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December 7, 2015

Sent via email santaana@waterboards.ca.gov

Santa Ana Regional Water Quality Control Board
Attn: Kurt Berchtold
3737 Main Street, Suite 500
Riverside, CA 92501-3348

RE: Comments on the Third Draft Orange County Municipal Separate Storm Sewer System ("MS4") Permit, NPDES Permit No. CAS61080

Dear Mr. Berchtold,

On behalf of Orange County Coastkeeper ("Coastkeeper"), I submit the following comments on the Regional Water Quality Control Board Santa Ana Region's ("Regional Board") revised draft Order No. R8-2015-0001, Orange County Municipal Separate Storm Sewer System Permit ("Draft Order"). We appreciate this opportunity to comment on the revised Draft Order.

I. Summary

The Draft Order presents a critical opportunity to meaningfully address the number one source of water pollution in the Santa Ana Region – urban runoff. Despite more than two decades of stormwater regulation, urban runoff continues to chronically impact human health and impair water quality at our beaches and in our rivers. It is time for this problem to be addressed in a way that will both reduce pollutant loading and guarantee attainment of water quality standards ("WQSs").

We support the State Water Resources Control Board's ("State Board") and Regional Board's desire to promote stormwater capture to help augment local water supplies while addressing water quality concerns. Such an approach is critically important in helping California cope with current and future drought as well as the increasing challenges of climate change. This approach also has the potential to achieve healthy waterways and compliance with WQSs, as the law requires. Unfortunately, the Draft Order fails to adequately promote this objective and instead provides safe harbors for Co-permittees that neither embrace a watershed approach nor commit to capture meaningful amounts of stormwater runoff – let alone guarantee compliance with WQSs.

The foundation for our comments rest on EPA guidance that NPDES permitting authorities establish clear, specific, and measureable permit requirements to implement the minimum control measures in MS4 permits.[1] Consider the adoption of the Draft Order will cause the Regional Board to be inundated by

[1] Memo. from Andrew D. Sawyers, Director Office of Wastewater Management, to Water Division Directors Regions 1-10, *Revisions to the Nov. 22, 2002 Memo. Establishing Total Maximum Daily Load (TMDL)*

WQMPs sent by Co-permittees submitted at or near the same time. Without the necessary financial and human resources available to the Regional Board, the volume and technical complexities of these plans are likely to overwhelm the Regional Board. As such, the Regional Board should modify language described below before the adoption of the Draft Order in order to provide staff with the appropriate guidance to properly review documents submitted by Co-permittees. The effective use of clear, specific, and measurable permit requirements detailing the Co-permittees obligations will help alleviate public, Co-permittee, and staff confusion as to the requirements found in the Draft Order.

As is detailed more fully in these comments, we oppose the Draft Order because as currently written it represents bad public policy and is illegal. Our comments focus on anti-backsliding, anti-degradation, reference to relevant permits, new and significant redevelopment, infiltration of industrial storm water, and miscellaneous issues.

In sum, Coastkeeper believes there is a better way forward. We believe the Regional Board can achieve the mutual goals of water quality protection and stormwater capture by embracing compliance with WQSs while retaining critical enforcement discretion. Enforcement is a proven tool to drive success and can be used to motivate compliance where other regulatory methods have failed over the past two decades.

A strong MS4 permit is critical to the health of Orange County's waterways and the millions of people who depend on them. Moreover, because any Regional Board's MS4-related Order has the potential to influence water quality policy statewide, a strong Order from this Regional Board is critical to water quality all across California.

II. <u>Background</u>

This comment letter builds on the comments from our previous letters, dated June 20, 2014 and February 13, 2015. We incorporate those letters by reference, as well as the letter submitted by the Natural Resources Defense Council ("NRDC") on June 20, 2014. Coastkeeper and NRDC have worked collaboratively on MS4 comments to the Regional Board in the past and will continue to collaborate where possible.

Coastkeeper's continued involvement in MS4 permits renewals regularly confirm our frustration with the slow pace of water quality improvements as a result of these complex regulatory mechanisms. Existing MS4 permits have not reduced urban runoff impacts to water quality to the extent that the public deserves and the law requires under existing MS4 Permits. Orange County swimmers, surfers, kayakers and the like continue to suffer from waterways that are too often closed or posted for pollution. We acknowledge the money spent and time dedicated to the issues, but the iterative process has been underutilized and ineffective[2] to date in bringing MS4 discharges into compliance with water quality standards. As the State Water Resources Control Boards asserted, '[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing beneficial uses.' More than a decade later, this is still true.[3]

Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, (Nov. 26, 2014)("EPA Sawyers Memo") at 5.

[2] Order WQ 2015-0075 (June 16, 2015) at 14.

[3] *Id.* at 15.

The state and national economies benefit from a thriving ocean economy. With the ocean directly impacted by the storm sewer system, it is necessary that the MS4 Co-permittees are knowledgeable of its effect on the ocean economy at large.

