



**CALIFORNIA
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Advocate for the Heavy Construction Industry

September 15, 2011



Charles R. Hoppin, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Subject: Comment Letter - Draft Caltrans MS4 Permit as Revised August 18, 2011

Dear Members of the Board:

The California Alliance for Jobs is writing to comment on the draft storm water MS4 permit for Caltrans under consideration by the State Water Resources Control Board (State Water Board), as most recently revised August 18, 2011 (Draft Permit). We are extremely concerned that although some beneficial revisions were made to the Draft Permit, the fundamental, excessive burdens remain in the new draft. As written, this Draft Permit has a very low probability of accomplishing the State Water Board's mandated goals for a balanced and effective water quality control program. However, the approach taken in the Draft Permit is guaranteed to deplete the State's highway funding coffers.

The California Alliance for Jobs is a labor-management partnership that represents more than 2,000 heavy construction companies and 80,000 union construction workers from Kern County to the Oregon border. A unique partnership between labor and management, the Alliance focuses on what matters to our members and Californians most: creating jobs and ensuring that our state builds and maintains the transportation networks, water systems, and commercial and residential building projects they need. We believe appropriate investment in public infrastructure is an investment in California and its residents.

If implemented, the revised draft permit would drain an estimated \$600 million in annual funding for vital transportation projects around the state, destroy thousands of construction jobs, and divert significant taxpayer dollars without demonstrating a commensurate benefit to the public or the environment. Put in perspective, that \$600 million annually is *fully one-third of the money Caltrans has available statewide to maintain and rehab the state highway system*. The Governor and Legislative leaders have recently called for increased economic analysis of state regulations to better balance taxpayer costs and benefits. Even if evaluation of the costs as well as the benefits were not mandated by law here, which we believe it is, failing to provide this analysis is unacceptable State policy, and contributes to the failure to focus on clear and achievable water quality improvements.

The Draft permit is much more stringent, complex and costly than permits issued to transportation agencies by other states, clearly exceeding requirements of the federal Clean Water Act. The California Alliance for Jobs retained leading stormwater experts, Larry Walker Associates, to analyze key

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requirements of the revised Draft Permit in comparison to ten other states' permits selected at random from EPA and AASHTO lists: Arizona, Arkansas, Colorado, Kansas, Maine, Maryland, Michigan, New Jersey, Nevada and Washington. Larry Walker Associates' Technical Memorandum is enclosed as Attachment 1 to these comments. ¹ Based on their assessment, California Alliance for Jobs would submit that the following conclusions are pertinent to the Draft Permit:

Y-2 → • Many of the additional regulatory requirements identified in the Draft Permit are costly monitoring programs that do not improve our water quality, but instead would require tens of millions of taxpayer dollars for state agencies to collect data and issue reports. The Draft Permit would require Caltrans to establish candidate pool of *500 monitoring sites* by the third year of the Program (reduced from 1,000 in the January 2011 draft). Caltrans would then have to sample several times per year at a minimum of 100 sites, testing for 45 or more constituents. Caltrans would have to work with each of the nine Regional Water Boards to agree on these lists, straining agency resources and making timelines unworkable. In contrast, the other states' permits require monitoring at a handful of sites, or provide flexibility to monitor as would best support the goals of the permit.

Y-3 → • Caltrans has expended millions of dollars monitoring and evaluating stormwater discharges at some 180 sites, and has published leading studies on treatment and structural controls. Yet the updated permit does not evaluate, discuss or make any use of the available information. Instead, it imposes new complex and costly monitoring requirements, and fails to focus resources on known priority areas and sources.

Y-4 → • The Draft Permit's monitoring and retrofit program is far more costly and complex than the programs defined in the other states' permits. Only the proposed permit for Caltrans compares sampling data to an extremely long list of stringent water quality standards used as "action levels," triggering mandatory investments in new structural control measures. The type of toxicity testing requirements in the revised Draft permit, as revised, are not found in the other state permits, and are premature given the Water Board's own pending Toxicity Policy.

Y-5 → • While other states address prevention of erosion impacts, none have the broad stream crossing study and maintenance program newly extended to all existing crossings with specific beneficial uses by the August revision to the Draft Permit. Caltrans would be required to perform studies of thousands of crossings, culverts as well as bridges, which would then have to be considered for accelerated retrofit.

Y-6 → • No other states force transportation agencies to take such extensive responsibility to scrutinize and manage agricultural irrigation water. Agricultural irrigation water often drains into Caltrans' MS4, and is actually exempt from NPDES permitting under the Clean Water Act. Although the State itself has not yet adopted a statewide permitting program for irrigated agriculture, the Draft Permit requires that Caltrans determine whether irrigation run-on is covered by a state permit or waiver, and, if not, then stop the drainage or find some way to redirect the water, whether or not it is polluted.

¹ Larry Walker & Associates, Technical Memorandum of Analysis of DOT NPDES Stormwater Permits, September 15, 2011, enclosed as Attachment 1. The permits were selected at random from a list of state DOT stormwater websites provided on the U.S. EPA's Road-Related MS4s web page, as well as from a list of state DOTs having membership in the American Association of State Highway and Transportation Officials (AASHTO) Organization. The state DOT permits analyzed included permits for Arizona, Arkansas, Colorado, Kansas, Maine, Maryland, Michigan, New Jersey, Nevada and Washington.

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- By not examining other states' more cost effective permits, or attempting to find less costly effective measures, the State Water Board would be implementing the most expensive stormwater permit in the nation without any analysis of less expensive alternatives.

Y-1 → **The Draft Permit eliminates middle class jobs and weakens California's economy, causing real human and environmental impacts.** Given that every \$1 billion invested in transportation infrastructure produces 18,000 jobs², adoption of the draft permit would result in the loss of thousands of workers, not only in the construction industry, but in almost every employment sector. Devoting scarce resources to data collection and extensive report-writing, and continual litigation over provisions that are impossible to comply with, robs funds from valuable infrastructure projects and from the highest environmental priorities.

Y-1 → **The Draft Permit creates safety issues and increases costs for motorists.** Deferred maintenance and improvements have guaranteed impacts. Californians currently average \$590 per year in vehicle maintenance costs³ because of poorly maintained and unsafe roads. The proposal shifts Caltrans' focus from improving roadways to retrofiting existing infrastructure to meet new storm water requirements. This would worsen road conditions, create unsafe driving environments, and make California motorists pay more for driving on under maintained roadways.

Y-1 → **The Draft Permit increases the potential for more costly lawsuits.** The Draft Permit contains many requirements that cannot be complied with, and many that are so complex that compliance is unlikely to be achievable on the prescribed timelines. It also gives Regional Water Boards broad authority to impose *additional* requirements that could further increase costs and encourage third party lawsuits. This opens the door to allow third party lawsuits to step in and set the agenda and define State priorities. It also squanders precious dollars on litigation costs, including attorneys' fees Caltrans must pay if third party plaintiffs prevail on any of their claims.

