

Public Comments Received Regarding the Tentative Determination to Re-Issue the National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems (General Discharge Permit No. 13-SF-5501, General NPDES No. MDR055501)

Commenters:

1. Maryland Department of Agriculture
2. Maryland Department of Transportation
3. Maryland Port Administration
4. Maryland-National Capital Park & Planning Commission
5. United States Department of Defense
6. University of Baltimore
7. University of Maryland System Institutions
8. Washington Suburban Sanitary Commission



Maryland Department of Agriculture

Office of Resource Conservation

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Joseph Bartenfelder, Secretary
James P. Eichhorst, Deputy Secretary

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March 30, 2017

Mr. Raymond Bahr
Maryland Department of the Environment
Water Management Administration
Sediment, Stormwater, and Dam Safety Program
1800 Washington Boulevard, Suite 440
Baltimore, Maryland 21230-1708

Re: NPDES General Permit for Small MS4s – General Discharge Permit No. 13-1M-5500
NPDES General Permit for State and Federal Small MS4s – General Discharge
Permit No. 13-SF-5501

Dear Mr. Bahr:

As you may be aware, the Maryland Department of Agriculture has proposed language for inclusion in the above referenced permits. The Department continues to be concerned about the loss of productive farmland due to installation of restoration projects to meet Impervious Acre Credits under the NPDES General Permit. The Department would like to ensure that agricultural operations participating in such projects are in compliance with all applicable laws and regulations prior to project approval. Consequently, we suggest the following wording be adopted in all future MS4 permits:

Land which has an Agricultural Use Assessment as determined by the Department of Assessments and Taxation may be eligible to participate in stormwater management projects using equivalent impervious acres only if the Maryland Department of Agriculture has determined that such land has met all applicable local, State, and federal laws and regulations, including but not limited to Nutrient Management Plan implementation consistent with the requirements of COMAR 15.20.07 and 15.20.08. In addition, the participant must have an approved Soil Conservation and Water Quality Plan, and if appropriate a Waste Storage Plan, which addresses existing resource concerns on the land.

We would be glad to discuss the Department's proposal at your convenience and look forward to hearing from you.

Sincerely,

Hans Schmidt
Assistant Secretary



Maryland Department of Transportation
The Secretary's Office

Larry Hogan
Governor

Boyd K. Rutherford
Lt. Governor

Pete K. Rahn
Secretary

March 30, 2017

Mr. Raymond Bahr
Maryland Department of the Environment
Water Management Administration
Sediment, Stormwater, and Dam Safety Program
1800 Washington Boulevard, Suite 440
Baltimore MD 21230-1708

Dear Mr. Bahr:

The Maryland Department of Transportation (MDOT) would like to thank the Maryland Department of the Environment (MDE) for the opportunity to comment on the draft NPDES General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems. MDOT strongly supports the permit goals to “reduce the discharge of pollutants, protect water quality, and satisfy the water quality requirements of federal regulations under the Clean Water Act.”

MDOT appreciates and thanks MDE for its efforts in developing the draft permit and the beneficial outreach, meetings, and discussions MDE staff has participated in to date with MDOT. The following comments are offered to address the questions and concerns MDOT has regarding the draft permit.

1. Part II.B.1. Notice of Intent Requirements - Contents states, “*The NOI shall contain the following: The facility name and address of each property for which coverage under this general permit is being sought.*” MDOT owns and operates multiple facilities across the entire State of Maryland. These facilities do not always have a specific address associated with the location (e.g., Park and Ride facilities). Clarification on the type of documentation required to sufficiently describe each covered property would be helpful.
2. Part II.B.2. Notice of Intent Requirements - Contents states, “*A brief description of each property for which coverage is being sought. This shall include the approximate size, land uses, a description of the stormwater conveyance system, and list of other NPDES permits that have been issued by MDE.*” MDOT would like to request that the “*list of other NPDES permits that have been issued by MDE*” language be deleted from the permit. The permits are already captured within MDE. It is unclear if the permit requires a list of all other NPDES permits (construction, general, 12-SW, etc.) and how far back in time the permittee is required to go to create the list. It is also unclear how the list would contribute to increased environmental protection. The requirement is an administrative burden on the permittee and is redundant with systems and permit databases already in place at MDE.

3. Part IV. C. 2. Minimum Control Measures – Illicit Discharge Detection and Elimination (IDDE) of the draft permit states that all permittees shall, *“Submit SOPs to MDE for review and approval within two years of permit issuance. MDE will review for consistency with guidance in Appendix B.II;”*.

MDOT requests “approval” be changed to “acceptance” with the understanding that SOPs are required to demonstrate that we have procedures in place to meet the intent of this minimum control measure.

4. Part IV. A. Minimum Control Measures – Personnel Education and Outreach states that permittees are required to, *“Implement and maintain a personnel education and outreach program and distribute education materials to the community and employees to help reduce the discharge of pollutants caused by stormwater runoff. This entails developing brochures, booklets, and training programs to educate personnel about the impacts of stormwater discharges on receiving waters, why controlling these discharges is important, and what personnel and the public can do to reduce pollutants in stormwater runoff.”* MDOT would like to request clarification on the definition of “personnel.” For facilities where personnel include tenants and/or contractors is MDOT responsible for directly overseeing the implementation of personnel education and outreach for these individuals?

5. Part IV. D. 4. Minimum Control Measures – Construction Site Stormwater Runoff Control states that all permittees shall, *“Notify the complainant of the investigation and findings within seven days”* when responding to complaints from interested parties regarding construction related activities. MDOT would like to request that the timeframe to *“notify the complainant of the investigation and findings”* be extended from the current seven days to fourteen days or even longer for more complex investigations. Documenting a finding, completing an investigation, and preparing a response could be difficult to carry out in seven days. MDOT would like to suggest the following language, *“Notify the complainant that an investigation will be initiated within 7 days. A response with findings will follow the investigation.”*

6. Part IV. F. 2. Minimum Control Measures – Pollution Prevention and Good Housekeeping states that all permittees shall, *“Develop, implement, and maintain a pollution prevention plan at each jurisdiction owned or operated property covered under this general permit...”*. MDOT would like to request clarification on the types of activities that represent a pollution risk and would therefore require written good housekeeping procedures, procedures for routine site inspections, and documentation of any discharge, release, leak, or spill.

MDOT would also like to request clarification regarding how the permittee is expected to address the implementation of a pollution prevention plan on State-owned property that is leased to tenants. If the leased areas are covered under other NPDES permits, MDOT would like to suggest that the language in this section be revised to clarify that the pollution prevention plan is being addressed under another NPDES permit to prevent duplicative coverage.

7. Part IV. F. 2. Minimum Control Measures – Pollution Prevention and Good Housekeeping states that all permittees shall, “*Develop, implement, and maintain a pollution prevention plan at each jurisdiction owned or operated property covered under this general permit, that includes...*”

MDOT requests that the requirements in the pollution prevention plan be less prescriptive. We suggest removing items a through f and rewording IV.F.2 to summarize in a more general way the elements of a pollution prevention plan. We also have concerns that as stated, the requirements may be redundant with other permits in place.

8. Part IV. E. 3. d. Post Construction Stormwater Management states, “*Verification that BMPs are maintained in accordance with MDE requirements outlined in the approved plans.*” In our most recent Annual Report reviews (letters from Deborah Cappuccitti to MPA, MAA, MTA and MVA in December 11, 2015), MDE suggested that “All State and federal facilities are required to conduct inspection and maintenance of BMPs per the checklists provided on all stormwater management plans approved by MDE.” The checklists provided did not include alternative BMPs. When will MDE have checklists for these alternative BMPs in place?

9. Part VII. R. Standard Permit Conditions – Reporting Requirements states, “*The permittee shall report any non-compliance which may endanger human health or the environment. Any information shall be provided orally within 24 hours from the time when the permittee becomes aware of the circumstances.*” MDOT has concerns about the timeframe and the potential for redundant reporting requirements. MDOT would like to request more specificity regarding which activities should be reported under each permit so the permittee does not have overlapping reporting requirements. In other words, what is the primary reporting method/permit for reporting “*any non-compliance which may endanger human health or the environment.*”

MDOT thanks you in advance for your consideration of our comments. We look forward to continued coordination and discussions with MDE. If you have any questions or concerns or need additional information, please contact Ms. Sandy Hertz, MDOT, Assistant Director, Office of Environment at 410-865-2780, toll free 1-888-713-1414, or via email at shertz@mdot.state.md.us. Ms. Hertz will be happy to assist you.

Sincerely,



R. Earl Lewis, Jr.
Deputy Secretary

cc: Ms. Sandy Hertz, Assistant Director, Office of Environment, MDOT

Mr. Raymond Bahr
Page Four

bcc: Mr. Eric Asugha, Environmental Compliance Manager, MVA
Ms. Robin Bowie, Acting Director, Office of Environmental Services, MAA
Mr. Robert Frazier, Environmental Compliance Manager, MTA
Charles Glass, Ph.D., P.E., Assistant Secretary for Transportation Policy Analysis and
Planning, MDOT
Mr. Peter Mattejat, Environmental Manager, MDTA
Ms. Barbara McMahon, Manager, Safety, Environment, & Risk Management, MPA
Ms. Dorothy Morrison, Director, Office of Environment, MDOT



Larry Hogan
Governor
Boyd K. Rutherford
Lieutenant Governor

Maryland Port Commission
Pete K. Rahn
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Brenda Dandy
Christian R. Dean
J. Robert Huber, Sr.
Rev. Dr. John A. Lunn, Sr.
David M. Richardson
Walter Tilley, Jr.

James J. White
Executive Director

March 30, 2017

Mr. Raymond Bahr
Maryland Department of the Environment
Water Management Administration
Sediment, Stormwater, and Dam Safety Program
1800 Washington Boulevard, Suite 440
Baltimore, Maryland 21230-1708

RE: Comments for the General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems. Permit # 13-SF-5501 and MDR055501.

Dear Mr. Bahr:

The Maryland Department of Transportation Port Administration (MPA) is submitting the following comments on the above referenced permit renewal. The MPA supports the Maryland Department of the Environment's efforts and recognizes the need to reduce the stormwater impacts resulting from storm drain system discharges and to improve water quality. The MPA is committed to improving water quality and can demonstrate its commitment through its mission to "serve as a steward of the Chesapeake Bay and Maryland's natural environment." and the many programs and measures that have been implemented at the MPA facilities.

The public comment period for the draft permit provides the regulated community an opportunity to provide feedback on proposed regulatory changes. There are significant newly proposed changes in this current draft permit that were not included in the previous permit. Specifically, there are changes to the Minimum Control Measures (MCMs), new reporting requirements and the inclusion of the restoration requirement. The restoration requirement mandates the treatment of 20% of the existing impervious surfaces for water quality improvement. This requirement will not only be extremely costly, but will undoubtedly have an impact on our tenants, port operations and cargo movement activities. Given the disruptive nature of this restoration effort the MPA requests Maryland Department of the Environment (MDE) stay committed to maintaining permit flexibility, permittee partnerships, offsite restoration projects, and new innovative solutions, as well as establishing a trading program.

The following are specific comments on the draft permit:

General Comment:

- MDE has significantly increased its oversight and influence over how a permittee complies with the permit. This is evident in numerous locations in the permit where the permittee is required to submit plans for MDE to **approve**. This implies that there is a formal review and approval process for these plans and that MDE will provide technical comments. This process will limit the MPA's ability to develop plans that fit the unique challenges of port facilities and operations.

Suggestion:

- MDE can require that the plans be submitted for review, but remove the word **approve** from the permit. Alternatively, could replace the word **approve** with **accept**.

Part IV – Minimum Control Measures

Section F - Pollution Prevention and Good Housekeeping

Subsection 2 - Develop, implement, and maintain a pollution prevention plan at each jurisdiction owned or operated property covered under this general permit

Comment:

- This section is extremely prescriptive and will create conflicts with site specific activities. This section does not recognize properties that have tenants and the fact that other discharge regulations already apply to them. Most of the marine terminals are leased to tenants for cargo movement activities. These tenants have addressed their discharges from operations through other National Discharge Elimination System (NPDES) permits. The provision is duplicative as it relates to tenant activities and their requirement to have environmental permit coverage.

Suggestion:

- The MPA suggests that this section be revised to remove to prescriptive elements of items a-f. The MPA thinks that the opening statement "*Develop, implement, and maintain a pollution prevention plan at each jurisdiction owned or operated property covered under this general permit*" satisfies the requirement without adding to additional provisions. This will allow flexibility in development of this minimum control measure. As well as resolving potential conflict with other NPDES regulations.

Part VII – Standard Permit Conditions

Section K – Requiring an Individual Permit

Subsection 3.

Suggestion:

- Consider revising the wording. It is not clear as to MDE's intent for this subsection.

Part VII – Standard Permit Conditions

Section R – Reporting Requirements

Comment:

- This requirement is duplicative with other regulatory requirements. The MPA is currently subjected to regulations, both federal and state, that require reporting to environmental agencies. These overlapping reporting requirements will cause confusion and it's not clear who would have regulatory oversight. This permit is designed to be self-implementing. By submitting the notice of intent the permittee is obligated to make corrections as defined in Part VII. Section H. "Duty to Mitigate."