In 2010, the ocean economy was associated with approximately 5.4 million direct and indirect and induced jobs.[4] The tourism and recreation industry had the most consistent growth of all the ocean economy industry sectors and supplied over seventy percent of the ocean economy jobs.[5] California is among the top three states providing employment in the tourism and recreation industry.[6]

The oceans and Great Lakes have been a prime destination for vacations and leisure since the nineteenth century.[7] It has been estimated that between 150 and almost 400 million visits are made to California's beaches annually.[8] These visits result in "billions of dollars in expenditures, by tourists and local swimmers and nonmarket values enjoyed mostly by local area residents."[9] The total contribution of the ocean economy was estimated at $633 billion or 4.4 percent of the national GDP in 2010.[10]

Polluted ocean water has shown to have a drastic effect on the access to California beaches. During 2004 alone, "CA county health officials posted or closed beaches 3,985 days," all generally attributed to unknown sources of fecal indicator bacteria.[11] This number grows each year as counties monitor more beaches.[12] A study published in 2006 estimated that between 627,800 and 1,479,200 excess gastrointestinal illnesses occur at beaches in Los Angeles and Orange Counties each Year.[13] This resulted in an approximate economic loss of $21 or $51 million depending upon the underlying epidemiological model used.[14] "Results demonstrate that improving coastal water quality could result in a reduction of gastrointestinal illnesses locally and a concurrent savings in expenditures on related health care costs."[15] For instance, "GI can result in loss of time at work, a visit to the doctor, expenditures on medicine, and even significant nonmarket impacts that represent the "willingness-to-pay" of swimmers to avoid getting sick (sometimes referred to as psychic costs)."[16] The study determined the total lost work and medical cost alone was $36.58 per illness in 2004 dollars.[17]

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[4] Judith T. Kildow, et al., State of the U.S. Ocean and Coastal Economies, National Ocean Economics Program, Center for the Blue Economy 8 (2014).
[5] *Id.* at 49.
[6] *Id.* at 36.
[7] *Id.*
[8] Suzan Given, et. al, *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, 40 Environ. Sci. Technol. 4851, 4851 (2006).
[9] *Id.*
[10] *Kildow*, at 8.
[11] *Given, et. al*, at 4851. "Beach closure days combine the number of days of closure for each beach closed." Blomquist, et. al, *Assessing Risk Information Concerning Coastal Runoff*, Nat'l Water Research Institute Occasional Paper 9 (2003).
[12] *Given et. al,* at 4851.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 4854.
[17] *Id.*

One may remember that when a major El Nino season hit during 1998, rains "from those storms swept across the urban coastal landscape and filled storm drains, channels, creeks, and rivers. As these flows reached the ocean, they often produced high bacterial counts that prompted public health officials to declare beaches off-limits to water recreation until bacteria concentrations subsided. California recorded 3,273 temporary beach closures in 1998."[18] The record number of beach closures in 1998 and 1999 combined with the implementation of Assembly Bill 411 requirement to post health regulations drew much media attention that had negative implications for Orange County Beaches.[19] For example, Huntington Beach closed from the Fourth of July weekend to nearly Labor day in 1999, making nationwide news and reducing August beach attendance by 45 percent compared to August 1998.[20]

The public is aware of the problem, and the Regional Board must address storm sewer systems as a causal link to the polluted ocean waters. In Southern California, most counties issue a 72-hour advisory after it rains to warn people from going into polluted waters.[21] "[I]f the public believes swimming is associated with an increased risk of illness, they may be discouraged from going to the beach, resulting in a loss of beach-related expenditures to local businesses and recreational benefits to swimmers in addition to the loss in health benefits described here."[22]

"In addition to illness-related costs, many analysts and media reports suggest that perceptions of adverse water quality can reduce recreational income for the affected beach areas. One study estimates that the annual direct recreational spending for food, gas, parking, and other beach-related amenities in California is about $14 billion per year."[23] Which, when applied to an economic multiplier method, "the total annual indirect economic benefit to the entire United States attributable to California's beaches has been estimated at $73 billion (King, 1999)".[24]

III. <u>Moratorium on Inclusion of Receiving Water Limitation Language in this Permit</u>

Coastkeeper has consistently warned, and does so again, against the inclusion of counterproductive Receiving Water Limitation ("RWL") language sought by Co-permittees to be included in this Draft Order. The existing language RWL found in Order No. R8-2009-0030, as amended by Order No. R8-2010-0062, contains clear, appropriate, and enforceable language that complies with the Clean Water Act and has stood the test of administrative, judicial, and enforcement challenges.

The Regional Board and Co-permittees rely on Order WQ 2015-0075 in justifying the inclusion of revised RWL language. In a letter to the State Water Resources Control Board, the EPA commented on the inclusion of language in Order WQ 2015-0075 directing all Regional Boards to consider the Los Angeles

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[18] *Blomquist et. al*, at 7.
[19] *Id.* at 4.
[20] *Id.* at 9.
[21] Beachapedia, www.beachapedia.org/Health_Threats_from_Polluted_Coastal_Waters.
[22] *Given et. al*, at 4857.
[23] *Kildow*, at 93.
[24] *Kildow*, at 94.

MS4 approach that it would be premature and inappropriate to require that approach statewide.[25] Instead, EPA recommended the Regional Boards to "consider" the approach, but not require it.[26]

Currently, litigation related to RWL language in the Los Angeles MS4 permit has been filed in no fewer than three Superior Courts. The San Diego Regional Board's recently adopted MS4 permit is subject to appeal before the State Board. Contentious issues related to RWL language in MS4 permits remains a serious and unsettled element of storm water permitting. A regional moratorium on the inclusion of this illegal language in this Draft Permit is a reasonable and justifiable option. Coastkeeper asks for a moratorium on the revision of the existing RWL language in any MS4 permit until such time as the Los Angeles MS4 litigation has been fully resolved.

