

Environmental Groups' Joint Presentation: Board Consideration of a Petition for Review of the EO's Conditional Approval of Nine WMPs

Los Angeles Regional Water Quality Control Board

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Environmental Groups' Petition for Review:

- The Executive Officer's action to conditionally approve nine WMPs pursuant to the 2012 LA MS₄ Permit was illegal because:
 - 1) the Executive Officer acted outside the scope of his delegated authority;
 - 2) the Executive Officer's action constituted an illegal modification of the permit; and

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 - 2) the Executive Officer's action constituted an illegal modification of the permit; and
 - 3) the terms of the conditional approvals are inconsistent with Permit requirements and the federal Clean Water Act.

“The WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions... and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.”

State Board Final Order, at 51

“...we cannot accept a process that leads to a continuous loop of iterative WMP /EWMP implementation without ultimate achievement of receiving water limitations. . . .”

State Board Final Order, at 33

What was the overarching vision for the Watershed Management Programs?

1. To commit to strategies, control measures, and BMPs to achieve water quality standards...
2. ...supported and guided by a Reasonable Assurance Analysis...
3. ...and refined through an Adaptive Management Process.

Have these plans achieved that? If not, what is deficient, and can it be corrected?

1. To commit to strategies, control measures, and BMPs to achieve water quality standards...

LAR UR2: "The dates identified in this WMP Plan are subject to the procurement of grants or other financing support commensurate with the existing and future fiduciary responsibilities of the Permittees. They may furthermore be adjusted based on evolving information developed through the iterative adaptive management process identified in the 2012 MS₄ Permit or similar Parts within future MS₄ Permits...The WMP, including the schedule aspect, will be updated through the adaptive management process; to that extent, the implementation schedules identified are tentative unless determined as a date certain associated with specific TMDL provisions." (Final WMP, p. 116)

Staff justification (August 2015): "The Group will further evaluate whether past interim and final deadlines have been met as data are collected through the Group's CIMP."

COMMENT: Most importantly, the WPM provides *no* commitments for any action, but instead relegates them as tentative (at best) and fully contingent on financial priorities. Note that the original (October 2014) Staff requirement for "compliance with the past due interim WQBELs" was simply ignored.

1. To commit to strategies, control measures, and BMPs to achieve water quality standards...

LOWER LAR, LOWER SGR: "Meeting the load reductions determined by the RAA results in an aggressive compliance schedule in terms of the technological, operational, and economic factors that affect the design, development, and implementation of the necessary control measures. **Notably, as described in Chapter 6, there is currently no funding source to pay for these controls. Assuming finances are available...**" (Final WMPs, p. 5-1)

Staff justification (August 2015): "The revised WMP provides an estimate of the cost of structural BMPs and based on this estimated cost, reiterates the financial difficulties and uncertainties of implementing the WMP (particularly the lack of funding sources for controls)...The Group's **existing strategy** to control pollutants "as soon as possible" is sound.

COMMENT: The reference to "an existing strategy" is perplexing: there *isn't* any strategy, just a resigned acknowledgment that no funding is available. Note that the original 2014 comment letter stated "...the program needs to more clearly demonstrate that the compliance schedule (Section 5) ensures compliance is 'as soon as possible'." **The only "demonstration" is the absence of *any* binding commitments to *any* actions.**

2. ...supported and guided by a Reasonable Assurance Analysis...

LAR UR2: "Prior to preparation of the LAR UR2 WMA RAA, [the models] were being developed, calibrated, compared to each other, and used to address the growing interest in watershed water quality modeling, BMP implementation and monitoring. The following subsections address some of the **broader hydrology and pollutant modeling and calibration efforts**, to which LSPC and SBPAT were subjected and evaluated." (p. 75)

COMMENT: To quote from the March 2014 Guidelines for Conducting RAA, "model calibration and validation are necessary and critical steps in model application." However, there has been ***no calibration of the model to the LAR UR2 watershed area, and no validation of predicted results at all.*** From the original Staff comments (October 2014): "...no historical hydrology and water quality monitoring data were used for comparison with the model results for the baseline prediction."

We agree; their absence renders all predictions of outcomes meaningless.

Staff response (August 2015): none(?)

3. ...and refined through an Adaptive Management Process.

First, the language in the 2012 Permit:

“Permittees in each WMA shall implement an adaptive management process, every two years from the date of program approval, adapting the Watershed Management Program or EWMP to become more effective, based on, but not limited to *a consideration* of the following:

1. Progress toward achieving the outcome of improved water quality in MS4 discharges and receiving waters through implementation...
2. Progress toward achieving interim and/or final water quality based effluent limitations and/or receiving water limitations...
3. Re-evaluation of the highest water quality priorities identified for the Watershed Management Area based on more recent water quality data...
4. Availability of new information and data from sources other than the Permittees’ monitoring program(s)...
5. Regional Water Board recommendations; and
6. Recommendations for modifications to the WMP solicited through a public participation process”

The permit provides no structure, timeline, or process for analyzing or acting upon monitoring information to improve actions—**but a requirement that permittees do so.**

3. ...and refined through an Adaptive Management Process.

