

**MEETING DATE:** 08/13/12

**AGENDA ITEM:** Support for Los Angeles Permit Group's Position and Comments on the Draft Countywide Municipal Separate Storm Sewer System Permit.

| <b><u>ATTACHMENTS</u></b> |                                                                                                                                               | <b><u>Pages</u></b> |
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| 1                         | Letter from Sam Unger, Denial of Time Extension                                                                                               | 1-2                 |
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EDUARDO G. ESPINOZA JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## Los Angeles Regional Water Quality Control Board

July 30, 2012

### RESPONSE TO REQUESTS FOR EXTENSION OF REVIEW PROCESS AND COMMENT PERIOD FOR THE TENTATIVE LOS ANGELES COUNTY MS4 PERMIT

#### Los Angeles County MS4 Permittees and Interested Persons:

The Regional Board staff has received many letters requesting a 180-working day extension to develop the permit and an additional 45-day comment period to review a revised tentative permit. Beginning in May 2011 the Regional Board has worked diligently to provide an open and transparent permit development process, realizing the importance of having Permittees and other interested persons closely involved.

The Regional Board has provided myriad opportunities for Permittees and other interested persons to present issues and concerns to the Board and Board staff through three board workshops, five staff-level workshops, and one to two meetings per month since November 2011 with the LA Permit Group Negotiating Committee. In addition, Regional Board staff has met frequently with several other entities including the City of Los Angeles, Los Angeles County Flood Control District, NRDC, Los Angeles Waterkeeper, and Heal the Bay, throughout the permit development process to ensure all interested persons had opportunities to vet their concerns.

Furthermore, Regional Board staff distributed to Permittees and interested persons five working proposals of the permit provisions, covering the principal sections of the permit to facilitate the understanding of the permit on a section by section basis. For each working proposal, Board staff provided Permittees and interested parties with a three-week written comment period as well as the opportunity to discuss the working proposals with the Regional Board at Board workshops held on April 5, 2012 and May 3, 2012. The draft permit was revised to address many of the written and oral comments received on the working proposals. The tentative LA County MS4 Permit, which was released for public comment on June 6, 2012, reflects these changes. Regional Board staff has made every effort to involve Permittees and interested persons to address concerns and comments during this 15-month development process.

Regional Board members directed staff to adhere to a permit development schedule that would ensure that the permit would be considered by the Board at its regularly scheduled September Board meeting. In order to meet this directive, and in light of the significant number of opportunities for engagement and comment on the draft permit that have been provided over the past 15 months, I am not granting requests for an extension of the comment deadline.

MARIA MEHRANIAN, CHAIR | SAMUEL UNGER, EXECUTIVE OFFICER

320 West 4th St., Suite 200, Los Angeles, CA 90013 | [www.waterboards.ca.gov/losangeles](http://www.waterboards.ca.gov/losangeles)

Regional Board staff will continue to be available to meet and confer on any permit provisions prior to the September board hearing. If you have any questions, please call Renee Purdy at (213) 576-6622 or Ivar Ridgeway at (213) 620-2150.

Sincerely,

A handwritten signature in cursive script that reads "Samuel Unger".

Samuel Unger  
Executive Officer



# Culver CITY

## PUBLIC WORKS DEPARTMENT

9770 Culver Boulevard, Culver City, California 90232



Charles D. Herbertson, P.E., LS  
Public Works Director and  
City Engineer

(310) 253-6421

Damian Skinner  
Environmental Programs and Ops. Manager

FAX (310) 253-6430

July 23, 2012

Mr. Ivar Ridgeway  
Regional Water Quality Control Board, Los Angeles  
320 W. 4<sup>th</sup> Street, Suite 200  
Los Angeles, CA 90013  
(Electronically to [LAMS42012@waterboards.ca.gov](mailto:LAMS42012@waterboards.ca.gov))

**Subject: Comment letter – Draft NPDES Permit (Draft Order) for MS4 Dischargers within the Los Angeles County Flood Control District**

Dear Mr. Ridgeway:

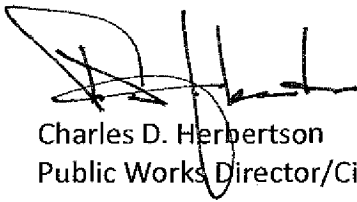
The City of Culver City (City) appreciates the opportunity to provide comments on the subject draft order for the Los Angeles region. The City has actively participated with other municipalities through the Los Angeles Permit Group (LAPG) to understand and comment on the complex provisions of the draft permit. Attached to this letter is the comment letter the LAPG will submit as a whole and which Culver City agrees with and supports. In addition, we would like to highlight a few issues of critical importance to the City of Culver City.

The City did not receive adequate time to review the draft permit in its entirety. The Regional Board released parts of the draft permit and labeled them as staff working proposals, but those sections changed once the entire permit was released. Because of the many interrelationships between the different sections of the permit, it is critical to provide an adequate opportunity to review the permit as a whole. In addition, the City and the LAPG did not receive a response to many of our comments from Regional Board staff so we are unaware of the impact of our efforts to engage in a consensus building process. The City respectfully requests a one-year extension to allow time for a continuing collaborative and iterative process whereby several drafts can be reviewed and subjected to comments, comments can be addressed or responded to and we will

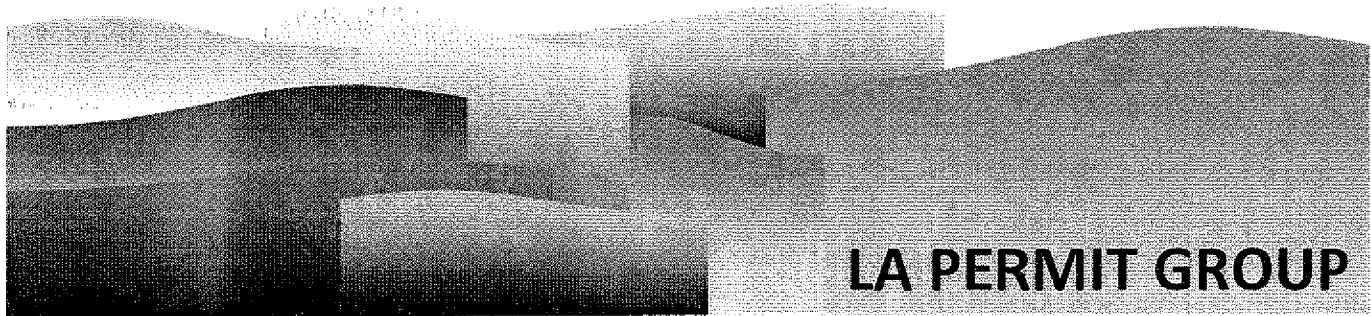
have adequate opportunity to obtain input from City policy makers as the final permit takes shape.

The City recognizes the need to continue to make significant progress toward attainment of water quality standards. However, we also believe that no regulatory benefit accrues from the State establishing permit provisions that result in the potential of immediate non-compliance for Permittees. For these reasons, the City requests revision of the draft MS4 Permit as described in the letter dated July 23, 2012 from the LAPG and for the reasons stated above, a one-year extension to the permit adoption process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles D. Herbertson', written over a horizontal line.

