to compliance with the

⁷² The concept of a controlling pollutant means the one that requires the most aggressive controls in comparison with other pollutants.

⁷³ See NSMB EWMP, Section 5.1.1.1, pp. 99 - 100 (Section 20, RB-AR 5465 - 5466). See also NSMB EWMP, Attachment C-2, Example TLR Calculations (Section 20, RB-AR 5717 - 5718).

⁷⁴ See NSMB EWMP, Appendix E (Section 20, RB-AR 5887 - 5895).

⁷⁵ The Permittees also recognized and stated their commitment to meet this requirement in their EWMP Work Plan, stating “[i]n the ASBS-portion of the NSMBCW EWMP Area and in accordance with the [Ocean Plan] General Exception, non-authorized dry weather discharges have effectively been stopped and responsible agencies will continue to take necessary actions to prevent dry weather discharges.” NSMB EWMP, Appendix B, p. 64 (Section 20, RB-AR 5608 - 5704).

MS4 Permit's requirement to eliminate 100 percent of non-exempt non-stormwater discharges from the MS4.⁷⁶

The commitment to eliminate 100 percent of non-exempt non-stormwater MS4 discharges is consistent with the non-stormwater discharge prohibition in Section I.A.1.e of Attachment B to State Water Board Resolution No. 2012-0012. This prohibition on non-stormwater discharges to the ASBS is also a provision of the LA County MS4 Permit. Parts III.A.1 and III.A.3 impose a prohibition on non-stormwater discharges to ASBS 24 that is the same as the Ocean Plan General Exception. The Ocean Plan General Exception allows six categories of non-stormwater discharges; these same categories are identified in Part III.A.3, Conditional Exemptions from Non-Storm Water Discharge Prohibition within an ASBS, of the Permit. The Permit clearly states, “[c]onditionally exempt non-storm water discharges shall not cause or contribute to an exceedance of applicable receiving water limitations and/or water quality based effluent limitations in this Order or the water quality objectives in Chapter II of the Ocean Plan, or alter natural ocean water quality in an ASBS”.⁷⁷ This provision regulates the water quality of conditionally exempt non-stormwater discharges from the MS4 to the ASBS. The Permit does not allow customization of the requirements of Part III.A pertaining to the non-stormwater discharge prohibition through a WMP or EWMP. As such, regardless of whether Permittees are implementing a WMP or EWMP, the Permittees must implement these provisions as set forth in the Permit without modification. As stated above, the Permittees have committed to do so in the NSMB EWMP.

The EWMP proposes a program to eliminate all non-stormwater discharges through the MS4 that consists of series of steps that include: (i) non-stormwater outfall based screening, (ii) source identification, (iii) monitoring, and (iv) abatement/elimination. These steps are outlined in Table 11 and shown in Figure 6 of the EWMP and are also described in more detail in Section 4 of the CIMP for the North Santa Monica Bay Coastal Watershed EWMP Group.⁷⁸ These steps implement both the requirements of the LA County MS4 Permit as well as the Ocean Plan General Exception by continuing to prohibit non-stormwater discharges to the ASBS.⁷⁹

2. Consistency of the NSMB EWMP Dry Weather RAA with ASBS Non-Stormwater Standards

For non-stormwater MS4 discharges, the NSMB EWMP uses a “four part test” to document reasonable assurance of compliance with the applicable water quality-based effluent limitations

⁷⁶ See NSMB EWMP, pp. 140 - 145 (Section 20, RB-AR 5506 - 5511). Petitioners question the Permittees' commitment through this process to work toward eliminating, diverting or treating significant non-stormwater discharges that are unauthorized and determined to be causing or contributing to receiving water limitation or water quality based effluent limitation exceedances, perhaps taking issue with the Permittees' statement that they will “*strive* to eliminate, divert or treat significant non-stormwater discharges” (emphasis added). The Los Angeles Water Board interprets this not as a lack of commitment, but rather an honest acknowledgement of the on-going challenge of controlling all non-stormwater discharges.

⁷⁷ See LA County MS4 Permit, Part III.A.3.c (Section 1, RB-AR 30).

⁷⁸ See NSMB EWMP, pp. 66 - 67 (Section 20, RB-AR 5432 - 5433).

⁷⁹ Relevant provisions of the LA County MS4 Permit related to these steps include Part III.A.4.c.-d. pertaining to monitoring and abatement of non-stormwater discharges; Part VI.C.5.b.iv.(2) “Non-Storm Water Discharge Measures;” Parts VI.D.4 and VI.D.10 pertaining to the Permittees' Illicit Connection/Illicit Discharge Elimination Programs; and Attachment E Part IX “Non-Storm Water Outfall Based Screening and Monitoring” (see Section 1, RB-AR 31 - 32, 62, 81 - 86, 137 - 141 and Section 31, RB-AR 9865 - 9870).

and receiving water limitations addressed in the NSMB EWMP. The four part test consisted of evaluating designated compliance points along the shoreline using the following four criteria: (1) presence of effective diversion/disinfection of MS4 discharge at the MS4 outfall adjacent to the shoreline compliance point; (2) absence of any MS4 outfall adjacent to the shoreline compliance point; (3) shoreline monitoring data demonstrate dry weather compliance with the Santa Monica Bay Beaches Bacteria TMDL receiving water limitations; and (4) absence of non-stormwater discharge from any adjacent MS4 outfall. If any of the four evaluation criteria were met, that constituted demonstration of reasonable assurance of compliance with the TMDL receiving water limitations and other water quality objectives addressed in the NSMB EWMP.⁸⁰

Petitioners appear to misunderstand the purpose of the dry weather RAA that is presented in Sections 4.1 and 5.3.2 of the NSMB EWMP.⁸¹ Petitioners mistakenly state that the semi-quantitative conceptual model used in the dry weather RAA “establishes compliance” with the Permit’s non-stormwater discharge prohibition. This is not an accurate assessment as explained below.

First, the RAA required by the LA County MS4 Permit was not intended to evaluate the Permittees’ planned actions to eliminate all non-exempt, non-stormwater discharges pursuant to the non-stormwater discharge prohibition in Part III.A.1 of the Permit. The RAA models identified in the Permit are designed to quantitatively evaluate pollutant load reductions – particularly for stormwater discharges. They provide reasonable assurance that the load reductions will achieve the numeric water quality-based effluent limitations and receiving water limitations. RAA models are not needed to evaluate load reductions from elimination of all non-stormwater discharges because no pollutants are discharged. This is apparent from Part VI.C.5.b.iv.(5)(a)-(c) of the LA County MS4 Permit:

The objective of the RAA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees’ MS4 discharges achieve applicable water quality based effluent limitations and do not cause or contribute to exceedances of receiving water limitations.

