Comment Letters Received from Environmental Agencies

- Ballona Creek Renaissance
- Environmental Entrepreneurs (E2)
- Malibu Surfing Association
- NRDC, Heal the Bay, Los Angeles Waterkeeper
- Surfrider Foundation
- TreePeople

BALLONA CREEK Renaissance

P.O. Box 843, Culver City CA 90232

July 23, 2012

Via electronic mail

Mr. Sam Unger
Executive Officer and Members of the Board
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Email: LAMS42012@waterboards.ca.gov

Re: Comments on Draft Los Angeles County Stormwater Permit, Tentative Order No. R4-2012-XXXX

Dear Mr. Unger:

On behalf of Ballona Creek Renaissance, we appreciate the opportunity to comment to the Los Angeles Regional Water Quality Control Board ("Regional Board") on the Draft Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit ("Draft Permit"). As the local nonprofit organization focused on the renewal of Ballona Creek and its watershed, we suggest the following revisions to the Draft Permit, which better reflect the goals and requirements of the Clean Water Act.

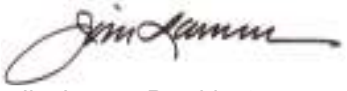
BCR would like the Regional Board to maintain requirements in the MS4 permit's Receiving Water Limitations section for permittees to meet water quality standards. We further urge the Regional Board to properly incorporate and enforce Total Maximum Daily Load (TMDL) provisions, including interim and final numeric waste load allocations, as described below.

Bacteria TMDLs, in particular, merit immediate attention, perhaps the most critical being the Santa Monica Bay Beaches Bacteria TMDL for dry weather. It would do much to protect swimmers, surfers, waders and beachgoers from the proven harmful impacts of waterborne fecal bacteria. We strongly disagree with the Draft Permit's suggested allowance of additional time for these long overdue protections..

BCR also strongly supports including low impact development (LID) and green infrastructure provisions in the Draft Permit. Because there are practical and cost-effective methods for retaining and reusing stormwater, which reduces runoff volume and pollutant loading while in many cases increasing water supplies, these practices should be a priority requirement in the new LA MS4 Permit. These mechanisms, including use of infiltration, capture and re-use, and evapotranspiration, produce economic and social benefits, in addition to improvements to water quality.

The Regional Board should revise the Draft permit to ensure all permittees are held to the same standards (infiltration and/or capture of the 85th percentile storm). Also, requirements should apply not only to new development and redevelopment, but also to the existing built environment where technically feasible. The vast majority of runoff stems from the existing development.

Sincerely,



Jim Lamm, President

ENVIRONMENTAL ENTREPRENEURS®
The *Independent* Business Voice for the Environment
www.e2.org

July 23, 2012

Mr. Sam Unger, Executive Officer
RWQCB Los Angeles Region

RE: Comments on Draft Los Angeles County Stormwater Permit, Tentative Order No. R4-2012-XXXX

Dear Mr. Unger and Members of the Board:

On behalf of Environmental Entrepreneurs (E2), we write to express support for the inclusion of strong protections for our region's beaches and surface waters in the Draft Los Angeles County Municipal Separate Storm Sewer (MS4) Permit ("Draft Permit").

Clean beaches and a safe ocean are critical to the success of our region's economy. As a result, we are particularly interested in the need to manage and control stormwater, a leading cause of water pollution in Los Angeles County and statewide. The Draft Permit must ensure that the public health of county residents and visitors to our waters are protected, and that the Regional Board is moving forward with solutions to the problems of stormwater pollution that are effective and enforceable.

E2 is a non-partisan, national community of business leaders who promote strong environmental policy to grow the economy. In California, E2 represents a community of almost 600 business leaders who promote strong environmental policy to grow the economy. We are entrepreneurs, investors and professionals who collectively manage over $81 billion of venture capital and private equity. Our members have started 1,200 businesses, which in turn have created almost 420,000 jobs.

Controlling pollution in stormwater discharges has far-reaching economic and social benefits for the Los Angeles region. According to a report to California's Resources Agency, "California has the largest Ocean Economy in the United States, ranking number one overall for both employment and gross state product . . . ."[1] This ocean economy, particularly in southern California, is responsible for tens of thousands of jobs and provides billions in wages each year. A 2007 study by the National Oceanic and Atmospheric Association found that improving water quality in Long Beach, to the healthier standards of Huntington City Beach would create $8.8 million in economic benefits over a 10-year period.[2]

Yet the number of beach closures and advisories has nearly doubled in California since 2009, and there were more than 2,400 closing or advisory days at beaches in Los Angeles County last year, the highest of any county in the state.[3] Many of these closures and advisories are directly related to urban runoff conveyed through our region's MS4 system. These beach closures and advisories result in direct and indirect negative effects on the coastal economy, including lost revenue.

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[1] Judith Kildow and Charles S. Colgan, National Ocean Economics Program (2005) California's Ocean Economy: A Report to the Resources Agency, State of California, at 1.
[2] Leeworthy, V.R., and P.C. Wiley (February 2007) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, National Oceanic and Atmospheric Administration, at 9, 15, available at http://coastalsocioeconomics.noaa.gov/core/scbeach/long%20beach_econ_imp.pdf
[3] Natural Resources Defense Council (2012) Testing the Waters: A Guide to Water Quality at Vacation Beaches, 22nd Annual Report, at CA Chapter, available at http://www.nrdc.org/water/oceans/ttw/ca.asp.

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We believe it is imperative that the Regional Board include strong and enforceable provisions in the region's new MS4 permit that require compliance with water quality standards set to protect the public health and that will promote important recreational and commercial uses of our waters. The permit should also prioritize use of green infrastructure practices to address stormwater runoff. These practices, which infiltrate, capture and re-use, or evapotranspirate runoff at its source, reduce the volume of runoff and pollution that reaches our beaches and inland waters, while potentially replenishing groundwater resources and increasing our local water supplies.

The new MS4 permit for the Los Angeles Region is an opportunity to move forward in improving water quality vital to our region's economy and well being. Please act to ensure it contains strong protections for our waters.

Sincerely,

The following 145 E2 members have signed this letter:

Dan Abrams
President/CEO, Cross River Pictures
Tony Bernhardt, PhD
Northern California Director, Environmental Entrepreneurs
Maureen Blanc
Director, CHARGE ACROSS TOWN
Dayna Bochco
President, Steven Bochco Productions
Steven Bochco
Steven Bochco Productions
Lori Bonn
President, Bonnventures LLC
David Bowen
Consultant
Eric Bowen
Director Business Development & Legal Affairs, Renewable Energy Group
Barbara Brenner Buder
CFO, San Francisco Theological Seminary
Selcuk Cakir
MSD Capital
Pete Cartwright
CEO, Avalon Ecopower
Steve Chadima
John Cheney
CEO, Silverado Power, LLC
David Cheng
Co-Founder & CEO, VendorStack
Roger Choplin
Proprietor / Owner, Our Earth Music, Inc.
Diane Christensen
President, Manzanita Management Corp
Lyn Christenson
Director, Corporate Communications, Codexis
Stephen Colwell
Executive Director, Philanthropy Associates
Daniel Conners
Senior V.P. Financial Advisor, UBS
Catherine Crystal Foster
Consultant, Policy & Advocacy Consulting
Jayne Davis
Peter Davis
Retired Attorney
John Dawson
Co-founder, Zentek Technology
Rick DeGolia
Partner, Exigen Capital
Harry Dennis
Pediatrician, Palo Alto Medical Clinic
Susan Dennis
Fine Arts Advisor, Self-employed
Ann Doerr
John Doerr
Partner, Kleiner Perkins Caufield and Byers
Elizabeth Dreicer
CEO, KUITY Corp
Ted Driscoll
Venture Partner, Claremont Creek Ventures
Patricia Durham
Bob Epstein
Co-founder, Sybase, New Resource Bank, Environmental Entrepreneurs
Christina Erickson
Founder, Green by Design
Rob Erlichman
Founder & President, Sunlight Electric, LLC
Homeyra Eshaghi
Anne Feldhusen
Noel Fenton
General Partner, Trinity Ventures

Sally Fenton
Kacey Fitzpatrick
President, Avalon Enterprises Inc
Andrew Foss
CEO, Swan Labs
Jon Foster
Board of Directors, California Clean Energy Fund
Karen Francis
CEO, Academix Direct, Inc
Bonnie Gemmell
GoFavo
Rob Gemmell
Co-founder, AlikeList
Tushar Gheewala
CEO & Chairman, Inventions Outsource
Nancy Gail Goebner
Gardenpeach Place
Ken Goldsholl
CEO, x.o.ware, Inc.
Nancy Goldsholl
Lorena Gonda Kiralla
Guest Greswold
Kate Greswold
TOSA Foundation
Doug Hammer
Ruth Hartman
President, Wordcraft Incorporated
Paula Hawthorn, PhD
Carol Hazenfield
Alan Herzig
Independent Director
Shiela Hingorani
First Vice President- Wealth Management , Morgan Stanley Smith Barney
Rick Holmstrom
Partner & Vice Chairman, Menlo Equities
Nicholas Josefowitz
Impact Reactor LLC
Charlene Kabcenell
Former Vice President, Oracle Corporation
Derry Kabcenell
Former Executive Vice President, Oracle Corporation
Kiran Kiki Kapany
Chief Executive Officer, KIKIM Media
Arthur Keller
Managing Partner, Minerva Consulting
Eric Kentor
Steven Kiralla
Charly Kleissner
Co-Founder, KL Felicitas Foundation
Lisa Kleissner
KL Felicitas Foundation
Charles Knowles
Executive Director, Wildlife Conservation Network
Stephanie Knowles
Gina Lambright
Managing Partner, TOZ Consulting
Sue Learned-Driscoll
Administrator, Stanford University
Nicole Lederer
Co-Founder, Environmental Entrepreneurs
Waidy Lee
Sam Leichman
Cindy Lewis
Malcolm Lewis
Founder, Constructive Technologies Group Inc.
Alison Long Poetsch
Principal, SHR Investments
Teresa Luchsinger
Tracy Lyons
Singer-Songwriter, Mythic Records LLC
Steve MacKay
Principal, Scourie Network Partners
Marguerite Manteau-Rao
Entrepreneur, blogger
Ughetta Manzone
Attorney-at-Law
Christine Martin
Clinical Nurse Specialist, San Francisco General Hospital
Nancy McCarter-Zorner
Plant Pathologist
Bill McClure
Attorney/Partner, Jorgenson, Siegel, McClure & Flegel LLP
Christina McClure
Community Volunteer
Lisa Mihaly
Family Nurse Practitioner
Kate Mitchell
Managing Partner, Scale Venture Partners
Wes Mitchell
Board Member, Foto Forum, SFMOMA
Carol Moné
Producer, Our Earth Productions
John Montgomery
Chairman, Montgomery & Hansen, LLP
Linda Montgomery
Robert Morgan
Founder, President & COO, Agile Energy, LLC

Gib Myers
Partner Emeritus, Mayfield Fund and Founder/board of the Entrepreneurs Foundation
Susan Myers
Armand Neukermans
Founder, Xros
Eliane Neukermans
Nadine North
CEO, The North Point
Carrie Norton
Founder & CEO, Green Business BASE CAMP
Anne O'Grady
Standish O'Grady
Managing Director, Granite Ventures, LLC
Jack Oswald
CEO, SynGest Inc.
Lyn Oswald
E2 Membership Director
Mark Parnes
Attorney, Wilson Sonsini Goodrich & Rosati
Neela Patel
Director, Biology, Poniard Pharmaceuticals
Jim Patton
Trade Counsel, Apple
Jean Pierret
Jeff Poetsch
Principal, JCP Advisors
Marc Porat
Chairman, Greencube
Christopher Pribe
Prad Rao
Investor
Kate Ridgway
David Rosenheim
Executive Director, The Climate Registry
Jackie Rosenheim
Rick Rosenthal
Amy Roth
David Schwartz
Michael Schwarz
Lauren Scott
Paul B. Scott
Vice President, Advanced Technologies, Transportation Power Inc
Anneke Seley
CEO, ALIO Inc.
Ann Shulman
President, Philanthropy Associates, Inc.
Barbara Simons
Research Staff Member, Retired, IBM Research
Jon Slangerup
CEO, NEI Treatment Systems, LLC
Sandra Slater
Owner, Sandra Slater Environments
Kristen Steck
Nancy Stephens
Marc Stolman
Attorney, Stolman Law office, E2 Climate Project Leader
Ed Supplee
Former CFO, UTStarcom
Sally Supplee
Former Chief Financial Officer, various companies
Sven Thesen
Communication & Technology, Better Place
Adam Tibbs
President, projectFrog
Mike Ubell
Architect, Oracle
Thomas Van Dyck
Sr. Vice President, RBC Wealth Management
Mark Vander Ploeg
Bill Weihl
Sustainability guru, Facebook
Dave Welch
Chief Technology Officer, Infinera Corporation
Heidi Welch
Tonia Wisman
Gary Wolff
Former Vice Chair, CA State Water Resources Control Board
Mary M. Yang
Scientist and Entrepreneur
Daniel Yost
Partner, Orrick, Herrington & Sutcliffe LLP
Margaret Zankel
Martin Zankel
Emeritus Chairman, Bartko, Zankel, Tarrant & Miller
Paul Zorner
Chairman, Kuehnle AgroSystems

July 22, 2012

Via electronic mail

Mr. Sam Unger
Executive Officer and Members of the Board California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Email: rpurdy@waterboards.ca.gov, iridgeway@waterboards.ca.gov, LAMS42012@waterboards.ca.gov

RE: COMMENTS ON TENTATIVE LOS ANGELES COUNTY MS4 PERMIT

Dear Mr. Unger:

The Malibu Surfing Association (MSA) formed in 1961 as one of California's first surfing clubs. The MSA is an all-volunteer, nonprofit organization dedicated to the fellowship of surfing and to the stewardship of our home break, world-famous Malibu Surfrider Beach.
Our club membership represents over 750 years of cumulative surfing experience at Malibu. We advocate for the protection and preservation of this historic surfing spot and a positive experience for Surfrider's
2.5 million annual visitors. In over 50 years since our club's founding, we remain intimately associated with the past, present, and future of Malibu surfing and of Surfrider Beach.

On behalf of the club, I am writing with regard to the Tentative Los Angeles County MS4 Permit ("Tentative Permit"). We appreciate the opportunity to comment on the Tentative Permit. While we support some of the progress made in comparison to the current Permit's provisions, now more than ten years old, we are concerned that the Tentative Permit, as currently drafted, fails to properly implement both state and federal law, and is otherwise insufficiently protective of water quality in the region. In this regard, we appreciate the opportunity to comment on the Tentative Permit and suggest revisions that better reflect the goals and requirements of the Clean Water Act.

I. Enforceable Standards Are Imperative to Water Quality Protections

We support strong and enforceable provisions that require compliance with water quality standards set to protect the beneficial uses in our beaches and waterways. Most of Los Angeles' waterways are listed as impaired for one or more pollutants due to years of industrial, commercial, and stormwater pollution. This includes Malibu Creek, Malibu Lagoon, and Surfrider Beach. This new LA MS4 Permit is an opportunity to move forward in improving water quality in the region – not moving backwards. Thus, we urge the Regional Board to maintain current strong enforceable receiving water limitations and to properly incorporate and enforce TMDL provisions, as described below.

II. TMDLs Are Critical to Public Health and Must Comply With CWA Requirements

We support the Los Angeles Regional Water Quality Control Board
(LARWQCB) and U.S. EPA's efforts to adopt TMDLs for 175 waterways in the Los Angeles area over the past thirteen years. We recognize and appreciate that this is more than in any other region in the State

of California. It is now imperative that each of these TMDLs is properly incorporated into the MS4 Permit such that waste load allocations are enforceable and water quality improvements are guaranteed.

Of the numerous TMDLs established to protect our rivers, creeks, beaches, and ocean in the last several years, one category merits special attention because of the significant public health risks it addresses to protect swimmers, surfers, waders and beachgoers from the proven harmful impacts of waterborne fecal bacteria. Bacteria TMDLs, in particular, require immediate attention by permittees. Perhaps the most important of these, both in terms of its territorial reach and the magnitude of public health protection it provides, is the Santa Monica Bay Beaches Bacteria TMDL for dry weather. Epidemiological studies demonstrate that recreating in polluted runoff causes an increased health risk to swimmers. Our organization's members, who place a premium on clean water they recreate in, demand their health be protected and that their recreational activities do not result in sickness and doctor visits.

We urge the Board to require immediate compliance with bacteria TMDLs for dry weather that are past due and intended to protect public health. The Tentative Permit's suggested allowance of additional time for these long overdue protections is inappropriate and dangerous to the millions of people that frequent our beaches and waterways each year.

We note that over 2.5 million annual visits take place at Surfrider Beach. For us recreating in these waters, and being intimately involved in the future of surfing there, we ask that you do everything possible to ensure our waters are clean and safe.

III. LID Provisions Are Critical to Protecting LA's Waterways

In general, we support the inclusion of the low impact development and green infrastructure provisions in the Tentative Permit. Because there are affordable and effective methods for retaining and reusing stormwater, this should be a priority requirement in the new LA MS4 Permit. These mechanisms produce economic and social benefits, in addition to improvements to water quality.

However, requirements should apply not only to new development and redevelopment, but also to the existing built environment where feasible. The vast majority of runoff stems from the existing development and the Regional Board should prioritize controlling pollutants, reducing pollutant loads, and addressing runoff volume from existing streets and parking lots to improve water quality in all of Los Angeles' waterways. Suggested mechanisms include: infiltration, storage for reuse, and evapotranspiration. In existing development areas, retrofit of existing impervious surfaces is a transformative opportunity. Specifically, the LARWQCB could require "Green Street" pilot projects that follow U.S. EPA guidance and prioritize on-site stormwater runoff retention where technically feasible. To ensure effectiveness, the LARWQCB should require permittees to address storms up to a 24-hour 85th percentile storm in these projects, as is required in several other regional permits.

Thank you for the opportunity to comment on the Tentative Permit.
Please feel free to contact me with any questions or concerns.

Sincerely,

Michael Blum
Stewardship Chair, on behalf of Malibu Surfing Association

July 23, 2012

Via electronic mail

Mr. Sam Unger
Executive Officer and Members of the Board
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Email: LAMS42012@waterboards.ca.gov

Re: Comments on Tentative Order R4-2012-XXXX, Los Angeles County MS4 Permit, June 6, 2012 Draft

Dear Mr. Unger:

On behalf of the Natural Resources Defense Council ("NRDC"), the Los Angeles Waterkeeper ("Waterkeeper"), and Heal the Bay (collectively, "Environmental Groups"), we are writing with regard to the June 6, 2012, Draft Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Los Angeles County Flood Control District, Including the County of Los Angeles, and the Incorporated Cities Therein, Except the City of Long Beach, Draft permit R4-2012-XXXX, NPDES Permit No. CAS004001 ("Draft Permit"). We appreciate the opportunity to submit these comments to the Los Angeles Regional Water Quality Control Board ("Regional Board") on the Draft permit.