Suggestion:

Mr. Bahr
March 27, 2017
Page Three

- The reporting requirements should be revised to eliminate overlapping reporting requirements with other regulations.
- The 12-SW General Permit for Discharges from Stormwater associated with Industrial Activities has corrective action procedures. MDE could use the language from the 12-SW permit for this section. This would be in line with a self-implementing permit and eliminate overlapping reporting requirements.

Appendix B – Compliance with General Permit Requirements for MS4s
Section III – Illicit Discharge Detection and Elimination Program Guidance
Part B – Standard Operation Procedures

Comment:

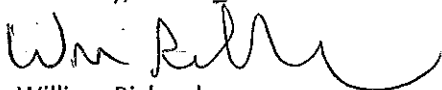
- The guidance states *“This checklist will assist a jurisdiction in identifying any potential illicit discharge, determining the need for a more in-depth investigation, and **noting any other outfall maintenance needs (e.g., cracks, erosion, excessive vegetation).**”* The MPA considers the last phrase *“noting any other outfall maintenance needs (e.g., cracks, erosion, excessive vegetation)”* to be outside the scope of the Illicit Discharge Program Guidance. The MPA does not dispute the need for inspection and maintenance of structures, but it should not be tied to a illicit discharge checklist.

Suggestion:

- Remove the phrase *“**noting any other outfall maintenance needs (e.g., cracks, erosion, excessive vegetation)**”* from this section. If a statement of maintenance is needed in the permit, MDE could consider adding language to the Post-Construction Stormwater Management – Minimum Control Measure.

The MPA appreciates the opportunity to comment on the draft permit. If you have any questions, please contact me at 410-633-1145 or by email at wrichardson@marylandports.com.

Sincerely,



William Richardson,
Maryland Port Administration



MONTGOMERY COUNTY DEPARTMENT OF PARKS
MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION

March 30, 2017

Mr. Raymond Bahr
Maryland Department of the Environment
Water Management Administration
Sediment, Stormwater, and Dam Safety Program
1800 Washington Blvd., STE 440
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M-NCPPC Montgomery Parks Comments on Draft Phase II NPDES General Permit for State and Federal Small MS4s

Mr. Bahr,

Thank you for the opportunity to comment on the Draft Phase II NPDES General Permit for State and Federal Small MS4s. As one of the initial 35 agencies covered under the first permit, M-NCPPC Montgomery Parks (Parks) believes we have taken unique, collaborative, and innovative approaches in implementing our 6 Minimum Control Measures and will continue to do so under this new permit. Our mission statement includes the concerted effort to “Protect and interpret our valuable natural and cultural resources” on over 36,500 acres of parkland. As primarily a stream valley park system, and the downstream recipient of most of Montgomery County’s stormwater pollution, we have found that being an independent permit holder empowers us to fulfill that mission to fullest extent possible.

Parks respectfully submits the following comments on the draft permit.

1. In an effort to most efficiently comply with both Parks’ and other local permit holders’ MS4 requirements, we work with these other entities (e.g., Montgomery County, Maryland State Highway Administration) and allow them to construct stormwater BMPs and stream restoration projects within our Park system without requiring them to share restoration and/or treatment credits with us. Moreover, impervious surfaces comprise approximately 2% of Montgomery County Parkland. Given our low impervious surface levels parkwide, abundance of forests and other natural areas, as well as the fact that Montgomery parkland often provides the most practical and feasible opportunities for other entities to fulfill their permit requirements, Parks requests that MDE recognize flexibility in our Implementation Plan for the 20% retrofit requirement. This would avoid competition for impervious restoration credits that could potentially impede the progress of other entities attempting to fulfill their MS4 permit requirements using Parkland, as well as overall efforts to improve water quality throughout Montgomery County.
2. Currently, we report annual progress in fulfilling requirements of the Chesapeake Watershed Implementation Plan (WIP) as a separate effort from our MS4 reporting. Generally, we are fulfilling the WIP requirements through the BMPs from our Phase II MS4 permit. We recommend that you to integrate WIP reporting seamlessly into MS4 reporting to streamline the process for all involved.
3. Although we are considered a State agency, our stormwater management plans and erosion and sediment control plans are not permitted by MDE; instead we are permitted by Montgomery County Department of Permitting Services. We request that where the permit references permitting by MDE, that the language “or designated local permitting agency” be added.

4. Under 'Pollution Prevention and Good Housekeeping', a newly proposed requirement is to "Develop and implement pollution prevention plans at all facilities and describe good housekeeping procedures to detect and correct any pollutant discharge, release, leak, or spill on site." Unlike many other Phase II MS4 permit holders, who have their facilities consolidated into a single campus, Parks currently manages 418 discrete parks spread out throughout Montgomery County and acquires new Parks regularly. These parks have a range of size, use and purpose: Recreational Parks, Regional Parks, Urban Parks, Local Parks, small Neighborhood Parks, Stream Valley Parks, Greenways, Maintenance Facilities, and Special Parks, each of which has a specific land management strategy associated with it. Currently, all of our 12 Maintenance Facilities have Stormwater Pollution Prevention Plans (SWPPPs) and are regulated by NPDES Industrial Site Permits. While some larger parks are good candidates for independent SWPPPs, we feel that the majority of our parks would better benefit by having more generalized management plans would allow for better operational implementation of water quality strategies. Thus, instead of creating a SWPPP for each Park facility, Parks requests that instead we define an approved stormwater strategy for each facility based on its facility designation/purpose and location within the watershed.

We realize the importance of raising the bar statewide to meet regional water quality goals, and look forward to fulfilling our role in this to the extent possible. It is important to note however that to fully implement the expanded requirements of this new permit will require additional resources we don't currently have budgeted. We appreciate your consideration of our comments on this draft permit and we look forward to continuing our partnership with MDE to improve water quality.

Sincerely,

A handwritten signature in blue ink, appearing to read 'MFR', with a small blue dot at the end of the signature.

Michael F. Riley
Director of Parks

General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems

1. Fact Sheet, Part V, and Appendix B (Section III) - Twenty Percent Impervious Area Restoration Requirement

The fact sheet reads:

“Permit provisions established in this small MS4 general permit reflect guidance from EPA provided during prior permit negotiations and detailed in the EPA Memorandum “Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,” (November 12, 2010). EPA noted the difficulty of establishing clear, effective, and enforceable NPDES permit limitations for sources that are expressed as single categorical or aggregated WLAs. Therefore, EPA advised that it is suitable to use a surrogate parameter to establish numeric targets that are expected to result in the attainment of water quality standards, such as decreasing stormwater flow volume or impervious cover. In addition, EPA advises that NPDES permits contain objective and measureable elements (e.g., schedule for BMP installation or level of BMP performance) to show adequate progress toward achieving applicable water quality standards and TMDL allowance.

In accordance with EPA guidance, this general permit establishes the twenty percent impervious area restoration requirement as a parameter for meeting Chesapeake Bay and local TMDLs. ... Therefore, restoration requirements established above are consistent with Maryland’s efforts to address the Chesapeake Bay and local TMDLs for stormwater sources and EPA guidance related to NPDES permit requirements.”

Part V., Pg. 11 reads “Maryland’s Watershed Implementation Plan (WIP) specifies the nutrient and sediment load reductions required to address the Chesapeake Bay TMDL by 2025. This general permit will make progress toward that strategy by requiring small MS4s to commence restoration efforts for twenty percent of existing developed lands that have little or no stormwater management.”

Appendix B, Section III, Pg. B-10 reads “Small MS4 operators covered under this NPDES general permit are required to commence impervious area restoration for twenty percent of existing developed lands that have little or no stormwater management by the end of the permit term.”

Comment:

The EPA Memorandum cited as the basis for the twenty percent impervious area restoration requirement as a surrogate pollutant parameter is no longer operative and was superseded in 2014.¹ More specifically, the updated memorandum reads “Today's memorandum replaces the November 12, 2010, memorandum on the same subject; the Water Division Directors should no longer refer to that

¹ See Revisions to the November 22, 2002, Memorandum “Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,” (November 26, 2014).

memorandum for guidance.” Furthermore, the updated memorandum removes the “surrogate” language entirely and removes the entire section titled “Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity,” the section which provided guidance on the proper development of a TMDL surrogate pollutant parameter and how such a parameter is properly incorporated into the corresponding NPDES permit.

The only mention of the term “impervious cover” in the updated memorandum is in relation to defining the term “numeric effluent limitation” for point sources in the context of NPDES permits for storm water discharges. The updated memorandum recommends the use of an “effective impervious cover” pollution parameter as a water quality based effluent limitation (WQBEL), “*where feasible*,” only if MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion and only as necessary to meet water quality standards. The updated memorandum does not define the term “*where feasible*.”

The November 12, 2010, EPA Memorandum, cited as the basis for the Maryland twenty percent impervious area restoration requirement as a surrogate pollutant parameter, reads “where a surrogate parameter is used, the TMDL document must demonstrate the linkage between the surrogate parameter and the documented impairment” and “the TMDL should provide supporting documentation to indicate that the surrogate pollutant parameter appropriately represents storm water pollutant loadings.” The same November 12, 2010, EPA Memorandum also reads “where the WLA of a TMDL is expressed in terms of a surrogate pollutant parameter, then the corresponding permit can generally use the surrogate pollutant parameter in the WQBEL” and “where the TMDL includes WLAs for storm water sources that provide numeric pollutant load or numeric surrogate pollutant parameter objectives, the WLA should, where feasible, be translated into numeric WQBELs in the applicable storm water permits.”

DoD would be interested in any existing documentation within the control of Maryland demonstrating the linkage between the twenty percent impervious area restoration requirement as a surrogate pollutant parameter and the documented impairment in the Chesapeake Bay and local TMDLs, as well as supporting documentation to indicate that the surrogate pollutant parameter appropriately represents storm water pollutant loadings. Relating to the development of the Chesapeake Bay and local TMDLs, DoD would be interested in any existing documentation reflecting a WLA being expressed in terms of “impervious area,” or otherwise WLAs that provide a numeric “impervious area” objective. Technically sufficient documentation of such linkage must be proven before use of a surrogate parameter should be considered. DoD is concerned that there is insufficient evidence that point sources are the primary cause of pollutants in typical storm water scenarios, as well as insufficient data to support an assumption that numeric effluent limitations in storm water discharges, such as the use of an “effective impervious cover” pollution parameter as a water quality based effluent limitation (WQBEL), is feasible, reasonable or otherwise cost-effective. DoD is not aware that a technically sufficient linkage has been documented between the use of a twenty percent impervious area restoration requirement a surrogate pollutant parameter and the documented impairment in the Chesapeake Bay and local TMDLs.

Recommendation:

DoD objects to the inclusion of a twenty percent impervious area restoration requirement as a pollutant parameter for meeting Chesapeake Bay and local TMDLs. Existing statutory and regulatory authority cannot be reasonably interpreted as providing a basis to require that a federal agency, as part of

a Clean Water Act permit, restore impervious area on its federal property. To the contrary, the Clean Water Act statutory requirement for small MS4s is to reduce pollutants to the maximum extent practicable. Small MS4s require the flexibility to determine where and if restoration is necessary in order to comply with regulatory requirements for discharges and to improve water quality. The inclusion of an arbitrary and costly restoration requirement, which may provide little or no benefit for the attainment of water quality standards in receiving waters, is inappropriate.

2. Fact Sheet and Part V - Permit Term

The Fact Sheet reads:

“In accordance with EPA guidance, this general permit establishes the twenty percent impervious area restoration requirement as a parameter for meeting Chesapeake Bay and local TMDLs. MDE also requires specific deliverables and implementation schedules as enforceable provisions of the permit. ... The BMP implementation schedules established in this permit will be incorporated in future permits in accordance with MDE’s iterative permitting approach in order to achieve pollutant reductions associated with Chesapeake Bay and local TMDLs.”

Part V., Pg. 11 reads “The conditions established below require permittees to perform watershed assessments, identify water quality improvement opportunities, secure appropriate funding, and develop an implementation schedule to show the twenty percent impervious area restoration requirement will be achieved by 2025.”

Part V., Pg. 12 reads that by year five of the permit term, the permittee must provide a “complete list of specific projects needed to meet the twenty percent restoration requirement in Table 2 and include the projected implementation year (no later than 2025).”

Comment:

NPDES permits shall be effective for a fixed term not to exceed 5 years.² Although the permit is careful to only require deliverables within the 5-year fixed term, the permit allows for permittees to project specific projects needed to meet the twenty percent restoration requirement with an implementation year outside of the five-year fixed term. Because the implementation schedules established in this permit will be incorporated in future permits, the permit, as applied, practically regulates permittees for a term which exceeds 5 years.

Recommendation:

Clarify to what extent, if any, permittees will be required to complete specific projects with a projected implementation year outside of the five-year fixed term of the permit or otherwise what flexibility permittees will have during the future permit term to achieve pollutant reductions associated with Chesapeake Bay and local TMDLs.

