



CITY OF BEVERLY HILLS
DEPARTMENT OF PUBLIC WORKS & TRANSPORTATION

MEMORANDUM

TO: Public Works Commission

FROM: Christian Di Renzo, Sr. Management Analyst 

DATE: September 11, 2012

SUBJECT: Background on the NPDES Permit and LA County Funding Initiative

ATTACHMENTS:

- A) City comment letter on tentative NPDES permit
- B) Ballona Creek watershed map
- C) LA County funding initiative brochure

Executive Summary

On October 5-6, 2012, the Los Angeles Regional Water Quality Control Board (Regional Board) will consider reissuing the Los Angeles County Municipal Separate Storm Sewer System permit (hereinafter, the LA County MS4 permit). The LA County MS4 permit is a federal National Pollutant Discharge Elimination System (NPDES) permit that regulates municipal separate storm sewer system (MS4)¹ discharges of stormwater and urban runoff. As with all NPDES permits, the LA County MS4 permit must comply with all applicable provisions of the federal Clean Water Act and implementing regulations. Discharges from the MS4 reach receiving waters in Los Angeles County including, but not limited to, Santa Monica Bay, Los Angeles and Long Beach Harbors, and the Los Angeles and San Gabriel Rivers and their tributaries.

The LA County MS4 permit was last reissued by the Regional Board in 2001, and has been amended three times in the past five years to incorporate provisions to implement total maximum daily loads (TMDLs) for bacteria and trash. However, since 2001, 33 TMDLs have been developed by either the Regional Board or US EPA that will be implemented through an updated MS4 permit.

¹ According to 40 CFR section 122.26(b)(8), "[a] municipal separate storm sewer system (MS4) means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2."

This memorandum is structured in five sections. The first three sections provide general background. Section I provides background on the regulatory framework for stormwater and urban runoff management. Section II provides a description of the Los Angeles County MS4. Section III provides an overview of the current LA County MS4 permit. Section V provides a description of key issues raised by the LA Permit Group stakeholders regarding the reissuance of the LA County MS4 Permit. Lastly, Section VI briefly covers the LA County stormwater funding initiative.

I. REGULATORY FRAMEWORK FOR STORMWATER AND URBAN RUNOFF MANAGEMENT

The regulatory framework for NPDES permits is provided by the federal Clean Water Act and its implementing regulations contained in Title 40 of the Code of Federal Regulations (40 CFR). Under the NPDES program, all facilities that discharge pollutants from any point source² into waters of the United States are required to obtain an NPDES permit. The stated goals of the Clean Water Act are to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

In 1987, Congress amended the Clean Water Act to bring discharges from MS4s under the NPDES program. USEPA has identified stormwater and urban runoff as one of the most significant sources of water pollution in the country and a serious threat to aquatic life and habitat as well as to human health. Stormwater is precipitation that flows over streets, parking lots, and other developed parcels, and through commercial, industrial and residential sites, and is then collected in MS4s and conveyed to surface waters, which are waters of the United States and State of California. When stormwater flows over urban environs, it collects suspended metals, sediments, nutrients (nitrogen and phosphorus), trash and debris, petroleum products, untreated sewage, pesticides, and other toxic pollutants, which are then discharged to creeks, rivers, estuaries and the Pacific Ocean. In addition to stormwater, the MS4 collects non-stormwater runoff from urban activities such as street washing, potable water system testing, and discharges from groundwater treatment programs. These non-stormwater discharges can also contain pollutants that impair the beneficial uses (e.g. recreation, habitat protection, etc.) of the region's water, including the recreational uses of the Pacific Ocean.

Section 402(p) of the Clean Water Act states that permits for discharges from MS4s: (1) may be issued on a system-wide or jurisdiction-wide basis; (2) shall include a requirement to effectively prohibit non-stormwater discharges into the MS4; and (3) shall require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Regional Board determines appropriate for the control of such pollutants. Congress established this flexible MEP standard, and gave permitting authorities discretion to include other provisions as necessary, so that administrative bodies would have the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution, especially as the field of stormwater management is constantly changing as new information and technologies become available.

² "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharged and return from irrigated agriculture." (33 U.S.C. § 1362(14).)

MS4s are required to develop and implement a stormwater management program (SWMP). The required elements of a SWMP are described in 40 CFR section 122.26(d)(2)(iv). Historically, the SWMP has been the “bread and butter” of stormwater management programs. Permit provisions to implement a SWMP have been grouped into the following six categories of so-called “minimum control measures”:

- (1) a program to monitor and control pollutants in stormwater discharges from commercial areas and industrial facilities;
- (2) a program to maintain structural and non-structural best management practices (BMPs) to reduce pollutants in stormwater runoff from construction sites;
- (3) a program to detect and remove illicit discharges and improper disposal into the MS4;
- (4) public agency activities to reduce the impact of MS4 discharges to receiving waters, including impacts from residential areas and flood management projects;
- (5) planning procedures to reduce pollutants from areas of new development and significant redevelopment; and
- (6) a public information and participation program (PIPP) related to the above five areas.

Implementing these minimum control measures typically requires the application of one or more structural or non-structural best management practices (BMPs). Pursuant to California Water Code section 13360, the Regional Board cannot specify the design, location, type of construction, or particular manner in which a permittee complies with its permit. As long as a permittee complies with the standard set (prohibition for non-stormwater discharges and MEP and other provisions as necessary for stormwater), then a permittee may comply in any lawful manner. On March 8, 2000, the development planning program requirements, including the *Standard Urban Stormwater Mitigation Plan* requirements were approved by the Regional Board as part of the Municipal Separate Storm Sewer System program to address stormwater pollution from new construction and redevelopment. The *Standard Urban Stormwater Mitigation Plan (SUSMP)* contains a list of minimum BMPs that must be employed to infiltrate or treat stormwater runoff, control peak flow discharge, and reduce the post-project discharge of pollutants from stormwater conveyance systems. The *Standard Urban Stormwater Mitigation Plan (SWPPP)* defines, based upon land use type, the types of practices that must be included and issues that must be addressed as appropriate to the development type and size.

Over the last decade, the Regional Board and US EPA have developed total maximum daily loads (TMDLs)³ to remedy water quality impairments in various waterbodies within Los Angeles County. In most cases, these TMDLs identify MS4 discharges as a source of pollutants to these waterbodies and, as required, set waste load allocations (WLAs) for MS4 discharges to reduce the amount of pollutants discharged to receiving waters. As part of the update of the LA County MS4 Permit, the Regional Board developed numeric limitations and other provisions to implement the TMDL WLAs assigned to permittees regulated by the LA County MS4 Permit. The Regional Board has some flexibility when establishing permit provisions that are designed to determine compliance with the numeric limitations derived from the TMDL WLAs. Broadly, this means that the Regional Board may either require a demonstration that permittees comply with the numeric

³ When designated beneficial uses of a particular receiving water body are being compromised by water quality, Section 303(d) of the CWA requires the EPA to identify and list that water body as “impaired.” Once a water body has been deemed impaired, a Total Maximum Daily Load (TMDL) must be developed for the impairing pollutant(s). A TMDL is an estimate of the total load of pollutants from point, non-point, and natural sources that a water body may receive without exceeding applicable water quality standards (plus a “margin of safety”). Once established, the TMDL allocates the loads among current and future pollutant sources to the water body as Waste Load Allocations.

limitations through monitoring (such as outfall and/or receiving water monitoring) or, alternatively, allow permittees to develop and implement control measures to achieve the numeric limitations (referred to as an “action-based” compliance demonstration) where there is an adequate demonstration that the selected control measures and schedule will achieve the numeric limitations. As described below, the manner in which the TMDLs will be incorporated in the forthcoming MS4 permit is one of the key comments that underlie much of the controversy in the development of the reissued MS4 permit.

