

January 20, 2015



VIA ELECTRONIC MAIL

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Re: Comments to A-2236(a)-(kk) - Submitted on Behalf the Cities of Duarte and
Huntington Park in Response to State Board Draft Order Dated 11/21/14

Dear Ms. Townsend:

This office represents the Cities of Duarte and Huntington Park ("Cities") in connection with their Petitions for Review challenging Order No. R4-2012-0175, NPDES Permit No. CAS004001 ("Permit" or "Subject Permit"), and submits the attached Memorandum of Points and Authorities/Comments in response to that Draft Order issued by the State Water Resources Control Board ("State Board") dated November 21, 2014.

The Memorandum of Points and Authorities/Comments are being submitted in addition to, and to supplement, the presentations provided to the State Board at the December 16, 2014 Workshop offered on behalf of the Cities of Duarte, Huntington Park, Pico Rivera, Pomona and Signal Hill.

If you have any questions with respect to the above or the attached please do not hesitate to contact the undersigned. Thank you for your attention to this matter.

Sincerely,

RUTAN & TUCKER, LLP

A handwritten signature in blue ink, appearing to read "Richard Montevideo", written over a horizontal line.

Richard Montevideo

RM:pj

Enclosure

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7

8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9

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11 In the Matter of:

12 The California Regional Water Quality
13 Control Board, Los Angeles Region's
Adoption of Waste Discharge Requirements
14 for Municipal Separate Storm Sewer System
(MS4) Discharges Within The Coastal
15 Watersheds of Los Angeles County, Except
Those Discharges Originating from the City
16 of Long Beach MS4, Order No. R4-2012-
0175, NPDES No. CAS004001
17

CITIES OF DUARTE AND HUNTINGTON
PARK MEMORANDUM OF POINTS AND
AUTHORITIES/COMMENTS IN
RESPONSE TO STATE BOARD DRAFT
ORDER DATED 11/21/14

[Water Code § 13320 and Title 23,
CCR § 2050, *et seq.*]

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TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. INTRODUCTION	1
4	II. THE PERMIT TERMS MUST BE REVISED TO DELETE THE	
5	USE OF ANY NUMERIC EFFLUENT LIMITS AS STRICT	
6	COMPLIANCE REQUIREMENTS BECAUSE SUCH LIMITS	
	WERE NOT ADOPTED IN ACCORDANCE WITH CWC §§	
	13000, 13263 and 13241	4
7	III. THE PERMIT MUST BE REVISED TO ALLOW FOR DEEMED	
8	COMPLIANCE THROUGH A BMP-BASED WMP/EWMP	
	ADAPTIVE MANAGEMENT PROCESS	10
9	IV. REQUIRING STRICT COMPLIANCE WITH NUMERIC LIMITS	
10	IN AN MS4 NPDES PERMIT IN MOST CASES IS REQUIRING	
11	COMPLIANCE WITH TERMS THAT ARE IMPOSSIBLE TO	
	ACHIEVE	12
12	V. THE PERMIT’S NON-STORMWATER “DISCHARGE	
13	PROHIBITION” IS INCONSISTENT WITH FEDERAL LAW	
14	AND CONTRARY TO STATE LAW BECAUSE THE MEP	
	STANDARD APPLIES TO DISCHARGES OF BOTH “NON-	
	STORMWATER” AND “STORMWATER” FROM THE MS4.....	15
15	VI. THE DRAFT ORDER DOES NOT ADDRESS THE REGIONAL	
16	BOARD’S FAILURE TO COMPLY WITH CWC §§ 13267, 13225	
	AND 13165 IN ADOPTING THE PERMIT MONITORING AND	
	REPORTING PROGRAM REQUIREMENTS	18
17	VII. REQUIRING A PERMITTEE INVOLVED IN A COMINGLED	
18	DISCHARGE TO PROVE IT DID NOT CAUSE OR	
19	CONTRIBUTE TO AN ALLEGED EXCEEDANCE VIOLATES	
	BASIC TENANTS OF DUE PROCESS OF LAW AND IS	
	FUNDAMENTALLY UNENFORCEABLE	22
20	VIII. THE DRAFT ORDER DOES NOT CORRECTLY ADDRESS THE	
21	REGIONAL BOARD’S FAILURE TO COMPLY WITH	
22	APPLICABLE DUE PROCESS REQUIREMENTS PROHIBITING	
	THE SAME ATTORNEYS FROM ADVISING BOTH THE	
	BOARD AND ITS STAFF	25
23	IX. WITHOUT ANY SUBSTANTIVE ANALYSIS, THE DRAFT	
24	ORDER IMPROPERLY DISMISSES THE CITIES’ REMAINING	
25	OBJECTIONS AS “NOT RAISING SUBSTANTIAL ISSUES	
	APPROPRIATE FOR STATE WATER BOARD REVIEW.”	30
26	X. CONCLUSION	31
27		
28		

1 I. INTRODUCTION

2 The Cities of Duarte and Huntington Park (the “Cities”) submit these Points and
3 Authorities/Comments in response to that Draft Order issued on November 21, 2014
4 (“Draft Order”) by the State Water Resources Control Board (“State Board”) in
5 connection with the various Petitions for Review of Order No. R4-2012-0175, NPDES
6 Permit No. CAS004001 (“Permit” or “Subject Permit”).

7 As presented on behalf of the Cities of Duarte and Huntington Park (and other
8 cities) at the Workshop on December 16, 2014, the Cities are generally supportive, *in*
9 *concept*, of the provisions within the Draft Order endorsing the Watershed Management
10 Program (“WMP”) and Enhanced Watershed Management Program (“EWMP”), along
11 with the Adaptive Management Process described in the Draft Order, but strongly object
12 to the continued reliance on the use of numeric water quality-based effluent limits or
13 other numeric limits (collectively, “numeric effluent limits”) as legal compliance
14 requirements to be achieved with the WMP/EWMP program.

15 The inclusion of numeric effluent limits in a municipal separate storm sewer
16 system (“MS4”) NPDES permit is not required under federal law, and therefore can only
17 be imposed under the California Porter-Cologne Act when the factors set forth in
18 California Water Code (“CWC”) sections 13241, 13263 and 13000 have first been fully
19 considered, and the Permit findings and terms have been developed consistent with these
20 factors. Here, substantial evidence clearly does *not* exist to justify the inclusion of
21 numeric effluent limits in light of the requirements under the Porter-Cologne Act. The
22 Draft Order is thus legally deficient, as is the Subject Permit, in light of the lack of
23 finding and determinations showing that the Permit terms were developed in accordance
24 with the factors and considerations required by State law.

25 For the following reasons, as elaborated on further below and in the Cities’ Briefs
26 in support of their Petition for Review, as written the Draft Order and the subject Permit
27 are contrary to law:¹

28 _____
¹ All of the Cities’ legal arguments, as set forth in their Petition for Review and

- 1 1) The inclusion of strict numeric effluent limits within the Permit (including
2 as a measure of WMP and EWMP legal compliance) were not developed in
3 accordance with the express requirements of State Law, namely CWC
4 sections 13000, 13263, and 13241. The Draft Order is similarly defective
5 because it fails to correct this significant legal defect. The WMP/EWMP
6 process should therefore be revised to allow for deemed compliance
7 through a BMP-based WMP/EWMP adaptive management process.
8 (Proposed revisions to the relevant Permit terms to effectuate this approach
9 are included herewith as Exhibit "A.:" – Cities WMP/EWMP Alternative
10 Approach. Note that the attached is *not* intended to address any of the
11 other defects in the Permit discussed here or otherwise.)
- 12 2) The numeric effluent limits in the Permit are, in many cases, impossible to
13 comply with, and therefore are contrary to law. The Draft Order fails to
14 address this legal defect with the Permit.
- 15 3) The provisions within the Draft Order involving the “Non-Storm Water”
16 “Discharge Prohibition” is inconsistent with federal law and contrary to
17 State law because the maximum extent practicable (“MEP”) standard under
18 the CWA applies to discharges of both “non-storm water” and “storm
19 water” from the MS4.
- 20 4) The Permit Monitoring and Reporting Program requirements have not been
21 substantively revised with the Draft Order, and thus remain contrary to law
22 because they were not developed in accordance with the requirements of
23 CWC sections 13267, 13225 and 13165.
- 24 5) Both the Permit terms and as terms of the Draft Order, requiring a
25 Permittee involved in a co-mingled discharge, to prove it did not cause or
26 contribute to an alleged exceedance, violate basic tenants of due process of

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28 accompanying Memorandum of Points and Authorities, to the extent not directly
addressed in the Draft Order, are incorporated and restated herein in their entirety by this
reference.

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law.

6) The legal arguments in the Draft Order notwithstanding, the fact that the same attorneys advised both the Regional Board Staff and the Board itself, prior to and during the adjudicative hearing on the adoption of the Permit, has resulted in a violation of the Permittees’ procedural rights to due process of law.

7) Without any substantive analysis, the Draft Order improperly dismisses the Cities’ remaining objections as “not raising substantial issues appropriate for State Water Board review.” The Draft Order thus does not address the preemption problems created by the inconsistency between the California Environmental Quality Act (“CEQA”) requirements, and the Planning And Land Development Program Permit requirements, including the new Low Impact Development (“LID”) and Hydro-modification requirements in the Permit. These Permit terms, therefore, remain contrary to law.

As explained herein, the Cities respectfully request that the numeric effluent limits in the Permit, which are currently imposed as strict compliance requirements, be omitted, and that the Draft Order and Permit be revised to instead include a WMP/EWMP process, whereby compliance may be achieved through the implementation of best management practices (“BMPs”), and adherence to the adaptive management process. Numeric effluent limits should only be used as goals or targets to measure BMP effectiveness, but not as legally enforceable requirements. Consistent with this approach, the Cities are hereby providing a markup of the relevant WMP/EWMP provisions of the Subject Permit – “Cities WMP/EWMP Alternative Approach” (included as Exhibit “A” to this Brief). This WMP/EWMP Alternative Approach requires the development of BMPs that are consistent with the MEP standard, and using numeric effluent limits as goals rather than as strict legal requirements.

The Cities also respectfully request that the subject Permit be further revised to address the other legal deficiencies set forth in this Brief/Comments.

1 Finally, the Draft Order should be revised to require the LA Regional Board, and
2 all regional boards, to use separate legal counsel during the MS4 permit adoption process,
3 separate from counsel used by its staff in assisting in the drafting of MS4 permit terms; in
4 responding to comments on a proposed MS4 permit; in revising a proposed permit to
5 respond to comments; and in assisting staff during the MS4 Permit adoption hearing(s)
6 before the Regional Board in issue.

7 **II. THE PERMIT TERMS MUST BE REVISED TO DELETE THE USE OF**
8 **ANY NUMERIC EFFLUENT LIMITS AS STRICT COMPLIANCE**
9 **REQUIREMENTS BECAUSE SUCH LIMITS WERE NOT ADOPTED IN**
10 **ACCORDANCE WITH CWC §§ 13000, 13263 and 13241.**

11 The Draft Order reaffirms prior State Board Orders acknowledging that federal
12 law does not require strict compliance with water quality standards. (*See e.g.*, Draft
13 Order, p. 56 [*We have already stated above in section C.1 that the permitting authority*
14 *has discretion to choose between BMP-based and numeric effluent limitations depending*
15 *on fact-specific considerations.*"]; and p. 72 [*... we are not bound by federal law or state*
16 *Law to require compliance with water quality standards in municipal stormwater*
17 *permits,*"]; *see also* prior State Board Order Nos. 91-04, p. 14 [*There are no numeric*
18 *objectives or numeric effluent limits required at this time, either in the Basin Plan or any*
19 *statewide plan that apply to storm water discharges.*] p. 14]; 91-03, [*We . . . conclude*
20 *that numeric effluent limitations are not legally required. Further, we have determined*
21 *that the program of prohibitions, source control measures and 'best management*
22 *practices' set forth in the permit constitutes effluent limitations as required by law.*"]; 96-
23 13, p. 6 [*federal laws does not require the [San Francisco Reg. Bd] to dictate the*
24 *specific controls.*"]; 98-01, p. 12 [*Stormwater permits must achieve compliance with*
25 *water quality standards, but they may do so by requiring implementation of BMPs in lieu*
26 *of numeric water quality-based effluent limitations.*"]; 2000-11, p. 3 [*In prior Orders*
27 *this Board has explained the need for the municipal storm water programs and the*
28 *emphasis on BMPs in lieu of numeric effluent limitations.*"]; 2001-15, p. 8 [*While we*

1 *continue to address water quality standards in municipal storm water permits, we also*
2 *continue to believe that the iterative approach, which focuses on timely improvements of*
3 *BMPs, is appropriate.”]; 2006-12, p. 17 [“Federal regulations do not require numeric*
4 *effluent limitations for discharges of storm water”]; and Stormwater Quality Panel*
5 *Recommendations to The California State Water Resources Control Board – The*
6 *Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater*
7 *Associated with Municipal, Industrial and Construction Activities, June 19, 2006, p. 8*
8 *[“It is not feasible at this time to set enforceable numeric effluent criteria for municipal*
9 *BMPs and in particular urban dischargers.”]; italics added.)*

10 The Draft Order further goes on to recognize that “*when implementing*
11 *requirements under the Porter-Cologne Act that are not compelled by federal law, the*
12 *State Water Board and Regional Boards (collectively, ‘Water Boards’) have some*
13 ***flexibility*** *to consider other factors, such as economics, when establishing the*
14 *appropriate requirements. Accordingly, the State Water Board has discretion under both*
15 *federal and State law as to whether and how to require compliance with Water Quality*
16 *Standards for MS4 discharges.” (Draft Order, p. 11, italics and bolding added.)*
17 Although it is true that, as interpreted by the Ninth Circuit Court of Appeal, federal law
18 authorizes but does not require the inclusion of numeric effluent limits within a
19 Municipal NPDES permit, the contention that State law provides “*flexibility*” to the
20 Water Boards when implementing requirements not compelled by federal law, and in
21 particular, to impose numeric effluent limits on municipal permittees, is legally
22 inaccurate.

