

**COMMENTS OF COUNTY OF LOS ANGELES AND THE LOS ANGELES COUNTY  
FLOOD CONTROL DISTRICT IN SUPPORT OF THE WATERSHED AND  
ENHANCED WATERSHED MANAGEMENT PROGRAMS IN THE LOS ANGELES  
MS4 PERMIT**

**EXECUTIVE SUMMARY**

The County of Los Angeles (“County”) and the Los Angeles County Flood Control District (“District”) support the watershed management program (“WMP”)/enhanced watershed management program (“EWMP”) alternative contained in the Los Angeles MS4 Permit (“Permit” or “LA MS4 Permit”) as an appropriate approach to implementing receiving water limitations (“RWL” or “RWLs”) in MS4 permits. WMPs and EWMPs are a carefully drafted and compliance oriented water quality management tool that will ensure improvement of surface water quality while providing the opportunity to increase local water supplies.

**The WMP and EWMP Approach Ensures Water Quality While Providing Opportunities to Increase Local Water Supply**

The Environmental Protection Agency (“EPA”) gives the California State Water Resources Control Board (“State Board”) and the nine Regional Water Quality Control Boards (“Regional Boards”) considerable flexibility to implement the requirements of MS4 permits. In recognition of the challenge posed by municipal stormwater, the Los Angeles Regional Board considered and approved a permit that would achieve water quality goals while providing opportunities for increasing local water supply resources.

The approach and the specific requirements of the permit are appropriate. As the Los Angeles Regional Board noted in the fact sheet that accompanied the LA MS4 Permit, “the purpose of the Watershed Management Programs is to provide a framework for Permittees to implement the requirements of [permits] in an integrated and collaborative fashion to address water quality priorities on a watershed scale.” (Fact Sheet, p. F-40.)

The Regional Board retains significant oversight of the WMPs and EWMPs. Additionally, while developing WMPs or EWMPs, permittees are obligated to continue to implement the watershed control measures in their existing stormwater management programs, including actions within each of the Permit’s six categories of minimum control measures, and continue to implement control measures from existing TMDL implementation plans (LA MS4 Permit, pp. 57-58).

Both WMPs and EWMPs encourage watershed planning and cooperation amongst permittees. Virtually all of the 86 permittees under the LA MS4 Permit have committed to implementing the Permit through the WMP/EWMP approach.

The LA MS4 Permit’s approach is also appropriate because, by including WMPs and EWMPs as part of RWL compliance, the approach incentivizes watershed-based, strategic planning, including multi-benefit projects that will have water supply benefits as

well as providing park and green space. This permit approach is stringent and challenging, but most significantly represents a paradigm shift in stormwater management.

### **The WMP and EWMP Approach is Legally Valid and Enforceable**

The WMP and EWMP approach is a legally valid and enforceable approach to compliance with RWLs. The approach in the Permit does not violate the Clean Water Act (“CWA”) but instead follows relevant guidance and precedent while remaining faithful to the mandates and requirements of anti-backsliding, anti-degradation, and total maximum daily loads (“TMDLs”).

Given the nature of MS4 discharges, which reflect highly variable flow rates and pollutant concentrations, the United States Congress (“Congress”) intended and EPA has stated that compliance programs for MS4 permittees are intended to reflect an adaptive management program. EPA itself has adopted a BMP-centered compliance program for achieving RWLs and has specifically rejected claims of backsliding. For example, in 2011 EPA issued a National Pollutant Discharge Elimination System (“NPDES”) permit for stormwater discharges from the District of Columbia that contained watershed management programs and enhanced watershed management programs that are conceptually similar to those in the LA MS4 Permit.

### **The LA MS4 Permit Approach Does Not Violate Anti-Backsliding**

The LA MS4 permit approach to RWL compliance does not violate anti-backsliding.

First, the CWA does not require municipal stormwater dischargers to meet the anti-backsliding provisions of section 402(o) of the CWA, 33 U.S.C § 1342(o).

Second, even if the anti-backsliding provisions in section 402(o) were generally applicable to MS4 permits, that section restricts “effluent limitations” from being less stringent than in the previous permit; RWLs are not effluent limitations. In the CWA “effluent limitation” means any restriction on “quantities, rates and concentrations of chemical, physical, biological or other constituents which are discharged from point sources into navigable waters.” (33 U.S.C. § 1362(11).) RWLs set forth the quality of the receiving water; they are not “quantities, rates and concentrations” of pollutants.