I. Introduction

While we believe the Draft Permit in many aspects either appropriately preserves requirements or improves upon requirements contained in the predecessor Los Angeles MS4 permit[1] – now more than 10 years old – we are concerned that in other critical aspects the Draft Permit fails to meet the requirements of the federal Clean Water Act and California Porter Cologne Act, and is otherwise inconsistent with both state and federal law. We urge the Regional Board to revise the Draft Permit in accordance with the legal requirements outlined in the comments we present below. We also stress the need for the Regional Board to incorporate these revisions in a timely fashion and to avoid any further delay in the Permit adoption process. Given the continuing threat to

[1] Los Angeles Regional Water Quality Control Board, Order No. 01-182, NPDES Permit No. CAS004001 (as amended by Orders R4-2006-0074, R4-2007-0042, R4-2009-0137, and October 19, 2010 and April 14, 2011 pursuant to L.A. Superior Court Case No. BS122724) ("2001 Permit").

public health and the environment posed by stormwater pollution in Los Angeles County, and consistent with the Regional Board's repeatedly stated intent, the Regional Board should ensure that a new MS4 permit for Los Angeles County, that meets the requirements of state and federal law, is finalized this coming September.

II. Summary of Comments

We are concerned that the Draft Permit in several aspects fails to meet the requirements of federal and state law, and is inadequate to control pollution and protect the region's waters, which are threatened by persistent, pervasive pollution from urban runoff. We note first several provisions that are appropriately incorporated and legally required in the Draft Permit, followed by a summary of provisions that require revision for the Draft Permit to pass legal muster.

- The Draft Permit's Receiving Water Limitations have been upheld against numerous administrative, judicial, and enforcement challenges, and under federal law must prohibit discharges that cause or contribute to a violation of water quality standards as an independently enforceable provision.

- The Draft Permit must require Low Impact Development practices to retain stormwater runoff on-site, which are common in other jurisdictions and are the most practicable means of protecting and restoring water quality in Los Angeles County.

- The Draft Permit inappropriately allows for use of biofiltration practices that discharge runoff and pollutants where retention of stormwater runoff, either on-site or off-site is feasible.

- The Draft Permit establishes unlawfully high thresholds for applicability of its otherwise enforceable Low Impact Development standards.

- The Draft Permit allows for unprecedented and unlawful waivers from its core provisions and TMDL requirements through permit terms that fail to provide for meaningful review or allow for adequate public process.

- The Draft Permit unlawfully delegates authority to the Executive Officer to determine key control requirements.

- For TMDLs, the Draft Permit incorporates unlawful compliance schedules that are inconsistent with federal requirements under the Clean Water Act.

- The Draft Permit fails to include interim numeric benchmarks for TMDL implementation to properly track TMDL compliance.

- The Draft Permit illegally exempts Dischargers from compliance with U.S. Environmental Protection Agency developed TMDLs.

- The Draft Permit inappropriately establishes a goal of discharge water quality in comparison to Municipal Action Levels rather than against Water Quality Standards.

- The Draft Permit fails to address monitoring plans for U.S. EPA developed TMDLs.

- The Draft Permit fails to require adequate monitoring for toxicity at outfalls, and

- The Draft Permit authorizes the discharge of runoff from non-stormwater sources that are known sources of pollution to receiving waters.

III. Factual Background

The 2001 Permit has been the subject of repeated administrative, judicial, and enforcement challenges, the majority brought against the Regional Board by the Permittees, with the result that the California Court of Appeal for the Second District upheld the validity of the 2001 Permit on all grounds, including the permit's foundational requirement that "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." (See *County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 989; see also, *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897; see also section on Legal Background, below.) Many of the Permittees have suggested the Regional Board weaken protections from the 2001 Permit, upheld by the courts and legally required by the Clean Water Act, that have been properly incorporated into the Draft permit. They have also pushed for the Board to instill controls that will be less protective of water quality than state and federal law require or that sound policy advises. But stormwater runoff remains the leading cause of surface water pollution in southern California, and a substantial and persistent public health risk and source of harm to aquatic life. The Regional Board should reject calls to place Los Angeles County's waters and residents at further risk.

A. Stormwater Runoff is the Leading Source of Water Pollution in Southern California

Waters discharged from municipal storm drains carry bacteria, metals, and other pollutants at unsafe levels to rivers, lakes and beaches in Los Angeles County. This pollution causes increased rates of human illness, harm to the environment, and an economic loss of tens to hundreds of millions of dollars every year from public health impacts alone. The U.S. Environmental Protection Agency ("U.S. EPA") considers

urban runoff to be "one of the most significant reasons that water quality standards are not being met nationwide."[2] As the U.S. EPA has stated:

> Most stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.[3]

In Los Angeles County, the Regional Board has found that:

> Discharges of storm water and non-storm water from the Los Angeles County [MS4] convey pollutants to surface waters throughout the Los Angeles Region. The primary pollutants of concern in these discharges . . . are indicator bacteria, nutrients, total dissolved solids, turbidity, nickel, zinc, cyanide, bis(2-ethylhexyl)phthalate, polycyclic aromatic hydrocarbons (PAHs), diazinon, and chlorpyrifos. Aquatic toxicity, particularly during wet weather, is also a concern. . . .
>
> Pollutants in storm water and non-storm water have damaging effects on both human health and aquatic ecosystems. Water quality assessments conducted by the Regional Water Board have identified impairment of beneficial uses of water bodies in the Los Angeles Region caused or contributed to by pollutant loading from municipal storm water and non-storm water discharges.

(Draft permit, at Finding A.) Specifically, "[n]umerous receiving waters within Los Angeles County do not meet water quality standards or fully support beneficial uses." (*Id*., at Finding J.1.)

Monitoring data collected pursuant to the 2001 Los Angeles County MS4 Permit at mass emission stations demonstrates that the LA County MS4 persistently contributes to violations of water quality standards and TMDLs in Los Angeles area waterbodies. The water quality limits for fecal bacteria, various heavy metals, ammonia, pH and cyanide,

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[2] U.S. General Accounting Office (June 2001) *Water Quality: Urban Runoff Programs*, Report No. GAO-01-679.

[3] U.S. Environmental Protection Agency (December 2007) *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices*, at v.

among other constituents, were exceeded in Ballona Creek, Malibu Creek, the Los Angeles River, Santa Clara River, Dominguez Channel, and Coyote Creek 1105 times since 2003.[4]

Monitoring conducted by non-profit organizations, including Friends of the Los Angeles River ("FoLAR"), Heal the Bay and Waterkeeper similarly shows that the Los Angeles County MS4 is a significant source of pollution to receiving waters in the region.

Malibu Creek Watershed monitoring data collected by Heal the Bay from 1998 until 2010 reveal that regulatory limits for nitrogen, ammonia, phosphate, E.coli and enterococcus were routinely exceeded both during wet and dry weather.[5] At some of the sites sampled in the Malibu Creek Watershed, 100% of the samples collected from a particular monitoring station were above the limit for nitrogen, phosphate and enterococcus.[6]

Heal the Bay's monitoring in Compton Creek also demonstrates frequent exceedances of Basin Plan and California Toxics Rule limits, with the highest magnitude of exceedances occurring during storm events at storm drain outfalls.[7] In addition, copper, zinc and lead were exceeded at most of the sites sampled during wet weather, while the rate of exceedances during dry weather was significantly lower for the same metals. *Id*. Exceedances of ammonia, nitrogen and pH limits were also a common occurrence in Compton Creek.[8]

Data from sampling of the Los Angeles River watershed conducted by FoLAR similarly shows that water quality standards in Los Angeles River are routinely exceeded.[9] Of the 22 sites sampled in 2005 by FoLAR throughout the Los Angeles River watershed, 13 received an F grade for failing water quality standards for PH, temperature, dissolved solids, nutrients, dissolved oxygen and turbidity.[10] Bacteria monitoring data from FoLAR's 2003-2004 sampling at 23 sites in the Los Angeles River watershed similarly reveal widespread fecal bacteria indicator exceedances.[11]

Furthermore, storm drain and receiving water data collected by Waterkeeper clearly establish that MS4 discharges contribute to violations of water quality standards and

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[4] Los Angeles County Stormwater Monitoring Reports *2003-2004*, *2005-2006*, *2006-2007*, *2007-2008*, *2008-2009*, *2009-2010*, *2010-2011*, (selected data tables attached and full documents available at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm, last visited July 19, 2012).
[5] See Exhibit A1: Heal the Bay, Exceedance figures for Malibu Watershed; Exhibit A2: Heal the Bay, Malibu Watershed Exceedances, Raw Data.
[6] *Id*.
[7] See Exhibit B1: Heal the Bay, Compton Creek Monitoring Summary; Exhibit B2: Heal the Bay, Sed Data Analysis – Compton Creek; Exhibit B3: Heal the Bay, Water Data Analysis – Compton Creek.
[8] *Id*.
[9] Friends of the Los Angeles River (2005) The First State of the Los Angeles River Report.
[10] *Id.* at 3.
[11] *Id.* at 6.

TMDLs. Recent Waterkeeper monitoring of 18 storm drains reveals consistently high levels of bacteria in dry weather discharges from these storm drains flowing into Ballona Creek, which is impaired by fecal bacteria.[12] Receiving water sampling conducted in Ballona Creek together with the dry weather storm drain sampling demonstrates the link between polluted storm drain discharges and exceedance of water quality standards.[13] Similarly, monitoring data from Waterkeeper's sampling efforts in the City of Malibu confirm that the MS4 system is a significant source of pollution to receiving waters and contributes to violations of water quality limits. For example, Waterkeeper's receiving water samples at Malibu Creek and various Malibu beaches collected during the January 21, 2012 storm event contemporaneously with samples at storm drain inlets and outfalls discharging to these waters show that fecal indicator bacteria from the MS4 discharges and contributes to exceedances of bacteria limits in the receiving waters.[14]

Finally, monitoring data demonstrates the pervasive pollution problem affecting tens of millions of Los Angeles County residents and visitors recreating at our world-famous beaches.[15] California Ocean Plan standards and fecal bacteria TMDL limits established to protect the health of beachgoers were exceeded on thousands of occasions. In fact, beach bacteria TMDL limits were exceeded at 65 Los Angeles County beach monitoring locations 3369 times during the April – October dry weather season from 2006 through 2011, exposing the public to various well-documented health risks associated with recreating in polluted water.[16] In addition, a total of 974,306 trash items, including plastic, styrofoam and cigarette butts, were collected during volunteer clean ups at 30 Los Angeles County beaches.[17] An estimated 80 percent of marine debris comes from land-based sources.[18] As important, monitoring data collected by Waterkeeper at storm drain inlets, outlets and coastal receiving waters in the City of Malibu puts to rest any argument that storm drain discharges are not the source of exceedances of water quality standards and TMDLs at the beaches.[19]

B. Stormwater Pollution Poses a Significant Threat to Public Health

Discharges of polluted urban runoff result in elevated bacteria levels and increased illness rates among swimmers, and the association between heavy precipitation (leading to

[12] See Exhibit C: Los Angeles Waterkeeper, Ballona Creek Data.
[13] *Id*.
[14] See Exhibit D :Los Angeles Waterkeeper, 2011-2012 Storm Water Monitoring.
[15] See Exhibit E1: Heal the Bay, 2012-07-06 Trash Table; Exhibit E2, Heal the Bay, Beach Trash Data; Exhibit F: Heal the Bay, 2011 Santa Monica Bay Bacteria TMDL data.
[16] See Exhibit F.
[17] See Exhibits E1; E2.
[18] National Oceanic and Atmospheric Administration (1999) Turning to the Sea: America's Ocean Future, at 52.
[19] See Exhibit D; Exhibit G: Los Angeles Waterkeeper Malibu Data Revised 3-27-2012; Exhibit H: Los Angeles Waterkeeper, Non-ASBS and Malibu Creek data revised 3-27-2012.

increased runoff) and waterborne disease outbreaks is well documented.[20] Swimming or contact with waters contaminated by stormwater runoff can lead to fever, chills, ear infections and discharge, coughing and respiratory ailments, vomiting, diarrhea and other gastrointestinal illness, and skin rashes.[21] In a peer reviewed evaluation of 22 selected epidemiological studies from around the world, scientists found that 19 of 22 studies showed that adverse health effects were significantly related to fecal indicator bacteria or bacterial pathogens.[22]

Among those, an epidemiological study of Santa Monica Bay investigated health risks of swimmers exposed to storm drain runoff while swimming in ocean waters.[23] The study found that the number of adverse health effects in swimmers at beaches receiving stormwater discharge increases with increasing densities of fecal bacteria indicators in the water; the study concluded that high levels of indicator bacteria were more likely to be in or close to a storm drain, and there was an approximately 50-100 percent increase in health risk for those swimming directly in front of a storm drain versus those who swam more than 400 yards away from the storm drain.[24] The study reported that per 10,000 swimmers, there were 130 cases of attributable highly credible gastroenteritis, 165 attributable cases of skin rash, and 277 cases of attributable diarrhea.[25] Given that an estimated 55 million people visit Santa Monica Bay alone each year, a significant number of negative health incidences occur when beach water quality does not meet health standards.

The Regional Board itself has acknowledged that the harm to the public from violating bacteria standards "is dramatic both in terms of health impacts to exposed beachgoers, and the economic cost to the region associated with related illnesses." (2001 Permit (as amended by Order R4-2009-0130, at Finding 32).) And the health impacts do come at tremendous cost—one study demonstrated that swimming at polluted beaches in Los Angeles County caused between 427,800 and 993,000 excess cases of gastroenteritis per year, in turn resulting in annual health costs of between $14 and $35 million, or $120 and $278 millon (depending on the epidemiological model used) per year.[26] Without

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[20] Curriero et al., (August 2001) *The Association Between Extreme Precipitation and Waterborne Disease Outbreaks in the United States, 1949-1994,* American Journal of Public Health, 91:8 1194-1199.
[21] See, e.g., Haile, et al. (1999) *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff,* Epidemiology 10(4): 355-63; Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay,* Santa Monica Bay Restoration Project, 70 pp.
[22] Pruss, A. (1998) *Review of epidemiological studies on health effects from exposure to recreational waters,* International Journal of Epidemiology 27:1-9.
[23] See, Haile, R. W. et al (1996) ; see also, Haile, et al. (1999).
[24] Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay,* Santa Monica Bay Restoration Project, at 54.
[25] *Id*. at 59.
[26] Vernon R. Leeworthy and Peter C. Wiley, National Oceanic and Atmospheric Administration (2000) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, at 4.

question, swimming in stormwater runoff contaminated water has a high cost for our region.

C. Economic studies indicate that the control of stormwater pollution provides numerous economic benefits, while stormwater pollution creates many economic harms.

As discussed in the section on Legal Background, below, the Regional Board is unconditionally precluded from considering economic factors to weaken federally mandated controls in the Draft Permit.[27] Within this framework, however, controlling pollution in stormwater and non-stormwater discharges has far-reaching economic and social benefits for the region. According to a report to California's Resources Agency, "California has the largest Ocean Economy in the United States, ranking number one overall for both employment and gross state product . . . ."[28] One study estimated that local beach goers in California spend as much as $9.5 billion annually and the non-market values associated with beach going in California may be as high as $5.8 billion annually.[29] A review of multiple studies concerning the consumer surplus per visitor for beach visits found that welfare impacts of were in the range of $8.16 to $60.79 per visit for several California beaches.[30]

Yet stormwater runoff in Los Angeles County's coastal waters caused or contributed to potentially thousands of days of beach closures or advisories in 2011.[31] Beach closures and advisories result in direct and indirect negative effects on the coastal economy, such as lost revenue.[32] A hypothetical beach closure of Huntington Beach for one day was estimated to result in a loss of 1200 beach visits and associated economic losses of $100,000.[33] For a month long closure of the beach due to poor water quality, losses

[27] Draft Permit, at Finding R ("the requirements in this permit are not more stringent than . . . minimum federal requirements").
[28] Judith Kildow and Charles S. Colgan, National Ocean Economics Program, California's Ocean Economy: A Report to the Resources Agency, State of California (2005), at 1.
[29] Pendleton, L. 2003. *Estimating the Regional Economic Benefits of Improvements in the California Coastal Ocean Observing System*. Arlington, VA: Ocean. Unnumbered Report. July.
[30] Chapman, D. and Hanemann, M. (2001) Environmental damages in court: the American Trader case, in The Law and Economics of the Environment, Anthony Heyes, Editor, pp. 319-367.
[31] NRDC (2012) Testing the Waters: A Guide to Water Quality at Vacation Beaches, at California Chapter Summary. Los Angeles County reported 2,430 total closing or advisory days in 2012 from all sources. Reported closing or advisory days are for events lasting six consecutive weeks or less. NRDC learned just prior to publication of the 2012 report that Los Angeles County's 2011 closing and advisory days were underreported. Eighteen of 69 beaches managed by the county were scrutinized and 25 missing closing and advisory days at four beaches were discovered. These days are included in the analysis in this summary and in the California table, but any additional errors in the remaining 51 beaches remain uncorrected.
[32] Leeworthy, V.R. and Wiley, P.C. (2000) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, National Oceanic and Atmospheric Administration, at 4.
[33] Hanemann, M., L. Pendleton, and C. Mohn (November 2005) Welfare Estimates for Five Scenarios of Water Quality Change in Southern California. A Report from the Southern California Beach Valuation Project, at 7-8.

could be as much as 38,000 beach visits, with corresponding economic losses of more than $3.5 million; or a staggering $9.0 million in losses with a season long (i.e., June, July, and August) closure. Conversely, a 2007 study by the National Oceanic and Atmospheric Association found that an increase in water quality in Long Beach (a C grade), to the healthier standards of Huntington City Beach (a B grade) would create $8.8 million in economic benefits over a 10-year period.[34]

D. MS4 Permittees Have Historically Overlooked the Benefits of Stormwater Capture While Exaggerating the Costs of Compliance

The above societal costs and benefits have been generally overlooked in comments or contentions by the Permittees, who have focused almost solely on calling attention to claimed costs, in many cases wildly inaccurate, of implementing stormwater programs. In comments submitted on the 2001 Permit, for example, the City of Signal Hill and city members of the "Coalition for Practical Regulation"[35] stated that "the cost of the TMDL program for Los Angeles County alone, which is to be implemented in part, through the NPDES permitting process, could result in expenditures to Los Angeles taxpayers in excess of ***$50 billion***."[36] In contrast to this assertion, the Regional Board notes in the Draft permit Fact Sheet that "Based on reported values [by the Permittees], the average annual cost to the Permittees in 2010-11 was $4,090,876 with a median cost of $687,633," for implementation of their entire stormwater programs, including TMDL requirements. (Fact sheet, at F-138.)

