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8 BEFORE THE
9 STATE WATER RESOURCES CONTROL BOARD
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12 IN THE MATTER OF WASTE DISCHARGE
13 REQUIREMENTS FOR THE SAN
FRANCISCO BAY MUNICIPAL REGIONAL
14 STORMWATER PERMIT (MRP), NPDES
PERMIT CAS612008
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CITY OF SAN JOSE'S PETITION
FOR REVIEW OF REGIONAL
WATER QUALITY CONTROL
BOARD - SAN FRANCISCO BAY
REGION ORDER NUMBER R2-2009-
0074

18 **I. INTRODUCTION.**
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20 Pursuant to Section 13320(a) of the California Water Code ("Water Code") and
21 Section 2050 of Title 23 of the California Code of Regulation ("CCR"), the City of San José
22 ("San José")¹ hereby submits this Petition to the California State Water Resources Control
23 Board ("State Water Board"), requesting that the State Water Resources Control Board
24 ("State Board") review an action by the California Regional Water Quality Control Board,
25 San Francisco Bay Region ("Regional Board").
26

27 ¹ San José may be contacted through the person identified in the caption above.
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1 **II. THE SPECIFIC ACTION UPON WHICH STATE BOARD REVIEW IS**
2 **REQUESTED.**

3 San José seeks review of the Regional Water Board's October 14, 2009 Municipal
4 Regional Storm Water Permit Order No. R2-2009-0074, issuing NPDES Permit No.
5 CAS612008 (the "MRP")². San José is the largest city among the 76 cities, towns, counties
6 and other public entities subject to the MRP. Although the entire MRP fails to satisfy the
7 requirements of federal and state law governing the issuance of an NPDES permit, the
8 defective provisions that are our greatest concern to San José³ are: Provisions C.3.c (Low
9 Impact Development), C.3.f (Hydromodification Management)⁴, C.10 (Trash Load
10 Reduction) and C.15.b (Monitoring of Planned Potable Water Discharges).

11 San José is not seeking immediate review of this Petition and instead, request that it
12 be held in abeyance pending further notice by San José to the State Water Board in the
13 event that San José wishes to request that the review process be activated.

14 **III. SUMMARY OF GROUNDS FOR REVIEW.**

15 **A. Failure to Comply with Procedural Requirement for Adoption of an**
16 **NPDES Permit**

17 The MRP that was adopted by the Regional Board was issued on September 24,
18 2009 - less than three weeks before the meeting at which it was adopted.⁵ In addition, the

19 _____
20 ² A copy of Order R2-2009-0074 may be accessed via the internet at
21 http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0074.pdf. As
22 the Order and its attachments are 279 pages, a hardcopy is not being provided concurrently with this Petition
23 but will be provided to the State Water Board upon its further request should that be deemed necessary.

24 ³ San José reserves the right to supplement and expand upon this Petition if it is taken out of
25 abeyance and once the record had been assembled.

26 ⁴ As reflected in repeated comments to the Regional Board, San José's most acute concern with
27 Provision C.3.f is the December 1, 2009 implementation date for Santa Clara County. Providing a large
28 municipality, like San Jose, with only 45 day notice to implement a major new requirement is simply not
29 practicable. The provision becomes even more impracticable if it is interpreted to apply to public projects that
30 are already under design, where funding to cover additional costs is simply not available.

31 ⁵ The final actually-adopted version of the MRP, containing additional changes in text, was not made
32 available until the day before the hearing.

1 Fact Sheet (98 pages) was not released until October 7, 2009, and the Response to
2 Comments Received on the prior drafts of the MRP (totaling over 1,000 pages) were not
3 released until October 5, 2009 - just nine days before the final MRP was adopted. The Final
4 Tentative Order imposed numerous new substantive requirements that had not appeared in
5 the last version made available for public comment in February 2009. The changes were
6 significant. Specifically, Provision C.3., the "LID" or "low impact development" provision was
7 completely rewritten and Provision C.10 relating to Trash Load Reduction was replaced in
8 its entirety. Despite the substantial public interest in the MRP and the extensive last minute
9 revisions, the Regional Water Board did not allow anyone, even permittees such as San
10 José, to submit additional written comments analyzing or providing evidence concerning the
11 new requirements in the Final Tentative Order. San José and most other participants were
12 allotted only five minutes each at the Regional Water Board's October 14, 2009 hearing to
13 verbally explain their positions and lodge objections.

14 **B. Many Requirements in the Order Exceed Federal Requirements**
15 **and Were Adopted Without the Required Economic and**
16 **Environmental Analyses**

17 Although the Regional Water Board's Fact Sheet asserts that various MRP
18 Provisions are required by the "maximum extent practicable" ("MEP") standard set forth in
19 the federal Clean Water Act and its implementing regulations, this assertion is not
20 sufficiently supported by findings, nor does evidence in the record support those assertions.
21 In fact, some of the MRP requirements, including the provisions of specific concern to
22 San José as indicated above, *exceed* the federal MEP standard, thereby triggering legal
23 obligations for the Regional Water Board to have conducted additional analysis of technical
24 feasibility and economic and environmental impacts under section 13241 of the California
25 Water Code and the California Environmental Quality Act, none of which were adequately
26 performed before adoption of the MRP.