LAR UR2: In the Final WMP the term “adaptive management process” is mentioned 16 times, and its acronym (“AMP”) another 6 times. Nowhere in the document is this “process” defined or specified, except in the phrase “through the AMP identified within MS4 Permit Part VI.C.8.a.” (from the Executive Summary).

COMMENT: The original Staff comments (October 2014) stated “While the draft WMP notes revisions will occur as part of the ‘Adaptive Management Process’ in referral to multiple proposed actions **it does not include a comprehensive strategy for the Adaptive Management process.** The draft WMP should provide more detail on how the ‘Adaptive Management Process’ will be implemented.” Given the complete lack of any specificity in the Final WMP, or indeed any change at all on this topic between the Draft and Final versions, the absence of follow-up is perplexing.

The absence of any articulated plan or structure to the AMP, 19 months before its initial scheduled implementation, virtually guarantees its ineffectualness and/or failure.

Staff response (August 2015): none(?)

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LLAR and LSGR: These plans quote the 2012 permit language verbatim with respect to adaptive management (section C.8.), constituting section 1.6.2 of the WMP (“Adaptive Management”). Section 9 of the WMP (“Adaptive Management Process”) repeats this information, and adds that “The adaptive management process fulfills the requirements in MS4 Permit §V.A.4 to address continuing exceedances of receiving water limitations.”

Staff response (August 2015): Staff looks forward to addressing uncertainties in the present plans by anticipating “...that greater certainty will be provided through the adaptive management process.”

COMMENT: Quoting the permit language in these two WMPs does not provide any more guidance than does the absence of any such restated language in the LAR UR2 plan. The permit language does not describe what an Adaptive Management Process *is*, or how it should be implemented (nor did it intend to); it only describes what it should be “based on, but not limited to a **consideration of the following...**” Absent an organizational or management structure, and an articulated list of questions or uncertainties for which adaptations may be needed, there is virtually no chance that all the necessary data will be collected, that necessary analyses will occur, or that plan participants will be able to agree on what actions are necessary.

Summary of the Key Elements

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1. To commit to strategies, control measures, and BMPs to achieve water quality standards...

NO: All “commitments” in the WMPs are uniformly expressed as contingent on other financial priorities. If the Board wishes these control measures to be built, they will need to be made municipal priorities (i.e., *required*).

“Meeting the load reductions determined by the RAA results in an aggressive compliance schedule in terms of the technological, operational, and economic factors that affect the design, development, and implementation of the necessary control measures. Notably, as described in Chapter 6, there is currently no funding source to pay for these controls. Assuming finances are available...” (p. 5-1, LLAR & LSGR WMPs)

Summary of the Key Elements

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IN PART: Some optimistic assumptions are made, and that should be revisited, for LLAR/LSGR within a reasonable, state-of-the-practice model.

NO for the LAR UR₂ model, which lacks even basic requirements of a credible calibration and/or validation. It provides *no* “reasonable assurance” of any outcome whatsoever.

Summary of the Key Elements

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3. ...and refined through an Adaptive Management Process.

NO: The WPMs lack any description, or even acknowledgment, of a functional adaptive management process. The concept is laudable, but the roadmap for its implementation is presently non-existent.

“The draft WMP should provide more detail on how the ‘Adaptive Management Process’ will be implemented.” (Staff comments, October 2014)

Legal Requirements for WMP Approval

“Alternative Compliance Scheme”

- Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/EWMP are deemed in compliance with interim TMDL limits, and Receiving Water Limitations. *Permit at Part VI.C.; SWRCB Final Order at pp.17-18.*

“Safe Harbor”

- No matter what sampling results demonstrate is actually occurring in area creeks, rivers, and beaches, a City is deemed in compliance so long as it meet the requirements of its approved WMP.

SWRCB approved this scheme only where it maximizes likelihood of achieving ultimate goal-compliance with Water Quality Standards

- “We can support an alternative approach to compliance with RWL only to the extent that the approach requires clear and concrete milestones and deadlines towards achievement of RWLs and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met.” *Final Order* at p. 33.

SWRCB approved this scheme only where it maximizes likelihood of achieving ultimate goal-compliance with Water Quality Standards

- “Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.” *Id.*

To provide the level of assurance of WQS compliance to Qualify as an “Alternative Means of Compliance” a WMP Must:

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1...Commit to strategies, control measures, and BMPs to achieve water quality standards...

- All “commitments” contingent on funding—and no funding source is identified.
- WMPs Rely on adaptive management to set actual schedules.
- RWQCB Staff relies on future sampling to set schedules.
- WMPs lack current milestones and deadlines.

2...supported and guided by a Reasonable Assurance Analysis...

- “The requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP. Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.” *Final Order at p.37.*
- Yet, the LAR UR2 lacks the data to conduct a RAA at all.

3...and refined through an Adaptive Management Process.

- Rather than merely refining WMPs via adaptive management, the WMPs, and RWQCB staff, rely on adaptive management to correct core WMP inadequacies at some future date.
- Yet, the WMPs provide no real adaptive management strategy, and thus no real means of “fixing” the inadequate WMPs.

- Thus, each of the WMPs put off to the future determination of a compliance strategy, conducting a RAA, and adaptive management.
- None of the WMPs provide the level of assurance of ultimate WQS compliance required by the Permit and the SWRCB.
- None of the municipalities qualify for “safe harbor” protection—and this Board cannot approve the WMPs.