



May 16, 2011

Mr. Kevin Weiss
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Via electronic mail to weiss.kevin@epa.gov

RE: Retain Key Provisions of EPA's November 2010 TMDL and Storm Water Memorandum

Dear Mr. Weiss:

Thank you for the opportunity to submit comments on the United States Environmental Protection Agency's (EPA) "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'"¹ (2010 Memorandum). The undersigned conservation groups, fishing associations, watershed and creeks groups and civic associations represent a diverse group of citizens that use and enjoy rivers, estuaries, lakes and coastal areas in California, North Carolina, Pennsylvania, Virginia, West Virginia, Maryland, District of Columbia, Michigan, Florida, Alabama, and Oregon. **On behalf of our organizations and the more than 700,000 citizens that we represent, we urge EPA to preserve the 2010 Memorandum in its original form.**

EPA's November 22, 2002 Memorandum "Establishing Total Maximum Daily Load Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (2002 Memorandum) has failed to reduce impairments. Storm water-caused impairments are pervasive throughout the country after over two decades of permitting based on best management practices. The Commission on Ocean Policy found that "[n]inety percent of impaired water bodies do not meet water quality standards at least in part because of nonpoint source [storm water] pollution."²

Since EPA's issuance of the 2002 Memorandum, states and EPA have obtained considerable knowledge in storm water abatement. The 2010 Memorandum builds upon an expanded knowledge base and provides a critical step forward, primarily by encouraging more specifics in storm water permits such as TMDL numeric storm water wasteload allocations and specific numeric effluent limits on storm water-borne pollutants. EPA's guidance on these points will help ensure that our storm water regulations and permits actually improve water quality. Accordingly, we urge EPA to retain the 2010 Memorandum, particularly the recommendation that numeric effluent limits be included in storm water permits, as well as the guidance on improving storm water programs with:

- BMP performance monitoring where numeric effluent limits are infeasible;
- Numeric targets for surrogates of pollutant parameters; and
- Disaggregation of storm water sources in TMDLs.

¹James Hanlon, Office of Wastewater Management and Denise Keeher, Office of Wetlands, Oceans and Watersheds, U.S. EPA to Water Management Division Directors, U.S. EPA Regions 1-10, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'," (Nov. 12, 2010) (Memorandum), available at: http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf.

² U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report*, p. 213, available at http://oceancommission.gov/documents/full_color_rpt/14_chapter14.pdf (COP Report).

I. EPA SHOULD PRESERVE 2010 MEMORANDUM GUIDANCE ON NUMERIC EFFLUENT LIMITS IN STORM WATER PERMITS.

In the 2010 Memorandum, EPA recommends that “NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling storm water discharges.”³ This recommendation is consistent with the federal Clean Water Act, which requires that storm water permits contain water quality based effluent limitations when the permitting authority has determined that the discharge has the “reasonable potential to cause or contribute” to exceedances of water quality standards.⁴ This includes cases where a receiving water body is already identified on the threatened and impaired waters list.

EPA’s 2010 Memorandum recognizes that “[n]umeric WQBELs in storm water permits can clarify permit requirements and improve accountability and enforceability.”⁵ The current lack of clarity in storm water permits impacts their implementation and enforcement, both of which have become extremely resource-intensive. According to the U.S. Commission on Ocean Policy, “millions of dollars are spent on treating the symptoms of storm water pollution but much less is spent on efforts to control its causes.”⁶ The California Environmental Protection Agency (CalEPA) Enforcement Initiative found that: “one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable.”⁷ Straightforward requirements—such as numeric limits—create clear paths for enforcement and conserve valuable staff resources. Numeric limits in storm water permits would reduce the need for intensive staff oversight and allow the programs to be overseen more efficiently by the state.

As EPA’s March 17, 2011 Notice recognizes, the 2010 Memorandum reflects the fact that “the use of numeric effluent limitations no longer is a novel or unique approach to storm water permitting.” Setting quantifiable goals and assessment measures is consistent with state and federal movement toward numeric effluent limits, which provide greater certainty in assessing impacts both of pollution and controls. California is no exception. In December 2006, the California State Water Resources Control Board upheld the inclusion of numeric effluent limits for storm water discharges from the Santa Susana Field Laboratory facility in response to a petition submitted by Boeing Company.⁸ As upheld by the State Water Board, California State and Regional Boards have full authority to establish enforceable effluent limits for discharges. As another example, the California Construction General Permit includes a numeric limit for pH

³ *Supra* note 1.

⁴ Clean Water Act Section 402(p)(3)(A), 40 CFR 122.44(d)(1)(iii).

⁵ *Supra* note 1.

⁶ U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report*, Ch. 14, p. 217 (Sept. 2004), available at: http://oceancommission.gov/documents/full_color_rpt/14_chapter14.pdf (COP Report).

⁷ Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, p. 8 (November 30, 2004) (“CalEPA Enforcement Initiative”).

⁸ California State Water Resources Control Board Order, WQ 2006-0012, In the Matter of the Petition of Boeing Company (2006), available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2006/wqo/wqo2006_0012.pdf.

(6.0-9.0)) and, for certain discharges, turbidity (500 NTU).⁹ The State Board's Draft Caltrans Permit also provides numeric effluent limits for Lake Tahoe.¹⁰

Retain Guidance on Wasteload Allocations in Storm Water Permits.

