

**SAN BERNARDINO COUNTY MS4 TENTATIVE ORDER NO. R8-2010-0036**  
**Comments/Responses**

**Summary of Comments and Responses on the San Bernardino 3rd Draft MS4 Permit (December 14, 2009)**

Item No.	Commenting Parties & Page Numbers	Section No & Topic	Comment	Response /Change(s) made
221	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_2	Comment 1 - Revisions Agreed to by the Regional Board Staff Have Not Been Incorporated into the Draft Permit	Appended hereto as Exhibit D to this comment letter is the January 6, 2010 email (including attachments) from me to David Rice, Counsel to the Regional Board, describing the proposed changes Sections II.L.3, II.F.9 and II.F.15.I to the Draft Permit. Based on our conversations with Regional Board staff, we anticipate receiving an errata sheet (or other similar documentation) from Board staff, which addresses and resolves the issues described in such email correspondence. However, to the extent such anticipated documentation does not conform to SBC's understanding of those changes, SBC requests that the changes in the attached email correspondence be incorporated in their entirety into the Draft Permit.	The January 19, 2010 errata (the underline/strikeout version of the December 14, 2009 draft) to the third draft of the MS4 Permit incorporates revisions that are consistent with the USEPA's September 9, 2009 comment letter and the November 24,2009 email comments on the draft MS4 Order.
222	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_2	Comment 2 - Compliance with Obligations Under the Draft Permit is Economically Infeasible	The cost of implementing the new and expansive programs required under the Draft Permit impose significant economic burdens on the individual permittees making compliance with certain provision of the Draft Permit infeasible. Significantly, the estimated cost of compliance with the Draft Permit is more than three times the current version of the Permittees' NPDES permit....In midst of this economic climate, a threefold increase in the cost of compliance imposes an unreasonable obligation on the SBCFCD and the individual Permittees. Any further economic slowdown, or a slower than expected recovery,	Comments noted.
223	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_3	Comment 3 - 3—Issues Regarding Incorporation of TMDLs into the Draft Permit Have Not Been Sufficiently Resolved A. Expression of Wasteload Allocations May be Improperly Construed as Imposing Numeric Effluent Limits	Ambiguity remains in the Draft Permit regarding the nature of total maximum daily loads (TMDLs) wasteload allocations ("WLA") in the Draft Permit. Regional Board staff has agreed to incorporate a robust best management practices ("BMP") implementation plan, which builds upon the previously approved TMDL Implementation Plans for the Middle Santa Ana River Watershed Bacteria Indicator TMDL and the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions. This BMP implementation plan is expected to be developed and approved within the first two years of the Draft Permit term, and will be enforceable and become the final Water Quality Based Effluent Limits ("WQBELs"). However, we object to portions the Draft Permit that describe how the WQBEL development process will occur. SBC remains concerned that such language could be misinterpreted as imposing numeric effluent limits that are potentially applicable to runoff pursuant to these approved TMDLs. As written, any exceedance of such effluent limits under the Draft Permit could be construed as a violation despite efforts by the permittee(s) to minimize the TMDL pollutants—regardless of whether the beneficial uses are in fact impaired. Language in the Draft Permit should be modified to expressly state that numeric effluent limits will not be imposed during the permit term unless the BMP implementation plan is not successful.	The December 14, 2009 draft of the proposed Order included a requirement for the Permittees to develop and implement a comprehensive plan designed to achieve compliance with the WLAs by the dates specified in the TMDLs. The final numeric WQBELs become effective only if such a comprehensive plan is not approved by the compliance dates in the TMDLs. The proposed Order also includes timeframes for development and approval of these comprehensive plans. The language in the proposed Order very clearly indicates when the final numeric WQBELs become enforceable.
224	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_3	Comment 3 - 3—Issues Regarding Incorporation of TMDLs into the Draft Permit Have Not Been Sufficiently Resolved B. Anti-backsliding Provisions May be Implicated by Imposing Numeric Effluent Limits	As further addressed in SBC's prior comment letters, it is far from clear, based on the current state of the law, whether the anti-backsliding provision would act to preclude subsequent modifications to the Draft Permit. SBC is concerned that to the extent any WQBEL—based on the WLA for the Middle Santa Ana River Watershed Bacteria Indicator TMDL and the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions—are expressed as numeric effluent limits, the anti-backsliding provisions of section 402(o) of the Clean Water Act ("CWA") may preclude adoption of less stringent limits even if the underlying water quality objectives are changed. If any such WQBELs are expressed as numeric effluent limits in the Draft Permit (only after a showing that the BMP implementation plan was not successful), SBC objects to such limits to the extent the Regional Board considers these limits to be subject to federal anti-backsliding requirements.  Consistent with U.S. EPA's interpretation, SBC believes that the anti-backsliding requirements of section 402(o) of the CWA do not apply to revisions to effluent limitations made before the scheduled date of compliance for those limitations. U.S. EPA, Waster Quality Standards: Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California (California Toxics Rule), 65 Fed. Reg. 31682, 31704) (May 18, 2000); see <i>Communities for a Better Env't. v. State Water Res. Control Bd.</i> (2005) 132 Cal. App. 4th 1313, 1331-32.	Several commenters have raised the concern that federal anti-backsliding regulations could prohibit the relaxation of effluent limits in the future should water quality standards or WLAs undergo changes. Currently there are several taskforces efforts being undertaken in the Region to revisit water quality standards and TMDLs to ensure that water quality is protected in the most efficient manner. We agree with the commenter that it is the position of both USEPA and the State Board that effluent limits can be relaxed in the permits prior to the effective dates for the effluent limits without the need for any anti-backsliding analysis. Additionally, there are numerous exceptions to the anti-backsliding rule, including those set forth in 303(d)(4) of the Clean Water Act that may apply given the specific facts surrounding future relaxation of effluent limits.