Charles D. Herbertson  
Public Works Director/City Engineer



July 23, 2012

Mr. Ivar Ridgeway  
California Regional Water Quality Control Board, Los Angeles Region  
320 West 4th Street, Suite 200  
Los Angeles, California 90013

*Electronically to :*

[LAMS42012@waterboards.ca.gov](mailto:LAMS42012@waterboards.ca.gov)

[rpurdy@waterboards.ca.gov](mailto:rpurdy@waterboards.ca.gov)

[iridgeway@waterboards.ca.gov](mailto:iridgeway@waterboards.ca.gov)

**SUBJECT:      Comments on the Draft NPDES Permit (Draft Order), Order No. R4-2012-XXXX; NPDES Permit NO. CAS004001, for MS4 Dischargers within the Los Angeles County Flood Control District**

The LA Permit Group (LAPG) appreciates the opportunity to provide comments on the subject Draft Order for the Los Angeles region. The Los Angeles Permit Group is a consortium of municipalities that was formed to ensure Los Angeles' stormwater is managed properly, both for flood control and water quality protection (LA Permit Group agencies list provided in Exhibit A).

The LA Permit Group was formed, to accomplish several important objectives, including:

- Promoting constructive collaboration and problem-solving between the regulated community (municipalities) and the Los Angeles Regional Water Quality Control Board (LARWQCB);
- Assisting in development of a new NPDES Permit that is capable of integrating the protection of water quality with other watershed objectives in a cost-effective and science-based manner;
- Focusing limited municipal resources on implementation of water quality protection activities that are efficient, effective and sustainable.

Over 62 Los Angeles County municipalities have actively participated in the effort to develop negotiations points and provide comments throughout the MS4 NPDES Permit development process. Comments and negotiations points are developed by each of the LA Permit Group's four Technical Sub-Committees (Development Programs, Reporting & CORE Programs, Monitoring, and TMDLs), which are then approved by the LA Permit Group. The group's consensus is represented by the Negotiations Committee. This comment letter and accompanying exhibits reflect a collaborative effort to develop a permit that will lead to water quality protection in a cost effective manner. We have a number of major and minor concerns with the Draft Order. Our comments are organized around the following major issues:

- Receiving Water Limitations
- TMDLs
- Monitoring
- MCMs
- Watershed Management Program
- Cost Implications

Our recommendations for each issue are noted in **bold** in this letter and our detailed comments on the Draft Order are provided in the Exhibits to this letter (Exhibit B).

We also want to note that the Draft Order contains a number of errors and inconsistencies. This is not surprising given the sheer magnitude of the draft document, which is the basis for our multiple requests for more time to review the more than 500 pages of Permit. As stated in our letter dated July 2, 2012 (incorporated in this letter as attached – Exhibit C) and in Public Comments at the July 12, 2012 Regional Board Meeting, the comment deadline of July 23, 2012 is far too short to address all the potential issues and concerns. On several occasions, the Regional Board staff has used the Staff Working Proposal process and workshops as a justification for the expeditious manner in which the Draft Order was developed and the curtailed 45-day public comment period. This justification is misplaced for several reasons:

- Each Staff Working Proposal was issued with only a few weeks for stakeholders to provide comments on what may be considered the most significant increase in public effort to address water quality issues in the past 20 years;
- Although we provided comments on the working proposal, it is unclear to us how the Regional Board staff addressed our comments. In some cases changes were made and other cases no changes were made. In both cases no explanation was provided. As a result we have attached our previous comment letters for the record (Exhibit D);
- By rolling out different working proposals at different times it was difficult to understand how the key provisions interacted with each other. It was only after the full draft Order was issued did we see the interaction (or lack of interaction) of the provisions;
- It is the LA Permit Group's goal to cooperatively develop the MS4 Permit to support the Regional Board's policy goal of a permit that would reduce the need for litigation. This goal is important to us as we believe that good policy and regulations are those that are developed reasonably, that Permittees are capable of complying with. Even though we have worked hard and in good faith with Regional Board staff to try to develop a Permit that is protective of water quality in a cost-effective and science-based manner, the draft Order places the Permittees in a very vulnerable position for not immediately complying with water quality standards (see our discussion below regarding Receiving Water Limitations);
- It is also important to note that stormwater managers have an obligation to adequately inform other municipal departments, legal counsel, city management and elected officials on the fiscal impact of this draft Order. The time to properly evaluate the Permit, assess its financial, legal, and personnel impacts, and inform our cities cannot be accomplished in the 45 day review period; and
- We have also heard from many cities that their executives and elected officials had registered for the League of California Cities Conference on September 5-7, 2012, months prior to the Permit adoption hearing notice. We request that the adoption hearing be rescheduled after September 6-7, 2012 to allow for elected officials and executive of the Permitted agencies to attend the hearing; it is imperative that the adoption hearing be scheduled at a time that municipal decision makers have the opportunity to attend and provide comments at the hearing.

It is essential that municipalities be given an additional 180 days to review the Permit and develop alternatives for the substantial issues found in this Draft Order. Based on the issues listed above and as communicated in our July 2<sup>nd</sup> letter and at the July 12<sup>th</sup> Regional Board meeting, we request that the our appeal for additional time be reconsidered. This could be accomplished by an additional review of a tentative Order before an adoption hearing is held.

### ***Receiving Water Limitations***

As previously outlined in our 05/14/12 comment letter on the working proposal, the Receiving Water Limitations (RWL) language in the Draft Order creates a liability to the municipalities that is unnecessary and counterproductive. We have the following significant concerns with the RWL language included in the Draft Order:

- Recent court decisions have created a new interpretation of the RWL that creates a liability for the Permittees without a commensurate increase in protection of water quality.
- The RWL as written is not a federal requirement so it is not necessary to maintain the current language.
- The RWL as written is contradictory to the Watershed Management Program.
- Alternative approaches are available to address the concerns and maintain the intent of the language in the approach; we request that RWQCB utilize this alternative language.

We feel that the RWL as included in not necessary and does not support the improvement of water quality as discussed in more detail below.

### **Creation of Unwarranted Liability**

The proposed language for the receiving water limitations provision is almost identical to the language that was litigated in the 2001 Permit. On July 13, 2011, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Natural Resources Defense Council, Inc., et al., v. County of Los Angeles, Los Angeles County Flood Control District, et al.*<sup>1</sup> (*NRDC v. County of LA*) that determined that a municipality is liable for Permit violations if its discharges cause or contribute to an exceedance of a water quality standard. This represents a fundamental change in interpretation of policy and contrasts sharply with the Board's own understanding as expressed in a 2002 letter from then-Chair Diamond answering questions about the 2001 MS4 Permit in which she articulated this collective understanding that a violation of the Permit would occur only when a municipality fails to engage in good faith effort to implement the iterative process to correct the harm<sup>2</sup>. In light of the 9<sup>th</sup> Circuit's decision and based on the significant monitoring efforts being conducted by other municipal stormwater entities, municipal stormwater Permittees would be considered to be in non-compliance with their NPDES Permits. Accordingly, municipal stormwater Permittees will be exposed to considerable vulnerability, even though municipalities have little control over the sources of pollutants that create the vulnerability. Basically, the draft Order language again exposes the municipalities to enforcement action (and third party law suits) even when the municipality is engaged in an adaptive management approach to address the exceedance.