Y-1 → **The Draft Permit does not comply with applicable state as well as federal law.** Additional legal comments are enclosed, as Attachment 2, including the following points, among others:

- Whenever Caltrans is unable to comply with permit conditions, or simply is found not to perform every detail to the satisfaction of a third party or a Water Board, it is vulnerable to large daily penalties for each alleged violation – as much as \$37,500 per violation, per day.
- Clear language is needed in the Draft Permit's receiving water limitations and prohibitions to avoid putting Caltrans at risk of continual violations despite making every possible effort to improve its stormwater pollution controls.
- The State Water Board should adopt exceptions to the prohibition on discharges to "Areas of Special Biological Significance," all along the Coast, before issuing the permit which disallows these discharges without the exceptions, which have been delayed the State Water Board itself.
- The Draft permit violates the Porter Cologne Water Quality Control Act by failing to consider statutory factors balancing needs for use of water, economics and environmental benefit, and fails to support its requirements with the necessary findings based on evidence that can be considered by the public and any reviewing court.

² University of Massachusetts at Amherst, "How Infrastructure Investments Support the U.S. Economy," January 26, 2009, p. 12.

³ TRIP, "Future Mobility in California: The Condition, Use and Funding of California's Roads, Bridges and Transit System, December 2009.

- The permit goes well beyond the minimum federal standard of controls to the “maximum extent practicable,” without clearly acknowledging and supporting the State’s decision to do so.

We are also concerned that the State Water Board denied requests by Caltrans for an extension of the public comment period to allow time to fully assess the permit and its impacts. No explanation of the extensive revisions or response to initial comments was provided. There has been insufficient time to allow the public to understand the extensively revised permit, and to hear the additional input from Caltrans and State Water Board staff necessary to understand the impacts of this important statewide program.

We appreciate the opportunity to comment on the Draft Permit, and look forward to the opportunity to review beneficial changes to a new draft that will address these concerns.

Thank you for your consideration.



Jim Earp
Executive Director
California Alliance for Jobs

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ATTACHMENT 1



Technical Memorandum

DATE: September 15, 2011

TO: Mr. Michael Quigley,
Mgr of Government & Environmental Affairs
California Alliance for Jobs
928 Second St., Suite 200
Sacramento, CA 95814

COPY TO:

SUBJECT: Analysis of Department of Transportation
NPDES Stormwater Permits

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EXECUTIVE SUMMARY

Larry Walker Associates (LWA) reviewed 10 department of transportation (DOT) National Pollutant Discharge Elimination System (NPDES) stormwater permits from around the United States to determine how other states' regulation of discharges from municipal separate storm sewer systems (MS4s) operated by various DOTs compare to the requirements set forth in the August 18, 2011, Tentative Order (TO) that will constitute the reissued California Statewide NPDES Permit (CAS000003) for the California Department of Transportation (Caltrans or Department). The 10 DOT permits selected for evaluation were reviewed in their entirety with special attention paid to the regulation of discharges in the following five areas:

1. The point of compliance for determination of an exceedance of an applicable water quality standard.
2. A requirement to retrofit an outfall with a revised Best Management Practice (BMP) when a discharge is determined to cause or contribute to an exceedance of an applicable water quality standard.
3. A DOT's responsibility to control agricultural irrigation run-on to the DOT's right-of-way (RoW).
4. Extent of monitoring requirements.
5. The requirement to conduct a stream stability analysis where a DOT facility crosses a perennial stream, including via a culvert, and the water body in question has the designated beneficial uses of fish migration, fish spawning, and freshwater habitat.

These five areas of regulation were focused on because they are related to requirements set forth in the Caltrans TO (18 August 2011 version) that are believed to set new regulatory benchmarks for stormwater and non-stormwater discharges from a MS4 owned or operated by a DOT.

The review of 10 DOT stormwater permits revealed that none of the permits contain requirements as strict as those included in the Caltrans TO in these regulatory areas. Specifically, the requirements of the 10 DOT permits in the five regulatory subject areas differed from the requirements in the Caltrans TO in the following ways:

- Seven of the 10 permits reviewed do not contain a requirement for the DOT to compare pollutant concentrations measured in its discharges to water quality standards, and two others do so only where TMDL requirements or 303(d) listings are involved;
- Five of the 10 permits reviewed do not contain a requirement to retrofit an outfall when a DOT discharge is determined to cause or contribute to an exceedance of an applicable water quality standard in receiving waters; four others impose less extensive retrofit requirements than the Caltrans TO;
- Eight of the 10 permits reviewed specify that agricultural irrigation runoff/return water is an allowed non-stormwater discharge from the DOT MS4 provided the specific agricultural discharge is not identified as a significant contributor of pollutants; one permit describes agricultural return flows as exempt from Clean Water Act regulation and the other permit does not mention it at all;
- While most DOT permits reviewed contained some prescriptive requirements for monitoring, the Caltrans TO includes by far the most onerous requirements related to discharge characterization monitoring and BMP performance monitoring requirements among all 11 permits reviewed; and
- Eight of 10 permits reviewed contain no requirements for evaluating the stability of receiving stream channels that may be impacted by a DOT's discharge from the MS4.

In addition to the above findings, a more general conclusion regarding the appropriateness of the requirements contained in the Caltrans TO can be drawn from an assessment of the potential benefits to water quality with adoption of the TO as compared to the socioeconomic impacts of implementing the TO's requirements. Elements of the Caltrans TO may be viewed as lacking an appropriate balance between water quality protection and the expenditure of exceedingly scarce resources and the concomitant impacts to other environmental and non-environmental needs of the people of the State. It is this balancing of the proposed action – the adoption of the Caltrans TO and the public interest – that appears to have not been given sufficient scrutiny during development of the TO by the State Water Resources Control Board (State Water Board).

On balance, the Caltrans TO embodies a much more stringent approach to the regulation of stormwater and non-stormwater discharges from a DOT MS4 than do any of the other 10 NPDES permits evaluated. It is unclear to what degree the requirements of the TO will bring about an improvement of the quality of effluent discharged from Caltrans facilities or an enhancement to downstream receiving water quality. Without a balancing of the potential improvements to water quality that may result from adoption of the TO against the socioeconomic impacts that will result from an increased burden placed on the people of the State to fund an expanded Caltrans Stormwater Management Program, it is unknown whether the implementation costs of the TO are

commensurate with the potential water quality benefits that may be achieved with adoption of the Order.

INTRODUCTION

Larry Walker Associates (LWA) reviewed 10 department of transportation (DOT) National Pollutant Discharge Elimination System (NPDES) stormwater permits from around the United States to determine how the regulation of discharges from municipal separate storm sewer systems (MS4s) owned or operated by various DOTs compare to the requirements set forth in the August 18, 2011, Tentative Order (TO) that will constitute the reissued California Statewide NPDES Permit (CAS000003) for the California Department of Transportation (Caltrans or Department). LWA performed the same comparison of the January 7, 2011, Caltrans Tentative Order against permits issued to other DOTs. The 10 DOTs for which NPDES stormwater permits were reviewed are listed in Error! Reference source not found. along with the type of permit (DOT MS4, Phase I MS4 or Phase II MS4) and its expiration date. The permits were selected at random from a list of state DOT stormwater websites provided on the U.S. EPA's Road-Related MS4s web page¹, as well as from a list² of state DOTs having membership in the American Association of State Highway and Transportation Officials (AASHTO) Organization.