² 40 CFR § 122.46(a)

3. Section: Throughout.

Comment: There are a number of locations in the permit that reference the term “jurisdiction.” For example, Section Part V.B states “Permittees may use the workplan or develop a custom plan that addresses the unique circumstances of individual jurisdictions for MDE review and approval.”

Recommendation: Since this permit is issued specific to state and federal facilities, using terms related to state and federal facilities would help clarify the scope of permit conditions.

4. Section: Part VI. Pg. B-16. “Evaluation, Recordkeeping, Reporting and Recordkeeping.” Table B.I. Urban Best Management Practice (BMP) Database and Codes. “The BMP database below will tabulate a list of all BMPs within a jurisdiction. BMPs may be entered as a single structure or as a system of practices.”

Comment: Reporting to MDE for both compliance and Chesapeake Bay progress is duplicative.

Recommendation: To avoid duplicative reporting requirements DoD requests information submitted in the annual report be forwarded to the MDE Science Service Administration for Chesapeake Bay Program reporting purposes and further coordination with the DoD Chesapeake Bay Program Coordinator.

5. Section: Part V. Part A. Page 11 states, “Permittees shall determine the total impervious surface area within their jurisdiction and delineate the portions that are treated with acceptable water quality BMPs. This analysis will provide the baseline used to calculate the twenty percent restoration requirement...”

Comment: In prior years, the baseline was associated with a specified year.

Recommendation: Request MDE provide clarification in the permit whether the baseline is associated with or defined by a year. If the baseline year is simply a starting point for determining impervious area restoration, it would be helpful for permittees to understand the final restoration requirement would be the same regardless of the baseline year selected (i.e. 2002, 2006).

6. Section: Appendix B. Section III.A. Page B-10 states that in order to conduct a baseline assessment, permittees must determine the total impervious surface area under their responsibility and delineate the portions that are treated with acceptable water quality best management practices.

Comment: It is unclear the specified dates in which to categorize BMPs for determining the baseline.

Recommendation: Request MDE provide clarification in the permit, that restoration/redevelopment from 1/1/2002 – 12/31/05 is deducted from baseline, while restoration/redevelopment from 1/1/06 – present will get restoration credit. We also recommend MDE clarify that “implemented” refers to when the BMP was installed versus when it was designed.

7. Section: Part V. Section B. Page 12 states, “The impervious area baseline assessment shall be submitted with the first year annual report for MDE review and approval.”

Comment: Based on DoD fiscal year budgeting cycle, it will be virtually impossible to program for the development of the work plan by the Year 1 reporting deadline. The ability to program for development of the workplan is highly dependent on when the final permit is released.

Recommendation: Require the assessment reporting no later than Year 2.

8. Section: Part V. Section B. Page 12. Table 1 requests the impervious area restoration work plan provide funding needs and develop a long term budget.

Comment: Providing budget information in the workplan would provide advanced expenditures to potential contractors bidding on restoration work and may disadvantage DoD in receiving competitive bids. Permittees providing detailed activities and milestones performed over the permit term to show progress should suffice.

Recommendation: Remove requirement to submit funding needs and long term budget in the workplan.

9. Section: Appendix B. Section III.A. Page B-10 Land Use and Impervious Surface Area Analysis states the “baseline may be 2002.”

Comments: It is unclear the specified dates in which to determine baseline.

Recommendation: Request MDE provide clarification in the permit whether the baseline is associated with or defined by a year. If the baseline year is simply a starting point for determining impervious area restoration, it would be helpful for permittees to understand the final restoration requirement would be the same regardless of the baseline year selected (e.g. 2002, 2006).

10. Section: Appendix B. Section III.A. Page B-11, states “Where plans, design specifications, and complete inspections and maintenance records are not available, BMPs are not considered to provide acceptable water quality treatment. Impervious areas draining to these structures must count toward the baseline.”

Comment: For many of the era BMPs, plans and as-builts are not available, which is not uncommon to DoD installations only. The permit condition, as stated, indicates that if a plan, design specification or as-built is not available, the BMP would not be considered to provide acceptable water quality treatment.

Recommendation: An in-lieu of option for BMPs without plans, design specifications, or as-builts needs to be developed. DoD recommends that full (or partial) credit be given to BMPs based on when they were built and their current physical (visual) condition. A viable option would be to evaluate those BMPs on a case-by-case basis based on documentation related to the most recent inspection, field verification and necessary maintenance.

Recommendation: MDE should also consider for BMPs that are lacking maintenance records allow crediting in the baseline if the permittee can demonstrate the BMP is functioning as designed.

11. Section: Appendix B. Section III.C. B-13, states “when inspections and repairs are performed according to these guidelines (or others required by local review authorities), then the facility is considered properly maintained.”

Comment: This statement implies that all BMPs will need repairs to be considered fully maintained.

Recommendation: Provide clarification that this portion of the permit is related to old / failed BMPs (i.e. pre-2000) with significant structural problems and water quality concerns identified during a field verification/inspection.

12. Section: Appendix B. Section III.C. B-13, states “routine maintenance is addressed throughout the life of the BMP in order for the permittee to keep the credit.”

Comment: BMPs have various life cycles and with proper inspection and maintenance may extend beyond its typical life expectancy.

Recommendation: Provide clarification on ways to determine the life of each BMP, a definition of “life cycle,” and if a BMP regardless of its inspection and maintenance history would need a complete restoration after its life expectancy.

13. Section: B.1, Page B-22 Table B.2 Alternative Urban BMPs and Impervious Acre Credit provides a list of alternative Urban BMPs and reference information on calculating credits for those alternative BMPs and qualifying conditions for crediting.

Comment: There are additional expert panel reports that provide credits and qualifying conditions from the Chesapeake Bay Program, but those are not listed as reference for use in the table.

Recommendation: Provide clarification in Table B.2 that qualifying conditions outlined in MDE 2014 and expert panel reports apply to these credits.

14. Section: Part II B.4., Pg. 3. Requires NOI submittal include “An estimate of the anticipated expenditures to implement the required programs specified in this general permit”; Appendix D. Impervious Area Restoration Reporting, #7, Pg. D-6 “List the total cost of developing and implementing impervious area restoration program during the permit term”; Appendix D. MCM#1, #8., Pg. D-7 “List the total cost of implementing this MCM over the permit term”; Appendix D. MCM#2, #5, Pg. D-9 “List the total cost of implementing this MCM for the permit term”; Appendix D. MCM#3, #12, Pg. D-12 “List the cost of implementing this MCM during this permit term”; Appendix D. MCM #4, #6, Pg. D-14 “List the total cost of implementing this MCM over the permit term”; Appendix D. MCM#5, #6, Pg. D-16 “List the total cost of implementing this MCM over the permit term”; and Appendix D. MCM#6, #5, Pg. D-18 “List the total cost of implementing this MCM over the permit term.”

Comment: Implementation costs are difficult to assess and does not fully relate to a permittee’s ability to comply with the conditions of the permit.

Recommendation: Instead of permittees being required to provide implementation costs for each MCM, continue with the overall program management costs on the NOI with an explanation of how costs were derived.

15. Section: Part III, Pg 3 states that “State and federal government entities covered under this general permit must manage, implement, and enforce a stormwater management program ... to meet the following requirements... 2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL)...” And then - “... Compliance with the conditions contained in Parts IV and V of this permit shall constitute compliance with § 402(p)(3)(B)(iii) of the CWA and adequate progress toward compliance with Maryland's receiving water quality standards and any Environmental Protection Agency (EPA) approved stormwater WLA for this permit term.”

Comment: Requesting clarification on the condition and permit requirement. Permittees could interpret that either (a) the DoD installation covered by the MS4 permit would have no other stormwater nutrient/sediment reduction obligations or (b) the DoD installation covered by the MS4 permit would have no other stormwater nutrient/sediment reduction obligations under the permit.

Recommendation: Provide clarification in the permit that it meets any Chesapeake Bay TMDL associated stormwater loading requirement.

16. Section: Part IV. A states that “Permittees are required to implement and maintain a personnel education and outreach program and distribute education material to the community and employees to help reduce the discharge of pollutants caused by stormwater runoff.”

Comment: The intended goal of this section appears to be the distribution of educational material to those within the MS4 service area, but the permit is unclear as it does not include a definition for community.

Recommendation: Provide a definition of community or revise the permit to state “Permittees are required to implement and maintain a personnel education and outreach program and distribute educational material to the people and personnel that live and work on the facility to help reduce the discharge of pollutants caused by stormwater runoff.”

17. Section: Part IV.A states “...why controlling these discharges is important, and what personnel and the public can do to reduce pollutants in stormwater runoff.”

Comment: The intended goal of this section appears to be the distribution of educational material to those within the MS4 service area, but the permit is unclear as it uses the term “public” for a state and federal facility.

Recommendation: Provide a definition of public as it relates to federal and state facilities or revise the permit to state “...why controlling these discharges is important, and what personnel living and working on the facility can do to reduce pollutants in stormwater runoff.”

18. Section: Part IV F. 1. Pg. 10 states the “...Topics shall include spill prevention and response, controls for reducing or eliminating discharge of pollutants during facility operations, proper disposal of

waste, and routine inspections to detect and correct potential stormwater discharges at facilities owned and operated by the jurisdiction;”

Comment: Provided that “jurisdiction” refers to the territorial range of control and authority, the permit is unclear in its applicability to the MCM. Many DoD Small MS4s are also covered by other NPDES permits where requirements for stormwater pollution prevent are stated. This section of the permit may be duplicative for some.

Recommendation: Recommend clarification of stormwater discharges to include language such as “within the MS4 regulated area” or “covered under this general permit.” Stormwater discharges that include industrial related processes would be regulated under a different NPDES Permit.

19. Section: Part IV F.2.f. Page 10, states “Documentation of any discharge, release, leak, or spill, including date, findings and response actions.”

Comment: Reporting all and any discharge is burdensome.

Recommendation: Revise the permit to state “Documentation of any reportable discharge, release, leak...”

20. Section: Page 4 states, “1. Develop a hotline for reporting of water quality complaints within one year of permit issuance...”

Comment: Request clarification as to whether the Department expectation includes a dedicated stormwater phone line.

Recommendation: Permittees are required to ‘develop a process for receiving, investigating and resolving complaints from any interested party related to construction activities...’ as part of the Construction Site Stormwater Runoff Control minimum control measure. We recommend that in lieu of a hotline solely dedicated to water quality complaints, each permittee develop a process for reporting all stormwater related complaints that is communicated via education and outreach materials, which can be verified by MDE in the Year 2 and 4 annual reports.

21. Section: Page 5 states, “4. Provide public access to the permittee’s progress reports via website or other method and consider any substantive public comments received concerning the jurisdictions MS4 program...”

Comment: State and federal facilities are non-traditional MS4s and have targeted audiences for those working and living on the facility.

Recommendation: Consider defining public as it relates to non-traditional MS4s to provide clarification. We suggest referencing EPA’s statement c in the Federal Register Volume 64, No. 235, page 68,750, as public being the resident and employee population of the facility within its fence line.

Comment: Posting all reports online impacts operational security.

Recommendation: Consider allowing permittees to provide a summary of activities available online, publically accessible to provide transparency of said activities while protecting secure information.

22. Section: Page D-10 of Appendix D requires maps to be submitted to MDE showing the extent of the facility's drain system, including all outfalls, inlets, stormwater management facilities and illicit discharge screening locations.

Comment: Information submitted to MDE may be considered authorized for release to the public under FOIA. DoD is concerned that having maps of our facilities and the potential for the public to obtain fails to meet operational security requirements.

Recommendation: Require the permittee to provide an example of the maps available on-site to verify compliance with permit requirements during an audit.



Raymond Bahr -MDE- <raymond.bahr@maryland.gov>

University of Baltimore's Comment on the General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems

1 message

Steve Reid <sreid@umd.edu>

Thu, Mar 30, 2017 at 4:23 PM

To: Raymond.Bahr@maryland.gov

Cc: Deborah Cappuccitti -MDE- <deborah.cappuccitti@maryland.gov>, Mark Beck <mbeck@usmd.edu>, bwinsor@ubalt.edu, "Brenda D. Testa" <btesta@umd.edu>

Mr. Bahr,

The University of Baltimore had a specific question related to seeking a waiver of exemption and, therefore, this question is being submitted separately from the questions submitted on behalf of the other University of Maryland institutions. Please find that question below.

The University of Baltimore seeks to file a waiver of exemption from the small MS4 permit based on Part I, B, sec 3 (pg. 1) for areas under 5 acres with no interconnecting roads and having buildings which drain directly into a Phase I MS4 jurisdiction. While Appendix C., Waiver Form defines steps for exemption, the exemption requirements themselves are ambiguous and require greater explanation. There are several determining factors for exemption status including Part I and Appendix A, which require greater clarification for eligibility to meet small MS4 exemption and whether co-permit status with Phase I municipality is required.

Thank you.