In the event the Regional Board makes the decision to include legally suspect safe harbor provisions in the Draft Order, it must be consistent with State Board guidance.

IV. <u>The Draft Order is Inconsistent with the State Board's Order</u>

The State Board makes their intentions very clear in their Order when they state, quite simply, "we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations."[27]

The State Board's Order provided specific guidance principles for other regions to follow when developing safe harbor provisions.[28] Of particular relevance to the Draft Order, the following principles are to apply to any region's safe harbor provisions:

1. The receiving water limitations provisions…should not deem good faith engagement in the iterative process to constitute such compliance.[29]
2. Permits should incorporate an ambitious, rigorous, and transparent alternative compliance path.[30]
3. The safe harbor should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.[31]
4. The safe harbor should have rigor and accountability.[32]

In upholding the LA Order's safe harbor scheme, the State Board affirmed in particular the Reasonable Assurance Analysis and multi-benefit requirements and incentives in the LA Order. With regard to the principles, the Board specifically stated that they, "direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits

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[25] Ltr from David Smith, Manager EPA NPDES Permit Section, to Ms. Jeanine Townsend, State Water Res. Control Bd., *Comments to A-2236(a)-(kk)* (Jan 20 2015) [hereinafter "EPA Smith Ltr"] at 2.
[26] *Id.* at 2.
[27] State Wat. Resources Control Bd., Order WQ 2015-0075, at 16.
[28] *Id.* at 51-52.
[29] *Id.* at 51.
[30] *Id.* at 52.
[31] *Id.*
[32] *Id.*

going forward,"[33] and that, they, "expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons."[34] The Draft Order in does not comply with the State Board Order because it does not contain a reasonable assurance analysis, protocols, or guidelines to ensure the Co-permittee's analysis and resulting plans will actually achieve RWLs and WQSs; it does not include requirements for multi-benefit projects or stormwater resource projects; and the draft language as written would allow for a safe harbor during plan review periods.

V. <u>If Adopted, the Tentative Order Would Violate the Clean Water Act's Anti-Backsliding Provisions</u>

The Clean Water Act, through its anti-backsliding provisions, prohibits a permit from being renewed, reissued, or modified on the basis of effluent guidelines promulgated after the original issuance of the permit, to contain effluent limitations that are less stringent than the comparable ones in the previous permit.[35] A permit may be renewed, reissued, or modified to contain a less stringent effluent limitation if certain exceptions apply,[36] however, none of those exceptions are applicable in this instance. Water quality based effluent limits in NPDES permits can be revised to be less stringent only where consistent with a TMDL properly incorporated into that permit.[37] And any TMDL implementation must be consistent with the requirements for compliance schedules in NPDES permits.[38] In fact, no permit may be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of that limitation would result in a violation of an applicable water quality standard.[39]

Regional Board staff asserts all effluent limitations in the Draft Order are at least as stringent as effluent limitations in the previous permit.[40] For the reasons discussed below, this statement is not supported by the law or the facts.

a. <u>Safe Harbor During Watershed Management Plan Development</u>

In the event a Co-permittee determines that a discharge or urban runoff is causing or contributing to an exceedance of WQS or to exceedances of a WQBEL, that Co-permittee *may* develop and fully implement a Water Quality Management Plan ("WQMP") designed to address these exceedances according to the requirements in the Draft Order.[41] Section XI of the Draft Order provides that Co-permittees are deemed in compliance with RWL in Section IV and with WQBELs whose final deadlines have not yet passed in Section XVII upon written notice to the Executive Officer of their intent to develop a WMP.[42]

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[33] *Id.* at 51.
[34] *Id.*
[35] 33 U.S.C. § 1342(o)(1); *see also* 40 C.F.R. § 122.44(l).
[36] 33 U.S.C. §§ 1342(o)(2)(A-E).
[37] 33 U.S.C. § 1342(o)(1).
[38] *See In the Matter of Star-Kist Caribe, Inc.*, 1989 EPA App. LEXIS 38, at 7 (E.A.B. 1989); 33 U.S.C. § 1313(e)(3)(F); 40 C.F.R. § 122.47.
[39] 33 U.S.C. § 1342(o)(3).
[40] Draft Order, Finding 26.
[41] Draft Order, Section XI.
[42] Draft Order, Section XI.A.1.

Coastkeeper cannot support the Draft Order so long as it provides compliance to Co-permittees upon notification to the Regional Board that they intend to develop a plan.

Although it is a stated goal of these programs to ensure that stormwater discharges do not cause or contribute to exceedances of RWLs, and that TMDL waste load allocations ("WLAs") are achieved**, it is not a requirement that the programs achieve these results in fact**. Permittees are instead given a safe harbor from the prohibition on violations of RWLs, or, in some cases of TMDL limits, if they participate in a WMP – regardless of whether RWLs or TMDLs are achieved.

Coastkeeper's concerns are consistent with EPA's comment to the State Board on this same issue in the Los Angeles MS4 Permit.[43] Those comments read, "[r]ather than being in compliance upon notification of intent to prepare a WMP/EWMP, we recommend that a permittee be deemed in compliance only after approval of a WMP/EWMP."[44] EPA continued by stating, "[e]stablishing a safe harbor during this planning phase is not warranted."[45] Rather than provide compliance after a notice of intent, EPA supported the San Diego Regional Board's decision, and encouraged the State Board to include language, finding permittees in compliance with RWLs only when a plan is approved. Coastkeeper again recommends revising the Draft Order to clarify that Co-permittees are held to be in compliance with RWLs only when a plan is approved and not when a Co-permittee notifies the Regional Board of their intent to prepare a plan.