Further, as the Regional Board notes, the "reported program costs are not all solely attributable to compliance with requirements of the LA County MS4 Permit. . . . For example, storm drain maintenance, street sweeping and trash/litter collection costs are not solely or even principally attributable to MS4 permit compliance, since these practices have long been implemented by municipalities," and provide separate and additional municipal benefits beyond stormwater pollution control. (Fact Sheet, at F-138.) As a result, "the true program cost related to complying with MS4 permit requirements is

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[34] Leeworthy, V.R. and Wiley, P.C. (2000) Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern California, National Oceanic and Atmospheric Administration, at 9, 15.

[35] At the time of this comment, the Coalition for Practical Regulation was made up of at least 35 cities regulated under the Los Angeles County MS4 permit, of which at least 20 were members of the current Los Angeles Permit Group, comprising one-third of that group's membership, as of May 30, 2012. These cities include: Arcadia, Artesia, Bellflower, Burbank, Commerce, Diamond Bar, Industry, Lakewood, Lawndale, Monrovia, Montebello, Paramount, Pico Rivera, Pomona, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, South Gate, and Vernon. (See Letter from Larry Forester, Coalition for Practical Regulation, to Mr. Dennis Dickerson, Regional Board, re: Second Draft – Municipal NPDES Permit, August 6, 2001, at 1; Statement by Larry Forester, Coalition for Practical Regulation, December 13, 2001, at 1; City Manager's Office, City of San Gabriel (May 30, 2012) The Council Weekly, "LA Permit Group: Voting Agencies," at 9.)

[36] Letter from Rutan & Tucker, LLP, to Dr. Xavier Swamikannu, Los Angeles Regional Water Quality Control Board, re: Los Angeles Regional Water Quality Control Board, October 11, 2001 Draft NPDES Permit No. CAS004001, November 13, 2001, at 20.

some fraction of the total reported costs. For example, after adjusting the total reported costs by subtracting out the costs for street sweeping and trash collection, the average annual cost to the Permittees was $2,397,315 with a median cost of $290,000." (Fact Sheet, at F-138.) Even multiplied over the course of the 10 years the 2001 Permit has been in effect, these expenditures (which as stated above, cover the entire program, not just TMDL implementation), are an order of magnitude less than claimed by the commenting cities.

This pattern has been repeated by claims of costs that will be incurred by the regulated entities. In 2010 Los Angeles County asserted, for instance, that compliance with the Trash TMDLs "could cost the municipalities over $1 billion."[37] Yet the staff report for the TMDLs states that the cost of implementing the TMDLs "will depend on the BMPs selected by the Permittees," and in fact, the County itself points out that compliance could cost less than $1 million.[38] The listed implementation costs for the Los Angeles River Trash TMDL, for example, are also spread among 44 Permittees, meaning the costs borne by any one discharger are only a fraction of any total cost estimate.[39]

Further, the "Gateway IWRM Authority"[40] was awarded $10 million from the State Water Resources Control Board Clean Water State Revolving Fund as part of the American Recovery and Reinvestment Act.[41] As explained in the grant award document, these funds were specifically given to assist the cities in their compliance with the Los Angeles River Trash TMDL by supporting acquisition of full capture devices for literally thousands of catch basins in the watershed. Some of those same municipal recipients have long opposed the trash TMDL. The Regional Board should not be dissuaded by these cities' arguments about cost or feasibility when these cities have claimed full compliance with the TMDL and have accepted taxpayer funds to address the problem specifically in the Los Angeles River.[42]

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[37] Brief of Amici Curae County of Los Angeles and Los Angeles County Flood Control District in Support of Cross-Appeal of Plaintiffs/Cross-Appellants Cities of Arcadia et al. at 16, in *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 161.

[38] Regional Board (Revised Draft July 27, 2007) Trash Total Maximum Daily Loads for the Los Angeles River Watershed, at 42; Brief of Amici Curae County of Los Angeles and Los Angeles County Flood Control District in Support of Cross-Appeal of Plaintiffs/Cross-Appellants Cities of Arcadia et al. at 16 n.5.

[39] See, e.g., *City of Arcadia v. U.S. E.P.A.* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1157 (rejecting an economic challenge to the Trash TMDL in part based on the fact that costs are spread among multiple parties).

[40] Participants in the grant request included Bell, Bell Gardens, Commerce, Compton, Cudahy, Downey, Huntington Park, Long Beach, Lynwood, Maywood, Montebello, Paramount, Pico Rivera, South Gate, and Vernon.

[41] See Clean Water State Revolving Fund American Recovery and Reinvestment Act Status Report as of Oct 30, 2009 (attached hereto and available at http://www.waterboards.ca.gov/water_issues/programs/grants_loans/srf/docs/economic_recovery/stimulus_report.pdf)

[42] See Gateway IWRM Press Release, $10 Million L.A. River Regional Stormwater Clean-Up Project Complete (November 1, 2011); see also Mr. Desi Alvarez, Representing Gateway IRWM at 11/5/09 Regional Board hearing.

In 2004, a group of Permittee cities commenting on the 2005 Triennial Review for the Los Angeles Basin Plan, referred to three studies prepared for CalTrans in 1998 regarding costs of stormwater treatment, specifically "in light of the Receiving Water Limitation language prohibiting exceedances of water quality standards and objectives in the existing Los Angeles County [MS4] permit."[43] In response, the Regional Board noted that one of the studies "has been disavowed by Cal-Trans, the agency that requested the report,"[44] and that the costs presented in the studies "assume a worst-case scenario and assume advanced treatment for all storm water discharges." The Regional Board further noted that they had performed their own economic analysis of the costs, and "The numbers are orders of magnitude less."[45]

But as discussed above, the Permittees often fail to mention the economic and social *benefits* of stormwater regulations. For example, Los Angeles County claimed in 2010 that one method of implementing the Metals TMDLs for the Los Angeles River and Ballona Creek would cost as much as $1.7 billion, with annual operational costs as high as $180 million.[46] The accuracy of this claim notwithstanding, the staff report that discussed these costs also demonstrated that region-wide benefits associated with removing metals from the waterways would substantially outweigh costs and equal as much as $18 billion.[47] This would be in addition to "[u]nquantifiable health benefits" associated with implementation.[48]

As mentioned above with regard to the Gateway IWRM and Clean Water State Revolving Fund, Permittees have also generally failed to mention the funding sources that have provided resources for implementation of the Los Angeles County MS4 permit. Public agencies (both federal and state) have provided significant sources of funding through grants, bonds, and fee collections designated for implementation of stormwater management programs in Los Angeles County. From sources such as Prop O, Props, 12, 13, 40, 50, and 84, grants or funds from state agencies such as DWR and the Coastal Conservancy, and Measure V, more than $645 million has been provided for stormwater management in Los Angeles County. (Draft Fact Sheet, at F-142.)

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[43] Regional Board, Responsiveness Survey – Triennial Review (to comments received before February 11, 2005), at 35-37.
[44] *Id*.
[45] *Id*.
[46] Brief of Amici Curae County of Los Angeles and Los Angeles County Flood Control District in Support of Cross-Appeal of Plaintiffs/Cross-Appellants Cities of Arcadia et al. at 16. It is worth noting that these TMDLs are based on federally promulgated standards in the California Toxics Rule and are therefore not subject to economic analysis that could weaken the federal requirement (see 40 C.F.R. § 131.36.)
[47] Regional Board and U.S. EPA Region 9 (June 2, 2005) Total Maximum Daily Loads for Metals Los Angeles River and Tributaries, at 77. The report this analysis was based on found that if structural systems were determined to be needed, the study found that total costs would be $5.7 to $7.4 billion, while benefits could reach $18 billion.
[48] *Id*.; See Draft Fact Sheet, at 76-77.

IV. Standards Governing the Adoption of the Los Angeles County MS4 Permit by the Regional Board

In considering the Draft Permit, the Regional Board must not only ensure compliance with substantive legal standards, but it must also ensure that it complies with well-settled standards that govern its administrative decision-making. The Draft Permit's terms must be supported by evidence that justifies the Regional Board's decision to include, or not to include, specific requirements. The Regional Board would be abusing its discretion if the Permit ultimately fails to contain findings that explain the reasons why certain control measures and standards have been selected and others omitted. Abuse of discretion is established if "the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Cal. Code Civ. Proc. § 1094.5(b).)[49] "Where it is claimed that the findings are not supported by the evidence, . . . abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 98-99.)

The administrative decision must be accompanied by findings that allow the court reviewing the order or decision to "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) This requirement "serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision … to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." (*Id.* at 516.) "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Id.* at 516 n.15.) Currently, several of the terms presented in the Draft Permit are not supported by the necessary evidence, as discussed below. The lack of substantial evidence to support the Permit terms would render it unlawful as currently drafted. (*See, e.g., Bangor Hydro-Elec. Co. v. F.E.R.C.* (D.C. Cir. 1996) 78 F.3d 659, 664.)

V. Legal Context for the Draft Permit

In 1972, Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) The Act has the important goal of eliminating the discharge of pollutants into navigable waters by 1985, with an interim goal of achieving fishable and swimmable conditions, wherever possible, by 1983. (33 U.S.C. § 1251(a)(1)-(2).) Courts have consistently

[49] See also, *Zuniga v. Los Angeles County Civil Serv. Comm'n* (2006) 137 Cal.App.4th 1255, 1258 (applying same statutory standard).

recognized that the Act is a tough law – "strong medicine." (*Texas Municipal Power Agency v. U.S. EPA* (5th Cir. 1988) 836 F.2d 1482, 1488.)[50]

The primary means for achieving the Act's objectives is through the issuance of permits via the NPDES program, which Congress authorized state agencies to implement. (33 U.S.C. § 1342(b).) In California, the approved agency is the California State Water Resources Control Board. (Water Code §§ 13001, 13160.) For the Los Angeles area, state law further approves permit development by the Regional Board. (*Id*. §§ 13200(d), 13263, 13377.)

The Clean Water Act requires each state to adopt and submit for federal approval water quality standards for all waters within its boundaries. (33 U.S.C. §§ 1311(b)(1)(C), 1313.) Water quality standards include maximum permissible pollutant levels, expressed either as numeric limits or in narrative terms, that must be sufficiently stringent to protect public health and enhance water quality, consistent with the uses for which the water bodies have been designated. (*Id*. § 1313(c)(2)(A).) Water quality standards provide the basis for regulating point sources within a state, "to prevent water quality from falling below acceptable levels." (*PUD No. 1 of Jefferson County v. Washington Dep't of Ecology* (1994) 511 U.S. 700, 704 [114 S. Ct. 1900, 1905] [quotation omitted].) States also must identify as impaired any water bodies that fail to meet water quality standards. (33 U.S.C. § 1313(d).) For impaired waters, states must establish TMDLs, which set a daily limit on the discharge of each pollutant necessary to achieve water quality standards. (*Id*. § 1313(d)(1).) The TMDL "assigns a ***waste load allocation (WLA)*** to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which a NPDES permit is required." (*Communities for a Better Env't v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313, 1321 (emphasis in original).) Importantly, and as discussed in the sections on TMDLs below, federal law requires that "once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA's in the TMDL." (*id.*, at 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B).) The provisions and requirements established in a TMDL cannot be challenged through the adoption process for this permit. (*Id*.)

The Act prohibits the discharge of any pollutant from a point source into navigable waters without an NPDES permit. (33 U.S.C. §§ 1311(a), 1342.) "Point source" is defined to mean any discrete "conveyance," such as a pipe or channel. (*Id*. § 1362(14).) Since 1987, Municipal Separate Storm Sewer Systems ("MS4s") have been recognized as point sources under the Clean Water Act. (Id. §§ 1342(p), 1362(14).) Moreover, the definition of a "discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man [and] discharges through pipes, sewers, or other conveyances owned by a State, municipality,

[50] "The [Clean Water Act] is strong medicine. . . . Congress explicitly recognized that reduction of the amount of effluents—not merely their dilution or dispersion—is the goal of the [Act]." (*Texas Municipal Power Agency*, 836 F.2d at 1488.)

or other person which do not lead to a treatment works . . ." (40 C.F.R. § 122.2.) For that reason, the discharge of pollutants from an MS4 is unlawful unless in compliance with an NPDES permit. (33 U.S.C. § 1342(a), (p).) An MS4 permit may be issued on a jurisdiction-wide basis when a number of entities operate an interconnected storm sewer system. (33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.26(d).).

The discharge of pollutants from an MS4, often called "polluted runoff" or "urban runoff," is a two-part problem. It includes what is often referred to as non-stormwater discharges—typically, landscape irrigation flows, washwater, and other flows not related to precipitation carrying herbicides, bacteria, metals, used motor oil and other pollutants.[51] And it includes urban stormwater—which is basically what it sounds like—storm flows that contain pollutants from the urban environment. (*See* 33 U.S.C. § 1342(p)(3)(B)(ii)-(iii).)

Consistent with the federal Clean Water Act, a fundamental goal of all municipal stormwater permits is to ensure that discharges from storm sewers do not cause or contribute to a violation of water quality standards. (33 U.S.C. § 1341.) In addition, for MS4s covered under the NPDES program, permits for discharges from municipal storm sewers:

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

(33 U.S.C. § 1342(p)(3)(B)(iii).) The maximum extent practicable ("MEP") standard serves effectively as a floor to performance for regulated parties.

1. <u>The Clean Water Act's "Maximum Extent Practicable" Standard</u>

The Clean Water Act's MEP standard does not grant unbridled leeway to Permittees in developing controls to reduce the discharge of pollution. "[W]hat the discharger will do to reduce discharges to the 'maximum extent practicable' . . . crosses the threshold from being an item of procedural correspondence to being a substantive requirement of a regulatory regime." (*Environmental Defense Center, Inc. v. U.S. E.P.A* (9th Cir. 2003) 344 F.3d 832, 853.) The MEP standard "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." (*Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").

[51] Unauthorized non-stormwater discharges into the MS4 are prohibited. (33 U.S.C. § 1342(p)(3)(B)(ii).)

As one state hearing board held:

> [MEP] means to the fullest degree technologically feasible for the protection of water quality, except where costs are wholly disproportionate to the potential benefits…. This standard requires more of Permittees than mere compliance with water quality standards or numeric effluent limitations designed to meet such standards…. The term "maximum extent practicable" in the stormwater context implies that the mitigation measures in a stormwater permit must be more than simply adopting standard practices. This definition applies particularly in areas where standard practices are already failing to protect water quality….

(*North Carolina Wildlife Fed. Central Piedmont Group of the NC Sierra Club v. N.C. Division of Water Quality* (N.C.O.A.H. October 13, 2006) 2006 WL 3890348, Conclusions of Law 21-22 (internal citations omitted).) The North Carolina board further found that the permits in question violated the MEP standard both because commenters highlighted measures that would reduce pollution more effectively than the permits' requirements and because other controls, such as infiltration measures, "would [also] reduce discharges more than the measures contained in the permits." (*Id.* at Conclusions of Law 19.)

Nor is MEP a static requirement—the standard anticipates and in fact requires new and additional controls to be included with each successive permit. As U.S. EPA has explained, NPDES permits, including the MEP standard, will "evolve and mature over time" and must be flexible "to reflect changing conditions." (55 Fed. Reg. 47990, 48052.) "EPA envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards." (64 Fed. Reg. 68722, 68754.) In other words, successive iterations of permits for a given jurisdiction will necessarily evolve, and contain new, and more stringent requirements for controlling the discharge of pollutants in runoff.

2. <u>33 U.S.C. § 1342(p)'s Requirement to Incorporate "Such Other Provisions" as the Permitting Authority Determines Appropriate</u>

Requiring compliance with MEP is often synonymous with achieving water quality standards and other common permit terms such as TMDL waste load allocations. Nonetheless, permits also require "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." This language in section 1342(p) has been held by California courts to grant "the EPA (and/or a state approved to issue the NPDES permit) . . . the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'" (*Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 883 (citing *Defenders of Wildlife v. Browner*

(1999) 191 F.3d 1159, at 1165–1167).) As a result, while the MEP standard represents a statutory floor, rather than limit, for permit requirements, the Regional Board and EPA maintain the authority to impose additional restrictions over and above MEP as they determine appropriate.

B. The 2001 Los Angeles County MS4 Permit and Litigation

Since 1990, the County of Los Angeles and municipalities in the region have been subject to NPDES permit requirements for discharges from their MS4. (Draft permit, at Finding B; *see also* 33 U.S.C. 1342(p)(2).) In 2001, the Regional Board adopted the current NPDES permit for MS4s in Los Angeles County.[52] The 2001 Permit, designed to address the harm caused by pollutants conveyed via storm drains to surface waters in the Los Angeles area—including bacteria hazardous to human health—regulates the County of Los Angeles and the Los Angeles County Flood Control District, and 84 incorporated cities within the County. The County, along with 43 of these cities,[53]challenged in state court the validity of the 2001 Permit; their challenge involved many of the permit provisions and requirements incorporated into the Draft Permit such as the permit's Receiving Water Limitations (discussed further below). After years of complex litigation, the case ended with the Permit being upheld on all grounds by the California Court of Appeal.[54]

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[52] This was the third such permit issued by the Regional Board to Los Angeles County and local municipalities, prior permits were adopted in 1990 and 1996. (2001 Permit, at Finding A.)

[53] Thirty-two cities and Los Angeles County appealed the Superior Court's decision in the matter. (*County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 990.)

[54] *See, In re L.A. County Mun. Storm Water Permit Litigation.*, No. BS 080548 at 4-7 (L.A. Super. Ct. Mar. 24, 2005) ("*L.A. County Mun. Stormwater*"); *County of Los Angeles v. Cal. State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985, 989.) We also note that, in 2005, 21 of the Permittee cities and the Building Industry Legal Defense Foundation filed suit in California State Court for a writ of mandate ordering the State Water Resources Control Board and the Regional Board to declare the continued application of water quality standards to stormwater null and void, and cease all activities relating to the implementation and application of water quality standards to stormwater pending further specified action by the Regional Board. (See *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 161 (petition denied and appeal dismissed as moot on appeal).) Further, in 2003, The County of Los Angeles and 14 Permittee cities filed a "test claim" before the California Commission on State Mandates, seeking subvention of state funds under a claim that numerous provisions of the permit exceed the requirements of federal law and thus constituted state imposed costs. (*State of Cal. Dept. of Finance, et al. v. Comm'n on State Mandates* (Super Ct. L.A. County, 2011, No. BS130730) (the court found that the challenged provisions were compelled by federal law and were not state mandates).) And in 2006, the County of Los Angeles challenged the Regional Board's incorporation of the Dry Weather Bacteria TMDL for Santa Monica Bay Beaches into the Permit in State Court. (*County of Los Angeles et al. v. Cal. State Water Res. Control Bd. et al.*, (Super. Ct. L.A. County, 2010, No. BS122724) (The Court ordered the Regional Board to vacate the provisions of the NPDES Permit implementing the Dry Weather TMDL based solely on a ruling that the Regional Board had erred procedurally during its administrative process. Importantly, the Court did *not* rule on the merits of the TMDL language in the permit, nor did the Court order the Regional Board or its Executive Officer to ignore the substantive or procedural requirements necessary for NPDES permits, such as the requirement for permits to be consistent with TMDL provisions.).)

