LEGAL COMMENTS ON L.A. REGIONAL BOARD'S PROPOSED AMENDMENT TO BASIN PLAN FOR THE LOS ANGELES REGION TO INCORPORATE TOTAL MAXIMUM DAILY LOADS FOR BACTERIA IN THE LOS ANGELES RIVER

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Submitted on behalf of the
Cities of Arcadia, Bellflower, Carson, Cerritos, Claremont, Commerce, Downey, Duarte, Glendora, Hawaiian Gardens, Irwindale, Lawndale, Lynwood, Monterey Park, Paramount, Santa Fe Springs, Signal Hill, Vernon, and Whittier

June, 2010

227/065121-0081
1091055.07 a06/04/10

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I. INTRODUCTION

These comments are being submitted on behalf of the Cities of Arcadia, Bellflower, Carson, Cerritos, Claremont, Commerce, Downey, Duarte, Glendora, Hawaiian Gardens, Irwindale, Lawndale, Lynwood, Monterey Park, Paramount, Santa Fe Springs, Signal Hill, Vernon, and Whittier (hereafter, collectively "Cities"), in response to the California Regional Water Quality Control Board, Los Angeles Region's ("Regional Board") proposed amendments to the Water Quality Control Plan for the Los Angeles Region ("Basin Plan") to incorporate total maximum daily loads ("TMDLs") for bacteria for the Los Angeles River, as described in the Regional Board's Notice of Hearing dated April 20, 2010, Tentative Resolution and Basin Plan Amendment, the April 20, 2010 Los Angeles River Watershed Bacteria TMDL Report ("TMDL Report"), and the Substitute Environmental Documents ("SED").

For the reasons set forth herein and in those comments submitted under separate cover on behalf of the Cities addressing the Regional Board's failure to comply with the California Environmental Quality Act ("CEQA") – Public Resources Code ("PRC') § 21000, *et seq.*, the Cities respectfully request that the Regional Board not adopt the proposed Bacteria TMDL until such time as: the "designated uses" in the Basin Plan (upon which the TMDL is based) are first reviewed and revised consistent with the federal regulations, *i.e.*, "those uses actually attained in the water body" – 40 CFR § 131.1(e); the Water Quality Standards in the Basin Plan ("Standards") have been reviewed and revised as required by the Orange County Superior Court Decision, Judgment and Writ of Mandate (collectively included herewith as Exhibit "1") in the case of *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.*, OCSC Case No. 06CC02974, Fourth Appellate District, Division 3, Case No. G041545 (hereinafter the "*Arcadia*" Case) (including deleting the improperly designated "potential" use designations for the LA

River in the Basin Plan); the numerous deficiencies with the TMDL and the accompanying CEQA documents have been corrected; the necessary scientific data has been developed so that the TMDL is "suitable for calculation" and can be expressed in the form of "daily loads;" and the requirements of the California Administrative Procedure Act and the California Constitutional prohibition against imposing unfunded State mandates have all been met.

II. SUMMARY OF COMMENTS

The Los Angeles River is described in the TMDL Report as being "unlike any other river," and that because it has been "so greatly altered it is now sometimes maligned as a mere 'concrete ditch.'" (TMDL Report, p. 1.) The TMDL Report also recognizes that because the main stem of the 55 miles of the LA River is "mostly concrete – and much of the principal tributaries are concrete – many see the Los Angeles River only as a flood control channel." (*Id.*) Yet, the TMDL Report pays mere lip service to this important use of the LA River as a flood control channel, providing that while this flood control use "is important," "so much more can be, and is, expected from the Los Angeles River." (*Id.*)

According to the TMDL Report, "**the River's potential**, as identified in the Los Angeles River Master Plan, as required by the Clean Water Act and Porter Cologne Water Quality Control Act, and as detailed in this and other TMDLs is such that **all parties are compelled to take aggressive action to protect and restore this river**." (TMDL Report, p. 1.) Yet, this most basic premise of the TMDL is fundamentally flawed, and it is this flaw that is the linchpin of many of the legal and technical deficiencies that exist with the TMDL.

In fact, over the course of the past 70+ years, significant time and substantial resources have been invested in developing the LA River, not into a swimmable soft-bottom river, but to the contrary, into a concrete-lined flood control channel for the protection of the hundreds of thousands of people residing nearby. According to the TMDL Report, **"[d]ue to major flood**

events at the beginning of the century, most of the Los Angeles River Watershed was lined with concrete between the 1940s to 1950s." This statement is an acknowledgement that the very purpose of developing the River with concrete was specifically because of prior "major flood events." In fact, so much of the River had been "lined with concrete" over the years that today, "only three sections of [the] main channel remain soft-bottom, these sections include the Sepulveda Basin, Glendale Narrows, and the lower reaches of the main channel from Willow Street to the estuary, though this portion still retain[s] concrete-lined sides." (TMDL Report, p. 5.)