Revisions to the Draft Order indicate the Regional Board has considered this request and nonetheless enhanced compliance protections for Co-permittees. Section XVIII.C.1 of the Draft Order states that for Co-permittees who are not achieving applicable WLAs in state adopted TMDLs where the final compliance deadlines have not passed, the responsible Co-permittees may be deemed in compliance after they initiate development of and implement a WMP according to the requirements of Section XI. Regional Board staff deleted "implement an approved plan designed to comply with final WQBELs" and replaced it with "initiate development of." The Draft Order's appendices provide compliance with the WQBELs be determined according to methods described in Section XVIII. WMPs must include BMPs selected to achieve WQS and WLAs,[46] but the Draft Order lacks the mechanisms to provide reasonable assurance the WMP will achieve WQS or WLAs.

In short, the Draft Permit allows a Co-permittee participating in a WMP to comply with RWLs, even if a Co-permittee's discharges actually cause or contribute to an exceedance of the RWLs, including violations of WQS or WLAs. By contrast, the existing Permit required compliance with WQSs and WLA. Thus, the Draft Permit excuses discharges of pollution and violations of WQSs that the previous permit prohibited. That is backsliding.

b. <u>The Draft Order Unlawfully Fails to Incorporate Waste-Load Allocations Consistent With Applicable TMDLs</u>

The Clean Water Act relies on TMDLs to restore water bodies that fail to meet WQS. TMDLs establish a clear and scientifically-driven pathway towards protecting beneficial issues for public health and aquatic

[43] EPA Smith Ltr.
[44] *Id.* at 1.
[45] *Id.*
[46] Draft Order, Finding 7.

life. The CWA and its implementing regulations require that NPDES permits are consistent with the assumptions and requirements of TMDL WLAs.

Further, under the Porter-Cologne Act, waste discharge requirements must implement water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.[47] In this regard, Porter-Cologne treats MS4 dischargers and other dischargers equally and anticipates all waste discharge requirements will implement water quality control plans.[48] The Regional Boards and State Board may have limited discretion to avoid strict compliance with water quality standards of the water quality control plans for MS4 dischargers, but that flexibility is not applicable related to the continued implementation of a TMDL where a final compliance deadline has passed.

The Regional Board's water quality control plan ("Basin Plan") was amended to establish a TMDL for fecal coliform bacteria in Newport Bay.[49] The amendment identified two designated beneficial uses harmed by bacterial contamination: water-contact recreation (REC-1) and shellfish harvesting (SHEL).[50] The principal sources of coliform input to Newport Bay are recognized in the Basin Plan as originating from tributary inflows, urban and agricultural runoff, including stormwater.[51] The Basin Plan includes a prioritized, phased approach to control bacterial quality in Newport Bay, which included studies on bacterial sources and fate. Coastkeeper participated in these studies and believed the additional information gathering provided rationale for the lengthy ultimate twenty (20) year compliance period.

As adopted, the TMDL WLA and load allocations ("LAs") were established to assure compliance with REC-1 standards no later than December 30, 2014 and with SHEL standards no later than December 30, 2019.[52] WLAs were specified for vessel waste and urban runoff, including stormwater, the quality of which is regulated under the MS4 permit.[53] LAs were specified for fecal coliform inputs from agricultural runoff, including stormwater, and natural sources.[54] The Basin Plan has not been revised or amended to address the fecal coliform TMDL for Newport Bay and clearly, the compliance deadline for REC-1 has passed and the compliance deadline for SHEL is near.

Federal law requires that once a TMDL is developed, effluent limitations in NPDES permits must be consistent with WLAs in the TMDL.[55] Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective.[56] The Draft Order demands discharges of urban runoff from MS4s owned or operated by the Co-permittees must be in compliance with the applicable discharge

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[47] Order WQ 2015-0075 at 11; Cal. Wat. Code § 13263.
[48] *Id.*
[49] Resolution No. 99-10.
[50] Resolution No 99-10, at 5; Basin Plan at 5-112.
[51] *Id.*
[52] Basin Plan at 5-113.
[53] *Id.*
[54] *Id.*
[55] *Communities for a Better Env't v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313, 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)); See 40 C.F.R. § 130.7(a); EPA Sawyers Memo at 6.
[56] EPA Sawyers Memo at 6

prohibitions contained in the Ocean Plan and in Chapter 5 of the Basin Plan.[57] Chapter 5 of the Basin Plan includes the implemented fecal coliform TMDL the staff has inappropriately omitted from the Draft Order. Consequently, the Draft Order inconsistently and illegally applies the Basin Plan in order to render an approved and enforceable fecal coliform TMDL ineffective.