23 Under State law, prior to imposing any permit term, including a numeric effluent
24 upon a Municipal Permittee, all water boards in the State are “*required*” to consider
25 certain specified factors, *e.g.*, the water board must consider whether the proposed permit
26 term is “*reasonably achievable*,” after considering “*economics*,” the “*environmental*
27 *characteristics*” of the water body in issue, the “*impacts on housing within the region*,”
28 and other considerations compelled by State law as provided for in CWC sections 13241,

1 13263 and 13000.

2 According to the California Supreme Court’s holding in *Burbank v. State Board*
3 (2005) 35 Cal.4th 613 (“*Burbank*”), a regional board must consider the factors set forth in
4 sections 13263, 13241 and 13000 when adopting an NPDES Permit, unless the
5 consideration of these factors “would justify including restrictions that do not comply
6 with federal law.” (*Id.* at 627.) As stated by the *Burbank* Court, “**Section 13263 directs**
7 **Regional Boards, when issuing waste discharge requirements, to take into account**
8 **various factors including those set forth in Section 13241.**” (*Id.* at 625, emphasis
9 added.) Specifically, the *Burbank* Court held that to the extent the NPDES Permit
10 provisions in that case were not compelled by federal law, the Boards were required to
11 consider their “economic” impacts on the dischargers themselves, finding in particular
12 that such requirement means that the Water Boards must analyze the “**discharger’s cost**
13 **of compliance.**” (*Id.* at 618.)

14 The Court in *Burbank* thus interpreted the need to consider “economics” as
15 requiring a consideration of the “cost of compliance” on the cities involved in that case.
16 (*Id.* at 625 [“The plain language of *Sections 13263 and 13241* indicates the Legislature’s
17 intent in 1969, when these statutes were enacted, that a regional board *consider the costs*
18 *of compliance when setting effluent limitations in a waste water discharge permit.*”].)

19 The *Burbank* Court recognized that the goals of the Porter-Cologne Act, as
20 provided for under Section 13000, are to “attain the highest water quality *which is*
21 *reasonable*, considering all demands being made and to be made on those waters *and the*
22 *total values involved, beneficial and detrimental, economic and social, tangible and*
23 *intangible.*” (*Id.* at 618, citing § 13000.)

24 Similarly, the California Supreme Court in *Burbank* discussed the requirement of
25 section 13263(a), which provides that waste discharge requirements developed by the
26 Regional Board “*shall implement any relevant water quality control plans that have been*
27 *adopted, and take into consideration the beneficial uses to be protected, the water quality*
28 *objectives reasonably required for that purpose, other waste discharges, the need to*

1 *prevent nuisance, and the provisions of Section 13241.”* (§ 13263(a).)

2 In addition, the *Burbank* Court discussed the particular application of section
3 13241 to permits adopted under section 13263, and quoted the following factors from
4 section 13241 as applying to such permits:

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

15 (*Burbank, supra*, 35 Cal.4th 613, 624, *citing* § 13241.)

16 In a concurring opinion in the *Burbank* case, Justice Janice Rogers Brown made
17 several significant comments regarding the importance of considering “economics” in
18 particular, and the Section 13241 factors in general, when the water boards adopt NPDES
19 permits that includes terms not required by federal law:

20 Applying this federal-state statutory scheme, it appears that
21 throughout this entire process, the Cities of Burbank and Los
22 Angeles (Cities) were unable to have economic factors
23 considered because the Los Angeles Regional Water Quality
24 Control Board (Board) – the body responsible to enforce the
25 statutory framework – failed to comply with its statutory
26 mandate.

27 For example, as the trial court found, the Board did not consider
28 costs of compliance when it initially established its basin plan,
and hence the water quality standards. The Board thus failed to
abide by the statutory requirements set forth in Water Code
section 13241 in establishing its basin plan. Moreover, the Cities
claim that the initial narrative standards were so vague as to make
a serious economic analysis impracticable. Because the Board
does not allow the Cities to raise their economic factors in the
permit approval stage, they are effectively precluded from doing
so. As a result, the Board appears to be playing a game of
“gotcha” by allowing the Cities to raise economic considerations
when it is not practical, but precluding them when they have the
ability to do so. (*Id* at 632, J. Brown, concurring; emphasis
added.)

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Justice Brown went on to find that:

Accordingly, the Board has failed its duty to allow public discussion – including economic considerations – at the required intervals when making its determination of proper water quality standards. What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions. (*Id* at 632-33.)

Accordingly, it is clear from the plain language of sections 13263, 13241 and 13000, and the Supreme Court’s holding in *Burbank*, that before adopting any permit terms which go beyond terms required by federal law, specifically including a municipal NPDES Permit that seeks to require compliance with numeric effluent limits, a regional board is required to comply with sections 13263, 13241 and 13000 of the CWC.

In the Cities’ initial Memorandum of Points and Authorities offered in Support of their Petition for Review challenging the Subject Permit (“Petition Ps & As”), at pages 45-51, the Cities explain the evidence illustrating that the Subject Permit was adopted without the Regional Board having complied with the requirements of the Porter-Cologne Act, including the failure on the part of the Regional Board to make any findings or reference any evidence, either in the Permit or in the Fact Sheet, to show that the numeric effluent limits in issue “*could reasonably be achieved*,” or that such limits could be justified based on “*economic*” considerations or otherwise properly imposed in light of the “*environmental characteristics*” of the water bodies in issue. (CWC § 13241.)

In addition, report after report after report, as cited (and in some cases quoted) in the Petition Ps & As, show that the “*economic*” impacts from having to comply with numeric effluent limits in a Municipal NPDES Permit, even assuming that the numeric effluent limits could technically be achieved under current technology (which is not the case for all of the numeric limits), are well beyond the financial capabilities of the Permittees. At the Workshop on December 16, 2014, several presentations were made to the State Board which only further confirmed that achieving strict compliance with the numeric effluent limits included in the Subject Permit is not economically viable, and in

1 many cases, such as with the Bacteria TMDL for the Los Angeles River, is not even
2 technically possible using currently available BMPs.

3 In sum, as a matter of law, the Draft Order and the Permit are both contrary to
4 State law, and thus both must be revised to exclude the inclusion of any numeric effluent
5 limit within the Permit, unless and until the limits have first been reviewed and imposed
6 in accordance with the requirements of the Porter-Cologne Act. The WMP/EWMP
7 provisions within the Permit must therefore be revised to allow for a deemed compliance
8 approach with the water quality standards, the TMDLs and any other numeric effluent
9 limits set forth in the Permit. Under such circumstances, so long as the Permittee has
10 acted in good faith and submitted and is implementing a BMP-based WMP/EWMP
11 program, developed to achieve the water quality conditions that are “reasonably
12 achievable,” in light of “economic” considerations, the “environmental characteristics” of
13 the water bodies in issue, and the other requirements in sections 13241, 13263 and 13000,
14 the Permittee should be considered in compliance with all such numeric effluent limit
15 terms.

16 The Cities respectfully request that the State Board revise the Subject Permit with
17 its Final Order on these Petitions, consistent with a BMP-based WMP/EWMP adaptive
18 management process that seeks achievement of numeric effluent limits in accordance
19 with the maximum extent practicable standard. Attached hereto as Exhibit “A” to this
20 Brief is a markup of the core language of excerpts from the Subject Permit, setting forth
21 proposed modifications to the Permit that are designed to transform the existing numeric
22 effluent limit-driven WMP/EWMP process, into a BMP-based WMP/EWMP adaptive
23 management process. (Exhibit “A,” Cities WMP/EWMP Alternative Approach.)
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1 **III. THE PERMIT MUST BE REVISED TO ALLOW FOR DEEMED**
2 **COMPLIANCE THROUGH A BMP-BASED WMP/EWMP ADAPTIVE**
3 **MANAGEMENT PROCESS**

4 As explained, the adaptive management process, as set forth in Part V of the
5 Permit, does not provide the Permittees with any form of deemed compliance with the
6 receiving water limitation section of the Permit, nor with the other terms of the Permit
7 incorporating waste load allocations (“WLAs”) from TMDLs (Permit, Part VI.E).
8 Instead, the Permit merely provides that complying with the “adaptive management
9 process fulfills the requirements in V.A.4 to address continuing exceedances of receiving
10 water limitations.” (Permit, p. 67.) Yet, this language does nothing to protect the
11 Permittees from third-party citizen suits or enforcement actions under the Permit, even if
12 the Permittees are, in fact, carrying out the adaptive management iterative process in
13 good faith.

14 As discussed in detail in the Petition Ps & As, rather than allowing municipalities
15 to comply with the Permit terms through continued compliance with the adaptive
16 management process/iterative process, *i.e.*, to continue to implement BMPs that are
17 consistent with the maximum extent practicable standard as envisioned by Congress, the
18 Permit makes clear that numeric effluent limits must be achieved. But, as discussed at
19 the workshop on December 16, 2014 and in the Petition Ps & As, imposing numeric
20 limits on municipalities, in lieu of allowing for deemed compliance through an adaptive
21 management BMP process, is a significant change in permit-writing policy in California,
22 and is a change that ignores the reality that iterative BMPs are the only means by which
23 municipalities have to comply with numeric effluent limits and other receiving water
24 limits. It is also a change that ignores the fact that requiring compliance with numeric
25 limits will not in any way alter a Permittee’s ability to achieve those limits or improve
26 water quality.

27 In short, municipalities have no means of attempting to achieve compliance with
28 numeric effluent limits, other than through complying in good faith with an adaptive

1 management process. The Draft Order and the Subject Permit, which demand that the
2 Permittees do more, is simply not possible and will only result in more litigation and
3 wasted resources, without any benefit to the public. The attempt to impose numeric
4 effluent limits on municipalities ignores the true limitations municipalities face when
5 attempting to reduce the discharge of pollutants from their respective MS4 systems.
6 There can be no dispute but that municipal dischargers simply do not have the luxury of
7 ceasing operations or installing a single or a series of filtration or treatment systems to
8 eliminate pollutants from urban runoff. Municipalities, for the most part, are not
9 generating the urban runoff that is being discharged, and cannot close a valve to prevent
10 the rain from falling or runoff from entering their expansive storm drain systems.

11 Accordingly, to conclude that municipalities must somehow develop BMPs that
12 will *guarantee* compliance with all numeric effluent limits, is to require municipalities to
13 develop and implement “*impracticable*” BMPs, that are not technically and/or
14 economically supported. The ultimate outcome of imposing numeric effluent limits on
15 municipalities will not be to improve water quality, but instead to increase litigation and
16 attorneys fees in fighting enforcement actions and citizen suits (*see, e.g., NRDC v.*
17 *County of Los Angeles, supra*, 673 F.3d 880). Imposing such requirements on
18 municipalities will similarly subject them to unnecessary penalty claims, including
19 mandatory minimum penalties. (*See Permit*, p. 45-46, citing CWC § 13385.)

20 Both the subject Permit and the Draft Order rely upon the concept of a “time
21 schedule order” as a means by which a Permittee, who has been unable to meet a numeric
22 effluent limit, can attempt to avoid enforcement action from the Regional Board. (*See,*
23 *e.g., Permit*, pp. 146-147; and *Draft Order*, pp. 30-31.) And, as the Draft Order
24 recognizes: “*The Environmental Petitioners, concede that immediate compliance with*
25 *receiving water limitations is not achievable in many instances and that some additional*
26 *time to reach compliance is warranted. They have proposed an alternative to the*
27 *WMP/EWMP that would incorporate many of the provisions of those programs but*
28 *require implementation through the mechanism of the time schedule order or other*

1 *enforcement order rather than permit conditions.*” (Draft Order, pp. 29-30.)

2 Of course, a “time schedule order” or “TSO” is a creature of State law, not federal
3 law. (*See* CWC §§ 13000 and 13304.) For this reason, the issuance of a TSO, “Cease
4 and Desist Order,” or a “Cleanup and Abatement Order,” would not, *per se*, provide
5 protection to a Permittee from a third-party citizen suit that may be brought under the
6 Clean Water Act. In fact, if anything, a TSO or other State enforcement order may only
7 strengthen a Clean Water Act citizen suit against a Permittee because, by definition, such
8 an enforcement order presupposes a violation of the Permit.

9 The Subject Permit must therefore be reissued to recognize the technical and
10 economic realities of attempting to reduce the discharge of pollutants in urban runoff; the
11 numeric effluent limits therein must accordingly be deleted and replaced with a BMP
12 performance-based WMP/EWMP adaptive management process.

13 **IV. REQUIRING STRICT COMPLIANCE WITH NUMERIC LIMITS IN AN**
14 **MS4 NPDES PERMIT IN MOST CASES IS REQUIRING COMPLIANCE**
15 **WITH TERMS THAT ARE IMPOSSIBLE TO ACHIEVE**

16 Several of the TMDLs incorporated into the Permit in the form of interim and/or
17 final numeric limits, including those interim numeric limits that, in theory, may be
18 complied with through the submission of WMPs and a “reasonable assurances analysis”
19 that the numeric effluent limitation issue will be timely met, are not possible to be
20 complied with, and thus, are not appropriate for inclusion in the Permit.

21 Specifically, the various numeric limits imposed as a result of the following
22 TMDLs are unobtainable: (1) the Bacteria TMDL for the Los Angeles River; (2) the
23 US EPA adopted Long Beach City Beaches and Los Angeles River Estuary Bacteria
24 TMDL; (3) the Dominguez Channel and Greater Los Angeles Harbor and Long Beach
25 Harbor Waters Toxic Pollutants TMDL; (4) the Los Angeles River Metals TMDL; (5) the
26 Los Cerritos Channel Metals TMDL; and (6) the Los Angeles River Trash TMDL
27 (except where a city is able to physically and economically install deemed-compliant full-
28 capture devices throughout all of the city.)

1 Nor is strict compliance with the numeric receiving water limits and, in effect, the
2 water quality standards that do not have a TMDL associated with them, possible to
3 achieve for the same reasons the TMDL-numeric limits are unachievable. As explained
4 in the various comments submitted in connection with each of these TMDLs, meeting
5 many of the interim or any of the final numeric WLAs from these TMDLs, if imposed as
6 suggested with the existing language in the Permit, as numeric WQBELs, is simply not
7 possible.