Lastly, when an NPDES permit is renewed, reissued or modified, it generally must be at least as stringent as the prior permit (referred to as *anti-backsliding*). This is consistent with Congress’ intent that state management programs evolve based on changing conditions from program development and implementation and corresponding improvements in water quality.

II. THE LOS ANGELES COUNTY MS4

The Los Angeles County MS4, like many MS4s in the nation, is based on regional floodwater management systems that use both natural and altered waterbodies to achieve flood management goals. The LA County MS4 is a large interconnected system, controlled in large part by the Los Angeles County Flood Control District (County FCD), among others, and used by multiple cities along with Los Angeles County. These systems convey stormwater and nonstormwater urban runoff across municipal boundaries where it is commingled within the MS4 and then discharged to a receiving waterbody.

The Los Angeles County Flood Control Act was passed in 1915. The original storm drain system was developed in the 1930s by the U.S. Army Corps of Engineers (ACOE). As Los Angeles began to grow rapidly in the 1920s and 1930s, stormwater that was once absorbed by acres of undeveloped land began to run off the newly paved and developed areas, leading to an increased amount of water flowing into the region’s rivers and local creeks. These waterways could not contain the increased amount of water and the region experienced extensive flooding. In response, the ACOE lined the Los Angeles River and Ballona Creek with concrete and initiated the development of an underground urban drainage system. As Los Angeles continued to grow, the complex drainage system we now know as the Los Angeles County MS4 developed.

Today, a total of approximately 120,000 catch basins, over 2,800 miles of underground pipes, and 500 miles of open channels comprise the Los Angeles County MS4. In total, runoff from approximately 1,060 square miles of developed land reach Santa Monica and San Pedro Bays through approximately 60 storm drain outfalls. Approximately 100 million gallons of urban runoff flow through Los Angeles County’s MS4 on an average dry day. When it rains, the amount of water flowing through the channels can increase to 10 billion gallons, reaching speeds of 35 mph and depths of 25 feet. The chemical and hydrological variability of stormwater and urban runoff within the MS4 creates both technical and regulatory complexity. The treatment technologies for these discharges are not as well developed as those for sewage and industrial waste discharges and cannot be easily centralized. Issues of shared responsibility for compliance with TMDL wasteload allocations and receiving water limitations, and equity and fairness between multiple permittees are far more complex in an MS4 permit that regulates commingled discharges compared to an individual NPDES permit.

III. CURRENT LOS ANGELES COUNTY MS4 PERMIT

The permit regulates commingled discharges of stormwater and urban runoff from one of the nation’s largest MS4s, covering the jurisdictional areas of 86 permittees. Permittees regulated by

the LA County MS4 Permit include the County FCD as owner and operator of the MS4 infrastructure, Los Angeles County, and 84 incorporated cities⁴ within Los Angeles County.

The current LA County MS4 Permit was last reissued by the Regional Board in 2001. The permit expired in 2006, but has been administratively extended pursuant to federal regulations. Since 2006, the current permit has been reopened and amended three times to incorporate provisions to implement three TMDLs. It was further amended in 2010 and 2011 pursuant to a peremptory writ of mandate.

The current LA County MS4 Permit is organized under the following seven parts and includes several attachments. The description below summarizes key permit parts and attachments:

Part 1 – Discharge Prohibitions

As required by section 402(p) of the Clean Water Act, Part 1 requires permittees to “effectively prohibit non-storm water discharges into the MS4 and watercourses, except where such discharges” are covered by a separate MS4 permit or fall within one of thirteen categories of flows that are conditionally exempted from the discharge prohibition. These exempted flows fall under the general categories of natural flows, firefighting flows, and flows incidental to urban activities (i.e. landscape irrigation, sidewalk rinsing). These non-stormwater flows may be exempted so long as (i) they are not a source of pollutants, (ii) their effective prohibition is not necessary to comply with TMDL provisions, and (iii) they do not violate anti-degradation policies. Part 1 also authorizes the Executive Officer to impose conditions on these types of discharges and to add or remove categories of conditionally exempted non-stormwater discharges based on their potential to contribute pollutants to receiving waters.

Part 2 – Receiving Water Limitations

As required by 40 CFR section 122.44(d)(1), Part 2 prohibits discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives. In addition, discharges from the MS4 of stormwater or non-stormwater, for which a Permittee is responsible, may not cause or contribute to a condition of nuisance. Part 2.3 states that permittees shall comply with these prohibitions “through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of [the LA County MS4 Permit].” Part 2.3 establishes an “iterative process” whereby certain actions are required when exceedances of water quality standards or objectives occur. This iterative process includes submitting a Receiving Water Limitations Compliance Report; revising the SWMP and its components to include modified BMPs, an implementation schedule and additional monitoring to address the exceedances; and implementing the revised SWMP.

Part 2 also includes provisions relating to the Marina del Rey Harbor Mothers’ Beach and Back Basins Bacteria TMDL (summer dry weather provisions only). During summer dry weather, Part 2.6 prohibits discharges of bacteria from MS4s into Marina del Rey Harbor Basins D, E, or F, including Mothers’ Beach that cause or contribute to exceedance of the applicable bacteria objectives.

Part 2 had also included similar TMDL provisions relating to the Santa Monica Bay summer dry weather bacteria TMDL. However, as a result of a legal challenge by Los Angeles County and the County FCD, the Regional Board was required to void and set aside those provisions, which the Regional Board did in 2011.

⁴ With the exception of the City of Long Beach, who has had a separate MS4 permit since 1991.

Part 3 – Stormwater Quality Management Program (SQMP) Implementation

Under Part 3, each permittee shall, at a minimum, implement the SQMP, which is an enforceable element of the LA County MS4 Permit. The SQMP, at a minimum, shall also comply with the applicable stormwater program requirements of 40 CFR 122.26(d)(2), which includes the minimum control measures outlined above. The SQMP and its components shall be implemented so as to reduce the discharges of pollutants in stormwater to the MEP and effectively prohibit non-stormwater discharges to the MS4. Each permittee shall also implement additional controls, where necessary, to reduce the discharge of pollutants from the MS4. Permittees shall revise the SQMP at the direction of the Regional Board Executive Officer to comply with regional, watershed specific requirements, and/or TMDL wasteload allocations.