Stephen Reid

Environmental Planner, Campus Development

Facilities Management/University of Maryland

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College Park, MD 20742

Office Phone: 301-405-6910



Raymond Bahr -MDE- <raymond.bahr@maryland.gov>

University of Maryland System Institution's Comments on the General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems

1 message

Steve Reid <sreid@umd.edu>

Thu, Mar 30, 2017 at 4:15 PM

To: Raymond.Bahr@maryland.gov

Cc: Deborah Cappuccitti -MDE- <deborah.cappuccitti@maryland.gov>, Mark Beck <mbeck@usmd.edu>, Charles Robert Reuning <creuning@umd.edu>, "Brenda D. Testa" <btesta@umd.edu>, "Richard S. Lupin" <slupin@umd.edu>, mkotlas@umd.edu, "William P. Mallari" <wmallari@umd.edu>

Mr. Bahr,

Institutions within the University of Maryland system has reviewed the draft General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems and would like to provide the following questions and comments:

1. Can MDE clarify how smaller satellite buildings/parcels that drain into another storm drain system will be accounted for/included?
2. Can MDE clarify how projects built after 2002 will be counted if half the site was new development but the other half of the site was on existing impervious areas (i.e., redevelopment)?
3. If a BMP was built in 2006, does it come off the baseline or count as a retrofit? On page B-11 it says "BMPs implemented for retrofitting or redevelopment between 2002 and 2006 may be subtracted from the baseline number." However, in other/previous guidance it seems to imply that BMPs built in 2006 onward for retrofit or redevelopment would count for retrofit credit. For example, the "Chesapeake Bay Restoration Getting Started" guidance says "Any restoration BMP installed between 2006 and the issuance of the next permit will be credited toward the new requirements." We would recommend that BMPs built in 2006 to be counted as retrofit credit.
4. Can MDE provide more guidance on how "impervious areas" are defined?
5. Can MDE provide more guidance as to what type of financial plan is required for to achieve the 20% retrofit requirement?
6. For the USM institutions required to obtain coverage, will USM have the choice to apply permit requirements as an aggregate and/or a subset of institutions and/or each individual institution? Can UMCP do credit trading with other USM institutions for retrofit credit?
7. The proposed Urban BMP Database is complex and will be difficult and expensive for small MS4 owners to complete. The database should be simplified so that small MS4 owners can complete the database with minimal assistance from consultants.

8. Several USM institutions have interconnected storm drain systems with adjacent municipalities. These connections can occur within the main campus and/or at isolated satellite buildings. Please provide additional guidance on each MS4 owner's responsibility when storm drains are interconnected, including limits of permit coverage, storm drain mapping requirements, and IDDE obligations.

9. How will future property acquisitions be handled? Will an updated permit be required and if so what will the process be?

10. Page 2 - Regarding the estimate of anticipated expenditures, is this limited to the implementation of the 6 MCMs or does this include anticipated future costs associated with implementation of the 20% retrofit? Is this estimate limited to the permit term or does it need to include long-term costs of monitoring, maintenance, retrofit, etc. that extend beyond the permit term?

11. Page 5 - Point #5 states that in order to comply with this MCM, one must comply with all State and Federal public notice requirements for any regulated activity on the property. Non-compliance with a public notice requirement may be considered a violation of a specific regulation or permit requirement. Would this supplemental requirement be tantamount to "double jeopardy?"

12. Page 6 - This section specifies the number of outfalls that must be inspected annually, while also stating that screening must be based on identified pollution potential. Under this scenario, and for properties greater than 100 acres and therefore are not required to inspect 100% of all outfalls annually, it is likely that some outfalls may be evaluated each year, based on potential for pollution, whereas others may not. Is MDE consenting that accordingly all outfalls may not be evaluated every two years to five years (for example), based on the relative risk of each outfall?

13. Page 7 - Section "7e" states a facility policy is required to ensure illicit discharges are eliminated. This is already a requirement within page 6 Section C(2), which requires a policy or other directive that prohibits illicit discharges. We feel that the standard operating procedures (SOP) should simply refer to that policy and therefore 7e is unnecessary.

14. Page 9 - Requirement #5 refers the permittee to submit a BMP database in accordance with Table B.2 in Appendix B. This reference appears to be incorrect. Should that requirement be referring the permittee to Table B.1 in Appendix B? Page 15 has a correct reference to Table B.1, under "Reporting" requirement #2.d.

15. Page 10 - Requirement #2 specifies that a permittee must develop and implement a SWPPP at each property covered under the general permit. Does this mean that a SWPPP is required that covers the entire campus, as well as any associated satellite locations? If so, this does not seem reasonable. Would it be adequate to maintain a SWPPP for those "high risk" locations identified and covered under a 12-SW permit?

16. Page 21 - "Reporting Requirements" Please provide additional clarification or guidance on how to define a non-compliance which may "endanger human health or the environment."

Thank you very much for the opportunity to comment on this permit and we look forward to MDE's responses and continued discussions.

Stephen Reid

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Carla A. Reid

3/16/17

Mr. Raymond P. Bahr, Chief
Program Review Division
Sediment, Stormwater, and Dam Safety Program
Water Management Administration
Maryland Department of the Environment,
1800 Washington Blvd.
Baltimore, Maryland 21230-1708

re: NPDES General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems (General Discharge Permit No. 13-SF-5501, General NPDES No. MDR055501)

Dear Mr. Bahr,

WSSC's attached detailed comments on MDE's Tentative Determination to reissue the above NPDES permit identify specific issues that require clarification or further explanation. WSSC also requests review of the informal MDE opinion expressed to WSSC that properties covered by the existing general permit are not eligible for waivers under the terms of the reissued permit. We have included specific references to both federal law and regulation to support the position that any property that satisfies the waiver requirements should be granted a waiver.

A final point of major concern is the timing for MDE review and decision on waiver requests since submission of the final Notice of Intent (NOI), development of an impervious area baseline and preparation of the Impervious Area Restoration Workplan are all contingent on MDE decisions on waiver requests. WSSC has suggested modifications to the permit to address the timing related to each of these requirements.

WSSC would be glad to meet with you to discuss these points and provide further clarification if necessary.

Sincerely,

James (J.C.) Langley
Chief of Plant Operations
Production Team

Enclosures: 1) WSSC Comments on General Discharge Permit No. 13-SF-5501,
General NPDES No. MDR055501
2) California Superior Court opinion; Case No. BS156962

MAR 27 2017

Washington Suburban Sanitary Commission

**WASHINGTON SUBURBAN SANITARY COMMISSION COMMENTS ON DRAFT
NPDES STORMWATER GENERAL PERMIT 13-SF-5501, GENERAL NPDES No.
MDR055501**

Background

The Washington Suburban Sanitary Commission (WSSC) has reviewed the Department of the Environment's (MDE) Tentative Determination to reissue the NPDES General Permit for Discharges from State and Federal Small Municipal Separate Storm Sewer Systems (General Discharge Permit No. 13-SF-5501, General NPDES No. MDR055501). The permit threshold for properties subject to coverage under the permit continues to be properties of five acres or more of developed land located in urbanized areas. Specific agencies identified that are subject to this permit include WSSC. Under the current permit 05-SF-5501, WSSC listed fewer than ten properties greater than five acres in size that were subject to coverage.

The reissued permit includes a decision by MDE to incorporate an impervious area threshold of greater than 10% impervious area in addition to the five acre minimum size limit. In addition, MDE has adopted the EPA General Permit Waiver Criteria for the definition of a small MS4. (The federal definition is specified in 40 CFR 122.26(b)(16)(iii)). State and federal MS4s are considered similar to municipal systems and MDE has established a Waiver Application process and criteria that are discussed in the Fact Sheet for the permit and in Appendix C of the permit.

Specific comments are listed below in the same order that the topics appear in the draft permit.

Part I. Coverage Under this General Permit

B. Eligibility – Waiver Criteria for Small MS4s

As defined in 40 CFR 122.26(b)(16)(iii), a “small” MS4 is “. . . similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.”

Currently Enrolled Properties Should be Eligible for Waiver

After the public hearing on the draft permit, MDE staff expressed concern with the possibility that a Permittee (such as WSSC) might seek waivers for properties enrolled for coverage under the current permit. The concern expressed was whether this would constitute “backsliding” under CWA §402(o) or 40 CFR 122.44(l). WSSC believes that scenario would not constitute backsliding under those provisions for the following reasons:

Under the clear language of the statute and regulation, the “anti-backsliding” rule applies to the establishment of effluent limitations in permits. In creating the provision, CWA §402(o)

specifically refers to “effluent limitations established on the basis of §402(a)(1)(B).” The Phase II General Permit program, as other municipal stormwater programs, is established under the authority of CWA §402 (p). As the fact sheet for the new permit recites (page 4) “CFR considers small State and federal MS4s to be similar to municipal systems, therefore MDE may grant waiver from permit coverage.....” In short, municipal and municipal-like entities covered under the Phase II program have their own regulatory standards, the maximum extent practicable (MEP) standard of CWA §402(p)(3)(B); as such, they do not fall into the category covered by the backsliding language of §402(o).

In a well-known and often-cited federal Ninth Circuit opinion, *Defenders of Wildlife v. Browner* 191 F.3d 1159 (9th Cir. 1999), the U.S. Court of Appeals distinguished the separate standards for municipal discharger v. industrial dischargers, finding the Congress expressly required industrial dischargers to comply with CWA §301, but set up a different standard for municipal dischargers, the MEP standard. 191 F.3d at 1164-65.

A recent well-reasoned California Superior Court opinion, submitted with this comment, applies this distinction specifically to the anti-backsliding provisions of CWA §402(o) and 40 CFR 122.44 (l). In that case, the renewed MS4 permit did not relax specific effluent limitations, but created a “deemed compliant” condition for municipalities designing and implementing comprehensive stormwater management plans detailed by the permit conditions. The discussion on pp. 11-14 of the attached opinion articulates why MDE should not be concerned about backsliding in creating the waiver provision and possibly having it apply to properties enrolled in the existing permit that does not provide for waiver.

Lastly, common sense dictates that if a property meets the waiver criteria, established for good reason by MDE, the waiver should be granted regardless of prior permit enrollment under a permit not containing any waiver criteria.

Substantial Contribution

Appendix A (page 6) outlines three waiver criteria applicable to eligible small MS4 facilities (i.e., greater than 5 acres, and having at least ten percent impervious area) that constitute individual buildings or few buildings with parking and driveways with storm drains (criterion 1) and which are not a military base, large hospital complex, prison complex, highway or thoroughfare (criterion 3). However, the second criterion that an eligible facility “does not contribute substantially to the pollutant loadings of a physically interconnected regulated MS4 jurisdiction” requires further guidance on how an applicant seeking a waiver can determine whether stormwater from the facility to a regulated MS4 jurisdiction constitutes a “substantial” versus “non-substantial” contribution. Does such a demonstration require monitoring of flow volumes and pollutant loads? If so, what pollutants should be measured?

For State and federal agencies with multiple, small properties/facilities meeting the first and third waiver criteria, any demonstration of insignificant or insubstantial pollutant loading based on

monitoring could become a very expensive and lengthy project. Instead, could some quantitative measures be developed based on predicted flow volumes, untreated impervious surface area and sources of pollutants exposed to stormwater, as a desktop exercise? Alternatively, is it sufficient for an applicant seeking a waiver to affirm that there are no sources of pollutants exposed to stormwater, regardless of the amount of untreated impervious surface, and regardless of the volume of stormwater delivered to the regulated MS4 jurisdiction?

- ***WSSC requests that guidance be provided for determining what constitutes an insubstantial pollutant loading from a small MS4 facility that may qualify for a waiver.***

Physical Interconnection

Further clarification is needed as to the definition of what constitutes a “physical interconnection” between a storm drain system at a facility and the separate storm drain system of a regulated MS4 jurisdiction. USEPA’s Fact Sheet Stormwater Phase II Final Rule (EPA 833-F-00-003, revised June 2012) defines “physically interconnected” as “one MS4 is connected to a second MS4 in such a way that it allows for direct discharges into the second system.”

For example, if a State or federal facility has a storm drain system that discharges via outfalls to nearby creeks, streams or rivers are those watercourses considered to be part of the “second MS4” municipal system? Since MS4 storm drains typically consist of many pipe networks leading to multiple outfalls into local creeks, streams or rivers, would a State or federal facility that discharges stormwater to the same creek, stream or river be considered as “physically interconnected” to the municipal system? Or would the storm drain system from a State or federal facility need to be connected only to a municipal storm drain pipe network rather than share a common receiving watercourse? Are large rivers in the State, such as the Potomac, Patapsco and Patuxent Rivers, many of which form boundaries between neighboring regulated Phase I municipalities, defined as part of the MS4 drain systems of those municipalities, or are these large rivers simply receiving waters? How small does a watercourse have to be to be considered part of a Phase I municipal system?