8 As a matter of law, the Clean Water Act does not require permittees to achieve the
9 impossible. In *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.*, 519 U.S.
10 993 (1996), the plaintiff sued JMS Development Corporation (“JMS”) for failing to
11 obtain a storm water permit that would authorize the discharge of storm water from its
12 construction project. The plaintiff argued JMS had no authority to discharge any quantity
13 or type of storm water from the project, i.e. a “zero discharge standard,” until JMS had
14 first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was
15 being discharged from its property and that it had not obtained an NPDES permit, but
16 claimed it was not in violation of the Clean Water Act (even though the Act required the
17 permit) because the Georgia Environmental Protection Division, the agency responsible
18 for issuing the permit, was not yet prepared to issue such permits. As a result, it was
19 impossible for JMS to comply. (*Id.*)

20 The Eleventh Circuit Court of Appeal held that the CWA does not require a
21 permittee to achieve the impossible, finding that “Congress is presumed not to have
22 intended an absurd (impossible) result.” (*Id.* at 1529.) The Court then found that:

23 In this case, once JMS began the development, compliance with
24 the zero discharge standard would have been impossible.
25 Congress could not have intended a strict application of the zero
26 discharge standard in section 1311(a) when compliance is
27 factually impossible. The evidence was uncontroverted that
whenever it rained in Gwinnett County some discharge was going
to occur; nothing JMS could do would prevent all rain water
discharge.

28 (*Id.* at 1530.) The Court concluded, “*Lex non cogit ad impossibilia*: The law does not

1 compel the doing of impossibilities.” (*Id.*) The same rule applies here.

2 The Clean Water Act does not require municipal permittees to do the impossible
3 and comply with unachievable numeric limits. Because municipal permittees are
4 involuntary permittees, that is, because they have no choice but to obtain a municipal
5 storm water permit, the Permit, as a matter of law, cannot impose terms that are
6 unobtainable. (*Id.*)

7 In this case, as reflected in the various comments submitted at the December 16,
8 2014 Workshop on the Draft Order, and others submitted in connection with the various
9 Petitions and with each of the then-proposed TMDLs, strictly complying with the various
10 waste load allocations set forth in the TMDLs, and with the other numeric receiving
11 water limits, is not achievable by the Permittees, given the variability of the potential
12 sources of pollutants in urban runoff, as well as the unpredictability of the climate in
13 Southern California. In fact, as discussed above in *Divers’ Environmental Conservation*
14 *Organization v. State Water Resources Control Board (Divers’ Environmental)* (2006)
15 145 Cal.App.4th 246, 256: “In regulating storm water permits the EPA has repeatedly
16 expressed the preference for doing so by way of BMPs, rather than by way of imposing
17 either technology-based or water quality-based numeric limitations.” (*Id.* at 256.)
18 According to the *Divers* Court: “EPA has repeatedly noted, storm water consists of a
19 variable stew of pollutants, including toxic pollutants, from a variety of sources which
20 impact the receiving body on a basis which is only as predictable as the weather.” (*Id.* at
21 258.)

22 Similarly, in *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866,
23 889-90, after having recognized the “practical realities of municipal storm sewer
24 regulation,” and the “physical differences between municipal storm water runoff and
25 other pollutant discharges,” and finding that the maximum extent practical approach was
26 a “workable enforcement mechanism” (*id.* at 873, 884), the Court there concluded that
27 the MEP standard was purposefully intended to be a highly flexible concept that balances
28 numerous factors including “technical feasibility, costs, public acceptance, regulatory

1 compliance and effectiveness.” (*Id.* at 889-90.)

2 For many of the numeric limits, the “technical” and “economic” feasibility to
3 comply simply do not exist, and imposing such requirements goes beyond “the limits of
4 practicability.” (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1162.)
5 Accordingly, the imposition of the various numeric effluent limits goes beyond what is
6 “practicable,” and in this case, beyond what is “feasible.” Because the law does not
7 compel doing the impossible, the numeric effluent limits imposed in the Subject Permit,
8 and upheld with the Draft Order, are contrary to law.

9 **V. THE PERMIT’S NON-STORMWATER “DISCHARGE PROHIBITION” IS**
10 **INCONSISTENT WITH FEDERAL LAW AND CONTRARY TO STATE**
11 **LAW BECAUSE THE MEP STANDARD APPLIES TO DISCHARGES OF**
12 **BOTH “NON-STORMWATER” AND “STORMWATER” FROM THE**
13 **MS4.**

14 The language in the CWA requires municipalities to “require controls to reduce
15 the discharge of *pollutants* to the maximum extent practicable.” (33 U.S.C.
16 § 1342(p)(3)(B)(iii).) Here, the Permit sidesteps the “maximum extent practicable”
17 (“MEP”) standard through an outright prohibition on “non-stormwater discharges
18 through the MS4 to receiving waters.” By doing so, it exceeds federal law and is not
19 authorized under State law.

20 Page 58 of the Draft Order inaccurately provides:

21 Although the statute imposes the MEP standard to control of
22 ‘pollutants’ rather than specifically to ‘pollutants in storm water,’
23 any reading of section 402(p)(3)(B)(iii) to apply generally to both
24 non-storm water and storm water would render the effective
25 prohibition on non-storm water in section 402(p)(3)(B)(ii)
26 meaningless.

25 In reality, the plain language of section 402(p)(3)(B)(iii) expressly provides that
26 the MEP standard applies to *all* “pollutants” discharged “from” the MS4, whether the
27 discharges are classified as “non-stormwater” or “stormwater.” This reading of the plain
28 language does *not* render section 402(p)(3)(B)(ii) “meaningless” because, although “non-

1 stormwater” is required to be “effectively prohibited” from entering “*into*” the MS4
2 under section 402(p)(3)(B)(ii), the CWA does not treat discharges “*from*” the MS4 any
3 differently if the “pollutants” in issue arose as a result of a “storm water” versus a “non-
4 stormwater” discharge. (33 U.S.C. § 1342(p)(3)(B)(iii).) Indeed, section 402(p)(3)(B)(ii)
5 only applies to discharges “*into*” the storm sewers and not discharges “*from*” the MS4.

6 By suggesting that the MEP standard set forth in section 402(p)(3)(B)(iii) could
7 not possibly apply to both non-stormwater and stormwater, the Draft Order appears to
8 erroneously define the word “into” as meaning “from” and the word “from” as meaning
9 “into.” However, it is clear from the plain language that section 402(p)(3)(B)(iii) applies
10 to *all* “pollutants” discharged “from” the MS4 and makes no distinction between “non-
11 stormwater” and “stormwater.”

12 Further, the Draft Order ignores the authorities cited by the Cities interpreting this
13 language in the CWA as requiring an application of the MEP standard to municipal
14 discharges, rather than an application of a standard requiring strict compliance with
15 numeric limits. Specifically, federal law only requires strict compliance with numeric
16 effluent limits by industrial dischargers, but not by municipal dischargers. As the Ninth
17 Circuit in *Defenders, supra*, 191 F.3d 1159 found, “Congress required municipal storm-
18 sewer dischargers ‘to reduce the discharge of pollutants to the maximum extent
19 practicable’ finding that the Clean Water Act was “*not merely silent*” regarding requiring
20 “municipal” dischargers to strictly comply with numeric limits, but in fact found that the
21 requirement for traditional industrial waste dischargers to strictly comply with the limits
22 was “replaced” with an alternative requirement, i.e., “that *municipal* storm-sewer
23 dischargers ‘reduce the discharge *of pollutants* to the maximum extent practicable . . . *in*
24 *such circumstances, the statute unambiguously demonstrates that Congress did not*
25 *require municipal storm-sewer discharges to comply strictly with 33 U.S.C.*
26 *§ 1311(b)(1)(C).* (*Id.* at 1165; emphasis added.)

27 Similarly, in *BIA, supra*, 124 Cal.App.4th 866, relying upon the Ninth Circuit’s
28 holding in *Defenders*, the court agreed that, “with respect to *municipal* stormwater

1 discharges, Congress clarified that the EPA has the authority to fashion NPDES permit
2 requirements to meet water quality standards without specific numeric effluent limits and
3 instead to impose ‘controls to reduce the discharger *of pollutants* to the maximum extent
4 practicable.’” (*Id.* at 874, emphasis added.) The Court explained the reasoning for
5 Congress’ different treatment of MS4dischargers versus industrial waste dischargers
6 when it stated that:

7 Congress added the NPDES storm sewer requirements to
8 strengthen the Clean Water Act and making its mandate
9 correspond to the practical realities of municipal storm sewer
10 regulation. As numerous commentators pointed out, although
11 Congress was reacting to the **physical differences between**
12 **municipal storm water runoff and other pollutant discharges**
13 that made the 1972 legislation’s blanket effluent limitations
14 approach **impractical and administratively burdensome**, the
15 primary points of the legislation was to address these administra-
16 tive problems while giving the administrative bodies the tools to
17 meet the fundamental goals of the Clean Water Act in the context
18 of stormwater pollution. (*Id.* at 884, emphasis added.)

19 Here, the Permit appears to attempt to “back door” numeric limits on to the
20 municipalities by the altered “Discharge Prohibition” language, and on its face goes
21 beyond what was required by Congress with the 1987 Amendments to the CWA.

22 Although there are two requirements imposed upon municipalities under the
23 CWA, one requiring that municipalities effectively prohibit “non-stormwater” “into” the
24 MS4, and a second requiring municipalities to “reduce the discharge of pollutants to the
25 maximum extent practicable,” it is clear that the MEP standard applies to “pollutants”
26 discharged from the MS4 system, regardless of whether such discharges are stormwater
27 or non-stormwater.

28 Here, the Permit improperly thwarts the MEP standard through an outright
prohibition on “non-stormwater discharges through the MS4 to receiving waters.” By
doing so, it exceeds federal law and is not authorized under State law.

1 VI. THE DRAFT ORDER DOES NOT ADDRESS THE REGIONAL BOARD'S
2 FAILURE TO COMPLY WITH CWC §§ 13267, 13225 AND 13165 IN
3 ADOPTING THE PERMIT MONITORING AND REPORTING
4 PROGRAM REQUIREMENTS.

5 On one hand, the Draft Order admits that the Permit is “implementing
6 requirements under the Porter-Cologne Act that are not compelled by federal law.”
7 (Draft Order, p. 11; see also *id.*, p. 10 [“[t]he Clean Water Act does not reference the
8 requirement to meet water quality standards”].) On the other hand, it suggests that the
9 Porter-Cologne Act is “inapplicable” because the “monitoring and reporting provisions of
10 the [Permit] are incorporated pursuant to federal law.” (Draft Order, p. 60.) The Draft
11 Order is, in essence, taking one position when it suits its purpose and then repudiating the
12 same position when it is no longer to its advantage to do so.

13 In fact, the federal regulations relied upon in the Draft Order to suggest that the
14 monitoring and reporting requirements are adopted under federal law say nothing about
15 relieving the Regional Board of its obligation to otherwise comply with State law. There
16 is nothing in the referenced federal regulations that conflicts with State law or that require
17 the specific monitoring requirements provided for in the Subject Permit, and nor do the
18 federal regulations provide that further requirements imposed upon administering
19 agencies under State law are *not* to be complied with.

20 Moreover, in accordance with CWC section 13372(a), only those requirements
21 “required under” the Clean Water Act which are “inconsistent” with the other
22 requirements of the Porter-Cologne Act outside of Chapter 5.5, may be avoided by the
23 Regional Board in issuing an NPDES Permit. The Draft Order points to no federal law or
24 regulatory requirement imposing the particular monitoring requirements imposed upon
25 the Permittees, and nor does federal law prohibit the conducting of a “cost/benefit”
26 analysis under the present circumstances, thus the requirements of Sections 13225 and
27 13267 must be complied with prior to imposing the monitoring obligations on the
28 Permittees. The Regional Board failed to comply with the cost/benefit requirements

1 under said Sections, and thus acted in excess of its authority and contrary to law. The
2 Draft Order is in error in its analysis of this deficiency with the Permit.

3 Under California law, before any monitoring, reporting, investigation and study
4 requirements may be imposed upon a permittee, a cost/benefit analysis must be
5 conducted and no such requirements can be imposed unless the Regional Board has first
6 shown that the burden, including the costs of these requirements, “bear a reasonable
7 relationship” to their need. (CWC § 13267(b).) Section 13267, entitled “Investigation
8 of Water Quality; Report; Inspection of Facilities,” provides in relevant part, as follows:

9 (a) A regional board, in establishing and reviewing any water
10 quality control plan or waste discharge requirements, or in
11 connection with **any action relating to any plan or
requirement authorized by this division**, may investigate the
quality of any waters of the state within its region.

12 (b) (1) In conducting an investigation specified in subdivision (a),
13 the regional board may require that any person who has
14 discharged, discharges, or is suspected of having discharged or
15 discharging, or who proposes to discharge waste within its
16 region, or any citizen or domiciliary, or political agency or entity
17 of this State . . . that could affect the quality of waters within its
18 region shall furnish, under penalty of perjury, **technical or
monitoring program reports which the regional board
requires. The burden, including costs, of these reports shall
bear a reasonable relationship to the need for the report and
the benefits to be obtained from the reports.** In requiring those
19 reports, the regional board **shall provide the person with a
written explanation** with regard to the need for the reports, and
shall identify the evidence that supports requiring that person to
provide the reports.

20 (CWC § 13267, emphasis added.)

21 The Draft Order’s claim that the cost/benefit requirements of CWC section 13267
22 do not apply because “Water Code section 13383, rather than Water Code 13267,
23 controls monitoring and reporting requirements in the context of NPDES permitting,” is
24 entirely without support, and is directly controverted by the plain language of the statutes
25 themselves. Whether or not the Regional Board is authorized under section 13383 to
26 establish monitoring, inspection and reporting requirements does not change the fact that
27 it must comply with the other consistent requirements of the Porter-Cologne Act,
28 including the express limitation on its authority under CWC section 13225 and 13267.

1 (See CWC § 13372(a).)

2 CWC section 13383 and CWC section 13267 are not inconsistent with each other;
3 rather, they are complementary and interdependent. Indeed, CWC section 13267
4 expressly applies to “any plan or requirement authorized by [the Porter-Cologne Act],”
5 which would include NPDES permitting and CWC section 13383.