1 **C. Many Requirements in the Order Are Overly Prescriptive in**
2 **Violation of Water Code Section 13360**

3 Even a cursory review of the 126 page MRP (not including attachments),
4 demonstrates that it contains a level of detail concerning the manner and method of
5 compliance that violates Water Code Section 13360. This defect is particularly acute with
6 respect to the LID, structural trash capture and hydromodification management
7 requirements which are of specific concern to San José.

8 **D. The Order Contains Requirements that Extend Beyond the Permit**
9 **Term in Violation of Water Code Section 13378**

10 Finally, the MRP illegally contains provisions extending beyond the maximum five-
11 year term of an NPDES permit, as limited by Water Code section 13378. Of particular
12 concern to San José, are the mandated trash load reductions for 2017 and 2022, which are
13 clearly beyond the maximum five year term of the permit.

14 **IV. POINTS AND AUTHORITIES.**

15 **A. Federal and State Statutory Scheme**

16 The discharge of pollutants in storm water is governed by the Clean Water Act
17 Section 402(p), which governs permits issued pursuant to the National Pollution Discharge
18 Elimination System ("NPDES"). 33 U.S.C. § 1342(p). With respect to a municipality's
19 discharge of storm water from a municipal separate storm sewer system ("MS4"), Section
20 402(p)(3)(B) provides:

21 Permits for discharges from municipal storm sewers –

- 22 (i) may be issued on a system or jurisdiction-wide basis;
23 (ii) shall include a requirement to effectively prohibit non-
24 storm water discharges into the storm sewers; and
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1 (iii) shall require controls to reduce the discharge of pollutants
2 to the maximum extent practicable, including
3 management practices, control techniques and system,
4 design and engineering methods, and such other
provisions as the Administrator or the State determines
appropriate for the control of such pollutants.

5 33 U.S.C. § 1342(p)(3)(B).

6 California is among the states that are authorized to implement the NPDES permit
7 program. 33 U.S.C. § 1342(b). California's implementing provisions are found in the Porter-
8 Cologne Water Quality Control Act. See Water Code §§ 13160 and 13370 *et seq.*
9 Respondent State Water Board is designated as the state water pollution control agency for
10 all purposes stated in the Clean Water Act. Water Code § 13160.⁶ State and Regional
11 Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES
12 permits are issued for terms not to exceed five years. *Id.* § 13378 ("Such requirements or
13 permits shall be adopted for a fixed term not to exceed five years.").

14 Thus, when a Regional Water Board issues a NPDES permit, it is implementing both
15 federal and state law. Permits issued by a Regional Water Board must impose conditions
16 that are at least as stringent as those required under the federal Act. 33 U.S.C. § 1371;
17 Water Code § 13377. But, relying on its state law authority or discretion, a Regional Water
18 Board may also impose permit limits or conditions in excess of those required under the
19 federal statute as "necessary to implement water quality control plans, or for the protection
20 of beneficial uses, or to prevent nuisance." Water Code § 13377.

21 The Water Code requires the Regional Water Board, when issuing NPDES permits,
22 to implement "any relevant water quality control plans that have been adopted, and shall
23 take into consideration the beneficial uses to be protected, the water quality objectives
24 reasonably required for that purpose, other waste discharges, the need to prevent nuisance,
25 and the provisions of Section 13241." Water Code § 13263(a). Section 13241 requires the

26 ⁶ Water Code Sections 13160 and 13370 *et seq.* reference the Federal Water Pollution Control Act.
27 After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water
28 Act.

1 consideration of a number of factors, including technical feasibility and economic
2 considerations. *Id.* § 13241.

3 Courts have read these provisions together to mean that the Regional Water Board
4 cannot rely on the requirement for consideration of economic conditions under section
5 13241 as justification for imposing conditions that are *less stringent* than those required
6 under the federal Act. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th
7 613, 626-27 (2005). However, nothing in the federal or state statutory scheme prohibits
8 consideration of economic factors in fashioning permits that *meet* federal standards. *Id.* at
9 629 (J. Brown, concurring). And as implied by the remand order issued by the court in the
10 *City of Burbank*, sections 13236 and 13241 together *require* that economic factors must be
11 considered when imposing conditions that exceed federal requirements. *Id.* at 627 n.8 &
12 629 (remanding to the trial court “to decide whether any numeric limitations, as described in
13 the permits, are ‘more stringent’ than required under federal law and thus should have been
14 subject to ‘economic considerations’ by the Los Angeles Regional Board before inclusion in
15 the permits”).

16 Permit conditions that are imposed pursuant to state law reaching beyond the
17 mandatory requirements of the federal Clean Water Act would also trigger review of their
18 environmental impact under the California Environmental Quality Act, Pub. Res. Code §
19 21000 et seq. (“CEQA”).⁷

20 B. Procedural Requirements

21 1. Public participation.

22 NPDES permits may be issued only “after opportunity for public hearing.” 33 U.S.C.
23 § 1342(a)(1). Indeed, public participation is a fundamental - and non-discretionary -
24 component of issuing a NPDES permit:

25 ⁷ Issuance of NPDES permits as required to implement the Clean Water Act are exempt from CEQA’s
26 requirement of preparation of an environmental impact report for all projects that are expected to have a
27 significant environmental impact. Water Code § 13389. But municipal storm water permits that contain
28 provisions exceeding the “maximum extent practicable” standard set by the federal Clean Water Act fall
outside the exemption established by section 13389.