- ***WSSC requests that a more detailed description be provided for what constitutes a “physical interconnection” between a State or federal storm drain system and that of a regulated MS4 jurisdiction.***
- ***WSSC also requests that guidance be provided on the role of watercourses that serve as receiving waters for either regulated MS4 jurisdictions or State or federal facilities, and whether there is a size criterion for such watercourses to be considered part of a MS4 system.***

Part II. Notice of Intent Requirements

Timing of NOI Dependent on Waiver Determinations

Part II.A provides that a Notice of Intent (NOI) be submitted within 180 days of the effective date of the permit. However, for a State or federal applicant that owns multiple facilities or properties and which is contemplating seeking coverage for individual facilities (rather than a joint application for multiple facilities), it is unclear when applications for Waivers must be submitted, when regulatory determinations on those Waivers would be made, and whether an unsuccessful Waiver application that would thus need to have a NOI could meet the 180 day deadline.

- *WSSC requests that MDE specify the amount of time that reviews and determinations on Waiver application will take; and, if longer than 180 days, whether an applicant seeking a Waiver must concurrently file a NOI to meet the submittal deadline. Alternatively, WSSC requests that MDE extend the NOI submittal deadline to one year for sites for which waiver is requested and denied by MDE.*

Part IV. Minimum Control Measures (MCM)

F. Pollution Prevention and Good Housekeeping

The extensive listing of actions required to comply with this MCM are overly prescriptive for the small sites (i.e., less than 100 acres) covered by this permit that are established sites with limited if any ongoing construction activity. The requirement for detailed pollution prevention plans for unstaffed, stabilized sites that are also fenced to prevent public access is unnecessary. EPA Guidance on this MCM (EPA 833-F-00-010) does not require development of a specific pollution prevention plan but instead points out the need for operation and maintenance programs, employee training, and determination of the appropriate site BMPs.

- *WSSC requests that separate pollution prevention plans for unstaffed stabilized small sites not be required if there are existing site plans that delineate all drainage structures and existing or planned BMPs.*

Part V. Chesapeake Bay Restoration and Meeting Total Maximum Daily Loads

A. Develop a Baseline Impervious Area Assessment

Impervious Surface

While 40 CFR 122.26(c)(i)(B) refers to certain kinds of impervious surfaces, including paved areas and building roofs, clarification of the definition is needed for other surfaces at facilities with large areas of industrial process equipment that may not be contributing runoff to the facility storm drain system. For example, are open tank reactor trains containing liquids (e.g.,

water treatment sedimentation basins or clarifiers) considered to be impervious surfaces when no runoff to the facility storm drain network can occur because the equipment is part of a closed treatment system? Large electrical transformer substations at facilities are commonly laid on pervious gravel bedding; can these areas be excluded from impervious surfaces resembling "paved areas and building roofs"?

- ***WSSC requests greater specificity in the definition of what constitutes an impervious surface if the structure or equipment is neither a building roof nor paved area and does not drain to the facility storm drain system.***

B. Develop and Implement an Impervious Area Restoration Work Plan

WSSC has developed preliminary data on the amount of impervious area for existing sites covered by the current permit but completion of every detail specified in items 1. through 6. on page 11 requires further analysis of the sites covered by the new permit. WSSC will also be submitting Waiver applications for sites that appear to meet the requirements for a Waiver from coverage. While the permit does not specify a date for submission of Waiver applications, MDE review and decision on granting a Waiver would logically be a prerequisite to any detailed site analysis and identification of necessary restoration projects. WSSC will need to develop a scope of work and advertise for bids for external support to complete the site specific impervious area analysis and to identify, design and implement site specific restoration plans.

The requirement for submission of a detailed Baseline Impervious Area Assessment and an Impervious Area Restoration Work Plan by the end of the first year is not achievable since the sites covered by the permit would not be known until MDE evaluates the Waiver applications and a scope of work for external support cannot proceed until that decision is made by MDE.

- ***WSSC requests that MDE allow one year after a decision on any Waiver requests for submission of a Baseline Impervious Area Assessment and preparation of an Impervious Area Workplan.***

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7 *Attorneys for Respondents and Defendants, State
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8 Regional Water Quality Control Board, Los Angeles
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FEE EXEMPT [Gov. Code, § 6103]

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES, CENTRAL DISTRICT

13 **NATURAL RESOURCES DEFENSE
COUNCIL, INC., AND LOS ANGELES
14 WATERKEEPER,**
15 **Petitioners,**
16 **v.**
17 **STATE WATER RESOURCES CONTROL
BOARD and CALIFORNIA REGIONAL
18 WATER QUALITY CONTROL BOARD,
LOS ANGELES REGION,**
19 **Respondents.**

Case No. BS156962
**NOTICE OF RULING; ORDER
DENYING PETITION FOR WRIT OF
MANDAMUS.**
Dept.: 86
Judge: The Honorable Amy D. Hogue
Action Filed: July 24, 2015
Trial Date: January 23, 2017

22 **TO THE PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

23 PLEASE TAKE NOTICE that on January 24, 2017, the Court entered the Order Denying
24 Petition for Writ of Mandamus, attached hereto as Exhibit A.

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Dated: January 31, 2017

Respectfully submitted,

XAVIER BECERRA
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Regional Water Quality Control Board, Los
Angeles Region*

EXHIBIT A

CONFORMED COPY
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Superior Court of California
County of Los Angeles

JAN 24 2017

Sherril R. Carter, Executive Officer/Clerk
By Fernando Becerra, Jr., Deputy

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**
10

11 NATURAL RESOURCES DEFENSE
12 COUNCIL, INC. AND LOS ANGELES
13 WATERKEEPER,

14 **Petitioners,**

15 vs.

16 STATE WATER RESOURCES CONTROL
17 BOARD and CALIFORNIA REGIONAL
18 WATER QUALITY CONTROL BOARD,
19 LOS ANGELES REGION,

20 **Respondents.**

Case No. BS156962

ORDER DENYING PETITION FOR WRIT
OF MANDAMUS

Dept.: 86
Hearing Date: January 23, 2017
9:30 a.m.

21
22 **I. Introduction**
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24
25 At issue in this case is the 2012 NPDES permit issued by the California Regional Water
26 Quality Board, Los Angeles Region, for various municipalities' discharges of potentially
27 contaminated storm water run-off transported via sewer systems to the various rivers, creeks,
28 oceans and other water bodies located in watersheds throughout Los Angeles County. Petitioners
National Resource Defense Council, Inc. ("NRDC") and Los Angeles Waterkeeper (collectively

1 "Petitioners") filed this action against the State Water Resources Control Board ("SWB" or "State
2 Board") and California Regional Water Quality Control Board, Los Angeles Region ("RWB" or
3 "Regional Board") seeking to invalidate the 2012 NPDES Permit ("2012 Permit") by obtaining a
4 judicial writ of mandate.

5 The 2012 Permit marks a sea change in RWB's approach to compliance with the Clean
6 Water Act (the "Act"). Whereas the prior NPDES permit (the "2001 Permit") was structured to
7 enforce water quality standards, the 2012 Permit creates incentives for municipalities to construct
8 infrastructure improvements designed to retain polluted storm water *in situ* rather than piping it
9 via sewer system to the region's various water bodies.

10 Although the 2001 Permit articulated water quality standards (measured as concentrations
11 of contaminants in receiving waters) for purposes of enforcement, environmental groups
12 challenged RWB's efforts to enforce them. For example, NRDC accused the County of Los
13 Angeles and the County Flood Control District of violating the 2001 Permit, claiming that its
14 prohibition of "discharges from [municipal sewer systems (MS4s)] that cause or contribute to the
15 violation of Water Quality Standards or water quality objectives" was ineffectual. (*Natural*
16 *Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1199.)

17 Although the 2001 Permit required permittees (including the County, the Flood Control District
18 and 88 municipalities) to monitor the impacts of the MS4 discharges and to publish the results on
19 an annual basis, the mechanism for monitoring impacts – collecting representative data from seven
20 mass monitoring stations positioned "downstream from a significant number of [county
21 defendants'] outfalls" (*id.* at 1209) – made it impossible to quantify the extent to which an
22 individual permittee's discharges caused or contributed to any measured exceedance¹ and vitiated
23 RWB's enforcement measures. Ultimately, the Ninth Circuit interpreted the 2001 Permit as
24 imposing liability for every exceedance on all permittees who discharged into the affected
25
26
27
28

¹ An exceedance is a reading in excess of the acceptable percentage concentration of a particular contaminant as defined in water quality standards.

1 watershed, apportioning responsibility (fines or enforcement orders) based on the extent of each
2 permittee's individual discharge. (*Id.* at 1206-1209.)

3 By the time RWB adopted the 2012 Permit, its system for monitoring discharges and
4 identifying the sources of pollutants had been improved with the addition of numerous monitoring
5 devices placed in multiple outfall locations. The SWB also promulgated 33 new Total Maximum
6 Daily Limits ("TMDLs") for specified pollutants, placing caps on the total allowable discharges
7 of such pollutants into identified water bodies. The 2012 Permit establishes water quality-based
8 effluent limitations ("WQBELs") based on the TMDLs, allocating a share of each TMDL to each
9 municipality. As a result of these changes, RWB has the capacity to more effectively assign
10 accountability to dischargers who exceed effluent limitations thus enhancing its potential
11 enforcement of water quality standards.
12

13 Notwithstanding the additional TMDLs and the increased accountability, the focus of the
14 2012 Permit is not enforcement of specified water quality standards. The 2012 Permit has an
15 entirely new regulatory structure designed to promote a long term goal of compliance by
16 encouraging cities to deploy find ways to retain polluted storm water run-off (prevent it from
17 reaching water bodies) in exchange for short term protection from enforcement of existing water
18 quality standards. The overall plan is for RWB to work closely with the numerous municipalities
19 under its jurisdiction, facilitating cooperation among them to allocate their public funds to
20 structural solutions designed to retain storm water and other contaminated run off in the originating
21 jurisdictions rather than pipe it via sewer systems into the regional water bodies. From RWB's
22 and SWB's point of view, this is an enlightened approach that allows RWB to hold municipalities
23 accountable for originating and implementing long term solutions that will solve the problem of
24 Southern California's contaminated water bodies rather than simply penalize dischargers. The
25 hope is that municipalities and other governmental entities will find ways to retain contaminated
26 run off that will either halt or greatly reduce storm water discharge of contaminants into to the
27 County's water bodies.
28

1 From Petitioners' point of view, RWB's 2012 Permit indefinitely abrogates RWB's
2 enforcement of water quality standards (and the public's right to use litigation as a means of
3 enforcing those standards) in exchange for future promises (water management plans ("WMPs")
4 and enhanced water management plans ("EWMPs")) that may or may not culminate in public
5 construction of catch basins or other structural solutions for the retention of run off, let alone
6 ultimate compliance with water quality standards under the Act. In the meantime, Petitioners
7 complain RWB has relinquished all power to enforce water quality standards, "deeming" entities
8 preparing WMPs and EWMPs in compliance with existing standards, rather than enforcing those
9 standards.

10
11 According to Petitioners, the "deemed compliance" aspect of the 2012 Permit renders the
12 2012 Permit less stringent than the 2001 Permit in violation of the Act's antidegradation clause
13 and the California Toxic Rule ("CTR") which forbids toxic contamination of water bodies.
14 Petitioners therefore argue the Court should issue a Code of Civil Procedure Section 1094.5 writ
15 of mandate, countermanding the 2012 Permit as unlawful and as a prejudicial abuse of discretion.
16 They urge the Court to exercise its independent judgment to conclude the 2102 Permit is not
17 supported by the weight of the evidence.

18
19 Respondents, joined by intervenors comprised of twenty cities governed by the 2012
20 Permit, the County of Los Angeles and the Los Angeles County Flood Control District
21 (collectively "Intervenors"), make the case for denying the petition for writ of mandate.

22 As set forth below, the Court is persuaded the 2012 Permit is lawful and supported by the
23 weight of the evidence. To rule in Petitioners' favor would require the Court to substitute its
24 judgment for the judgment of SWB and RWB which is not permissible or appropriate in writ of
25 mandate proceedings prosecuted under California Code of Civil Procedure 1094.5. The Court
26 therefore denies the Petition.