6 Moreover, by the express terms of the Permit, the Permit was issued “pursuant to
7 article 4, chapter 4, division 7 of the California Water Code (commencing with Section
8 13260)” as well as “chapter 5.5, division 7 of the California Water Code (commencing
9 with section 13370).” (Permit, p. 20.) The requirements of the Permit expressly
10 implement the Basin Plan “[p]ursuant to California Water Code section 13263(a).”
11 (Permit, p. 21.) Thus, it is apparent that in issuing the subject Permit, the Regional Board
12 was compelled to comply with both State and federal law, and that the Permit was issued
13 by the Regional Board expressly relying upon authority outside of chapter 5.5, division 7
14 of the CWC (commencing with section 13370).

15 In addition to section 13267, section 13225(c) mandates that the Regional Board
16 similarly conduct a cost/benefit analysis if it requires *a local agency* to investigate and
17 report on technical factors involved with water quality. Section 13225(c) of the CWC
18 requires that each regional board, with respect to its region, shall:

19 (c) Require as necessary any state or local agency to
20 investigate and report on any technical factors involved in water
21 quality control or to obtain and submit analyses of water;
22 **provided that the burden, including costs, of such reports
shall bear a reasonable relationship to the need for the report
and the benefits to be obtained therefrom.**

23 (§ 13225(c) (emphasis added); *see also* § 13165 [imposing this same requirement on the
24 State Board where it requires a “local agency” to “investigate and report on any technical
25 factors involved in water quality control; *provided that the burden, including costs, of
26 such reports shall bear a reasonable relationship to the need for the reports and the
27 benefits to be obtained therefrom*”].)

28 Here, nearly every Board Member raised concerns with the “cost” of the Permit at

1 the Hearing on the Permit before the Regional Board. (*See e.g.*, Transcript, 218:6-7
2 [“I’m concerned about the cost”], 240:4-9 [“What if the costs are completely blown out
3 of the park, and it’s a really serious problem for the cities and they just can’t, you know,
4 for budgetary reasons, they just can’t do the things that the permit requires them to do?”],
5 251:11-15 [“And I know that some of my colleagues already touched upon it, but I think
6 we need to take it very seriously because the truth of the matter is . . . that cities – many
7 smaller cities specifically are really facing borderline bankruptcies”], 257:14-17 [“So I
8 would really appreciate, as we move forward, you know, to do a much better job with
9 looking at the cost – the true cost and benefits in the economics of water quality.”].)

10 In part, to address these concerns, a Regional Board Attorney proceeded to advise
11 the Board (wrongly) that the Board should not be conducting, and was not required to
12 conduct, a cost/benefit analysis. (Transcript, p. 259, [“But just to summarize it, there's no
13 cost benefit analysis, so I just wanted to let you know.”].) In short, the Regional Board
14 was wrongly advised by its Staff’s attorney that there was no obligation on the part of the
15 Board to conduct any form of cost-benefit analysis, presumably including a cost benefit
16 analysis as required under CWC sections 13225, 13165 or 13267.

17 Of course the requirement for the Regional Board to have considered “the burden,
18 including costs” of the reporting and monitoring obligations under the Permit, and
19 whether those costs “bear a reasonable relationship to the need for the report and the
20 benefits to be obtained therefrom” (CWC § 13225(a), 13165 and 13267), cannot
21 rightfully be characterized as anything other than as a cost-benefit analysis. As such, the
22 Regional Board was wrongly advised that they did not need to conduct any form of cost-
23 benefit analysis, and its failure to do so was error.

24 Because a cost/benefit analysis as required by CWC sections 13225, 13267 and
25 13165 was not conducted, *i.e.*, because the evidence does not support a determination that
26 the burden, including the costs of all of the monitoring, investigations, studying and
27 reporting obligations in the Permit, bore a “reasonable relationship” to the need for this
28 information, the Permit was not adopted in accordance with law. The Draft Order should

1 be revised accordingly.

2 **VII. REQUIRING A PERMITTEE INVOLVED IN A COMINGLED**
3 **DISCHARGE TO PROVE IT DID NOT CAUSE OR CONTRIBUTE TO AN**
4 **ALLEGED EXCEEDANCE VIOLATES BASIC TENANTS OF DUE**
5 **PROCESS OF LAW AND IS FUNDAMENTALLY UNENFORCEABLE.**

6 The Draft Order make short shrift of the Cities’ concern that requiring a Permittee
7 involved in a comingled discharge to prove it did not cause or contribute to an alleged
8 exceedance violates basic tenants of due process of law. Rather than directly addressing
9 the concern, the Draft Order actually identifies the concern as the solution:

10 “[E]ven where joint responsibility is presumed, a Permittee may
11 subsequently counter the presumption of joint responsibility by
12 affirmatively demonstrating that its MS4 discharge did not cause
13 or contribute to the relevant exceedances.” (Draft Order, p. 63.)

14 “[T]he Los Angeles MS4 Order provides that Permittees may
15 affirmatively show that their discharge did not cause or contribute
16 to an exceedance.” (Draft Order, p. 64.)

17 The Draft Order fuels confusion by indicating that “joint responsibility” is
18 presumed in the Permit, yet suggests that the Permit “does not impose joint and several
19 liability” that “would require each permittee to take full responsibility for addressing
20 violations, regardless of whether, and to what extent, each permitted contributed to the
21 violation.” (Draft Order, p. 64.) This confusion appears to be the result of the Draft
22 Order’s misunderstanding of the meaning of “joint and several liability,” “joint liability,”
23 and “several liability.”

24 If defendants are “jointly and severally liable,” the plaintiff may collect his or her
25 entire damages from any one of them, and the defendants must then rely on principles of
26 indemnity or contribution to apportion ultimate liability amongst themselves. (See
27 *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d
28 578, 586–590.) In contrast, if defendants are “severally liable” only, an obligation is
divided amongst them in proportion to their liability; the plaintiff is entitled to collect
from each only the part that corresponds to the liability of each. (*See Civ. Code*

1 § 1431.2(a); *Douglas v. Bergere* (1949) 94 Cal. App. 2d 267, 270.)

2 Joint liability only (as opposed to joint and several liability) is a concept that has
3 little or no application under current law and must be read as referring to joint and several
4 liability. (25 California Forms of Pleading and Practice (Matthew Bender 2010) §
5 300.14; 5 California Torts (Matthew Bender 2009) § 74.04[1].)

6 By using the term “joint” instead of “several” in reference to a Permittee’s
7 responsibility, the Draft Order undermines its own assertion that the Permit “does not
8 require each permittee to take full responsibility for addressing violations, regardless of
9 whether, and to what extent, each permittee contributed to the violation.” If the Draft
10 Order means what it says, it should substitute its use of the term “joint responsibility”
11 with “several responsibility” and revise the Permit to make it clear that several
12 responsibility (as opposed to joint responsibility) applies to the Permittees.

13 The Draft Order makes no mention of the various cases confirming that the
14 Regional Board has the burden of proofing liability against an individual Permittee,
15 regardless of whether or not there is a comingled exceedance, nor does the Draft Order
16 address the fact that there is no such thing as “presumed” liability, nor joint and several
17 liability, under either the Clean Water Act or the Porter-Cologne Act. (See e.g., *Rapanos*
18 *v. United States* (2006) 547 U.S. 715, 745 [“[T]he agency must prove that the
19 contaminant-laden waters ultimately reach covered waters”]; *Sackett v. E.P.A.* (9th Cir.
20 2010) 622 F.3d 1139, 1145-47 [“We further interpret the CWA to require that penalties
21 for noncompliance with a compliance order be assessed only after the EPA proves, in
22 district court, and according to traditional rules of evidence and burdens of proof, that the
23 defendants violated the CWA in the manner alleged in the compliance order”] [reversed
24 on other grounds, *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367]; *United States v. Range Prod.*
25 *Co.* (N.D. Tx. 2011) 793 F. Supp 2d 814, 823 [court expressed doubt that civil penalties
26 can be obtained without EPA ever proving defendant actually caused contamination]; *In*
27 *the Matter of Vos*, 2009 EPA ALJ LEXIS 8.)

28 Similarly, the Draft Order does not analyze California Evidence section 500,

1 which provides that, “[e]xcept as otherwise provided by law, a party has the burden of
2 proof as to each fact the existence or nonexistence of which is essential to the claim for
3 relief or defense that he is asserting.” Nor does the Draft Order identify anything in the
4 Porter-Cologne Act that would otherwise provide for the burden to be shifted to a
5 Permittee.

6 California Courts interpreting the Porter-Cologne Act have confirmed that a
7 plaintiff bears the burden of proving a violation. (See, *State of California v. City and*
8 *County of San Francisco* (1979) 94 Cal.App.3d 522, 530 [“once plaintiff had proved that
9 there had been a discharge in violation of the Water Code it became defendant’s burden
10 to establish, by a preponderance of the evidence, that the amount of penalty imposed
11 should be less than the maximum”].) *City and County of San Francisco* clearly shows
12 that even if a burden is shifted, it is shifted only *after* the actual violation is first proven
13 *by plaintiff*.

14 The cases all clearly show that liability under either the CWA or the Porter-
15 Cologne Act triggers constitutional protections, and that the burden is on a plaintiff to
16 prove a violation of one of these statutes, not the other way around. The regulations,
17 furthermore, show quite conclusively that a particular alleged violation is only
18 responsible for its own discharges and not discharges of others. (40 C.F.R. §
19 122.26(a)(3)(vi).)

20 The Draft Order’s reliance on Restatement of Torts to suggest that the Permit’s
21 presumption of responsibility “is not contrary to law,” is misguided. (See Draft Order, p.
22 64.) An action to impose penalties under the CWA is not analogous to a tort action;
23 rather it is quasi-criminal. (See e.g., *United States v. Bay-Houston Towing Co.* (2002)
24 197 F. Supp. 2d 788 [“civil penalties may be considered ‘quasi criminal’ in nature”]; see
25 also *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1001 [“A civil contempt proceeding
26 is criminal in nature because of the penalties that may be imposed”].) In quasi-criminal
27 actions, where penalties are imposed, the accused is entitled to the presumption of
28 innocence until proven guilty. (See e.g., *In re Witherspoon* (1984) 162 Cal.App.3d

1 1000, 1002; *Bennett v. Superior Court* (1946) 73 Cal.App.2d 203.) The presumption of
2 innocence . . . [is] fundamental to the Anglo-American system of law.” (5 Witkin &
3 Epstein, Cal. Crim. Law (4th ed 2012) Crim. Trial § 624.)

4 It is clear that the concept of “presumed guilt” is not an accepted principle of
5 justice within the American System of Jurisprudence in the assessment of penalties under
6 the CWA. Presuming a Permittee is in violation of the Permit and subject to penalties,
7 whenever there is a co-mingled exceedance, thus violates basic tenants of due process of
8 law, plain statutory requirements and well-established precedent. As such, all such terms
9 are contrary to law.

10 **VIII. THE DRAFT ORDER DOES NOT CORRECTLY ADDRESS THE**
11 **REGIONAL BOARD’S FAILURE TO COMPLY WITH APPLICABLE**
12 **DUE PROCESS REQUIREMENTS PROHIBITING THE SAME**
13 **ATTORNEYS FROM ADVISING BOTH THE BOARD AND ITS STAFF.**

14 The Draft Order acknowledges that the proceeding to adopt the Permit was an
15 adjudicative proceeding subject to the California Administrative Procedures Act’s
16 (“APA”) administrative adjudication statutes in Government Code section 11400 *et seq.*
17 (Draft Order, p. 66.) Government Code section 11425.10, part of the “Administrative
18 Adjudication Bill or Rights,” provides that “[t]he adjudicative function shall be separated
19 from the investigative, prosecutorial, and advocacy functions with the agency” By
20 having the same attorneys advising both the Regional Board and its Staff, the Regional
21 Board failed to promote even the appearance of fairness. Thus, the Permit must be
22 invalidated and sent back to the Regional Board for rehearing.

23 The Draft Order incorrectly provides that “there is nothing in the record to suggest
24 that advice [given by the Regional Board’s attorneys] was driven by biased advocacy for
25 a Board staff position.” (Draft Order, p. 69) In fact, the record shows that the Board
26 Staff and their attorneys advocated in favor of the objections of one group of parties over
27 another, and took a position contrary to the interest of the Permittees. Just by way of
28 example, Board Member Mary Ann Lutz stated she had been forced to recues herself

1 from even participating as a Board Member in the proceeding because of objections made
2 by certain parties, namely, the Natural Resources Defense Council (“NRDC”) and the
3 Water Keepers. Importantly, it is clear from the Transcript that in making her decision to
4 recuse herself, Mr. Lutz did so based on the advice she received from the Board’s
5 attorneys, *the very same attorneys that also had been and would be advising Staff*
6 *throughout the Hearing itself.*

7 According to Board Member Lutz:

8 The Water Board attorneys have urged me to recues myself and I
9 presume that they would advise the Board that I should be
disqualified.

10 ***

11 I have repeatedly been told by counsel and staff that they are
12 concerned about the possibility of lawsuits that could be
13 threatened by the NRDC and others if I continue to participate. I
14 wish that our counsel’s advice had been driven on what is right
and what is just and not just on the fear of lawsuits from one side
in these proceedings.

15 In my view, the staff and the Board should be just as concerned
16 about potential litigation from those that may be brought by
17 permittees who feel that **the staff and the interest groups have**
further stacked the deck against them in eliminating this
perspective in the proceeding.

18 (Transcript, pp. 16-20, emphasis added.) To claim that the Permit adoption process did
19 not “involve investigative, prosecutorial or advocacy functions,” or that Staff was
20 advocating “on behalf of a particular position,” is belied by the advice given by the
21 attorneys to Board Member Lutz before the formal Hearing even commenced.

22 These comments at the very outset of the Hearing plainly demonstrated the need
23 for the Board itself to have had separate counsel from the counsel for Staff, in order to
24 insure the “fairness” of the process and necessary “due process.” The Board’s refusal to
25 separate itself from Staff with separate counsel, clearly “tainted” the process, and, as
26 suggested by Member Lutz, did so at the outset. Accordingly, the Board’s refusal to
27 assign separate counsel was a violation of due process of law and requires that the Permit
28

1 be invalidated and sent back to the Regional Board for rehearing.