The 10 permits were reviewed in their entirety with special attention paid to the regulation of discharges in the following five areas:

1. The point of compliance for determination of an exceedance of an applicable water quality standard.
2. A requirement to retrofit an outfall with a revised Best Management Practice (BMP) when a discharge is determined to cause or contribute to an exceedance of an applicable water quality standard.
3. A DOT's responsibility to control agricultural irrigation run-on to the DOT's right-of-way (RoW).
4. Extent of monitoring requirements.
5. The requirement to conduct a stream stability analysis where a DOT facility crosses a perennial stream, including via a culvert, and the water body in question has the designated beneficial uses of fish migration, fish spawning, and freshwater habitat.

These five areas of regulation were focused on because they are related to requirements set forth in the Caltrans TO (18 August 2011 version) that are believed to set new regulatory benchmarks for stormwater and non-stormwater discharges from a MS4 owned or operated by a DOT. The requirements³, where they exist, for each of the 10 DOT NPDES stormwater permits were compared to the requirements in the Caltrans TO in each of the five areas of regulatory interest. The following section presents the findings of the comparison of DOT NPDES stormwater permits.

¹ <http://cfpub.epa.gov/npdes/stormwater/municroads/transportprograms.cfm>

² <http://www.transportation.org/?siteid=37&pageid=332#ME>

³ Only requirements contained in DOT permits were evaluated. Review of a DOT's implementation of its permit requirements via its stormwater management plan was beyond the scope of this effort.

Table 1: Department of Transportation NPDES Stormwater Permits Reviewed for Analysis.

DOT Name	Type of Permit	Permit Expiration
Arizona Department of Transportation	DOT MS4	September 18, 2013
Arkansas State Highway and Transportation Department	Phase II MS4	July 31, 2014
Colorado Department of Transportation	DOT MS4	December 31, 2011
Kansas Department of Transportation	Phase I & II MS4	September 30, 2009 ⁽¹⁾
Maine Dep. Of Transportation and Maine Turnpike Authority	DOT MS4	June 30, 2013
Maryland State Highway Administration	DOT MS4	October 21, 2010 ⁽¹⁾
Michigan Department of Transportation	DOT MS4	April 1, 2009 ⁽¹⁾
New Jersey Department of Transportation	DOT MS4	February 28, 2014
Nevada Department of Transportation	DOT MS4	July 6, 2015
Washington State Department of Transportation	DOT MS4	March 6, 2014

(1) Order under an administrative extension.

COMPARISON OF DOT NPDES STORMWATER PERMITS

Tabular presentations of Caltrans TO requirements and other DOT stormwater permit requirements in each of the five subject areas are presented below for comparison. In many instances, the “other” DOT permits do not contain regulatory language similar to that found in the Caltrans TO, and in these instances a permit requirement in a particular subject area is described as “none specified.” Where a requirement in a DOT permit is similar to a requirement in the Caltrans TO, the similar requirements are highlighted in gray. Additionally, the requirements set forth in each permit have some nexus, whether well-established or tenuous, to the Environmental Protection Agency’s (EPA) phased NPDES requirements for stormwater discharges. The EPA regulatory nexus to a particular category of DOT permit requirement is included below for each comparison of requirements.

Table 2: Comparison 1 – Point of Compliance for Determination of an Exceedance of an Applicable Water Quality Standard.

State	Point of Compliance Requirement
CA	Analysis of water quality sample collected in receiving water downstream of Caltrans discharge.
AZ	Water quality standard exceedance determination based on analysis of effluent collected at outfall, not based on analysis of a water quality sample collected in the receiving water.
AK	Analysis of effluent collected at outfall for discharges to a water body with an adopted TMDL or a water body on the 303(d) list of waters with known water quality impairments.
CO	None specified.
KS	None specified.
ME	None specified.
MD	None specified.
MI	None specified.
NJ	None specified.
NV	None specified.
WA	Analysis of water quality sample collected in receiving water downstream of WSDOT discharge.

Comparison 1 – Regulatory Nexus

Some DOTs are required to determine whether runoff from their MS4s are causing or contributing to an exceedance of a water quality standard (WQS). WQS are assigned to receiving waters as a means to protect the beneficial uses of a water body. The determination of whether or not a discharge is causing or contributing to the exceedance of a WQS is made by evaluating the concentration of a pollutant in the discharge and in the receiving water. If the pollutant concentration in the discharge is high enough to make the downstream receiving water concentration exceed the WQS (where the upstream receiving water concentration is below the WQS), then the discharge is *causing* the receiving water to exceed the WQS. If the pollutant concentration in the discharge is sufficiently high as to make the pollutant concentration in the downstream receiving water increase above that in the upstream receiving water, and the upstream receiving water concentration exceeds the WQS, then the discharge is *contributing* to the exceedance of the WQS in the receiving water. With regard to the CA and WA permits, requiring the DOT to perform receiving water monitoring once DOT effluent concentrations exceed a water quality action level (so-called in the Caltrans TO), and not requiring the ‘cause or contribute’ determination to be made until after receiving water monitoring is performed, allows for the possibility of dilution of the discharge due to some assimilative capacity for the pollutant that may exist in the receiving water. To this end, the point of compliance for Caltrans and the WSDOT permits is the receiving water. In contrast, the point of compliance for the AZ DOT appears to be the outfall from the MS4 without the benefit of dilution credit.⁴

Table 3: Comparison 2 – Requirement to Retrofit an Outfall with a Revised BMP when a Discharge is Determined to Cause or Contribute to an Exceedance of an Applicable Water Quality Standard.

State	Outfall Retrofit Requirement
CA	If source control and non-structural BMPs are ineffective in stopping exceedances of water quality standards in receiving waters, then structural controls will need to be implemented in an iterative fashion.
AZ	Develop and implement BMPs that minimize the discharge of pollutants from the MS4 to the maximum extent practicable and ensure that no degradation of the receiving water will occur from stormwater and non-stormwater discharges.
AK	MS4 discharges determined to cause or contribute to the impairment of a water body with an adopted TMDL or a water body on the 303(d) list must be addressed through the implementation of enhanced BMPs.
CO	None specified.
KS	None specified.
ME	None specified.
MD	If an assessment by the DOT indicates that TMDL waste load allocations (WLAs) are not being met, then additional or alternative stormwater controls must be implemented to achieve WLAs.
MI	None specified.
NJ	None specified.
NV	If an assessment by the DOT indicates that TMDL waste load allocations (WLAs) are not being met, then additional or alternative stormwater controls must be implemented to achieve WLAs.

⁴ We did not investigate how the Arizona permit is being interpreted or enforced in practice. However, we note that Section 7.1 of the permit specifies that failing to meet water quality standards is not, in itself, a violation of the permit, if other detailed provisions of the permit are complied with.