1. The 2001 Permit's Receiving Water Limitations Have Withstood Multiple Legal Challenges

A principal challenge to the 2001 Permit by the Permittees was directed at the permit's Receiving Water Limitations section. Part 2.1 of the 2001 Permit states, "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." (2001 Permit, at 23.)[55] Under Part 2.3 of the 2001 Permit, the Permittees are directed to begin remedial measures immediately if discharges violate water quality standards. (*Id*.) If exceedances of water quality standards persist, notwithstanding control measures, the Permittees "shall assure compliance" by preparing a compliance report that identifies the violations and adopts more stringent pollution control measures to correct them. (*Id*.) Specifically, under Part 2.3(a), if the Regional Board or a Permittee determines that "discharges are causing or contributing to an exceedance of an applicable Water Quality Standard," the Permittee must promptly notify the Regional Board and submit a Receiving Water Limitations Compliance Report. (*Id*.) The compliance report must include: 1) a plan to comply with water quality standards; 2) a revised stormwater quality management program to eliminate exceedances; 3) "enhanced monitoring to demonstrate compliance"; and 4) the results of implementation of these measures. (2001 Permit at T-3.) The compliance report must also include an implementation schedule. (2001 Permit, at 23.)

However, compliance with the permit's reporting process does not excuse violations of water quality standards, prohibited under Part 2.1 of the 2001 Permit. MS4 discharges that exceed water quality standards are independently enforceable as violations of the permit and the Clean Water Act. (*L.A. County Mun. Stormwater*, at 7.)[56] As the court stated in *L.A. County Mun. Stormwater*, the Regional Board "included Parts 2.1 and 2.2 in the Permit without a 'safe harbor.'" (*Id*.) The Regional Board has affirmed this interpretation: "the plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a 'violation of Water Quality Standards' [or water quality objectives] or to a condition of nuisance."[57] Put simply, "[t]he Regional Board's position . . . is that the Permit cannot be read to excuse exceedances of water quality standards."[58]

Based on the authority of permitting authorities under section 1342(p)(3)(B)(iii) to issue NPDES permits imposing "appropriate" water pollution controls, the court in *In re L.A.*

[55] "Water Quality Standards and Water Quality Objectives" are defined in the 2001 Permit to mean "water quality criteria contained in the Basin Plan, the California Ocean Plan, . . . the California Toxics Rule, and other state or federally approved surface water quality plans." (2001 Permit, at 70.)
[56] This conclusion has been upheld by the 9th Circuit Court of Appeals, which found that "no such 'safe harbor' is present in this Permit . . . . Part 2.3 . . . offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions." (*Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897.) This portion of the 9th Circuit Court's Opinion is not subject to further review.
[57] Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4.
[58] *Id*. at 9.

County Mun. Stormwater noted that, "the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard." (*In re L.A. County Mun. Stormwater*, at 7.) But regardless of this authority, as described above, the Court found that "the terms of the Permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged Permit Provisions." (*Id*. at 7-8.) Having carefully reviewed the administrative record, the Court found that compliance with Part 2.1 and 2.2 of the permit, which prohibit discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives, constitute compliance with MEP. (*Id.* at 8.)

2. California Water Code Sections 13241 and 13263 Do Not Apply to the Current Adoption Proceedings

Because the Clean Water Act creates a federally mandated floor for controls in MS4 permits, it cannot be in any way lessened by the application of state law. (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 626.) In *City of Burbank*, the California Supreme Court found that although the Regional Board is required to consider factors set forth in Water Code section 13241 when issuing an NPDES permit, including economic considerations, section 13241 is only relevant when the requirements of federal law are exceeded; Regional Boards are forbidden from considering state law factors, such as those under section 13241, "if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act." (*Id.*) As the Regional Board points out in the Draft Permit, "the requirements in this permit are not more stringent than the minimum federal requirements. Therefore, a 13241 analysis is not required. . . ." (Draft Permit, at Finding R.)

In fact, California law explicitly ensures consistency between the state and federal regulatory schemes. In 1972, the California Legislature enacted Chapter 5.5 of the Porter-Cologne Act, subordinating provisions of the California Porter-Cologne Water Quality Control Act to those of the Clean Water Act. Water Code section 13372(a) provides that, "This chapter [entitled 'Compliance with the Provisions of the Federal Water Pollution Control Act as Amended in 1972'] shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act. . . . The provisions of this chapter shall prevail over other provisions of this division [which includes section 13241] to the extent of any inconsistency." (Wat. Code § 13372(a).) Section 13372 therefore acts as a limitation upon the applicability of other sections of the Porter-Cologne Act, such as section 13241, ensuring that the State will not enforce water quality laws that would weaken practices required under the Clean Water Act. (*See City of Burbank*, 35 Cal.4th at 620.) Since the Draft Permit does not impose controls more stringent than federal law requires, economic factors may weaken the requirements of federal law and may not be considered.

3. Federally Mandate Practices do not Constitute an Unfunded Mandate

Article XIII B, Section 6(a) of the California Constitution provides that whenever "any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service. . . ." However, "constitutional subvention is not required when the costs implement federal law. Article XIII B, section 9, subdivision (b) excludes from the state or local spending limit any 'appropriations required to comply with mandates of the . . . federal government.'"[59] A California Court recently found that, under the MEP standard, permits will ordinarily "evolve" and contain changing permit requirements that may not yet have been articulated in regulation or prior permits. As a result, that a permit term or requirement is not expressly dictated by federal regulation is irrelevant, "[a] federal mandate does not require explicit mention of every mandated activity. Rather the relevant inquiry is whether these . . . activities fall within the Clean Water Act's maximum extent practicable standard."[60] Where the terms of a permit, such as the 2001 Permit, meet MEP, the terms in that permit do not constitute an unfunded mandate.[61]

4. The California Environmental Quality Act Does Not Apply to the Current Permit Adoption Proceedings

The California Environmental Quality Act ("CEQA") (Public Resources Code § 21100, et seq.) does not apply to the issuance of NPDES permits. (*County of Los Angeles v. Cal. Water Boards* (2006) 143 Cal.App.4th 985, 1005-07.) As a result, the Regional Board is not required to consider CEQA in the adoption of the Draft Permit here.

5. The Regional Board and U.S. EPA Maintain Jurisdiction to Issue Permit Requirements for the Watersheds Addressed in the Draft Permit

The Los Angeles River and the San Gabriel River are navigable waters,[62] as are numerous other water bodies in Los Angeles County including the Santa Clara River,

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[59] See *State of Cal. Dept. of Finance v. County of Los Angeles* (Super. Ct. L.A. County, 2011, No. BS10730), Court's Ruling on Petition for Writ of Mandate Heard on August 10, 2011, at 4.
[60] *Id*. at 10.
[61] *Id*. at 11. The regional board has found that the terms of the Draft Permit also "are not more stringent than the minimum federal requirements." (Draft Permit, at Finding R.)
[62] *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 898 ("The Watershed Rivers are all navigable waters"); see also, Letter from Jared Blumenfeld, U.S. EPA, Administrator, EPA Region 9, to Colonel Mark Toy, U.S. Army Corps of Engineers, transmitting the Clean Water Act (CWA) jurisdictional determination for the Los Angeles River, at 1. ("We conclude that the mainstem of the Los Angeles River is a 'Traditional Navigable Water' from its origins at the confluence of Arroyo Calabasas and Bell Creek to San Pedro Bay at the Pacific Ocean, a distance of approximately 51 miles."); U.S. EPA, Region IX (July 1, 2010) Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional Navigable Water.

Malibu Creek, Ballona Creek, the Dominguez Channel, and Santa Monica Bay. As a result, these rivers and waterbodies are subject to Clean Water Act requirements to obtain a NPDES permit for the discharge of any pollutant into their waters.

VI. The Draft Los Angeles County MS4 Permit

A. Receiving Water Limitations in the Adopted MS4 Permit Must Remain As Stringent As They Are Currently

Environmental Groups applaud Regional Board staff's recommendation to retain the current Draft Permit's Receiving Water Limitations ("RWLs"), which contain the same prohibition against "discharges from the MS4 that cause or contribute to the violation of" water quality standards as contained in the 2001 Permit. (Draft Permit at V.A.1.)[63] The RWL provisions in the Draft Permit, as in the 2001 Permit, contain clear, appropriate, and enforceable language that complies with the Clean Water Act and has stood the test of administrative, judicial, and enforcement challenges.[64] This section of the permit has now been upheld by state and federal courts, and has been strongly supported by the Regional Board through these proceedings, including in its Amicus Briefs submitted to the District Court for the Central District of California and the Ninth Circuit Court of Appeals.[65] Moreover, the Regional Board has stated that "the requirements in this [2001] permit," which include the RWLs "are not more stringent than the minimum federal requirements." (Draft Permit, at Finding R.) As a result, the current RWLs must be adopted in the final permit.

Permittees have, as they did in 2001, suggested that the Regional Board revise the RWLs to incorporate a "safe harbor" provision.[66] The regional Board should decline this request. Any weakening of the RWL language would fall below federal minimum requirements, and in any event, would constitute a violation of the Clean Water Act's

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[63] Section V.A.1. prohibits Discharges from the MS4 that cause or contribute to the violation of Receiving Water Limitations. Receiving Water Limitations are defined under Attachment A of the Draft Permit as "Any applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR § 131.38."

[64] "[T]he plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a 'violation of Water Quality Standards' [or water quality objectives]." Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4. See also, *In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 at 4-7 (L.A. Super. Ct. Mar. 24, 2005).

[65] *Id.*; see also Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880.

[66] The LA Permit Group states that the Ninth Circuit Court of appeals recently "determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard," and therefore "municipal stormwater Permittees will now be considered to be in non-compliance with their NPDES permits." *Id*. Yet there is nothing new about this interpretation of the 2001 Permit—

anti-backsliding provisions.[67] The adopted permit must require compliance with water quality standards, with no "safe harbor" or other restriction placed on the prohibitions of this section.

Moreover, despite claims that the Ninth Circuit Court of appeals only recently "determined that a municipality is liable for permit violations if its discharges cause or contribute to an exceedance of a water quality standard," and therefore "municipal stormwater Permittees will now be considered to be in non-compliance with their NPDES permits,"[68] there is categorically nothing new about this interpretation of the Receiving Water Limitations. The prohibition against discharges that cause or contribute to an exceedance of water quality standards has been in effect and explicitly understood by all parties since the permit was adopted in 2001, and at least as far back as 2006 in light of the Court's decision in *L.A. County Mun. Stormwater*.[69] The Permittees will not only "now" be considered to be in non-compliance for their discharges, they have been in non-compliance for over a decade, and the Draft Permit imposes no new terms to this effect.

Further, the U.S. EPA has objected to inclusion of any "safe harbor" in the permit that would shield Permittees from liability for exceedances of water quality standards. The State Board has issued a precedential order implementing EPA's requirement that the permit language contain no safe harbor provision.[70] As the Regional Board rightly points out, under this framework, "The Regional Board did not include a safe harbor in the [2001] Permit and, under California law, could not have done so."[71] The Regional Board is similarly precluded from taking such action here.

B. The Draft Permit's LID Requirements

Subject to the overarching requirement that pollution in discharges from MS4 systems be controlled to the MEP, 40 C.F.R. section 122.26(d)(2)(iv)(A)(2) requires municipalities to implement controls to reduce polluted runoff from MS4s that "receive discharges from areas of new development and significant redevelopment." The sections that implement this requirement are contained in the Draft Permit's Planning and Land Development

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[67] 40 C.F.R. 122.44(l)(1) provides that except for a narrow set of enumerated circumstances, "when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."

[68] See, e.g. Letter from LA Permit Group to Regional Board re: Technical Comments on Los Angeles Regional Water Quality Control Board Staff Working Proposals for . . . Watershed Management Programs, TMDLs and Receiving Water Limitations, May 14, 2012, at 6.

[69] See, e.g. Cities of Arcadia et al.'s Opening Brief, Feb. 13, 2006, in *County of Los Angeles* 143 Cal.App.4th 985 ("it is impossible for Permittees to strictly comply with Part 2 of the Permit; they would be in violation of Parts 2.1 and 2.2 of the Permit from its effective date. . . .").

[70] State Water Resources Control Board, Order No. WQ 99-05, June 17, 1999 (revising receiving water limitations language).

[71] Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 8.

Program. While the controls in this section, particularly the Draft Permit's low impact development ("LID") based stormwater runoff retention requirements, represent in general a substantial step forward from those in the 2001 Permit, the Draft Permit's controls are undermined by: 1) the incorporation of an unjustifiably lenient applicability threshold for new development; 2) a lack of clarity with respect to the Draft Permit's Alternative Compliance provisions; and, 3)provisions allowing for the Regional Board's Executive Officer to approve to waive the Draft Permit's core LID provisions in favor of a Permittee developed local ordinance without requisite public process and Regional Board consideration necessary for approval under the Clean Water Act. As a result, while providing a potentially strong framework, the Draft Permit's Planning and Land Development Program fails to meet the requirements of the Act's MEP standard, and must be revised in order to pass legal muster under the federal Act.

1. <u>The Draft Permit's Performance Criteria Appropriately Require New Development and Redevelopment Projects to Retain On-Site the 0.75-inch, 24-hour rain event or the 85th percentile, 24-hour rain event, whichever is larger.</u>

At the outset, we strongly support that the Draft Permit establishes requirements for new development and redevelopment projects to retain on-site the runoff from the 85th percentile, 24-hour rain event or the 0.75 inch, 24-hour rain event, whichever is greater.[72] This requirement, resulting in retention of stormwater runoff with no off-site discharge in the vast majority of storms, is consistent with on-site retention requirements of other permits throughout California, as well as in permits and ordinances found in all corners of the United States. Similar or more stringent requirements are included in the following permits:

Ventura County: MS4 permit requires on-site retention of ninety-five percent of rainfall from the 85th percentile storm; off-site mitigation allowed if on-site retention is technically infeasible;[73]

South Orange County: MS4 permit requires on-site retention of the 85th percentile storm, off-site mitigation allowed if on-site retention is technically infeasible;[74]

[72] We note, however, that the evidence presented below, including reports from Dr. Richard Horner and examples of permits and ordinances from other jurisdictions, would support requirements for projects to retain runoff from up to and including the 95th percentile storm event.
[73] Los Angeles Regional Water Quality Control Board (July 8, 2010) Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2009-0057; NPDES Permit No. CAS004002.
[74] San Diego Regional Water Quality Control Board (December 16, 2009) South Orange County MS4 Permit, Order No. R9-2009-0002, NPDES Permit No. CAS0108740.

Washington D.C.: MS4 permit requires retention of the first 1.2 inches of stormwater (which represents the 90th percentile storm) for all new development and redevelopment over 5,000 square feet.[75]

West Virginia: Statewide Phase II MS4 permit requires on-site retention of "the first one inch of rainfall from a 24-hour storm" event unless infeasible;[76] and,

Philadelphia, PA: Infiltrate the first one inch of rainfall from all impervious surfaces; if on-site infiltration is infeasible, the same performance must be achieved off-site.[77]

These jurisdictions have recognized the paramount importance of mandating onsite retention of a certain quantity of stormwater since onsite retention prevents *all* pollution in that volume of rainfall from being discharged to receiving waters, in comparison with practices that treat or filter runoff with subsequent discharge, which invariably result in the discharge of pollutants as well.

The retention requirement in the Draft Permit is additionally supported by recent technical analysis by national stormwater expert Dr. Richard Horner. Dr. Horner's analysis demonstrates that, for five different types of land use development or redevelopment projects in Southern California, the full 85th percentile, or even the full 95th percentile, 24-hour precipitation event could be retained on-site using *only* infiltration practices on sites overlying soils classified as Group C (typically containing 20 to 40 percent clay) under the Natural Resources Conservation Service (NRCS) major soil orders classification scheme.[78] Even for sites overlying Group D soils (typically 40 percent or more clay with substantially restricted water transmissivity) and assuming no infiltration was feasible, greater than 50 percent of the 85th percentile storm could be retained at each development type using only rooftop runoff dispersion or harvest and reuse techniques.[79] Additional retention under these scenarios could be achieved through use of evaporation practices, or, in cases where some infiltration is feasible, use of infiltration BMPs.