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<sup>1</sup> No. 10-56017, 2011 U.S. App. LEXIS 14443, at \*1 (9th Cir., July 13, 2011).

<sup>2</sup> January 30, 2002. Letter from Francine Diamond, Chair, Los Angeles Regional Water Quality Control Board



The LA Permit Group would like to more fully address Board Member Glickfeld's question raised at the May 3rd workshop about how the RWL language as currently written puts cities in immediate non compliance, either individually or collectively. As noted above, significant monitoring by other MS4s in the state had demonstrated that MS4 discharges pose water quality issues and with the proposed outfall monitoring detailed in the Draft Order we would expect the runoff characteristics to be similar to other MS4 discharges in the State. As the RWL language is currently written, municipalities cannot cause or exceed water quality standards in the basin plan as soon as this Permit is adopted. While the Regional Board staff has noted that enforcement action is unlikely if the Permittees are implementing the iterative process, the reality is that municipalities are immediately vulnerable to third party lawsuits in addition to enforcement action by the Regional Board. This is in fact what happened to the City of Stockton. The City of Stockton was sued by a third party for violations of the cause/contribute prohibition even though the City was implementing a comprehensive iterative process with specific pollutant load reduction plans. This was a series of pollutants not covered by a TMDL, but that dealt with water quality exceedances. Cities will have no warning or time to react to any water quality exceedances, but still be vulnerable to third party lawsuits even when cities are diligently working to address the pollutants of concern. This will be disastrous public policy, creating a chilling effect on productive storm water programs. Also in the Santa Monica Bay, cities were sent Notices of Violation that, in essence, stated that all cities in the watershed were guilty until they proved their innocence when receiving water violations were found, in some cases miles away. The "cause and contribute" language was quoted prominently in those NOV's as justification for why the Regional Board could take such action.

It is inherently unfair and poor public policy to put cities in non-compliance on day one of the Permit without the opportunity for the cities to develop a plan of action, develop source identification, and implement a plan to address the concern. With the very recent legal interpretation that fundamentally changes how these Permits have been traditionally implemented, please understand that adjusting the Receiving Water Limitations language is a critical issue. Again, the receiving water limitation language must be modified to allow for the integrated approach (iterative/adaptive management) to address numerous TMDLs and non-TMDL water quality problems within the watershed based program in a systematic way. This is a fair and constructive approach to meet water quality standards.

#### **Receiving Water Limitation Language as Written is Not Required under Federal Law**

We believe Federal Law does not require that the RWL language be written as presented in the Tentative Permit. Based on the language presented in other Permits throughout the United States, the proposed language is not the only option. The RWL provision as crafted in the contested 2001 Los Angeles permit is unique to California. Recent USEPA developed Permits (e.g. Washington D.C.<sup>3</sup>) do not contain similar limitations. Thus, we would submit that the decision to include such a provision and the structure of the provision is a State policy and therefore an opportunity exists for the Regional and State Boards to reaffirm the iterative process as the preferred approach for long-term water quality improvement.

#### **Receiving Water Limitation Language as Written is Contradictory to the Watershed Management Program**

Beyond the legal/liability aspect of the RWLs we would submit that in a practical sense the RWL, as currently written, does not support the Permit's goal of protecting water quality and works against the Watershed Management Program proposal. On the one hand, the municipalities will develop watershed management

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<sup>3</sup> NPDES Permit No. DC0000221, October 7, 2011, issued by USEPA Region 3.

programs that are based on the highest priority water quality issues within the watershed. Consistent with the Draft Order provision for the Watershed Management Program, we would expect the focus to be on TMDLs and the pollutants associated with those TMDLs. However, under the current RWL working proposal, the municipality will need to direct their resources to any and all pollutants that may cause or contribute to exceedances of water quality standards. Based on a review of other municipal outfall monitoring results in the State, there will be occasional exceedances of other non-TMDL pollutants (e.g. aluminum, iron, etc.). These exceedances may only occur once every 10 storms, but according to the current RWL proposal the municipalities must address these exceedances with the same priority as the TMDL pollutants. The LA Permit Group views this as unreasonable and ineffective use of limited municipal resources.

**We have requested that this language be revised on several occasions including written comments, workshop comments, and meetings with staff; however this issue has not yet been resolved in the Tentative Permit. An explanation is requested as to why this language remains as presented in the Draft Order is requested. Alternative Approaches are Available to Address Concerns.**

The RWL language is a critical issue for municipalities statewide and has been highlighted to the State Water Resources Control Board for consideration. Currently the State Board is considering a range of alternatives to create a basis for compliance that provides sufficient rigor in the iterative process to ensure diligent progress in complying with water quality standards but at the same time allows the municipality to operate in good faith with the iterative process without fear of unwarranted third party action. It is imperative that the Regional Board works with the State Board on this very important issue.

The California Association of Stormwater Quality (CASQA) has developed draft language that we feel should be used in lieu of the current language. The language provides specificity in compliance and subjects Permittees who are not engaged in good faith in the iterative process to enforcement without unnecessary and counterproductive liability for the majority of Permittees who are diligently implementing stormwater programs. We feel that the CASQA language maintains the intent of the current RWL while addressing the concerns outlined above.

**Recommendation: Develop Receiving Water Limitation language consistent with the California Association of Stormwater Quality language that was submitted in a comment letter on Caltrans Permit (Exhibit E) and on the Statewide Phase II Permit which defines action thresholds, an iterative/adaptive management process, and avoids unnecessary liability.**

#### ***Total Maximum Daily Loads***

As outlined in our May 12, 2012 comment letter on the TMDL working proposal, the incorporation of TMDL WLAs into the Tentative Permit is of critical importance to the LASP. **WLAs should be incorporated using a BMP-based approach that includes an iterative approach to attain the WLAs and provides flexibility to the Permittees to address the complexities of addressing multiple TMDLs within a watershed.** The best mechanism to achieve water quality standards is by implementing BMPs, evaluating their effectiveness and implementing additional BMPs as necessary to meet TMDL WLAs. Without this process, and due to the requirement in the Draft Order to meet numeric values, our ability to effectively implement BMPs is hampered by the legal issues associated with Permit compliance.

The Draft OrderDraft Order proposes to incorporate more TMDLs than any other Permit in California issued to date. As a result, the manner in which the TMDLs are incorporated into the Permit is a critical issue to the LA Permit Group and will likely set a significant precedent for future MS4 Permits.