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225	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_3	Comment 3 - 3—Issues Regarding Incorporation of TMDLs into the Draft Permit Have Not Been Sufficiently Resolved B. Anti-backsliding Provisions May be Implicated by Imposing Numeric Effluent Limits	In addition, in its September 9 comment letter, SBC described three real-world scenarios related to the forthcoming changes to bacteria objectives in the Middle Santa Ana River. We specifically asked Regional Board staff how such anti-backsliding provision would apply in each particular circumstance. To date, Regional Board staff has provided no explanation of how less stringent effluent limits could be applied in the Draft Permit after the Basin Plan is amended to adopt less stringent bacteria standards. We again request that Regional Board adequately respond to this important issue.	Please see the comments above. The operation of these rules are not only very fact specific, but would require discretionary action by the Regional Board. The exceptions provided in 303(d)(4) could provide a means to avoid the prohibition against relaxation of effluent limits contained in the anti-backsliding rules because the scenarios contemplate either the relaxing of water quality standards, removal of beneficial uses, and/or revisions to waste load allocations. Regional Board staff has no special expertise in interpreting the operation of the anti-backsliding rules and exceptions.
226	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_4	Comment 4 - Several Obligations Imposed by the Draft Permit Constitute Unfunded Mandates in Violation of Article XIII B, Section 6 of the California Constitution	The Draft Permit contains numerous unfunded State mandates. Unless funding is provided for the implementation of these provisions by local governments, such aspects of the Draft Permit violate Article XIII B, Section 6 of the California Constitution. Significantly, Section 6 provides that: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government of the costs of the program or increased level of service . . ." Cal. Const. art. XIII B, § 6 (emphasis added). This provision "was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task." County of Fresno v. State of California (1991) 53 Cal. 3d. 482, 487. Section 6, therefore, provides for reimbursement, through subvention, "to local governments for the cost of complying with certain requirements mandated by the state." County of Los Angeles v. Comm'n on State Mandates (2007) 150 Cal. App. 4th 898, 905.	The proposed Order implements the federal laws and regulations under the Clean Water Act. As explained in Finding II. B.6 of the proposed Order and Section II of the Fact Sheet (see the January 19, 2010 errata to the third draft), the requirements in the proposed Order do not constitute an unfunded mandate.
227	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5 - The Draft Permit Imposes Unreasonable Deadlines for Completing Certain Program Enhancements	As discussed in its September 9, 2009 comment letter, the Draft Permit places unreasonable deadlines on the permittees to incorporate a litany of obligations, including, but not limited to, preparing guidance, constructing databases, formulating inspection programs, and completing certain program evaluations. SBC requests that several sections of the Draft Permit be revised as follows:	Some of the deadlines were revised base on information provided by the Permittees.
228	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5: Septic System Program (IX.F)	Extend completion schedule from 24 to 36 months. This obligation requires modification to an existing program; thus, its completion is a lower priority.	Such an extension cannot be justified as similar requirements were included in the third term permit.
229	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5: Public Education BMP Guidance (XII.E)	Extend completion schedule from 12 to 24 months. The existing BMP education programs currently address most pollutants, and BMP resources are available from other sources. Accordingly, completion of this task is a lower priority.	Such an extension cannot be justified as similar requirements were included in the third term permit.
230	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5: Post Construction Database Activities (XI.I.2, XI.J.2)	Extend completion schedule from 12 to 18 months. This extension will provide time for the permittees to link this activity with the local implementation plans ("LIP"), low-impact development ("LID") and water quality management plans ("WQMP") priority activities, as several elements of post-construction database development relate to these permit requirements.	See revisions in the January 19, 2010 draft monitoring and reporting program
231	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5: Risk-Based Inspections (X.A.3)	Extend completion schedule from 18 to 24 months. This is an enhancement of an existing program that is not a high priority permit requirement. Thus, such an extension is reasonable.	Such an extension cannot be justified as similar requirements were included in the third term permit.

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232	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_5	Comment 5: Effectiveness Evaluation (XVIII.B)	Extend the deadline to propose changes to how program effectiveness is evaluated from the first annual report completed after permit adoption to the second such annual report. The deadline proposed under the Draft Permit is premature.	Program effectiveness analysis is an important component of the MS4 program. The Permittees should be looking for opportunities to refine the program effectiveness analysis as new information becomes available.
233	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_6	Comment 5: Pathogen Control Ordinance (VII.D)	Extend completion schedule from 36 to 48 months in order to coordinate the pathogen control ordinance with the residential BMP program, which includes development of home owners association ("HOA") control measures. We propose to develop the elements of this ordinance while developing the residential BMP program (See Section X.E.1 of the Draft Permit). Thus, a draft ordinance would be completed within 36 months of permit adoption. However, SBC requests an additional 12 months in order to provide adequate time for each permittee to complete the ordinance adoption process.	Bacteria in urban runoff is a high-priority program under the Permittee proposed risk-based approach to addressing water quality issues within the permit area. As such, this ordinance should be given high priority; 36 months seem to be an appropriate amount of time to enact this ordinance.