Coastkeeper again raised our concerns with the Regional Board's willingness to prematurely withdraw, or fail to enforce, the existing fecal coliform TMDL in our comments on the Triennial Review. In response to our comments on item number two on the proposed Triennial Review priority list, deletion of obsolete fecal coliform objectives for recreational uses in consideration of new pathogen indicator objectives, the Regional Board clarified their position on the TMDL for Newport Bay, stating:

> "If and when obsolete fecal coliform objectives for the Bay are deleted and new objectives are established, then the following actions would be necessary and appropriate: (1) those parts of the Fecal Coliform TMDL that address compliance with the fecal coliform objectives for recreational uses should be withdrawn since they are not scientifically defensible; (2) a new impairment assessment based on the new objectives should be conducted; (3) if warranted by the results of the impairment assessment, a new TMDL to address compliance with the new objectives would be developed and recommended for approval."[58]

The Regional Board is effectively calling for the withdrawal of the TMDL for REC-1, the justification for the withdrawal rests on EPA recommendations from fecal coliform as the relevant bacteria indicator to enterococcus and/or E. coli. The Regional Board goes on to state in the Draft Technical Report, "implementing the REC-1 objectives in the Basin Plan is no longer scientifically justified and enforcing related WQBELs in this Order would be an ineffective use of the Regional Board's resources."[59] Coastkeeper asserts it is not in the discretion of the Regional Board to simply withdraw TMDLs through omission from MS4 permits using as justification the effective use of resources.

The EPA and States have adopted more than ten thousand fecal coliform TMDLs nationally that may or may not be impacted by new pathogen criteria.[60] Anticipating confusion with the impact the change in criteria would have on existing TMDLs, EPA has made it clear that "changes in WQS pathogen criteria from fecal coliform to E. coli and/or enterococci do not necessarily mean that a State should revise an existing TMDL written to meet other criteria addressing the same designated use."[61] Translating original fecal coliform-based allocations to the new criteria or adopting the criteria for Newport Bay established under AB 411, while keeping the existing TMDL in effect, is the lawful means of allowing for the change in criteria. Regardless, of the criteria ultimately chosen, the Regional Board is not complying with the mechanisms necessary to revise or withdraw a TMDL pursuant to federal law.

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[57] Draft Order, Section III.A.5.
[58] Regional Board, *Response to Comments on the preliminary FY2015-2018 Basin Plan Triennial Review Priority List and Work Plan*, at 8.
[59] Draft Permit, Draft Technical Report, at 97.
[60] EPA, *Considerations for Revising and Withdrawing TMDLs* (March 22, 2012) at 2, 14.
[61] *Id.*

If TMDL revision is pursued, the Regional Board should also consider that EPA recommends any revised TMDL include a daily expression of loads.[62] These daily expressions of loads apply to all pollutants, notwithstanding a regulator's contention that some pollutants were poorly suited to daily load limits.[63]

Consistent with EPA regulations, the MS4-related WLAs for TMDLs adopted in the Santa Ana Region must be properly reflected in the MS4 Permit. However, the Permit fails to properly incorporate the very limitations it acknowledges are necessary. During this renewal, the Regional Board proposes deleting the REC-1 WLAs under the existing fecal coliform TMDL. In violation of the federal requirements, the Draft Order fails to ensure compliance with all interim and final WLAs for at least the fecal coliform TMDL and is therefore illegal.

c. **<u>The Draft Permit's Assurance Analysis is Legally Insufficient and Does Not Satisfy the Requirements of the Clean Water Act</u>**

The Draft Permit's reliance on requirements for Co-permittees to conduct a "Reasonable Assurance Analysis" ("RAA"), while put forth by the Regional Board as a rationale for authorizing an alternative compliance pathway in the Draft Permit, similarly fails to ensure that requirements of the Clean Water Act will be met. What requirements for an RAA the Draft Permit does offer are vague, open a number of potential loopholes for permittees to evade compliance requirements, and ultimately are little more than a "plan to develop a plan," despite potentially granting permittees a safe harbor from long existing requirements to meet water quality standards for the region.

First, the initial requirements for Co-permittees to develop an RAA lack clarity even as to the basic requirements for any modeling to be conducted by the Co-permittees. The Draft Permit states "[t]he analysis must be supported, *in part*, by peer-reviewed models that are in the public domain. . . ."[64] This leaves entirely unclear as to what is meant by "in part," or to what degree peer-reviewed models are required for any demonstration of compliance. Even were we to assume that all steps of an analysis must employ a peer reviewed model, even this requirement may be waived at the discretion of the Executive Officer.[65] Further, the Draft Permit is effectively silent as to the requirements for *inputs* to the model—other than a mention under the Permit's requirements to conduct program effectiveness assessments that Co-permittees must include "Information related to the validity of the reasonable assurance analysis performed in support of the Watershed Management Plan,"[66] the Permit does not specify minimum data requirements for an RAA or requirements for validation or calibration of any modeling employed as part of an RAA.[67]

Instead, these critical details appear to be left to future Regional Board documentation. The Permit states, "The [RAA] analysis must be in substantial conformance with written guidance developed or referenced

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[62] *Id.* at 7 (citing "Establishing TMDL 'Daily' Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. E.P.A. et al.*, No. 05-5015 (April 25, 2006) and Implications for NPDES Permits.").
[63] *Friends of the Earth, Inc. v. E.P.A. et al.*, 466 F.3d 140 (D.C. Cir. 2006).
[64] Draft Permit, Section XI.E.8 (emphasis added).
[65] *Id.*
[66] Draft Permit, Section XIX.F.
[67] We note that this has led to substantial implementation issues under the Los Angeles County MS4 Permit's alternative compliance scheme.

by Regional Board staff."[68] But as this guidance has not been developed,[69] this is little more than a "plan to develop a plan," which leaves the public with no meaningful opportunity to assess the rigor of any RAA or likelihood an RAA will accurately predict whether a Co-permittee will actually achieve compliance with water quality standards under its WMP.