1 Public participation in the development, revision, and
2 enforcement of any regulation, standard, effluent limitation, plan,
3 or program established by the Administrator or any State under
4 this Act **shall be provided for**, encouraged, and assisted by the
Administrator and the States.

33 U.S.C. § 1251(e) (emphasis added).

5 Thus, among other things, federal regulations require a state permitting agency to
6 provide at least 30 days for public comment on a draft NPDES permit. 40 C.F.R. §
7 124.10(b)(1). This is particularly critical for a permit such as the MRP that has taken so long
8 in its development and applies to so many Permittees.

9 The federal regulations also require at least 30 days advance notice of a public
10 hearing on adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings
11 held by the Regional Water Board in consideration of an NPDES permit are governed by the
12 Regional Water Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of
13 the Administrative Procedure Act (commencing with § 11400 of the Government Code),
14 sections 801-805 of the Evidence Code, and section 11513 of the Government Code. See
15 Cal. Code Regs., tit. 23, § 648(b). Government Code § 11513 provides that each party
16 shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine
17 opposing witnesses on any matter relevant to the issues even though the matter was not
18 covered in direct examination, to impeach any witness, and to rebut the evidence against
19 the party. Government Code § 11513(b). The Regional Water Board's procedural
20 regulations also establish the right of a party in an adjudicative hearing before the Regional
21 Water Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, §
22 648.5(a).

23 The issuing agency is required to respond to comments received during the comment
24 period by: (1) specifying which, if any, provisions of the draft permit have been changed in
25 the final permit, and the reasons for the change; and (2) briefly describing and responding to
26 all significant comments on the draft permit raised during the public comment period or at
27 the any hearing on the permit. 40 C.F.R. § 124.17(a).

1 **2. Legally sufficient findings.**

2 Because issuing an NPDES permit is an adjudicative action, the Regional Water
3 Board is required to make "legally sufficient findings" in support of its conclusions. See, *In*
4 *re Petition of Pacific Water Conditioning Assn., Inc.*, State Water Board Order WQ 77-16, at
5 *7 (citing *City of R. P. Verdes v. City Council of R. Hills, etc.*, 59 Cal.App. 3d 869, 129 Cal.
6 Rptr. 173 (1976); *Merced County Board of Supervisors v. California Highway Com'n*, 57
7 Cal.App. 3d 952, 129 Cal.Rptr. 504, (1976); *Myers v. Board of Supervisors of City of Santa*
8 *Clara*, 58 Cal.App. 3d 413, 129 Cal.Rptr. 902, (1976).) Adequate findings assure that the
9 permit is the result of careful consideration of the record before the agency and facilitates
10 review. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506,
11 516-517 (1974).

12 In the context of a NPDES permit, particularly one that imposes conditions beyond
13 the requirements of federal law, such findings must, at a minimum, demonstrate that such
14 conditions are necessary to protect specific beneficial uses. *Southern Cal. Edison Co. v.*
15 *State Water Resources Control Bd.*, 116 Cal. App. 3d 751, 758-59 (1981) (rejecting
16 conditions in an NPDES permit based on the State Ocean Plan that were unsupported by
17 findings that such standards were "necessary to protect *specific beneficial uses* . . . The
18 absence of such evidence makes it impossible to determine whether stricter regulations
19 than those found in the Ocean Plans are in fact "necessary.")

20 **C. The Regional Water Board's Adoption of the Final MRP Was**
21 **Procedurally Defective.**

22 **1. The Regional Water Board provided insufficient notice of**
23 **the October 14, 2009 hearing on the Final Tentative Order.**

24 The MRP is the culmination of nearly five years of work by the Regional Water Board,
25 permittees, and stakeholders. The process has been iterative, and the Regional Water
26 Board has established a pattern of allowing time between iterations to facilitate public
27 participation. The first draft permit was published for notice and comment on December 14,
28 2007. This was followed by a public workshop held by the Regional Water Board in March
2008. Nearly a year later, on February 11, 2009, the Regional Water Board produced a

1 revised draft. On May 13, 2009, the Regional Water Board held a public hearing to discuss
2 revisions to the December 2007 draft. At each preliminary stage of the permitting process,
3 the Regional Water Board provided sufficient notice and solicited public comment on
4 revisions from the prior draft in keeping with the public participation requirements in the
5 federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

6 However, at the final stage, the Regional Water Board abruptly departed from its prior
7 efforts to provide for meaningful public participation. On September 24, 2009, the Regional
8 Water Board published a new "Final Tentative Order" reissuing the MRP to be proposed for
9 adoption by the full Regional Water Board at its regularly scheduled October 14, 2009
10 meeting. Not only did this truncated notice period deprive San José and other stakeholders
11 of a full and meaningful opportunity for comment and participation, it failed to provide the
12 30-day mandatory advance notice required under the federal regulations. 40 C.F.R. §
13 124.10(b)(2) ("Public notice of a public hearing *shall be given* at least 30 days before the
14 hearing.") (emphasis added).