234	SBCFCD, through Hunton & Williams_Third Supplemental comment_010710_6	Conclusion	SBC requests that the Regional Board amend or revise the Draft Permit consistent with these comments....	Please see appropriate changes in the January 19, 2010 errata to the third draft.
235	NRDC_via Email_010710_1 to 2	1. The Permit Should Ensure that Only Water Retained Onsite Counts Toward the Design Capture Volume	<p>This language (Section XI.E.4) creates ambiguity as to the precise measures a development may use to satisfy its design capture requirement. Specifically, the language appears to allow measures that do not retain water onsite, such as bio-treatment, to count toward the design capture requirement. Critically, because bio-treatment allows for discharge of some quantity of stormwater to receiving waters, any bio-treatment system would have to be 100% effective at removing pollutants, a condition almost certain not to be attained, in order to provide the equivalent water quality benefit derived from retaining the same volume of stormwater onsite.</p> <p>...The Permit should be revised such that it clearly states that only water retained onsite may count towards this requirement, and the word "bio-treated" should be removed from this section such that the clause in footnote 87 reads: "[only volume retained onsite qualifies towards the volume capture requirement."</p>	The proposed Order includes a hierarchy for LID implementation. The Order also includes a prioritized system for various LID BMPs. The first-tier or the highest priority LID BMPs are: infiltration, harvest and use and evapotranspiration. If the first tier LID BMPs are not feasible at a particular site, bio-treatment may be considered; bio-treatment is considered as a second-tier LID BMP. Furthermore, the proposed Order would only allow a properly designed and maintained bio-treatment system.
236	NRDC_via Email_010710_3	2. In Lieu and Alternative Programs Must Provide Water Quality Benefits at Least Equivalent to Those that Would Result From Compliance with Onsite LID Requirements	<p>The seeming intention of the Permit is to require projects that have demonstrated the infeasibility of complying with onsite retention requirements to participate in either the alternative compliance program (§ XI.E.10) or the in lieu or credit program (§ XI.G). The Permit does not clearly establish this requirement, however. Section XI.E.10, for instance, uses the permissive term "may" when defining which projects should follow the alternative compliance program.</p> <p>The Board should clarify the Permit so that it expressly requires projects that do not meet the onsite design capture volume requirement to participate in the alternative compliance program, in lieu program, or credit program. See, e.g., the MS4 permit for Ventura County ("When a permittee finds that a project applicant has demonstrated technical infeasibility, the permittee <i>shall</i> identify alternative compliance measures that the project will need to comply with as a substitute for the otherwise applicable post-construction requirements listed in subparts 4.E.III.1.(a)-(c) of this permit.")</p>	The January 19, 2010 errata to the third draft requires that if a waiver is granted, the project proponent must participate in one of the in-lieu programs or alternative compliance program as per XI.E.10.
237	NRDC_via Email_010710_3	2a. In Lieu Payments Must Correspond to Water Quality Impairment that Will Result from Non-Compliance with Onsite Retention Requirements	Section XI.G.2 allows a Permittee to establish an urban runoff fund when granting a waiver. As a preliminary matter, we believe the section should be changed to require the establishment of such a fund, as has been required by other recently adopted permits in California ... While a fund is just one of several means by which the Permit allows projects to comply with LID requirements, leaving the establishment of a fund to the discretion of Permittees could potentially create a loophole allowing projects to avoid LID requirements altogether. For example, if a project demonstrating infeasibility of onsite retention is unable to either comply with the alternatives listed under section XI.E.10.d or demonstrate justification for an award of credits under section XI.G, absent the creation of a fund there is no means of ensuring the project will ultimately provide equivalent water quality benefits to onsite retention (or, alternately, no means of justifying the grant of a waiver absent their payment into a fund). In order to prevent this potential outcome, the creation of a fund should be required by the Permit.	The January 19, 2010 errata to the third draft requires that if a waiver is granted, the project proponent must participate in one of the in-lieu programs or alternative compliance program as per XI.E.10.

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238	NRDC via Email_010710_4	2a. In Lieu Payments Must Correspond to Water Quality Impairment that Will Result from Non-Compliance with Onsite Retention Requirements	<p>Additionally, Section XI.G.2 currently requires contributions to in lieu programs "be at least equivalent to the cost savings for waived BMPs." Tying the contribution amount to cost savings could allow projects to satisfy Permit requirements by contributing payments that are insufficient to address the water quality impairment that the failure to retain water onsite will cause. The Board should thus revise this section so that payment amounts are related to water quality impacts, not to cost savings claimed.</p> <p>The Ventura County Permit, for instance, calculates payment amount in such a manner: "Regardless of the methods through which permittees allow project applicants to implement alternative compliance measures, the sub-watershed-wide (defined as draining to the same hydrologic area in the Basin Plan) result of all development must be at least the same level of water quality protection as would have been achieved if all projects utilizing these alternative compliance provisions had complied with subparts 4.E.III.1.(a)-(d) of the permit."</p>	The January 19, 2010 errata to the third draft includes a requirement for equivalent water quality protection when a project proponent contributes to an urban runoff fund.