The rate of development of TMDLs in the Los Angeles Region was unparalleled in California, and likely the nation. A settlement agreement necessitated the much accelerated time schedule for these TMDLs. The TMDLs were developed based on the information available at the time, not the best information to identify or solve the problem. As a result, the sophistication of the TMDLs vary widely, meaning that not all TMDLs are created equal regarding knowledge of the pollutant sources, confidence in the technical analysis, availability of control measures sufficient to address the pollutant targets, etc. Additionally, the majority of the TMDLs were developed with the understanding that monitoring, special studies, and other information would be gathered during the early years of the TMDL implementation to refine the TMDLs. As such, many MS4 dischargers were told during TMDL adoption that any concerns they may have over inaccuracies in the TMDL analysis would be addressed through a TMDL reopener. The recent experience with the Santa Monica Bay Beaches Bacterial TMDL reopener demonstrates just how difficult, if not impossible, obtaining serious reconsideration of established TMDLs, irrespective of the weight of evidence presented. The proposed method of incorporating TMDL waste load allocations (WLAs) as outlined in the Draft OrderDraft Order does not effectively allow for addressing this phased method of implementing TMDLs; nor does it recognize the time, effort and complexities involved in addressing MS4 discharges; and places municipalities into non-compliance risk.

We recognize and appreciate that TMDLs must be incorporated in such a way as to require action to improve water quality. However, the Permit should recognize the articulated goal of many of the TMDLs to be adaptive management documents, using the iterative approach to achieve the goals, and consider the challenges of trying to address the non-point nature of stormwater. As such, it is imperative to have flexibility in selecting an approach to address the TMDLs and the time frame by which to implement the approach. We would like to thank Board staff for providing the opportunity to submit an implementation schedule and BMPs in context of a Watershed Management Plan to attain EPA TMDL WLAs. The same flexibility is also necessary to address Regional Board adopted TMDLs.

The LA Permit Group would submit that the Regional Board staff is making two policy decisions that have massive financial impacts to the region (studies show in the range of billions of dollars) with regards to incorporating TMDLs into a stormwater NPDES Permit:

- The inclusion of numeric effluent limitations for final TMDL WLAs.
- The use of time schedule orders to address Regional Board adopted TMDLs for which the compliance points have passed.

#### **Numeric Effluent Limitations for Final TMDL WLAs**

The LA Permit Group opposes the incorporation of final WLAs solely as numeric effluent limitations in the proposed Permit language. Although staff has discretion to include numeric limits where feasible, it is not required and the use of numeric limits results in contradictions and compliance inconsistencies with the rest of the Permit requirements. Court decisions (See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-1167 (9th Cir. 1999)<sup>4</sup>), State Board orders (Order WQ 2009-0008, In the Matter of the Petition of County of Los

<sup>4</sup> See also California Regional Water Quality Control Board San Diego Region - Fact Sheet / Technical Report For Order No. R9-2010-0016 / NPDES NO. CAS0108766.

Angeles and Los Angeles County Flood Control District, at p. 10)<sup>5</sup> have affirmed that WLAs can be incorporated as non-numeric effluent limitations.

Under 40 CFR Section 122.44 (k), the Regional Board may impose BMPs for control of storm water discharges in lieu of numeric effluent limitations when numeric limits are infeasible. It states that best management practices may be used to control or abate the discharge of pollutants when numeric effluent limitations are infeasible. In 2006, the State Board convened Blue Ribbon Panel made recommendations to the State Water Resources Control Board concluding that it was not feasible to incorporate numeric limits into Permits to regulate storm water, and at best, there could be some action level to focus on problematic drainage sheds<sup>6</sup>. Very little has changed in the technology and the feasibility of controlling storm water pollutants since 2006. What has changed is that a legally compelled, long list of TMDLs has been adopted in the LA Region in a very short time period. The draft stormwater Permit for CalTrans also states “Storm water discharges from MS4s are highly variable in frequency, intensity, and duration, and it is difficult to characterize the amount of pollutants in the discharges. In accordance with 40 Code of Federal Regulations section 122.44(k)(2), the inclusion of BMPs in lieu of numeric effluent limitations is appropriate in storm water Permits. This Order requires implementation of BMPs to control and abate the discharge of pollutants in storm water to the MEP. To assist in determining if the BMPs are effectively achieving MEP standards, this Order requires effluent and receiving water monitoring. The monitoring data will be used to determine the effectiveness of the applied BMPs and to make appropriate adjustments or revisions to BMPs that are not effective.” The LAPG requests similar consideration as the Draft Order is a much more variable and complicated MS4 than CalTrans.

Additionally, during the May 3, 2012 MS4 Permit workshop, Regional Board staff seemed to indicate that the basis for incorporating the final WLAs as numeric effluent limitations is EPA’s 2010 memorandum pertaining to the incorporation of TMDL WLAs in NPDES Permits<sup>7</sup>. This memorandum (which is currently being reconsidered by U.S. EPA) states that “EPA recommends that, *where feasible*, the NPDES permitting authority *exercise its discretion* to include numeric effluent limitations as necessary to meet water quality standards” (emphasis added). This statement highlights the basic principle that the Regional Board has discretion in how WLAs are incorporated into a MS4 Permit. Regional Board staff commented during the workshop that staff have evaluated data and have determined numeric effluent limitations are now feasible. However, no information refuting the Blue Ribbon Panel report recommendations has been provided that demonstrates how the appropriateness of using strict numeric limits was determined and why these limits are considered feasible now even though historically both EPA and the State have made findings that developing numeric limits was likely to be infeasible.

Given the discretion available to Regional Board staff and the variability among the TMDLs with respect to understanding of the pollutant sources, confidence in the technical analysis, and availability of control measures sufficient to address the pollutant targets, **it is critical to use non-numeric water quality based**

<sup>5</sup> “[i]t is our intent that federally mandated TMDLs be given substantive effect. Doing so can improve the efficacy of California’s NPDES storm water permits. This is not to say that a wasteload allocation will result in numeric effluent limitations for municipal storm water dischargers. Whether future municipal storm water permit requirement appropriately implements a storm water wasteload allocation will need to be decided on the regional water quality control board’s findings *supporting either the numeric or non-numeric* effluent limitations contained in the permit.” (Order WQ 2009-0008, In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District, at p. 10 (emphasis added).)

<sup>6</sup> Storm Water Panel Recommendations to the California State Water Resources Control Board “The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities. June 19, 2006.

<sup>7</sup> U.S. EPA, *Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*, Memorandum from U.S. EPA Director, Office of Wastewater Management James A. Hanlon and U.S. EPA Director, Office of Wetlands, Oceans, and Watershed Denise Keehner (Nov. 10, 2010).

**effluent limitations for final WLAs in this Permit.** The proposed Watershed Management Program will require quantitative analysis to select actions that will be taken to achieve TMDL WLAs. For the entire length of the TMDL compliance schedule, Permittees will be required to demonstrate compliance with interim WLAs by implementing actions that they have estimated to the best of their knowledge will result in achieving the WLAs and water quality standards. However, unless final WLAs are also expressed in this Permit as action-based water quality based effluent limitations, and if instead strict numeric limits are required for final WLAs, then, at the specified final compliance date, no matter how much the Permittee has done, no matter how much money has been spent, no matter how close to complying with the numeric values, no matter what other sources outside the Permittees' control have been identified and quantified, and no matter what other information has been developed and submitted to the Regional Board, the Permittee will be considered out of compliance with the Permit requirements. Furthermore, because of the structure established in this Permit, the Regional Board staff will have to consider all Permittees in this situation as being out of compliance with the Permit provisions if the strict numeric limits have not been met, regardless of the actions taken previously. This approach is inconsistent with the goals of good public policy, fair enforcement, fiscal responsibility and holding Permittees responsible only for discharges over which they have individual control.