15 **2. The Regional Water Board deprived San José of the**
16 **opportunity to comment on substantive new requirements**
17 **in the MRP.**

18 There is no dispute that the September 24 Final Tentative Order contained significant
19 substantive changes from the February 2009 draft that was the subject of the Regional
20 Water Board's May 2009 hearing, or that the changes will result in additional costs and
21 burdens on permittees. (See Appendix B to Final Tentative Order, showing changes from
22 February 2009 tentative order.)⁸ The new draft also replaced some more flexible provisions
23 of the draft tentative orders that provided continuity from past permit requirements with more
24 prescriptive and inflexible requirements. For example, for new development and
25 redevelopment projects, the Final Tentative Order included the following new LID-only
26 requirements:

27 ⁸ Provision C.3.c. regarding LID was nearly completely rewritten and Provision C.10 regarding Trash
28 Load Reduction was replaced in its entirety.

- 1 • A requirement that 100 percent of storm water from regulated projects be
2 treated onsite through a handful of prescribed methods, with alternatives
3 such as bioretention allowed only where the permittee can demonstrate
4 that the preferred methods are infeasible;
- 5 • A requirement that the municipal permittees produce a report determining
6 feasibility or infeasibility of LID measures within the next 18 months; and
- 7 • A requirement that the municipal permittees propose a LID treatment
8 reduction Special Project credit system within one year for projects that
9 have demonstrated environmental benefits to allow a portion of the storm
10 water runoff onsite to be treated by non-LID, or so-called "conventional,"
11 treatment measures.⁹

12 (Final Tentative Order, sections C.3.c(i)(2)(b); C.3.c(ii); C.3.e(ii).)

13 The Final Tentative Order also introduced, without more meaningful opportunity for
14 comment or analysis, prescriptive and burdensome new structural requirements for the
15 capture and containment of trash. Regional Water Board staff acknowledged that these
16 new provisions would be costly to permittees; it estimated that the associated capital cost
17 alone will be around \$28 million dollars over the permit term, and further admitted that it has
18 identified only \$5 million in available funds. (Appendix D to Final Tentative Order, at p. 6.).

19 Despite the extensive and substantive nature of the changes from the February 2009
20 Tentative Order, the Regional Water Board accepted no further written public comments or
21 evidence. Instead, participation by the permittees who would be subject to these
22 burdensome new requirements was limited to five-minute oral testimony at the Regional
23 Water Board's October 14, 2009 hearing on the MRP. (Transcript of October 14, 2009
24 Hearing (hereinafter "Tr."). The Regional Water Board's statement that these revisions were
25 the "outgrowth of comments" submitted by Permittees and other interested persons is not
26 accurate, is an oversimplification of the changes, and does not justify the refusal to allow
27 written comments on these revisions.

28 During the hearing, members of the Regional Water Board and the witnesses who
testified agreed that the new provisions were significantly different from the draft discussed

⁹ This could relate to Brownfield Sites, low-income housing, senior citizen housing, transit oriented development projects and other infill or redevelopment projects.

1 at the May 2009 hearing. (See, e.g., Tr. at p. 31 (comments of Mr. Moore: “particularly
2 between the pilot project work you just discussed, and the low impact development
3 requirements. Because I think they both progressed very – on a pretty significant pace
4 since May.”) A witness for a group favoring the new trash provisions testified that the
5 changes were not just significant but “historic.” (Tr. at p. 78 (comments of David Lewis:
6 “This is a big improvement from May. *And we call these historic changes . . .*”).)

7 Yet, despite the nature, scope, and burdens of these new and controversial
8 provisions and the failure of the Regional Water Board to allow written comments, each
9 interested entity was allowed only five minutes to speak, and was encouraged by the chair
10 to limit remarks to less than three minutes. (Tr. at p. 51) Permittees who wished to present
11 more than one witness were required to split their five-minute allotment among those
12 witnesses. (*Id.*) The only exception was granted to a witness appearing on behalf of one
13 group that favored the new provisions. This witness was allotted ten minutes. (*Id.* at p. 92.)
14 While the Regional Water Board staff was allowed to respond to all comments with no time
15 limit, and was questioned by the members of the Regional Water Board, no additional time
16 was allotted for Permittees to question staff directly or to submit additional evidence. (See,
17 e.g., Tr. at p. 82 (refusing to allow a witness to provide the Regional Water Board with a
18 copy of written comments).)

19 Witnesses who appeared on behalf of Permittees objected to the imposition of these
20 costly, burdensome and inflexible new provisions being added so late in the process and
21 without the opportunity to provide more detailed comments, and testified to the lack of
22 available public resources to fund them. (See, e.g., Tr. at p. 102 (comments of Melody
23 Tovar: “We do look at the new draft, though, and note some new changes in the permit,
24 and that the revised draft was not circulated for public review and comment, and we think it
25 should have been. For us, that means that my testimony here today does not benefit from
26 the direction and feedback from our City Council, and that is something we have
27 thoughtfully done for every draft of this permit.”); see also, Tr. at pp. 58, 83, 85, 111-113,
28 121-22, 129.)