239	NRDC via Email_010710_4	2b. The Credit System Should Only Award Credits to Projects Providing Equivalent Water Quality and Flow Volume Benefits	The Permit allows Permittees to establish "a water quality credit system for alternatives to LID and hydromodification requirements." § XI.G.4. It then lists twelve types of projects that may be considered for such a credit system. NRDC recognizes that many of these project types may provide laudable social and environmental benefits, and has, for example, long advocated for mixed use and in-fill development. However, their blanket inclusion as potential projects receiving water quality credits raises significant concerns.	The January 19, 2010 errata to the third draft includes a requirement for equivalent water quality protection when a project proponent wants to establish a water quality credit system.
240	NRDC via Email_010710_4	2b. The Credit System Should Only Award Credits to Projects Providing Equivalent Water Quality and Flow Volume Benefits	First, a Permittee could create a credit system that awards credits that are not in proportion to the water quality benefits a project will offer. It is unclear how certain project types – such as those in the city center or in historic districts or historic preservation areas –would improve, or are even related to water quality and thus deserve credit under this provision. See § XI.G.4(i)-(j). But even for those project types that would seem to offer direct water quality benefits – such as redevelopment projects that reduce the overall impervious area – there is no requirement that the credit given be equivalent to the water quality benefit a project provides. §XI.G.4(a).	The January 19, 2010 errata to the third draft includes a requirement for equivalent water quality protection when a project proponent wants to establish a water quality credit system.
241	NRDC via Email_010710_4	2b. The Credit System Should Only Award Credits to Projects Providing Equivalent Water Quality and Flow Volume Benefits	The Board should revise this section such that any credit system will result in a project providing equivalent water quality benefits (e.g., reduction in pollutant load). Further, for projects undertaking offsite mitigation in order to receive a water quality credit, the Permit should require that any offsite mitigation must be performed in the same hydrologic subarea and provide water quality and flow volume benefits that are the same or better than the benefits that compliance with onsite retention requirements would provide.	The January 19, 2010 errata to the third draft includes a requirement for equivalent water quality protection when a project proponent wants to establish a water quality credit system.
242	NRDC via Email_010710_5	2b. The Credit System Should Only Award Credits to Projects Providing Equivalent Water Quality and Flow Volume Benefits	Second, section XI.G.4 would allow Permittees to establish credit systems without public review or other form of oversight. By allowing for currently undefined credits to be granted for a broad array of project types, Permittees could potentially excuse projects from the Permit's LID and onsite retention requirements, a central provision of the Permit, altogether.8 The Clean Water Act prohibits such self-regulatory systems. <i>Env't. Def. Ctr., Inc. v. EPA</i> (9th Cir. 2003) 344 F.3d 832, 854-56. ("[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity . . . Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy.") The Board should thus either amend section XI.G.4 to require public review of credit systems, or delete the section in its entirety	The January 19, 2010 errata to the third draft requires the Permittees to report any water quality credit that they grant. The annual reports are public documents and are available for public review and comments.
243	NRDC via Email_010710_5	2b. The Credit System Should Only Award Credits to Projects Providing Equivalent Water Quality and Flow Volume Benefits	Finally, the section lets Permittees establish systems that award credits for contributions to urban runoff funds. § XI.G.4(g). But another section of the Permit – XI.G.2 – already allows for in lieu payments. To have two sections – and potentially two parallel and even conflicting schemes – governing payments could risk confusing permittees, project developers, or others.	The duplicative provisions in Section XI.G.4(g) has been deleted.

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244	NRDC via Email_010710_5	3. Where Onsite Retention is Infeasible, a Project Must Treat Water Before Discharging It	Section XI.G creates in lieu and alternative programs for projects that cannot feasibly retain water onsite. While under the Permit projects may pursue these alternative programs after demonstrating the infeasibility of onsite retention, the Permit must require, pursuant to state SUSMP requirements as established by the State Water Resources Control Board in In re Bellflower SWRCB Order WQ2000-11, that projects must additionally at least treat the design capture volume onsite through conventional BMPs (or bio-treatment) before discharging it. As currently drafted, a project participating in the in-lieu or credit program could potentially discharge the full onsite design storm volume into receiving waters without any treatment whatsoever. The absence of a provision requiring onsite treatment of the design storm volume not only would violate the requirements of WQ2000-11, but stands in contrast to provisions adopted in multiple recent California MS4 permits.	In Region 8, the Water Quality Management Plans (WQMPs) address the SUSMP requirements. There is an approved Model WQMP for the Permittees. Provision XI.D.1 requires the permittees to continue to require project-specific WQMP for all priority projects.
245	NRDC via Email_010710_5	3. Where Onsite Retention is Infeasible, a Project Must Treat Water Before Discharging It	<i>See Ventura County Permit ("The project must reduce the percentage of Effective Impervious Area to no more than 30 percent of the total project area and treat all remaining runoff pursuant to the design and sizing requirements of subparts 4.E.III.1.(b)-(d)."); South Orange County Permit ("If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs . . . the project may implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(8).")</i>	In Region 8, the Water Quality Management Plans (WQMPs) address the SUSMP requirements. There is an approved Model WQMP for the Permittees. Provision XI.D.1 requires the permittees to continue to require project-specific WQMP for all priority projects.