State	Outfall Retrofit Requirement
WA	Washington State Department of Ecology has the authority to require the WSDOT to implement an "Adaptive Management Response" to a discharge found to be causing or contributing to an exceedance of a water quality standard in receiving waters. The Adaptive Management Response requires successive implementation of BMPs until the discharge is determined to no longer be causing or contributing to an exceedance of a water quality standard in receiving waters.

Comparison 2 – Regulatory Nexus

DOTs are required to develop and implement BMPs that reduce the discharge of pollutants from the MS4 to the maximum extent practicable. If a particular BMP shows little or no reduction of a particular pollutant, then the DOT is often required to implement additional, enhanced BMPs (source control, non-structural and/or structural) until an adequate level of pollutant reduction is achieved.

Table 4: Comparison 3 – DOT's Responsibilities regarding Agricultural Irrigation Run-on.

State	Requirements regarding Agricultural Run-on
CA	Agricultural runoff not covered by a WDR or conditional waiver of a WDR is a prohibited discharge to the Caltrans MS4, and ostensibly must be treated as an illicit discharge. For those agricultural discharges covered by a WDR or conditional waiver, Caltrans must provide "reasonable support" to an agricultural entity that includes facilitating monitoring activities, providing necessary access to monitoring sites, and cooperating with monitoring efforts as needed. Caltrans is not required to actively conduct monitoring or provide funding for monitoring of agricultural discharges.
AZ	Requirement to minimize run-on to maintenance areas, material storage areas, fueling areas, and tank or container storage areas. Agricultural irrigation run-on is described as exempt from Clean Water Act regulation.
AK	Agricultural irrigation run-on is an allowed non-stormwater discharge provided it isn't identified as a significant contributor of pollutants to the MS4; otherwise it must be treated as an illicit discharge.
CO	As above
KS	As above
ME	As above
MD	As above
MI	As above
NJ	As above
NV	Agricultural irrigation run-on not mentioned in permit as an allowed non-stormwater discharge, or otherwise mentioned.
WA	Agricultural irrigation run-on is an allowed non-stormwater discharge provided it isn't identified as a significant contributor of pollutants to the MS4; otherwise it must be treated as an illicit discharge.

Comparison 3 – Regulatory Nexus

MS4 permits must include a requirement for the permittee to "effectively prohibit" illicit non-stormwater discharges into the MS4. Only certain non-stormwater discharges (e.g., foundation drain water, landscape irrigation, etc.) are to be allowed into the MS4. Typically, MS4 permits specify a limited number of authorized non-stormwater discharges. Agricultural irrigation discharges are generally exempt from NPDES permit requirements.

Table 5: Comparison 4 – Extent of Monitoring Requirements.

State	Monitoring Requirement
CA	Establish candidate pool of 500 monitoring sites by the third year of the Program. Monitor a minimum of 100 sites per sampling year. Continue monitoring sites showing WQS exceedances in receiving waters in subsequent years. Sampling Frequency: 3 wet weather and 2 dry weather events per year. Parameters: 46 or more constituents in effluent and receiving waters, plus toxicity bioassays (chronic and acute whole effluent toxicity testing). Toxicity identification evaluations as required.
AZ	Collect at least 1 wet weather sample from each of 5 monitoring sites per year. Parameters: 40 standard pollutants (including conventionals, inorganics, nutrients, microbiologicals, and trace metals) at each site each year and 54 organic compounds during years one and three of the permit.
AK	Quarterly grab samples for pollutant(s) listed in TMDL or 303(d) listing.
CO	Scope of monitoring not defined in permit, but historic monitoring was limited to a handful of sites to characterize wet weather discharges. Parameters monitored include, but are not limited to, TDS, sediment, petroleum products, chloride, and metals.
KS	Scope of monitoring not defined in permit, but monitoring may be performed to assess the success of the stormwater management program at reducing the discharge of pollutants.
ME	Maine Department of Environmental Protection may require monitoring of an individual discharge as may be reasonably necessary in order to characterize the nature, volume or other attributes of that discharge or its sources.
MD	Twelve (12) storm events shall be monitored at a site each year; total number of sites to be monitored is not specified in permit. Dry event monitoring can substitute for wet weather monitoring during dry periods. EMCs for 14 parameters shall be calculated. Macroinvertebrates should be collected each spring. Stream habitat assessment shall be conducted; frequency not specified.
MI	Monitoring of discharges not required, but may be undertaken by DOT at its discretion.
NJ	Monitoring of IC/ID flows may be useful in identifying potential source of discharge. Additional monitoring requirements not specified in permit.
NV	Monitoring is required, but the scope of monitoring is not defined in the permit. NDOT to submit a stormwater monitoring plan to the Nevada Division of Environmental Protection for approval.
WA	BASELINE HWY MONITORING: 5 sites, 43 parameters, and 14 events distributed throughout wet and dry seasons. SEDIMENT MONITORING: Annual samples collected at baseline monitoring sites and associated receiving waters, 41 parameters evaluated. TOXICITY MONITORING: 3 untreated runoff sites and 3 BMP sites, toxicity testing and chemical analysis of 28 parameters collected during first flush event in either August or September. TIE/TRE may be implemented. NON-HWY FACILITIES MONITORING: 2 rest areas, 6 maintenance facilities, and 1 high-use ferry terminal, evaluate from 30 – 45 parameters for 7 events per year. BMP EFFECTIVENESS MONITORING: A minimum of 4 sites, various parameters evaluated based on type of BMP, at least 12 influent and effluent samples collected per year.

Comparison 4 – Regulatory Nexus

DOTs are required to perform some level of monitoring of discharges from the MS4 as a means to evaluate the impact of the activities on water quality. The establishment of baseline measurements of pollutants contained in discharges also allows the DOT to determine if implementation of BMPs is reducing pollutant concentrations in the runoff.

Table 6: Comparison 5 – Requirement to Conduct a Stream Stability Analysis.

State	Stream Stability Analysis Requirement
CA	Conduct a stream stability analysis where a Caltrans facility crosses a perennial stream, including a culvert, and the water body in question has the designated beneficial uses of fish migration, fish spawning, and freshwater habitat
AZ	None specified.
AK	None specified.
CO	None specified.
KS	None specified.
ME	None specified.
MD	Requirement to conduct annual geomorphic stream assessment for those outfalls associated with a watershed restoration project.
MI	None specified.
NJ	Requirement to perform annual stream and stream bank scouring detection, remediation, and maintenance for all outfall pipes operated by a Highway Agency in the State of New Jersey.
NV	None specified.
WA	None specified.

Comparison 5 – Regulatory Nexus

DOTS are required to minimize erosion processes caused by discharges from the MS4 through the implementation of erosion control measures. Some DOTs are required to identify and remediate stream erosion problems caused by the discharge of runoff from MS4 outfalls.