1 Under similar circumstances, the State Water Board has expressed concern that
2 such proceedings were insufficient to assure that all participants were allowed adequate
3 opportunity to be heard:

4 But we are concerned that at the . . . hearing, interested persons
5 and permittees *were not given adequate time to review late*
6 *revisions or to comment on them.* Given the intense interest in
7 this issue, *the Regional Water Board should have diverged from*
8 *its strict rule limiting individual speakers to three minutes and*
9 *conducted a more formal process.* Such a process should
10 provide adequate time for comment, including continuances
11 where appropriate.

12 *In re The Cities of Bellflower et al.*, State Water Board Order WQ 2000-11, at *24 (Oct. 5,
13 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished
14 Regional Water Boards to employ the proceedings for hearings set forth in section 648 of
15 the Regional Board's regulations. *Id.* at *24 n.25 ("For future adjudicative proceedings that
16 are highly controversial or involve complex factual or legal issues, we encourage regional
17 water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit.
18 23, section 648 et seq.") Those regulations require the Regional Water Board to allow
19 interested parties the opportunity to cross-examine witnesses and present contrary
20 evidence. Cal. Code Regs, tit. 23, § 648.5(a). The Regional Water Board here ignored the
21 State Water Board's admonition. As a result, San José has thus far been denied the right to
22 full and fair participation in the permitting process as required under both federal and state
23 law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It should not be overlooked that these
24 requirements apply to 76 Permittees in the San Francisco Bay Region - that in itself
25 provides for very complex and controversial issues.

26 **3. The Regional Water Board Failed to Adequately Respond to**
27 **Comments on its Prior Draft Tentative Orders.**

28 Federal permitting regulations require that states issuing NPDES permits seek,
consider, and provide responses to public comments on draft permits. 40 C.F.R. §
124.17(a). The Regional Water Board failed to provide timely responses to comments
submitted on its draft tentative orders, and ignored or, at most, provided only sursory

1 responses to many comments suggesting pragmatic modifications that would, among other
2 things, help avoid wasting resources and/or mitigate the economic impacts of the MRP on
3 fiscally stressed municipalities.¹⁰ The Final Order indeed includes hundreds of pages of
4 charts containing purported responses to written comments received on earlier iterations of
5 the MRP. (See Appendices E and F of the Final Order.)¹¹ However, a closer examination of
6 it reveals that it is insufficient. Each comment is summarized in a few sentences, and the
7 responses are often limited to two or three words. (*Id.*) Few, if any, meaningful changes
8 were made in response to comments submitted. In other words, despite providing a
9 voluminous and nice-looking chart, the responses were substantively too little and too late
10 to be meaningful as is required by law.

11 To better illustrate these deficiencies, a few illustrative examples of substantive and
12 important issues that were not adequately addressed in the Regional Water Board's
13 responses to comments are discussed below.

14 Comments submitted by the Santa Clara Valley Urban Runoff Pollution Prevention
15 Program, for example, requested that the Regional Water Board's requirement for an initial
16 desktop feasibility analysis of the provisions set forth in sections C.11 and C.12 of the
17 February 2009 draft be used as a screening mechanism to determine whether and to what
18 extent the pilot diversions should be required. (Appendix F, at p. 438-39.) This suggestion
19 – which would have saved public resources by providing an equivalent amount of
20 information with less paperwork – was ignored: all five pilot diversion studies are mandated
21 in the Final Order, *regardless of the outcome of the initial feasibility analysis.* (*Id.*) In light of
22 the overwhelming evidence of financial distress suffered by municipal permittees in this

23 ¹⁰ Despite prior specific direction from Regional Water Board members to the staff to expedite getting
24 responses to previously submitted written comments issued following the May 2009 hearing on the February
25 2009 revised tentative order, the *only* responses to written comments submitted over the five-year course of
26 the MRP's development (totaling well over 1,000 pages) were issued less than 10 days prior to the Regional
Water Board's October 14, 2009 adoption hearing, further depriving San José and others of a meaningful
public participation opportunity.

27 ¹¹ The Final Order and all associated documents are available at
http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/stormwater/mrp.shtml.

1 economic environment, opportunities for added efficiencies are of critical importance to the
2 permittees, taxpayers, and the Regional Water Board as a public entity. The Regional
3 Water Board's failure to meaningfully respond to this suggestion is an example of its
4 procedural failures in considering and responding to public comments.¹²

5 In addition, with respect to new and redevelopment requirements, several Permittees
6 provided evidence that vault-based systems for on-site treatment of storm water are
7 effective in removing pollutants and that there are situations in which these types of controls
8 represent the maximum practicable level of treatment. (See, e.g., Comments of Santa Clara
9 Valley Urban Runoff Pollution Prevention Program ("SCVURPPP"), at pp. 4-5; Comments of
10 the Alameda Countywide Clean Water Program, and Comments of the City of Dublin, at p.
11 7.) The Regional Water Board staff responded by asserting – without providing an
12 evidentiary basis or citation to EPA regulations or permitting guidance (since none exists) –
13 that LID measures, rather than the vault-based systems, represent the "maximum extent
14 practicable" because they address a broader range of pollutants and provide other benefits.
15 (Response to Comments on February 2009 Draft.) This response is inadequate because it
16 assumes, rather than finds with adequate support, that LID measures are "practicable."
17 Indeed, as discussed in more detail below, the Regional Water Board has effectively
18 admitted that it has no factual basis for such a conclusion by requiring the Permittees to
19 study the very *feasibility* of LID measures imposed in the MRP.