Third, as a matter of fact, there is no backsliding in the LA MS4 Permit. The RWL provisions of the Permit are essentially identical to the RWL provision in the LA 2001 Permit. What has changed is that the new LA MS4 Permit provides additional mechanisms, the WMP and EWMP, to comply with that provision. WMPs and EWMPs reflect the evolution of MS4 permit requirements to a watershed planning approach that is integrated into water supply needs. With the adoption of the LA MS4 Permit, the Regional Board has moved to improve water quality in the Los Angeles Region, not stood still or fallen back to rely on the previous approach.

## **The LA MS4 Permit Approach Does Not Violate California's Anti-Degradation Policy**

Under the federal regulations, California is required to develop an anti-degradation policy that shall, as pertinent here, provide that "existing in-stream water uses and the level of water quality necessary to protect existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). State Board Resolution No. 68-16 provides that "existing high quality" waters shall be maintained unless an exception is established. "Existing high quality" refers to water whose quality was better than the quality established in policies of the State Board as of the date on which such policies became effective. When undertaking an antidegradation analysis, the regional board compares the "baseline water quality" to water quality objectives. "Baseline water quality" is the best quality of the receiving water that has existed since 1968. If the baseline water quality is equal to or less than water quality objectives, the objectives set forth the quality that should be attained or achieved.

The Permit approach is consistent with the anti-degradation provisions of 40 C.F.R. 131.12 and State Board Resolution No. 68-16. It does not allow discharges that will result in the quality of the receiving waters becoming worse. Instead, the WMP/EWMP approach ensures that any projects built will comply with these requirements. Programs under the WMPs and EWMPs will improve, not degrade the quality of the waters.

In sum, the WMP and EWMP approach embraced by the LA MS4 Permit and by EPA elsewhere is appropriate. WMPs and EWMPs will produce regional benefits by allowing permittees to develop programs that integrate water quality requirements with water supply and conservation goals. WMPs and EWMPs allow for strategically planned, technically based, comprehensive approaches to compliance with water quality standards. When fully implemented, WMPs and EWMPs will change not only a region's approach to water quality by increasing water conservation but will also change the urban landscape. It is appropriate for the Los Angeles Regional Board to implement this EPA-endorsed approach, and it is imperative that the State Board now support it.

## **I. WMPS AND EWMPs PROMOTE WATERSHED PLANNING**

By letter dated July 8, 2013, the State Water Board invited comments on the following two questions:

1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 permits?
2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 permits?

The County and the District submit that the watershed management and enhanced watershed management programs contained in the LA MS4 Permit is an appropriate approach to implementing RWLs in MS4 permits.<sup>1</sup> WMPs and EWMPs are a carefully drafted and compliance oriented water quality management tool that will ensure improvement of surface water quality while also increasing available water supply for local use. As the Los Angeles Regional Board said in the fact sheet that accompanied the LA MS4 Permit, “An emphasis on watersheds is appropriate at this stage . . . to shift the focus of the Permittees from rote program development and implementation to more targeted, water quality driven planning and implementation.” (Fact Sheet, p. F-40.)

The Los Angeles Regional Board adopted the Permit on November 8, 2012, after two days of lengthy hearings and four public workshops. During the public notice and comment period, permittees commented about the deficiencies in the draft permit and the need for an alternative approach. As a result of these comments, the Regional Board staff proposed and the Regional Board Members voted unanimously to include WMPs and EWMPs in the Permit.

WMPs and EWMPs allow for both strategic planning and the integration of water supply benefits with water quality goals. WMPs and EWMPs use watershed-based planning and encourage water infiltration and green infrastructure, and permittees can join together and partner on multi-benefit, regional projects. As the Los Angeles Regional Board noted in the fact sheet that accompanied the LA MS4 Permit, “the purpose of the Watershed Management Programs is to provide a framework for Permittees to implement the requirements of [permits] in an integrated and collaborative fashion to address water quality priorities on a watershed scale.” (Fact Sheet, p. F-40.)