Part 3 also sets forth specific responsibilities of the Principal Permittee, which under the 2001 permit is the County FCD, and co-permittees. In addition, Part 3 sets forth requirements for Watershed Management Committees (WMCs) which, among other tasks, prioritize pollution control efforts and evaluate the effectiveness of and recommend changes to the SQMP and its components. Each Permittee must also have the necessary legal authority to prohibit nonstormwater discharges to the MS4, as well as possess adequate legal authority to develop and enforce stormwater and non-stormwater ordinances for its jurisdiction.

Part 4 – Special Provisions

Part 4 sets forth provisions for public information and participation, industrial/commercial facilities control program, development planning, development construction, public agency activities, and illicit connections and illicit discharges elimination. These programs are termed “minimum control measures” and have been in place since the inception of the stormwater program.

Part 5 – Definitions

Part 5 includes definitions for terms used within the LA County MS4 Permit.

Part 6 – Standard Provisions

Part 6 includes standard provisions relating to implementation of the programs required by the permit. Such provisions include the duty to comply, the duty to mitigate, inspection and entry requirements, proper operation and maintenance requirements, and the duty to provide information. Most of these provisions are required by 40 CFR section 122.41 and apply to all NPDES permits.

Part 7 – TMDL Provisions

In 2009, the permit was amended to include provisions that are consistent with the assumptions and requirements of wasteload allocations from the Los Angeles River Trash TMDL. Appendix 7-1 identifies the permittees subject to the Los Angeles River Trash TMDL and sets forth the interim and final numeric effluent limitations for trash that the permittees must comply with. Part 7 also sets forth how permittees can demonstrate compliance with the numeric effluent limitations. Permittees have the option to employ three general compliance strategies to achieve the numeric effluent limitations. Depending on the strategy selected, the Permittee may demonstrate compliance either by documenting the percentage of its area addressed by full capture systems (“action-based” demonstration) or by calculating its annual trash discharge to the MS4 and comparing that to its effluent limitation.

Attachment U – Monitoring and Reporting Program

The LA County MS4 Permit has both self-monitoring and public reporting requirements, which include: (1) monitoring of “mass emissions” at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies. The purpose of mass emissions monitoring is to: (1) estimate the mass emissions from the MS4; (2) assess trends in the mass emissions over time; and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards or objectives by comparing results to the applicable standards and objectives in the Basin Plan. The permit establishes that the Principal Permittee shall monitor the mass emissions stations. The permit requires that mass emission sampling is conducted five times per year for the Watershed Rivers.

IV. KEY ISSUES RAISED BY THE LA PERMIT GROUP⁵

The remainder of this memorandum summarizes the key issues that stakeholders have raised during the current effort to develop a draft LA County MS4 Permit for the Regional Board’s consideration. The issues identified below have been raised during staff level meetings and workshops, as well as the Regional Board workshop held on November 10, 2011.

Permit Structure

The current 2001 Permit is a single permit whereby all 86 permittees are assigned uniform requirements with additional requirements for the Principal Permittee.

One of the fundamental issues for the forthcoming permit was a reconsideration of the basic permit structure. The structure of an updated MS4 permit and the relationship among the permittees has been an issue raised by multiple permittees for several years. In 2006, the Cities of Downey and Signal Hill each submitted an individual Report of Waste Discharge (ROWD), which serves as an application for an individual MS4 permit. Also in 2006, five cities in the upper San Gabriel River watershed submitted a ROWD for a small group MS4 permit. In 2010, the County FCD submitted a ROWD also requesting an individual MS4 permit. The County FCD’s ROWD asserted that there is a fundamental difference in their activities relative to the other municipalities and the unincorporated areas of the County of Los Angeles, in that the County FCD does not own or control land areas where pollutants originate. The County FCD also requested that if an individual MS4 permit was not issued to them, that it no longer be designated as the Principal Permittee and that it is relieved of Principal Permittee responsibilities. Ultimately Regional Board staff evaluated these ROWDs and found them to be inadequate.

The federal Clean Water Act (CWA) section 402(p) and implementing regulations at 40 CFR section 122.26(a)(1)(v) allows the permitting authority to issue permits for MS4 discharges on a system-wide or jurisdiction-wide basis taking into consideration a variety of factors. Such factors include the location of the discharge with respect to waters of the United States, the size of the discharge, the quantity and nature of the pollutants discharged to waters of the United States, and other relevant factors. Federal regulations at 40 CFR section 122.26(a)(3)(ii) identify a variety of possible permitting structures, including one system-wide permit covering all MS4 discharges or distinct permits for appropriate categories of MS4 discharges including, but not

⁵ The LA Permit Group is a consortium of approximately 62 municipalities in Los Angeles County working collaboratively by sharing costs and expertise in negotiating development of the Los Angeles County MS4 NPDES permit. The City of Beverly Hills is one of its members.

limited to, all discharges owned or operated by the same municipality, located within the same jurisdiction, all discharges within a system that discharge to the same watershed, discharges within a MS4 system that are similar in nature, or for individual discharges from MS4s.

At the May 25, 2011 kick-off meeting, Regional Board staff requested input from the attendees on various permit structures. The permittees in attendance brought forth several key considerations, such as:

- The passage of Assembly Bill 2554 in 2010, which amended the Los Angeles County Flood Control Act. This statute allows the County FCD to assess a parcel tax for stormwater and clean water programs. Funding is subject to voter approval in accordance with Proposition 218. Fifty percent of funding is allocated to nine “watershed authority groups” to implement collaborative water quality improvement plans; and
- The Regional Board and US EPA have developed 33 TMDLs that need to be incorporated into the LA County MS4 permit, and permittees have set up jurisdictional groups on a watershed or subwatershed basis for TMDL implementation.

In addition, a shared comment from many stakeholders is that they would like the LA County MS4 permit to provide flexibility to allow them to pool resources to implement stormwater BMPs and address TMDL requirements on a watershed scale in the reissued MS4 permit. Regional Board staff was motivated to set up a MS4 permit structure that would allow governance and compliance either through a watershed based group, or individually.

The issue of permit structure was a key subject for the Regional Board workshop on November 10, 2011. At that workshop, Regional Board staff recommended a single permit with some sections devoted to universal requirements for all permittees and others devoted to requirements specific to each major Watershed Management Area (WMA), which would include TMDL implementation provisions. Staff explained that a single permit would ensure consistency and equitability in regulatory requirements within the county, while watershed-based sections within the single permit would provide flexibility to tailor permit provisions to address distinct watershed characteristics and water quality issues. Additionally, an internal watershed-based structure comports with the Regional Board’s watershed-based TMDL requirements and the County FCD’s funding initiative. Watershed-based sections will help promote watershed-wide solutions to address water quality problems, which in many cases are the most efficient and cost-effective means to address stormwater and urban runoff pollution.