20 A number of commenters also requested more time for implementation of new
21 requirements in the February 2009 draft MRP based on the impacts that the new provisions
22 for development and redevelopment projects in that version of the permit would have on
23 existing Hydromanagement ("HM") programs that are already being implemented by

24 ¹² Likewise, the Santa Clara Program submitted comments on Provision C.15 of the MRP noting that it
25 had previously developed and obtained approval of a comprehensive non-stormwater discharge management
26 program. It asked the Regional Water Board staff to explain why that program was no longer adequate or
27 could not simply be grandfathered, thereby saving significant public resources while continuing to protect
28 water quality; it also asked the staff to explain where the existing program had failed to protect water quality.
The response fails to provide any data or analysis, merely paying lip service to these important points while
attempting to put the ball back in the municipalities' court. *Id.* at 502-503

1 Permittees. In the response to comments, the Regional Water Board indicated that it had
2 accommodated this request by moving all immediate deadlines back. (Appendix E to Final
3 Tentative Order, at pp. 2-3.) However, because the Final Tentative Order fails to
4 acknowledge that the new MRP will have an immediate effect on changing the requirements
5 in some existing HM programs, no such revision was made to the deadlines for their
6 implementation. (Final Tentative Order C.3.g.ii(5); C.3.a.ii.) While the response therefore
7 facially responds to the comment in question, its identification of changes made in response
8 is inaccurate and misleading, and it is therefore inadequate and legally insufficient.

9 Each of these examples raises a significant point of importance to Permittees, and,
10 more important, only exemplifies the widespread and pervasive set of deficiencies in the
11 Regional Water Board's response to comments and compliance with mandatory public
12 participation requirements. The Regional Water Board staff's responses to many of the
13 comments submitted were either dismissive, non-existent, based on a mischaracterization
14 of evidence before the Regional Water Board, inaccurate and misleading, or non-responsive
15 to the issue presented. None satisfies the requirement for a reasonable response. 40
16 C.F.R. § 124.17.

17 **D. The Final MRP Is Substantively Defective.**

18 The Final MRP fails to satisfy the requirements of federal and state law governing the
19 issuance of an NPDES permit. Two of the new provisions included in the final MRP – the
20 LID and trash provisions – are highlighted in the discussion below.¹³ However, as indicated
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23

24 ¹³ Comments in the record submitted by and on behalf of Bay Area municipalities raise the issues to
25 which this section of the Petition is addressed with respect to many other requirements of the MRP, including,
26 but not limited to: Provisions C.3 (e.g., C.3.f, C.3.g, C.3.i), C.8 (e.g., C.8.d.iii, C.8.f), C.9e, C.11 (e.g., C.11.e,
27 C.11.f, C.11.h, C.11.i, C.11.j), C.12 (e.g., C.12.e, C.12.f, X.12.h, C.12.i), C.13 (e.g., C.13.e), C.14 and C.15.
28 Should this Petition be removed from abeyance, San José reserves the right to elaborate on these and the
illustrations above.

1 above, the same substantive defects exist with respect to the other provisions that are of
2 specific concern to San José.¹⁴

3 **1. The Regional Water Board's imposition of LID measures,**
4 **and new requirements for trash capture, are not supported**
5 **by legally sufficient findings and cannot be supported on**
6 **the record before it.**

7 The federal Clean Water Act requires storm water discharges to be controlled to the
8 "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). This term is not defined in the
9 federal statute or its implementing regulation, but has been interpreted by the U.S.
10 Environmental Protection Agency and courts to require imposition of best management
11 practices, or "BMPs." *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir.
12 1999).

13 Neither the Final Tentative Order, nor the Final Order as approved by the Regional
14 Water Board, contains any additional findings supporting its conclusion that the new LID
15 measures required under the Final MRP represent the "maximum extent practicable."
16 Indeed, the evidence before the Regional Water Board was to the contrary. As the
17 Regional Water Board staff admitted, the permittees uniformly testified that the new
18 requirements would be difficult and expensive to implement, and may well be out of reach.
19 (See e.g., Tr. at pp. 53-54, 58, 83, 121-122, 125.) As one Regional Water Board member

20
21 ¹⁴ For example, San José repeatedly expressed concern to the Regional Board with the
22 mischaracterization of Provision 3.c.f. as simply continuing an existing program for Santa Clara County, and
23 with the practicability of the December 1, 2009 implementation date for Provision C.3.f in Santa Clara County.
24 For Santa Clara County, Provision C.3.f not only expands the geographic areas that are subject to HMP
25 requirements, but it lowers the threshold project size substantially from 20/50 acres (depending on area) to 1
26 acre. Providing a large municipality, like San José, with only 45 day notice to implement such a major new
27 requirement is simply not practicable. The provision becomes even more impracticable if it is interpreted to
28 apply to public projects that are already under design, where funding to cover additional costs is simply not
available. Similarly, San José and many other commented throughout the Regional Board process about
excessive monitoring requirements. The requirement to sample planned potable water discharges is simply
one example of such a requirement, especially given the lack of any evidence in the record of any adverse
impact to water quality from this source.

1 summarized succinctly: "Well, the state of the economy, or the state of the cities is such
2 that, really, going backward, they cannot have it, they cannot afford it." (Tr. at p. 159.)