Additionally, the EWMPs contain a design storm component that allows for certainty in design and resulting water quality benefit: wherever feasible, EWMPs will be

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<sup>1</sup> Pursuant to the State Water Board’s letter of July 8, 2013, the County and District reserve the right to submit on or before September 20, 2013, responses to all other issues raised in the petitions challenging the LA MS4 Permit.

designed to retain all non-stormwater runoff and all stormwater runoff from the 85<sup>th</sup> percentile, 24-hour storm event for the drainage areas tributary to the projects. (LA MS4 Permit, p. 48). Because these EWMPs are multi-benefit--improving water quality while also providing flood control, water supply, recreation and open space benefits--they will also allow permittees to combine different funding sources to obtain funding for stormwater quality projects that would not otherwise be available, such as the funding available for recreational activities or water supply. When fully implemented, WMPs and EWMPs will change not only the region's approach to water quality by increasing water conservation but also the urban landscape in ways that existing low impact development ordinances, which are triggered only upon new or redevelopment, can only begin to do.

WMPs and EWMPs accomplish this result by creating a careful balance between incentives to pursue these new programs, which are voluntary, and compliance with receiving water limitations. For example, the WMPs and EWMPs as included the LA MS4 Permit contain rigorous requirements. Permittees that choose to implement the WMPs or EWMPs must do the following:

(1) Identify the water quality priorities within each watershed management area that will be addressed by the WMP. At a minimum, these priorities must include achieving applicable water quality-based effluent limitations and/or receiving water limitations established pursuant to TMDLs.

(2) Include an evaluation of existing water quality conditions, including characterization of storm and non-stormwater discharges from the MS4 to support identification and sequencing of management actions.

(3) Classify water body-pollutant combinations as being of highest priority, high priority, or immediate priority.

(4) Identify sources through existing information, including known and suspected stormwater and non-stormwater discharges.

(5) Set priorities that must include, at a minimum, controlling pollutants pursuant to TMDLs and other receiving water considerations.

(6) Select watershed control measures, including identification of specific structural and non-structural best management practices.

(7) Conduct a reasonable assurance analysis for each water body-pollutant combination addressed by the WMP. The reasonable assurance analysis shall demonstrate that the WMP's activities and control measures are likely to achieve applicable water quality-based effluent limitations and/or receiving water limitations.

(8) Include compliance schedules and, where necessary, interim milestones and dates for their achievement. (LA MS4 Permit, pp. 58-65.)

In addition to the above, EWMPs shall include multi-benefit regional projects that, wherever feasible, retain (i) all non-stormwater runoff and (ii) all stormwater runoff from the 85<sup>th</sup> percentile, 24-hour storm event for the drainage areas tributary to the project, while also achieving other benefits including flood control and water supply, among others. If retention of the 85<sup>th</sup> percentile, 24-hour storm event is not feasible, an EWMP shall include a reasonable assurance analysis to demonstrate that applicable water quality based effluent limitations and receiving water limitations shall be achieved through other watershed control measures (LA MS4 Permit, p. 48).

Because the WMP and EWMP requirements are rigorous and expensive, the Regional Board included incentives in the Permit to encourage permittees to participate in these programs. A major incentive is the provision that permittees can comply with receiving water limitations, including TMDLs and water quality based effluent limitations, through implementation of WMPs and EWMPs (LA MS4 Permit, pp. 49-53). Currently 83 of the 86 permittees under the LA MS4 Permit have chosen to develop WMPs or EWMPs, which clearly shows that cities recognize the benefits of these programs.

As reflected in the LA MS4 Permit, WMPs and EWMPs cannot be developed and built in a day. The larger the project, the greater the benefit, but also the greater the required planning, funding, and time for construction. Because permittees owe duties to their citizens to ensure that they are spending public money wisely, permittees must investigate the costs and benefits of joining together in a WMP or EWMP and give those recommendations to their city councils or supervisorial boards before they can commit to participating. Permittees must identify potential project locations and funding sources. These activities take time. It also takes time to build the projects; again the larger the project (and water quality benefit), the more time that is likely to be needed.

The Permittees, however, are not without regulatory oversight during the development and implementation of WMPs and EWMPs. Permittees must submit a draft plan to the Regional Board (LA MS4 Permit, pp. 56-57). Permittees must implement their plans upon their approval by the Executive Officer and provide a comprehensive evaluation every two years thereafter (LA MS4 Permit, p. 54). During this period, permittees are obligated to continue to implement the watershed control measures in their existing stormwater management programs, including actions within each of the Permit's six categories of minimum control measures, continue to eliminate non-stormwater discharges through the MS4, and continue to implement control measures from existing TMDL implementation plans (LA MS4 Permit, pp. 57-58). Significantly, permittees that do not elect to develop a WMP or EWMP, or that do not have an approved WMP or EWMP within 28 or 40 months, respectively, shall be subject to the Permit's baseline requirements, including demonstrating compliance with receiving water limitations and applicable interim water quality-based effluent limitations (LA MS4 Permit, p. 58).