Staff also explained that it did not plan to recommend multiple permits or individual permits for Signal Hill, Downey, the five upper San Gabriel River cities, or the County FCD. The information presented in the ROWDs did not reflect evolved program elements that have emerged over the past decade. In response to the request from the County FCD to be relieved of its responsibilities as Principal Permittee, staff agreed with this request. Staff explained that it did not intend to recommend any permittee as Principal Permittee in the updated permit and staff would continue to evaluate appropriate requirements for the County FCD in the permit.

Incorporation of TMDLs

The LA Permit Group opposes the incorporation of final WLAs solely as numeric effluent limitations in the proposed Permit language. To date the Regional Board and the EPA have adopted 33 TMDLs for the region’s water bodies. These include Metals and Bacteria TMDLs for the Los Angeles River, which are proving difficult and costly to understand and to implement. Understanding the sources and impacts of stormwater pollutants is scientifically challenging,

since many sources are diffuse in the urban environment and, moreover, reasonably affordable solutions are not currently available to cities when they attempt to meet numeric requirements imposed by the TMDLs, as strict, never-to-be-exceeded, numeric limits. Under the current permit jurisdictions are required to reduce pollutants to the maximum extent practicable, which afforded some flexibility to implement and adjust pollution control measures to address exceedances.

The League of California Cities has long established policies opposed to adding numeric limits to municipal stormwater permits. These policies cite the variable nature of stormwater, as well as both the difficulty and prohibitive costs associated in controlling runoff. TMDL implementation is daunting and costly. The Regional Water Board has estimated the cost for local government compliance with the Trash TMDL will be hundreds of millions of dollars. It has further estimated the compliance costs for the Los Angeles River Metals TMDL to be approximately \$1.4 billion.

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 Waste Load Allocations in NPDES Permits⁶. 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 Waste Load allocations 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.

While it is commonly accepted that TMDLs are not self-implementing, EPA's policy does not require that TMDLs be implemented by placing them into the municipal NPDES permits. While this is the preference of EPA staff in region IX, and may also be the goal of environmental attorneys, the Regional Water Board has discretion in how it chooses to implement the TMDL program. TMDL can be developed and implemented through a variety of procedures, including the third-party development process established through memoranda of agreements (MOAs). Since the Regional Water Board and the EPA have already entered into a MOA with the City of Los Angeles for the Bacteria TMDL, the precedent already exists.

The Trash TMDL could be incorporated into a municipal NPDES permit by referencing the need to utilize MEP-compliant BMPs to strive to reach the Waste Load Allocation. More specific implementation measures could, if needed, be developed through a MOA between the Regional Water Board and the affected cities that would address the particular means of implementing the TMDL, i.e. it would identify the particular MEP-compliant BMPs that would be utilized, over a negotiated implementation schedule, to achieve deemed compliance with the TMDL.

Non-Stormwater Discharge Prohibition

As noted above, Part 1 of the 2001 Permit contains a requirement for permittees to effectively prohibit discharges of non-stormwater into the MS4 and to watercourses, except where such discharges are covered by a separate MS4 permit or fall within one of thirteen categories of flows that are conditionally exempted from the discharge prohibition.

⁶U.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).

Some permittees expressed a concern that some of the flows that are exempted from the nonstorm water prohibition may contain pollutants that can cause violations of other provisions of the permit such as receiving water limitations. As noted above, the 2001 Permit conditionally exempts certain non-stormwater flows so long as they are not a source of pollutants. However, the effect of individual and collective exempted discharges into the MS4 on the quality of nonstormwater discharged from the MS4 has not been well characterized. Historically, the control measures required to achieve this effective prohibition have been those included in the illicit discharges/illicit connections elimination (IC/IDE) program of the SWMP. However, recent inspections of Permittees' IC/IDE program have indicated that while Permittees have conducted screening of their MS4 as required by the permit, non-stormwater discharges to the MS4 and watercourses continue, often resulting in exceedances of water quality standards.

Receiving Water Limitations (RWLs)

As noted above, Part 2 of the 2001 Permit contains a requirement that prohibits discharges from the MS4 that cause or contribute to violations of Water Quality Objectives or Standards. This section of the 2001 Permit also contains provisions that establish an "iterative process" whereby certain actions are required when exceedances of Water Quality Objectives or Standards occur. This iterative process includes submitting a Receiving Water Limitations Compliance Report; revising the SWMP and its components to include modified BMPs, an implementation schedule and additional monitoring to address the exceedances; and implementing the revised SWMP.

Many permittees have expressed concern regarding compliance with receiving water limitations, because they claim a lack of clarity as to whether compliance with the iterative process in Part 2.3 deems them in compliance with the discharge prohibitions in Parts 2.1 and 2.2. Many Permittees believe that if they fully comply with the iterative process in response to exceedances of Water Quality Objectives or Standards, then those Permittees should not be in violation, and thus not be subject to enforcement, of the discharge prohibitions in the Receiving Water Limitations section of the permit.

Members of the LA Permit Group share 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.

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.*¹ (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. In light of the Ninth 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 noncompliance 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 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.

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, in essence municipalities are immediately vulnerable to third party lawsuits in addition to enforcement action by the Regional Board. Apropos, 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. It is feared 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.

Cost/Economic Implications

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. Certainly one could contend whether this provision is legal given that it appears to violate the State Constitution, Article XVI, Section 18. 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.

The LA Permit Group has tried to have the Regional Board address the issue of whether or not the Permit requirements constitute an unfunded mandate. The Draft Order 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 however.

V. LA County Funding Initiative

In 2008, the County FCD began pursuing the establishment of a new funding source that would finance projects and activities designed to improve water quality. In 2010, the Governor approved Assembly Bill (AB) 2554 (Brownley), which amended the Los Angeles County Flood Control Act, authorizing the District to impose a parcel fee, subject to a public vote, to improve water quality and reduce stormwater and urban runoff pollution. AB 2554 provides the foundation for the proposed water quality fee (Fee) and requires the adoption of an implementation Ordinance.

On July 3, 2012, the Los Angeles County Board of Supervisors voted to move forward with the Water Quality Funding Initiative which would place, on average, a \$54 per parcel tax on approximately 2.1 million LA County parcels to raise funds to address polluted stormwater. Voting would take place in a 45-day mail-in ballot election taking place next March and ending May 7, 2012. Countywide the proposal would raise as much as \$273 million per year. As required by AB 2554, the District would apportion revenues collected from each parcel within the Fee service area as follows:

- 40% would be allocated to the cities and County unincorporated areas (Municipalities) in proportion to the Fees collected from within the respective municipalities. Municipalities will be required to prepare and provide to the public informational materials on the municipality's actual and budgeted use of Fee revenue.
- 50% would be allocated to nine Watershed Authority Groups (WAGs), in proportion to the Fees collected from within the respective watershed area of each WAG.
- 10% would be allocated to the District.

The annual parcel tax, as proposed, would vary from \$8 to \$83 per year - based on property size and impervious surface area. Single family parcels would account for 75 percent of the properties. Commercial and industrial parcels, which typically have more impervious area, would pay more. A public hearing would occur on November 27, 2012. Unless a majority of all property owners submit protests, the Board would vote to proceed with an election. Passage would require a majority of *returned* ballots.