2 There are numerous other examples in the records of Board Staff taking positions
3 on factual or legal issues that are contrary to those of the Permittees, one of the more
4 important ones is the Regional Board Staff attorney's comments on the requirement, or
5 lack thereof, for the Board to conduct a "cost-benefit analysis." In advising the Board on
6 the issue, such attorney took a position that was/is clearly contrary to the positions taken
7 by many of the Permittees in their comments, and was simultaneously advocating a
8 position that was supportive of what Staff had done (or, in this instance, not done):

9 **MS. McCHESNEY:** I just want to make a comment that -- and
10 I'll provide more detailed information on this and it'll be in
11 response to comments, too -- but the regional board is adopting
12 the permit under the federal Clean Water Act, and there are
13 certain constraints on the regional board in consideration of
14 economics. So I'll be providing more detail, but I understand that
15 that information is important and, you know, certainly the Board
16 can consider economics, but, there are -- but there's no cost
17 benefit analysis.

18 ***

19 But just to summarize it, there's no cost benefit analysis, so I just
20 wanted to let you know.

21 (Transcript, pp. 257-59.) This advocated position by the Regional Board's and its Staff's
22 joint attorney was, moreover, legally inaccurate, as discussed above, but the comment
23 illustrates the fact that the Regional Board's attorney was wearing two hats, one as
24 counsel for the judicial body itself, *i.e.*, the Regional Board, and one as counsel for the
25 prosecution of the Permit to be adopted, *i.e.*, Regional Board staff.

26 The Draft Order's attempts to distinguish the 2010 Writ of Mandate issued against
27 this Board for doing this very same thing, is unavailing. Regional Board Order No. R4-
28 2006-0074, involving the incorporation of the Santa Monica Bay Bacteria Total
29 Maximum Daily Load ("SMB Bacteria TMDL") into the 2001 MS4 Permit, was
30 specifically voided and set aside by the Los Angeles Superior Court because the Regional
31 Board used the same attorneys that its Staff used in advocating the permit amendment.
32 (See July 30, 2010 Peremptory Writ of Mandate and the July 16, 2010 Judgment.)

1 Importantly for purposes of the subject Permit, according to this prior Writ of Mandate,
2 should the Regional Board “choose to conduct any further hearing upon remand at such
3 hearing *the same person shall not act as both an advocate before the Los Angeles*
4 *Regional Water Quality Control Board and an advisor to the Los Angeles Regional*
5 *Water Quality Control Board*” (Writ, p. 2.)

6 By once again using the same counsel for the adoption of a permit that also
7 involved the incorporation of the SMB Bacteria TMDL into the Permit, that the Regional
8 Board has not only violated the Permittees’ rights to due process of law, it has also
9 violated the Superior Court’s Writ of Mandate.

10 The Draft Order provides that “the same counsel may advise staff in the course of
11 development of the permit and the board in the adoption proceeding.” (Draft Order, p.
12 67.) However, it cites no authority in support of this position. Rather, it dubiously relies
13 on exceptions to the *ex parte* communications rule. The “primary purpose of separation
14 of functions in adjudicatory proceedings,” however, is not “the need to present improper
15 *ex parte* communications,” as the Draft Order suggests. (Draft Order, p. 67.) Indeed, the
16 general prohibition on *ex parte* communications has little, if anything, to do with keeping
17 the advocacy/investigatory functions and the adjudicative functions separate in an
18 administrative hearing process. An *ex parte* communication is one in which an
19 interested party communicates with the decision maker without notice and opportunity
20 for all parties to participate. (Gov. Code § 11430.10.) Conversely, the separation of the
21 adjudicatory and advocacy function it is a matter of the decision maker wearing *two* hats.

22 The merging of the advocacy functions and the adjudicative functions is, in reality,
23 more egregious than a mere *ex parte* communication because the decision maker
24 becomes an advocate in favor of one party over another when he or she is instead
25 supposed to maintain impartiality. Thus, while the Administrative Adjudication Bill of
26 Rights provides exceptions to the *ex parte* communication rule (Gov. Code §§ 11430.10-
27 11430.30), there are no similar exceptions to the requirement that adjudicatory and
28 advocacy functions remain separate. (Gov. Code §§ 11425.10(a)(4), 11425.30.)

1 In *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, the Court
2 found that Government Code sections 11425.10 and 11425.30 preclude a lawyer from
3 both advocating on behalf of the staff of an administrative agency, and advising the
4 decision-making body itself in the same administrative proceeding. There, the Court
5 looked to the APA as providing guidance on the elements the California Legislature
6 believed were needed for conducting a fair administrative hearing. The Court concluded
7 that “one of the basic tenants of the California APA ... is that, to promote both the
8 appearance of fairness and the absence of even a probability of outside influence on
9 administrative hearings, the prosecutorial and, to a lesser extent, investigatory aspect of
10 administrative matters must be adequately separated from the adjudicatory function.”
11 (*Id.* at 91.) The Appellate Court thus found that where “counsel performs as an advocate
12 in a given case [he or she] is generally precluded from advising a decision-making body
13 in the same case,” with the Court then finding that the “adjudicative function” must be
14 separate from the “investigative, prosecutorial and advocacy functions within the
15 agency.” (*Id.* at 92.)

16 Similar to the 2006 hearing conducted before the Regional Board to incorporate
17 the SMB Bacteria TMDL, the Regional Board crossed the line by utilizing a “single”
18 counsel to “advise and assist” both “the Board members and its entire staff,” in adopting
19 the Permit. Because the substance of the hearing concerned the adoption of a very
20 lengthy, highly complex and hotly disputed NPDES permit heard over a three day period,
21 portions of which were being proposed by Regional Board Staff over the objections of
22 numerous affected Permittees, the hearing on the Permit was unlawfully conducted with
23 the “same” counsel advising and assisting both the Regional Board and its “entire staff.”
24 The Draft Order should be revised and this procedural error corrected.

25
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1 IX. WITHOUT ANY SUBSTANTIVE ANALYSIS, THE DRAFT ORDER
2 IMPROPERLY DISMISSES THE CITIES' REMAINING OBJECTIONS
3 AS "NOT RAISING SUBSTANTIAL ISSUES APPROPRIATE FOR STATE
4 WATER BOARD REVIEW."

5 The Cities' Petition raises the following additional objections to the Permit which
6 were not addressed in the Draft Order:

7 1. The Permit terms concerning the development and implementation of a
8 Watershed Management Program are vague and ambiguous, in that they fail to
9 adequately describe the necessary elements and contents for an acceptable Watershed
10 Management Program.

11 2. The California Environmental Quality Act ("CEQA") preempts the
12 Planning and Land Development Program requirements contained in the Permit
13 restricting and conditioning New Development and Redevelopment Projects by imposing
14 various numeric design conditions on such projects, and by imposing new Low Impact
15 Development ("LID") and Hydro-modification requirements on all such projects.

16 Rather than address these objections, the Draft Order dismisses them as "not
17 raising substantial issues appropriate for State Water Board review." (Draft Order, p. 4.)
18 In doing so, it relies on Cal. Code Regs., tit. 23, § 2052, subd. (a)(1). However, that
19 section applies only when the State Board outright refuses to review the Regional
20 Board's action because the *entire* "petition fails to raise substantial issues that are
21 appropriate for review."

22 Here, there can be no question that Cities' petition raises substantial issues
23 appropriate for State Board review because the State Board has already taken the Petition
24 up for review and issued the subject Draft Order. The cases relied on by the Draft Order
25 to dismiss the City's remaining objections are not analogous to the instant case. In
26 *People v. Barry* (1987) 194 Cal. App. 3d 158, 175, for example, the State Board simply
27 refused to review actions of a regional board. Conversely, in this case, the State Board is
28 not refusing to review the action of the Regional Board to adopt the Permit. Rather, it is

1 reviewing the adoption of the Permit.

2 Cal. Code Regs., tit. 23, § 2052, subd. (a)(1) does not permit the State Board to
3 consider only those objections is deems “substantial” once it has taken the Regional
4 Board’s action up for review. Once the State Board opts to review the Regional Board’s
5 action to adopt the Permit, it must consider all the objections to the Permit raised in the
6 Petition. Rather than reiterate the Cities’ arguments in support of these objections (which
7 were not considered by the State Board), the Cities hereby incorporates by this reference
8 into this Brief/Comments, those arguments as set forth in the Petition Ps & As.

9 **X. CONCLUSION**

10 For the foregoing reasons, the Cities respectfully contend that the Draft Order
11 must be revised so that the Subject Permit is modified to comport with State and federal
12 law, as proposed above and in the Cities’ prior briefing on these Petitions.

13 Respectfully submitted,

14 RUTAN & TUCKER, LLP
15 RICHARD MONTEVIDEO
16 JOSEPH LARSEN

17 Dated: January 20, 2015

18 By: 

19 Richard Montevideo
20 Attorneys for the Cities of Duarte and
21 Huntington Park

Exhibit “A”

**CITIES WMP/EWMP
ALTERNATIVE APPROACH**

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

LOS ANGELES REGION

320 W. 4th Street, Suite 200, Los Angeles, California 90013

Phone (213) 576 - 6600 Fax (213) 576 - 6640

<http://www.waterboards.ca.gov/losangeles>

ORDER NO. R4-2012-0175
NPDES PERMIT NO. CAS004001

**WASTE DISCHARGE REQUIREMENTS
FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES
WITHIN THE
COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE
DISCHARGES
ORIGINATING FROM THE CITY OF LONG BEACH MS4**

The municipal discharges of storm water and non-storm water by the Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities within the coastal watersheds of Los Angeles County with the exception of the City of Long Beach (hereinafter referred to separately as Permittees and jointly as the Dischargers) from the discharge points identified below are subject to waste discharge requirements as set forth in this Order.

I. FACILITY INFORMATION

Table 1. Discharger Information

Dischargers	The Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities within the coastal watersheds of Los Angeles County with the exception of the City of Long Beach (See Table 4)	
Name of Facility	Municipal Separate Storm Sewer Systems (MS4s) within the coastal watersheds of Los Angeles County with the exception of the City of Long Beach MS4	
Facility Address	Various (see Table 2)	
The U.S. Environmental Protection Agency (USEPA) and the California Regional Water Quality Control Board, Los Angeles Region (Regional Water Board) have classified the Greater Los Angeles County MS4 as a large municipal separate storm sewer system (MS4) pursuant to 40 CFR section 122.26(b)(4) and a major facility pursuant to 40 CFR section 122.2.		

Table 2. Facility Information

Permittee (WDID)	Contact Information	
Agoura Hills (4B190147001)	Mailing Address	30001 Ladyface Court Agoura Hills, CA 91301
	Facility Contact, Title, and E-mail	Ken Berkman, City Engineer kberkman@agoura-hills.ca.us

C. Watershed Management Programs

1. General

- a. The purpose of this Part VI.C is to allow Permittees the flexibility to develop Watershed Management Programs to implement the requirements of this Order on a watershed scale through customized strategies, control measures, and BMPs.
- b. Participation in a Watershed Management Program is voluntary and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part V.A. (Receiving Water Limitations), Part VI.E (Total Maximum Daily Load Provisions) and Attachments L through R, by customizing the control measures in Parts III.A.4 (Prohibitions – Non-Storm Water Discharges) and VI.D (Minimum Control Measures).
- c. Customized strategies, control measures, and BMPs shall be implemented on a watershed basis, where applicable, through each Permittee's storm water management program and/or collectively by all participating Permittees through a Watershed Management Program.
- d. The Watershed Management Programs ~~shall ensure that discharges from the Permittee's MS4-~~ where timely implemented by the Permittee, shall constitute the Permittee being deemed in compliance with: (i) ~~achieve~~ applicable water quality-based effluent limitations in Part VI.E and Attachments L through R, ~~pursuant to the corresponding compliance schedules,~~ (ii) ~~do not cause or contribute to exceedances of~~ (ii) the receiving water limitations in Parts V.A and VI.E and Attachments L through R, and (iii) ~~do not include the~~ non-storm water discharges requirements that are effectively prohibited pursuant to in Part III.A. The programs shall ~~also~~ ensure that controls are implemented to reduce the discharge of pollutants to the maximum extent practicable (MEP) pursuant to Part IV.A.1.
- e. Watershed Management Programs shall be developed either collaboratively or individually using the Regional Water Board's Watershed Management Areas (WMAs). Where appropriate, WMAs may be separated into subwatersheds to focus water quality prioritization and implementation efforts by receiving water.
- f. Each Watershed Management Program shall be consistent with Part VI.C.5-C.8 and shall:
 - i. Prioritize water quality issues resulting from storm water and non-storm water discharges from the MS4 to receiving waters within each WMA,
 - ii. Identify and implement strategies, control measures, and BMPs to achieve the outcomes specified in Part VI.C.1.d,

- iii. Execute an integrated monitoring program and assessment program pursuant to Attachment E – MRP, Part IV to determine progress towards achieving applicable limitations and/or action levels in Attachment G, and
- iv. Modify strategies, control measures, and BMPs as necessary based on analysis of monitoring data collected pursuant to the MRP to ensure that applicable water quality-based effluent limitations and receiving water limitations and other milestones set forth in the Watershed Management Program are sought to be achieved to the maximum extent practicable. ~~in the required timeframes.~~
- v. Provide appropriate opportunity for meaningful stakeholder input, including but not limited to, a permit-wide watershed management program technical advisory committee (TAC) that will advise and participate in the development of the Watershed Management Programs and enhanced Watershed Management Programs from month 6 through the date of program approval. The composition of the TAC may include at least one Permittee representative from each Watershed Management Area for which a Watershed Management Program will be developed, and must include a minimum of one public representative from a non-governmental organization with public membership, and staff from the Regional Water Board and USEPA Region IX.
- g. Permittees may elect to develop an enhanced Watershed Management Program (EWMP). An EWMP is one that comprehensively evaluates opportunities, within the participating Permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among Permittees and other partners on multi-benefit regional projects that, wherever feasible, retain (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood control and water supply, among others. In drainage areas within the EWMP area where retention of the 85th percentile, 24-hour storm event is not feasible, the EWMP shall include a ~~Reasonable Assurance Analysis to demonstrate~~ demonstration that applicable water quality based effluent limitations and receiving water limitations ~~shall be achieved~~ will be addressed to the maximum extent practicable through implementation of other watershed control measures. An EWMP shall:
 - i. Be consistent with the provisions in Part VI.C.1.a.-f and VI.C.5-C.8;
 - ii. Incorporate applicable State agency input on priority setting and other key implementation issues;
 - iii. Provide for ~~meeting~~ measures to address water quality standards and other CWA obligations to the maximum extent practicable by utilizing provisions in the CWA and its implementing regulations, policies and guidance;
 - iv. Include multi-benefit regional projects to ensure that MS4 discharges ~~achieve~~ are being addressed to the maximum extent practicable with the

goal of achieving compliance with all final WQBELs set forth in Part VI.E., and that the discharges do not to the maximum extent practicable, cause or contribute to exceedances of receiving water limitations in Part V.A., by retaining through infiltration or capture and reuse the storm water volume from the 85th percentile, 24-hour storm for the drainage areas tributary to the multi-benefit regional projects.;

- v. In drainage areas where retention of the storm water volume from the 85th percentile, 24-hour event is not technically feasible, include other watershed control measures to ensure that MS4 discharges achieve compliance with all interim and final WQBELs set forth in Part VI.E. ~~with compliance deadlines occurring after approval of a EWMP~~ to the maximum extent practicable, and to ensure that MS4 discharges also to the maximum extent practicable, do not cause or contribute to exceedances of receiving water limitations in Part V.A.;
- vi. Maximize the effectiveness of funds through analysis of alternatives and the selection and sequencing of actions needed to address human health and water quality related challenges and non-compliance;
- vii. Incorporate effective innovative technologies, approaches and practices, including green infrastructure;
- viii. Ensure that existing requirements to comply with technology-based effluent limitations and core requirements (e.g., including elimination of nonstorm water discharges of pollutants through the MS4, and controls to reduce the discharge of pollutants in storm water to the maximum extent practicable) are not delayed;
- ix. Ensure that a financial strategy is in place.