1 **II. Background**

2 **A. The Clean Water Act**

3
4 The Clean Water Act (33 U.S.C. §§ 1251-1387) originated in the Federal Water Pollution
5 Control Act ("FWPCA"). Pursuant to 1972 amendments to that Act, EPA established limits for
6 discharges from industrial sources and privately owned treatment plants into navigable waters of
7 the United States. The 1972 Amendments introduced the National Pollution Discharge
8 Elimination System (NPDES) permit program, a system generally delegating authority to state
9 agencies (such as SWB and RWB) for issuing permits regulating industrial, municipal and
10 agricultural point sources of pollution, based on water quality standards established by the State.
11 It was unclear, however, whether the 1972 Amendments regulating storm water run-off from
12 industrial sources also regulated run off from municipal storm drains because they were not
13 specifically addressed.
14

15 To resolve challenges to EPA's enforcement of the 1972 Amendments, EPA agreed in a
16 1976 consent decree ("Flannery Decree") to take more specific measures to address industrial
17 pollutants. Those measure were amended into the FWPCA in 1977 in legislation known as the
18 Clean Water Act of 1977. Congress amended the Act again in 1987, passing the Water Quality
19 Act of 1987. That legislation, known as the Clean Water Act ("CWA"), specifically addressed
20 municipal storm water run-off, establishing "a timetable for regulation of storm water,
21 strengthen[ing] requirements relating to water quality and . . . expand[ing] EPA's enforcement
22 tools." (Sullivan et al., Environmental Law Handbook (22nd ed. 2014) p. 330 ("Sullivan").)
23

24 As passed in 1972, the CWA stated various objectives, goals and policies, declaring an
25 "ultimate goal of eliminating the discharge of pollutants into the nation's navigable waters" by
26 1985. (33 U.S.C. § 1251(a)(1).) Although this goal, and the goal of controlling both point and
27 non-point sources of pollution (§ 1251(a)(3), (7)), are not legal mandates per se, EPA and the
28 courts have relied on them as declarations of Congressional intent. (Sullivan at p. 300.)

1 As noted above, administration of Congress's broad prohibition on discharges was largely
2 delegated to the States who are charged with establishing and enforcing an NPDES permit system.
3 The statutory language places the burden of proof on the discharger: "Except as in compliance
4 with . . . this title, the discharge of any pollutant [into navigable waters] by any person shall be
5 unlawful." (U.S.C. 1342 1311(a).) The NPDES permits regulate discharges of "any addition of
6 any pollutant to navigable waters from any point source" (§ 1362(12)), defining "point source" as
7 any "discernable, confined and discrete conveyance . . . from which pollutants are or may be
8 discharged" (§ 1362(14)).
9

10 The EPA has memorialized its delegation of NPDES permit power to the States in five-year
11 memorandums of agreement, specifying the numerical limitations on permitted discharges from
12 specified outfalls (including industrially generated channeled storm run-off).² (Sullivan at pp.
13

14 ² California's State Water Resources Control Board signed a June 1989 MOA with the Regional
15 Administrator of EPA superseding an MOA signed March 1973, and a 1986 Compliance and Enforcement
16 Agreement. (https://www.epa.gov/sites/production/files/2013-08/documents/ca-moa-npdes_0.pdf (as of
17 December 1, 2016) pp. 1-2 (the "MOA").) The MOA gives California "primary authority for the issuance,
18 compliance monitoring, and enforcement of all NPDES permits" in California. (MOA p. 1.) The MOA
19 sets forth responsibilities for EPA's Regional Board, SWB and RWB. Specifically, it gives RWB
20 "responsibilities" for managing the NPDES program including (a) regulating all discharge subject to the
21 NPDES programs; (b) maintaining administrative procedures and management control to ensure
22 implementation of the NPDES program in conformity with State laws, regulations and policies; (g)
23 comprehensively evaluating and assessing compliance with schedules, effluent limitations and other
24 conditions in permits; and (h) taking timely and appropriate enforcement action in accordance with the
25 CWA, federal regulations and State Law. (p. 6-7.) The MOA gives SWB and RWB "primary authority
26 for the issuance [and modification] of NPDES permits" and provides that EPA "may comment upon or
27 object to the issuance of a permit or the terms or conditions therein." (p. 7.) It contemplates the State and
28 EPA will "coordinate permit review through frequent telephone contact" and resolve differences over
permit content "through telephone liaison" (*id.*), holding out the possibility of a public hearing in the event
of disagreement (p. 19). For "a general permit," the Regional Board "will collect sufficient data to develop
effluent limitations and prepare and draft the general permit." (p. 8.) It contains extensive provisions for
giving notice of draft permits to EPA so that EPA can comment. The MOA requires the State Board "to
maintain compliance monitoring and enforcement procedures" and maintain an administrative procedures
manual (Enforcement Management System) for the NPDES program, which contains criteria for pre-
enforcement screenings and "formal enforcement action and follow-up wherever necessary." (p. 34.) The
MOA notes that the various compliance and enforcement related provisions of the APM "shall constitute
the framework . . . for making NPDES enforcement decisions." (p. 34.) It also requires the State to conduct
annual inspections of "all major dischargers" to determine compliance with permit requirements, including
"sampling and non-sampling inspections." (p. 35.) Under the MOU, "The Regional Boards pursue
enforcement of NPDES permit requirements, and of all other provisions of the NPDES program under State

1 335-36.) State programs have to be at least as stringent as the federal NPDES program but can be
2 more stringent. (Id., p. 336.) "The primary purpose of NPDES permits is to establish enforceable
3 effluent limitations," but they may also "establish a number of other enforceable conditions." (Id.,
4 p. 338.) Such limitations can be technology based limitations. The EPA establishes national
5 effluent guidelines through notices and rulemaking covering more than 50 industrial categories.
6 For industrial categories not yet covered by an EPA guideline, permit writers can rely on "best
7 professional judgment" to set guidelines so long as they do not run afoul of the EPA's anti-
8 backsliding policy (codified in the 1987 amendments). (Id., p. 341.) Effluent limits may be water
9 quality-based limitations, usually a numeric level of a pollutant that cannot be exceeded, intended
10 to maintain the designated use of the water body (e.g., fishing, swimming, etc.). (Id., p. 344.) The
11 federal criteria are "guidelines" but a State is free to set site-specific criteria.
12

13 *B. California's NPDES Permit Process*

14
15 Using delegated power, California issues NPDES permits to enforce the CWA's
16 prohibition on discharges of pollutants into navigable waters that would otherwise be illegal. The
17 permits generally identify particular pollutants and specify limits on the amount or concentration
18 to be discharged (effluent limitations). California's 1969 Porter-Cologne Water Quality Act
19 similarly prohibits contaminated discharges from "point sources" and requires any discharger of
20 waste to obtain a permit. (Water Code §§ 13000 et seq.) That Act specifies waste discharge
21 restrictions (§13777 et seq.) and imposes substantial penalties for violations (§ 13385 et seq.)
22

23 Under the CWA and the Porter-Cologne Act, industrial entities and municipalities
24 ("MS4s") are subject to the NPDES permitting process. In California, there are nine regional
25 boards, including Respondent RWB, responsible for issuing NPDES permits to municipalities
26 within their regions. The CWA requires states issuing NPDES permits to establish standards based
27

28
authority" (p. 38) and the State Board "shall assure that enforcement of the NPDES program is exercised
aggressively, fairly and consistently." (p. 39.) EPA can also independently initiate enforcement action
under certain circumstances. (p. 39-40.)

1 on Total Maximum Daily Limitations (TMDLs) for various pollutants based on the extent to which
2 a water body can assimilate them without degradation of water quality.

3 The EPA can review and has the power to veto NPDES permits if they fail to comply with
4 the CWA but has declined to take action in this case.³

5 An NPDES permit issued by RWB can also be challenged by appeal to the SWB. There
6 is no dispute Petitioners duly exhausted their administrative remedies by invoking review by the
7 State Board before filing a Petition.

8 SWB's June 16, 2015 Order upheld RWB's 2012 permit.
9

10 III. Standard of Review 11

12 Under Water Code § 13330(a), "any aggrieved party may file with the superior court a
13 petition for writ of mandate for review" of a decision by the State Water Board ("SWB"). The
14 Water Code specifies that Section 1094.5 of the Code of Civil Procedure governs such petitions
15 and that in reviewing an SWB decision or order, the Court "shall exercise its independent judgment
16 on the evidence." (§ 13330(e).) This means that, pursuant to section 1094.5(c), the court decides
17 whether the weight of the evidence supports the administrative findings (rather than whether
18 substantial evidence supports the findings). "In exercising its independent judgment, a trial court
19 must afford a strong presumption of correctness concerning the administrative findings, and the
20 party challenging the administrative decision bears the burden of convincing the court that the
21 administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels*
22 (1999) 20 Cal.4th 805, 817; see Evid. Code § 664 ["It is presumed that official duty has been
23 regularly performed."].) "[W]hile interpretation of a statute or regulation is ultimately a question
24 of law, [courts] must . . . defer to an administrative agency's interpretation of a statute or regulation
25 involving its area of expertise, unless the interpretation flies in the face of the clear language and
26
27
28

³ According to Respondents, the EPA has taken no action with respect to the 2012 NPDES permits at issue in the petition and have approved a District of Columbia permit containing similar provisions.

1 purpose of the interpreted provision.” (*Communities for a Better Environment v. State Water*
2 *Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1104.)
3
4

5 IV. Analysis 6

7 Petitioners asks the court “to issue a writ of mandate directing Respondents to set aside the
8 unlawful provisions of the 2012 Permit and remand the 2012 Permit for proceedings consistent
9 with federal and state law” and to “issue a declaration that Respondents have violated the law.”
10 Petitioners identify three reasons why the 2012 Permit is unlawful. First, Petitioners contend the
11 2012 Permit violates the Clean Water Act (33 U.S.C. § 1342(o)(1)), which forbids the issuance of
12 an NPDES permit containing “effluent limitations which are less stringent” than limitations in a
13 prior permit. They argue the conditions in the 2012 Permit allowing municipalities to comply with
14 TMDL limitations by planning and implementing Watershed Management Programs (WMPs) or
15 Enhanced Watershed Management Programs (EWMPs) are less stringent than the required
16 compliance with effluent limitations under the 2001 Permit. Petitioners assert this “backsliding”
17 violates EPA regulations (40 C.F.R. § 122.44(l)) as well.
18

19 Second, Petitioners assert that the 2012 Permit violates specified state and federal
20 antidegradation policies prohibiting degradation of high quality waters and further degradation of
21 waters that are already impaired by pollution. According to Petitioners, the Regional Board failed
22 to conduct analyses required by these laws and the State Board accepted the Regional Board’s
23 “conclusory” analysis on the grounds that it lacked sufficient data to establish a baseline level of
24 pollutants reaching back to water quality levels as they existed in 1968. Petitioners argue that the
25 Water Boards’ conclusory statements regarding anti-degradation fail to bridge the analytical gap
26 between the data they relied on and their conclusion that there is no degradation.
27

28 Third, Petitioners contend the 2012 Permit is illegal because it sets schedules for future
compliance with toxic pollutant limitations. They argue the schedules, which apply to water

1 bodies such as Ballona Creek, the Marina del Rey Harbor, and the Los Angeles River violate EPA
2 regulations requiring full compliance with the toxic pollutant limitations by 2010 at the latest.
3 Petitioners also point out that the scheduled dates for compliance are outside the 2012 Permit's
4 five-year duration.

5 Respondents reject Petitioners' backsliding arguments on the grounds that the backsliding
6 provisions (§ 1342(o) and 40 C.F.R. 122.44(l)) do not apply to MS4s and that § 1342(p)(3) applies
7 instead. Respondents argue that the 2012 Permit, as written, is not "backsliding" and it is not
8 comparable to the 2001 Permit because instead of regulating only the body of water receiving
9 pollutant discharges by imposing receiving water limitations (RWLs), the 2012 Permit also
10 regulates the discharge of pollutants by setting limits on the amount of pollutants in the MS4
11 discharges themselves ("effluent limitations").⁴

12
13 Alternatively, they contend the 2012 Permit is not, in fact, more lenient. They also argue
14 the 2012 Permit is exempt from backsliding provisions because it is based on "new information"
15 including: (1) the Water Boards' experience regulating pollutants since 2001; (2) the increase in
16 TMDLs from 4 in 2001 to 33 in 2012; (3) new studies (e.g., the 2008 National Research Council
17 Study); and (4) a new paradigm recognizing polluted storm water run-off is a headwater problem
18 requiring municipal cooperation and significant investment in cross-border structural solutions
19 such as adopting measures to retain or infiltrate rainwater to counterbalance water shortages.

20 Respondents also argue SWB's and RWB's anti-degradation findings are supported by
21 substantial evidence notwithstanding the absence of early data to support a 1968 baseline level of
22 water quality in county water bodies. To the extent the 2012 Permit permits any degradation,
23 Respondents argue it is justified by the need for flood control and stream flow measures that
24 necessarily benefit the public.
25

26
27
28

⁴ The 2001 Permit was reopened in 2009 to add effluent limitations based on a TMDL relating to trash in the Los Angeles River. The 2012 permit adds effluent limitations based on 33 additional TMDLs.

1 With regard to schedules for compliance, Respondents contend that the California Toxic
2 Rule does not apply to MS4s and that their only obligation is to reduce toxins to the “maximum
3 extent possible.”

4 C. The 2012 Permit Does Not Violate 33 USC § 1342(o) or 40 CFR 122.44(l)

5
6 Section 1311 of the CWA makes the discharge of any pollutant by any person unlawful.
7 Notwithstanding that section, EPA or a State exercising powers delegated by EPA’s administrator
8 may, under section 1342(b), issue permits for fixed terms of five years that apply, and ensure
9 compliance with, requirements under the CWA.
10

11 As explained in *American Farm* (3d Cir. 2015) 792 F.3d 281, 289, cert. denied sub nom.
12 *American Farm Bureau Federation v. E.P.A.* (2016) 136 S. Ct. 1246:

13 “The Clean Water Act gives the EPA primary responsibility for regulating point sources
14 by establishing ‘effluent limitations,’ 33 U.S.C. § 1311(b)(1)(A), which are pollution caps
15 that by statutory definition apply only to point sources. *Id.* § 1362(11). States in turn
16 regulate nonpoint sources. There is significant input and oversight from the EPA, but it
17 does not regulate nonpoint sources directly. *Id.* § 1329(b) & (e).”