#### **TMDLs Where Compliance Date Has Already Occurred**

The LA Permit Group is also concerned with the major policy decision related to the use of Time Schedule Orders for Regional Board adopted TMDLs for which the compliance date has already occurred prior to the approval of the NPDES Permit. There is a fundamental problem with the TMDL process whereby new information is not being incorporated into TMDLs. The ideal phased TMDL implementation process whereby dischargers can collect information, submit it to the Regional Board, and obtain revisions to the TMDL requirements to address data gaps and uncertainties has not occurred. As evidenced by the number of overdue Permits, the workload commitments of Regional Board staff are significant and TMDL reopeners seldom occur. Because the majority of the TMDLs have not been incorporated into Permit requirements until now, MS4 Permittees have been put in the position of trying to comply with TMDL requirements without knowing how compliance with those TMDLs would be determined and without knowing when or if promised considerations of modifications to the TMDL would occur. So Permittees would be expected to be in immediate compliance with new Permit provisions irrespective of most precedent, guidance regarding incorporation of TMDLs into MS4 Permits, and irrespective of what actions Permittees have taken to try and meet the TMDL requirements. This is neither fair nor consistent as requesting a TSO would place a Permittee in immediate non-compliance with the Permit and expose the Permittee to risk of third party lawsuits.

The LA Permit Group strongly believes that the adaptive management approach envisioned during TMDL development, whereby TMDL reopeners are used to consider new monitoring data and other technical information to modify the TMDLs, including TMDL schedules as appropriate, is the most straightforward way to address past due TMDLs. The Regional Board should use the reopener as an opportunity to adjust the implementation timelines to reflect the practical and financial reality faced by municipalities. Final WLAs should be delayed until serious reconsideration of the data that established the TMDLs so that the TMDLs can reflect information gathered during the implementation period. This will allow critically important data to be utilized to selectively modify time schedules in the TMDLs. Final compliance with TMDL Permit conditions should not occur prior to these additional TMDL reconsiderations. Additionally, the Permit should reflect any modifications to the TMDL schedules made through the reopener process, either through a delay in the issuance of the Permit until the modified TMDLs become effective, or by using its discretion to establish a specific compliance process for these TMDLs in the Permit. Providing for compliance with these TMDLs

through implementation of BMPs defined in the watershed management plans as we have requested for all other TMDLs is a feasible, fair and consistent way to achieve this goal.

#### Recommendation:

- **Provide a provision which requires that a TMDL be reconsidered in light of information that was not available when the TMDL was developed before the final WLAs become effective.** Whenever the reconsideration has been completed, the Permit should be reopened to make changes to any wasteload allocation, time schedules, and other pertinent information.
- **Translate WLAs into WQBELs, expressed as BMPs.**
- **State that the implementation of the BMPs using an iterative process will place the Permittee into compliance with the MS4 Permit.**
- **Provide for four compliance options for both interim and final WLAs:**
  - **Implement Actions/BMPs consistent with Watershed Management Program**
  - **Compliance at the outfall (end of pipe)**
  - **Compliance in the receiving water (river, creek, ocean)**
  - **No direct discharges**
- **Allow for the adaptive management approach to be utilized for TMDL compliance, consistent with the timelines identified in the Watershed Management Programs.**

#### Monitoring

The proposed monitoring program requirements have significantly increase compared to our current required efforts. Although we understand the need for monitoring to support the Permit, we believe there are number of issues within the MRP that need to more fully vetted and discussed. These issues include:

- **Receiving water monitoring should be consistent with SWAMP protocols including the requirement that ambient monitoring be conducted two days following a storm event.** Currently the receiving water monitoring is proposed to be conducted during storm events. Such an approach will not support the need to assess the receiving water quality consistent with the SWAMP approach that is used as the basis for 303(d) listing.
- **The focus and scope of non-stormwater monitoring is not commensurate with the environmental issues associated with dry weather flows.** We believe the non-stormwater monitoring should be to help identify illicit discharges and not for assessing the multitude of objectives noted in the MRP, II.E.a – c. Furthermore we would submit that the MS4s should focus its non-stormwater monitoring on discharges “into” our MS4 and not on discharges “through” or from our MS4s that may cause or contribute to exceedances of water quality standards. This is consistent with CWA section 402(p)(B).
- **Regarding regional studies (MRP XI.A – B), the LAPG would submit that these studies should be conducted by the Regional or State Board.** But if the Permit does require special studies, **the Permit needs to establish the mechanism/option for Permittees to participate in the studies without having to conduct the studies on an individual basis.** Furthermore, the Regional Board should be the agency to lead and coordinate these studies. The MRP appears to read that each and every Permittee must conduct the regional studies.
- **Toxicity monitoring should be limited to the receiving water only and not at the outfalls.** It’s important to establish whether is a toxicity issue in the receiving water before conducting this

expensive monitoring at the outfalls. Furthermore, recent Department of Pesticide Regulations<sup>8</sup> has severely limited the use of pyrethroid based pesticides, thus calling into question the need for expensive toxicity monitoring, especially at outfalls. And finally, should a study be deemed necessary, the Regional Board should lead this study.

- Insufficient time is allotted to prepare Coordinated Integrated Monitoring Plans (CIMP). Since the monitoring for TMDLs should continue per the TMDL schedules, the Permittees should be allowed sufficient time to prepare the CIMPs. To prepare a CIMP the Permittees will need more than a Letter of Intent to proceed. **We recommend that the Draft Order be modified to allow 12 months to submit a Memorandum of Agreement to participate in a CIMP and 24 months to submit the complete CIMP.** The time required to award the monitoring contract is 3 months, at least 6 months are needed to obtain Los Angeles County Flood Control Encroachment Permits, thus at least 9 months is needed before commencing monitoring.