2. Compliance with Receiving Water Limitations Not Otherwise Addressed by a TMDL through a WMP or EWMP

- a. For receiving water limitations in Part V.A. associated with water body-pollutant combinations not addressed through a TMDL, but which a Permittee elects to address through a Watershed Management Program or EWMP as set forth in this Part VI.C., a Permittee shall comply as follows:
 - i. **For pollutants that are in the same class¹²¹ as those addressed in a TMDL for the watershed and for which the water body is identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:**

¹ Pollutants are considered in a similar class if they have similar fate and transport mechanisms, can be addressed via the same types of control measures, and within the same timeline already contemplated as part of the Watershed Management Program for the TMDL.

- (1) Permittees shall demonstrate that the Watershed Control Measures to ~~achieve~~ address the applicable TMDL provisions identified pursuant to Part VI.C.5.b.iv.(3) to the maximum extent practicable, will also adequately address contributions of the pollutant(s) within the same class from MS4 discharges to receiving waters, consistent with the assumptions and requirements of the corresponding TMDL provisions, including interim and final requirements and deadlines for their desired achievement, such that the MS4 discharges of the pollutant(s) will, to the maximum extent practicable, not cause or contribute to exceedances of receiving water limitations in Part V.A.
- (2) Permittees shall include the water body-pollutant combination(s) in the ~~Reasonable Assurance~~ Demonstration Analysis in Part VI.C.5.b.iv.(5).
- (3) Permittees shall identify milestones and dates for their achievement consistent with those in the corresponding TMDL.

ii. For pollutants that are not in the same class as those addressed in a TMDL for the watershed, but for which the water body is identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:

- (1) Permittees shall assess contributions of the pollutant(s) from MS4 discharges to the receiving waters and sources of the pollutant(s) within the drainage area of the MS4 pursuant to Part VI.C.5.a.iii.
- (2) Permittees shall identify Watershed Control Measures pursuant to Part VI.C.5.b. that will adequately address contributions of the pollutant(s) from MS4 discharges to receiving waters such that the MS4 discharges of the pollutant(s) will not cause or contribute to exceedances of receiving water limitations in Part V.A.
- (3) Permittees shall include the water body-pollutant in the ~~Reasonable Assurance~~ Demonstration Analysis in Part VI.C.5.b.iv.(5).
- (4) Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.

- (5) Where the final date(s) in (4) is beyond the term of this Order, the following conditions shall apply:
- (a) For an EWMP, in drainage areas where retention of (i) all nonstorm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event will be achieved, each participating Permittee shall continue to target implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges that are a source of pollutants to receiving waters.
 - (b) For a WMP and in areas of a EWMP where retention of the volume in (a) is technically infeasible and where the Regional Water Board determines that MS4 discharges cause or contribute to the water quality impairment, participating Permittees may initiate development of a stakeholder-proposed TMDL upon approval of the Watershed Management Program or EWMP. For MS4 discharges from these drainage areas to the receiving waters, any extension of this compliance mechanism beyond the term of this Order shall be consistent with the implementation schedule in a TMDL for the waterbody pollutant combination(s) adopted by the Regional Water Board.

iii. For pollutants for which there are exceedances of receiving water limitations in Part V.A., but for which the water body is not identified as impaired on the State's Clean Water Act Section 303(d) List as of the effective date of this Order:

- (1) Upon an exceedance of a receiving water limitation, based on data collected pursuant to the MRP and approved IMPs and CIMPs, Permittees shall assess contributions of the pollutant(s) from MS4 discharges to the receiving waters and sources of the pollutant(s) within the drainage area of the MS4 pursuant to Part VI.C.5.a.iii.
- (2) If MS4 discharges are identified as a source of the pollutant(s) that has caused or contributed to, or has the potential to cause or contribute to, the exceedance(s) of receiving water limitations in Part V.A., Permittees shall address contributions of the pollutant(s) from MS4 discharges through modifications to the WMP or EWMP pursuant to Part VI.C.8.a.ii.
 - (a) In a modified WMP or EWMP, Permittees shall identify Watershed Control Measures pursuant to Part VI.C.5.b. that will adequately address contributions of the pollutant(s) from MS4 discharges to receiving waters such that the MS4 discharges of the pollutant(s) will not cause or contribute to exceedances of receiving water limitations in Part V.A.

- (b) Permittees shall modify the ~~Reasonable~~ Demonstration Assurance-Analysis pursuant to Part VI.C.5.b.iv.(5) to address the pollutant(s).
 - (c) Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.
 - (d) Where the final date(s) in (4) is beyond the term of this Order, the following conditions shall apply:
 - (i) For an EWMP, in drainage areas where retention of (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event will be achieved, each participating Permittee shall continue to target implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges that are a source of pollutants to receiving waters.
 - (ii) For a WMP and in areas of a EWMP where retention of the volume in (a) is technically infeasible, for newly identified exceedances of receiving water limitations, a Permittee may request that the Regional Water Board approve a modification to its WMP or EWMP to include these additional water body-pollutant combinations.
- b. A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the specific water body-pollutant combinations addressed by an approved Watershed Management Program or EWMP.
- c. If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement.

- d. Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. not otherwise addressed by a TMDL, if all the following requirements are met:
 - i. Provides timely notice of its intent to develop a WMP or EWMP,
 - ii. Meets all interim and final deadlines for development of a WMP or EWMP,
 - iii. For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations, and
 - iv. Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

3. Compliance with Receiving Water Limitations Addressed by a TMDL through a WMP or EWMP

- a. A Permittee's full compliance with all requirements and dates for their achievement in an approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with provisions pertaining to applicable ~~interim~~-water quality based effluent limitations and ~~interim~~-receiving water limitations in Part VI.E. and Attachments L-R for the pollutant(s) addressed by the approved Watershed Management Program or EWMP.
- b. Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A., if all the following requirements are met:
 - i. Provides timely notice of its intent to develop a WMP or EWMP,
 - ii. Meets all interim and final deadlines for development of a WMP or EWMP,
 - iii. For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations, and
 - iv. Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

- c. Subdivision b. does not apply to receiving water limitations corresponding to final compliance deadlines pursuant to TMDL provisions in Part VI.E. that have passed or will occur prior to approval of a WMP or EWMP.

4. Process

- a. Timelines for Implementation
 - i. Implementation of the following requirements shall occur per the schedule specified in Table 9 below:

Table 9. Watershed Management Program Implementation Requirements

Part	Provision	Due Date
VI.C.4.b	Notify Regional Water Board of intent to develop Watershed Management Program or enhanced WMP and request submittal date for draft program plan	6 months after Order effective date
VI.C.4.c	For Permittee(s) that elect not to implement the conditions of Part VI.C.4.c.i or c.ii, submit draft plan to Regional Water Board	1 year after Order effective date
VI.C.4.c	For Permittee(s) that elect to implement the conditions of Part VI.C.4.c.i or c.ii, submit draft plan to Regional Water Board	18 months after Order effective date
VI.C.4.c.iv	For Permittees that elect to collaborate on an enhanced WMP that meets the requirements of Part VI.C.4.c.iv, submit draft plan to Regional Water Board	18 months after Order effective date, provide final work plan for development of enhanced WMP
		30 months after Order effective date, submit draft plan
VI.C.4.c	Comments provided to Permittees by Regional Water Board	4 months after submittal of draft plan
VI.C.4.c	Submit final plan to Regional Water Board 3 months after receipt of Regional Water Board comments on draft plan	

Part	Provision	Due Date
VI.C.4.c	Approval or denial of final plan by Regional Water Board or by the Executive Officer on behalf of the Regional Water Board	3 months after submittal of final plan
VI.C.6	Begin implementation of Watershed Management Program or EWMP	Upon approval of final plan
VI.C.8	Comprehensive evaluation of Watershed Management Program or EWMP and submittal of modifications to plan	Every two years from date of approval

- b. Permittees that elect to develop a Watershed Management Program or EWMP must notify the Regional Water Board no later than six months after the effective date of this Order.
- i. Such notification shall specify if the Permittee(s) are requesting a 12-month or 18-month submittal date for the draft Watershed Management Program, per Part VI.C.4.c.i – ii, or if the Permittees are requesting a 18/30-month submittal date for the draft EWMP per Part VI.C.4.c.iv.
 - ii. As part of their notice of intent to develop a WMP or EWMP, Permittees shall identify all applicable interim and final trash WQBELs and all other final WQBELs and receiving water limitations pursuant to Part VI.E. and the applicable attachment(s) with compliance deadlines occurring prior to approval of a WMP or EWMP. Permittees shall identify watershed control measures, where possible from existing TMDL implementation plans, that will be implemented by participating Permittees concurrently with the development of a Watershed Management Program or EWMP to ensure that MS4 discharges achieve compliance with applicable interim and final trash WQBELs and all other final WQBELs and receiving water limitations set forth in Part VI.E. and the applicable attachment(s) by the applicable compliance deadlines occurring prior to approval of a WMP or EWMP.
 - iii. As part of their notification, Permittees electing to develop an EWMP shall submit all of the following in addition to the requirements of Part VI.C.4.b.i.-ii.:
 - (1) Plan concept and geographical scope,
 - (2) Cost estimate for plan development,
 - (3) Executed MOU/agreement among participating Permittees to fund plan development, or final draft MOU among participating Permittees

along with a signed letter of intent from each participating City Manager or head of agency. If a final draft MOU is submitted, the MOU shall be fully executed by all participating Permittees within 12 months of the effective date of this Order.

- (4) Interim milestones for plan development and deadlines for their achievement,
 - (5) Identification of, and commitment to fully implement, one structural BMP or a suite of BMPs at a scale that provides meaningful water quality improvement within each watershed covered by the plan within 30 months of the effective date of this Order in addition to watershed control measures to be implemented pursuant to b.ii. above. The structural BMP or suite of BMPs shall be subject to approval by the Regional Water Board Executive Officer, and
 - (6) Demonstration that the requirements in Parts VI.C.4.c.iv.(1) and (2) have been met.
- c. Permittees that elect to develop a Watershed Management Program shall submit a draft plan to the Regional Water Board as follows:
- i. For Permittees that elect to collaborate on the development of a Watershed Management Program, Permittees shall submit the draft Watershed Management Program no later than 18 months after the effective date of this Order if the following conditions are met in greater than 50% of the land area covered by the WMP:
 - (1) Demonstrate that there are LID ordinances in place and/or commence development of a Low Impact Development (LID) ordinance(s) meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and
 - (2) Demonstrate that there are green streets policies in place and/or commence development of a policy(ies) that specifies the use of green street strategies for transportation corridors within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.
 - (3) Demonstrate in the notification of the intent to develop a Watershed Management Program that Parts VI.C.4.c.i(1) and (2) have been met in greater than 50% of the watershed area.
 - ii. For a Permittee that elects to develop an individual Watershed Management Program, the Permittee shall submit the draft Watershed Management Program no later than 18 months after the effective date of this Order if the following conditions are met:

- (1) Demonstrate that there is a LID ordinance in place for the Permittee's jurisdiction and/or commence development of a Low Impact Development (LID) ordinance for the Permittee's jurisdiction meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and
 - (2) Demonstrate that there is a green streets policy in place for the Permittee's jurisdiction and/or commence development of a policy that specifies the use of green street strategies for transportation corridors within the Permittee's jurisdiction within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.
 - (3) Demonstrate in the notification of the intent to develop a Watershed Management Program that Parts VI.C.4.c.ii.(1) and (2) have been met.
- iii. For Permittees that elect not to implement the conditions under Part VI.C.4.c.i. or Part VI.C.4.c.ii., Permittees shall submit the draft Watershed Management Program no later than 12 months after the effective date of this Order.
- iv. For Permittees that elect to collaborate on the development of an EWMP, Permittees shall submit the work plan for development of the EWMP no later than 18 months after the effective date of this Order, and shall submit the draft program no later than 30 months after the effective date of this Order if the following conditions are met in greater than 50% of the land area in the watershed:
- (1) Demonstrate that there are LID ordinances in place and/or commence development of a Low Impact Development (LID) ordinance(s) meeting the requirements of this Order's Planning and Land Development Program within 60 days of the effective date of the Order and have a draft ordinance within 6 months of the effective date of the Order, and
 - (2) Demonstrate that there are green streets policies in place and/or commence development of a policy(ies) that specifies the use of green street strategies for transportation corridors within 60 days of the effective date of the Order and have a draft policy within 6 months of the effective date of the Order.
 - (3) Demonstrate in the notification of the intent to develop an EWMP that Parts VI.C.4.c.iv.(1) and (2) have been met in greater than 50% of the watershed area.