- (a) Permittees shall demonstrate using the RAA that the activities and control measures identified in the Watershed Control Measures will achieve *applicable water quality-based effluent limitations and/or receiving water limitations in Attachments L through R* with compliance deadlines during the permit term.
- (b) Where the TMDL Provisions in *Part VI.E and Attachments L through R* do not include interim or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines during the permit term, Permittees shall identify interim milestones and dates for their achievement to ensure adequate progress toward achieving interim and final water quality-based effluent limitations and/or receiving water limitations with deadlines beyond the permit term.
- (c) For water body-pollutant combinations not addressed by TMDLs, Permittees shall demonstrate using the RAA that the activities and control measures

⁸⁰ See NSMB EWMP, Section 4.1, pp. 63 - 64 (Section 20, RB-AR 5429 - 5430).

⁸¹ See Section 20, RB-AR 5429 - 5430, 5506 - 5508.

identified in the Watershed Control Measures will achieve *applicable receiving water limitations* as soon as possible.

(Emphasis added).

Second, the purpose of the four part test used in the dry weather RAA methodology was not to “establish compliance” as the Petitioners contend, but rather to provide lines of evidence to demonstrate reasonable assurance that MS4 non-stormwater discharges did not appear to be causing or contributing to dry weather receiving water exceedances. The dry weather RAA does not “allow additional exceedances [of the Santa Monica Bay Beaches Bacteria TMDL] to be deemed acceptable” as suggested by the Petitioners.⁸² Rather, the EWMP specifically acknowledges that the dry weather compliance deadlines for the Santa Monica Bay Beaches Bacteria TMDL have passed, and states that the analysis is not intended to support or justify a new compliance schedule.⁸³

The Petitioners also contend that the screening criteria in the dry weather RAA are inconsistent with the non-stormwater discharge prohibition. However, criteria 1, 2 and 4 of the four part test require documentation of non-existence of MS4 outfalls or elimination of non-stormwater discharges from MS4 outfalls. Criterion 3 requires a demonstration that there have been no exceedances of summer and winter dry weather bacteria receiving water limitations per the Santa Monica Bay Beaches Bacteria TMDL provisions in Attachment M, Part A of the LA County MS4 Permit. Given the stringent requirements of this TMDL, bacteria is considered a controlling pollutant for both stormwater and non-stormwater MS4 discharges for the NSMB EWMP area. Additionally, there is a long-term shoreline monitoring dataset for bacteria. For these reasons, bacteriological water quality conditions are appropriately used as a criterion in the dry weather RAA.

Finally, notwithstanding the results of this four part test, the NSMB EWMP along with its companion CIMP lays out a detailed non-stormwater screening process (as described above), and states that the NSMB EWMP Group’s non-stormwater screening process plays an important role in an on-going demonstration of reasonable assurance of compliance for non-stormwater discharges from the MS4. The EWMP also includes a plan to reevaluate the dry weather RAA with updated data biennially per the adaptive management process where there are any MS4 outfalls (major and minor).⁸⁴

3. Response to Petitioners’ Claim that the NSMB EWMP and RAA Fail to Consider ASBS Non-Stormwater Data

Many of Petitioners’ contentions focus on the draft ASBS Compliance Plan and do not consider the additional inspections of outfalls for non-stormwater discharges presented in the NSMB EWMP.⁸⁵ Petitioners take issue with the draft ASBS Compliance Plan for not proposing or

⁸² See Petition, Memorandum of Points and Authorities, at p. 25.

⁸³ See NSMB EWMP, Section 5.3.2, p. 140 (Section 20, RB-AR 5506).

⁸⁴ See NSMB EWMP, Section 5.3.1, p. 137 (Section 20, RB-AR 5503).

⁸⁵ In their discussion on “Regulatory Background”, Petitioners also mischaracterize the extent and outcome of the outfall inspections conducted in 2012 and 2013. (See Petition, Part II.B.4.b of Memorandum of Points and Authorities, at pp. 8 - 9.) To clarify, according to the September 2015 revised ASBS Compliance Plan, the Permittees inspected 31 outfalls (not 13 as indicated by the Petitioners) over a two-year period covering eight months. (See NSMB EWMP, Appendix E, Section 3.2.4 and Tables 3-3 and 3-4, pp. 50 - 53 [Section 20, RB-AR 5416 - 5419]. Thirteen outfalls

reporting additional inspections or monitoring of non-stormwater discharges, while simultaneously taking issue with the EWMP for proposing to repeat the process conducted pursuant to the Ocean Plan General Exception.⁸⁶ Petitioners disregard that about half of the NSMB EWMP area does not drain to ASBS 24. Additional outfall inspections, and commitments for future inspections and monitoring, are appropriately included in the NSMB EWMP and its companion CIMP as required by the LA County MS4 Permit. Furthermore, continual screening of MS4 outfalls is appropriate due to the highly variable and sometimes fleeting nature of non-stormwater discharges.

With regard to Petitioners' allegations that the EWMP does not consider the data submitted in the ASBS Compliance Plan, Petitioners are mistaken. Not only does the EWMP consider these data since the ASBS Compliance Plan is a part of the EWMP, but the EWMP also contains additional, more recent non-stormwater outfall screening data. These data are from 2014-2015, while the ASBS Compliance Plan non-stormwater discharge inspection data are from 2012-2013. In Table 31 and Appendix F, the EWMP presents the results of additional inspections for non-stormwater discharges for major MS4 outfalls, which were conducted on August 19, October 21, 29, 30, and November 12, 2014, and for minor MS4 outfalls on April 13, 2014, May 19, 2015, and June 19, 2015.