A review of the Engineer's Report indicates the Ballona Creek watershed would raise \$28,317,660 million dollars per year to be disbursed accordingly: \$14,158,830 for watersheds; \$11,327,064 for cities; \$2,831,766 for administration. The City of Beverly Hills makes up 4.4% of the Ballona Creek Watershed which corresponds to \$622,988 of its annual watershed revenue share and \$498,390 of its direct allocation.

Recommendation

This item is presented for informational purposes only and requires no Commission action.



July 20, 2012

Mr. Ivar Ridgeway
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, California 90013
LAMS42012@waterboards.ca.gov
rpurdy@waterboards.ca.gov
iridgeway@waterboards.ca.gov

Dear Mr. Ridgeway:

The City of Beverly Hills ("City") submits the following comments to the Los Angeles Regional Water Quality Control Board's ("Regional Board") Tentative Order No. R4-2012-xxx, NPDES Permit No. CAS004001 ("Permit"). The LA Permit Group has submitted comments regarding the Permit which the City joins and incorporates herein. The City reserves the right to make additional legal comments on the Permit prior to the close of the public hearing to adopt the Permit and at the public hearing itself.

On behalf of the City of Beverly Hills, we hereby submit the following initial comments on the Permit:

1. The Time Provided to Review the Permit Is Insufficient and Denies Permittees Due Process of Law

The period provided to review and comment on the Permit has been unreasonably short given the breadth of the Permit. Beginning on March 28, 2012, Regional Board staff issued a series of Staff Working Proposals pertaining to key sections of the Permit. Regional Board staff has used their Staff Working Proposal workshops as a justification for the hurried manner in which the Permit was developed. The same justification was used by the Executive Director in denying the LA Permit Group's request for a time extension.

This justification, however, fails for several reasons. First, Regional Board staff gave the permittees only a few weeks to comment on each of the Staff Working Proposals. Furthermore, the Regional Board staff did not respond to any comments, leaving permittees to guess at which requirements would be incorporated into the Permit. Seeing the Permit in its entirety and having the opportunity to understand how each of the sections and programs work together is imperative in order for permittees to fully understand the Permit provisions and to prepare comments.

Second, despite all the working proposals, workshops, and meetings, the permittees are left with a Permit that cannot be complied with from the first day the Permit goes into effect, due to the

Receiving Water Limitation (RWL) and the Waste Load Allocations (WLA) requirements that could subject the permittees to third party lawsuits.

We believe the Regional Board wants a review process that is open and transparent. Providing permittees only forty-five (45) days to comment makes this impossible. To develop and provide relevant and meaningful comments, each permittee must first:

- Read a 500 page Permit;
- Study the 500 page Permit to understand how the provisions work together;
- Compare it to the last Permit;
- Evaluate the resource needs to comply with the Permit;
- Determine the fiscal and organizational impacts on City services, which requires coordination with several City departments;
- Conduct technical and legal review of the Permit and prepare comments;
- Present information to and gather feedback from the City Council. Staff needs time to conduct a thorough review of the items listed above, prior to presenting them to the City Council; and
- Prepare written comments.

To ensure a proper review of the Permit, the City hereby requests an extension of 180 working days to include a Revised Tentative Permit to be released with a 45-day comment period. The intent of a Revised Tentative Permit is to ensure the permittees have the opportunity to review any changes made to the existing draft and provide comments prior to the Permit adoption hearing. Additionally, this extension request will resolve a conflict our city management and officials have with the current September 6-7, 2012 hearing date, which overlaps with the annual League of Cities conference in San Diego.

The extreme speed with which the Permit is being circulated and reviewed and proposed to be adopted amounts to a denial of the City's due process rights and is contrary to state and federal law. By denying the permittees a meaningful opportunity to review and comment on a Permit that so drastically affects the permittees' rights and finances, the Regional Board has denied the permittees' due process rights under state and federal law. *See Spring Valley Water Works v. San Francisco*, 82 Cal. 286 (1890) (reasonable notice and opportunity to be heard are essential elements of "due process of law," whatever the nature of the power exercised.) Furthermore, under the Clean Water Act, a reasonable and meaningful opportunity for stakeholder participation is mandatory. *See, e.g., Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994) ("the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA.") For the reasons stated above, the Permit does not satisfy the Clean Water Act standard and violates the City's due process rights.

2. The Permit Should Be Revised to Provide that Implementation of BMPs is Sufficient to Constitute Compliance with the Permit

Permittees should be able to achieve compliance with the Permit through a best management practice ("BMP") based iterative approach. Regional Board staff has previously indicated that it would not create a permit for which permittees would be out of compliance from the very first

day the Permit goes into effect. This necessarily means the Permit cannot require immediate strict compliance with water quality standards. Yet the Fact Sheet states that a party whose discharge "causes or contributes" to an exceedance of a water quality standard is in violation of the Permit, even if that party is implementing the iterative process in good faith. See Fact Sheet at pp. F-35-38. These positions are incompatible and effectively render the iterative approach meaningless.

As written, the Permit requires that all discharges to receiving waters must immediately meet water quality standards to avoid violating the Permit. This presents an impossible standard for permittees to meet, especially given the fact that thirty-three (33) TMDLs have been incorporated into the Permit. This means that numerous water bodies that currently do not meet water quality standards will be governed by the Permit and permittees will be subject to potential liability immediately. Even for TMDLs for which the Regional Board issues time scheduling orders, such orders will not protect a permittee from third-party lawsuits for measured exceedances, based on the Permit's current language. Even if such lawsuits are unfounded, the legal costs to defend such suits are enormous. For this same reason, final wasteload allocations should not be incorporated into the Permit, especially where we are dealing with TMDLs that have been rushed through due to the *Browner* consent decree with the understanding that they would be refined over time with reopeners as new information becomes available.

A BMP-based approach should be utilized in the Permit, as outlined in EPA's November 12, 2010 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." ("EPA Memorandum"). See also 40 C.F.R. § 122.44(k).

To accomplish this purpose, the City supports using the receiving water limitation language proposed by CASQA, which is similar to the language in the Draft Caltrans Permit. Otherwise, cities are potentially vulnerable to third party lawsuits such as those brought against the City of Stockton and the County of Los Angeles by third parties within the last five years.

Furthermore, the EPA Memorandum is clear that an increased reliance on numerics should be coupled with the "disaggregation" of different storm water sources within permits. See EPA Memorandum at pp. 3-4. The Permit currently aggregates multiple sources of storm water runoff while additionally imposing numeric standards. This will result in a system whereby the innocent will be punished alongside the guilty for numeric standard exceedances. The Regional Board should not allow this inequitable and legally unjustifiable result to occur.

Another reason for adopting a BMP-based approach is the fact that new and existing conditionally exempt non-stormwater discharges may also contribute to measured exceedances. This inequitable result means the exempt discharges may nonetheless contribute to permittee liability.