246	NRDC via Email_010710_6	4. The Permit Must Require Multi-Stage Developments that Will Satisfy LID Requirements in Later Stages to Follow Through on Obligations	Under section XI.G.3, "[t]he obligation to install structural site design and/or treatment control BMPs at a new development is met if, for a common plan of development, BMPs are constructed with the requisite capacity to serve the entire common project . . ." In some instances, developers may build subdivisions in stages and, due to financial or other reasons, never complete the stage that would have included the required BMPs. The portion of the subdivision that is built would thus not have included BMPs and would fail to satisfy its LID requirements.	Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
247	NRDC via Email_010710_6	4. The Permit Must Require Multi-Stage Developments that Will Satisfy LID Requirements in Later Stages to Follow Through on Obligations	Such a risk is not hypothetical. In this recession, developers have left many subdivisions incomplete. To ensure that future abandoned projects do not contribute to water quality violations that exceed the requirements of the Permit, the Board should amend the Permit so that it requires developers who do not finish subdivisions to still satisfy LID requirements for the completed sites.	Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
248	NRDC via Email_010710_6	5. Total Maximum Daily Load Provisions Should Clearly Detail How Monitoring and Other Requirements will Ensure Compliance with WLAs.	NRDC is pleased to see the draft Permit incorporates applicable wasteload allocations (WLAs) for Total Maximum Daily Loads (TMDLs) adopted for San Bernardino County, as required under 40 C.F.R. § 122.44(d)(1)(vii)(B), and fully supports the Regional Board's decision to incorporate the WLAs as numeric effluent limitations. While BMPs may, under certain circumstances, serve as a means of achieving WLAs, U.S. EPA policy requires that a permit "demonstrate that the BMPs are expected to be sufficient to comply with the WLAs." However, "given the uncertainties in the performance of many of the BMPs commonly used for stormwater pollution control, it is often difficult to make such a determination." Use of numeric effluent limitations derived from the WLAs is therefore the soundest means of ensuring compliance with the requirements of TMDLs adopted for the region.	Comment noted. In the absence of an approved comprehensive plan designed to achieve WLAs by the compliance dates specified in the TMDLs, the WLAs become the final numeric WQBELs.
249	NRDC via Email_010710_7	5. Total Maximum Daily Load Provisions Should Clearly Detail How Monitoring and Other Requirements will Ensure Compliance with WLAs.	While we support the Regional Board's approach in this regard generally, we are concerned that the Permit's TMDL implementation provisions do not adequately specify requirements for monitoring sufficient to ensure that applicable WLAs are being, or will be met. For example, for the Middle Santa Ana River (MSAR) Watershed Bacterial Indicator TMDL, the Permit requires initially only that the Permittees continue to comply with the TMDL Implementation Plan. § V.D.1.a. Neither this provision, nor the Permit's requirements that the Permittees later submit a draft Comprehensive Bacteria Reduction Plan (§ V.D.2.b.i), adequately detail what will be required by the Permittees' monitoring program, or how the monitoring program will be designed to ensure compliance with the WLAs. We suggest that the Permit be revised to further detail what will be required for the monitoring programs for applicable TMDLs, in order to ensure compliance with the applicable WLAs and their overlying TMDLs.	There are a number of monitoring programs that have been developed in response to TMDL implementation plans. These TMDL monitoring programs have been approved by the Regional Board and the Permittees are implementing these programs (e.g., see V.D.4.c and

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250	NRDC_via Email_010710_7	Conclusion	We appreciate the efforts made to date to implement sound LID standards in the Permit, and would be pleased to respond to any questions you may have about our comments. We believe the above suggested changes will significantly improve the effectiveness of the permit, and we urge that the Board implement these modifications before it is adopted.	Comments noted.
251	IEW-010710_1 to 2	Concern with third draft	<p>Waterkeeper is concerned with the development of the third draft of the MS4 permit issued to the County of San Bernardino. As written, the draft permit represents a significant lost opportunity to restore the degraded condition of the waters of the San Bernardino County and those municipalities downstream. ...</p> <p>Waterkeeper agrees that the assertion that the "number of waterbodies failing to achieve compliance with our nation's water quality goals is not declining." As such, the issuance of MS4 permits is critically important if that trend is destined to retreat and clear, measurable, and enforceable requirements are essential in moving towards that national goal.</p>	Comments noted. The proposed Order includes clear measurable, and enforceable requirements, where appropriate.
252	IEW-010710_2	WQBELS & TMDL WLA	<p>Waterkeeper encourages the Regional Board to adopt MS4 permits with clear, numeric effluent limits similar to those seen with the Big Bear Lake TMDL. There, consistent with 40 C.F.R. 122.44(d)(1)(vii)(B), the WLA in the approved TMDL act as de facto WQBELS. This provides permittees with clear, measurable and enforceable limitations which provide each permittee with notice and an opportunity to avoid violations.</p> <p>The adoption of WQBELS is consistent with the Los Angeles Water Quality Control Board's recently issued MS4 permit to the County of Los Angeles which includes, "numeric limits on bacteria levels for storm water discharges into the Santa Monica Bay during wet weather conditions" and the "TMDL-derived, water-quality-based numeric effluent limitations" specifically applied to MS4 discharges for wet-weather bacteria to be "implemented over a long period of time."</p>	The proposed Order provides the Permittees a number of options to achieve WLAs and ultimately water quality standards. Consistent with the federal regulations and USEPA guidance, the proposed Order includes the WLAs as WQBELS if no comprehensive strategic plan is adopted by the board by the TMDL compliance date. In the event that the Permittees fail to develop a comprehensive plan designed to achieve WLAs by the compliance dates specified in the TMDLs, or if the Board does not approve the comprehensive plan, the WLAs become the final numeric WQBELS. Referring to other MS4s is not necessarily helpful, as the Regional Boards must work with the individual needs, abilities, and limitations of the various permittees. Compared with other MS4 permits, this permit is more progressive in many respects.