### ***Minimum Control Measures***

In order to further water quality improvements, the Permit needs to set clear goals, while allowing flexibility with the programs and BMPs implemented. This is accomplished through integrated watershed planning and monitoring. This strategy has been requested by the LA Permit Group as it will allow Permittees to look at the larger picture and develop programs and BMPs based on addressing multiple pollutants. In doing so, limited local resources can be concentrated on the highest priorities. The LA Permit Group has on numerous occasions expressed our support of a watershed based approach to stormwater management. It would appear from a read of Provision VI.C.1.a (page 45) that the Board also supports this approach. We believe the opportunity for a municipality to customize the MCMs to reflect the jurisdiction's water quality conditions is absolutely critical if municipalities are to develop and implement stormwater programs that will result in environmental improvement. **We, however, suggest that the Permit ultimately establish criteria that will be used to support any customization of MCMs.** The criteria should be comprehensive but flexible. We suggest some flexibility in the criteria because the management of pollutants in stormwater is a challenging task and that the science and technology to help guide customizing MCMs are still developing. Furthermore, the municipal stormwater performance standard to reduce pollutants to the maximum extent practicable is not well defined and will depend on a number of factors<sup>9</sup>. This constraint, as well as USEPA position<sup>10</sup> that the iterative process is the basis for good stormwater management, supports the need to provide flexibility in defining the criteria for customizing MCMs. **Also, for clarification, the terms of adaptive management approach and the iterative approach need to be defined as equivalent and that they can be used interchangeably.**

### ***Timeline for Implementation***

The Draft Order does not provide adequate and reasonable timelines for the start-up and implementation of the Minimum Control Measure requirements. For example, the Draft Order in provision VI.D.1.b.i requires the majority of MCMs to begin within 30 days, unless otherwise noted in the order. There are a number of new/enhanced provisions and it is fair to say that there will be a transition period between the time the Permit becomes effective and the time that the municipalities will have to modify their current stormwater management programs to be in compliance with the new Permit provisions. At the same time, consideration should be given to the time required to develop watershed based "customized" programs. The LA Permit

<sup>8</sup> [http://www.cdpr.ca.gov/docs/legbills/rulepkgs/11-004/text\\_final.pdf](http://www.cdpr.ca.gov/docs/legbills/rulepkgs/11-004/text_final.pdf).

<sup>9</sup> See E. Jennings 2/11/93 memorandum to Archie Mathews, State Water Resources Control Board.

<sup>10</sup> See Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 FR 43761 (Aug. 26, 1996).

Group requests that the Regional Board provide a revised timeline for implementation and phasing-in of the Minimum Control Measure requirements. **We request that the Permit allow a 12 month time schedule to transition from our current efforts to the new and enhanced MCMs requirements.**

#### **Shifting of State Responsibility to the MS4**

The Draft Order shifts much of the State responsibilities regarding the State's General s for Construction and Industrial Activities to the municipalities. These new responsibilities have significant financial responsibilities on the permittees (ex. plan reviews, inspections time, reporting, enforcement, etc.). This is especially true for the Statewide General Construction Activities Permit (GCASP) and Provision VI.D.7. A few examples of where the Draft Order either shifts the responsibility or actually exceeds the requirements of the GCASP are listed below:

- Maintaining a database that overlaps with the States' own SMARTS database. Asking Permittees to collect the same data adds unnecessary time and expense with no benefit to water quality;
- Requiring the quantification of soil loss is redundant with the GCASP and adds additional MS4 costs.
- Inspections will be increased by more than 200% and are redundant since the State should be responsible for implementation of its own permit particularly in light of the fact that the State collects a permit fee for implementation.

**Those elements that shift State responsibility should be eliminated and the MCMs should be coordinated with other state and federal requirements, with particular attention to GCASP and General Industrial Activities Permit requirements.**

#### **MCMs Should Reflect Effective Current Efforts**

The LA Permit Group understands that the new Permit must reflect current understanding of stormwater management and water quality issues. Where the current stormwater management effort is assessed to be inadequate, then additional efforts are warranted. However, when current efforts are assessed to be adequate for protecting water quality, then the MCMs should reflect current efforts. One significant area where the LA Permit Group believes that the current effort is protective of water quality is in the new development program. The City and County of Los Angeles as well as the City of Santa Monica have developed and adopted Low Impact Development ordinances and significant work, technical analysis, and public input have gone into the development of these ordinances. Each of these ordinances required tailoring of standards to address the unique characteristics of their city (ex. size, land uses, soils, groundwater, watershed(s), hydrology, etc.). **The Permit should reference the type of program and flexibility needed to accommodate the unique and vastly varying characteristics throughout the County.** Instead of providing detailed information in the text of the Permit, the LID provisions should outline general requirements of the program, and the details should be contained in a technical guidance manual. This point was reiterated by several speakers at the April 5, 2012 workshop, including BIA. Ultimately, it may be more constructive if the Regional Board created a template for the Permittees to use.

#### **New Development MCM**

Notwithstanding our comments above, the LA Permit Group has a number of concerns with the New Development provision of the MCMs. While the LA Permit Group has concerns and need for clarification with the other MCMs we find the New Development MCM the most challenging and unsupportable. The provision is difficult to follow and the BMP selection hierarchy is confusing and at times in conflict. We have provided specific comments on this provision but it suffice to say that the LA Permit Group believes this provision should be redrafted. We have significant concerns with the following parts of the New Development MCM:



- Storm design criteria
- Alternative compliance option offsite mitigation
- Treatment control performance benchmarks
- BMP tracking and inspection
- BMP specificity and guidance
- Hydromodification

#### *Storm Design Criteria*

The Draft Order in Provision D.6.c.i (page 70) requires the developer to retain the stormwater quality design volume as calculated by either the 0.75 inch storm or the 85<sup>th</sup> percentile 24 hour storm whichever is greater. We take exception to the requirement to select the largest calculated volume. In all Permits to date in California these two design criteria were judged to be equivalent. **We recommend that the Draft Order be modified to specify that the two criteria are equivalent.** In fact, the current stormwater 2001 Permit for Los Angeles County includes four design criteria to choose from for the stormwater volume. The additional effort to assess every project to choose between two equivalent design criteria makes little sense and adds cost to any project. We recommend that the developer be allowed to choose between the two criteria without the need to calculate the largest.

#### *Alternative Compliance Option - Offsite Mitigation*

The Draft Order goes into great detail discussing an alternative compliance option to full on- site retention of the design storm volume. The alternative option takes the form of an offsite mitigation project. As currently structured it is highly unlikely that anyone will opt for this alternative compliance option. Probably the biggest hurdle for developers to overcome if they are to pursue offsite mitigation is the requirements that they must treat the project site runoff to the levels identified in Table 11. This combined with the requirement that the offsite mitigation project must be equivalent in pollutant load reduction as the original project site equates to the developer removing essentially twice as much pollutant loads as he would had accomplished on the project site had the site been able to retain the load onsite originally. This is inherently unfair. **We would recommend that the developer be required to remove only the pollutant loads that would have been removed at the project site at the mitigation site and if the mitigation site cannot meet that load reduction then the developer can implement treatment controls at the project site for the remaining differential.** Such an approach is fair and will be more readily accepted by the development community than the current proposal.