ANALYSIS OF FINDINGS

The review of the 10 DOT permits revealed a range of regulation of DOT discharges in terms of scope, detail, and technical specificity, with the majority of DOT discharges from MS4s being regulated on a much less robust level than stormwater and non-stormwater discharges from Caltrans facilities. Most of the DOT permits reviewed described discharges from transportation-related MS4s being regulated similar to the requirements imposed upon Caltrans more than a decade ago. Of the 10 DOT permits evaluated, only the Washington State Department of Transportation is required to operate its Stormwater Management Program under requirements that are, in certain areas, similar to those specified in the Caltrans TO. That being said, it is meaningful to evaluate the requirements in the 10 DOT permits related to the five regulatory areas of interest to understand how they compare to the requirements contained in the Caltrans TO.

Comparison 1 – Point of Compliance for determination of an exceedance of an applicable water quality standard.

Seven of the 10 permits reviewed do not contain a requirement for the DOT to compare pollutant concentrations measured in its discharges to water quality standards⁵. The Caltrans TO and the

⁵ It should be noted that none of the 10 permits reviewed contained “action levels” which have been suggested and used for industrial and municipal discharges to guide management decisions (see Construction General Permit Order No. 2009-0009 DWQ and Riverside Stormwater Permit Order No. R9-2010-0016). The Caltrans TO uses water quality standards as a type of action level, requiring follow-up receiving water monitoring if the action levels are exceeded in

Washington State DOT (WSDOT) permit require the comparison of pollutant concentrations to water quality standards, but allow for the measurement of pollutant concentrations in both DOT effluent and in downstream receiving waters before determining whether the DOT discharge is causing or contributing to the exceedance of a water quality standard in the receiving water. The Caltrans and WSDOT requirements provide for dilution of the DOT discharge by the receiving water and acknowledge that the receiving water may have available assimilative capacity for a specific pollutant. In contrast, the Arizona DOT permit requires the discharger to measure pollutant concentrations in discharges collected at DOT outfalls for comparison to water quality standards in receiving waters. The AZ DOT is then required to enter into an iterative process for implementing enhanced BMPs when effluent (outfall discharge) is observed to exceed a water quality standard. This requirement in the Arizona permit to determine compliance with water quality standards in receiving waters by measuring pollutant concentrations in effluent collected at its outfalls represents a particularly strict and preemptive interpretation of the 'cause or contribute' standard by not allowing for dilution or available assimilative capacity in downstream receiving waters to have any bearing on the exceedance determination. This requirement may reflect the very ephemeral nature of flowing receiving waters in Arizona.

Comparison 2 – A requirement to retrofit an outfall with a revised BMP when a discharge is determined to cause or contribute to an exceedance of an applicable water quality standard.

Five of the 10 permits reviewed do not contain a requirement to retrofit an outfall when a DOT discharge is determined to cause or contribute to an exceedance of an applicable water quality standard in receiving waters. Three others -- the Maryland, Nevada and Arkansas DOTs -- are only required to retrofit an outfall when total maximum daily load (TMDL) waste load allocations (WLAs) are not being met, and, in the case of the Arkansas DOT, when discharges cause or contribute to the exceedance of a pollutant listed on the 303(d) list of impaired water bodies. The Caltrans TO and the WSDOT permits resemble each other in that they require the DOT to implement successive BMPs (first source control, then non-structural BMPs, then structural BMPs) at outfalls when discharges are observed to exceed applicable water quality standards in the receiving water. The requirement to iteratively retrofit outfalls with enhanced BMPs appears to lack an appropriate mechanism to allow a DOT to exit the "do loop" when its successive attempts at mitigation fail to bring a stormwater or non-stormwater discharge into compliance. The Arizona DOT appears to have a more onerous requirement in this area, requiring successive BMPs at its monitored outfalls when a discharge is observed to exceed an applicable water quality standard regardless of whether there is an observed exceedance of the water quality standard in the receiving water, though it acknowledged that efforts may not achieve standards and could be addressed in a reopening of the permit.

Even in the case of the somewhat similar triggers for the Washington State DOT program, the permit provides a safe harbor for the DOT while it follows the adaptive management procedures,

the outfall, and then BMP improvements if the follow-up monitoring shows certain impacts in receiving waters. The approach is unusual, in that action levels are typically identified for selected constituents known to be of particular relevance to a discharge (e.g., metals from highway runoff) and not for the full suite of water quality standards.

expressly stating that requirements to meet water quality standards will not be violated as long as the DOT reports, evaluates and adopts improved operation and/or structural BMPs.⁶

Comparison 3 – A DOT's responsibilities to control agricultural irrigation run-on to the DOT's right-of-way.

Eight of the 10 permits reviewed specify that agricultural irrigation runoff/return water is an allowed non-stormwater discharge from the DOT MS4 provided the specific agricultural discharge is not identified as a significant contributor of pollutants. If a specific non-permitted agricultural discharge to the DOT's MS4 is identified as a significant source of pollutants, then the DOT must treat the agricultural discharge as an illicit discharge. The Arizona DOT permit describes agricultural return flows as being exempt from Clean Water Act regulation, while the Nevada DOT permit does not mention agricultural irrigation runoff into or from the MS4. All 10 permits state that the DOT shall, to the extent allowable under law, effectively prohibit through an appropriate regulatory mechanism, illicit discharges and illicit connections to the DOT's MS4, and implement appropriate enforcement procedures and actions.

The Caltrans TO is unique among the DOT permits in that it states that agricultural irrigation water (non-stormwater) that discharges to the Caltrans MS4 is conditionally exempt *only* if (1) the agricultural discharge is regulated by a separate Waste Discharge Requirement (WDR) or a conditional waiver of WDRs, *and* (2) Caltrans provides "reasonable support" to the monitoring activities of an agricultural waiver organization or similar entity. The term "reasonable support" is defined as "facilitating monitoring activities, providing necessary access to monitoring sites, and cooperating with monitoring efforts as needed." Furthermore, agricultural discharges not subject to WDRs or conditional waivers must be reported to the appropriate Regional Board when identified by Caltrans.

In no other permit reviewed is a DOT required to become a *de facto* participant in an agricultural monitoring program, if one even exists in a particular jurisdiction. The Caltrans TO identifies agricultural run-on as a pollutant source to the MS4 of heightened significance and places responsibility on the Department to act as a watchdog of agriculture. The Caltrans TO includes the most onerous requirements related to agricultural irrigation run-on to a DOT RoW among the 11 permits reviewed (10 DOT permits + Caltrans TO).

Comparison 4 – Extent of Monitoring Requirements.

A DOT's requirement to monitor its discharge from its MS4 showed the greatest variability in requirements among the five regulatory subject areas evaluated. The requirements in the Caltrans TO were far greater than any other permit reviewed. This is also notable given the fact that Caltrans has in the past devoted far greater resources to characterizing its discharges, producing extensive reports, and analyzing results from each type of Caltrans activity.