3. The Permit Improperly Intrudes Upon the City's Land Use Authority in Violation of the Tenth Amendment of the U.S. Constitution

To the extent that this Permit relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth

Amendment of the U.S. Constitution. Furthermore, to the extent the Permit requires a municipal permittee to modify its city ordinances in a specific manner, it also violates the Tenth Amendment. According to the Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, section 7 of the California Constitution California also guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." *See also City of W. Hollywood v. Beverly Towers*, 52 Cal. 3d 1184, 1195 (1991). Furthermore, the United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

Even so, both the Clean Water Act and the Porter-Cologne Act provisions regarding NPDES permitting do not indicate that the Legislature intended to preempt local land use authority. *Sherwin Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 1309 (1998) (Preemption of police power does not exist unless "Legislature has **removed** the constitutional police power of the City to regulate" in the area); *see* Water Code §§ 13374 and 13377 and 33 U.S.C. § 1342 (b)(1)(B).

If the Permit is adopted, the City believes that this Permit could establish the Regional Board as a "super municipality" responsible for setting zoning policy and requirements throughout Los Angeles County. The prescriptive and one-size-fits-all nature of this policy will ensure that any resident or business challenging the conditions set forth in this Permit would not only sue the municipality charged with implementing these requirements, but would also have to sue the Regional Board itself to obtain the requested relief. The City does not believe this is the intent of the Regional Board. Rather than adopting programs that dictate the precise method of compliance, the Regional Board should collaborate with the City and other permittees to develop a range of model programs that each municipality could then modify and adopt according to its own individual circumstances.

4. The Permit Constitutes an Unconstitutional Unfunded Mandate

The Permit contains mandates imposed at the Regional Board's discretion that are unfunded and go beyond the specific requirements of either the Clean Water Act or the EPA's regulations implementing the Clean Water Act, and thus exceed the "Maximum Extent Practicable" ("MEP") standard. Accordingly, these aspects of the Permit constitute non-federal state mandates. *See City of Sacramento v. State of California*, 50 Cal. 3d 51, 75-76 (1990). Indeed, the Court of Appeals has previously held that NPDES permit requirements imposed by the Regional Board under the Clean Water and Porter-Cologne Acts can constitute state mandates subject to claims for subvention. *County of Los Angeles v. Commission on State Mandates*, 150 Cal. App. 4th 898, 914-16 (2007).

The Permit goes beyond federal law, as the Permit is at least twice as long, and in some cases, three times as long as other MS4 permits developed by other Regional Boards in the State of

California, such as the Lahontan Regional Board and the Central Valley Regional Board, not to mention permits developed by EPA. This means that either some Regional Boards are failing to impose federally mandated requirements pursuant to the Clean Water Act, or the more likely explanation is that the Regional Board is imposing requirements that go beyond federal law.

A. The Permit's Minimum Control Measure Program is an Unfunded State Mandate

The Permit's Minimum Control Measure program ("MCM Program") qualifies as a new program or a program requiring a higher level of service for which state funds must be provided. The particular elements of the MCM Program that constitute unfunded mandates are:

- The requirements to control, inspect, and regulate non-municipal permittees and potential permittees (Permit at pp. 38-40);
- The public information and participation program (Permit at pp. 58-60);
- The industrial/commercial facilities program (Permit at p. 63);
- The public agency activities program (Permit at pp. 56-63); and
- The illicit connection and illicit discharge elimination program (Permit at pp. 106-109).

The MCM Program requirement that the permittees inspect and regulate other, non-municipal NPDES permittees is especially problematic and clearly constitutes an unfunded mandate. (*See, e.g.,* Permit at pp. 38-40.) These are unfunded requirements which entail significant costs for staffing, training, attorney fees, and other resources. Notably, the requirement to perform inspections of sites already subject to the General Construction Permit is clearly excessive. Permittees would be required to perform pre-construction inspections, monthly inspections during active construction, and post-construction inspections. The requirements of this Permit exceed past permits, meaning that the Regional Board is requiring a higher level of service than in prior permits.

Furthermore, there are no adequate alternative sources of funding for inspections. User fees will not fully fund the program required by the Permit. Cal. Gov't Code, § 17556(d). NPDES permittees already pay the Regional Water Quality Control Boards fees that cover such inspections in part. It is inequitable to both cities and individual permittees for the Regional Board to charge these fees and then require cities to conduct and pay for inspections without providing funding.

B. The Receiving Water Body Requirements Render the Permit an Unfunded Mandate

If strict compliance with state water quality standards in receiving water bodies is required—including state water quality standard-based wasteload allocations—in the MS4 itself or at outfall points and in receiving water bodies, the entire Permit will constitute an unfunded mandate because such a requirement clearly exceeds both the Federal standard and the requirements of prior permits, despite the fact no funding will be provided. *See Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866, 873, 884-85 (2004) (though the State and Regional Boards may require compliance with

California state water quality standards pursuant to the Clean Water Act and state law, these requirements exceed the Federal Maximum Extent Practicable standard.)

C. The City Does Not Necessarily Have the Requisite Authority to Levy Fees to Pay for Compliance With the Order

The ability to fund the Permit through bond measures or tax increases does not render the Permit's program ineligible for a subvention claim because such funding mechanisms are contingent upon voter approval, in some cases requiring supermajority votes. *Howard Jarvis Taxpayers Assoc. v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The money available from other sources is both too speculative and limited to cover all or even some of the costs imposed by the Permit. Such speculative funding sources cannot count as viable sources of funding so as to preclude a subvention claim. Cal. Gov't Code, § 17556(f). Furthermore, even if some portions of the Permit's programs can be covered by user fees, these fees will not come close to covering all such costs, meaning permittees' general funds will have to be utilized to cover substantial portions of these costs. Cal. Gov't Code, § 17556(d) (the ability to charge fees only defeats a subvention claim where the fees are sufficient to fully fund the program.)

5. The Permit's Monitoring Program Exceeds the Requirements of Law

The Permit's Receiving Water Monitoring Program is improper for going well beyond the scope of monitoring requirements authorized under Water Code Sections 13267 and 13383. The relevant portion of Water Code Section 13267 states:

“(b) (1) In conducting an investigation . . . the regional board may require that . . . any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its 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.”

The Regional Board's failure to conduct and communicate the requisite cost-benefit analysis pursuant to the monitoring requirements in the Permit constitutes an abuse of discretion. Water Code §§ 13267 and 13225(c).

The relevant portions of Water Code Section 13383 state:

“(a) The . . . regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements . . . for any person who discharges, or proposes to discharge, to navigable waters. . . .

(b) The . . . or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required.”

The Permit goes far beyond a requirement that a permittee “monitor” the effluent from its own storm drains. The Permit’s Receiving Water Monitoring Program seems to require a complete hydrogeologic model found in the receiving water body, which will in many cases be miles away from many of the individual permittees’ jurisdictions. To the extent the Permit requires individual permittees to compile information beyond their jurisdictional control, they are unauthorized. Although Water Code Section 13383(b) permits the Regional Board to request “other information”, such requests can only be “reasonably” imposed. Cal. Water Code § 13383(b). The information requested by the Regional Board is unreasonable. It is not just limited to each individual copermitttee’s discharge. Rather, the Permit requires copermitttees to analyze discharges and make assumptions regarding factors well beyond their individual boundaries. This is not reasonable, and is therefore not permitted under Water Code Sections 13225, 13267, and 13383. It is equally unreasonable to require the monitoring of authorized or unknown discharges. *See* Permit at p. 108.