Additional analysis by Dr. Horner has amply demonstrated both the viability of, and need for, such a retention standard. A principal reason to adopt such an approach is the superior pollutant load reduction capacity of LID practices that retain runoff on-site, for a

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[75] U. S. EPA (2011) Fact Sheet, National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Permit No. DC0000221 (Government of the District of Columbia).
[76] State of West Virginia Department of Environmental Protection, Division of Water and Waste Management, General National Pollution Discharge Elimination System Water Pollution Control Permit, NPDES Permit No. WV0116025 at 13-14 (June 22, 2009).
[77] City of Philadelphia (Jan. 29, 2008) Stormwater Management Guidance Manual 2.0, at 1.1, available at.
[78] Dr. Richard Horner and Jocelyn Gretz (November 2011) Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices Applied to Meet Various Potential Stormwater Runoff Regulatory Standards; Natural Resources Conservation Service, Distribution Maps of Dominant Soil Orders (http://soils.usda.gov/technical/classification/orders/, last accessed December 16, 2011).
[79] Id.

variety of climatic scenarios that bracket that of Los Angeles County.[80] With particular regard to the feasibility of the type of retention standard proposed by the Draft Permit, Dr. Horner has found that, in nearly all case studies, "all storm water discharges could be eliminated at least under most meteorological conditions by dispersing runoff from impervious surfaces to pervious areas."[81]

2. LID Is Cost-Effective and Provides Significant Economic Benefits

LID "provides ecosystem services and associated economic benefits that conventional stormwater controls do not."[82] Because traditional stormwater management approaches involve the construction of complex systems of infrastructure, they can entail substantial costs. Since LID attempts to mimic the predevelopment hydrology of a site, emphasizing storage and use, infiltration, and use of a site's existing drainage conditions, "[c]ost savings are typically seen in reduced infrastructure because the total volume of runoff to be managed is minimized."[83] A 2007 U.S. EPA study found that "in the vast majority of cases . . . implementing well-chosen LID practices saves money for developers, property owners, and communities while protecting and restoring water quality."[84] With only "a few exceptions," the EPA study found that "[t]otal capital cost savings ranged from 15 to 80 percent when LID methods were used" instead of conventional stormwater management techniques.[85] The savings identified in documented studies are noteworthy considering they do not reflect the additional economically beneficial attributes LID provides, including reduced costs of municipal infrastructure, reduced costs of municipal stormwater management, and increased value of real estate.[86]

Nor is the EPA Study alone in reaching this conclusion. A survey released by the American Society of Landscape Architects in 2011 found that green infrastructure reduced or did not influence project costs 75 percent of the time.[87] A joint project by the University of New Hampshire Stormwater Center and Virginia Commonwealth University found that use of LID provided stormwater management cost savings of 6 percent for residential development and 26 percent for commercial developments as

[80] See, e.g., Horner, Richard. Report for Ventura County; Horner, Richard. Initial Investigation for San Francisco Bay Area; Horner, Richard. Supplementary Investigation for San Francisco Bay Area; Horner, Richard. Report for San Diego Region.
[81] Horner, Ventura Report, at 15.
[82] ECONorthwest, The Economics of Low-Impact Development: A Literature Review, at iii. (2007) ("ECONorthwest") (Exh. 61).
[83] U.S. EPA Cost Study, at 2; U.S. Department of Housing and Urban Development, The Practice of Low Impact Development, at 33 (2003) (Exh. 62).
[84] U.S. EPA Cost Study, at iii.
[85] *Id.* at iv.
[86] See ECONorthwest, at 5; *Id*. at 15 (disconnecting downspouts to allow for natural infiltration in the Beecher Water District near Flint, Michigan cost the district about $15,000, but decreased the mean volume of sewer flows by 26 percent, and saved the district more than $8,000 per month in stormwater fees); U.S. EPA Cost Study, at 7.
[87] American Society of Landscape Architects (2011) Advocacy: Stormwater Case Studies.

compared with conventional stormwater management.[88] And while the economics of integrating LID into redevelopment projects vary slightly from new development, there is little evidence it typically raises project costs. An analysis of three communities by ECONorthwest found that while complying with stormwater standards, including strict runoff volume reduction requirements, is a cost consideration, it is rarely, if ever, a driving factor in decisions to undertake redevelopment projects.[89]

Other studies have found that LID provides significant economic benefits:

- Green Infrastructure impacts were evaluated for the city of Philadelphia for controlling Combined Sewer Overflows (CSOs) through managing 50 percent of runoff from impervious surface through LID. Cumulative effects from 2010 through 2049 indicated present value recreational benefits of $524.5 million from use of the stormwater controls, with improved aesthetics and property value benefits of $574.7 million.[90]
- A comprehensive cost-benefit analysis of Portland's green roof program estimated that green roofs provide each private homeowner, on average, a net benefit of $404,000 over 40 years from avoided stormwater fees, reduced heating and cooling costs, and longer roof life. In addition public buildings with green roofs realized net benefits of $191,000 from reduced operations and maintenance costs, avoided storm-water management costs, particulate pollution and carbon absorption benefits, and habitat amenities.[91]
- The city of Washington D.C. could potentially realize annual operational savings between $1.4 and $5.1 million per year from reduced pumping and treatment costs by implementing additional urban forestry practices, in addition to annual value in the millions already provided by street trees.[92]
- An estimation of the impacts of urban green areas on single family property values in Los Angeles, California in 2003-2004 found that more neighborhood

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[88] Roseen, R., T. Janeski, J. Houle, M. Simpson, and J. Gunderson (2011) *Forging the Link: Linking the Economic Benefits of Low Impact Development and Community Decisions*. University of New Hampshire Stormwater Center, the Virginia Commonwealth University, and Antioch University New England; see generally, NRDC (2011) Rooftops to Rivers II: Green Strategies for Controlling Stormwater and Combined Sewer Overflows, at 19-30.

[89] ECONorthwest (2011) "Managing Stormwater in Redevelopment and Greenfield Development Projects Using Green Infrastructure: Economic Factors that Influence Developers Decisions,"prepared by S. Reich et al, accessed at http://www.americanrivers.org/assets/pdfs/reports-andpublications/stormwater-green-report.pdf, p. 2.

[90] Stratus Consulting (August 2009) A Triple Bottom Line Assessment of Traditional and Green Infrastructure Options for Controlling CSO Events in Philadelphia's Watersheds, Final Report, at S-3.

[91] City of Portland Bureau of Environmental Services (November 2008) Cost Benefit Evaluation of Ecoroofs, at 22.

[92] Casey Trees and LimnoTech (April 2007) The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, DC, at v.

> trees would increase the values of 97 percent of the properties included in their sample.[93]

Further, LID can provide substantial benefits in Los Angeles and southern California in terms of increased local supply of water and reduced energy usage. A 2009 study conducted by NRDC and the University of California, Santa Barbara, "A Clear Blue Future," found that implementing green infrastructure practices that emphasize on-site infiltration or capture and reuse had the potential to increase local water supplies by up to 405,000 acre feet per year by 2030 at new and redeveloped residential and commercial properties in Southern California and the San Francisco Bay area.[94] This represents roughly two-thirds of the volume of water used by the entire city of Los Angeles each year. These water savings translate into electricity savings of up to 1,225,500 megawatt-hours—which would decrease the release of carbon dioxide (CO2) into the atmosphere by as much as 535,500 metric tons per year—because more plentiful local water reduces the need for energy-intensive imported water.[95] And, perhaps most importantly, these benefits would increase every year.

NRDC and the University of California, Los Angeles recently released a report demonstrating that if green roofs were installed on 50 percent of existing roof surfaces for residential, commercial, and government and public use buildings in southern California, it could save up to 1.6 million megawatt hours of electricity annually, enough energy to power more than 127,000 homes in California and save residents up to $211 million in energy costs each year based on 2012 rates.[96] The energy savings would cut carbon pollution by 465,000 metric tons annually.

These results are in addition to the stormwater runoff and pollution benefits LID practices can provide. For example, because green roofs absorb and evaporate rainfall, installing green roofs on 50 percent of the existing roof surfaces in southern California could reduce stormwater runoff by more than 36 billion gallons each year, significantly reducing the volume of pollution reaching our local waters.[97] As a result, we strongly support the Draft Permit's stormwater runoff retention requirements, and the Permit's specific requirement that, "[w]hen evaluating the potential for on-site retention, each Permittee shall consider the maximum potential for evapotranspiration from green roofs and rainfall harvest and use." (Draft Permit at VI.D.6.c.i.(4).)

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[93] Li, Wei, and Jean-Daniel Saphores. (March 2012) "Estimating the value of urban green areas: A hedonic pricing analysis of the single family housing market in Los Angeles, CA**."** *Landscape and Urban Planning*, Vol. 104, No. 3-4. pp. 373-387.

[94] NRDC and University of California at Santa Barbara (2009) A Clear Blue Future: How Greening California Cities Can Address Water Resources and Climate Challenges in the 21st Century. See also, NRDC (2011) Capturing Rainwater from Rooftops: An Efficient Water Resource Management Strategy that Increases Supply and Reduces Pollution.

[95] *Id*.

[96] NRDC and University of California at Los Angeles (2012) Looking Up: How Green Roofs and Cool Roofs Can Reduce Energy Use, Address Climate Change, and Protect Water Resources in Southern California.

[97] *Id*.

3. The Draft Permit's Planning and Land Use Program Fails to Meet the Requirements of the MEP Standard Due to its Unjustifiably Lenient Applicability Thresholds For New Development, is Hampered by a Lack of Clarity with respect to Alternative Compliance, Would Improperly Allow for Biofiltration to be Used When On-Site Retention is Feasible, and Creates an Unlawful Self-Regulatory Scheme in Violation of the Clean Water Act.

Although we support the inclusion of strong retention standards for stormwater runoff, we are concerned that the provisions of the Planning and Land Use Program in many aspects fail to meet the requirements of both state and federal law.

a. The Applicability Threshold for New Development Projects is Set Unjustifiably High and Fails to Meet MEP

The Draft permit establishes the threshold for application of requirements under the Planning and Land Development section for New Development Projects as "All developed projects equal to 1 acre or greater of disturbed area *and* adding more than 10,000 square feet of impervious surface acres." (Draft permit, at VI.D.8.b.i.(1)(a) (emphasis added).) This threshold, in particular the requirement that a project disturb 1-acre and *additionally* add 10,000 square feet of impervious surface, is unlawfully lenient in comparison with other Phase I permits in California, which have implemented substantially lower threshold requirements, demonstrating their practicability. For example, the South Orange County MS4 Permit requires any new development projects "that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site)" to comply with the Permit's Development Planning Component provisions, without any requirement that the site also disturb 1-acre or greater of land.[98] The San Francisco Bay Region MS4 Permit[99] sets the same 10,000 square foot threshold for all non-"Special Land Use Category" development, while "Special Land Uses" are set at 5,000 square feet.

More rigorous in its application thresholds for development, the recently adopted Low Impact Development Ordinance for the City of Los Angeles establishes that development creating, adding, or replacing only 500 square feet or more of impervious area may

[98] San Diego Regional Water Quality Control Board (December 16, 2009) Order No. R9-2009-0002, NPDES Permit No. CAS0108740, The Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region, at F.1.d.(2).

[99] San Francisco Regional Water Quality Control Board (October 14, 2009, revised November 28, 2011) Order No. R2-2009-0074, NPDES Permit No. CAS612008, Waste Discharge Requirements and National Pollutant Discharge Elimination System (NPDES) Permit for the discharge of stormwater runoff from the municipal separate storm sewer systems (MS4s) of the . . . San Francisco Bay Municipal Regional Stormwater Permit (MRP), at C.3.b.ii.(1)(a).

trigger requirements to implement low impact development practices to reduce stormwater runoff and pollution.[100] The threshold set forth in the Draft permit, applying requirements only to development adding 10,000 square feet of impervious surface *and* disturbing greater than one acre can hardly be construed as meeting the MEP standard when multiple other permits and local ordinances have set substantially more stringent standards.

Moreover, the Draft permit's threshold for new development is entirely nonsensical and unsupported when compared with the permit's applicability threshold for Redevelopment Projects. Under section VI.D.6.b.ii.(1).(a), the Draft permit states that "redevelopment projects subject to the Draft permit's performance criteria are: "Land-disturbing activity that results in the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site. . . ."[101] Thus, new development (including greenfield developments on open space), typically *less* likely to be constrained by space or density considerations than redevelopment projects, are afforded the far *more* lenient standard for applicability. Indeed, the concern over potential space constraints in a redevelopment context are explicitly addressed by off-ramp provisions in the Draft Permit, which allow for alternative compliance in cases of technical infeasibility for "redevelopment locations where the density and/ or nature of the project would create significant difficulty for compliance with the on-site volume retention requirement." We urge the Regional Board to include an applicability requirement commensurate with the City of Los Angeles' Ordinance. At a minimum, the applicability threshold for new development should be no less stringent than that set for redevelopment projects and should not include any requirement for an additional 1-acre of disturbed land, in line with other permits in California. As currently drafted, the standard fails on its face to meet the MEP requirements of the CWA.

[100] City of Los Angeles (Sept. 28, 2011) Low Impact Development Ordinance, at Sec. 64.72.D.

[101] This requirement is in line with requirements for other California Phase I permits. (See, e.g., San Diego Regional Water Quality Control Board (December 16, 2009) Order No. R9-2009-0002 (Performance Criteria apply to "Those redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site.").) We further note that the applicability threshold for redevelopment projects under VI.D.6.b.ii.(1).(a). confusingly refer to "development categories identified in Part VI.D.6.c. (New Development/Redevelopment Performance Criteria)." Part VI.D.6.c., however, contains performance criteria, and defines the criteria as applying to "all New Development and Redevelopment projects (referred to hereinafter as "new projects") identified in Part VI.D.6.b." The Draft permit should correct this circular reference, such that redevelopment criteria apply clearly to "Land-disturbing activity that results in the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site."

b. Repaving of Greater than 10,000 Square Feet of Surface Area on Publicly Owned Streets or Parking Lots Should Trigger Requirements to Meet Post-Construction Low Impact Development Standards

While is critical that the MS4 permit address new and redevelopment projects and prevent the introduction of new or additional sources of pollution to receiving waters, the vast majority of runoff stems from existing development. One of the primary opportunities to address runoff from the existing built environment is through retrofit of existing streets and parking lots. We support the Draft Permit's requirement that new streets, roads, highways, and freeway construction must follow U.S. EPA guidance regarding green streets, but urge the Regional Board to require that roadway construction of this size should be required to meet the Draft Permit's otherwise applicable on-site stormwater runoff retention standards where technically feasible, and require offsite mitigation where it is not. The Draft Statewide General Permit for Small MS4s in California currently requires that road projects that create 5,000 square feet or more of newly constructed contiguous impervious surface, including widening of existing road surface:

> shall comply with Low Impact Development Standards except that treatment of runoff of the 85th percentile that cannot be infiltrated onsite shall follow USEPA guidance regarding green infrastructure to the maximum extent practicable.[102]

The Draft Permit should similarly require infiltration or evaporation of the 85th percentile storm or 0.75 inch storm, whichever is larger, to the extent feasible.

Further, projects that result in the reconstruction or resurfacing of greater than 10,000 square feet of street, road, highway, freeway, or parking lot surface (or resurfacing of more than 25 parking spaces) should, at minimum, be required to implement post-construction LID BMPs, such as curb cuts, swales, or other retention practices. Of note, the City of Santa Monica adopted a green streets requirement with a threshold based on monetary expenditures:

> Any Municipal street, road and alley re-construction project of $500,000.00 or more of construction costs, excluding repaving projects of existing roads, shall implement post-construction BMPs for green transportation infrastructure.[103]

In combination with requirements to retrofit streets or parking lots undergoing resurfacing, the Regional Board should require Permittees to implement a set number of

[102] E.12.d.1.(e).
[103] An Ordinance of the City Council of Santa Monica Amending Santa Monica Municipal Code Chapter 7.10 to Update and Clarify the Urban Runoff Pollution Ordinance (July 27, 2010).

"Green Street Pilot Projects" that incorporate low impact development ("LID") techniques for site design and treatment in accordance with the Draft Permit's otherwise applicable on-site stormwater retention requirements. (See, e.g., San Francisco Bay Regional MS4 Permit, at C.3.b.iii.)

c. The Draft Permit's Alternative Compliance Provisions Lack Clarity and Should: 1) Require That Mitigation be Tied to Water Supply; and 2) Distinguish Between Groundwater Replenishment Facilities that Convey Runoff From the Project Site (Hydrologically Connected) and Those that Are Hydrologically Unconnected From the Project Site

NRDC strongly supports efforts to use LID and groundwater recharge or other stormwater capture practices to increase water supplies in California. These initiatives are in line with California's stated policy goals. For example, the State Water Resources Control Board's State Recycled Water Policy establishes a goal of increasing the capture and use of stormwater over the amount used in 2007 by at least 500,000 acre-feet per year by 2020, and by at least one million acre-feet annually by 2030.[104] While we are encouraged by the Regional Board's move to incorporate provisions that could promote increased reliance on local, energy efficient water supply strategies such as groundwater replenishment, we are concerned that the Draft Permit would allow projects to perform "off-site regional groundwater replenishment" without requiring a finding that the subsequently recharged groundwater will (or even could), in fact, be used to increase local water supplies. The Draft Permit's groundwater replenishment provisions require only that: 1) the volume of stormwater to be infiltrated, replenished, or retained by bioretention BMPs is equal to or greater than the design stormwater runoff volume, less the volume reliably retained on-site; 2) the project demonstrate, in vaguely defined terms, why it is not advantageous to replenish groundwater at the project site; and, 3) that the project provide equal or greater water quality benefits to the receiving surface water. (Draft Permit, at VI.D.6.c.ii.(3); iii.(2)(a).) The Proposal does not condition participation in an off-site mitigation project on its connection to an aquifer used for municipal or other groundwater supply.

The provision raises two concerns. First, while the ostensible objective of the groundwater replenishment provision is to promote use of stormwater as an alternative water source through recharge to augment groundwater supplies, the lack of any requirement that recharge be directed to an aquifer actually used for groundwater production undercuts this objective. The Regional Board should include a requirement that, in order to perform alternative compliance for groundwater replenishment, groundwater recharge must be directed to an aquifer used for water supply, or a purpose related to preserving groundwater supply (e.g., to prevent saltwater intrusion into a groundwater aquifer used for supply, or reduce/mitigate existing pollution to a

[104] State Water Resources Control Board (May 14, 2009) State Recycled Water Policy.

groundwater aquifer). Further, we suggest that the Regional Board direct the Permittees to assess and prioritize areas within their jurisdiction that, at either the site or regional scale, present opportunities to increase groundwater replenishment specifically for water supply.

Second, the Draft Permit is unclear in its definition of "off-site," and must provide clarification whether it intends for the term to mean an "off-site" project that is hydrologically unconnected to the project site, or a "regional" project that may receive runoff conveyed to it from the project site.[105] Conveying runoff from the project site to a regional groundwater replenishment facility that will retain that runoff, albeit at a different location, typically does not implicate significant water quality concerns. Where the same, specific quantum of water is ultimately retained, 100 percent of the pollution contained in that particular volume of water will be prevented from reaching receiving waters. In contrast, where a project, performs off-site mitigation at some other location within the same watershed or sub-watershed. that is not hydrologically connected to the original project site, it raises substantial concerns as to whether the alternate location will "provide equal or greater water quality benefits to the receiving surface water." (Draft Permit, at VI.D.6.c.ii.(3).) Among the issues presented by this form of off-site mitigation are whether the off-site mitigation will be performed at a similar land use; whether the mitigation project will achieve equivalent pollutant load reduction; and if so, what pollutants it will be monitored for. In practice it may prove exceedingly difficult to assess the equivalency of benefits to surface water quality from retention at one site to the next.

As currently drafted, the Draft Permit would allow a developer discretion to perform off-site mitigation, without a finding of infeasibility, at a site where it cannot be accurately determined whether equivalent protection of water quality will be achieved, to recharge groundwater that will not serve to increase local water supplies. While regional projects receiving runoff conveyed directly from the project site may raise less concern, the Draft Permit should be revised to allow off-site mitigation or alternative compliance at a site hydrologically unconnected from the project site only when it is technically infeasible for the project to retain runoff on-site.

An additional concern raised by the Draft Permit's off-site mitigation provisions is that they would potentially allow for new development discharging polluted runoff to persist in the built environment. A project that is developed during the term of this permit may stand for 60 years or more.[106] Yet if the project performs alternative compliance, the

[105] The provision under the "Options for Stormwater Management Design, Most Preferred Stormwater Management Options" requiring that a project opting to perform off-site groundwater replenishment "Must also provide reduction through treatment of the SWDQv at the project site" implies the former, that projects may perform off-site mitigation at a site hydrologically unconnected to the project within the same sub-watershed. In addition to the concerns described above.