The WMP and EWMP alternative contained in the LA MS4 Permit, therefore, is an appropriate approach to achieving compliance with RWLs. Indeed, it is a significantly improved approach because it incentivizes watershed-based, strategic planning, including multi-benefit projects that will have water supply benefits as well as providing park and green space. If the linkage between WMPs, EWMPs and RWLs is

broken, however, then the incentive to use WMPs and EWMPs will be diminished if not gone entirely.

## II. THE USE OF WMPs AND EWMPs DOES NOT VIOLATE ANTI-BACKSLIDING, ANTIDEDGRADATION OR TMDL REQUIREMENTS

### A. Use of WMPs and EWMPs Does Not Violate Anti-Backsliding Requirements

#### 1. U.S. EPA has Adopted a BMP-Centered Compliance Program for Achieving RWLs, and Rejected Claims of Backsliding

The WMPs and EWMPs in the LA MS4 Permit are conceptually similar to those in the 2011, EPA-issued NPDES permit covering stormwater discharges from the District of Columbia (“D.C.”). This permit adopted an iterative BMP-centered approach to compliance with water quality standards. In Part 1.4 of the D.C. permit, U.S. EPA provided that “Compliance with the performance standards and provisions contained in Parts 2 through 8 of the permit shall constitute adequate progress towards compliance with DCWQS [water quality standards] and WLAs [established under TMDLs] for this permit term.”<sup>2</sup> EPA, in the DC Permit Fact Sheet, explained the rationale for that language as follows:

Comments on the language in Part 1.4 varied widely. Some commenters did not believe it was reasonable to require discharges to meet water quality standards. Other commenters believed this to be an unambiguous requirement of the Clean Water Act.

Today’s Final Permit is premised upon **EPA’s longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance.** See generally, “National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges,” 55 F.R. 47990 (Nov. 16, 1990).

**EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles.** Rather the attainment of applicable water quality standards **as an incremental process** is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), which requires an MS4 permit “to reduce the discharge of pollutants to the maximum extent practicable” (MEP) “and such other provisions” deemed appropriate to control pollutants in municipal stormwater discharges. **To be clear, the goal of EPA’s stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal**

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<sup>2</sup> This Part has been modified slightly as part of settlement of litigation, but still provides that compliance with the performance standards and provisions constitute adequate progress.

**stormwater dischargers would need several permit cycles to achieve that goal.**

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase stringency until such time as standards are met in all receiving waters. **Therefore today's Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that "compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term" (Section 1.4).**

D.C. Permit Fact Sheet at 5-6 (emphasis supplied).

The issue of anti-backsliding was raised in comments on the D.C. Permit. A commenter argued that U.S. EPA had violated the anti-backsliding provisions in adopting the 2011 D.C. Permit because the 2004 D.C. permit had required an aggregate numeric effluent limit for four outfalls into Hickey Run, a receiving water. U.S. EPA rejected this argument:

In response, EPA notes that a non-numeric effluent limitation is not automatically less stringent than a numeric effluent limitation. A different (numeric or non-numeric) effluent limitation only violates the anti-backsliding prohibition if it can be fairly compared to the prior numeric limit and found to be less stringent than that requirement. *See e.g., Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal. App. 4th 1313 (August 29, 2005) (finding that no backsliding had occurred where the effluent limit in existing permit was not "comparable" to WQBEL in previous permit). In this case EPA 1) notes that additional controls on oil and grease may not be needed (as explained above), and 2) has determined regardless that compliance with the performance standards in the Final Permit will result in improved water quality protections for the District MS4 receiving streams more effectively than did the previous numeric effluent limitations (see discussions in relevant sections).

D.C. Permit Fact Sheet at 31.

Thus, using a BMP-centered compliance approach is endorsed by US EPA as both appropriate and not in violation of anti-backsliding requirements.