The 2010 Memorandum is critical in order to clarify to states that compliance assurance and implementation of TMDL storm water wasteload allocations (WLAs) should occur through numeric effluent limits in storm water permits. The Clean Water Act requires that if a TMDL includes wasteload allocations for storm water discharges, storm water permits regulating those sources must also contain water quality based effluent limits and conditions consistent with the requirements and assumptions of the waste load allocations in the TMDL.¹¹ One example of this approach is the Ventura County MS4 permit, adopted by the Los Angeles Regional Water Quality Control Board in July 2010.¹² This permit contains numeric WLAs from over a dozen different TMDLs. The Regional Board also reopened the Los Angeles County MS4 on December 10, 2009 to include TMDL WLAs for trash in the Los Angeles River.¹³ Guidance in the 2010 Memorandum is necessary to clarify federal law, which dictates that permitting agencies integrate the WLAs and load allocations into the effluent limitations of certain NPDES permits.

Retain Guidance on MS4 Effluent Limits.

The 2010 Memorandum correctly clarifies that MS4 permits should include water quality based effluent limits when the permitting authority has determined that the discharges have a reasonable potential to cause or contribute to exceedances of water quality standards, or when the MS4 discharges are included in a TMDL wasteload allocation. The Clean Water Act requires the control of discharge of pollutants from MS4s to the maximum extent practicable, and specifies the use of "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."¹⁴ EPA's 2010 Memorandum clarifies that the latter clause allows for the development of effluent limits "as necessary for compliance with water quality standards."

II. EPA SHOULD PRESERVE 2010 MEMORANDUM GUIDANCE ON WAYS TO IMPROVE STORM WATER AND TMDL PROGRAMS.

Retain Guidance on BMP Performance Monitoring Where Numeric Effluent Limits Are Infeasible.

One of the most significant shortcomings in previous storm water permits is the lack of performance-based criteria for best management practices (BMPs). As a result, BMPs are used as part of requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. When numeric limits are not an option, the most effective way to ensure the success of storm water programs and the

⁹ California State Water Resources Control Board Order 2009-0009-DWQ, Construction General Permit, NPDES No. CAS000002, General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities. September 2, 2009.

¹⁰ California State Water Resources Control Board, Tentative Order No. 2011-XX-DWQ, NPDES No. CA S000003, National Pollutant Discharge Elimination System Statewide Storm Water Permit Waste Discharge Requirements for State of California Department of Transportation. January 7, 2011.

¹¹ 40 CFR 122.44(d)(1)(vii)(B).

¹² Los Angeles Regional Water Quality Control Board, Final Ventura County Municipal Separate Storm Sewer (MS4) Permit, Order No. R4-2010-0108. July 8, 2010.

¹³ Los Angeles Regional Water Quality Control Board, Los Angeles County Municipal Separate Storm Sewer (MS4) Permit, Order No. 01-182 as amended by R4-2009-0130. December 10, 2009.

¹⁴ Clean Water Act Section 402(p)(3)(B)(iii).

attainment of water quality standards is to require performance-based criteria. After two decades of utilizing a wide variety of structural BMPs, there is ample information available to provide a scientific approach to performance based criteria for BMPs. The 2010 Memorandum recommends that numeric limits should be used "where feasible," yet the regulatory language allowing for the use of BMPs to "control or abate the discharge of pollutants" lists as one of four reasons: when "numeric effluent limitations are infeasible."¹⁵ When numeric effluent limits are proven infeasible, we support the 2010 Memorandum's statements explaining that the level of BMP performance must be demonstrated, and that adequate monitoring must occur to determine if the BMPs are performing as necessary.¹⁶

Retain Guidance on Using Surrogates for Pollutant Parameters.

The 2010 Memorandum highlights the recommendation from the National Research Council (NRC) in their 2008 Report on Urban Storm Water Management in the United States that a better way to "regulate storm water contributions to waterbody impairment would be to use flow *or* a surrogate, like impervious cover, as a measure of storm water loading."¹⁷ It is important to preserve the 2010 Memorandum's reference to the need to reduce storm water flow not only as a cause of pollutant loading, but also to prevent harm to aquatic life caused by stream channel scouring, erosion and sedimentation. It is also important to preserve language in the 2010 Memorandum that clarifies that the use of any surrogates would require demonstration of the linkage between the surrogate parameter and the documented impairment (e.g., biological degradation) as well as adequate monitoring to ensure compliance. When use of any surrogate alone is not adequate to achieve water quality standards, additional pollution source control measures must also be included. The use of surrogates should not be considered as functional compliance with water quality-based requirements, although such approaches may help a permittee protect uses and meet criteria.

Retain Guidance on the Disaggregation of Storm Water Sources in TMDLs

The 2010 Memorandum notes the great challenges with establishing clear, effective and enforceable storm water permit limits when TMDL storm water wasteload allocations are aggregated. Due to those challenges, EPA recommends that storm water wasteload allocations be disaggregated to the extent feasible *and* as narrowly as available information allows. This approach should lead to allocations for individual permittees and wherever possible to individual outfalls. That transition should be encouraged as much as possible.

The 2010 Memorandum reflects the evolution of federal storm water programs, more available data, significant experience with storm water controls and numerous examples of numeric water quality based effluent limits in storm water permits. **The undersigned conservation and fishing organizations, watershed and creeks groups, civic associations, and businesses collectively represent more than 700,000 Americans who support strong federal leadership on storm water pollution. We urge EPA not to weaken or withdraw the 2010 Memorandum and to continue work on a strong federal storm water permit.**

¹⁵ 40 CFR 122.4(k).

¹⁶ *Supra* note 1.

¹⁷ *Id.*

Sincerely,



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