6. The Permit Exceeds the Regional Board’s Authority by Requiring the City to Enter into Contracts and Coordinate With Other Copermitttees

The Regional Board cannot require the City to enter into agreements or coordinate with other copermitttees. The requirements that permittees engage in interagency agreements (Permit at p. 39) and coordinate with other copermitttees as part of their stormwater management program (Permit at p. 56-58) are unlawful and exceed the authority of the Regional Board. The Regional Board lacks the statutory authority to mandate the creation of interagency agreements and coordination between permittees in an NPDES Permit. *See* Water Code §§ 13374 and 13377. The Permit creates the potential for City liability in circumstances where the permittee cannot ensure compliance due to the actions of third party state and local government agencies over which the City has no control. Such requirements are not reasonable regulations, and thus violate state law. *Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal. App. 4th 1313, 1330 (2005) (regulation pursuant to NPDES program must be reasonable.)

7. The Permit Fails to Consider Economic Impacts As Required by Water Code Sections 13000 and 13241

The Regional Board’s failure to adequately consider the economic impacts of the Permit, as required by Water Code Sections 13000 and 13241, render the Permit invalid. Water Code Section 13241 requires the Regional Board to include “[e]conomic considerations” with its consideration of the Permit. As demonstrated above, the Regional Board is incorrect in its assertion that consideration of economics is not required in this Permit. *See* Permit at pp. 24-25. Because, as demonstrated above, the Permit requires new and higher levels of service in numerous key regards, consideration of economic factors is necessary. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).

The alleged facts in the economic consideration section of the Fact Sheet misrepresent the permittees’ data and fail to consider the economic impact of new, costly aspects of the Permit. The Fact Sheet’s open skepticism of municipal financial reports is troubling, and indicates the Regional Board has not taken permittees’ actual expenses seriously.

It is also premature and improper to assume that permittees will obtain funding from proposed ballot measures and other sources of funding which have not even been approved, much less voted on by the public. See Fact Sheet at pp. F-142-43. If the Regional Board wants to rely on initiatives, such as the Los Angeles County Flood Control District's Water Quality Funding Initiative, as sources of funding to offset the costs of storm water management, it should delay its public hearing and approval of the Permit until after the voters have actually voted on such initiatives. Otherwise, if such initiatives fail to pass, the copermitees will be left to implement the Permit's requirements without the funds to do so. Even if the Water Quality Funding Initiative is approved by the voters, the funds generated by the Initiative would not even be available until 2014 – well after the deadline for a majority of the compliance deadlines set forth in the Permit. Moreover, the Water Quality Initiative will not cover all the costs imposed on all permittees by the Permit.

The Permit also fails to consider the significant additional costs that TMDLs will impose. The incorporation of TMDLs and the massive expansion of monitoring requirements in the Permit, which also trigger the need for additional inspectors, will inevitably cause the copermitees' costs to skyrocket. Furthermore, speculations about what people may be willing to pay for cleaner water and social benefits from clean water have no real effect on cities' bottom lines. Finally, the Permit fails to account fully for all the expenses that implementing minimum control measures will impose. For all these reasons, the consideration of economic impact is entirely lacking, which violates state law.

8. The Permit's Imposition of Joint and Joint and Several Liability for Violations is Contrary to Law

The Permit appears to improperly impose joint liability and joint and several liability for water quality based effluent limitations and receiving water exceedances. It is both unlawful and inequitable to make a permittee liable for the actions of other permittees over which it has no control. A party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004). Because the City cannot prevent another permittee from failing to comply with the Permit, the Regional Board cannot, as a matter of law, hold the City jointly or jointly and severally liable with another permittee for violations of water quality standards in receiving water bodies or for TMDL violations. Under the Water Code, the Regional Board issues waste discharge requirements to "the person making or proposing the discharge." Cal. Water Code § 13263(f). Enforcement is directed towards "any person who violates any cease and desist order or cleanup and abatement order . . . or . . . waste discharge requirement." Cal. Water Code § 13350(a). In similar fashion, the Clean Water Act directs its prohibitions solely against the "person" who violates the requirements of the Act. 33 U.S.C. § 1319. Thus, there is no provision for joint liability under either the California Water Code or the Clean Water Act.

Furthermore, joint liability is proper only where joint tortfeasors act *in concert* to accomplish some common purpose or plan in committing the act causing the injury, which will generally never be the case regarding prohibited discharges. *Kesmodel v. Rand*, 119 Cal. App. 4th 1128, 1144 (2004); *Key v. Caldwell*, 39 Cal. App. 2d 698, 701 (1940). For any such discharge, it would be unlawful to impose joint liability and especially joint and several liability. The issue of

imposing liability for contributions to "commingled discharges" of certain constituents, such as bacteria, is especially problematic because there is no method of determining who has contributed what to an exceedance.

For receiving water body exceedances, the Permit should specify that the burden is on the Regional Board to show that any permittee's discharge caused or contributed to that exceedance. Requiring permittees to prove they did not cause or contribute an exceedance is both inequitable and unlawful. Permittees should not be required to prove they did not do something when the Regional Board has failed to raise even a rebuttable presumption that the contamination results from a particular permittee's actions. *See Cal. Evid. Code § 500; Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1667-1668 (2003).

The City is dedicated to the protection and enhancement of water quality. The City, however, has other functions that require funding as well. If this Permit is adopted as proposed, even in the best case scenario, spending cuts to other crucial services such as police, fire, and public works are certain. The permittees' stagnant general fund revenues is increasingly challenged by escalating costs and service demand levels and cannot absorb the financial hit the Permit is poised to impose on them. The City believes a more measured approach is necessary, especially regarding how compliance in this Permit is achieved.

As public agencies, all parties involved in the NPDES permitting process have the obligation to carry out their duties in a responsible, realistic, and reasoned manner. Requirements that tether public agencies to impractical positions are counterproductive and violate our sacred charge as representatives of the people. The City is committed to working with the State and Regional Boards in order to achieve our mutual goals and looks forward to engaging in a constructive dialogue with Regional Board staff on these issues.