253	IEW-010710_2	WQBELS & TMDL WLA	However, consistent with our first comment letter concerning the County of Riverside and the County of San Bernardino's MS4 permits, we cannot support a monitoring mechanism which guarantees failure while trumpeting success. A circuitous compliance tool without concrete benchmarks, little hope for progress, and no potential for permittees to be held responsible for their failures is not a solution to chronic storm water pollution. (Also see Section F. below)	The proposed Order includes specific deadlines to develop various plans and programs and it includes interim and final effluent limits, including numeric WQBELS. These are concrete benchmarks and are enforceable.
254	IEW-010710_3	CWA Section 303(d) Listed Waterbodies and TMDLs	Waterkeeper is concerned that interim compliance determination with the WLAs in the TMDLs will be based on the permittees progress in implementing the TMDL implementation plan. The mere compliance with an implementation plan may not result in actual compliance with limitations which are appropriate under the circumstances. Rather than approach chronic storm water pollution problems on 303(d) listed waters with TMDLs from a perspective permitting continual contamination so long as a tasks are being performed the Regional Board should strengthen its position and ensure actual compliance with state and federal regulations.	The plans that were developed and approved by the Board was based on best available information at that time. The Permittees are required to continue to implement these plans and to assess the effectiveness of these plans. The proposed Order requires the Permittees to develop comprehensive plans which should be based on the latest available information.
255	IEW-010710_3	CWA Section 303(d) Listed Waterbodies and TMDLs	Waterkeeper echoes EPA's concerns regarding the County of Riverside's the MS4 permit's section on Lake Elsinore/Canyon Lake's nutrient TMDL and how it mirrors concerns in San Bernardino. Chiefly, that it be revised to clarify that numeric WLA and the implementation of specific tasks in the implementation plan are independent obligations of permittees and the satisfaction of one does not equate to the satisfaction of the other. As EPA stated, "Currently, the language suggests that compliance with the tasks in the implementation plan may satisfy the requirement to comply with the numeric WLAs, even if the various tasks do not result in actual compliance with the numeric WLAs." The letter concluded, "the revision would provide greater assurance of consistency with the WLAs and would enhance the enforceability of the permit with regards to the WLAs."	Please see the January 19, 2010 errata to the third draft. The revisions to the TMDL provisions in the permit and the findings of the draft Order are consistent with the USEPA guidance (November 22, 2002) and recent comment letters (September 9, 2009 and email correspondence dated November 24, 2009) on this draft Order.

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256	IEW-010710_3	CWA Section 303(d) Listed Waterbodies and TMDLs	We agree with EPA that WLAs as numeric limits is appropriate in a final permit and strongly encourage uniform consistency between the TMDL provisions for San Bernardino and Orange County's MS4 permit on this issue.	Please note that the WLAs are expressed as the final numeric WQBELs in the absence of an approved comprehensive plan.
257	IEW-010710_3	(LID) and Hydromodification Management to Minimize Impacts from New Development/Significant Redevelopment Projects	Waterkeeper echoes the opinion of EPA Region IX that the implementation of LID principles in MS4 permits, especially third or fourth generation permits, must include <i>clear, measurable, and enforceable</i> provisions for the implementation of LID. ( <i>emphasis added</i> ) Similarly, permits should also include <i>clearly defined and enforceable</i> process for requiring off-site mitigation for projects where use of LID design is infeasible. ( <i>emphasis added</i> ). Waterkeeper would not support replacing concrete quantifiable approaches with qualitative provisions without measurable goals.	Provision XI.E of the proposed Order includes requirements for implementation of LID BMPs at priority development sites. These provisions are consistent with other recently adopted MS4 permits in the nation. As indicated above, the proposed Order includes clear and measurable goals and enforceable provisions (e.g., see Provision XI.E.4).
258	IEW-010710_3	(LID) and Hydromodification Management to Minimize Impacts from New Development/Significant Redevelopment Projects	Additional requirements clarifying MEP and improving enforceability of the permit would only strengthen the practical impact of the permit on localized water quality. Section 402(p) of the Clean Water Act establishes the MEP standard as the requirement for MS4 permits without affirmatively dictating what that term is intended to mean. While ambiguous, the MEP standard does not permit "unbridled discretion" by the Regional Board in determining the appropriate measure of compliance. Rather, the standard "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." Previous municipal audits in California have identified a lack of detailed requirements as a frequent shortcoming in previously-issued MS4 permits in southern California. Refined clarity in the quantitative requirements of LID sought by the Regional Board would help clarify to all parties the requirements of the permit as well as providing a consistent foundation upon which to measure regional progress.	We disagree with the commenter that the Regional Board is using "unbridled discretion" in prescribing requirements based on the MEP standard in the proposed Order. The proposed Order not only contains all the essential elements prescribed in the Clean Water Act (Section 402(p)) and its implementing regulations (40 CFR 122, 123 and 124), but it incorporates latest knowledge about low impact development techniques and other storm water treatment BMPs.