Most DOT permits reviewed contained some prescriptive requirements for monitoring; although the Kansas, Michigan and Nevada DOT permits were silent on this issue. No permits reviewed contained monitoring requirements as extensive as those found in the Caltrans TO. Washington State's monitoring requirements, while extensive as compared to all other DOT permits' monitoring

⁶ The Washington DOT permit program also addresses a systematic retrofit program that specifically refers to management within funding appropriated by the Legislature, defines cost effectiveness, and prioritizes projects according to a detailed matrix.

requirements, represent a fraction of the effort and financial costs levied upon Caltrans by its monitoring requirements in the TO. The extent of monitoring specified in the Caltrans TO constitutes a *re-characterization* of runoff from Caltrans facilities and does not effectively utilize the information gathered during the Department's earlier, extensive characterization monitoring efforts throughout the State. The Caltrans TO includes by far the most onerous requirements related to discharge characterization monitoring requirements among the permits reviewed.

Comparison 5 – Requirement to conduct a stream stability analysis.

Eight of 10 permits reviewed contain no requirements for evaluating the stability of receiving stream channels that may be impacted by a DOT's discharge from the MS4. The Caltrans TO contains a requirement for the Department to conduct stream stability analyses for its facilities that cross perennial streams, including culverts, where the water body in question has the designated beneficial uses of fish migration, fish spawning, and freshwater habitat. Additionally, stream and culvert crossings found to impair beneficial uses shall be prioritized for retrofit or remediation on a 10-year implementation schedule. The DOT permits of Maryland and New Jersey also have similar requirements to assess stream bed stability and remediate where necessary, but these states are required to perform the task on an annual basis and the assessments are not predicated upon particular beneficial uses, and do not mandate restoring aquatic beneficial uses.

CONCLUSIONS

A review of 10 DOT stormwater permits from various areas of the United States revealed that none of the permits contain requirements as strict as those included in the Caltrans TO across the five regulatory areas that were the focus of this current evaluation. A more general conclusion regarding the appropriateness of the requirements contained in the Caltrans TO can be drawn from an assessment of the potential benefits to water quality with adoption of the TO as compared to the socioeconomic impacts of implementing the TO's requirements. Elements of the Caltrans TO may be viewed as lacking an appropriate balance between water quality protection and the expenditure of exceedingly scarce resources and the concomitant impacts to other environmental and non-environmental needs of the people of the State. It is this balancing of the proposed action – the adoption of the Caltrans TO – and the public interest that appears to have not been given sufficient scrutiny during development of the TO by the State Water Resources Control Board (State Water Board).

On balance, the Caltrans TO embodies a more stringent approach to the regulation of stormwater and non-stormwater discharges from a DOT MS4 than do any of the other 10 NPDES permits evaluated. It is unclear to what degree the requirements of the TO will bring about an improvement of the quality of effluent discharged from Caltrans facilities or an enhancement to downstream receiving water quality. Without a balancing of the potential improvements to water quality that may result from adoption of the TO against the socioeconomic impacts that will result from an increased burden placed on the people of the State to fund an expanded Caltrans Stormwater Management Program, it is unknown whether the implementation costs of the TO are commensurate with the potential water quality benefits that may be achieved with adoption of the Order.

ATTACHMENT 2

Additional Legal Comments on the Revised Draft Municipal Separate Storm Sewer System (MS4) NPDES Permit (Draft Permit) for the California Department of Transportation (Caltrans)

The Draft Permit is inconsistent with both the federal Clean Water Act and the California Water Code, as explained in more detail below. Adopting a permit that cannot be complied with is obviously bad policy for many reasons. It is also improper, in that it exposes the State of California to massive exposure to penalties and costs of litigation. Violation of the permit results in strict liability under the Clean Water Act subject to State, U.S. Environmental Protection Agency ("EPA") and citizen suit enforcement, including substantial penalties up to \$37,500 per day, per violation (federal Clean Water Act Section 319, 33 U.S.C. § 1319) or \$25,000 per violation per day plus \$100 per gallon (California Water Code Section 13385). Third party plaintiffs can, as they have in the past, collect attorneys' fees for bringing enforcement actions, along with expert costs, and can seek to impose their own priorities on the State in settlements.

1. The Draft Permit contains requirements that far exceed federal requirements to control pollutants to the Maximum Extent Practicable ("MEP"), without acknowledging these decisions or supporting them with necessary findings.

California's water quality permitting program is set forth in the Porter Cologne Water Quality Control Act, found in the California Water Code. California Water Code ("Water Code") §§ 13000 et seq. The federal government has authorized California to implement the National Pollutant Discharge Elimination System (NPDES) program using special provisions within the Porter Cologne Act. NPDES permits, such as the Draft Permit, are required to be consistent with the federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., and with Clean Water Act regulations adopted by the United States Environmental Protection Agency (USEPA), 40 C.F.R. Parts 100-135, but are issued under state law. *See*, Water Code § 13377.

Under Clean Water Act section 402(p), Congress established two different standards for the regulation of stormwater discharges -- one for discharges of stormwater from areas of industrial activity and one for municipal stormwater discharges from MS4s. Stormwater discharges associated with industrial activity are required to comply with NPDES permits containing the technology-based effluent limitations or more stringent water quality based effluent limitations set forth in CWA section 301. *See* 33 U.S.C. §1342(p)(3)(A) (CWA §402(p)(3)(A)); 33 U.S.C. §1311(b)(1)(A) and (C) (requiring Best Practicable control Technology ("BPT") or "any more stringent limitation, including those necessary to meet water quality standards"); 33 U.S.C. §1311(b)(2) (CWA §301(b)(2)) (requiring Best Available Technology economically achievable ("BAT") for toxic pollutants and Best Conventional pollutant control Technology ("BCT") for conventional pollutants).

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

- “(i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.”

33 U.S.C. §1342(p)(3)(B)(i)-(iii) (CWA §402(p)(3)(B)(i)-(iii)) (emphasis added).

The “Maximum Extent Practicable” language contained in Section 402(p)(3)(B)(iii) is more commonly known as the “MEP” standard. MEP represents a different technology-based standard requiring municipalities to pursue sound pollutant control techniques that are technically and economically feasible.

Importantly, the Clean Water Act does not prescribe water quality-based requirements for municipal stormwater. Water quality-based requirements differ from technology-based requirements, in that water quality-based requirements are set based on the ambient water quality of and the applicable water quality standards¹ for a particular water body, while technology-based standards focus upon the water quality achievable by particular pollution control measures or technologies. This partial exemption is not unusual; the CWA also totally exempts some types of discharges from the permitting requirements of the Act. *See* 33 U.S.C. §1342(l)(1)-(2)(CWA §402(l)(1)-(2))(exempting agricultural return flows from irrigated agriculture and certain discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).

The Draft Permit does not explain, and contains no findings describing, how the State Water Board determined particular requirements represented the control to “maximum extent practicable.” The Draft Permit does not explain why much more severe pollutant reduction measures and costly controls are practical in California than in other states, or why they are needed in California when not required in other states implementing the MEP standard.