- d. Until the Watershed Management Program or EWMP is approved by the Regional Water Board or by the Executive Officer on behalf of the Regional Water Board, Permittees that elect to develop a Watershed Management Program or EWMP shall:
 - i. Continue to implement watershed control measures in their existing storm water management programs, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv),
 - ii. Continue to implement watershed control measures to eliminate non-storm water discharges through the MS4 that are a source of pollutants to receiving waters consistent with CWA section 402(p)(3)(B)(ii), and
 - iii. Implement watershed control measures, where possible from existing TMDL implementation plans, to ensure that MS4 discharges achieve compliance ~~with~~ to the maximum extent practicable, interim and final trash WQBELs and all other final WQBELs and receiving water limitations pursuant to Part VI.E. and set forth in Attachments L through R. ~~by the applicable compliance deadlines occurring prior to approval of a WMP or EWMP.~~
- e. Permittees that do not elect to develop a Watershed Management Program or EWMP, or that do not have an approved WMP or EWMP within 28 or 40 months, respectively, of the effective date of this Order, shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3).
- f. Permittees subject to the Middle Santa Ana River Watershed Bacteria Indicator TMDL shall submit a Comprehensive Bacteria Reduction Plan (CBRP) for dry weather to the Regional Water Board Executive Officer no later than nine months after the effective date of this Order. The CBRP shall describe, in detail, the specific actions that have been taken or will be taken to achieve compliance with the dry weather water quality-based effluent limitations and the receiving water limitations for the Middle Santa Ana River Watershed Bacteria Indicator TMDL by December 31, 2015. The CBRP shall also establish a schedule for developing a CBRP to comply with the water quality-based effluent limitations and the receiving water limitations for the Middle Santa Ana River Bacteria TMDL during wet weather by December 31, 2025. The CBRP may be developed in lieu of the Watershed Management Program for MS4 discharges of bacteria within the Middle Santa Ana River Watershed.

5. Program Development

- a. Identification of Water Quality Priorities

Permittees shall identify the water quality priorities within each WMA that will be addressed by the Watershed Management Program. At a minimum, these priorities shall include achieving to the maximum extent practicable, applicable water quality-based effluent limitations and/or receiving water limitations established pursuant to TMDLs, as set forth in Part VI.E and Attachments L through R of this Order.

- i. **Water Quality Characterization.** Each plan shall include an evaluation of existing water quality conditions, including characterization of storm water and non-storm water discharges from the MS4 and receiving water quality, to support identification and prioritization/sequencing of management actions.
- ii. **Water Body-Pollutant Classification.** On the basis of the evaluation of existing water quality conditions, water body-pollutant combinations shall be classified into one of the following three categories:
 - (1) **Category 1 (Highest Priority):** Water body-pollutant combinations for which water quality-based effluent limitations and/or receiving water limitations are established in Part VI.E and Attachments L through R of this Order.
 - (2) **Category 2 (High Priority):** Pollutants for which data indicate water quality impairment in the receiving water according to the State's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (State Listing Policy) and for which MS4 discharges may be causing or contributing to the impairment.
 - (3) **Category 3 (Medium Priority):** Pollutants for which there are insufficient data to indicate water quality impairment in the receiving water according to the State's Listing Policy, but which exceed applicable receiving water limitations contained in this Order and for which MS4 discharges may be causing or contributing to the exceedance.
- iii. **Source Assessment.** Utilizing existing information, potential sources within the watershed for the water body-pollutant combinations in Categories 1 – 3 shall be identified.
 - (1) Permittees shall identify known and suspected storm water and non-storm water pollutant sources in discharges to the MS4 and from the MS4 to receiving waters and any other stressors related to MS4 discharges causing or contributing to the water quality priorities. The identification of known and suspected sources of the highest water quality priorities shall consider the following:
 - (a) Review of available data, including but not limited to:

- (i) Findings from the Permittees' Illicit Connections and Illicit Discharge Elimination Programs;
 - (ii) Findings from the Permittees' Industrial/Commercial Facilities Programs;
 - (iii) Findings from the Permittees' Development Construction Programs;
 - (iv) Findings from the Permittees' Public Agency Activities Programs;
 - (v) TMDL source investigations;
 - (vi) Watershed model results;
 - (vii) Findings from the Permittees' monitoring programs, including but not limited to TMDL compliance monitoring and receiving water monitoring; and
 - (viii) Any other pertinent data, information, or studies related to pollutant sources and conditions that contribute to the highest water quality priorities.
 - (b) Locations of the Permittees' MS4s, including, at a minimum, all MS4 major outfalls and major structural controls for storm water and non-storm water that discharge to receiving waters.
 - (c) Other known and suspected sources of pollutants in non-storm water or storm water discharges from the MS4 to receiving waters within the WMA.
- iv. Prioritization. Based on the findings of the source assessment, the issues within each watershed shall be prioritized and sequenced. Watershed priorities shall include at a minimum:
- (1) TMDLs
 - (a) Controlling pollutants for which there are water quality-based effluent limitations and/or receiving water limitations with interim or final compliance deadlines within the permit term, or TMDL compliance deadlines that have already passed and limitations have not been achieved.
 - (b) Controlling pollutants for which there are water quality-based effluent limitations and/or receiving water limitations with interim or final compliance deadlines between September 6, 2012 and October 25, 2017.
 - (2) Other Receiving Water Considerations

- (a) Controlling pollutants for which data indicate impairment or exceedances of receiving water limitations in the receiving water and the findings from the source assessment implicates discharges from the MS4 shall be considered the second highest priority.
- b. Selection of Watershed Control Measures
- i. Permittees shall identify strategies, control measures, and BMPs to implement through their individual storm water management programs, and collectively on a watershed scale, with the goal of creating an efficient program to focus individual and collective resources on watershed priorities.
 - ii. The objectives of the Watershed Control Measures shall include:
 - (1) Prevent or eliminate non-storm water discharges to the MS4 to the maximum extent practicable that are a source of pollutants from the MS4 to receiving waters.
 - (2) Implement pollutant controls necessary to achieve to the maximum extent practicable, all applicable interim and final water quality-based effluent limitations and/or receiving water limitations pursuant to corresponding compliance schedules.
 - (3) Ensure that discharges from the MS4 do not to the maximum extent practicable, cause or contribute to exceedances of receiving water limitations.
 - iii. Watershed Control Measures may include:
 - (1) Structural and/or non-structural controls and operation and maintenance procedures that are designed to achieve to the maximum extent practicable, applicable water quality-based effluent limitations, receiving water limitations in Part VI.E and/or Attachments L through R;
 - (2) Retrofitting areas of existing development known or suspected to contribute to the highest water quality priorities with regional or subregional controls or management measures; and
 - (3) Stream and/or habitat rehabilitation or restoration projects where stream and/or habitat rehabilitation or restoration are necessary for, or will contribute to demonstrable improvements in the physical, chemical, and biological receiving water conditions and restoration and/or protection of water quality standards in receiving waters.
 - iv. The following provisions of this Order shall be incorporated as part of the Watershed Management Program:

- (1) Minimum Control Measures.
 - (a) Permittees shall assess the minimum control measures (MCMs) as defined in Part VI.D.4 to Part VI.D.10 of this Order to identify opportunities for focusing resources on the high priority issues in each watershed. For each of the following minimum control measures, Permittees shall identify potential modifications that will address watershed priorities:
 - (i) Development Construction Program
 - (ii) Industrial/Commercial Facilities Program
 - (iii) Illicit Connection and Illicit Discharges Detection and Elimination Program
 - (iv) Public Agency Activities Program
 - (v) Public Information and Participation Program
 - (b) At a minimum, the Watershed Management Program shall include management programs consistent with 40 CFR section 122.26(d)(2)(iv)(A)-(D).
 - (c) If the Permittee(s) elects to eliminate a control measure identified in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 because that specific control measure is not applicable to the Permittee(s), the Permittee(s) shall provide a justification for its elimination. The Planning and Land Development Program is not eligible for elimination.
 - (d) Such customized actions, once approved as part of the Watershed Management Program, shall replace in part or in whole the requirements in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 for participating Permittees.
- (2) Non-Storm Water Discharge Measures. Where Permittees identify non-storm water discharges from the MS4 as a source of pollutants that cause or contribute to exceedance of receiving water limitations, the Watershed Control Measures shall include strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants, to the maximum extent practicable, consistent with Parts III.A and VI.D.10. These may include measures to prohibit the non-storm water discharge to the MS4, additional BMPs to reduce pollutants in the non-storm water discharge or conveyed by the non-storm water discharge, diversion to a sanitary sewer for treatment, or strategies to require the non-

storm water discharge to be separately regulated under a general NPDES permit.

- (3) TMDL Control Measures. Permittees shall compile control measures that have been identified in TMDLs and corresponding implementation plans. Permittees shall identify those control measures to be modified, if any, to most effectively address TMDL requirements within the watershed. If not sufficiently identified in previous documents, or if implementation plans have not yet been developed (e.g., USEPA established TMDLs), the Permittees shall evaluate and identify control measures to ~~achieve~~ attempt to achieve, to the maximum extent practicable, water quality-based effluent limitations and/or receiving water limitations established in this Order pursuant to these TMDLs.
 - (a) TMDL control measures shall include where necessary control measures to address both storm water and non-storm water discharges from the MS4.
 - (b) TMDL control measures may include baseline or customized activities covered under the general MCM categories in Part VI.D as well as BMPs and other control measures covered under the non-storm water discharge provisions of Part III.A of this Order.
 - (c) The WMP shall include, at a minimum, those actions that will be implemented during the permit term to ~~achieve~~ attempt to achieve, to the maximum extent practicable, interim and/or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines within the permit term.
- (4) Each plan shall include the following components:
 - (a) Identification of specific structural controls and non-structural best management practices, including operational source control and pollution prevention, and any other actions or programs to attempt to achieve, to the maximum extent practicable, all water quality-based effluent limitations and receiving water limitations contained in this Part VI.E and Attachments L through R to which the Permittee(s) is subject;
 - (b) For each structural control and non-structural best management practice, the number, type, and location(s) and/or frequency of implementation;
 - (c) For any pollution prevention measures, the nature, scope, and timing of implementation;
 - (d) For each structural control and non-structural best management practice, interim milestones and dates for achievement to ensure

that TMDL compliance deadlines will be met, to the maximum extent practicable; and

- (e) The plan shall clearly identify the responsibilities of each participating Permittee for implementation of watershed control measures.
- (5) Permittees shall conduct a ~~Reasonable Assurance~~ Demonstration Analysis for each water body-pollutant combination addressed by the Watershed Management Program. A ~~Reasonable Assurance~~ Demonstration Analysis (DA) (RAA) shall be quantitative and performed using a peer-reviewed model in the public domain. Models to be considered for the ~~RAA~~ DA, without exclusion, are the Watershed Management Modeling System (WMMS), Hydrologic Simulation Program-FORTRAN (HSPF), and the Structural BMP Prioritization and Analysis Tool (SBPAT). The ~~RAA~~ DA shall commence with assembly of all available, relevant subwatershed data collected within the last 10 years, including land use and pollutant loading data, establishment of quality assurance/quality control (QA/QC) criteria, QA/QC checks of the data, and identification of the data set meeting the criteria for use in the analysis. Data on performance of watershed control measures needed as model input shall be drawn only from peer-reviewed sources. These data shall be statistically analyzed to determine the best estimate of performance and the confidence limits on that estimate for the pollutants to be evaluated. The objective of the ~~RAA~~ DA shall be to demonstrate the ability of Watershed Management Programs and EWMPs to ensure that Permittees' MS4 discharges achieve to the maximum extent practicable, applicable water quality based effluent limitations and do not to the maximum extent practicable, cause or contribute to exceedances of receiving water limitations.
- (a) Permittees shall demonstrate using the ~~RAA~~ DA that the activities and control measures identified in the Watershed Control Measures will achieve to the maximum extent practicable, applicable water quality-based effluent limitations and/or receiving water limitations in Attachments L through R with compliance deadlines during the permit term.
 - (b) Where the TMDL Provisions in Part VI.E and Attachments L through R do not include interim or final water quality-based effluent limitations and/or receiving water limitations with compliance deadlines during the permit term, Permittees shall identify interim milestones and dates for their achievement to ensure adequate progress toward achieving to the maximum extent practicable, interim and final water quality-based effluent limitations and/or receiving water limitations with deadlines beyond the permit term.

- (c) For water body-pollutant combinations not addressed by TMDLs, Permittees shall demonstrate using the ~~RAA-DA~~ that the activities and control measures identified in the Watershed Control Measures will achieve applicable receiving water limitations as soon as possible to the maximum extent practicable.
- (6) Permittees shall provide documentation that they have the necessary legal authority to implement the Watershed Control Measures identified in the plan, or that other legal authority exists to compel implementation of the Watershed Control Measures.

c. Compliance Schedules

Permittees shall incorporate compliance schedules in Attachments L through R into the plan and, where necessary develop interim milestones and dates for their achievement. Compliance schedules and interim milestones and dates for their achievement shall be used to measure progress towards addressing the highest water quality priorities and achieving applicable water quality-based effluent limitations and/or receiving water limitations to the maximum extent practicable.

- i. Schedules must be adequate for measuring progress on a watershed scale once every two years.
- ii. Schedules must be developed for both the strategies, control measures and BMPs implemented by each Permittee within its jurisdiction and for those that will be implemented by multiple Permittees on a watershed scale.
- iii. Schedules shall incorporate the following:
 - (1) Compliance deadlines occurring within the permit term for achieving all applicable interim and/or final water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R of this Order to the maximum extent practicable,
 - (2) Interim milestones and dates for their achievement to the maximum extent practicable, within the permit term, for any applicable final water quality-based effluent limitation and/or receiving water limitation in Part VI.E and Attachments L through R, where deadlines within the permit term are not otherwise specified.
 - (3) For watershed priorities related to addressing exceedances of receiving water limitations in Part V.A and not otherwise addressed by Part VI.E:
 - (a) Milestones based on measureable criteria or indicators, to be achieved in the receiving waters and/or MS4 discharges,

- (a) A schedule with dates for achieving the milestones, and
- (b) A final date for achieving the receiving water limitations as soon as possible, [to the maximum extent practicable](#).
- (c) The milestones and implementation schedule in (a)-(c) fulfill the requirements in Part V.A.3.a to prepare an Integrated Monitoring Compliance Report.