259	IEW-010710_4	Alternatives and In-Lieu Programs	Waterkeeper is concerned over the likelihood that the "obligation to install Treatment Control BMPs at New Development" if the "BMPs are constructed with the requisite capacity to serve the entire common project" will actually be achieved. During periods such as this current economic downturn there is a real threat that common plan developments begin construction with the intent to have structural BMPs satisfy the entire project's obligations that are never actually constructed because the common development stalls and is either not completed or placed on indefinite hiatus. These situations allow the possibility of new developments which would fall within the requirements of this MS4 permit to avoid actual construction of required BMPs because the common development project ceases construction and those residences already built will be without the otherwise required BMPs.	We believe that there are enough safeguards built into the proposed Order to address these concerns. Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
260	IEW-010710_4	Alternatives and In-Lieu Programs	Waterkeeper recommends the Regional Board consider requiring the pro rata development of BMPs to overall common development construction. For example, a common development construction in San Bernardino County which is twenty-five percent complete (phase 1 of 4) must have sufficient BMP capacity to address twenty-five percent of the storm water for that portion complete or enough to counter all of the immediately completed development.	Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
261	IEW-010710_4	Alternatives and In-Lieu Programs	In rebuttal to the potential BIA and permittees claims regarding the state of the regional or localized economy's impact on the area as an excuse for the status quo Waterkeeper directs the Regional Board's attention to an EPA study on the impact water quality has on residential property value. The study analyzed residential property values in the area around Lake Champlain in the Northeast United States and revealed that residences with higher water quality were valued twenty percent higher than those properties with poor water quality.	Comment noted.

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262	IEW-010710_4 TO 5	Alternatives and In-Lieu Programs	<p>Locally, a 2001 study conducted by the California Water Awareness Campaign revealed that the quality and quantity of water available rank as the two most important environmental issues facing California. It stated, "of the ten statewide issues, water quality and supply ranked at the top with eighty-three percent and eighty-two percent of the respondents ranking them, respectively, as 'very important.'</p> <p>As such, when deliberating the reasonableness of recommendations for the improvement of MS4 permits the Regional Board should remember the underreported aspects of water quality improvement on residential home values as well as the level of importance the general public regards the issue of water quality and quantity in California prior to the adoption of any tentative order.</p>	Comment noted.
263	IEW-010710_5	Alternatives and In-Lieu Programs	<p>Finally, we caution the Regional Board inasmuch as it defers compliance with WQMPs goals with the development of "watershed-based Treatment Control BMPs." The implementation of appropriate BMPs has been proven to result in improvements in storm water quality on a "site-specific basis, but information about watershed-scale improvement is lacking."</p> <p>Likewise, Waterkeeper has concerns with WQMP's that defer installation of permanent treatment BMPs until such time that the Home Owner's Association (HOA) can provide them. We feel strongly that this caveat should not be allowed and that it is the responsibility of the project proponent to complete the project in its entirety. It could be years until the HOA is developed and fully capitalized so we urge the Regional Board to close this loophole with this permit revision.</p>	The proposed Order does not allow postponement of BMP implementation till an HOA takes over the project. Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
264	IEW-010710_5	Alternatives and In-Lieu Programs	Likewise, Waterkeeper has concerns with WQMP's that defer installation of permanent treatment BMPs until such time that the Home Owner's Association (HOA) can provide them. We feel strongly that this caveat should not be allowed and that it is the responsibility of the project proponent to complete the project in its entirety. It could be years until the HOA is developed and fully capitalized so we urge the Regional Board to close this loophole with this permit revision.	Provision XI.G.3 requires the Permittees to verify that the treatment control systems are operational prior to issuing occupancy permits and Provision XI.I requires field verification of BMPs.
265	IEW-010710_5	General Comments #1	A common theme throughout this latest iteration of the MS4 permit is an unwillingness to hold those permittees accountable for their failure to abide by the terms of the permit, if that were to happen, and/or an uneasiness to demand specific goals be met by date certain. Previously, Waterkeeper submitted a comment letter to the Regional Board stating our opposition to a form of collaborative governance similar to the task force model used in the TMDL process. If permitted, the process will fail to achieve the concrete goals established in this or any MS4 permit because the intent of the process is not to reach defined objectives but rather to defer expenditures and responsibility.	We have had good experience with the various taskforces in our Region. These taskforces have provided significant contributions to water quality improvements in the Region. In fact, the Regional Board recognized the contributions by these taskforces by adopting a resolution.
266	IEW-010710_5	General Comments #2	We reiterate our firm opposition to the use of a collaborative task force approach in the execution and enforcement of the terms provided in this or any MS4 permit. Showing a "good faith effort" should not be the bar by which permittees are measured. We foresee this approach causing an unending chain of meetings for both the Regional Board staff and permittees resulting in little action, deferred compliance, a false sense of accomplishment on behalf of co-permittees and even less enforcement.	We have had good experience with the various taskforces in our Region. These taskforces have provided significant contributions to water quality improvements in the Region. In fact, the Regional Board recognized the contributions by these taskforces by adopting a resolution.