The Petitioners express concern that initial screening of outfalls for non-stormwater discharges will not be complete until December 2017. The Permit requires that source identifications are completed for 25% of outfalls with significant non-stormwater discharges by December 28,

were inspected in 2012; in 2013, these thirteen were re-inspected and an additional 18 outfalls were inspected for a total of 31 outfalls.) During this period, the Permittees observed non-stormwater discharges on 73 out of 251 occasions. During the 2012 inspections, most of which were prior to the adoption of the ASBS Special Protections in March 2012, there were 59 observations of non-stormwater discharges, 16 of which were unauthorized (i.e., over-irrigation, "sudsy water"). During the 2013 inspections, there were 14 observations of non-stormwater discharges, 3 of which were unauthorized (i.e., over-irrigation, construction site discharge). While there were repeated incidences of undetermined or unauthorized non-stormwater discharges in 2012 at ASBS-001, ASBS-002, and ASBS-004, according to the 2013 inspections, these discharges have either ceased, or have been significantly reduced. In conclusion, of the 251 outfall inspections, unauthorized or undetermined non-stormwater discharges were identified in approximately 10% of inspections. (See NSMB EWMP, Appendix E, Section 3.2.4 and Tables 3-3 and 3-4, pp. 50 - 53 [Section 20, RB-AR 5416 - 5419].)

The Petitioners also express concerns about non-stormwater discharges identified as "hillside dewatering" or "natural stream" flows in the ASBS Compliance Plan, and suggest that additional data are required to support these characterizations. However, there is no requirement in the ASBS Special Protections for Permittees to provide additional data beyond what has already been included for the non-stormwater discharge inspections in the ASBS Compliance Plan. They further suggest that Permittees must indicate whether the discharges are permitted or unpermitted. However, this is not necessary, since hillside dewatering and natural stream flows are among the allowed non-stormwater discharges in the ASBS Special Protections and in the LA County MS4 Permit. (See LA County MS4 Permit, Part III.A.3.a, p. 30 [Section 1, RB-AR 30] and State Water Board Resolution No. 2012-0012, Attachment B, Part I.A.1.e.(2), p. 2 [Section 30, RB-AR 7051].)

The Petitioners also allege that the draft ASBS Compliance Plan "distinguishes, without basis, between discharges that land on the beach in ASBS 24, and those that flow to the surf line." (Petition, Memorandum of Points and Authorities, at p. 9.) However, as stated above, of the 251 inspections, in only approximately 10% were there observations of unauthorized or undetermined non-stormwater discharges. The remaining non-stormwater discharges that were observed were from sources that are allowed, as described above. For unauthorized and undetermined non-stormwater discharges, the ASBS Compliance Plan outlines a suite of measures that include focused outreach, inspections, and enforcement -- not just outreach as suggested by the Petitioners. Regardless, the Permittees commit to ensuring that discharges of non-authorized, non-stormwater do not occur, whether they reach the surf or not. (See NSMB EWMP, Appendix E, Section 3.2.4.2, p. 50 [Section 20, RB-AR 5416].)

⁸⁶ Petition, Memorandum of Points and Authorities, at p. 21.

2015, and for the remaining 75% of outfalls by December 28, 2017.⁸⁷ Petitioners also express concerns about a delay in implementation. However, many of the measures identified in Appendices B and D of the EWMP address non-stormwater discharges. These measures are currently being implemented, and will continue to be; therefore, there will not be a two-year delay. Additionally, Petitioners again disregard that the EWMP area includes significant areas that are not subject to the ASBS Special Protections or the deadlines set forth therein.

As required by the ASBS Special Protections, for those EWMP areas draining to ASBS 24, Section 3.0 “Dry Weather Compliance” of the ASBS Compliance Plan outlines the measures the Permittees have been, and are continuing to, undertake to eliminate non-authorized, non-stormwater discharges to ASBS 24, how these measures will be maintained over time, and how these measures are monitored and documented.⁸⁸

With regard to the dry weather RAA for the NSMB EWMP, the Petitioners incorrectly state that “the RAA for dry weather discharges considers no data.”⁸⁹ Five years of shoreline bacteria monitoring data were considered in the evaluation presented in Table 31 of the EWMP.⁹⁰ As noted above, there is an extensive shoreline monitoring dataset for bacteria. For these reasons, bacteriological water quality conditions are appropriately used in the dry weather RAA. In contrast, while valuable, the non-stormwater data presented in the ASBS Compliance Plan only consists of visual monitoring of outfalls and a record of whether there was non-stormwater discharge. No water quality parameters were measured during the outfall dry weather inspections nor were they required to be by ASBS Special Protections, Part IV - Monitoring Requirements. Therefore, though considered and included in the EWMP in Appendix E, the data set did not meet data requirements for use in the RAA.

4. Response to Petitioners’ Concerns Regarding the Status of Revised ASBS Compliance Plan Relative to NSMB EWMP

Regarding the status of the ASBS Compliance Plan itself, as previously mentioned, the County of Los Angeles, Los Angeles County Flood Control District, and City of Malibu submitted a revised ASBS Compliance Plan in September 2015, addressing the State Water Board’s comments. Specifically, in response to the State Water Board’s concerns regarding ASBS-required sampling, and measures to prevent alteration of natural ocean water quality, and to prevent non-stormwater discharges, the Permittees revised the ASBS Compliance Plan to include additional sampling, monitoring, and reporting of non-stormwater discharges.⁹¹ For ocean receiving water monitoring, the ASBS Compliance Plan was revised to include data and discussions resulting from additional sampling at three sites (24-BB-03R, 24-BB-03Z, and 24-BB-02Z) during a December 1, 2014 storm event. Based on these results, and in accordance with the ASBS Exception, there were no exceedances of natural water quality.⁹² Furthermore, the revised ASBS Compliance Plan includes additional future sampling, including sites ASBS-

⁸⁷ Permittees have reported that they completed screening for 100% of major outfalls by December 2015 – two years ahead of the required schedule in the Permit.

⁸⁸ See NSMB EWMP, Appendix E, p. 38 (Section 20, RB-AR 5789).

⁸⁹ See Petition, Memorandum of Points and Authorities, at p. 3.

⁹⁰ See NSMB EWMP, Table 31, p. 141 (Section 20, RB-AR 5507).

⁹¹ See NSMB EWMP, Appendix E, Section 3.0, pp. 38 - 39 (Section 20, RB-AR 5789 - 5790).

⁹² See NSMB EWMP, Appendix E, Section 4.1.4, p. 69 (Section 20, RB-AR 5820).

S02 and ASBS-028 for one additional event, and site 24-BB-3-03R and its associated outfall 24-BB-03Z until three sampling events are completed. Results from the additional sampling were reported to the State Water Board in fall 2016 in accordance with ASBS Special Protections Section I.A.2.h.