There also can be no dispute that, over the years, billions of (today's) dollars, all public funds, have been expended to improve the River into a concrete-lined channel for the specific purpose of eliminating the risk of flooding from the River, primarily by re-designing the channel so that rain would quickly drain into the River and away from the surrounding communities (rather than being diverted away from the channel, as proposed by the Bacteria TMDL). As recently as 2002, the U.S. Army Corps. of Engineers completed a 15-year project, costing in excess of $216 million, and designed to raise the height of 21 miles of levees along the River, by building up the earthen levee embankments, constructing parapet walls on top of the levees, armoring the backside of some of the levees and modifying various bridges. (*See* Exhibit "2" consisting collectively of a U.S. Army Corp. of Engineers summary of this Project, a January 2002 letter from the Federal Emergency Management Agency ("FEMA") to the County of Los Angeles describing the importance of this Project, and a February 6, 2002 Press Release from LA County Supervisor Don Knobe announcing the completion of the Los Angeles County Drainage Area ("LACDA") project five years ahead of schedule.) The purpose of these $216 million of improvements was to eliminate the flood insurance mandates imposed by FEMA for

property owners with federally backed loans living within the overflow area of the River. (Exhibit "2," U.S. Army Corp. Summary).

Enclosed herewith is a copy of the *Los Angeles County Drainage Area Review Final Feasibility Study Interim Report and Environmental Impact Statement* dated December, 1991 (Rev. 1/92) (Exhibit "3"), which Report describes the above-referenced project in detail, along with its environmental impacts. Also enclosed is a Report entitled *Flood Plain Issues in Southeast Los Angeles County* prepared for the LACDA Alliance (Exhibit "4"), summarizing the project and its benefits, including, among other benefits, the following:

> 1. The original design of the County's storm drainage system was based on old, incomplete information.
>
> 2. Experts now understand that significant portions of Los Angeles County's population face serious threats of devastating economic and social losses in the event of a major storm and resulting flooding. Damage from a flood in the 500-year flood plain is estimated at $5.3 billion and in the 100-year plain at $2.3 billion.
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> 3. Because much of the population in affected areas are of low-to-moderate incomes, they would be most adversely impacted not only in the event of a flood, but by the ***de facto*** building and rehabilitation moratorium that exists in the absence of the Project, due to the requirements of the National Flood Insurance Program.
>
> . . .
>
> 6. In the absence of the Project, insurance costs in affected areas will be higher; costs of development and construction will be higher due to more restrictive building regulations; economic growth in the affected area will be stifled; industries and jobs will migrate to other parts of the State or to other States.
>
> 7. Failing to complete the Project will result in environmental harm as major flooding will mobilize trash, debris, and hazardous wastes which could find their way into Santa Monica Bay and Groundwater Resources.

(Exhibit "4," FACT SHEET – General Overview, Background, Benefits, p. 1-2.)

Now at this time, approximately 70 years after these massive public works projects to improve the River into a very large flood control channel for the health and safety of the public first commenced, but only eight years after the River was most recently expanded, the Regional Board appears intent on "**compelling**" all parties to "**take aggressive action to . . . restore this river.**" The fact remains, however, that the LA River was designed and constructed as a concrete "flood control" channel and not as a river for use for swimming, boating or other water contact recreational activities in the channel. As admitted in the TMDL Report itself, none of these recreational activities in the concrete-lined sections of the River (which would include all of Reaches 1 and 2) are even lawful, since "**access is prohibited to much of the Los Angeles River and the concrete channelized areas of Tujunga, Verdugo, Burbank Western Channel, Arroyo Seco, and Rio Hondo.**" (TMDL Report, pp. 1 & 15.) The reality is that one would need to "trespass," *i.e.,* engage in illegal activity in order to recreate in the concrete-lined portions of the LA River for recreational purposes.

In short, the proposed Bacteria TMDL, purportedly designed to "restore" the River to protect swimmers from exposure to bacteria, is directly at odds with the very purpose of its 70 years of development into a flood control channel. The indisputable reason "**access is prohibited to much of the Los Angeles River**" is because it is physically unsafe to swim or otherwise recreate in most all areas of the River, including all of Reaches 1 and 2. Evidence of this is shown by the many rescues that occur in the River each year during the rainy season, and by the Regional Board's own High Flow Suspension policy.