**2. Neither the Clean Water Act nor Implementing Regulations Require Application of the Anti-Backsliding Provisions to MS4 Permits**

**a. The Clean Water Act Requires Application of the Section 402(p)(3), Not Other Provisions of Section 402**

The anti-backsliding provisions of the CWA are found in Section 402 of the Act, which requires that dischargers of pollutants must obtain a National Pollutant Discharge Elimination System (“NPDES”) permit to authorize such discharge. 33 U.S.C. § 1342(a). NPDES permits are required for discharges from industrial point sources, such as oil refineries or steel mills (Section 402(a) of the CWA, 33 U.S.C. § 1342(a)), discharges of industrial stormwater (Section 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A)) and discharges of municipal stormwater (Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B)).

The CWA regulates these classes of NPDES permits very differently. Industrial point source dischargers must meet all applicable requirements under 33 U.S.C §§ 1311, 1312, 1316, 1317, 1318, and 1343. 33 U.S.C § 1342(a). Industrial stormwater dischargers are subject to the same requirements. Industrial stormwater dischargers are explicitly required to meet “*all applicable provisions of this section* [33 U.S.C. § 1342] and section 1311 of this title [33 U.S.C. § 1311].” 33 U.S.C. § 1342(p)(3)(A) (emphasis added). The anti-backsliding provisions are in 33 U.S.C. § 1342(o) and are thus applicable to both industrial point source dischargers and industrial stormwater dischargers as an “applicable provision” of section 402.

Congress explicitly *did not* impose the same requirements on municipal stormwater dischargers. Congress did not require municipal stormwater permits to meet either section 1311 (water quality standards) or the other “applicable provisions of [section 1342].” Instead, Congress required only that NPDES permits issued to municipal stormwater dischargers “include a requirement to effectively prohibit non-stormwater discharges into the storm sewers” and “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(ii) and (iii).

The anti-backsliding provisions in 33 U.S.C. § 1342(o) were made part of the CWA at the same time the stormwater permit provisions in 33 U.S.C. § 1324(p)(3) were made part of the Act. Pub. L. 100-4, 101 Stat. 67-68 (Section 1342(o); 101 Stat. 69-71 (Section 1342(p)). Thus, Congress had the clear opportunity to require MS4 permits to be bound by the anti-backsliding requirements. Congress chose not to do so.

Congress had good reasons for its choice not to impose the anti-backsliding requirements on municipal stormwater dischargers. MS4 discharges have highly variable flow rates and pollutant concentrations due to the vastly varying ambient conditions of the municipal watersheds and vastly varying weather conditions. Congress therefore intended and U.S. EPA has stated that compliance programs for

MS4 permittees are intended to be “both an iterative and adaptive management program.” D.C. Permit Fact Sheet, *supra*, at 5. In contrast, Congress intended to prevent industrial dischargers (who have a steady-state discharge with known pollutants and flows) from being able to “backslide” from already-established effluent limitations in their NPDES permits. Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 99-1004, at 153 (1986).

**b. Even Were the CWA’s Anti-Backsliding Provisions Applicable to MS4 Permits, They Are Inapplicable to RWLs**

Even assuming that the anti-backsliding provisions in Section 402(o) of the CWA are generally applicable to MS4 permits, they are not applicable to the receiving water limitations provisions of the permits

Section 402(o) provides that for “*effluent limitations* established on the basis of *subsection (a)(1)(B)* of this section” or for “*effluent limitations* established on the basis of *section 1311(b)(1)(c)* or *section 1313(d)* or *(e)* of this title,” a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit, except in limited cases (emphasis added).

In turn, “effluent limitation” is defined in the CWA to mean any restriction on “quantities, rates and concentrations of chemical, physical, biological or other constituents which are discharged from point sources into navigable waters.” 33 U.S.C. § 1362(11). Accordingly, “effluent limitations” are not receiving water limitations. “Effluent limitations” are specific end-of-pipe restrictions on quantities, rates, and concentrations in discharges into navigable waters. In contrast, receiving water limitations set forth the quality of the navigable water itself, i.e., the “receiving water.” Receiving water limitations may be the basis for water-quality based effluent limitations, but receiving water limitations are not effluent limitations themselves; they are not “quantities, rates and concentrations” of pollutants.