[106] See, e.g., Nelson, Arthur C., 2004, Toward a New Metropolis: The Opportunity to Rebuild America, Brookings Institution.

permit would then allow for the project to be developed using less protective conventional, engineered, treat and discharge controls on runoff. Instead, another "off-site" development would theoretically be retrofitted in place of on-site retention, even if that site might otherwise eventually be subject to the permit's (or a local ordinances) requirements to incorporate LID based controls: e.g., while the new project will be developed using inferior engineered controls that will persist in the built environment for generations, the off-site project would, independent of its participation in the Draft Permit's off-site program, potentially have been required to implement LID controls within the next 5, 10, or even 20 years. This path, requiring on-site retention and eventual retrofit of older development, would result in a substantially faster conversion of existing development to LID controls. Under the Draft Permit a continuous stream of new development projects could be constructed without LID based stormwater controls, ensuring that pollution will continue to be discharged to receiving waters.

d. The Draft Permit's Alternative Compliance Provisions for Biofiltration are Insufficiently Protective of Water Quality and Would Improperly Allow Use Of Biofiltration Off-site, Even Where On-Site Retention or Biofiltration were Feasible

In contrast to retention practices, which ensure that 100 percent of the pollutant load in the retained volume of runoff does not reach receiving waters, biofiltration practices that that treat and then discharge runoff through an underdrain result in the release of pollutants to receiving waters. Indeed, in order to achieve equivalent pollutant load reduction benefits to the use of on-site retention, biofiltration practices would have to be 100 percent effective at filtering pollutants from runoff, which they are invariably not. As a result, we have previously commented that biofiltration practices are not a proper substitute for LID practices that retain water on-site.

This conclusion is borne out by data presented in the Draft Ventura County Technical Guidance Manual estimates pollutant removal efficiency for total suspended solids to be 54-89 percent, and for total zinc to be 48-96 percent.[107] Biofiltration has additionally been shown to be a particularly ineffective method of pollutant removal for addressing nitrogen or phosphorous, two common contaminants found in stormwater.[108] The Draft Ventura Technical Guidance, for example, indicate that biofiltration achieves pollutant

[107] Ventura County Low Impact Development Technical Guidance Manual, July 13, 2011, at D-7.
[108] Lawn irrigation has been identified as a "hot spot" for nutrient contamination in urban watersheds—lawns "contribute greater concentrations of Total N, Total P and dissolved phosphorus than other urban source areas . . . source research suggests that nutrient concentrations in lawn runoff can be as much as four times greater than other urban sources such as streets, rooftops or driveways." Center for Watershed Protection (March 2003) *Impacts of Impervious Cover on Aquatic Systems* at 69; see also H.S. Garn (2002) *Effects of lawn fertilizer on nutrient concentration in runoff from lakeshore lawns, Lauderdale Lakes, Wisconsin.* U.S. Geological Survey Water- Resources Investigations Report 02-4130 (In an investigation of runoff from lawns in Wisconsin, runoff from fertilized lawns contained elevated concentrations of phosphorous and dissolved phosphorous).

removal efficiency for total nitrogen at between only 21-54 percent,[109] as compared with 100 percent for runoff retained on-site.

As a result, the Draft Permit's provision allowing that "if using biofiltration due to demonstrated technical infeasibility, then the new project must biofiltrate 1.5 times the portion of the [design volume] that is not reliably retained on-site," (Draft Permit, at VI.D.6.c.iii.(1)(a)), is not sufficiently protective of water quality and does not meet the Clean Water Act's MEP standard. This Regional Board has, in fact, already passed more stringent requirements regarding application of biofiltration to meet on-site LID requirements in the MS4 Permit for Ventura County. The Ventura permit requires that biofiltration devices be sized to treat 1.5 times the design storm volume *and* achieve 1.5 times the pollutant load reduction as would on-site retention. Even retention of equivalent pollutant load reduction to on-site retention (let alone 1.5 times the loading), a minimum backstop at the very least, is not guaranteed by a biofiltration system treating 1.5 times the design stormwater runoff volume. Based on treatment efficiencies in the Ventura County Technical Guidance Manual, biofiltration of 1.5 times the design runoff volume could result in as little as 81 percent removal of TSS, 72 percent of total zinc, and 32 percent of total nitrogen.

The Draft Permit should either eliminate biofiltration as an option for compliance, or at a minimum require that sites electing to use biofiltration for on-site compliance in cases of technical infeasibility must demonstrate both treatment of 1.5 times the design stormwater runoff volume *and* pollutant load reduction equivalent to that of retention practices. The 1.5 multiplier would thus set a minimum volume for treatment, but where a site is unable to demonstrate that biofiltration of 1.5 times the design volume will achieve equivalent pollutant load reduction to retention practices, the site would be required to treat a correspondingly larger volume of runoff until equivalent pollutant load reduction is achieved.

Even if the Regional Board allows the use of biofiltration for compliance on-site in cases of technical infeasibility, there is no justification for the Board's proposal to allow use of biofiltration to achieve compliance off-site at retrofit projects. (See Draft Permit, at VI.D.6.c.iii.(3).) Where on-site retention is infeasible, off-site mitigation through retention of the design storm volume, including at a retrofit project, should be allowed, coupled with requirements that the project demonstrate equivalent off-site pollutant load reduction and perform on-site treatment of the design stormwater volume. However, it is unclear whether the Draft Permit's Offsite Project – Retrofit Existing Development, requires infeasibility for on-site retention in the first instance. In this connection, it

[109] Ventura County Low Impact Development Technical Guidance Manual, July 13, 2011, at D-7. See also, BASMAA (December 1, 2010) *Draft Model Bioretention Soil Media Specifications-MRP Provision C.3.c.iii*, at Annotated Bibliography section 3.0 (noting nutrient removal from synthetic stormwater runoff demonstrated only 55 to 65 percent of total Kjeldahl nitrogen removal and that only 20 percent of nitrate is removed from the runoff).

would appear to allow biofiltration to be performed at an off-site retrofit project, even where on-site retention was feasible. The Draft Permit should be revised to explicitly state that biofiltration is not authorized as a method of alternative compliance at offsite locations under any circumstance where on-site compliance is feasible.

e. The Draft Permit's Water Quality Mitigation Criteria should apply to *all* BMPs

The Draft Permit establishes water quality mitigation criteria that serve as benchmarks applicable to new and redevelopment project BMPs only. Specifically, the Draft Permit requires the Permittee to meet the listed pollutant benchmarks prior to the discharge to the MS4. In general, we support performance-based criteria for BMPs.

One of the most significant shortcomings in previous stormwater permits is the lack of performance-based criteria for BMPs. As a result, BMPs are added as part of permit requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. An effective way to ensure the success of stormwater programs and the attainment of water quality standards is to assess BMPs based on performance. Flow-based design criteria are simply not adequate to ensure that water quality standards are consistently met because flow, and corresponding BMP size, is but one factor determining BMP effectiveness.

The Ventura MS4 appropriately contains Treatment BMP Performance standards that apply to all treatment BMPs being implemented under the Permit.[110] Thus, we urge the Regional Board to increase the applicability of the Water Quality Mitigation Critiera to all treatment BMPs being implemented under the Permit.

f. The Draft Permit's Local Ordinance Equivalence Provision Creates a Self Regulatory Scheme in Violation of the Clean Water Act

The Draft Permit allows for a Permittee to submit a local LID ordinance for "The Executive Officer [to] determine whether implementation of the local ordinance provides an equivalent pollutant control to the applicable provisions of" the Draft Permit. (Draft Permit, at VI.D.6.d.i.) But putting such review authority solely in the Executive Officer shields the development of these critical, core permit requirements from oversight and creates a self-regulatory scheme in violation of the Clean Water Act. In *Environmental Defense Center, Inc. v. U.S. E.P.A* (9th Cir. 2003) 344 F.3d 832, 854-56, the court explained: "[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity. . . . Congress identified public participation rights as a critical means of advancing

[110] Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2010-0108; NPDES Permit No. CAS004002, July 8, 2010 at 37.

the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."

In bypassing the public review process, the Local Ordinance Equivalence provision instead has the potential to exempt development from participation in the Permit's core requirements to prevent the discharge of pollutants to the MS4 system. These requirements, encompassing the permit's on-site stormwater controls, LID requirements, alternative performance criteria, hydromodification controls, and other post-construction requirements, are necessarily reviewed in order to determine whether the permit meets the requirements of the Clean Water Act's MEP standard. This determination lies properly with the Regional Board in the first instance, through the process of public review and hearing. In order to "ensure that each [MS4 permit] program reduces the discharges of pollutants to the maximum extent practicable," the Local Ordinance Equivalence provision should be removed, and Permittees should be required to meet the permit's applicable requirements, or should be subject to public notice and comment, with a final determination to be made by the Regional Board in public hearing. Moreover, the Draft Permit should clearly state that a local ordinance will not be considered without a minimum retention requirement numerically equal to the 0.75-inch, 24-hour rain event or the 85th percentile, 24-hour rain event, whichever is greater. Absent such a minimum numeric criteria, the local standard would by definition be less than what has been demonstrated practicable in California.

C. The Draft MS4 Permit Illegally Eliminates Essential Agency and Public Oversight

As discussed above in the Section on the Draft Permit's Local Ordinance Equivalence Program, (See Draft Permit, at VI.D.6.d.i), the Draft Permit fails to provide for meaningful agency and/or public review and comment on programs that would be developed by the Permittees. This scheme therefore violates the requirement that "stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity. . . ." (*Environmental Defense Center*, 344 F.3d at 854-56. Unfortunately, the Draft Permit is riddled with similar, and similarly unlawful, provisions allowing for the regulated parties to develop their own program:

- Section VI.C.3.b.iv.(5)(b): "Where the TMDL Provisions in Part VI.E and Attachments L through R do not include interim or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines during the permit term, Permittees shall identify interim milestones and dates for their achievement. . . ."
- Section VI.E.2.d.i.: "A Permittee shall be considered in compliance with an applicable interim water quality-based effluent limitation and/or a receiving water limitation for the pollutants associated with a specific TMDL" where certain demonstrations are made, which allows Permittees to determine their own

compliance with the MS4 Permit because Permittees identify their own "interim water quality-based effluent limitations" pursuant to Section VI.C.3.iv.(5)(b).

- Section VI.C.3.b.iv.(5)(b), and Section VI.E.2.d.i.: Provisions fail to provide for public review and comment of "interim milestones" and "dates for their achievement" developed by Permittees. These sections also fail to provide a timeline as to when agency review of Permittee's self-established limits and deadlines must occur.

Or more overarching in their application:

- Section VI.C.1.b.: "Participation in a Watershed Management Program is voluntary and allows a Permittee to customize the requirements in Part VI.D (Minimum Control Measures). . . ."
- Section VI.D.1.a.: "Each Permittee shall implement the requirements in Parts VI.D.4 through VI.D.9 below, or may, in lieu of the requirements in Parts VI.D.4 through VI.D.9 implement customized actions within each of these general categories of control measures as set forth in an approved Watershed Management Program per Part VI.C. Implementation shall be consistent with the requirements of 40 C.F.R. § 122.26(d)(2)(iv).

The above provisions effectively allow Permittees, with minimal and wholly inadequate oversight or public input, to rewrite vast and critical sections of the Los Angeles County MS4 Permit—Section VI.D.1.a allows for a Permittee to eliminate complete categories of Minimum Control Measures required in the Permit, solely by providing an ill-defined "justification for its elimination." (See Draft Permit, at § VI.D.1.c.). This type of self-regulatory program which eliminates meaningful agency review and public participation violates fundamental provisions of the Clean Water Act and has been expressly invalidated by the Ninth Circuit Court of Appeals. (*Environmental Defense Center*, 344 F.3d, at 854-56.) Given that "Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy," (*Id*. at 856-57), the public must given the opportunity to participate in the permitting and compliance process.

Failure to provide for meaningful agency review and public comment also impermissibly allows Permittees to defer implementation of and compliance with the terms of the MS4 Permit until some indeterminate future date – if ever. (See *id*. at 855 (reasoning that failing to require agency review and approval of Permittees' storm water management plans could improperly result in a Permittee "proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable"). The Regional Board "is required to ensure that the individual programs adopted are consistent with the law," and cannot allow Permittees to discharge without conducting a "meaningful review." *Environmental Defense Center, Inc.*, 344 F.3d at 856. These provisions in the Draft Permit must be removed, or must be substantially re-written to

provide for meaningful review and public process or they threaten to invalidate the entire MS4 permit.

D. The MS4 Permit Definition of "Joint Responsibility" is Potentially Internally Contradictory, and Should be Clarified to Ensure Compliance With Existing Waste Load Allocations and Other Clean Water Act Requirements

Citing to 40 C.F.R. section 122.26(a)(3)(vi), the Draft Permit states that, in the case of comingled discharges, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators." (Draft MS4 Permit § VI.E.2.b.ii.) Following from this, the Draft Permit states, referring to "joint responsibility" of the Permittees, that:

> Where Permittees have commingled discharges to the receiving water, compliance at the outfall to the receiving water or in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart v. below. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of an applicable water quality-based effluent limitation(s) at the outfall or receiving water limitation(s) in the target receiving water.

(Draft MS4 Permit § VI.E.2.b.iii-iv.) While we agree with the Draft Permit's description of joint responsibility above, we are concerned that the Permit's discussion of joint responsibility in the Findings section could potentially cause confusion for purposes of permit implementation, and suggest the Regional Board revise the findings accordingly.

In particular, under Finding J.1, the Draft Permit states that, "[t]his Order does not require a Permittee to individually ensure that a commingled MS4 discharge meets the applicable water quality-based effluent limitations included in this Order, unless such Permittee is shown to be solely responsible for an exceedance." In light of the clear prescription in the Permit's implementing language requiring individual Permittees to affirmatively demonstrate that their discharge did not cause or contribute to an exceedance, we do not interpret this finding to mean otherwise. However, we suggest that the Regional Board clarify that it is the Permittee who must show its discharge is not responsible for causing or contributing to an exceedance, rather than any other possible interpretation to the contrary.[111] Further, the Regional Board should explicitly state that it is a Permittees

[111] Such a clarification would be in line with requirements that the permitting authority ensure that "effluent limits … are consistent with the assumptions and requirements of any available wasteload allocation for the discharge. . . ." (40 C.F.R. § 122.44(d)(1)(vii)(B).) For example, The WLAs of the Santa Monica Bay

responsibility to address any contribution to an exceedance, not only exceedances for which they are solely responsible.

E. Environmental Groups Strongly Support the Inclusion of Final Numeric Waste Load Allocations

The Regional Board and EPA have adopted TMDLs for 175 waterways in the Los Angeles area over the past thirteen years. These TMDLs are due in large part to a 1998 Clean Water Act citizen action by Heal the Bay, NRDC and Santa Monica Baykeeper, which resulted in a consent decree with U.S. EPA setting the deadlines for the adoption of specified TMDLs. TMDLs are in effect for numerous pollutants that still impair Los Angeles waterways, including bacteria, metals, toxics, trash, and nutrients.

The Clean Water Act and its implementing regulations require that NPDES permits incorporate WLAs established in existing, applicable TMDLs as water-quality based effluent limitations ("WQBELs"). 40 C.F.R. § 122.44(d)(1)(vii)(B). Thus, the MS4-related waste load allocations for TMDLs adopted in the Los Angeles Region *must* be properly reflected in the MS4 Permit.

Accordingly, Environmental Groups strongly support the Draft Permit's inclusion of final numeric waste load allocations.

> The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR §122.44(d)(1)(vii)(B); Cal.Wat. Code §13263(a)).

(Draft Permit, at VI.E.1.c.) This provision is critical to ensure that the water quality objectives for each impaired waterbody are achieved. In this regard, the above provision of the Draft Permit is in line with other sections of the MS4 Permit. Section V.A.1. of the Draft MS4 Permit states: "[d]ischarges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited." "Receiving water limitations" is then a defined permit term. This language in fact creates effluent limitations in the form of "receiving water limitations."

Beaches Bacteria ("SMBBB") TMDLs establish that all responsible jurisdictions and responsible agencies within a subwatershed are *jointly responsible* for complying with the applicable WLAs, unless an individual discharger demonstrates their discharges did not contribute to an exceedance of the WLA. *See* Resolution No. 2002-022 SMBBB Wet Weather TMDL, Attachment A at pp. 5 (Waste Load Allocations), 10 (emphasis added); *see also* Resolution No. 02-004 SMBBB Dry Weather TMDL, Attachment A at p. 4 (Waste Load Allocations) (emphasis added).

However, section IV.A.2 of the Permit provides: "This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL waste load allocations assigned to discharges from the Los Angeles County MS4." This section must be revised to clarify that the WLAs in the specified TMDLs are incorporated into the Draft Permit as WQBELs, rather than merely stating that the WQBELs "are established."

1. The Draft Permit Fails to Incorporate *All* Existing, Applicable TMDLs In a Manner Consistent with the Clean Water Act.

NPDES permits may only include schedules for achieving compliance with permit limits as permit terms when schedules for achieving compliance are authorized, appropriate, and satisfy specific requirements. (*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.)

The Draft MS4 Permit violates these requirements in at least three ways. First, the Draft Permit incorporates illegal compliance schedules as permit terms. Second, and as described above, the Draft Permit unlawfully allows Permittees to enact self-regulatory programs. Finally, the permit fails to incorporate numeric WLAs established by U.S. EPA as WQBELs.

a. The Draft Permit Incorporates Illegal Compliance Schedules In Violation of 40 C.F.R. § 122.47

Section IV.A.2.a. of the Draft MS4 Permit provides:

> Each Permittee shall comply with applicable WQBELs as set forth in Part VI.E of this Order, *pursuant to applicable compliance schedules*.

(emphasis added). The Draft Permit also references the TMDL implementation schedules at several other sections.[112] The implementation schedules set out in the applicable TMDLs cannot be incorporated into the MS4 permit as an NPDES permit compliance schedules where the TMDL implementation schedules do not satisfy federal laws governing NPDES permit compliance schedules.

Any compliance schedules incorporated into the MS4 Permit must lead to compliance "as soon as possible," (40 C.F.R. § 122.47(a)(1)), and must comply with specific requirements including: (1) if the compliance schedule exceeds one year, it must include interim compliance deadlines; (2) interim deadlines must be no more than one year apart; and (3) if the time necessary for completion of any interim requirement is more than one year and is not readily divisible into stages for completion, the permit shall specify

[112] See, e.g., p. 52, Sec. VI.C.3.c; p.111, Sec. VI.E.1.; p. 112, Sec. VI.E.c.ii; p. 113, Sec. VI.E.2.d.i.

interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date. (40 C.F.R. § 122.47(a)(3).)

Waste load allocations and compliance schedules in the MS4 Permit must also be consistent with other state water quality control plans and statutory deadlines; a compliance schedule may only be included in an NPDES permit as a permit term when such compliance schedules are authorized. (See *In the Matter of Star-Kist Caribe, Inc.*, 1989 EPA App. LEXIS, at *7; 33 U.S.C. § 1313(e)(3)(F).) The Draft Permit then conflicts with federal requirements in several ways. First, waste load allocations in metals TMDLs in Los Angeles are based on the California Toxics Rule ("CTR") criteria and compliance schedules for CTR-based limits are authorized through the Inland Surface Water Plan ("ISWP"). But the ISWP only authorized compliance schedules for a maximum of 10 years from the time CTR criteria were promulgated and stated that no discharger can be given a compliance schedule to meet CTR criteria after May 18, 2010.[113] As a result, any compliance schedules set out in TMDLs implementing the California Toxics Rule ("CTR") are not authorized.