#### *Treatment Control Performance Benchmarks*

The concept of establishing benchmarks for post construction BMPs was initially developed in the 2009 Ventura MS4 Permit. However, there is a significant different between the Permits. The Ventura County's NPDES MS4 Permit requires the project developer to determine the pollutant of concern(s) for the development project and use this pollutant as the basis for selecting a top performing BMP. In the case of the Draft Order, there is no determination of the pollutant of concern for the development project. Instead post construction BMPs must meet all the benchmarks established in Table 11. Unfortunately, no one traditional post construction BMP (non-infiltration BMPs) is capable of meeting all the benchmarks and thus the developer will not be able to select a BMP. **We recommend that provision VI.D.6.c.iv.(1)(a) (page 74) be modified so that the selection of post construction BMPs is consistent with the Ventura Permit and is based**

**on the development site's pollutant of concern(s) and the corresponding top performing BMP(s) that can meet the Table 11 benchmarks.**

#### *BMP Tracking and Inspection*

In the Draft Order provision VI.D.6.d the Permittees are being required to track and inspect post construction BMPs including LID measures. The provision does allow that such effort can be addressed by the project developer but even with this consideration the provision is onerous for city staff as this would still require significant staff time (ex. plan reviews, data entry, letter preparation and enforcement, etc.). This is especially true for LID measures which if planned and designed correctly will include a large number of measures (planter boxes, infiltration trenches, swales, etc.) on every site. Furthermore most of the LID measures will be infiltration type measures which are difficult to inspect and should be only inspected in wet weather when one can ascertain that the LID measures are operating correctly. This inspection concept when taken to the extreme will mean that municipalities will be inspecting LID measures all over the community and only during rain events. This is just flat unreasonable and cost prohibitive for the municipality. Furthermore, the cost for implementation (e.g. inspection, monitoring, enforcement, etc.) are not shown to be commensurate with any corresponding improvement in water quality. **We recommend that the tracking and inspection of post construction BMPs be limited to only the conventional BMPs (e.g. detention basins, wetlands, etc.); alternatively require the MS4 to spot check a limited number of LID measures to ascertain how well they are operating.**

#### *BMP Specificity*

The Draft Order in Attachment H provides detail specifications for biofiltration and bioretention BMPs. The LA Permit Group believes that such specificity, although well intended, is counterproductive. Such specificity is equivalent to a wastewater NPDES Permit specifying the grain size in the multimedia filtration unit. It is more appropriate to establish the performance standard for the BMP and to allow the MS4 to develop design specifications to meet the standard. **We recommend that Attachment H be removed and a provision be established that establishes a collaborative approach to promote a technical guidance manual that would include the design specifications for bioretention/biofiltration.**

#### *Hydromodification*

The LAPG would submit that it is premature to change the hydromodification criteria, specifically the interim criteria. In our current 2001 order, Permittees were required to develop numerical criteria for peak flow control, based on the results of the Peak Discharge Impact Study. **We believe it more constructive to keep with the previously developed hydromodification criteria and not revised it for the interim until the final criteria can be developed by the State.** A change now and then one later on just adds confusion to the development process and creates additional work for a limited or non-existent water quality improvement. The effort under the 2001 Permit should be sufficient until such time the final criteria are developed.

#### **Public Agency MCM**

The Draft Order identifies a number of requirements for public agency MCMs. Our detailed comments are attached, but there are two issues we want to highlight here. First is provision VI.D.8.h.vii (page 102) which specifies additional trash BMPs regardless of whether the area is subject to a trash TMDL. We take exception to this approach, as the MCM requires prioritization, cleaning and inspection of catch basins as well as street sweeping and other management control measures to address trash at public events. And then even if the

Municipality is controlling trash through these control measures, the Municipality must still install trash excluders (see page 102 regarding “additional trash management practices”). This makes little sense and **the LA Permit Group would submit that if the initial control measures are successful, then the “additional trash management practices” are unnecessary (as evident by the lack of a TMDL).**

The second issue pertains to provision VI.D.8.d (page 94) regarding retrofitting opportunities. Provision VI.D.8.d.i requires that the MS4 develop an inventory of retrofit opportunities within the public right of way but then in provision VI.D.8.d.ii, the Draft Order requires the Permittees screen existing area of development. Furthermore in provision VI.D.8.d.iii the MS4 must prioritize all existing areas of development. Reading these provisions in whole would seem to indicate that the MS4 must identify all potential retrofit sites (private or publically owned) and to prioritize the sites. This is a contentious issue and should be addressed carefully. Stormwater regulations (40 CFR 122.26.(d)(2)(iv)(4) requires consideration of retrofitting opportunities, but the consideration is limited to flood management projects (i.e. public right of way) and does not require consideration of private areas. **We recommend that for this Permit term that the retrofit provision (i.e. inventory, screening, and prioritization) be limited to public right of ways lands only.**

#### **ID/IC MCM**

The Draft Order identifies a number of provisions that are fundamental to an Illicit Connection/Illegal Discharge program. These provisions include

- III. Discharge Prohibition,
- VI.A.2 Standard Provisions – Legal Authority,
- VI.D. 9 IC/ID Elimination Program,
- Attachments E, Monitoring and Reporting and
- Attachment G Non-stormwater Action Levels.

When combined, the ID/IC program will require a significant effort and not always effective. We have provided specific comments on these provisions in the Exhibit to this letter but we would like to highlight two of the more significant issues. First, is the magnitude of the dry weather monitoring being required. The TMDLs monitoring programs have already identified, to a large extent, a comprehensive non-stormwater monitoring program. **As such, the TMDL monitoring program should be the basis for the “non-stormwater outfall based monitoring program” and both should be identified in an Integrated Watershed Monitoring Program.**

The second issue pertains to the non-stormwater action levels established in Attachment G. One of the goals of establishing non-stormwater action levels is to assist Permittees in identifying illicit connections and/or discharges at outfalls. Exceedances of action levels can help Permittees prioritize and focus resources on areas that are having a real impact on water quality. Unfortunately, as currently drafted, the non-stormwater action levels do not accomplish this goal. The action levels established in the Draft Order are derived from Basin Plan, CTR, or COP water quality objectives. The non-stormwater action levels do not facilitate the consideration of actual impacts (e.g., excess algal growth), have no nexus to receiving water conditions, and do not address NAL issues unrelated to illicit discharges (e.g., groundwater). The action levels and the associated monitoring specified in the Monitoring and Reporting Program would require Permittees to investigate and address issues on an outfall-by-outfall basis, even if the receiving water is in compliance with all water quality standards. This will not assist Permittees in prioritizing resources on outfalls that are clearly having an impact on water quality. **We recommend that the Permit allow the Watershed Management Programs to guide the customization of the NALs based on the highest water quality priorities in each**

watershed and to establish them at a level that would provide better assurance that illicit discharges can actually be found and not have every outfall become a high priority outfall. If NALs are not established through the Watershed Management Programs, or Permittees should be required to use the default NALs and approach identified in Attachment G.