This revised ASBS Compliance Plan is the version that is incorporated into the NSMB EWMP. There is no requirement in the Ocean Plan's ASBS Special Protections or in the LA County MS4 Permit that the ASBS Compliance Plan be approved prior to its inclusion in the EWMP.⁹³ If, after a final review of the revised ASBS Compliance Plan by the State Water Board, there are any inconsistencies between the ASBS Compliance Plan and EWMP, the NSMB EWMP Group will need to update its EWMP through the adaptive management process to ensure consistency with the approved ASBS Compliance Plan. In part, Part VI.C.8.a.i.(4) of the LA County MS4 Permit requires that Permittees reevaluate water quality priorities based on more recent water quality data for MS4 discharges and for the receiving water and reassess sources of pollutants in MS4 discharges, while Part VI.C.8.b.i requires that Permittees must submit an updated EWMP with an updated RAA by June 30, 2021. As such, updates to the NSMB EWMP may include, but are not limited to, incorporation of additional category 3 pollutants based on an evaluation of data from the ASBS monitoring efforts relative to applicable water quality objectives, an update to the RAA to address any such pollutants, and commitments to implement additional structural and/or non-structural BMPs to address the additional pollutants, if necessary.

VI. RESPONSES TO PROCEDURAL CONTENTIONS RELATED TO THE LOS ANGELES WATER BOARD'S SEPTEMBER 7, 2016 MEETING

Petitioners make a variety of procedural arguments to support their contention that the Los Angeles Water Board denied Petitioners a fair "hearing" on September 7, 2016 when the Board considered the Petitioners' May 19, 2016 petition. Petitioners' primary grievance is that the Los Angeles Water Board failed to appoint separate counsel in order to separate "adjudicative functions from advocacy/prosecutorial functions." All of their arguments in this regard, however, are premised on three incorrect assertions: 1) the Los Angeles Water Board's consideration of the petition for reconsideration was an "appeal" of the Executive Officer's approval of the NSMB EWMP, 2) the Administrative Procedure Act (APA) applied to the Los Angeles Water Board's consideration of the petition and an evidentiary hearing was required, and 3) the APA required Board counsel and staff to separate functions at the September 7, 2016 proceeding. Without these assertions, Petitioners' arguments fail. Petitioners also erroneously contend that they were denied due process because the Los Angeles Water Board applied the incorrect standard of review in considering whether to review the merits of the petition.

⁹³ Given the deadlines for submitting the draft EWMP and the revised EWMP, and for receiving approval of the EWMP, it was not possible to align the timing of review and approval of the revised ASBS Compliance Plan with the review and approval timeline for the EWMP.

A. The Los Angeles Water Board Was Not Required to Separate Functions of Its Counsel and Staff

1. The Los Angeles Water Board's Consideration of the Petition for Reconsideration Was Not an "Appeal" of the Executive Officer's Approval of the NSMB EWMP

Petitioners repeatedly refer to their petition, and the Los Angeles Water Board's September 7, 2016 proceeding, as an "appeal" of the Executive Officer's approval of the NSMB EWMP to the Los Angeles Water Board. Petitioners fundamentally misunderstand or misstate the provisions of the LA County MS4 Permit and the September 7, 2016 proceeding where the Los Angeles Water Board considered whether to review the merits of the petition for reconsideration.

Actions that can be taken by a regional water board include such actions by its executive officer pursuant to powers and duties delegated to him by the regional water board. In other words, delegated actions of an executive officer are considered actions of the regional water board. Pursuant to Water Code section 13223, subdivision (b), a regional water board has the authority to delegate any of its powers and duties, with limited exceptions, to its executive officer. Such actions constitute actions of the board. The Los Angeles Water Board has done so in Resolution No. R14-005, "Delegation of Authority to Executive Officer." In its delegation, the Board has delegated "to its Executive Officer all powers and duties to conduct and to supervise the activities of the Regional Board," including, but not limited to, "exercising any powers and duties of the Regional Board."⁹⁴ The Board also specifically delegated to its Executive Officer, in Part VI.C.4 (Table 9) of the LA County MS4 Permit, the authority to "approve or deny" a final WMP/EWMP on behalf of the Board.⁹⁵ Accordingly, when the Executive Officer approved the NSMB EWMP on April 19, 2016, he acted pursuant to delegated authority and on behalf of the Los Angeles Water Board.

The LA County MS4 Permit also provides that a permittee or member of the public may request review by the Los Angeles Water Board of any formal determination or approval made by the Executive Officer pursuant to the permit by filing a petition.⁹⁶ This provision, however, does not establish any requirements or guidelines as to how the Board should or would consider any such request. In fact, there is no established process found in law for these types of regional water board considerations. It is entirely at the Los Angeles Water Board's discretion whether to review a request for reconsideration and, if so, how to resolve it. As such, the Board was under no mandatory duty to review the petition at all, and in deciding whether to review the request, was not required to follow any process.⁹⁷

The proceeding before the Los Angeles Water Board on September 7, 2016 was a meeting for the Board to consider whether to review or reconsider the Executive Officer's approval of the

⁹⁴ This delegation of authority is periodically updated by the Board, most recently in 2014.

⁹⁵ Order No. R4-2012-0175 as amended by Order WQ 2015-0075, Table 9, p. 55 (Section 1, RB-AR 54 - 55).

⁹⁶ Order No. R4-2012-0175 as amended by Order WQ 2015-0075, Part VI.A.6, p. 42 (Section 1, RB-AR 42). A permittee or member of the public may request such review by filing a petition with the Los Angeles Water Board within 30 days of the effective date of the notification of the decision.

⁹⁷ See *People v. Barry* (1987) 194 Cal.App.3d 158, 171 (noting the distinction between legislative use of a "petition" and an "appeal" and that a "petition" is commonly associated with discretionary rather than mandatory review).

NSMB EWMP in light of the claims made in the petition. The Executive Officer's action, however, was an action of the Board itself.⁹⁸ Such consideration was not and could not be an "appeal." In legal terms, an "appeal" seeks review of a decision by a lower body to a higher body.⁹⁹ In this instance, there was no lower body and higher body, there was just one body. The Los Angeles Water Board was the same body that approved the NSMB EWMP and declined to review the merits of the petition. Petitioners' many attempts to classify the Los Angeles Water Board's proceeding as an "appeal", and likewise citing to case law with non-analogous facts as purported support, fail since the Board's own action cannot be appealed to itself.