6. Watershed Management Program Implementation

Each Permittee shall begin implementing the Watershed Management Program or EWMP immediately upon approval of the plan by the Regional Water Board or the Executive Officer on behalf of the Regional Water Board.

- a. Permittees may request an extension of deadlines for achievement of **interim** milestones established pursuant to Part VI.C.4.c.iii. ~~(3)~~ **only**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions shall be subject to approval by the Regional Water Board Executive Officer.

7. Integrated Watershed Monitoring and Assessment

Permittees in each WMA shall develop an integrated monitoring program as set forth in Part IV of the MRP (Attachment E) or implement a customized monitoring program with the primary objective of allowing for the customization of the outfall monitoring program (Parts VIII and IX) in conjunction with an approved Watershed Management Program or EWMP, as defined below. Each monitoring program shall assess progress toward achieving the water quality-based effluent limitations and/or receiving water limitations per the compliance schedules, and progress toward addressing the water quality priorities for each WMA. The customized monitoring program shall be submitted as part of the Watershed Management Program, or where Permittees elect to develop an EWMP, shall be submitted within 18 months of the effective date of this Order. If pursuing a customized monitoring program, the Permittee(s) shall provide sufficient justification for each element of the program that differs from the monitoring program requirements as set forth in Attachment E. Monitoring programs shall be subject to approval by the Executive Officer following a public comment period. The customized monitoring program shall be designed to address the Primary Objectives detailed in Attachment E, Part II.A and shall include the following program elements:

- Receiving Water Monitoring
- Storm Water Outfall Monitoring
- Non-Storm Water Outfall Monitoring
- New Development/Re-Development Effectiveness Tracking

- Regional Studies

8. Adaptive Management Process

a. Watershed Management Program Adaptive Management Process

- i. 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 interim and/or final water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R, according to established compliance schedules;
 - (2) Progress toward achieving improved water quality in MS4 discharges and achieving receiving water limitations through implementation of the watershed control measures based on an evaluation of outfall-based monitoring data and receiving water monitoring data;
 - (3) Achievement of interim milestones;
 - (4) Re-evaluation of the water quality priorities identified for the WMA based on more recent water quality data for discharges from the MS4 and the receiving water(s) and a reassessment of sources of pollutants in MS4 discharges;
 - (5) Availability of new information and data from sources other than the Permittees' monitoring program(s) within the WMA that informs the effectiveness of the actions implemented by the Permittees;
 - (6) Regional Water Board recommendations; and
 - (7) Recommendations for modifications to the Watershed Management Program solicited through a public participation process.
- ii. Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate new compliance deadlines and interim milestones, ~~with the exception of those compliance deadlines established in a TMDL~~, necessary to improve the effectiveness of the Watershed Management Program or EWMP in the Annual Report, as required pursuant to Part XVIII.A.6 of the MRP (Attachment E), and as part of the Report of Waste Discharge (ROWD) required pursuant to Part II.B of Attachment D – Standard Provisions.

- (1) The adaptive management process fulfills the requirements in Part V.A.4 to address continuing exceedances of receiving water limitations.
- iii. Permittees shall implement any modifications to the Watershed Management Program or EWMP upon approval by the Regional Water Board Executive Officer or within 60 days of submittal if the Regional Water Board Executive Officer expresses no objections.

E. Total Maximum Daily Load Provisions

1. The provisions of this Part VI.E. implement and are consistent with the assumptions and requirements of all waste load allocations (WLAs) established in TMDLs for which some or all of the Permittees in this Order are responsible.
 - a. Part VI.E of this Order includes provisions that are designed to assure that Permittees achieve WLAs and meet other requirements of TMDLs covering receiving waters impacted by the Permittees' MS4 discharges to the maximum extent practicable. TMDL provisions are grouped by WMA (WMA) in Attachments L through R.
 - b. The Permittees subject to each TMDL are identified in Attachment K.
 - c. The Permittees shall comply to the maximum extent practicable, 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)).
 - d. A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means.

2. Compliance Determination

a. General

- i. A Permittee shall demonstrate ~~compliance~~ the effectiveness of the WMP or EWMP at compliance monitoring points established in each TMDL or, if not specified in the TMDL, at locations identified in an approved TMDL monitoring plan or in accordance with an approved integrated monitoring program per Attachment E, Part VI.C.5 (Integrated Watershed Monitoring and Assessment).
- ii. Compliance to the maximum extent practicable, with water quality-based effluent limitations shall be determined as described in Parts VI.E.2.d and VI.E.2.e, or for trash water quality-based effluent limitations as described in Part VI.E.5.b, or as otherwise set forth in TMDL specific provisions in Attachments L through R.
- iii. Pursuant to Part VI.C, a Permittee may, individually or as part of a watershed-based group, develop and submit for approval by the Regional Water Board Executive Officer a Watershed Management Program that addresses all water quality-based effluent limitations and receiving water limitations to the maximum extent practicable, to which the Permittee is subject pursuant to established TMDLs.

b. Commingled Discharges

- i. A number of the TMDLs establish WLAs that are assigned jointly to a group of Permittees whose storm water and/or non-storm water discharges are or may be commingled in the MS4 prior to discharge to the receiving water subject to the TMDL.
- ii. In these cases, pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.
- iii. 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.
- iv. 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.
- v. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of an applicable water quality-based effluent limitation or receiving water limitation in any of the following ways:
 - (1) Demonstrate that there is no discharge from the Permittee's MS4 into the applicable receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation; or
 - (2) Demonstrate that the discharge from the Permittee's MS4 is controlled to a level that does not exceed the applicable water quality-based effluent limitation; or
 - (3) For exceedances of bacteria receiving water limitations or water quality-based effluent limitations, demonstrate through a source investigation pursuant to protocols established under California Water Code section 13178 or for exceedances of other receiving water limitations or water quality-based effluent limitations, demonstrate using other accepted source identification protocols, that pollutant sources within the jurisdiction of the Permittee or the Permittee's MS4 have not caused or contributed to the exceedance of the Receiving Water Limitation(s).

c. Receiving Water Limitations Addressed by a TMDL

- i. For receiving water limitations in Part V.A. associated with water body-pollutant combinations addressed in a TMDL, Permittees shall [achieve](#) [be](#)

considered in compliance with the receiving water limitations in Part V.A. if they are in compliance with the WMP/EWMP process as outlined in this ~~Part VI.E. and Attachments L through R of this~~ Order.

- ii. A Permittee's full compliance with the applicable TMDL requirement(s), including compliance schedules, of this Part VI.E. and Attachments L through R constitutes compliance with Part V.A. of this Order for the specific pollutant addressed in the TMDL.
- iii. As an alternative means of complying with the TMDL requirements, other than through the WMP/EWMP process, As long as a Permittee will be considered is in compliance with the applicable TMDL requirements if it is in compliance with a time schedule order (TSO) issued by the Regional Water Board pursuant to California Water Code sections 13300 and 13385(j)(3), ~~it is not the Regional Water Board's intention to take an enforcement action for violations of Part V.A. of this Order for the specific pollutant(s) addressed in the TSO.~~

d. ~~Interim~~ Water Quality-Based Effluent Limitations and Receiving Water Limitations

- i. A Permittee shall be considered in compliance with an applicable ~~interim~~ water quality-based effluent limitation and ~~interim~~-receiving water limitation for a pollutant associated with a specific TMDL if any of the following is demonstrated:
 - (1) There are no violations of the interim water quality-based effluent limitation for the pollutant associated with a specific TMDL at the Permittee's applicable MS4 outfall(s),² including an outfall to the receiving water that collects discharges from multiple Permittees' jurisdictions;
 - (2) There are no exceedances of the applicable receiving water limitation for the pollutant associated with a specific TMDL in the receiving water(s) at, or downstream of, the Permittee's outfall(s);
 - (3) There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant associated with a specific TMDL; or
 - (4) The Permittee has submitted and is fully implementing an approved Watershed Management Program or EWMP pursuant to Part VI.C.
 - (a) To be considered fully implementing an approved Watershed Management Program or EWMP, a Permittee must be

² An outfall may include a manhole or other point of access to the MS4 at the Permittee's jurisdictional boundary.

implementing all actions consistent with the approved program and applicable compliance schedules, including structural BMPs.

- (b) Structural storm water BMPs or systems of BMPs should be designed and maintained to treat storm water runoff from the 85th percentile, 24-hour storm, where feasible and necessary to achieve applicable WQBELs and receiving water limitations, and maintenance records must be up-to-date and available for inspection by the Regional Water Board.
- (c) A Permittee that does not implement the Watershed Management Program in accordance with the milestones and compliance schedules shall demonstrate compliance with its interim water quality-based effluent limitations and/or receiving water limitations pursuant to Part VI.E.2.d.i.(1)-(3), above.
- (d) Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with provisions pertaining to ~~interim~~ WQBELs with compliance deadlines occurring prior to approval of a WMP or EWMP. This subdivision (d) shall not apply to ~~interim~~ trash WQBELs.
 - (1) Provides timely notice of its intent to develop a WMP or EWMP,
 - (2) Meets all interim and final deadlines for development of a WMP or EWMP,
 - (3) For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants to the maximum extent practicable from MS4 discharges that cause or contribute to the impairment(s) addressed by the TMDL(s), and
 - (4) Receives final approval of its WMP or EWMP within 28 or 40 months, respectively.

~~**e. Final Water Quality-based Effluent Limitations and/or Receiving Water Limitations**~~

- ~~i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:~~

- ~~(1) There are no violations of the final water quality-based effluent limitation for the specific pollutant at the Permittee's applicable MS4 outfall(s)³;~~
- ~~(2) There are no exceedances of applicable receiving water limitation for the specific pollutant in the receiving water(s) at, or downstream of, the Permittee's outfall(s);~~
- ~~(3) There is no direct or indirect discharge from the Permittee's MS4 to the receiving water during the time period subject to the water quality-based effluent limitation and/or receiving water limitation for the pollutant(s) associated with a specific TMDL; or~~

(5) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24-hour event is retained for the drainage area tributary to the applicable receiving water. This provision (4) shall not apply to ~~final~~ trash WQBELs.

3. USEPA Established TMDLs

TMDLs established by the USEPA, to which Permittees are subject, do not contain an implementation plan adopted pursuant to California Water Code section 13242. 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 are to be designed to be effective in achieving compliance with USEPA established numeric WLAs to the maximum extent practicable. ~~The Regional Water Board may, at its discretion, revisit this decision within the term of this Order or in a future permit, as more information is developed to support the inclusion of numeric water quality based effluent limitations.~~

- a. Each Permittee shall propose BMPs to achieve the WLAs contained in the applicable USEPA established TMDL(s), and a schedule for implementing the BMPs that is as short as possible, in a Watershed Management Program or EWMP.
- b. Each Permittee may either individually submit a Watershed Management Program, or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the USEPA established TMDL.
- c. At a minimum, each Permittee shall include the following information in its Watershed Management Program or EWMP, relevant to each applicable USEPA established TMDL:

³ ~~Ibid.~~

- i. Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
 - ii. A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
 - iii. A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
 - iv. A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s) to the maximum extent practicable.;

~~(1) For the Malibu Creek Nutrient TMDL established by USEPA in 2003, in no case shall the time schedule to achieve the final numeric WLAs exceed five years from the effective date of this Order; and~~
 - v. If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.
- d. Each Permittee subject to a WLA in a TMDL established by USEPA shall submit a draft of a Watershed Management Program or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4. e.
- e. If a Permittee does not submit a Watershed Management Program, or the plan is determined to be inadequate by the Regional Water Board Executive Officer and the Permittee does not make the necessary revisions within 90 days of written notification that plan is inadequate, the Permittee shall be required to demonstrate compliance with the numeric WLAs immediately based on monitoring data collected under the MRP (Attachment E) for this Order.

4. State Adopted TMDLs where Final Compliance Deadlines have Passed

- a. Permittees shall comply immediately with water quality-based effluent limitations and/or receiving water limitations to implement WLAs in state-adopted TMDLs for which final compliance deadlines have passed pursuant to the TMDL implementation schedule, but Permittees following the WMP/EWMP process in accordance with Part VI.C shall be considered in compliance with all such WQBELs, receiving water limitations and WLAs.
- b. ~~Where~~ As an alternative to compliance through the WMP/EWMP process, where a Permittee is seeking to comply with such WQBELs, receiving water limitations and WLAs, other than through the WMP/EWMP process, and

believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, ~~a~~the Permittee may within 45 days of Order adoption request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

- c. Permittees may either individually request a TSO, or may jointly request a TSO with all Permittees subject to the water quality-based effluent limitations and/or receiving water limitations, to implement the WLAs in the state-adopted TMDL.
- d. At a minimum, a request for a time schedule order shall include the following:
 - i. Data demonstrating the current quality of the MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
 - ii. A detailed description and chronology of structural controls and source control efforts, since the effective date of the TMDL, to reduce the pollutant load in the MS4 discharges to the receiving waters subject to the TMDL;
 - iii. Justification of the need for additional time to achieve the water quality-based effluent limitations and/or receiving water limitations;
 - iv. A detailed time schedule of specific actions the Permittee will take in order to attempt to achieve the water quality-based effluent limitations and/or receiving water limitations to the maximum extent practicable;
 - v. A demonstration that the time schedule requested is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the effluent limitation goals(s); and
 - vi. If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements for BMP implementation and the date(s) for their ~~achievement~~performance. The interim requirements shall include both of the following:
 - (1) Effluent limitation(s) goals for the pollutant(s) of concern; and
 - (2) Actions and milestones ~~leading~~ that are to be designed to attempt to meet to compliance with the effluent limitation goals to the maximum extent practicable(s).

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