And there is good reason to question how rigorous or accurate any RAA conducted under the permit will be required to be; the Draft Technical Report explicitly states:

> An analysis that provides 'reasonable assurance' is not expected to provide absolute assurance, but nevertheless, a high level of assurance. A reasonable assurance is expected to be supported by evidence that provides a reasonable basis to conclude that the Co-permittees' actions will achieve final WQBELs and that the evidence does not support alternative, conflicting conclusions.[70]

Stating outright that the permit will only require a (ambiguously defined) "high level of assurance" or provide a "reasonable basis" to conclude WQSs or WQBELs will be met clearly falls short of previous Permit requirements to flatly meet WQSs. It is effectively an admission by the Board that it does not know whether these conditions will be met. Under no circumstance does the Permit, as currently drafted provide justification for the provision of safe harbors to the Co-permittees, or sufficient detail for the public to assess whether it meets the requirements of the Clean Water Act.

VI. <u>The Draft Order Violates State and Federal Anti-Degradation Requirements</u>

The Draft Permit fails to include an adequate anti-degradation analysis, which federal and state law require because the "safe harbors" will allow continued degradation of water quality. The Draft Permit's anti-degradation analysis and findings are improper and lack basis.

The Draft Permit requires Co-permittees to implement programs and policies necessary to improve water quality; the Order does not allow any degradation of existing water quality. Therefore, according to the Draft Permit, this Order is consistent with the anti-degradation provisions of 40 CFR 131.12 and State Board Resolution No. 68-16 as discussed further in the Technical Report.[71] Simply claiming that no degradation will occur does not satisfy the requirements of the Clean Water Act.[72] The Regional Board has not undertaken the required analysis necessary to support such a finding.

Even assuming, as the Regional Board claims, that the new RWLs are as stringent as those in the previous Permit, allowing a permit regime that degrades receiving waters to continue triggers anti-degradation analysis. At a minimum, the existing Permit maintains the existing failed program implementation for over

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[68] Draft Permit, Section XI.E.8.c.
[69] The Draft Permit references guidance developed for the Los Angeles County MS4 Permit for RAA processes, but does not indicate this is required to be followed by Orange County permittees. (*See* Draft Technical Report, at 56.)
[70] Draft Technical Report, at 56.
[71] Draft Order, Finding 25.
[72] *Associacion de Gente Unida, for El Agua v. Central Valley Regional Board*, 149 Cal. Rptr. 3d 132, 145 (2012); *see also*, *American Funeral Concepts-American Cremation Soc'y v. Board of Funeral Directors and Embalmers*, 136 Cal. App. 3d 303, 309 (1982).

a year during WMP development and a potentially additional period of months during Regional Board review of the plans. Such an approach is inconsistent with anti-degradation requirements. As the Third Appellate District pointedly stated in rejecting the Regional Board's argument that because a new dairy permit was no worse than the last:

> Our problem with the Regional Board's reliance on the assertion that no groundwater degradation is allowed is twofold. First, as the order itself recognizes, the groundwater quality has degraded, and dairy operations are partly responsible. To the extent that the Order allows historic practices to continue without change, degradation will continue.[73]

There is no meaningful debate that urban runoff continues to degrade receiving waters in the Orange County area, and that the stormwater programs implemented under the prior permit failed to control that degradation. Therefore, because an anti-degradation analysis is required, and the Draft Order fails to conduct that analysis, the 2012 Permit violates State and Federal Law.

VII. <u>The Revised Draft Order Fails to Implement a Proper and Adequate Prohibition on the Discharge of Trash</u>

The Draft Permit fails to consider WQ Order No. 2015-0019, the "Amendment to the Water Quality Control Plan for the Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (hereinafter "Trash Amendments"), which was passed by the State Board in 2015. The Order is not currently listed anywhere in the Revised Draft, but should be introduced under either Section C. Water Quality Standards, or Section D. Considerations under Federal and State Law.

The objective of the State Board's Trash Amendments was to provide statewide consistency for the Regional Boards' regulatory approach to protect aquatic life and public health beneficial uses, and reduce environmental issues associated with trash in state waters, while focusing limited resources on high trash generating areas.[74] One of the five primary sources and transport mechanisms for trash to state waters is storm events which drain watersheds and carry trash (originating from littering, inadequate waste handling or illegal dumping) via the storm drain system to receiving waters.[75] Thus, a permit such as the MS4, drafted subsequent to the Trash Amendments, should incorporate this objective, as it directly relates to it.

With regards to trash and debris control, the Draft Permit states:

> Each Co-permittees [sic] must implement an effective program to reduce and/or eliminate the discharge of trash and debris to waters of the U.S. Measures employed for the control of trash and debris must be reported and reviewed annually by the Co-permittees to objectively evaluate the measures' effectiveness. The results of the reviews must be provided annually in the Annual Progress Report. The principle Co-permittee must demonstrate that the Co-permittees have formally evaluated new technologies for the control of trash and debris, as they become aware of them, and report the findings in the Annual Progress Report. Co-Permittees may discontinue control measures for trash and

[73] *Associacion de Gente Unida*, 149 Cal. Rptr., at 145.
[74] *Id.* at B-2.
[75] Final Staff Report for Trash Amendments, A-12.