Rather, the petition was a request for the Los Angeles Water Board to *reconsider* its own action. In considering whether to review the merits of the petition, separation of functions was not warranted or required to advise the same body. The functions of Board counsel and staff remained entirely the same – to advise the Board. It was entirely appropriate for the Board to hear from and be advised by its Executive Officer and other Board staff to understand why the Executive Officer determined that the NSMB EWMP met the requirements of the LA County MS4 Permit. In so doing, it was appropriate for Board staff, as the Board's advisors, to provide the Board with necessary background and context for the claims so the Board could make an educated decision as to whether, in the first instance, to review the merits of the petition or not.¹⁰⁰

2. The Administrative Procedure Act Did Not Apply to the Los Angeles Water Board's Consideration of the Petition for Reconsideration and No Evidentiary Hearing was Required

Petitioners assume without support that the Administrative Procedure Act (APA) applied to the Los Angeles Water Board's consideration of whether to review the merits of the petition and that the Board's September 7, 2016 proceeding was required to be conducted as a hearing. They also contend that the "meeting/hearing distinction" was somehow a ruse by the Board to "rationalize counsel's conflict of interest." Petitioners are incorrect on all accounts.

Government Code section 11400.10 states that Chapter 4.5 of the APA is applicable to adjudicative proceedings commenced on or after July 1, 1997. Government Code section 11405.20 defines "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." The September 7, 2016 proceeding at which the Los Angeles Water Board determined whether to reconsider the Executive Officer's prior approval was not an adjudicative proceeding. In making that determination, the Board did not consider additional evidence not already previously provided and considered by the Board in approving the NSMB EWMP. The Board considered documentation in the record for the Executive Officer's approval of the NSMB EWMP (i.e., the

⁹⁸ Wat. Code, § 13223, subd. (b).

⁹⁹ Black's Law Dictionary defines an appeal as "a proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰⁰ Petitioners feel compelled to note that "staff's lengthy slide show presentation...went well over the officially allotted time." In fact, Board staff were not provided with any time limits. On September 1, 2016, Board staff transmitted an Order of Presentations and Time Allocations to the Petitioners and permittees in response to their requests for time. (Section 28, RB-AR 6463.) The allocated times identified for Board counsel and staff were specifically noted as being approximate. In addition, it is not uncommon for such approximate times to be exceeded based on questions from the Board during the presentation, which did occur at this meeting.

various iterations of the EWMP, Board comments on the EWMP, etc.), as well as the petition and responses prepared by Board staff, permittees, and interested persons to the petition. Further, the Board did not make a “decision” as defined in the APA as the Board only made a procedural determination not to reconsider its prior action to approve the NSMB EWMP.¹⁰¹ Despite Petitioners’ claims, the Board did not determine facts or issue a decision regarding the merits of the petition. As noticed, the Board solely determined whether to reconsider its own prior action made through its Executive Officer. Thus, the APA did not apply to the Board’s consideration of the petition and the Board was not required to hold an evidentiary hearing solely to determine whether to reconsider an action it had already made.¹⁰² Moreover, nothing in the State Water Board’s regulations, the Porter-Cologne Water Quality Control Act, or the federal Clean Water Act required an adjudicative proceeding for this matter. Because the Los Angeles Water Board’s September 7, 2016 proceeding was not a hearing, it was appropriate for the Board to call it a meeting.¹⁰³ Further, regardless of whether the proceeding was called a “meeting” or a “hearing,” the substance of the proceeding, and not what it is called, determines what rights, if any, participants have.

Lastly, it must be noted that the State Water Board itself is not required to hold an evidentiary hearing when it determines whether to review a petition, nor does it conduct evidentiary hearings. Further, even if the State Water Board decides to review a petition, it does not necessarily conduct a hearing. The State Water Board’s regulations pertaining to petitions provide the State Water Board with discretion as to whether to hold a hearing or not.¹⁰⁴ While the Los Angeles Water Board held a public meeting, as the Bagley-Keene Open Meeting Act requires it to do, that does not mean that the Los Angeles Water Board conducted a hearing subject to the APA.

¹⁰¹ See Gov. Code, § 11410.10 (“This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.”); *Id.* § 11405.50 (“‘Decision’ means any agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.”)

¹⁰² This is not to say that the Los Angeles Water Board could not have conducted an evidentiary hearing pursuant to the APA if it wanted to. Where there are no statutory or regulatory requirements concerning a matter before the Board, the Board has the discretion to decide to hold an evidentiary hearing or not. Had the Board determined to review the merits of the petition at a later date, it could have decided that an evidentiary hearing would be helpful to further develop the facts to be considered. However, in this case, the Board did not notice or conduct a hearing.

¹⁰³ Petitioners also assert that the Board’s September 7, 2016 proceeding was not properly noticed as the proceeding was noticed as a “meeting” rather than a “hearing.” The basis for Petitioners’ assertion is their belief that the proceeding was required to be conducted as an evidentiary hearing. As noted above, the Board disagrees that a hearing was required to be conducted, nor was a hearing conducted. As such, the Board’s notice was proper.

¹⁰⁴ See Cal. Code Regs., tit. 23, § 2052, subd. (c) [“Before taking final action, the state board may, in its discretion, hold a hearing for the purpose of oral argument or receipt of additional evidence or both.”]; *Id.* § 2050.6, subd. (b) [“The petitioner may request that the state board conduct a hearing to consider testimony, other evidence, and argument. Such request shall be supported by a summary of contentions to be addressed or evidence to be introduced and a showing of why the contentions or evidence have not been previously or adequately presented. A request to conduct a hearing shall be submitted at the time the petition is filed or as soon as possible thereafter.”] Notably, in their May 19, 2016 petition, Petitioners do not request that either the Los Angeles Water Board or State Water Board conduct a hearing to consider supplemental testimony, other evidence, or argument.

3. Even If the APA Did Apply, Board Counsel and Staff Were Not Required to Separate Functions at the September 7, 2016 Meeting

Assuming that the APA applied to the Los Angeles Water Board's September 7, 2016 proceeding, Petitioners contend that they were denied due process because the Los Angeles Water Board failed to separate functions. Petitioners' contention fails because of the nature of the proceeding and the function of the Board's staff and counsel.