Second, compliance schedules may only be included in NPDES permits when the schedule leads to compliaAnce "as soon as possible." (40 C.F.R. § 122.47(a)(1).) The MS4 Permittees have been prohibited from causing or contributing to exceedances of the same water quality standards on which the TMDLs waste load allocations are based since 2001, and many TMDL deadlines have already passed. Where TMDL deadlines have already passed, allowing the Permittees additional time to comply with the WLAs as a term of the re-issued MS4 Permit will not lead to compliance "as soon as possible." The TMDL schedules therefore cannot be incorporated into the MS4 Permit.

Third, NPDES compliance schedules must meet certain specific requirements, which are:

> (i) if the compliance schedule exceeds one year, it must include interim compliance deadlines;
> (ii) interim deadlines must be no more than one year apart; and
> (iii) if the time necessary for completion of any interim requirement is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(40 C.F.R. § 122.47(a)(3).) Any implementation schedule set forth in an applicable TMDL that allows for more than one (1) year to achieve compliance and lacks interim deadlines cannot be incorporated into the MS4 Permit as an NDPES compliance schedule. For example, this specifically applies to the implementation schedules set out in

[113]Inland Surface Water Plan, at 19; see also October 23, 2006 EPA Letter re: California SIP, Compliance Schedule Provisions; State Board Memo dated September 15, 2006 Re: CTR Compliance Schedules; State Board Resolution No. 2008-0025 at 4; Final Staff Report, State Board Resolution No. 2008-0025 at 10; Final Response to Written Comments, State Board Resolution No. 2008-0025 at 6, 9, 10, 18-19, 26.

the Malibu Creek Bacteria TMDL, the SMBBB TMDLs, and the Los Angeles River Indicator Bacteria TMDL. These compliance schedules must either be modified to comply with the regulations or eliminated in their entirety.

Finally, the Draft Permit unlawfully provides a compliance determination for interim limits where a Permittee is merely implementing a Watershed Management Plan rather than actually achieving the defined interim limits. (Draft Permit, at VI.E.(2)(d)(i)(4).) This violates the provision on requirements for interim deadlines. But the Draft Permit nowhere references 40 C.F.R. § 122.47, nor does the permit explain how the requirements of this regulation have been met.

2. The Draft MS4 Permit Fails to Provide Meaningful Agency Review or Public Review and Comment on Interim Limits Developed by Permittees

Section VI.C.3.c. (p. 53) of the Draft Permit provides:

> Permittees shall incorporate compliance schedules in Attachments L through R into the plan and, where necessary develop interim milestones and dates for their achievement.

As with multiple other provisions in the Permit, including, as discussed above, sections VI.C.3.b.iv.(5)(b) and VI.E.2.d.i, this section is unlawful, as it allows Permittees to develop interim compliance deadlines applicable to their discharges, but fails to require meaningful agency review or public review and comment. (See *Environmental Defense Center*, 344 F.3d, at 854-56.) Absent opportunity for public review and comment, as well as Regional Board review and approval, on the interim milestones that are developed these provisions must be removed.

3. Interim TMDL Requirements Must Include Numeric Benchmarks to Properly Track Compliance

In addition to incorporating final numeric waste load allocations for TMDLs, it is imperative that the renewed MS4 Permit also includes interim numeric benchmarks that are consistent with federal regulations in order to track compliance and ensure that final objectives are met.

Rather than allowing for implementation of Watershed Management Programs to serve as the sole compliance measure, each TMDL requirement in the Permit with a future final compliance deadline should include interim numeric benchmarks throughout the process of implementation. This is the only way to track a Permittee's progress and evaluate BMPs and progress toward final compliance along the way, and is consistent with the requirements that compliance schedules include interim deadlines (40 C.F.R. § 122.47(a)(3).) For this reason, the renewed MS4 Permit should mirror the process already

adopted by the Regional Board in the Ventura MS4 Permit. In the Ventura MS4 Permit, Permittees must meet both interim and final compliance milestones, consistent with the adopted TMDL.[114] Likewise, Los Angeles MS4 Permittees should be required to monitor and evaluate methodologies, adapt accordingly, and report progress via numeric benchmarks in order to ensure that final numeric benchmarks will be met when required. (40 C.F.R. § 122.47(a)(3).)

In addition, each Permittee should be required to report on BMP implementation, BMP maintenance activities, and water quality monitoring results (which some TMDLs require independently)[115] on an annual basis to the Regional Board. The Working Proposal's requirement that this information merely be available for inspection by the Regional Board is insufficient to ensure that the public can access information related to permit implementation and compliance.

4. The Draft MS4 Permit Illegally Exempts Dischargers from Complying with Numeric Waste Load Allocations Established in Total Maximum Daily Loads Developed by EPA

The Draft MS4 Permit attempts to excuse Permittees from complying with WLAs set forth in TMDLs established by EPA. Specifically, Section VI.E.3 provides:

> TMDLs established by the USEPA, to which Permittees are subject, do not contain an implementation plan adopted pursuant to California Water code section 13424. However, USEPA has included implementation *recommendations* as part of these TMDLs. *In lieu of* inclusion of numeric water quality based effluent limitations at this time, this Order requires Permittees subject to WLAs in USEPA established TMDLs to propose and implement best management practices (BMPs) that will be effective in ultimately achieving the numeric WLAs.

(emphasis added). This section violates the requirement at 40 C.F.R. § 122.44(d)(1)(vii)(B) that NPDES permit requirements be consistent with existing, applicable WLAs. Because TMDLs established by EPA include numeric WLAs, the MS4 Permit must include numeric WQBELs consistent with those WLAs. For example, the San Gabriel River Metals and Selenium TMDL ("EPA San Gabriel TMDL"), which has been in effect since 2007, sets numeric WLAs based on the CTR criteria. The MS4 Permit must incorporate the numeric WLAs set forth in the EPA San Gabriel TMDL to comply with the Clean Water Act.

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[114] Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2010-0108; NPDES Permit No. CAS004002, July 8, 2010.

[115] See, *e.g.*,The Ballona Creek Metals TMDL (requiring ambient and effectiveness monitoring and special studies) (Amendment to the Water Quality Control Plan - Los Angeles Region to incorporate the Ballona Creek Metals TMDL, Resolution No. R2007-015, in effect October 29, 2008.)

Further, the Draft MS4 Permit mischaracterizes the "recommended implementation" portion of the EPA-established TMDLs. The EPA-established TMDLs' "recommended implementation" section "describes the implementation procedures and regulatory mechanisms that could be used to provide reasonable assurances that water quality standards will be met."[116] With respect to WLAs applicable to MS4 discharges, EPA recommends that the WLAs be incorporated into the MS4 permit. EPA San Gabriel TMDL at p. 46-47. The EPA "recommended implementation" thus provides no basis for not incorporating the numeric WLAs into the MS4 permit.

To the extent the Draft MS4 Permit exempts Permittees from complying with numeric WLAs established by EPA TMDLs, it violates the Clean Water Act. Permittees must be required to comply with all existing, applicable WLAs, regardless of the adopting agency.

F. The Draft MS4 Permit Ignores Implementation Plans Already Required Under the Current Permit

Section VI.C.2. and Table 9 of the Draft MS4 Permit allow Permittees a timetable for developing plans to implement programs required under the permit. However, under the 2001 Permit, Permittees were previously required to develop and implement implementation plans. For example, Part 3 of the 2001 Permit sets forth general and specific requirements for Permittees to develop and implement a "Storm Water Quality Management Program (SQMP)." The purpose of the SQMP is to "reduce the discharges of pollutants in storm water to the MEP." (2001 Permit, at section 3.A.2.) Permittees were to implement their SQMP no later than February 1, 2002. (2001 Permit, at section 3.A.1.) In some instances, Permittees have in fact developed and begun to implement these plans.[117] In others, failure to act timely under the terms of the 2001 Permit has resulted in noncompliance.

In either event, the timeline described in the Draft Permit fails to take into account the 2001 Permit's requirements that Permittees develop and put into effect implementation plans, and that time and effort have already been spent in developing plans that may be applicable to Draft Permit program requirements. Instead, the Draft Permit creates an entirely new mechanism for Permittees to implement the permit requirements, referred to by a different name—the "Watershed Management Program"—as well as a renewed period for plan development. (See Draft Permit, at VI.C.1.) The Draft Permit fails to explain why Permittees should be allowed to effectively "start over" with the implementation process, which will serve to substantially delay permit implementation. This is particularly troublesome given that it was anticipated that when the new MS4

[116] See EPA San Gabriel TMDL, at 46.
[117] See, e.g., City of Malibu Annual Storm Water Report 2009-2010, III.C. Storm Water Quality Management Plan SQMP Implementation ("The City has been implementing the Countywide SQMP since adoption of this permit in 2001. Generally, the City finds the SQMP helpful in meeting permit requirements.").

permit was reissued, as is being done now, it would take into consideration Permittees' prior implementation efforts: "Ideally, any *revisions* to the SQMP, or adoption of an *updated* or local/regional SQMP, would coincide with adoption of a new NPDES Permit."[118] Nor does the Draft Permit provide any basis as to why Permittees need more time to achieve compliance. Where plans have been properly implemented under the 2001 Permit, additional time should not be necessary. Where Permittees have failed to comply with Permit requirements of their own devise, providing additional time only rewards prior poor performance.

G. Monitoring and Reporting Program

The Clean Water Act requires that a Permittee undertake a self-monitoring program sufficient to determine compliance with its NPDES permit. (*See* 40 C.F.R. § 122.44(i)(1).) Appropriately, the Tentative Monitoring and Reporting Program ("Tentative MRP") outlines this as an objective: "The primary objectives of the Monitoring Program are to…assess compliance with receiving water limitations and water quality-based effluent limitations established to implement Total Maximum Daily Load wet weather and dry weather wasteload allocations…" (E-3).
We conceptually support the proposal to require both receiving water monitoring and storm water and non-stormwater outfall based monitoring to assess a Permittee's compliance with the permit. (E-4). The combination of monitoring will be used to establish compliance or violations of the permit. However, many of the specific requirements for the core monitoring program elements outlined in the Tentative MRP should be enhanced to improve upon the existing monitoring program and assist in assessment of water quality.

As an overarching comment, the Tentative MRP is difficult to evaluate, as it is unclear what monitoring is already underway and what additional monitoring locations are required in the Draft Permit.

1. <u>Receiving Water Monitoring</u>

    a. The MRP should identify beach water quality monitoring frequency

The LA County MS4 Order No. 01-182 includes a Shoreline Monitoring section that requires monitoring for the purposes of evaluating "the impacts to coastal receiving waters and the loss of recreational beneficial uses resulting from storm water/urban runoff." (Order No. 01-182, changes on June 15, 2005). Instead, the Tentative MRP refers to the monitoring requirements in the approved Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan ("CMP"). (E-9). One notable

[118] City of Malibu Annual Storm Water Report 2009-2010, III.C. Storm Water Quality Management Plan SQMP Implementation (emphasis added).

difference between the requirements in Order No. 01-182 and the CMP is that the monitoring frequency is not specified in the CMP. Thus, it is critical that the Regional Board include in the MRP the minimum sampling of five times per week at the same beaches included in Order No. 01-182 that were identified to necessitate this more frequent sampling.[119]

b. The MRP should specify a minimum number of receiving water monitoring locations

The Tentative MRP does not specify the required number of receiving water monitoring locations or exact monitoring locations. Instead, the Tentative MRP states that "[r]eceiving water monitoring shall be performed at previously designated mass emission stations and/or at TMDL receiving water compliance points, as designated in Regional Water Board Executive Officer approved TMDL Coordinated Monitoring Plans." (E-4). The MRP should include a specific list and map of all receiving water monitoring locations, including the existing mass emissions stations and TMDL receiving water compliance points.

The current mass emissions station (MES) monitoring locations should be maintained as is, to continue to fulfill the objectives set out in the 2001 Permit and the goals of the current Draft Permit. The Regional Board articulated several objectives of the MES monitoring in Order No. 01-182 including (1) estimate the mass emissions from the MS4; (2) assess trends in the mass emissions over time; and (3) determine if the MS4 is contributing to exceedances of water quality standards. *See* Order No. 01-182 at T-6. Thus, it is important that the Regional Board continue to require monitoring at each MES to continue to assess trends over time. This is also consistent with the Tentative MRP's objectives to assess trends over time. *See* Tentative MRP at E-4. Thus, the option to justify the elimination of MES monitoring in Parts VI.A.1.b.v. and VI.B.3.b. should be eliminated. *See* Tentative MRP at E-13-E-14. While we agree that there is room for improvement in the LA MS4 Permit, it is important that we not abandon all that has been implemented and achieved over the last decade.

In addition, the MRP should provide more specificity, including the exact location of all existing mass emission stations and the requirement that Permittees identify a minimum number of additional receiving water monitoring locations and comply with TMDL requirements.

[119] Surfrider, Topanga, Santa Monica Canyon, Santa Monica Pier, Pico, Ashland, Marina del Rey Playground, Marina del Rey Lifeguard, Ballona, Manhattan Beach 28th St, Herondo drain, Redondo Pier, Cabrillo Harborside

c. The Tentative MRP should include additional receiving water monitoring parameters

The Receiving Water Monitoring requirements contain an insufficient number of monitoring parameters and inappropriately focus on only known impairments, rather than a comprehensive assessment of the waterbody. Specifically the Tentative MRP requires monitoring for flow, known impairments, hardness, pH, dissolved oxygen, temperature, specific conductivity and toxicity. Theoretically under this scenario, a waterbody may not be assessed during the entire permit cycle for pollutants such as metals, nutrients and pesticides which are often found at levels exceeding water quality standards in waterbodies throughout the county. In comparison, the current LA MS4 MRP (Attachment U-1) and the Ventura County MS4 adopted in 2010 both contain receiving water monitoring requirements for over 130 parameters. What is the reasoning for this large drop in monitoring? TMDL monitoring certainly will not make up this gap. Instead, the Regional Board should maintain the parameters that are currently monitored in the receiving water. This is particularly important for assessing trends over time. This same list of parameters should be mimicked in the outfall monitoring program.

d. The wet weather thresholds should be clarified

The Draft Permit provides two wet weather thresholds: one for ocean water and one for streams. (E-14). We are concerned that the proposed thresholds assume that distance (space) and time are uniform throughout the waterbody. In reality, rainfall may be much more significant in the lower portion of a watershed, for example, than the upper portion. In this scenario, if a disproportionate amount of rain gauges are in the upper portion of the watershed, it could lead to a mischaracterization of conditions. The proposed approach also assumes that flow and contaminant loads are homogeneous throughout the watershed. The Regional Board should clarify how these differences will be accounted for when determining wet versus dry weather.

2. Outfall Monitoring

The Tentative MRP requires outfall based monitoring from "…at least one major outfall per subwatershed (HUC-12) drainage area, within the Permittee's jurisdiction." (E-17). We request that the Regional Board require monitoring from more than one outfall in each HUC-12 per Permittee at this time. "Hydrologic Units (HUC-12)" are very large drainages (up to 63 square miles). An associated receiving water monitoring location should be in proximity to this location. Further, the Regional Board must ensure that appropriate land-use categories are monitored in order to be able to more readily determine if a MS4 is causing or contributing to a water quality objective exceedance, and if so, which Permittee. Drainages carrying stormwater from commercial, industrial, and high-use transportation should be prioritized.

a. The MRP should determine the quality of a Permittee's discharge relative to Water Quality Standards, not action levels

The Tentative MRP states that a goal of both the stormwater outfall and non-stormwater outfall based monitoring is to "[d]etermine the quality of a Permittee's discharge relative to municipal action levels…" (E-4). This comparison is inappropriate, as the MRP should determine the quality of a Permitttee's discharge relative to Water Quality Standards and effluent limits, not municipal action levels. Further, the calculated MAL values are weak and completely inappropriate. Using the 25th percentile in developing the MAL values means that 75 percent of the time, BMPs performed better. For comparison, the MAL values are an order of magnitude higher than the Treatment Performance Standards calculated using median BMP performance and included in the Ventura MS4. For instance, the proposed total zinc MAL is 641 ug/l compared to 21.6 ug/l for wet pond BMPs in the Ventura Permit.[120] The Regional Board has not provided any justification for using the 25th percentile standard. Moreover, the Tentative MRP only requires action (3 years later) "for those subwatersheds with a running average of twenty percent or greater of exceedances of the MALs in any discharge of storm water from the MS4." (G-17). Instead, the discharge should be compared to water quality standards, and the median performance values should be used for developing Treatment BMP Performance Standards as was done in the Ventura MS4.

3. TMDL Monitoring

a. The MRP should include shortened timeframes for submitting MRPs on past-due TMDLs and USEPA TMDLs adopted prior to 2010

Appropriately, a stated goal of the MRP is assessment of compliance with applicable wet weather and dry weather WQBELs derived from TMDL WLAs. (E-4). However, according to Table E-1, the Regional Board does not have monitoring plans for USEPA-adopted TMDLs. As such the Tentative MRP allows for up to 12 months for Permittees to submit monitoring plans for these TMDLs. This timeframe is excessive for TMDLs that have been in effect prior to 2010. Also, the Regional Board should require all monitoring data that have been collected with respect to the TMDL since the effective date be submitted at the same time.

Moreover, as noted in Table E-1, several of the Monitoring Plans—such as the Santa Clara River Nitrogen Compounds TMDL (due March 23, 2005) and Middle Santa Ana River Watershed Bacteria Indicator TMDL (due November 16, 2007)—are past due. Yet the Tentative MRP allows up to 12 months for developing these already late plans.

[120] See Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2010-0108; NPDES Permit No. CAS004002, July 8, 2010, at Attachment C.

Instead, the plans should be submitted immediately. If the plans are not submitted, the Regional Board should immediately pursue enforcement action.

b. A summary of TMDL monitoring locations, frequencies and parameters should be included in the MRP

The Tentative MRP "incorporates by reference" and simply lists the TMDL Monitoring Plans that have been approved in Table E-1. (E-8). Referencing the Monitoring Plans makes review of the overall scope of the Tentative MRP monitoring program in conjunction with the TMDL monitoring plans extremely difficult, as the monitoring provisions are not described in the permit itself. It is difficult to discern if the TMDL monitoring programs are adequate for determining if water quality objectives are achieved in the receiving water. The Regional Board should include a summary of TMDL monitoring locations, frequencies and parameters in the MRP or Permit Factsheet.

4. Regional Studies

a. The Board should include bioassessment monitoring in the Permit that is sufficient for determining receiving water trends and stormwater impacts on specific aquatic communities

The Tentative MRP requires that the Permittees participate in the SMC Regional Monitoring Program for bioassessment monitoring. Specifically, the program calls for six random sites annually in the Santa Monica Bay Watershed Management area and three random sites annually in the Santa Clara River Watershed.