18 Section 1342(o) addresses backsliding in “effluent limitations” articulated in renewed permits:

19 In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this
20 section, a permit may not be renewed, reissued, or modified on the basis of effluent
21 guidelines promulgated under section 1314(b) of this title [empowering the EPA
22 Administrator to publish regulations with guidelines for effluent limitations] . . . which are
23 less stringent than the comparable **effluent limitations** in the previous permit. In the case
24 of effluent limitations established on the basis of section 1311(b)(1)(C)⁵ [setting timetables
25 for establishing effluent limitations] or section 1313(d) or (e) of this title [directing states
26 to establish and implement effluent limitations], a permit may not be renewed, reissued or
27 modified to contain **effluent limitations** which are less stringent than the comparable
28 effluent limitations in the previous permit except in compliance with 1313(d)(4) [allowing

⁵ Section 1311(a) makes “the discharge of any pollutant by any person” unlawful unless in compliance with “this section and sections 1312 (directing EPA administrator to set effluent limitations when limitations under 1311(b)(2) are insufficient), 1316, 1317, 1318, 1328, 1242, and 1344 of this title.”

1 revision of effluent limitations for below standard waters only under certain conditions or
2 in compliance with regulations].

3 (33 U.S.C. § 1342(o)(1) [emphasis added].)

4 Section 1342(p) articulates the relevant standard for municipalities. That provision makes
5 no reference to any “effluent limitations” in permits to be issued to municipalities for discharges
6 from municipal storm sewers. The only requirement for such permits is to “require controls to
7 reduce the discharge of pollutants to the maximum extent practicable, including management
8 practices, control techniques, and system design and engineering methods, and such other
9 provisions as the Administrator or the state determines appropriate for the control of such
10 pollutants.” Because the section regulating municipalities (§ 1342(p)(3)(B)(iii)) says nothing
11 about “effluent limitations,” the anti-backsliding statute does not apply to permits issued to
12 municipalities for storm water discharge.
13

14 The court in *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d. 1159, 1164-65
15 reached the same conclusion with regard to municipal storm sewer discharges. Citing section
16 1342(p)(3)(A), that court concluded that “Congress expressly required *industrial* storm-water
17 discharges to comply with the requirements of 33 U.S.C. § 1311,” but chose not to include a similar
18 provision for municipal storm sewer discharges electing instead to require municipalities “to
19 reduce the discharge of pollutants to the maximum extent practicable, including management
20 practices, control techniques and system, design and engineering methods and such other
21 provisions as the Administrator . . . determines appropriate for the control of such pollutants”
22 pursuant to section 1342(p)(3)(B)(iii). As that court explained, section 1342(p)(3)(B)(iii)
23 “replaces the requirements of § 1311” with the language set forth in that section and “creates a
24 lesser standard.” (*Id.* at 1165.)
25

26 *D. Respondents Did Not Violate 40 CFR 122.44's Backsliding Provision*

27
28 An EPA regulation, 40 C.F.R. § 122.44, likewise prohibits backsliding on any effluent
limitations:

1 “[W]hen a permit is renewed or reissued, interim effluent limitations, standards or
2 conditions must be at least as stringent as the final effluent limitations, standards or
3 conditions in the previous permit (unless the circumstances on which the previous permit
4 was based have materially and substantially changed since the time the permit was issued
5 and would constitute cause of permit modification or revocation and reissuance under §
6 122.62 [allowing modifications of permits for cause and identifying, in § 122.62(a)(2),
7 receipt of ‘new information . . . not available at the time of permit issuance . . . [that] would
8 have justified the application of different permit conditions at the time of issuance’ as such
9 cause]).”

10 For the reasons noted above, any purported backsliding on “effluent limitations” does not apply to
11 reissuances of municipal permits. To the extent the regulation prohibits less stringent standards or
12 conditions, the Court is not persuaded the regulation applies to MS4 permits for storm water run-
13 off. With respect to municipalities, SWB’s charter under the CWA is to “reduce the discharge of
14 pollutants to the maximum extent practicable, including management practices, control
15 techniques, and system design and engineering methods, and such other provisions as the
16 Administrator or the state determines appropriate for the control of such pollutants.” The Court
17 interprets the word “appropriate” as broad language delegating discretion to impose any practices,
18 techniques, methods or other provision that the State decides are suitable for control of pollutants.
19 Congress’s use of the adjective “appropriate” (defined by Merriam Webster Dictionary to mean
20 suitable or compatible) underscores the discretionary nature of the determination and
21 communicates a subjective rather than objective standard. On the other hand, the “one-way
22 ratchet” articulated in the regulation contemplates a comparison of objective measures, i.e.,
23 “effluent limitations,” “standards” or “conditions.” (See *Natural Resources Defense Council, Inc.*
24 *v. U.S.E.P.A.* (D.C. Cir. 1988) 859 F.2d 156, 202.) The differences between the language of
25 section 1342(p)(3)(B)(iii) and the language in the regulation supports an interpretation that the
26 regulation does not apply to MS4s. NRDC’s argument the regulation says “any permit” and was
27 enacted after EPA assumed responsibility for regulating storm water run-off does not persuade the
28 Court to the contrary.

1 Even if the regulation did apply to MS4s, there is substantial evidence supporting an
2 exemption based on new information. As detailed in the State permit, modern studies have
3 precipitated a change in paradigm favoring cross-boundary cooperation as a means of tailoring
4 structural solutions to each geographical watershed not merely to bring water quality into
5 compliance with the CWA but also to alleviate water shortages. The weight of the evidence
6 supports this approach as "appropriate" under section 1342(p)(3)(B)(iii).
7

8
9 *E. The 2012 Permit Does Not Violate Anti-Degradation Policies*

10
11 The federal "Antidegradation policy and implementation methods" is set forth in 40
12 C.F.R. § 131.12. That regulation is included in a section of the regulations describing "the
13 requirements and procedures for developing, reviewing, revising, and approving water quality
14 standards by the States as authorized by Section 303(c) [33 U.S.C. § 1313] of the Clean Water
15 Act." (40 C.F.R. § 131.1) Section 131.12 states:

16
17 (a) The State shall develop and adopt a statewide antidegradation policy. The
18 antidegradation policy shall, at a minimum be consistent with the following:

19 (1) Existing instream water uses and the level of water quality necessary to protect
20 the existing uses shall be maintained and protected.

21 (2) Where the quality of the waters exceeds levels necessary to support the
22 protection and propagation of fish, shellfish, and wildlife and recreation in and on
23 the water, that quality shall be maintained and protected unless the State finds . . .
24 that allowing lower water quality is necessary to accommodate important economic
25 or social development in the area in which the waters are located. In allowing such
26 degradation or lower water quality, the State shall assure water quality adequate to
27 protect existing uses fully. Further, the State shall assure that there shall be
28 achieved the highest statutory and regulatory requirements for all new and existing
point sources and all cost-effective and reasonable best management practices for
nonpoint source control.

* * *

1 (b) The State shall develop methods for implementing the antidegradation policy that are,
2 at a minimum, consistent with the State's policy and with paragraph (a) of this section. . . ."

3 . As noted in the *Water Board's* resolution No. 68-16, entitled "Statement of Policy with
4 Respect to Maintaining High Quality of Waters in California," "[t]he federal antidegradation
5 regulation 40 CFR 131.12, initially adopted in 1975, establishes requirements for protection of
6 high quality waters." (SB-AR-14340.) Resolution 68-16 likewise resolves to preserve high quality
7 waters requiring that any change deleterious to that quality "will be consistent with maximum
8 benefit to the people of the State, will not unreasonably affect present and anticipated beneficial
9 use of such water, and will not result in water quality less than that prescribed in the policies."
10 (SB-AR-14338.) It also requires the "best practicable treatment or control of the discharge" in
11 order to assure the highest water quality "consistent with maximum benefit to the people of the
12 State." (*Id.*)

13
14 An Administrative Procedures Update from the Board issued in 1990 (the "APU")
15 addresses how the Regional Boards should implement Resolution 68-16. The Update states, "the
16 Regional Boards must consider the need to include a finding that specifies that water quality
17 degradation is permissible when balanced against benefit to the public of the activity in question.
18 The determination as to whether a finding is needed must be made when issuing, reissuing,
19 amending or revising an NPDES permit. . . . The findings should specifically state that the
20 Regional Board has considered antidegradation pursuant to 40 CFR 131.12 and State Board
21 Resolution No. 68016 and find that the permitted discharge is consistent with those provisions,"
22 making findings, if applicable, identifying the pollutants that will lower water quality, the
23 socioeconomic and public benefits from lowered water quality, and the beneficial uses that will be
24 affected. The Update sets forth a "Procedure for Complete Antidegradation Analysis" that requires
25 a comparison of receiving water quality to the water quality objectives established to protect
26 designated beneficial uses using a baseline of quality "defined as the best quality of the receiving
27 water that has existed since 1968 . . . or, "if poorer water quality was permitted, the most recent
28 water quality resulting from permitted action." It also provides that the "Regional Board may

1 determine that it is not necessary to do a complete antidegradation analysis . . . if using its best
2 professional judgment and all available pertinent information, the Regional Board decides that the
3 discharge will not be adverse to the intent and purpose of the State and federal antidegradation
4 policies.” (SB-AR-14331.)

5 The RWB addresses antidegradation on pages 57 and 58 of its Response to Petitions
6 Challenging the 2012 Permit. (SB-AR-9859.) The RWB concludes “the terms and conditions of
7 the Permit will prevent degradation of existing high quality waters” and identifies four major
8 supports for its conclusion: (1) the receiving waters of discharges regulated by the Permit “have
9 long been heavily impacted by storm water;” “most . . . are impaired for multiple constituents”
10 [citing the EPA’s 1998 and 2010 lists of impaired waterbodies]; the “receiving waters are not high
11 quality” [citing a statement from the transcript of the October 4-5 hearing before the RWB⁶]; and
12 [t]o the extent that data is available from 1968, there were few high quality receiving waters in Los
13 Angeles County even at that time” [citing various studies addressing data collected since 1978];
14 (2) that the terms of the 2012 Permit are at least as stringent or more stringent than the prior permit
15 because it “does not authorize any new practices that would increase the amount of pollutant
16 loading from the MS4 and continues to require implementation of control measures to the
17 maximum extent practicable . . . ;” (3) measures controlling impacts from storm water discharges
18 are typically effective for multiple pollutants because, for example, retention basins and
19 development controls prevent storm water from ever reaching the receiving water bodies
20 (including high quality receiving bodies); and (4) “the Permit includes an extensive monitoring
21 program and reopener provisions to identify changes in water quality and to allow amendment of
22 the Permit as necessary to add preventative provisions if a threat of degradation is suspected.”
23

24
25 Petitioners argue the State Board failed to identify which waters covered by the 2012
26 Permit qualify as high quality and that the Regional Board’s apparent lack of data as to the quality
27 of waters back in 1968 is no excuse for failing to conduct an analysis. Petitioners fail, however to
28

⁶ “Despite years of storm water program implementation, many, if not most, of the waterbodies in Los Angeles County have been listed as impaired.” (RB-AR-18328.)

1 identify any studies or data specifying the water quality in 1968 that the State Board overlooked
2 or disregarded. Their argument that the Board “admitted” that such data is available (citing SB-
3 AR-13224) is not supported by the record. The Court is therefore not persuaded that such data
4 exists, let alone that the failure to analyze such data was an abuse of discretion.

5 Petitioners compare the State Board’s conclusion that no degradation will occur to a similar
6 statement by the Board in *Asociacion de Gente Unida por el Agua v. Central Valley Regional*
7 *Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1266 (“Agua”). As the court noted in
8 that case, “the State Board’s antidegradation policy applies whenever: (a) there is existing high
9 quality water, and (b) an activity which produces or may produce waste or an increased volume or
10 concentration of waste that will discharge into such high quality water.” (*Id.* at 1268.) That court
11 explained “when undertaking an antidegradation analysis, the Regional Board must compare the
12 baseline water quality (the best quality that has existed since 1968) to the water quality
13 objectives. . . . [and] if the baseline water quality is better than the water quality objectives, the
14 baseline water quality must be maintained in the absence of findings required by the
15 antidegradation policy.” In that case, there was evidence that, even in 1986, the nitrate measured
16 in certain ground water was 2.4 mg/L, significantly less than the water quality objective for nitrate
17 (10mg/L). Based on that data, the court concluded the water was “high quality” for purposes of
18 antidegradation:
19

20 “The important point . . . is that the water quality objective for nitrate is 10 mg/L, and in
21 1986, the concentration was 2.4 mg/L. Although there is some evidence the concentration
22 was even less in 1968, it is certain that the water quality of the existing groundwater is
23 better than the water quality objective, making the ground water high quality water for
24 antidegradation purposes. Water can be considered high quality for purposes of the
25 antidegradation policy if it is determined to be so for any one constituent because the
26 determination is made on a constituent by constituent basis.”