Although the APA did not apply to the Los Angeles Water Board's September 7, 2016 proceeding, even if it did, there would be no obligation or due process requirement for the Board to separate functions and appoint separate counsel and staff. Government Code section 11425.10 provides that "[t]he adjudicative function shall be separated from the *investigative, prosecutorial, and advocacy functions* within the agency..." (emphasis added.) The Board's September 7, 2016 proceeding involved none of these functions. At the proceeding, the Board considered whether to review a petition seeking reconsideration of the final approval of the EWMP. The proceeding was not an investigation. No investigative order was under consideration, and no investigative functions were involved. Likewise, the proceeding did not involve a prosecution. Neither sanctions, liability, nor criminal, civil, or administrative penalties of any sort were being sought during the proceeding. There was nothing to prosecute, and, therefore, no prosecutorial function was involved.

Board staff and attorneys also had no advocacy function prior to or at the September 7, 2016 proceeding. *Howitt v. Superior Court* held that, "[b]y definition, an advocate is a partisan for a particular client or point of view."¹⁰⁵ Board staff did not advocate or even recommend that the Board take a particular action. Prior to Board staff's presentation at the proceeding, counsel stated that staff was not going to make a recommendation whether the Board should review the merits of the petition or not.¹⁰⁶ The purpose of staff's written responses to the petition and oral presentation was to provide the Board with necessary background and context for the claims so the Board could make an educated decision as to whether, in the first instance, to review the merits of the petition or not.

Petitioners provide no specific factual basis for its conclusions that staff and counsel acted as advocates. Petitioners make no reference to any statements in the transcript or audio recording of the September 7, 2016 proceeding indicating any advocacy on the part of counsel or staff. This is because both the transcript and audio recording make clear that no advocacy took place. Petitioners merely argue that "[e]xplaining the basis' for the decision necessarily implies defending the merits of the approval..."¹⁰⁷ Petitioners appear to assert that anytime a Board staff or attorney advises the Board on a factual or legal issue that is contrary to positions held by Petitioners, the Board staff or attorney is advocating a position. Such a theory mischaracterizes the role of Board staff and counsel. Board staff and counsel's role is distinct from that of an advocate, who picks a particular view and advocates only for that view. In a non-prosecutorial, non-investigative proceeding, Board staff's participation exists for the purpose of advising and assisting the Board, including on technical facts and policy choices. Likewise, attorneys for the Board advise and assist the Board, which includes the Board members and its entire staff.

¹⁰⁵ (1992) 3 Cal.App.4th 1575, 1585.

¹⁰⁶ See Regional Board Staff Presentation (Section 28, RB-AR 6470); Transcript for September 7, 2016 Board Meeting, p. 30 (Section 28, RB-AR 6529); and Audio File of September 7, 2016 Meeting (from 00:27:40 to 00:28:10) (Section 28, RB-AR 6661).

¹⁰⁷ Petition, Memorandum of Points and Authorities, at p. 16.

Board attorneys may properly advise the Board on procedural, evidentiary, and other legal issues. These issues include advising the Board on any procedural or substantive legal requirements and/or interpretations, or lack thereof, and the various options in the Board's consideration of a petition seeking review of the Executive Officer's delegated action. Providing technical, legal, or policy advice is not advocating for a position. As Board counsel and staff are advisors to the Board rather than advocates for a particular position, the same counsel may advise staff in the Executive Officer's approval of the NSMB EWMP and the Board in its consideration of the petition seeking review of that approval.¹⁰⁸ In the end, attorneys for the Board cannot be serving as a representative for both the decision maker and the "advocacy staff" if there is no advocacy staff to begin with. In a non-prosecutorial, non-investigative proceeding, staff's role is well-settled. Staff and attorneys merely advise the Board members.

As the California Supreme Court has recognized, separation of functions in adjudicatory proceedings is inextricably linked with the prohibition on ex parte communications.¹⁰⁹ While different, they serve a similar purpose. As such, the exceptions to the ex parte communications prohibition are instructive and further support the position that counsel advising board staff may also advise the board itself. The provisions of Government Code sections 11430.10 to 11430.80 obviate the need for a separation of functions in non-prosecutorial proceedings, such as that held on September 7, 2016. Subject to limited exceptions, Government Code section 11430.10 generally prohibits communications concerning issues in a pending adjudicative proceeding between the presiding officer (in this case the Board) and an employee of the agency that is a party.¹¹⁰ One such exception provides that a communication "for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage" is permissible.¹¹¹ Another exception (specifically referencing the water boards) excepts the communication from the general ex parte communications prohibition rules without regard to whether the person previously served as investigator, prosecutor, or advocate. Government Code section 11430.30 provides that a communication is not an ex parte communication if:

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is non-prosecutorial in character:

...

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

This express statutory authority specifically authorizes Board staff to provide ex parte advice to the presiding officer concerning any issues in a pending adjudicative proceeding that is non-prosecutorial in character. This exception indicates that the Legislature has recognized that

¹⁰⁸ On several occasions in the Petition, Petitioners assert that counsel advocated for the Executive Officer's approval of the NSMB EWMP. (See Petition, Memorandum of Points and Authorities, at pp. 14, 16.) Petitioners fail to cite anything to support their conclusion, and the transcript and audio recording make clear that no such advocacy took place at the hearing.

¹⁰⁹ See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

¹¹⁰ Los Angeles Water Board staff, as advisors to the Board, was not a "party" to the September 7, 2016 proceeding, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

¹¹¹ Cal. Code Regs., tit. 23, § 11430.30, subd. (a).

communications that would customarily be prohibited are appropriate for Board staff during a non-prosecutorial adjudicative proceeding.¹¹² Nothing in the APA makes such communications contingent on the Board appointing separate counsel for staff.

In addition, Petitioners' reliance on *Nightlife Partners, LTD. v. City of Beverly Hills* is misplaced.¹¹³ *Nightlife Partners* involved a city attorney who served in conflicting functions in different phases of a proceeding about the plaintiff's application for a cabaret license. The attorney advocated to the decision maker (in that case, the executive staff) that it should determine the application was incomplete, and the decision maker rejected the application on that basis. Thereafter, the same attorney also served as the advisor to the hearing officer during the plaintiffs' subsequent administrative appeal of that ruling. Unlike the city attorney in *Nightlife Partners*, the Board's attorneys neither advocated for a particular result before the Los Angeles Water Board nor advised any appellate body (the State Water Board, in this case) on how to resolve the petition. *Nightlife Partners* did not even involve the exercise of dual functions in the same proceeding. It certainly did not rule that a public body was required to appoint separate advisory staff when it reconsiders its Executive Officer's action made under delegated authority.