This reading is consistent with the purpose of anti-backsliding, which is to avoid the softening of already established specific end-of-pipe permit limits except under specific circumstances. At the hearing on the LA MS4 Permit, this distinction was specifically addressed by the Regional Board staff. See testimony of Deborah Smith, Chief Deputy Executive Officer, Nov. 8, 2012 at 313:12-16. (Section 402(o)(1) of the CWA “talks about backsliding on effluent limits and not receiving water.”)

In addition, even if RWLs could fall within the definition of an “effluent limitation,” they are not the type of effluent limitations that are the subject of Section 402(o). Section 402(o) applies to “effluent limitations established on the basis of subsection (a)(1)(B) of this section” and “effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e).” The RWL provisions were not established pursuant to sections 1342(a)(1)(B), 1311(b)(1)(C), 1313(d) or 1313(e) of the CWA.

In this regard, MS4 permits are adopted pursuant to section 1342(p)(3), not 1342(a)(1)(B), and therefore the receiving water limitations in the LA MS4 Permit were not adopted pursuant section 1342(a)(1)(B).

Likewise, it is well established that section 1311 is not applicable to MS4 permits. *Defenders of Wildlife v. Browner*, 191, F.3d 1159,1165-66 (9<sup>th</sup> Cir. 1999). The RWL provisions, therefore, were not adopted pursuant to that section either.

The RWL provisions were also not established pursuant to sections 1313(d) or (e). Sections 1313(d) and (e) address the establishment of effluent limitations through the TMDL process or the continuing planning process. The RWL provisions were not adopted pursuant to those provisions; the RWL provisions existed before TMDLs were adopted. Thus, even if the anti-backsliding provisions in the CWA applied to MS4 permits, because RWLs do not constitute an “effluent limitation” or an effluent limitation adopted pursuant to the sections referenced in section 402(o), the anti-backsliding provisions do not apply.

Finally, as a matter of fact, there is no backsliding. In the LA MS4 Permit, the RWLs are essentially identical to the RWL provision in the 2001 Permit. The 2012 Permit has simply provided additional mechanisms, the WMP and EWMP, to comply with that provision. These provisions reflect the evolution of MS4 permit requirements from specific prescriptions to a watershed planning approach, an approach that recognizes the important societal goal of conserving water for future use and promotes “green” infrastructure and open space opportunities in urban areas where such amenities are lacking.

### **3. The Anti-Backsliding Regulations Do Not Apply to RWLs**

Any argument that contends that RWLs, even if not an “effluent limitation,” constitute a “standard” or “condition” somehow separate from an “effluent limitation,” and thus subject to the anti-backsliding regulations at 40 C.F.R. § 122.44(l)(1), would also lack merit. 40 C.F.R. § 122.44(l)(1) provides that “interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit . . . .”

First, 40 C.F.R. § 122.44(l) is, like various other requirements in section 122.44, inapplicable to MS4 permits. As discussed above, under CWA Section 402(p)(3)(B), MS4 permittees are not required to comply with the anti-backsliding requirements in Section 402(o). The introduction to 40 C.F.R. § 122.44 states that “each NPDES permit shall include conditions meeting the following requirements [including subsection (l)] *when applicable*.” (Emphasis added.) Subsection (l) is not applicable. A regulation cannot apply to an activity where the statute it is implementing does not.

Second, even were such regulations applicable to MS4 permittees, given the plain language of CWA Section 402(o), which applies the backsliding prohibition only to “effluent limitations,” the regulation’s use of the terms “standards” or “conditions” necessarily means “standards” or “conditions” associated with effluent limitations, and not simply any standard or condition in an NPDES permit. This is supported by the

regulatory language itself, which focuses entirely on revisions to “effluent limitations,” including the conditions under which a less stringent effluent limitation may be incorporated into a revised permit, and not revisions to “standards” or “conditions.” 40 C.F.R. § 122.44(l)(2). Since the RWLs are not an “effluent limitation,” the requirements of 40 C.F.R. § 122.44(l) do not apply to those provisions.

Third, even were RWLs considered to be “conditions” subject to the anti-backsliding requirements of the Code of Federal Regulations, those RWLs are not changing. The RWLs are functionally identical; only the means to comply with the RWLs are changed, in a way that is far more rigorous in their specific requirements of the permittees than was the prior iterative process. This fact was noted by Regional Board staff in their testimony at the hearing on the LA MS4 Permit:

But we are not changing them [the RWL provisions]. That language has not changed. We are not changing the standard. That standard is still the goal. All we are doing -- and it's not just the compliance -- mechanism is not just a path with no action, but it's very -- it's a highly conditioned process that we have laid out provided during the pathway to compliance. So we feel like even with that provision and implementing regulations that there's not anti-backsliding.”