> debris that they deem to pose an unmitigatable hazard or to be ineffective provided that the measure is replaced by the equal or more-effective measure. The permanent substitution of control measures must be reported in the Annual Progress Report and approved by the Executive Officer. The proposed substitution must be supported by substantial objective evidence. This applies to program-level changes and not to the day-to-day operation of control measures. Co-permittees must satisfy any conditions imposed by the Executive Officer as part of the approval of any substitution.[76]

Alternatively, the Los Angeles Regional Board proactively implemented TMDLs to resolve their trash problem, and additionally addressed trash control measures in its MS4 Permit. The Los Angeles Regional Board's fifteen trash and debris TMDLs set the numeric target for trash in the applicable water bodies to zero, as derived from the water quality objective in their Basin Plan. The TMDLs defined "trash" as "man-made litter," as defined by the Cal. Govt. Code § 68055.1(g). The implementation plans varied slightly but were mostly based on phased percent reduction goals that can be achieved through discharge permits, BMPs, and structural controls.[77]

The San Francisco Bay MRP, Order No. R2-2009-0019 also addressed Trash Load Reduction in order to proactively confront its trash problem. The San Francisco Bay MRP applies to 76 large, medium and small municipalities and flood control agencies in that region. It uses narrative language, rather than numerical targets, to prohibit trash discharges. Compliance with the permit is met through timely implementation of control measures, BMPs, and any trash reduction ordinances or mandatory full trash capture devices to reduce trash loads from MS4s by set percent reductions.[78]

The current wording regarding reduction of trash and/or debris is vague and leaves the Co-permittee vying for direction and structure. Language in permit provisions should be clear, specific, measurable, and enforceable. It should identify what needs to happen, who needs to do it, how much they need to do, when it needs to get done, and where it is to be done.

For example, the San Francisco Bay MRP required implementation *by Permittees* of *control measures and other actions* to *reduce trash loads* from MS4s *by* 40% by 2014, 70% by 2017, and 100% by 2022.[79] These identifiers are sufficiently clear for the Permittee to understand the timeline and goals, while still giving the Permittee the option to choose the means to achieve such goals.

As another example, when implementing the number of the annual catch basin inspections not subject to a TMDL, the Los Angeles MS4 Permit prioritized the catch basins from Priority A to Priority C, with "A" basins consistently generating the highest volumes of trash and/or debris, and "C" basins generating the least. Priority A areas required *the Permittee* to *annually inspect a catch basin once during the dry season and three times during the wet season*.[80]

Similarly, the Draft Permit already prioritizes areas in Orange County with labels such as "high-priority", "medium priority," and "low-priority," with regards to construction, commercial, and industrial sites. The

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[76] *Id.* at 28.
[77] *Id.* at A-24.
[78] *Id.* at A-26.
[79] Order No. R2-2009-0074, Fact Sheet I-74.
[80] Order No. R4-2012-0175, at 131.

Draft Permit also changes the inspection requirements based on the priority level of a site. Using this type of familiar categorization, the control measures and timelines to reduce trash in areas of Orange County can vary depending on the priority of an area. Using these prioritization, the Regional Board should implement more specific tasks and deadlines regarding the reduction of trash, thus producing a more attainable goal for the Permittees and providing consistency with the Trash Amendments.

VIII. Section IX of the Draft Permit Fails to Reference the Sector-Specific Permit

Section IX of the Draft Permit guides Co-permittees on the municipal inspection of industrial sites including the development of inventories and policies related to industrial inspection. Section IX.A of the Draft Permit mandates each Co-permittee to maintain an inventory of all industrial sites with the potential to discharge pollutants to the MS4 within its jurisdiction. Sites are to be included in the Co-permittee's inventory regardless of whether the site is subject to the Statewide Industrial General Permit or other NPDES permit.[81] Section IX.B. of the Draft Permit requires written policies and procedures related to how inspections and related enforcement actions are carried out. These inspections and related enforcement actions must be carried out in a manner that consistently enforces compliance with applicable ordinances, plans, permits, or other requirements related to the control of discharges of pollutants to their MS4s.[82]

The Draft Permit fails to include reference to the Sector Specific General Permit for Storm Water Runoff Associated with Industrial Activities from Scrap Metal Recycling Facilities within the Santa Ana Region[83] "(Sector-Specific Permit"), which exists only within this region and should not be ignored when developing industrial inventories. Reference to the Sector-Specific Permit should be included in Section IX.A.1 and A.3,[84] and Section IX.B.1.d. and B.2.b.

IX. Specific Inquiries Regarding the Draft Permit's Section on New Development (Including Significant Redevelopment)

Coastkeeper is largely encouraged by the Draft Permit's language regarding LID BMPs. However, we seek clarification for the following modifications:

a. Section XII.E.c: **"The Co-permittees approve no more than ten (10) such nonconforming structural treatment control BMPs in total during the term of this Order."** This previously read "three (3)," what is the rationale for a more than threefold increase in nonconforming structural treatment control BMPs allowed under this permit?

b. Section XII.G.2: **"Source control, site design, and structural treatment control BMPs must be designed to maximize retention of the site's design capture volume unless such measures pose an unmitigatable environmental hazard."** Compare with Section XII.F.2.c, which reads it total: **"The Co-permittees must require retention LID BMPs for the design capture volume, or the maximum portion thereof, unless such control**