Perhaps most significantly, unlike the Board staff, the city attorney in *Nightlife Partners* did not have the benefit of an express grant of statutory authority to advise the presiding officer off the record on any issues in a non-prosecutorial adjudicative proceeding. As Board staff was not tasked with an advocacy function in the proceeding, and because Government Code section 11430.30, subdivision (c)(2), allows for such communications and is expressly limited to the Board (and a very small number of other agencies), *Nightlife Partners* had no application to the Los Angeles Water Board's proceeding.

Moreover, Petitioners' assertion that the Los Angeles Water Board proceeding that resulted in the Los Angeles County Superior Court's writ of mandate in *County of Los Angeles and LACFCD v. State Water Resources Control Board and Los Angeles Regional Water Quality Control Board*, Los Angeles County Superior Court Case No. BS122724, presents a "factually analogous case" is incorrect. In that case, the Court held that a former Los Angeles Water Board attorney acted as both an advocate and an advisor to the Board during adjudicative proceedings (subject to the APA) in 2006 to consider incorporation of provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles County MS4 Permit, Order No. 01-182. In concluding that the former attorney acted as an advocate, the Court found that the attorney directly examined witnesses from the Board's staff, cross-examined witnesses called by permittees, made a closing argument on behalf of Board staff, and made objections to questions asked by permittees, while simultaneously advising the Board.¹¹⁴ The Board's September 7, 2016 proceeding did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceeding. Here, unlike the 2006 proceeding, the Los Angeles Water Board's consideration of whether to review the merits of the

¹¹² Notably, the Law Revision Commission comments on section 11430.30, subdivision (c), state that "[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as...proceedings...setting water quality protection...requirements." The notes further state that "[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel." (25 Cal.L.Rev.Comm. Reports 711 (1995).) The Los Angeles Water Board's limited staffing resources would caution against an expansive interpretation of separation of functions in non-prosecutorial adjudicative proceedings.

¹¹³ (2003) 108 Cal.App.4th 81.

¹¹⁴ See *County of Los Angeles et al. v. State Water Resources Control Board et al.* (L.A. Super. Ct., No. BS122724), Minute Order, June 2, 2010, pp. 2 - 3.

petition was not an adjudicative proceeding and therefore not subject to the APA. Further, unlike the 2006 proceeding, none of the attorneys who advised the Board during the Board's consideration of the petition acted as an advocate for a particular position. While Board attorneys did provide advice on the Petitioners' procedural objections, providing procedural advice is one of the primary functions of the Board's advisors.

Petitioners fail to note that, following the Los Angeles Water Board's adoption of the LA County MS4 Permit in 2012, certain parties to that adjudicative proceeding subject to the APA filed petitions seeking review by the State Water Board, among other assertions, that their rights to due process of law were violated because of the Los Angeles Water Board's failure to appoint separate counsel to advise the Board. In its Order, the State Water Board concluded that in a permitting proceeding, which is subject to the APA, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role.¹¹⁵ The State Water Board further stated that "[b]ecause counsel and staff are advisors to the Board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings."¹¹⁶ It therefore follows that in a non-adjudicatory and non-investigatory or prosecutorial proceeding involving the Board's review of an action of its Executive Officer pursuant to the Board's delegated authority, there was an even less basis for assigning separate counsel for the September 7, 2016 proceeding.

Therefore, even assuming that the APA applied to the Los Angeles Water Board's September 7, 2016 proceeding, the Board did not violate any applicable procedural rights owed to Petitioners by not assigning separate counsel to Board staff and the Board. Neither staff nor counsel served as investigators, prosecutors, or advocates, and there was no reason to provide separate counsel to staff and the Board.

B. No Standard of Review Applied to the Los Angeles Water Board's Consideration of the Petition for Reconsideration

Petitioners contend that the Los Angeles Water Board further denied Petitioners due process by applying an inappropriate standard of review when it determined not to review the petition on its merits. In making this argument, Petitioners assume that the Board's consideration of a petition seeking review of its Executive Officer's delegated decision was actually subject to an established standard of review in the first place. Petitioners are incorrect.

As previously noted, the LA County MS4 Permit provision allowing the public to file a petition seeking review of an Executive Officer's action does not establish any requirements or guidelines as to how the Board should or would consider any petition filed. There are no requirements or procedures found in any statute, regulation, or guidance for this type of reconsideration. It was entirely at the Los Angeles Water Board's discretion whether to reconsider the Executive Officer's action and, if so, how to do so. The Board was under no mandatory duty to review the petition at all, and in deciding whether to review the petition, was not required to apply any particular standard of review. As such, the Board had significant flexibility in its consideration of the petition.

¹¹⁵ See State Water Board Order WQ 2015-0075, at p. 71 (RB-AR 225).

¹¹⁶ *Ibid.*

Petitioners are correct that several Los Angeles Water Board members expressed confusion over the nature of the September 7, 2016 proceedings and what standard of review they should apply in making their decision.¹¹⁷ Some Board members questioned whether deciding to review the petition at a later date necessarily meant deciding the merits of the petition. As Petitioners note, another Board member questioned whether the Board should review the claims made in the petition and decide whether any obvious mistakes were made. Such confusion was not entirely unexpected, as a proceeding on a petition seeking review of an Executive Officer determination had only occurred one other time in recent years in regards to the approval of nine WMPs a year prior. The Board's counsel explained that no process and no given standard applied. Counsel advised the Board to consider whether the Executive Officer's action was inappropriate (based on an obvious mistake or otherwise) in light of the contentions raised in the petition. Another Board counsel provided clarification to the Board noting that the petition was not an appeal, but rather a request for the Board to reconsider its own delegated action. In many circumstances, including this one, the Board could simply choose to reconsider an Executive Officer's action on any basis. After reviewing the petition and hearing from the permittees and Board staff, the Board unanimously determined it was unnecessary to review the merits of the petition. The Board was not required to state what standard of review they applied in their decision making.

Petitioners contend that the standard of review contained in Water Code section 13320, which is applicable to State Water Board consideration of petitions, should have been the governing standard for the Los Angeles Water Board's consideration. The Board disagrees, as this section is inapplicable based on its unambiguous language. However, the Board notes that Water Code section 13320's "inappropriate or improper" standard was essentially the standard that Board counsel recommended that the Board apply in its consideration of whether to review the merits of the petition.

As no established standard of review applied to the Los Angeles Water Board's consideration of the petition, Petitioners could not have been denied due process based on application of an improper standard of review.