¹ Water quality standards consist of the “designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” *See* 33 U.S.C. §1313(c)(2)(A) (CWA §303(c)(2)(A)). Generally, “uses” are the types of activities for which the water can be used (e.g., recreation, aquatic life protection) and “criteria” (or the State equivalent term, “water quality objectives”) are the numeric or narrative water quality levels necessary to support the water’s designated uses.

In fact, many of the measures appear to be physically impossible, such as the prohibitions in Section A and the receiving water limitations in Section D, which specify that the discharge not cause or contribute to exceedance of any water quality standards, and which incorporate prohibitions from more than ten Water Quality Control Plans by reference into the permit. No technological measures have been found that can guarantee discharges will not exceed, or contribute to instream exceedance, of all water quality standards.

Other measures in the Draft Permit are impossible due to unrealistic timing and scope, or are simply cost prohibitive. The Draft Permit must consider both the individual elements it requires, and the cumulative effort required to accomplish them in the entire, extensive and costly program.

In a precedential order (State Water Board Order WQ 2000-11 (*In the Matter of the petitions of the Cities of Bellflower et al.*)), the State Water Board confirmed the meaning of "maximum extent practicable," noting:

"If a permittee employs all applicable BMPs [best management practices] except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard."

The Draft Permit Glossary in Attachment V has added a definition of MEP, and stated that only the Water Boards can finally determine what measures will constitute MEP. Yet, the Draft Permit fails to analyze and explain how its requirements are technical feasible or meet the cost and benefit criteria inherent in the MEP standard.

Specific findings supporting each requirement, including the justification and legal basis for the measures, must be set forth in the NPDES permit. See 40 C.F.R. § 124.8(b)(4); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974) ("*Topanga*"); *So. California Edison v. SWRCB*, 116 Cal. App.3d 751, 761 (4th Dist. 1981). The Draft Permit does not contain these findings based on evidence before the State Water Board, as required by law.

2. The Draft Permit imposes Unreasonable Requirements Exceeding Federal Minimum Requirements without Considering Balancing Factors including Economics and Coordinated Control of Factors Affecting Water Quality, in Violation of Water Code Sections 13000, 13263 and 13241.

The California Legislature has directed in Water Code Section 13000 that activities affecting water quality, which includes permitting, "shall be regulated to attain the highest water quality which is *reasonable*, considering all demands being made and to be made on those waters *and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.*" See Water Code § 13000. This enunciates the clear State policy that all permit provisions be reasonable considering all circumstances, as further defined in the detailed provisions of the Porter Cologne Water Quality Control Act.

Within Porter-Cologne, the ways to reach the reasonable balance called for in Section 13000 when issuing waste discharge requirements are described in Sections 13241 and 13263. These sections require the State Water Board to consider a number of carefully prescribed balancing factors whenever fashioning waste discharge requirements. In *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 624-28 (2005), the California Supreme Court confirmed that the Cal. Water Code § 13241 balancing factors must be applied when waste discharge requirements are established pursuant to Cal. Water Code § 13263, except where the agency is merely meeting and not exceeding *non-discretionary*, federally-prescribed *minimum* requirements. Clearly the Draft Permit requires substantially more than non-discretionary, federal minimum requirements.

The Section 13241 balancing factors are:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

These factors require that the State Water Board consider economic considerations, which are totally unaddressed in the Draft Permit, along with the need for infrastructure supporting the development of housing. The Draft Permit also fails to consider control of all factors affecting water quality, but focuses only on the discharges out of the Caltrans MS4, even going so far as to impose requirements that Caltrans regulate irrigation runoff from neighboring agricultural operations. Finally, the Draft Permit provides that Regional Water Quality Control Boards can add more requirements, subjecting Caltrans to multiple, inconsistent and undefined further burdens.

Clearly, in specifying the most stringent program in the nation, the Draft Permit's requirements go well beyond minimum non-discretionary federal requirements. The State Water Board should expressly acknowledge that it is using its own discretion to impose requirements beyond those of the federal Clean Water Act, and determine the costs and other impacts of the resources required to carry them out, and whether these achieve corresponding benefits and the mandated goals of the State's water quality laws.

3. Receiving Water Limitations and Prohibitions in the Draft Order must be revised further to clearly define the iterative adaptive management process.

As noted above, in accordance with federal and state law, the State adopts water quality standards to protect the most sensitive beneficial uses of waters of the State. For example, standards protect against impacts on the reproductive success of algae, water fleas, and other sensitive species, and can amount to only a few “parts per billion.” Standards relating to sediment and turbidity often do not differentiate between levels expected during storms and at other times. It is well known that stormwater from many areas, including urbanized areas and roadways, often has levels of constituents higher than water quality standards.

Together with the variability inherent in precipitation flows and lack of control over inputs to MS4 systems, this is why Congress chose not to mandate that MS4 discharges meeting water quality standards, and why MS4 permits rely on best management practice mandates instead of numeric effluent limits. This was confirmed by the Ninth Circuit Court of Appeals in 1999, in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). In that case, the Court contradicted direction USEPA had given the State of California, and which had first caused the State to begin including MS4 permit provisions addressing compliance with water quality standards. Compare *In the Matter of the Petition of Citizens for a Better Environment, et al*, SWRCB Order No. WQ 91-03, 1991 WL 135460 (May 16, 1991), at p. *16 (confirming that water quality standard compliance was not required by MS4s), with *Own Motion Review of the Petition for Environmental Health Coalition*, SWRCB Order No. WQ 99-05, 1999 WL 458768 (June 19, 1999) (showing the State Water Board revised safe harbor language in the Orange County MS4 permit to comply with a 1998 disapproval letter from USEPA).

However, the Court also found that the Clean Water Act *allows* States, as a matter of discretion, to include more stringent requirements in MS4 permits relating to water quality standards. Considerable confusion has accompanied this issue ever since. Given detailed language in the State’s MS4 permits on measures to address water quality challenges, it was generally understood that the State’s MS4 permits only required an iterative, adaptive management approach to the goal of protecting water quality standards over time. Indeed, the State Water Board confirmed that intention in its 2001 decision on the San Diego County MS4 permit, saying

“... we point out that our language, similar to U.S. EPA’s permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an *iterative approach* requiring improved BMPs.”

In the Matter of the Petitions of Building Industry Assn. of San Diego County and Western States Petroleum Assn. (Nov. 15, 2001), Order WQ 2001-15, p. 7 (emphasis added).

Just this summer, however, a new Ninth Circuit case interpreted a California MS4 permit containing similar language, like that in the Caltrans Draft Permit, suggesting that it requires strict compliance with water quality standards, whatever the intention of Water Board may have been. *See Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, et al.* (9th Cir., July 13, 2011, No. 10-56017) 2011 U.S. App. LEXIS 14443 at *1 (*NRDC v. County of Los Angeles*) (interpreting the receiving water limitations and prohibitions in the Los Angeles County Municipal Storm Water National Pollutant Discharge Elimination Permit, No. CAS004001, Order No. 01-182 (Dec. 13, 2001, with subsequent amendments) (LA County MS4 Permit)).