Testimony of Chief Deputy Executive Officer Deborah Smith, November 8, 2012, at 314.

#### **4. The Permit’s Provisions Meet the Exceptions in Section 402(o) of the Act**

Even were it to be found that RWLs are subject to the anti-backsliding requirements of the CWA, there is ample evidence to qualify the approach set forth in the LA MS4 Permit under the exemptions set forth in 33 U.S.C. § 1342(o), which allow issuance of a permit containing “less stringent effluent limitations applicable to a pollutant.” 33 U.S.C. § 1342(o)(2).

First, under 33 U.S.C. § 1342(o)(2)(B)(i), a permit with “less stringent effluent limitations” may be renewed, reissued or modified if “information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance.”

In 1999, when RWLs were first placed in MS4 permits, regional boards were not presented with testimony or evidence focusing on the importance of infiltration of storm water and green infrastructure. The approach to stormwater control has evolved, in part based upon permittees’ experience in California and in part based on other parties’ experiences under other permits issued throughout the country. WMPs and EWMPs, for the first time, integrate water supply with water quality and seek to incentivize water infiltration. This is new information that warrants changes in permits to effectuate these goals, with the ultimate goal of meeting water quality standards. If the approach to meeting water quality standards cannot be modified then permittees, regional boards and California’s citizens will be will be bound to an outdated permit philosophy, one that

will not achieve the clean water and water supply goals sought to be achieved under the new approach.

Second, under 33 U.S.C. § 1342(o)(2)(C), a permit with less stringent effluent limitations may be reissued if “a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.” This provision would apply to urban runoff and storm water discharges for several reasons:

- 1) Urban runoff and stormwater discharges vary drastically in volume and pollutant loadings from storm to storm, day to day, and month to month.
- 2) Unlike an industrial NPDES permittee, a municipal permittee is not typically the source of the pollutants in the MS4 discharge (whether in wet or dry weather). The municipality can regulate sources to some degree but cannot guarantee that pollutants will not enter the MS4 and then be discharged into the receiving waters.
- 3) Municipalities cannot control natural sources of pollutants discharged through the MS4. Monitoring has indicated that many pollutants are likely from natural and not anthropogenic sources.
- 4) While Permittees are required to conduct public education programs as part of their MS4 programs, municipalities cannot control human behavior or prevent individuals from acting or failing to act in ways that might cause pollution to enter the MS4.
- 5) MS4 Permittees cannot prevent all stormwater flows from entering their MS4. To protect life and property of their residents, MS4 operators must allow the legitimate flows of water into their drains. This is especially true for flood control districts (including the District), which are charged by the Legislature with protecting people and property from flooding.
- 6) During dry weather, other NPDES-permitted discharges continue to flow through the MS4 to the receiving waters. For example, NPDES permits covering thousands of dischargers are allowed to discharge pollutants into Los Angeles County receiving waters. Because of these discharges, which are legal and authorized by the Regional Board, the MS4 permittees have essentially no more control over compliance with water quality standards in dry weather than in wet weather.<sup>3</sup>

Finally, as both a legal and factual matter, the LA MS4 Permit does not contain “less stringent effluent limitations” so as to run afoul of the “backstop” provision in

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<sup>3</sup> Evidence about these reasons was submitted in the LA MS4 Permit hearing. See testimony of Brian Currier and Ashli Deshai (October 4 Hearing Transcript at 190, 192-93, 202).

33 U.S.C. § 1342(o)(3). As discussed above, there are no “effluent limitations” in the Permit to which Section 1342(o) would apply. Even if such effluent limitations were in the Permit, as a factual matter, the Permit is far more stringent than the prior permit. There are 33 TMDLs incorporated in the new Permit, as opposed to two TMDLs in the 2001 permit. The requirements placed on the discharges are thus much stricter. This is confirmed by the testimony of Ms. Purdy of the Regional Board staff:

MS. PURDY: And I have one more thing. I can't help myself. Because the one last thing that I did want to say -- and it is just from an overall perspective. So Deb talked about the effluent limitations and the receiving water limitations, but also I would just say that from an overall prospective when you look at this permit overall, the permit provisions are much more stringent than the previous permit. And this is with the addition of new and enhanced minimum control measures within the stormwater management program, more robust and rigorous provisions to implement the non-stormwater discharge prohibition.