267	IEW-010710_6	Conclusion	Finally, the Regional Board should be resolute in ensuring the adoption of this Permit in recognition of the increasing need for clean water. Brief economic disruptions, while regrettable and unenviable, provide an insufficient rationale for regulatory delay. Although the global recession has impacted San Bernardino County to a significant degree the Regional Board must remember that recessions are transitory and cannot be allowed to dictate foundational regulatory mandates such as those under the Act.	Comments noted.

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268	City of Claremont_120909_1	Clarification - not a Co_Permittee	Claremont is a general law city located in the County of Los Angeles. The City is a co-permittee on the NPDES permit IWDR issued by the Los Angeles Regional Board and is not within the jurisdiction of the Santa Ana Board. Claremont sends this letter to clarify and confirm that the San Bernardino Permit has no application to Claremont.	The City of Claremont is not listed as a co-permittee on this permit. Therefore, the City of Claremont is not technically bound by this permit. However, the City of Claremont does discharge a substantial portion of stormwater (and perhaps non-stormwater) into the Santa Ana Region. Accordingly, it has been assigned a WLA for the MSAR Bacteria Indicator TMDLs. Therefore, to the extent that the City of Claremont discharges pollutants into the waterbodies in the Santa Ana Region, it does so without an NPDES permit and in violation of the Clean Water Act.
269	City of Claremont_120909_1	MSAR TMDL	In Findings 7-15 and Section V.D.1 of the San Bernardino Permit, the Santa Ana Regional Board applied the Middle Santa Ana River (MSAR) Watershed Bacteria Indicator TMDL to the San Bernardino Permit co-permittees, as listed in Table 1 of the Permit. Claremont is not a co-permittee on the San Bernardino Permit, and, therefore, none of the permit, including the portions related to the MSAR TMDL apply or could apply in any way to Claremont. Claremont requests that the Regional Board expressly acknowledge this fact.	Please see above.
270	City of Claremont_120909_2	Conclusion - Participation in MSAR TMDL Task Force only; NOT to SAR Basin Plan and SB MS4 Permit	When the Regional Board amended the Basin Plan in 2005 to incorporate the MSAR TMDL, it included Claremont without the City's knowledge and participation. Because Claremont is not located within the area to which the Basin Plan applies and is not under the Santa Ana Board's jurisdiction, Claremont believes and continues to believe that the MSAR TMDL should not apply to it. However, in the spirit of cooperation and in response to a Water Code section 13267 order issued by the Executive Officer, Claremont agreed to join the MSAR TMDL Task Force. Claremont will, at this time, continue to participate in the Task Force. By its participation in the Task Force, Claremont in no way agrees to subject itself to the Santa Ana Region Basin Plan or the San Bernardino Permit.	This is not true; the City was invited to participate in the TMDL development process and was notified of the Regional Board's intent to amend the Basin Plan.
271	City of Ontario_121409_1	Significant Cost Increases	The implementation cost of the NPDES program under the proposed permit will be more than double than that of the last permit. Compounding the issue of revenue shortfall and the need to secure additional resources, it will be infeasible to implement this permit and accomplish all required tasks within the specified schedule. The City of Ontario recommends that the Permittees be allowed to adjust the priorities and required tasks in the proposed permit using a risk-based approach so that the total program expenditures for the next two fiscal years do not exceed the FY 2009/2010 program costs.	Please note that the proposed Order is based on a risk-based prioritization scheme that the Permittees proposed in their ROWD.
272	City of Ontario_121409_1	Numeric Water Quality Compliance Standards	Previous permits required a Best Management Practice (BMP) approach to protect water quality. The proposed permit will establish Numeric Effluent Limits (NEL) for water quality compliance. Such limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded and does not adversely affect beneficial uses regardless of whether recreational uses are actually harmed. Therefore, any exceedance of Numeric Effluent Limits (NEL) would be a permit violation.	Please note that the final numeric water quality-based effluent limits do not go into effect if the Permittees have developed and implemented a comprehensive plan designed to achieve WLAs by the dates specified in the TMDLs.
273		Numeric Water Quality Compliance Standards	Also, we understand the Regional Board is not required to impose numeric limits at this time because the numeric limit water quality compliance dates are outside the term of the proposed permit (December 31, 2015 for dry weather conditions and December 31, 2025 for wet weather conditions). Furthermore, we note that numeric limits requirements were not incorporated into the recently adopted permit for the San Francisco Bay area. For the above reason, we request that all language related to NEL be removed from the proposed permit.	The TMDL provisions have been revised and they are consistent with the USEPA guidance (November 22, 2002) and its comment letters on this draft Order (September 9, 2009 and email comment dated November 24, 2009).

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274	City of Ontario_121409_1	Land development requirements	The proposed permit requires all new development and significant redevelopment projects to implement the Low Impact Development (LID) approach. As a result, development projects are required to retain, infiltrate, and reuse the design stormwater runoff, including all public road construction and widening projects, unless it is infeasible. Such requirement is beyond LID implementation and will become an overall impediment to projects approval and urban growth. The City recommends that biofiltration and biotreatment LID BMPs be expressly allowed to meet the volume capture standard without performing a feasibility analysis. In addition, economic feasibility should be considered as well as technical feasibility when considering the feasibility of implementing LID best practices and permit language added to reflect this omission.	Please note that there are preferred LID BMPs based on their effectiveness. The first-tier or the highest priority LID BMPs are: infiltration, harvest and use and evapotranspiration. The propose Order includes bio-treatment as a second-tier LID BMP.