3 To find the basis for the Regional Water Board's implementation of these
4 requirements, one must instead "grobe through the record to determine whether some
5 combination of credible evidentiary items which supported some line of factual and legal
6 conclusions supported the ultimate order or decision of the agency," in contravention to the
7 requirement for clear and explicit findings. *Topanga Assn. for a Scenic Community v.*
8 *County of Los Angeles*, 11 Cal. 3d 506, 516-517 (1974).

9 A search for such findings would also, in this instance, prove fruitless. Instead of
10 evidence-based findings, the Regional Water Board staff simply asserts in a separate
11 document that "LID is rapidly being established as the maximum extent practicable (MEP)
12 standard for new and redevelopment stormwater treatment." (Staff Report, at p. 2.)¹⁵ In
13 fact, even this somewhat equivocal and unsupported statement is belied by the very
14 conditions of the final MRP, which 1) requires permittees to conduct studies of whether the
15 LID measures required under section C.3 of the MRP are feasible (Final MRP at
16 C.3.c.i(2)(b)(iv)-(v).), and 2) requires a proposal from Permittees to support LID treatment
17 reduction credits for Special Projects. (Final MRP at C.3.e.ii.(1)&(2)). The fact that the
18 Regional Water Board deems such studies necessary confirms that it is not in possession of
19 sufficient evidence to conclude that these measures are "practicable." Thus, inclusion of
20 these studies in the MRP is a tacit admission that the Regional Water Board *cannot* make
21 legally sufficient findings to support its conclusion that LID represents MEP. In corollary, to
22 make such findings would be an admission that the required studies were excessive and
23 unnecessary. Indeed, the Regional Water Board's insertion of these requirements into the
24 MRP before it has the supporting data is based on speculation, not evidence.

25
26 ¹⁵ Even if this rationale were sufficient and supported by evidence, a statement in the Staff
27 Report or other supporting document cannot substitute for findings in the permit. *In re City and*
28 *County of San Francisco et al.*, State Board Order WQ 95-4, at pp. *28-29 (Sept. 12, 1995).

1 of money it is going to take to [conduct] these studies, even
2 though they are spread over a period of time, you are still talking
3 anywhere from \$6 to \$43 million in capital costs throughout the
4 permit over that five years to address some of the issues
5 identified in those studies, possibly, and you are talking about
6 \$12, 15, 18 million of studies, of getting data. . . . I think, in
7 reality, I want to go on record that you may hear from us in
8 another year or two, saying, "You know what? There is not
9 enough money to do all the studies that you ask for in the time
10 frame that you put out in this permit."

11 (Tr. at 111-113.)

12 Against this same fiscal backdrop, the Regional Water Board staff itself also
13 estimated that the new trash capture requirements will carry a capital cost price tag of \$28
14 million, and admitted that they had identified only \$5 million dollars in public resources
15 available to fund implementation. (Staff Report, at p. 6.)

16 While the record is replete with such acknowledgements by the Regional Water
17 Board that the new requirements (LID, trash capture, monitoring, and others) are costly and
18 burdensome, it does not contain any actual analysis by staff of costs against the
19 environmental benefit to be gained by their imposition.¹⁶ For this reason, and on this record,
20 the requirements are unsustainable under State law.

21 Moreover, the Regional Water Board has not made any specific findings supporting
22 the conclusion that these new requirements are necessary to maintain any specific
23 beneficial use tied to local receiving waters. Instead, for LID, for example, the Regional
24 Water Board simply points in a staff report to storm water permits adopted in *other regions*
25 that have implemented "extensive requirements for LID measures." (Staff Report, at p. 6.) It
26 also failed to consider how the more extensive, new and redevelopment controls and
27 hydromodification requirements implemented in the permittees' jurisdictions as a result of
28 their prior permit compliance may already be adequate to achieve protection of beneficial
uses (as their prior permits' findings determined they would). This approach is simply not
sufficient to justify permit conditions in excess of those required under federal law. *Southern*

¹⁶ Municipalities submitted many such analyses; but these were dismissed or ignored.

1 *Cal. Edison Co. v. State Water Resources Control Bd.*, 116 Cal. App. 3d 751, 758-59
2 (1981).

3 **3. The Regional Water Board has not analyzed the broader**
4 **environmental impacts of the new requirements.**

5 More than one witness testified at the October 14, 2009 hearing that the imposition of
6 rigid new LID requirements could actually have an *adverse* environmental impact by
7 discouraging environmentally responsible infill projects. (See, e.g., Tr. at 121-23: "We have
8 strong concerns that fully implementing this requirement on certain types of projects will be
9 very difficult. In fact, complying with the LID requirement as it is written may not be possible
10 for some projects and may deter responsible redevelopment.") Witness testimony also
11 supported revisions to the Final Tentative Order suggested by Regional Water Board
12 members to allow greater flexibility in choosing from among environmentally sound
13 treatment methods by eliminating language in the permit that discourages the use of
14 bioretention. (See, e.g., Tr. at pp. 105, 120, 124, 130.) These revisions were not included.

15 Because these provisions relating to LID and trash removal exceed MEP, they are
16 not exempt from the requirements of CEQA pursuant to section 13389 of the Water Code.
17 Thus, these and other potential environmental impacts of these provisions must be
18 analyzed before they may be applied solely pursuant to the authority provided under state
19 law.