27 (*Id.* at 1271.) The *Agua* court also rejected the Regional Board’s assertion the Order’s prohibition
28 of degradation was sufficient and no further analysis was necessary. The court noted the order
failed to explain whether there would be no degradation because there would be no discharge or

1 because any discharge would not degrade the quality of the groundwater. As that court interpreted
2 Resolution 68-16, "all that is required for the antidegradation policy to apply is a determination
3 that the receiving water is high quality water and that an activity will discharge waste into the
4 receiving water. The policy presumes from those two facts that the quality of the receiving water
5 will be degraded by the discharge of waste." (*Id.* at 1272.) The court concluded that, for the Board
6 to sustain its claim that no degradation analysis was necessary because it declared that no
7 degradation would be allowed, "the Order's monitoring program must be sufficient to alert the
8 Regional Board if a dairy is degrading the groundwater." (*Id.* at 1274.) Because the record
9 identified various gaps and defects in monitoring and there was no contrary evidence, the court
10 concluded the monitoring program was inadequate. (*Id.* at 1275.) The court also found there was
11 insufficient enforcement mechanism to ensure that any groundwater contamination would be
12 stopped. (*Id.* at 1279.)

14 In this case, by contrast, the Regional Board's assertion that "discharges permitted in [the
15 2012 permit] are consistent with the antidegradation provisions" is not without support. First, the
16 2012 permit is more stringent than the 2001 Permit: while the 2012 Permit imposes the same RWLs
17 as the 2001 Permit, it regulates the discharge of pollutants by imposing effluent limitations based
18 on 33 new watershed-based TMDLs. Second, rather than "allow[ing] historic practices to continue
19 without change" (*Agua* at 1273), the 2012 Permit incentivizes municipalities to implement long-
20 term structural solutions to polluted storm water runoff by participating in WMPs and EWMPs.
21 While it is true the municipalities may be "deemed" in compliance while planning and
22 implementing WMPs and EWMPs, the 2012 Permit requires municipalities to implement these
23 programs on a strict schedule. This is consistent with the *Agua* court's approval of a "phased
24 approach" to implementing measures necessary to maintain water quality. (*Agua* at 1277 [citing
25 Water Code § 13263].) Moreover, during the planning phase, the 2012 Permit requires permittees
26 to "[c]ontinue to implement watershed control measures in their existing storm water management
27 programs"; continue to eliminate any non-storm water discharges through MS4s; and ensure that
28 MS4 discharges meet applicable compliance deadlines occurring prior to approval of a WMP or

1 EWMP. (2012 Permit pp. 58-59.) Third, the 2012 Permit establishes an “extensive new
2 monitoring program” designed to identify any changes in water quality. While the 2001 Permit
3 required monitoring only at seven mass emission stations located in the receiving waters, the 2012
4 Permit requires monitoring at hundreds of outfall monitoring sites, enhancing the accountability
5 of the various municipal dischargers. Based on this evidence, the Court finds the weight of the
6 evidence supports RWB’s finding the discharges permitted by the 2012 Permit “are consistent with
7 the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16.” (2012 Permit p.
8 F-20-21.)
9

10 Petitioners also complain other findings are conclusory and lack a rational basis including,
11 for example, the finding that degradation is necessary to accommodate important economic or
12 social development and is therefore of maximum benefit to the people of the State. The 2012
13 Permit’s fact sheet explains “the discharge of storm water in certain circumstances is to the
14 maximum benefit to the people of the state because it can assist with maintaining instream flows
15 that support beneficial uses, may spur the development of multiple-benefit projects, and may be
16 necessary for flood control, and public safety as well as to accommodate development in the area.”
17 (2012 Permit p. F-20.) According to the fact sheet, the 2012 Permit ensures the best possible
18 treatment or control of necessary discharges by requiring permittees to either “implement
19 extensive minimum control measures in a storm water management program” or “implement
20 WMPs or EWMPs.” (*Id.* at F-21.)
21

22 This Court accepts these findings as sufficient to justify any degradation that may occur as
23 a result of the 2012 Permit’s regulatory scheme. As discussed, the weight of the evidence supports
24 the Regional Board’s assertion that “discharges permitted in [the 2012 Permit] are consistent with
25 the antidegradation provisions.” Under these circumstances, a complete antidegradation analysis
26 is not needed. A “simple antidegradation analysis” is sufficient where, as here, “[a] Regional
27
28

1 Board determines the reduction in water quality is temporally limited and will not result in any
2 long-term deleterious effects on water quality.” (SB-AR-14331.)⁷
3

4
5 *F. The 2012 Permit’s Compliance Schedules Are Legal*

6 The California Toxics Rule (“CTR”), codified at 40 C.F.R. § 131.38, establishes “numeric
7 criteria for priority toxic pollutants for the State of California.” Section 131.38 includes a table
8 listing various toxic pollutants and the maximum permissible concentrations of those pollutants
9 (“water quality criteria”). For permits issued after May 18, 2000 containing Water Quality Based
10 Effluent Limitations (“WQBELs”) based on those water quality criteria, Section 131.38(e)(2)
11 requires new dischargers to comply with any WQBEL “upon commencement of discharge.”
12 Although Section 131.38(e)(3) allowed existing dischargers to seek an alternative schedule of
13 compliance, the authorization for such schedules expired on May 18, 2005. (Section 131.38(e)(8).)
14

15 Petitioners contend that because the CTR itself no longer authorizes compliance schedules
16 for existing dischargers, the compliance schedules in the 2012 Permit violate the CTR. As
17 authority for their contention, Petitioners cite EPA’s final rule promulgating the CTR (65 Fed.
18 Reg. 31682 (May 18, 2000)) which states:
19

20 The rule allows all compliance schedules to extend up to a maximum duration of five years,
21 which is the maximum term of any NPDES permit. . . . Such compliance schedules,
22 however, cannot be extended to any indefinite point of time in the future because the
23 compliance schedule provision in this rule will sunset on May 18, 2005.

24 (*Id.* at 31704.)

25
26 ⁷ Indeed, the 2012 Permit includes measures ensuring that any degradation that may occur during the implementation
27 of WMPs and EWMPs will be temporary. The 2012 Permit requires permittees choosing to implement WMPs or
28 or EWMPs to conduct a “Reasonable Assurance Analysis” using a peer-reviewed model to show that proposed WMPs
or EWMPs will “achieve applicable water quality based effluent limitations” and will not “cause or contribute to
exceedances of receiving water limitations.” (2012 Permit p. 65.) In addition, once WMPs or EWMPs have been
implemented, the 2012 Permit requires a comprehensive program evaluation every 2 years to ensure progress toward
achieving effluent and receiving water limitations. (*Id.* p. 68.)

1 Respondents counter that the CTR does not apply because an EPA compliance schedule is
2 not required for an MS4 permit. The Court agrees with Respondents. The section of the final rule
3 immediately preceding the section cited by Petitioners (titled "Wet Weather Flows") specifically
4 addresses EPA's approach to municipal separate storm sewer systems. (*Id.* at 31703.) That section
5 discusses the Ninth Circuit's decision in *Defenders, supra*, 191 F.3d 1159 and acknowledges that
6 while "the CWA does not require 'strict compliance' with State water quality standards for
7 municipal storm sewer permits under section 301(b)(1)(C) . . . the CWA does give EPA discretion
8 to incorporate appropriate water quality-based effluent limitations under another provision, CWA
9 section 402(p)(3)(B)(iii)." (*Id.* at 31703.) The *Defenders* court held that "33 U.S.C. §
10 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33
11 U.S.C. § 1311(b)(1)(C)." (191 F.3d at 1165.) Based on that holding, the final rule states:

13 EPA believes that compliance with water quality standards through the use of Best
14 Management Practices (BMPs) is appropriate. . . . The [EPA's] policy affirms the use of
15 BMPs as a means to attain water quality standards in municipal storm water permits, and
16 embraces BMPs as an interim permitting approach.

17 The interim permitting approach uses BMPs in first-round storm water permits, and
18 expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for
19 the attainment of water quality standards. **In cases where adequate information exists to
20 develop more specific conditions or limitations to meet water quality standards, these
21 conditions or limitations are to be incorporated into storm water permits, as
22 necessary and appropriate.**

23 (*Id.* at 31703.) This language in the final rule promulgating the CTR is evidence EPA did not
24 intend to apply the compliance schedule in CTR (40 C.F.R. § 131.38(e)) to MS4 permits. Rather,
25 EPA recognized municipalities would use BMPs to attain water quality standards and, where
26 appropriate, would be subject to permits with "more specific conditions or limitations to meet
27 water quality standards." The compliance schedules in the 2012 Permit are "conditions or
28 limitations . . . to be incorporated into storm water permits, as necessary and appropriate." Thus,

1 the Court finds the compliance schedules are not subject to section 131.38(e)'s compliance
2 schedule provisions.

3 Further supporting this interpretation of the CTR is the fact that the State Board's policy
4 establishing "implementation provisions for priority pollutant criteria promulgated by the [EPA]
5 through the [CTR]," expressly states that "[the] Policy does not apply to regulation of storm water
6 discharges." (SB-AR-14897 fn. 1.)⁸
7

8
9 **V. Conclusion**

10
11 For the foregoing reasons, the Court DENIES Petitioners' motion for a writ of mandate.
12

13 Dated: JAN 24 2017

14 AMY D. HOGUE, JUDGE

15 AMY D. HOGUE
16 JUDGE OF THE SUPERIOR COURT
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18
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23

24
25 ⁸ In oral argument, Petitioners expressed concern the 2012 Permit effectively abrogates their ability to use
26 litigation as a means of compelling RWB and SWB to comply with the CWA. They contend that with dischargers
27 "deemed in compliance," Petitioners' ability to challenge Respondents' enforcement measures is greatly
28 compromised. While the Court recognizes the importance of private actions to enforce CWA and other environmental
laws, the Court is not persuaded the 2012 Permit runs afoul of those rights. To the contrary, it appears to the Court
that the right to challenge enforcement remains in place but the nature of the potential challenges has changed. Instead
of policing RWB's enforcement (or failure to enforce) quantitative water quality levels, environmental groups like
Petitioners must monitor RWB's progress with municipalities' compliance with promises and commitments made in
MWPs and EMWPs and, if appropriate, sue to compel compliance.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/24/17

DEPT. 86

HONORABLE Amy D. Hogue

JUDGE F. Becerra

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONIT

Deputy Sheriff

Reporter

BS156962

Plaintiff
Counsel

NATURAL RESOURCES DEFENSE COUNC

NO APPEARANCES

Defendant
Counsel

VS

VS

STATE WATER RESOURCES CONTROL
BOARD ET AL

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE
RULING ON SUBMITTED MATTER

The Court, having taken the above matter under submission on January 23, 2017, now makes its ruling as follows:

The petition for writ of mandate is denied for the reasons set forth in the document entitled ORDER DENYING PETITION FOR WRIT OF MANDAMUS, signed and filed this date.

Petitioner's Exhibit 1, administrative record and joint appendix, is ordered returned forthwith to counsel for Respondents, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal. Counsel for Respondents to pick up binders forthwith upon receipt of this order.

Counsel for respondent is to prepare, serve and lodge the proposed judgment within ten days.

Counsel for Respondent State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region is to give notice to all parties.

CLERK'S CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/24/17

DEPT. 86

HONORABLE Amy D. Hogue

JUDGE F. Becerra

DEPUTY CLERK

HONORABLE

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Plaintiff

Counsel

NATURAL RESOURCES DEFENSE COUNCIL

NO APPEARANCES

Defendant

VS

Counsel

VS

STATE WATER RESOURCES CONTROL BOARD ET AL

NATURE OF PROCEEDINGS:

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the above dated minute order and copy of ORDER DENYING PETITION FOR WRIT OF MANDAMUS upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: January 24, 2017

Sherri R. Carter, Executive Officer/Clerk

By: F. Becerra
F. Becerra

Jennifer Kalnins Temple
Deputy Attorney General
300 South Spring Street, Suite 1702
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MINUTES ENTERED
01/24/17
COUNTY CLERK

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: *Natural Resources Defense Council, Inc. and Los Angeles Waterkeeper v. State Water Resources Control Board, et al.*

Case No.: BS156962

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 31, 2016, I served the attached:

NOTICE OF RULING; ORDER DENYING PETITION FOR WRIT OF MANDAMUS

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 31, 2017, at Los Angeles, California.

Edwina R. Tuyay
Declarant

Edwina R. Tuyay

Signature

Case Name: *Natural Resources Defense Council, Inc. and Los Angeles Waterkeeper v. State Water Resources Control Board, et al.*

Case No.: BS156962

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