While the SMC Regional Monitoring Program is useful in measuring the overall health of Southern California watersheds, probabilistic monitoring does not provide adequate information on compliance or trends over time at specific sites. Of note the Ventura MS4 includes one fixed site in each watershed, although we do not believe this is sufficient to solve this overall deficiency. The SMC Program should not take the place of a compliance monitoring program that is necessary for compliance assurance purposes in an MS4 permit.

Bioassessment monitoring is critical to assess the full impacts of the discharge and should be performed on a regular basis. Heal the Bay has monitored over a dozen fixed sites per year in the Malibu Creek watershed for over a decade to observe trends. In order to determine the impacts of stormwater on biological resources in receiving waters, the Board must include a defined semi-annual or annual bioassessment monitoring program with at least six fixed sites per watershed in the Permit as part of the "Core Monitoring" requirements.

There is brief mention of Permittees contributing resources towards the San Gabriel and Los Angeles River Regional Watershed Management Programs; however, it is unclear

what this monitoring entails and what would be required under this permit. It is critical that biological communities in all watersheds throughout Los Angeles County are adequately monitored.

In addition the Regional Board should discuss how the bioassessment results will be evaluated. If bioassessment results raise concern, when compared to the Southern California Index of Biological Integrity, for example, the Permittee should be required to assess the impact and determine the source of impairment. This is a critical component absent in the Draft MRP.

b. Toxicity

Toxicity testing is the "safety net" of the NPDES permit monitoring program, as toxicity tests can identify pollution problems due to pollutants that may not be monitored or synergistic impacts from multiple pollutants.

In general, we are concerned that the proposed toxicity monitoring is inconsistent with the 2010 USEPA guidance[121] on toxicity monitoring, guidance released from the State Water Board in anticipation of the statewide Toxicity Policy[122], and the California Ocean Plan. For instance, sample hold time, sample volume, and the procedure for species selection in brackish and freshwater should be consistent with the above-mentioned guidance and polices. The Regional Board should address the comments below and should coordinate with the State Water Board and USEPA staff in order to ensure consistency and the utilization of the latest scientific thinking.

c. The MRP should include enhanced aquatic toxicity outfall monitoring requirements

We strongly support the proposed aquatic toxicity monitoring in both dry and wet weather in the receiving water and outfalls. We also support the four required monitoring events each year for receiving water monitoring. These requirements are consistent with the Ventura MS4 and the recommendations from the *SMBRC Technical Memorandum on Toxicity Testing of Wet and Dry Weather Runoff*. However, the Tentative MRP requires outfall monitoring only once per year and provides for an "out" to outfall monitoring entirely if toxicity is not found in receiving water for two years. Toxicity can be very fleeting. A once-per-year sampling regime will likely not capture toxic discharge. In order to ensure that toxic discharge is identified, the Regional Board should require outfall monitoring for toxicity four times per year, at a minimum, at the same time that

[121] U.S. Environmental Protection Agency. 2010a. National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document. EPA 833-R-10-003. Washington, DC: Office of Wastewater Management.
[122] State Water Resources Control Board. http://www.swrcb.ca.gov/water_issues/programs/state_implementation_policy/docs/draft_tox_staff_report_0612.pdf. Accessed July 17, 2012.

the receiving water monitoring location is sampled. In addition, the toxicity tests should continue for the term of the permit. Outfall toxicity monitoring is important, as it characterizes the discharge without in-stream dilution. The Permittee should select dischargers that are chronically flowing and that represent high-impact land uses such as transportation and industrial.

d. The MRP should require TST data reporting

Consistent with the 2010 USEPA guidance[123], we urge the Regional Board to also require toxicity data be reported for the Test of Significant Toxicity ("TST") statistical method (pass/fail and percent effected). This is also consistent with current drafts of the statewide Toxicity Policy.

e. The Regional Board should clarify the TIE/TRE processes for acute and chronic toxicity

The Draft MRP provides for different requirements for follow-up action if acute and chronic toxicity are observed. For acute toxicity the Permittee shall immediately begin a Toxic Identification Evaluation ("TIE") and the Initial Toxicity Reduction Evaluation ("TRE") workplan. (E-30). In the cases of chronic toxicity, a TRE Workplan is required to be implemented. Why does the Regional Board not require a TIE for chronic toxicity? Logically, one should identify the cause of toxicity prior to efforts to reduce the toxicity. The Regional Board should make these clarifications in the Permit.

5. Miscellaneous Monitoring Provisions

The Tentative MRP states that "[m]onitoring shall commence within 30 days after approval of the IMP or CIMP plan by the Executive Officer…" (E-8). How long does the Regional Board anticipate this approval process taking? We are concerned that the limited staff resources may significantly delay this approval process and inhibit adequate monitoring from taking place for an extended period of time. As an example of how this has already occurred, the Malibu Creek Watershed Trash Monitoring and Reporting Plan was submitted to the Regional Board on April 28, 2010 but has yet to be approved over two years later. (E-9) Also, the MRP must require that current MS4-required monitoring and TMDL monitoring occurs during the interim.

The Tentative MRP does not include Southern California Bight Monitoring Requirements, as the Ventura MS4 includes. What is the Regional Board's reasoning for this difference?

[123] U.S. Environmental Protection Agency. 2010a. National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document. EPA 833-R-10-003. Washington, DC: Office of Wastewater Management.

H. The Draft Permit's Non-stormwater Provisions Contradict Federal and State Law and Are Unsupported by the Evidence

Pursuant to section 402(p) of the Clean Water Act, MS4 Permits must contain "a requirement to effectively prohibit non-storm water discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B). Non-storm water discharges through the MS4 which are not covered by an NPDES Permit are by definition "illicit discharge[s]" (55 Fed.Reg. 47990, 47995.) "Such illicit discharges are not authorized under the CWA." (*Id.*) Further, regulations under 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) explicitly require that certain categories of non-stormwater discharges or flows that the Draft Permit claims are exempt from the section 402(p)(3)(B) prohibition "shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." MS4 Permittees are responsible for continuously evaluating the exempted non-stormwater discharges to ensure these discharges are not sources of pollution to receiving waters. 40 C.F.R. § 122.26 (d)(2)(iv)(B)(1).

Despite the Regional Board's explicit recognition of the "widespread presence of persistent non-storm water discharges" and continued "widespread exceedances of WQS during dry weather,"[124] the Regional Board proposes to continue authorizating a long list of non-stormwater discharges through the MS4. The permit must include a requirement to "effectively prohibit" these discharges.[125] More than two decades after the first Los Angeles County MS4 Permit was issued, non-storm water discharges to and from the MS4 continue to be a daily occurrence in Los Angeles County. Moreover, monitoring data demonstrates that TMDLs and water quality standards are persistently exceeded on days with no precipitation.[126] Storm drain monitoring data similarly confirms that the Los Angeles County MS4 is a significant source of pollution to Los Angeles rivers, creeks and beaches.[127]

The Draft Permit states that several enumerated "categories of non-storm water discharges are conditionally exempt from the non-stormwater discharge prohibition. . . . provided that the discharge itself is not a source of pollutants and meets all required conditions. . . ." (Draft Permit, at III.A.2.b.)[128] But evidence of unabated non-

[124] April 5, 2012 LA County MS4 Permit Workshop, Regional Board Staff Presentation, Slide 8 (unnumbered).
[125] While Environmental Groups are concerned over the impacts of non-stormwater runoff from all listed categories under section III.A.2 of the Draft Permit, we focus our comments on those discharges identified in sections III.A.2.a.ii and III.A.2.b, and do not address discharges from essential *non-emergency* fire fighting activities under section III.A.2.i here.
[126] See Exhibit E2 and Exhibit F.
[127] See Exhibit C and Exhibit D.
[128] While Environmental Groups dispute that 40 C.F.R. § 122.26(d)(2) authorizes any exemption in the first instance, it is abundantly clear that, as the San Diego Regional Water Quality Control Board correctly points out, where "certain categories of non-storm water discharges have been identified by the municipality to be sources of pollutants, they are no longer exempt and become subject to the effective prohibition requirement in section 402(p)(3)(B)(ii)."

stormwater pollution and the Permittees' failure to identify the specific sources of pollution in these discharges dictates these discharges should be prohibited. (See 40 C.F.R. § 122.26 (d)(2)(iv)(B)(1).) As the Regional Board has observed, there has been "little done [by the Permittees] to identify the sources and characteristics" of non-stormwater discharges that persistently impair Los Angeles County's waters, harming aquatic life and endanger public health.[129] Yet the Permittees cannot reap the reward of their own failure to act; pending a full evaluation of the currently exempted categories of non-stormwater discharge both to and from the MS4, the Regional Board must "effectively prohibit" these sources of non-stormwater discharge.[130]

1. Landscape Irrigation Must Be Removed From the List of Conditionally Exempted Discharges

Regardless of the Regional Board's overall approach to non-stormwater discharges, the continued inclusion of landscape irrigation in the list of conditionally exempted discharges in the Draft Permit is plainly unjustified. It is well-established that landscape irrigation is a significant source of pollutants to receiving waterbodies—Lawn irrigation has been identified as a "hot spot" for nutrient contamination in urban watersheds—lawns "contribute greater concentrations of Total N, Total P and dissolved phosphorus than other urban source areas … source research suggests that nutrient concentrations in lawn runoff can be as much as four times greater than other urban sources such as streets, rooftops or driveways."[131]

The San Diego Regional Board recently removed landscape irrigation as a category of exempt non-stormwater discharge in MS4 permits for both South Orange County and Riverside County due to the presence of pollution in runoff from this source.[132] Landscape irrigation is a proven source of pollutants and should no longer be included in the list of conditionally exempt non-storm water discharges in the Draft Permit.

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[129] December 15, 2011 LA County MS4 Permit Workshop, Regional Board Staff Presentation, Slide 5

[130] We note that, as authorized by Clean Water Act implementing regulations under 40 C.F.R. § 122.26 (d)(2)(iv)(B, the Regional Board can alternately regulate the conditionally exempted non-storm water discharges listed in Part III.A.2 of the draft Permit by separate NPDES Permits.

[131] Center for Watershed Protection (March 2003) *Impacts of Impervious Cover on Aquatic Systems* at 69; see also H.S. Garn (2002) *Effects of lawn fertilizer on nutrient concentration in runoff from lakeshore lawns, Lauderdale Lakes, Wisconsin*. U.S. Geological Survey Water-Resources Investigations Report 02-4130 (In an investigation of runoff from lawns in Wisconsin, runoff from fertilized lawns contained elevated concentrations of phosphorous and dissolved phosphorous); Orange County Watershed and Coastal Resources Division (August 18, 2006) Model Aliso Creek Watershed Action Plan, at 2-13 ("Based on other studies performed in Orange County, it is suspected that organophosphate pesticides may be a significant component of aquatic toxicity in the Aliso Creek storm samples.")

[132] South Orange County Permit Order No. R9-2009-0002, NPDES Permit No. CAS0108740; Riverside County MS4 Permit, Order No. R9-2010-0016, NPDES Permit No. CAS90108766

VII. Conclusion

Environmental Groups appreciate this opportunity to comment on the Draft Permit. Please feel free to contact us with any questions or concerns you may have.

Sincerely,

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Project Attorney
Natural Resources Defense Council

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Director of Water Quality
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SURFRIDER FOUNDATION

TO: Mr. Sam Unger
Executive Officer and Members of the Board
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

DATE: July 23, 2012

Via electronic mail:
LAMS42012@waterboards.ca.gov

Re: Comments on Draft Los Angeles County Stormwater Permit, Order No. R4-2012-XXXX

Dear Mr. Unger:

I am writing on behalf of Surfrider Foundation and our over 20,000 California members and activists, in regard to the Tentative Los Angeles County MS4 Permit (Tentative Permit). Our members are volunteer activists dedicated to the protection and enjoyment of our ocean, waves and beaches.

Surfrider Foundation, through our several chapters in the Los Angeles County area, have supported the adoption of numerous TMDLs over the past decade or so in recognition that most of Los Angeles' waterways are impaired for one or more pollutants due to years of industrial, commercial, and stormwater pollution. We support strong and enforceable provisions in the Permit that require compliance with water quality standards set to protect the beneficial uses in our waterways.

Dischargers have been on notice for many years that the provisions in numerous TMDLs would be enforced through the Tentative Permit. While we applaud efforts by some to reduce pollutant loading in our urban creeks and ocean, it has been too little and too late. It is now imperative that each of these TMDLs is properly incorporated into the MS4 Permit such that interim and final waste load allocations are enforceable and water quality improvements are guaranteed.

We strongly oppose further delay. Extensions on compliance will only signal dischargers that their unwillingness to comply will be rewarded by more extensions.

Further, we want to highlight what we believe are economical and multi-benefit solutions to meet the overriding goals of the Clean Water Act – that is, to ensure our waters are "fishable, swimmable and drinkable." While these goals may seem somewhat discrete, we think the solutions are interconnected.

For example, some municipalities have adopted Low Impact Development ordinances that result in simultaneous capture and natural treatment of polluted runoff, freshwater demand reduction, habitat restoration and flood control. We believe these multiple benefits are also achieved through "green street" and other "green infrastructure" projects. Finally, a critical component to true "integrated water management" in the Los Angeles region is the development of a network of treatment wetlands. We applaud those municipalities that have implemented pilot projects to demonstrate that this innovative approach solves otherwise intractable problems. Unfortunately, there has been little progress in widespread implementation of these proven multi-benefit solutions.

Surfrider Foundation is attempting to work with municipalities and water supply agencies to more broadly implement multi-benefit integrated water management solutions that, among other benefits, will result in dramatic reduction of non-point source pollution.

We have launched our "Ocean Friendly Gardens" program to educate and assist in retrofitting urban landscapes – both public and private, as well as new development and existing. We believe our proven efforts to date exceed what is required in some Low Impact Development ordinances, and expand the benefits beyond the reach of only new development. Please see:
http://www.surfrider.org/programs/entry/ocean-friendly-gardens

The Ocean Friendly Gardens program is one component of our broader vision and advocacy for true integrated water management, our "Know Your H2O" program. Please see: http://www.surfrider.org/programs/entry/know-your-h2o

We are also actively working to resolve marine debris through our public education and advocacy program, "Rise Above Plastics." Please see:
http://www.surfrider.org/programs/entry/rise-above-plastics

These and other programs illustrate our willingness and desire to assist dischargers in meeting the strictest pollution prevention possible. And we look forward to working in a collaborative effort of non-governmental organizations and government agencies to ensure multiple benefits for quality of life, environmental protection and sustainable resources well into the future.

With this in mind, we strongly support the incorporation of the numerous TMDLs in Los Angeles County into the MS4 Permit. And we stand by, ready to assist in compliance in the near future.

Thank you for the opportunity to comment on the Tentative Permit. Please feel free to contact us with any questions or concerns you may have.

Sincerely,

Joe Geever
Surfrider Foundation
Water Programs Manager
PO Box 41033
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(949) 636-8426

July 19, 2012

Via electronic mail

Mr. Sam Unger
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Re: Comments on Draft Los Angeles County Stormwater Permit, Tentative Order No. R4-2012-XXXX

Dear Mr. Unger:

On behalf of TreePeople, a 40-year-old, Los Angeles-based environmental nonprofit largely focused on watershed and stormwater management issues, we are writing with regard to the Draft Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit ("Draft Permit"). We appreciate the opportunity to comment on the Draft Permit to the Los Angeles Regional Water Quality Control Board ("Regional Board"). While we support some of the progress made in comparison to the current Permit's provisions, now more than ten years old, we are concerned with certain provisions in the Draft Permit.

1) Enforceable Standards Are Imperative to Water Quality Protections

We support strong and enforceable provisions that require compliance with water quality standards set to protect the beneficial uses in our waterways. Most of Los Angeles' waterways are listed as impaired for one or more pollutants due to years of industrial, commercial, and stormwater pollution. This new LA MS4 Permit is an opportunity to move forward in improving water quality and water supply in the region—we need stronger protections for our region's waters, not weaker ones. Thus, we urge the Regional Board to maintain requirements in the MS4 permit's Receiving Water Limitations section, in place for more than ten years, for permittees to meet water quality standards.

2) LID Provisions Are Critical to Protecting LA's Waterways

Over the last 15 years, TreePeople has demonstrated that low impact development (LID) best management practices (BMPs) are economically, socially and technically feasible. Together with our partners, we have demonstrated the viability and importance of these technologies at homes, parks, schools and streets, on both private and public property. We strongly believe that both distributed and centralized stormwater capture can and should comprise a significant portion of LA's water supply. This can only occur if the stormwater is infiltrated or captured through BMPs that retain, rather than detain and release, stormwater to receiving waters.

In 2010, TreePeople, the LA Department of Water and Power, and the Council for Watershed Health conducted a study (using a U.S. Bureau of Reclamation model) that explored the potential and identified favorable areas for groundwater recharge through stormwater infiltration in the City of LA. Results of the study highlight the critical role that green infrastructure and LID BMPs can play in augmenting the City of LA's local water supply. For example, despite the prevalence of impermeable surfaces, the

hydrogeological characteristics of the Eastern San Fernando Valley region indicate that retrofitting this area to allow stormwater infiltration would result in significant aquifer recharge.

For these and other reasons, we support the inclusion of the low impact development and green infrastructure provisions in the Draft Permit. These practices should be a priority requirement in the new LA MS4 Permit.

However, the Regional Board must ensure all Permittees are held to the same standards (infiltration and/or capture of the 85th percentile storm). The Draft Permit creates too many off ramps from this critical minimum standard.

- The Applicability Threshold for New Development Projects is set Unjustifiably High

  The threshold for new development includes a requirement that a project disturb a land area of 1-acre or greater, in addition to adding 10,000 square feet of impermeable surface area. The 1-acre threshold is too high and the Permit's LID and associated requirements should be triggered solely by the addition of 10,000 square feet of impermeable surface. More rigorous in its application thresholds for development, the recently adopted Low Impact Development Ordinance for the City of Los Angeles establishes that development creating, adding, or replacing only 500 square feet or more of impervious area may trigger requirements to implement LID BMPs to reduce stormwater runoff and pollution.

- Any Alternative Requirement Must Include a Public Review Process and Hearing before the Regional Board

  The Draft Permit currently allows for creation of Watershed Management Programs or use of Local Ordinance Equivalence programs to replace the Permit's LID requirements. Any provision that deviates from the Permit's LID performance criteria and/or other core Planning and Land Use requirements must go through the process of public review and hearing before the Regional Board.

We also believe that the Regional Board should seriously consider extending LID requirements to existing developments where technically feasible. In Los Angeles, the vast majority of runoff, and therefore lost water supply and increased water pollution, stems from existing development. Extending LID requirements to existing development, including streets, parking lots and other public rights-of-way and areas under the Permittee's jurisdiction would significantly reduce water pollution and augment the region's water supply.

Thank you for the opportunity to comment on the Draft Permit. Please feel free to contact us with any questions or concerns you may have.

Sincerely,

Deborah Weinstein
Director of Policy
TreePeople