C. Petitioners and Other Stakeholders Were Provided With a Fair and Transparent Process

As previously noted, no statute, regulation, or guidance required the Los Angeles Water Board to follow a certain process in its consideration of the petition. In fact, per the terms of the LA County MS4 Permit, the Board has complete discretion as to whether to review a petition at all. While the Los Angeles Water Board was not required to hold an evidentiary hearing, separate functions, or apply a certain standard of review, the Board took great efforts to provide Petitioners and stakeholders with a transparent and fair process. The Board also opted to add a half-day to its September 2016 Board meeting in order to give ample time for the Board to consider this matter. Both Petitioners, NSMB EWMP permittees, and other stakeholders were provided with meaningful opportunities to address the Board, both in writing and in oral comments. Petitioners were also granted the time that they requested for their oral

¹¹⁷ See Transcript for September 7, 2016 Board Meeting (Section 28, RB-AR 6529 - 6536); Audio File of September 7, 2016 Meeting (from 00:28:20 to 00:37:30) (Section 28, RB-AR 6661).

comments.¹¹⁸ In advising the Board, staff provided the Board with written responses to the contentions in the petition to give the Board necessary background and context for the claims made in the contention and to explain the basis for the Executive Officer's determination. Collectively, Petitioners, permittees, and Board staff provided information necessary to assist the Board in deciding whether to review the merits of the petition or not. While Petitioners understandably dislike the outcome of the Board's consideration, the Board provided a transparent and fair process.

VII. CONCLUSION

In conclusion, the NSMB EWMP: (i) applies the proper stormwater and non-stormwater standards from the Ocean Plan's ASBS Special Protections; (ii) appropriately considers and utilizes available ASBS stormwater and non-stormwater data; and (iii) demonstrates reasonable assurance that implementation of the EWMP will meet all applicable standards. As such, in approving the NSMB EWMP on behalf of the Los Angeles Water Board, the Executive Officer determined that the EWMP meets the requirements of the LA County MS4 Permit and the Ocean Plan's ASBS Special Protections provisions for discharges of stormwater and non-stormwater to ASBS 24. The Los Angeles Water Board also did not deny Petitioners a fair "hearing" or due process when the Board considered the Petitioners' May 19, 2016 petition at its September 7, 2016 meeting.

In light of the responses provided herein and the administrative record, the Los Angeles Water Board requests that the State Water Board deny the Petitioners' requests for an order by the State Water Board: 1) vacating the vote taken at the Los Angeles Water Board's September 7 meeting; 2) invalidating the Los Angeles Water Board Executive Officer's approval of the NSMB EWMP; and 3) remanding the matter to the Los Angeles Water Board with instructions to require compliance with Permit requirements. The Los Angeles Water Board urges the State Water Board to uphold the Los Angeles Water Board's actions in their entirety, retaining the final approval of the NSMB EWMP. Retaining the approval of the NSBM EWMP would allow the significant collaborative planning efforts that have occurred to date to continue so that actions to address water quality priorities are timely implemented.

¹¹⁸ Request for Time from Arthur S. Pugsley on behalf of Petitioners Los Angeles Waterkeeper and Natural Resources Defense Council (Section 28, RB-AR 6390).

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¹ All page numbers in the administrative record are preceded by “RB-AR,” to indicate “Regional Board Administrative Record.”

² Attachments A-R of Order No. R4-2012-0175 were inadvertently omitted from the Administrative Record submitted to the State Water Board on February 6, 2017. Attachments A-R are included as a new Section 31 at the end of the Administrative Record in order to preserve the original Bates numbering.

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	30	References	
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2/21/12		Appendix 2 to PEIR for Exception to the California Ocean Plan for Areas of Special Biological Significance Waste Discharge Prohibition for Storm Water and Nonpoint Source Discharges, with Special Protections	7040
3/20/12		State Water Board Resolution No. 2012-0012, General Exception to the Ocean Plan ASBS waste discharge prohibition	7045
5/23/12		Raimondi, Peter, Ken Schiff, Dominic Gregorio. 2012. Characterization of the rocky intertidal ecological communities associated with southern California Areas of Special Biological Significance. May 23, 2012.	7072
6/19/12		State Water Board Resolution No. 2012-0031, Amendment to the General Exception to the Ocean Plan ASBS waste discharge prohibition	7152
2/14		Dodder, Nathan, Lao, Wayne, Tsukada, Diehl, Dario, and Schiff, Kenneth. Areas of Special Biological Significance: Bioaccumulation Monitoring. SCCWRP Technical Report 816. February 2014.	7177
2/15		Schiff, Kenneth and Jeff Brown. 2015. South	7210

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9/20/15		ASBS 24 Final Compliance Plan for the County of Los Angeles and City of Malibu	7371
		Other References	
8/31/05		Santa Monica Bay Beaches Wet-Weather Bacteria Total Maximum Daily Load Implementation Plan – Jurisdictional Groups 1 and 4. Submitted by County of Los Angeles, City of Malibu, California Department of Transportation. August 31, 2005.	7605
1/8/07		Quantitative Assessment – Santa Monica Bay Bacteria TMDL Implementation Plan – Jurisdictional Groups 1 & 4. Submitted by County of Los Angeles, City of Malibu, and California Department of Transportation. January 2007.	7791
9/10		Summation of Finding Natural Water Quality Committee, 2006-2009, Technical Report 625	7866
9/10		Schiff, Kenneth, Brenda Luk, Dominic Gregorio. 2010. Status of California's Marine Water Quality Protected Areas. SCCWRP Technical Report 631. September 2010.	7903
9/18/12		County of Los Angeles, Los Angeles County Department of Beaches and Harbors, and the	7926

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12/14		Attachment C – Receiving Water Limitations Status Report. 2013-2014 Reporting Year. County of Los Angeles.	7961
10/23/14		Topanga Source ID Study. Final Report Dec 2012 – August 2014. Prepared by Resource Conservation District of the Santa Monica Mountains, UCLA, BioSolutions, and Topanga Underground. October 23, 2014.	7966
4/15		Los Angeles County Flood Control District Enhanced Watershed Management Programs – Final Program Environmental Impact Report. April 2015.	8195
		<ul style="list-style-type: none"> • Exhibit A: Findings of Fact 	9701
		<ul style="list-style-type: none"> • Exhibit B: Statement of Overriding Considerations 	9757
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