And also just as Sam said, provisions to implement 33 TMDLs which are addressing hundreds of water body pollutant combinations that are impaired and also at the same time as we're implementing these 33 TMDLs, that is actually going to be addressing other pollutants as well that are not covered by TMDL.

And then finally, the fact that we have much more rigorous and extensive monitoring requirements. So I think when you look at the permit as a whole, it clearly is a much more stringent permit than the previous permit.

(November 8 hearing, at 315.)

#### **B. The LA MS4 Permit Approach Does Not Violate Anti-Degradation Requirements**

Under the federal regulations, California is required to develop an anti-degradation policy which shall, as pertinent here, provide that “existing in-stream water uses and the level of water quality necessary to protect existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1).

California has adopted such an anti-degradation policy. State Board Resolution No. 68-16 provides that “existing high quality” waters shall be maintained unless an exception is established. “Existing high quality” refers to waters whose qualities were better than the quality established in policies of the State Board as of the date on which such policies became effective.

When undertaking an anti-degradation analysis, a regional board compares the “baseline water quality” to water quality objectives. “Baseline water quality” is the best quality of the receiving water that has existed since 1968. If the baseline water quality is equal to or less than water quality objectives, the objectives set forth the quality that should be attained or achieved.

The Los Angeles Regional Board found that the LA MS4 Permit approach is consistent with anti-degradation policies (LA MS4 Permit, p. 25). No provision authorizes an increase in the discharge of waste. Instead, the WMPs and EWMPs will be designed to achieve water quality standards and, while the WMPs and EWMPs are being developed, the permittees must continue with the same measures that they implemented under the prior permit as well as meeting additional requirements. As noted above, the LA MS4 Permit is much more stringent than the prior permit, including the incorporation of requirements relating to 33 additional TMDLs.<sup>4</sup>

Under State Board Administrative Procedures Update 90-004, “if the Regional Board has no reason to believe that existing water quality will be reduced due to the proposed action, no antidegradation analysis is required.” (APU 90-004, p.2.) The LA MS4 Permit approach, with its WMPs and EWMPs, will improve, not degrade the quality of the waters.

### **C. The LA MS4 Permit Approach is Consistent With Applicable TMDLs**

Some challengers to the LA MS4 Permit approach argue that the EWMPs are not consistent with TMDL waste load allocations because permittees can design their programs using the 85<sup>th</sup> percentile, 24-hour storm event.

The 85<sup>th</sup> percentile design storm is a reasonable means for translating WLAs into permit requirements and the Regional Board appropriately used its agency expertise and discretion by including a design storm in the LA MS4 Permit. Without the use of a design standard, permittees would not develop the EWMPs with their multi-benefit projects because, without a clear design standard which is tied to compliance, permittees would be unwilling to invest the significant monies needed for these projects.

In this regard, the LA Regional Board could reasonably rely on their experience with the trash TMDL in determining whether it can rely on the use of a design storm. The trash TMDL has been one of the most successful TMDLs in the Los Angeles region with regard to its implementation. Its success derives to a large extent from the fact that a design standard is included, which advises the permittees as to the standard that must be met.

Moreover, it is perfectly appropriate for a regional board to implement the waste load allocations through BMPs. EPA recognizes that waste load allocations can be reflected in a permit through BMPs. EPA November 2002 Memorandum; see also EPA 2012 Memorandum. In this regard, the LA MS4 Permit provided that:

The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L-R, consistent with the assumptions and requirements of the WLAs established in

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<sup>4</sup> Additionally, in the Los Angeles Region, evidence suggests that the water quality in the receiving water is currently less than that set forth in applicable water quality objectives, and therefore the antidegradation policy is arguably not triggered.

the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL . . . .

Permit, Part VI.E.1.c, p. 141,

### **III. CONCLUSION**

The LA MS4 Permit approach is a forward-looking approach that, for the first time, integrates water supply with water quality. It accomplishes this result through WMP and EWMPs that encourage an integrated approach to watershed-based planning and programs. Without WMPs/EWMPs, permittees will not have the incentive or the ability to move forward, cooperate with each other, and develop ambitious, watershed-based, compliance programs. The State Water Board should endorse this approach, not reject it.