### ***Watershed Management Programs***

Overall, the LA Permit Group supports the Regional Board's proposed approach to address high priority water quality issues through the development and implementation of a Watershed Management Program. However, one of our biggest concerns continues not be addressed, is the Draft Order proposed timeline for developing the watershed management program(s). The Draft Order allows the municipalities only one year to develop a comprehensive watershed management program. This is insufficient time to organize the watershed cities and other agencies, develop cooperative agreements, initiate the studies, calibrate and run the models based on relevant data, draft the plans, and obtain necessary approvals from political bodies. As a comparison, the City of Torrance required two years to prepare a comprehensive water quality plan that addressed a suite of TMDLs, similar to what is being considered in the watershed management program. **We believe that it will require at least 24 months to develop a draft plan that is comprehensive, analytically supported, and implementable. Alternatively we would suggest a phased approach where some initial efforts (e.g. MOUs, retrofit inventory) could be completed and submitted within 12 months but allow 24 month timeline for the more complicated or resource intensive efforts.**

We also offer the following comments regarding the Watershed Management Program (our line item by line item review and comments are attached):

- The Draft Order seems to be silent on the critical issue of sources of pollutants outside the authority of MS4 Permittees (e. g. aerial deposition, upstream contributions, discharges allowed by another NPDES permit, etc.). **We request that Permittees be allowed to demonstrate that some sources are outside the Permittee's control and not responsible for managing or abating those sources.**
- **The Permit needs to clearly state that watershed management programs and the reasonable assurance analysis can be used for TMDL compliance purposes.**
- **The Permit should clarify that the adaptive management process is equivalent to the iterative process described in the Receiving Water Limitation provision and provide the legal justification for the adaptive management process.**
- More careful consideration should be given to the frequency and extent of the reporting and adaptive management assessments. The current Draft Order results in a significant annual effort and the LA Permit Group members question the value of such an effort. Current reporting appears to overwhelm Regional Board staff resources and has provided limited feedback to the municipalities. We believe that the reporting can be streamlined and that the jurisdictional and watershed reporting should be combined. **Furthermore, we recommend that the adaptive management process be applied every two years instead of the every year frequency noted in the Draft Order.**
- It is unclear how the current implementation of our stormwater program and TMDL compliance will be handled during the interim period before development of the watershed management program. For those entities that choose this path, **the LA Permit Group requests that current, significant efforts in our existing programs and implementation plans be allowed to continue while we evaluate new MCMs as part of the watershed management program.**

- **Consideration of the technical and financial feasibility of complying with water quality standards should be included in the watershed management program.**
- **The timing of revising the Watershed Management Programs is in conflict and confusing. There should only be one revision to the Watershed Management Program, and only when adaptive management/iterative process demonstrates that the modification is warranted.**
- **The adaptive management/iterative approach and timing should be consistent between individual Permittees (“jurisdictional watershed management program”) and the watershed management program.**

### ***Cost/Economic Implications***

Regarding fiscal resources, the LA Permit Group would like to reemphasize the limited parameters in which municipalities operate. The Draft Order (page 40) requires municipalities to exercise its authority to secure fiscal resources necessary to meet all of the requirements of the Permit. We have reservations as to whether this provision is legal given that it appears to violate the State Constitution, Article XVI, Section 18. That being said, Permittees have a limited amount of funds that are under local control. Any additional funds needed to raise money for stormwater programs would need to come from increased/new stormwater fees and grants. **New fees for stormwater are regulated under the State’s Prop 218 regulations, and require a public vote. Therefore, raising new fees is an item that is not under direct control of the municipalities – the Permit language should reflect this.** Furthermore, in addition to clean water, local resources are also directed to a number of health, safety and quality of life factors. Thus, all these factors need to be developed in balance with each other. This requires a strategic process and that will take time to get right. We request that the Regional Board develop the Permit conditions based on a reasonable timeframe in balance with the existing economy and other health, safety, regulatory and quality of life factors that local agencies are responsible for.

The LA Permit Group also wants to address the issue of whether or not these Permit requirements constitute an unfunded mandate. The Fact Sheet makes a unilateral statement that the Regional Board has determined that the Permit requirements do not exceed Federal requirements and therefore are not unfunded mandates. No back up information is provided to substantiate this claim. Our request is for the Regional Board to substantiate this statement for each section of the Permit. We also want to point out that the court decisions on unfunded mandates claims are still on appeal, and it is premature to conclude on the merits of the appeal.

As previously discussed at workshops, and in comment letters, and requested by many Board Members, the economic implications of the many proposed Permit requirements are of critical importance. It is also worth noting that the cost for complying with both the stormwater regulations and TMDL requirements should be carefully considered. This point is highlighted in the March 20, 2012 memo<sup>11</sup> from OMB to heads of executive departments and agencies (including USEPA) which clarified Presidential Executive Order 13563. This Order requires the agencies to take into account among other things, and to the extent practicable, the costs of cumulative regulations. This is particularly relevant for this Draft Order where we have the convergence of TMDLs and stormwater regulations. Although we have not had sufficient time to assess the cost for the new stormwater requirements, the County of Los Angeles has completed an analysis (using the Los Angeles County BMP Decision Support System model) to assess the effort required to implement low impact development retrofits throughout Los Angeles County to address all TMDLs and 303(d) listings. This model roughly estimated that, to meet these water quality standards, the area would have to spend between \$17 billion and

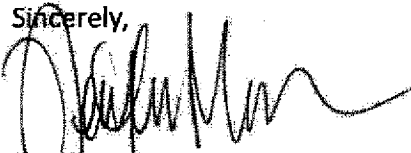
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<sup>11</sup> Cass R. Sunstein, Executive Office of the President, OMB memorandum for the Heads of Executive Departments and Agencies regarding Cumulative Effects of Regulations, March 20, 2012.

\$42 billion. Los Angeles River Watershed Bacteria TMDL could cost up to \$5.4 billion for full, inclusive, implementation costs for that watershed alone for only one pollutant. Even if the Water Quality Funding Initiative passes (and it is far from guaranteed to pass), it would take a full 20 years dedicating the entire fund to the Los Angeles River Bacteria TMDL to pay for these requirements. It would require over 60 years paying for the larger estimate. In the fact sheet, Regional Board staff stated that the TMDL costs were considered during the TMDL adoption process. However, given Executive Order 13563, we would submit that the Board should consider all costs associated with the management of stormwater. With these types of economic implications, **it is critical that this Regional Board and their staff more carefully evaluate comments and provide additional, extended comment periods for these requirements.**

In closing, we thank you for the opportunity to comment on the Draft Order and we look forward to meeting with you to discuss our comments and to explore alternative approaches. However, we must reiterate the need for more time to review and analyze this Draft Order. In spite of the Regional Board staff statement<sup>12</sup> that there has been a myriad of opportunities to present our concerns and comments, we believe otherwise. The LAPG would submit that we have not had an opportunity to voice our concerns to the Regional Board members themselves as we have been limited (in some cases prevented) in responding to questions posed by the Board members during different workshops. Consequently, **we respectfully request that that the Board provide another complete second draft Tentative Order with an additional review period to allow Permittees to have at least a total of 180 days to discuss and review the full document.** We believe it important to review the entire draft Permit to better understand the relationship among the various provisions; this is especially true for the monitoring provision and its relationship to the watershed management program. We also believe that the Regional Board staff will be hard pressed to consider and respond to all the comments that will be submitted on the Draft Order. Thus, it is advantageous to all parties that more time is provided to craft a permit that is implementable and protective of water quality. We request the issues presented in our letter are resolved in a revised Permit draft. . Please feel free to contact me at (626) 932-5577 if you have any questions regarding our comments.

Sincerely,



Heather M. Maloney, Chair  
LA Permit Group

Enc. Exhibits XX-XX

cc: LA Permit Group

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<sup>12</sup> S. Unger's 7/13/12 letter to H. Maloney and the LA Permit Group.