In the Draft Permit, proposed Receiving Water Limitations Section D.2 states, "The discharge of storm water from a facility or activity shall not cause or contribute to an exceedance of any applicable water quality standard." A parallel, broad prohibition is found in Section A.4, which broadly requires compliance with all discharge prohibitions in any Basin Plans, now expressly also mentioning the California Toxics Rule.²

Other language in the Draft Permit, like the LA County MS4 permit, calls for evaluation and improvement of best management practices in an iterative, but still demanding, process.³ The permit addresses challenges meeting instream water quality standards and prohibitions is mandating a procedure requiring prompt reporting and adoption of additional BMPs to prevent or reduce the pollutants. § E.2.c.3)c). In addition, there is a complex monitoring program in Section E.2.c.2) calling for specific measures to be taken in response to exceedances of "action levels" based on water quality objectives.

However, the reasoning in *NRDC v. County of Los Angeles* would appear to reject any safe harbor for all these efforts, suggesting that this permit language, which was discretionary on the part of the State, may require continual compliance with water quality standards.⁴

² The prohibitions in Draft Permit Section A.4, the receiving water limitations of Section D, and the monitoring and compliance requirements of Section E have been revised since the January 2011 draft, but have not remedied, and in places have worsened, these critical mandates of the permit.

³ Specifically, Section D.4 provides,

"The Department shall comply with Section A.4, D.2 and D.3 of this Order through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SWMP and other requirements of this Order including any modifications. The SWMP shall be designed to achieve compliance with Sections A.4, D.2 and d.3 of this Order. If exceedance(s) of WQS persist notwithstanding implementation of the SWMP, and other requirements of this Order, the Department shall assure compliance . . . by complying with the procedure specified at Section E.2.c.3)c) of this Order."

⁴ The court found that the Receiving Water Limitations language set forth in the LA County MS4 Permit "... offers no textual support for the proposition that compliance with certain provisions [i.e., the iterative process provisions] shall forgive non-compliance with the discharge prohibitions." (*NRDC v. County of Los Angeles*, 2011 U.S. App LEXIS 14443 at pp. **43-44.) Further, the court found that the discharge prohibition language in Receiving Water Limitation 2.1 of the LA County MS4 Permit provides no "safe harbor." (*NRDC v. County of Los Angeles* at

This interpretation would render the prohibitions and receiving water limits impossible to comply with. This interpretation could be taken to create permit violations any time a single discharge causes these conditions, which is known to be unavoidable. For example, residuals from brake pad wear have been shown to contribute to the instream exceedances of extremely low water quality standards for copper protecting the most sensitive aquatic life (just a few parts per billion). No feasible best management practice technology has been shown to reduce copper to below those levels. *Caltrans* has no power to this well documented source of copper, but has done what it can by helping to fund research that lead to landmark 2010 California legislation, S.B. 346, mandating that brake pads sold in the State have much lower copper content – by 2025.

We believe the State Water Board does not intend that *Caltrans* will violate its permit until brake pads no longer emit copper. However, the recent Ninth Circuit decision, *NRDC v. Los Angeles*, suggests that this may be the result of the permit language.

There is no longer room for confusion and ambiguity. A similar reading of *Caltrans*' permit would make *Caltrans* the constant prisoner of endless litigation, and divert the State's resources toward overly costly, and possibly legally ineffective, investments that would do little to clean up the State's waters. It would make the extensive reporting, evaluation and BMP improvement procedures a useless paper exercise, and would leave *Caltrans* in violation of the permit throughout the process.

The State Water Board must clearly state its intentions not to automatically create a violation of the permit (and thus the law) if a discharge is found to cause or contribute to receiving water quality standards -- as long as the permittee is following the steps outlined in the permit. The State Water Board must revise its prohibitions and receiving water limitations to reflect state policy that properly state policy that water quality standards protections will be accomplished by evaluation and adoption of improved best management practices over time.⁵

p. *43.) Based on its reading of the permit, the court ultimately found that water quality standard exceedances detected from various compliance and monitoring mechanisms are permit violations subject to enforcement. (*Id.* at p. *42.)

⁵ Not only has the State itself used clearer language in past permit, including a recent permit issued by the Central Valley Regional Water Quality Control Board to the Port of Stockton, but one can see a similar concept in the State of Washington DOT permit. Section S.4 of that permit contains detailed provisions on compliance of water quality standards, and then provides a safe harbor procedure to deal with situations where discharges affect the ability of waters to achieve standards, as follows, stating, "Provided WSDOT is implementing the approved adaptive management response under this section, WSDOT remains in compliance with Condition S4, despite any on-going violations of Water Quality Standards identified under S4.A or B above."

4. The Draft Permit issuance process should be coordinated with other State Water Board action granting Caltrans exceptions to the prohibition on discharges of Waste to Areas of Special Biological Significance.

The Draft Permit prohibits discharges to Areas of Special Biological Significance unless Caltrans has been granted an exception for such discharges by the State Water Board. Yet, the State Water Board has simply chosen to delay issuance of the necessary exceptions, a process entirely within its control. The State Water Board has had proceedings on this subject underway since before 2006, including a proposed approach for regulating stormwater proposed in 2006 and, most recently, a proposed General Exception, including Special Protections, for discharges into ASBS and related draft Program Environmental Impact Report (PEIR). The State Water Board, and not Caltrans, controls its own issuance of the exceptions, and should obviously adopt them before adopting this permit and prohibition.

5. The Draft Permit improperly imposes stringent requirements on Caltrans to manage agricultural irrigation water draining into its MS4.

The Draft Permit improperly prohibits Caltrans from accepting agricultural irrigation water, except under limited circumstances, and incorrectly makes Caltrans a surrogate for the State in scrutinizing the regulatory status of such discharges. As discussed in the Fact Sheet in revised language, discharges of irrigation water are unqualifiedly exempt from NPDES permit requirements under the Clean Water Act. Yet, the Draft Permit determines that Caltrans may not accept such discharges into its municipal storm sewer system, “commingling” them with municipal stormwater, if the agricultural source does not have a waiver or permit.

This effectively treats agricultural irrigation as illicit discharges under the law. This is incorrect. In fact, there is no regulation prohibiting or regulating “commingling” of waters. The term “commingling” is normally used to describe problems that arise when a permittee allows its process waste streams, which are subject to one set of federal permitting rules, to enter another of its own wastewater streams with less stringent requirements, subjecting the combined discharge to the more stringent process water limits. Here, Caltrans is not the source of the discharges, and they are exempt from the NPDES program.

The State has taken responsibility to regulate irrigated agriculture, on its own timeline, and has the power to impose requirements directly on agricultural sources. Caltrans has no such authority. The economic and legal implications of effectively prohibiting established drainage patterns are substantial. Caltrans should not be expected to stop drainage the State has failed to regulate. Agricultural irrigation should be restored as a nonstormwater source falling outside the prohibitions against illicit connections.

As is evident from the extensive legal shortcomings in the Draft Permit, and its major impacts on the State’s welfare and economy and proper allocation of environmental resources, the State Water Board should take the time to consider its impacts and make substantial revisions.