20 **4. The new LID provisions violate the prohibition on specifying**
21 **the means of compliance.**

22 Throughout the MRP development process, a number of commenters and witnesses
23 objected to the prescriptiveness of this permit. For example, the replacement in the final
24 MRP of more flexible approaches to responsible development that have previously been
25 endorsed by the State Water Board with more rigid, proscriptive LID requirements that
26 severely limit options available to permittees in planning new development and
27 redevelopment projects was the subject of specific testimony at the October 14 adoption
28 hearing. (See, e.g., Tr. at pp. 60-61.) At least one Regional Water Board member admitted

1 at that hearing that he felt the Regional Water Board was "treading in dangerous territory
2 here, from my perspective, in specifying the method and means of compliance." (Tr. at p.
3 171.) The member was correct. The Water Code expressly prohibits permit terms that
4 specify the means of compliance. Water Code § 13360 ("No waste discharge requirement
5 or other order of a regional board or the state board or decree of a court issued under this
6 division shall specify the design, location, type of construction, or particular manner in which
7 compliance may be had with that requirement, order, or decree, and the person so ordered
8 shall be permitted to comply with the order in any lawful manner.").¹⁷

9 **5. The MRP contains provisions extending beyond the permit**
10 **term.**

11 Finally, the Final MRP identifies several items extending its reach well beyond the
12 MRP's five-year term. For example:

13 The Permittees shall demonstrate compliance with Discharge
14 Prohibition A.2 and trash-related Receiving Water Limitations
15 through the timely implementation of control measures and other
16 actions to reduce trash loads from municipal separate storm
sewer systems (MS4s) by 40% **by 2014**, 70% **by 2017**, and
100% **by 2022** as further specified below.

17 (Final MRP, at section C.10 (emphasis added).) The MRP is effective December 1, 2009.
18 By law, an NPDES permit term cannot exceed five years. Water Code § 13378. For this
19 reason, only the 2014 date referenced above is legally valid and those extending beyond it
20 should be stricken from the final MRP. When the MRP or another successor NPDES permit
21 is reissued, the Regional Water Board can reassess the necessity, feasibility, and cost of
22 additional reduction goals and impose any incremental increase as supported by the
23 evidence before it at that time.

24
25 ¹⁷ The LID requirements are again illustrative. First, they require all covered development projects to
26 treat 100% of storm water on site. (Final MRP, section C.3.c.i(2)(b).) This requirement clearly specifies the
27 "location" of treatment in contravention of section 13360. In addition, by eliminating the use of underground
vaults or bioremediation except where none of the prescribed treatment methods are feasible, the MRP is
specifying the design and type of construction, as well as the manner of compliance. (*Id.*)

1 **V. SERVICE OF COPIES PETITION ON REGIONAL BOARD.**

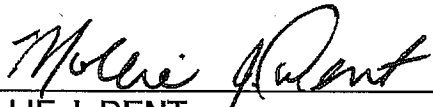
2 Copies of this Petition have been served on the Regional Water Board and on all
3 other Permittees other than the City of San José.

4 **VI. CONCLUSION.**

5 For all of the reasons set forth above, and others which may be raised in other
6 petitions or by a further review of the record once it is assembled and if this Petition is taken
7 out of abeyance, the Final MRP is both procedurally and legally defective.

8 Dated: November 13, 2009

RICHARD DOYLE
City Attorney

9
10 By: 
11 MOLLIE J. DENT
12 Sr. Deputy City Attorney
13 On behalf of the City of San José
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1 **PROOF OF SERVICE**

2 CASE NAME: **CITY OF SAN JOSE'S PETITION FOR REVIEW OF REGIONAL**
3 **WATER QUALITY CONTROL BOARD – SAN FRANCISCO BAY**
4 **REGION**

4 ORDER NO.: R2-2009-0074

5 I, the undersigned declare as follows:

6 I am a citizen of the United States, over 18 years of age, employed in Santa Clara
7 County, and not a party to the within action. My business address is 200 East Santa Clara
8 Street, San Jose, California 95113-1905, and is located in the county where the service
9 described below occurred.

9 On November 13, 2009, I caused to be served the within:

10 **CITY OF SAN JOSE'S PETITION FOR REVIEW OF REGIONAL WATER**
11 **QUALITY CONTROL BOARD – SAN FRANCISCO BAY REGION ORDER**
12 **NUMBER R2-2009-0074,**

12 by E-MAIL, with a copy of this declaration, by electronically transmitting the moving
13 papers to the e-mail addresses indicated below:

14
15 jbashaw@waterboards.ca.gov.1

16 mrp@waterboards.ca.gov

17 ddickie@waterboards.ca.gov

18 amasjedi@ci.pleasanton.ca.us

19 Alex.Ameri@ci.hayward.ca.us

20 dakagi@ci.berkeley.ca.us

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13 vbessey@cityofsanmateo.org
14 vvoong@burlingame.org
15 lbarnett@vsfcd.com
16 gleach@ci.vallejo.ca.us

17
18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct. Executed on November 13, 2009, at San Jose, California.

20 
21 _____
22 Susan Uemura
23
24
25
26
27
28