[81] Draft Order, Section IX.A.1.
[82] Draft Order, Section IX.B.
[83] Order No. R8-2012-0012, NPDES Permit No. CAG 61800.
[84] A Sector-Specific Permittee would not possess an Industrial General Permit WDID. They would possess a similar identifier that should be included in the Co-permittees' inventory of industrial sites.

are: (c) where environmental and public health hazards cannot be mitigated to an acceptable level." Section XII.G.2. relies on a standard of "unmitigatable environmental hazard," while section XII.F.2.c. adds "public health" and "cannot be mitigated to an acceptable level." Although Coastkeeper acknowledges and appreciates the language supporting retention LID BMPs in Section XII.F.4, how does the Regional Board define "acceptable" and what is the rationale for the addition of "public health" to Section XII.F.2.c?

c. Section XII.K.9: **"Infiltration LID BMPs must not be used to treat storm water runoff associated with industrial activity[85], storm water runoff from highways subject to motorized vehicular traffic of 25,000 average annual daily traffic, automotive repair shops, car washes, motorized fleet vehicle storage, nurseries, or other land uses or activities that pose a high-threat to ground water quality."** How does the Regional Board define "treat?" Does the Regional Board seek to prohibit infiltration of storm water from areas of industrial activity and associated areas of non-industrial activity regardless of the potential threat to groundwater? Is the Regional Board seeking to require pre-treatment before infiltrating industrial storm water and not prohibiting all industrial storm water infiltration? What is the Regional Board's scientific and legal justification for a prohibition? What is the Regional Board's legal and scientific justification for not providing industrial facilities from conducting a site specific review of the threat to groundwater from industrial storm water infiltration? Footnote 17 must be restated to provide clarity, but assuming storm water at an industrial facility originating from an area outside of an area of industrial activity cannot be infiltrated on-site, what is the legal and scientific justification for that prohibition?

d. Section D.18: **"Where the tributary area to an on-site facility includes areas outside of the project boundary, the facility does not need to be sized to treat the design capture volume or flow from outside the project boundary unless appropriate agreements are in place for that facility to function as a regional or sub-regional facility according to Subsection XII. M."** Is the Regional Board asserting that a facility is only legally responsible for discharges originating from their facility and not flow that originates from offsite that nonetheless leaves a facility?

X. <u>Miscellaneous</u>

a. In Section IX, the Draft Order limits an industrial site from being prioritized a high priority in a Co-permittee's inventory it, among other criteria, the site is tributary to, *and within 500-feet of*, an area defined in the Ocean Plan as an Areas of Special Biological Significance ("ASBS").[86] What is the Regional Board's justification for including such a narrow geographic scope to an industrial site discharging to an ASBS being categorized as a high priority site in a Co-permittee's inventory?

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[85] Draft Order, Section XII.K.9 footnote 17 reads: "This does not exclude areas of an industrial site where no industrial activity occurs, such as a roof which has no roof-mounted industrial equipment or exhausts from industrial equipment which may emit potential storm water pollutants."
[86] Draft Order, Section IX.B.2.d.

b. Coastkeeper is encouraged by the Regional Board's commitment to the Sediment TMDL for Upper Newport Bay. EPA recommends existing TMDLs not be withdrawn simply because the load and wasteload allocations have been implemented successfully and the water is now attaining water quality standards.[87] Appendix D to the Draft Order retains important elements of the Sediment TMDL. Coastkeeper supports the retention of the Sediment TMDL to protect against sedimentation in Upper Newport Bay.

XI. Conclusion

Coastkeeper appreciates the time and effort by Regional Board staff to find acceptable solutions to ensuring discharges from MS4s do not cause or contribute to the violation of water quality standards. Despite that hard work, however, the Draft Order as proposed is inconsistent with the State Board's Order and would violate the Clean Water Act for the reasons described above and in discussions and comments Coastkeeper have made to Regional Board staff and the Regional Board thus far.

The Regional Board could correct each of these fatal deficiencies in the Draft Order's language and the safe harbor by choosing to not adopt the proposed language and instead continue to require implementation of watershed management programs as one way to achieve, rather than demonstrate, compliance with RWLs and WQSs. Coastkeeper respectfully requests the Regional Board remove the safe harbor language. Should the Regional Board chose to adopt safe harbor language despite the Draft Order's legal and practical deficiencies, we respectfully request the Draft Order be made consistent with the State Board's Order through an amendment that includes the following requirements, at a minimum: (1) the Reasonable Assurance Analysis and WMP guidance, modeling, and standards that were expressly approved by the State Board's Order and that are the lynchpin of the approved safe harbor approach, (2) regional multi-benefit projects be a necessary element of compliance BMPs, (3) language that automatically triggers an end to the safe harbor protections, as earlier proposed by Environmental Groups and referenced above, and (4) removal of the iterative process from the safe harbor scheme.

Incorporating the Trash Amendments, clarifying retention LID BMP application for industrial facilities, including reference to the Sector-Specific Permit, and restoring the applicability of the fecal coliform TMDL to Newport Bay are critical issues for Coastkeeper and our membership. We look forward to discussing these issues with you and your staff in the coming weeks.

Thank you for the opportunity to comment.

Sincerely,

Colin Kelly
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Orange County Coastkeeper

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[87] EPA, *Considerations for Revising and Withdrawing TMDLs* (March 22, 2012) at 12.

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