Sincerely,



Chris Theisen
Assistant Director of Public Works & Transportation

cc: Jeff Kolin, City Manager
Laurence S. Wiener, City Attorney
Christian Di Renzo, Senior Management Analyst

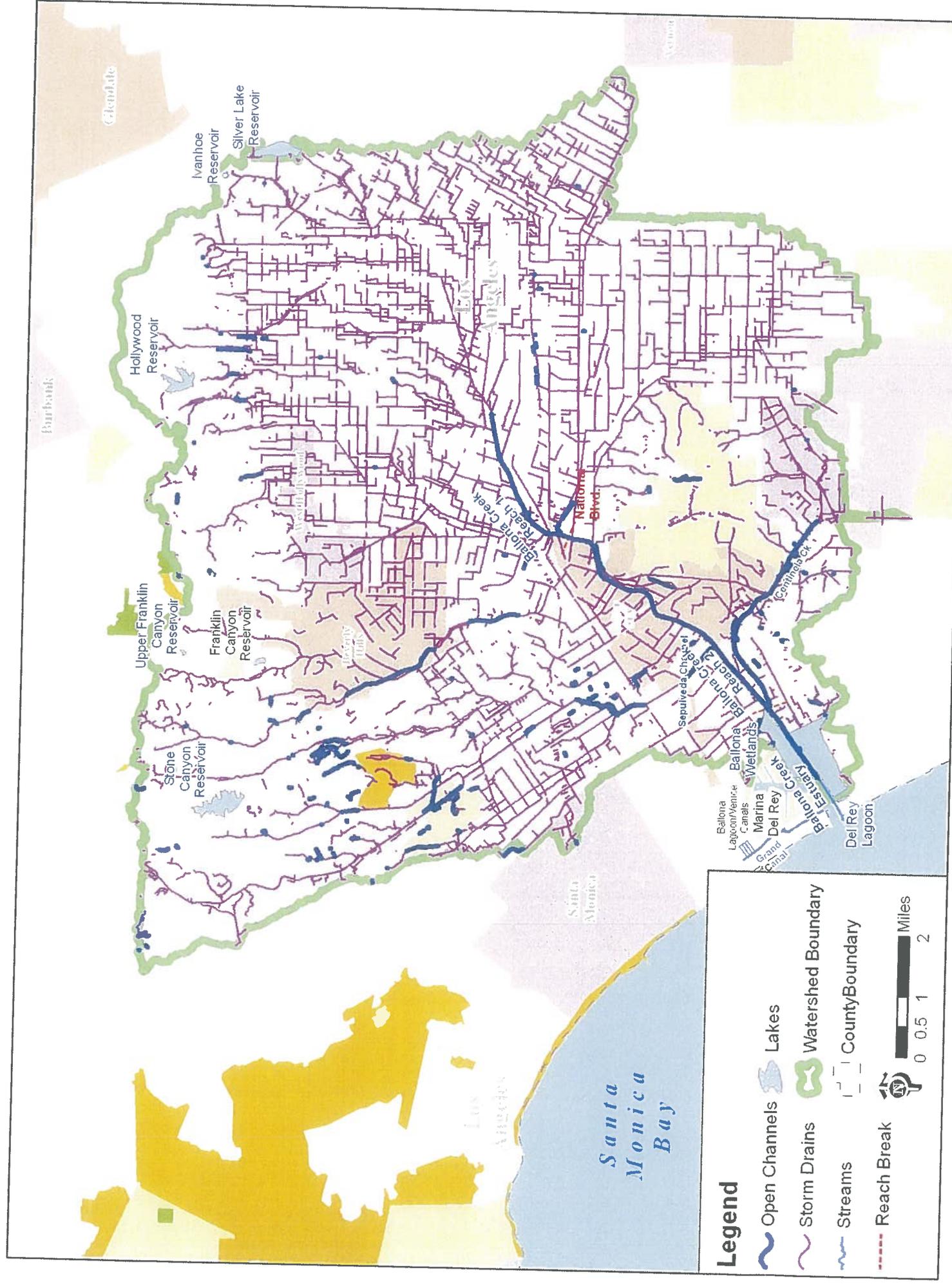


Figure C-2b: Ballona Creek Watershed Flow Schematic (Santa Monica Bay WMA).



highlights of the measure

The Los Angeles County Flood Control District worked collaboratively with cities and all six Councils of Government to develop the Clean Water, Clean Beaches Measure. If approved, it could raise **\$270 million a year, with 90% local return:**

- 40% direct return to cities and County unincorporated communities for **local projects**, which can include both new and existing services such as sweeping streets and maintaining storm drains and filters.
- 50% regional return to Watershed Area Groups for **regional collaborative projects** among cities in that area, based on nine watersheds in the LA basin.
- 10% to the County Flood Control District for **countywide water quality monitoring**, projects for improving water quality, planning, administration of programs, and technical assistance to cities and the regional collaborations.



The Dominguez Gap Wetlands in Long Beach naturally cleanses millions of gallons of water every day by removing and neutralizing harmful pollutants, and increases groundwater supplies available for drinking water.

schedule a presentation

Education, stakeholder involvement and community outreach will be key to property owner understanding of the importance of the Clean Water, Clean Beaches Measure. To schedule presentations, please contact Virginia Fowler:

(626) 458-4354
vmfowler@dpw.lacounty.gov

You'll find more information at

LACountyCleanWater.org



LOS ANGELES COUNTY clean water, clean beaches measure

providing dedicated funds to cities and county communities

May 2012

The Clean Water, Clean Beaches Measure would provide dedicated funding for local and regional water clean up and water conservation programs.

The measure, if approved, would fund projects that can:



Clean up water by keeping toxic chemicals, bacteria and trash out of waterways and off local beaches



Protect public health and safety



Help increase available drinking water supplies



Create thousands of local jobs in fields such as construction, engineering, landscaping and environmental clean up



Fund clean water education programs for local schools



Expand wetlands, parks and open space to be used as areas where water can be retained and naturally cleansed before going to the ocean or replenishing groundwater

the problem

Rivers, lakes, creeks, streams, beaches and coastal waters in the Los Angeles County area have been found to exceed Clean Water Act pollution and trash standards.

The Clean Water Act requires localities to develop and implement water clean-up plans, but cities and County unincorporated communities don't have the dedicated funding needed for clean-up efforts. Many are using General Funds, which diverts funding from other needed community services.



Oil and fluids from cars flow directly into storm drains and into our waterways



Tons of trash ends up in waterways, flowing out to the ocean



Trash from the ocean washes back up onto beaches



Pollution is routinely found in the water around the outlets of the LA and San Gabriel rivers

the vision

A clean water fee can provide long-term, dedicated funding for local water quality projects and programs, as well as operations and maintenance. The fee could only be used for water clean up and cannot be diverted by the State or any other entity for any other purpose.

If approved, the fee would be property-based, charged to property owners in proportion to how much water a property sends into the storm drain system. Over 85% of residential properties would pay \$54 a year or less. Commercial/industrial parcels generally have more paved surface areas that send water into storm drains, so they would pay a higher fee.



Revetted wetlands can hold and naturally cleanse stormwater, and provide healthy habitat for wildlife



Street planters and rain gardens can capture runoff, letting water percolate down into groundwater



Above or below ground cisterns can capture stormwater and either slowly release it into groundwater, or make it available for irrigation



The Tujunga Wash Greenway in the San Fernando Valley is now a re-naturalized stream that replenishes groundwater in an area that gets 40% of its drinking water from groundwater, and provides recreation opportunities for families

the vote

All parcel owners are eligible to vote. A ballot would be sent directly to property owners of record. Pending Board of Supervisors approval, a vote is anticipated in March 2013.

clean water
clean beaches
measure