To make matters worse, many of the REC-1 and REC-2 designated uses of the River are admittedly designated as mere "potential" or "intermittent" beneficial uses, thereby further

confirming that large portions of the River are not presently appropriate for such REC-1 and REC-2 uses.[1] Further, the designated "existing" beneficial uses of the River are highly questionable, as none of these so-called "existing" uses for any of the concrete-lined portions of the River were, in fact, "actually attained in the water body on or after November 28, 1975" (*see* 40 C.F.R. § 131.3(e)), given that, by November 28, 1975, most of the Los Angeles River had already been concrete-lined. (TMDL Report, p. 5 ["[M]ost of the Los Angeles River Watershed was lined with concrete between the 1940s to 1950s."].) The two reaches of the LA River that are of most concern to the Cities herein, Reaches 1 and 2, are concrete-lined in their entirety.

Moreover, the desire on the part of the Regional Board at this time to "compel" "all parties [] to take aggressive action . . . to restore" the Los Angeles River into something other than a concrete-lined flood control channel, is even more astonishing when one considers the fact that the Regional Board's desired "restoration" is being sought through a "TMDL" that is based on a set of Standards that were never developed to "cover" stormwater/urban runoff (hereafter "Stormwater"[2]) in the first instance.

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[1] Four Reaches, *i.e.*, the Tujunga Wash, Burbank Western Channel and Rio Hondo Reaches 1 and 2, have "potential use" designations, and a majority of the Reaches in the Los Angeles River Watershed have "intermittent" use designation.

[2] The term "Stormwater," as defined by the Superior Court in the *Arcadia* Case, includes all "urban runoff," *i.e.*, wet weather and dry weather runoff: "Federal law defines 'Stormwater' to include urban runoff, *i.e.*, 'surface runoff and drainage.'" (Exhibit "1," Judgment, p. 3, fn. 2, citing 40 C.F.R. 122.26(b)(13).) The State and Regional Boards similarly claimed, in their Opening Brief on the Appeal of the *Arcadia* Case, that "storm water emanates from diffused sources, including surface run-off following rain events (hence, 'storm water') and urban run-off." (Boards Opening Appellate Brief, p. 9, n. 5.) The Intervenors in the *Arcadia* Case made a similar admission at p.6, n.3 of their Opening Appellate Brief: "For ease of reference, throughout this brief, the terms 'urban runoff' and 'Stormwater' are used interchangeable to refer generally to the discharges from the municipal Dischargers' storm-sewer systems." (Copies of the cited excerpts from the Water Boards' and the Intervenors' Appellate Briefs are included herewith as Exhibit "5."

In sum, the proposed Bacteria TMDL in issue cannot be lawfully adopted until such time as the Regional and State Boards have:

(1) evaluated the propriety of the "existing," "potential" and "intermittent" beneficial use designations in the Basin Plan, in light of "those uses actually attained" in the LA River "on or after November 28, 1975" (40 CFR § 131.3(e));

(2) complied with the Decision, Judgment and Writ of Mandate in the *Arcadia* Case (collectively included herewith as Exhibit "1") by deleting the improperly designated "potential" beneficial uses and otherwise complying with the express factors and considerations set forth under California Water Code ("CWC") sections 13000 and 13241 before applying the Standards in the Basin Plan to Stormwater dischargers;

(3) considered the factors and considerations set forth in CWC sections 13000 and 13241 in connection with the development of this particular Bacteria TMDL for the Los Angeles River, including, among other factors, the "environmental characteristics" of the water body, the impacts of the TMDL on "housing within the region," and whether the TMDL is "reasonably" and "economically" achievable;

(4) developed a TMDL to protect probable future uses of the River, not to protect "potential" uses of the LA River that are not "probable future" uses;

(5) developed the required "load allocations" and an implementation plan for all non-point sources of bacteria to the River, including all natural sources;

(6) developed sufficient scientific data and conducted the necessary studies so that proper technical conditions exist to develop sound "daily" load allocations, *i.e.*, so that the TMDL is "suitable for calculation";

(7) developed the TMDL only after full consultation with affected local agencies, as required by law;

(8) imposed only monitoring and reporting requirements after conducting a cost/benefit analysis in accordance with CWC sections 13165, 13225(c), and 13267;

(9) developed the Bacteria TMDL in compliance with all applicable requirements of the California Administrative Procedures Act ("APA" – Gov. Code § 11340 et seq.);

(10) provided appropriate funding as required by the California Constitution, before enforcing the TMDL against any local governmental agency; and

(11) complied with all aspects of CEQA, including having considered feasible project alternatives, such as evaluating the propriety of all of the "use designations" for the River and thereafter determining the need for a Bacteria TMDL for the River, if any, and/or first reviewing and revising the Standards in the Basin Plan, consistent with the Decision, Judgment and Writ in the *Arcadia* Case.

III. THE BASIN PLAN MUST BE REVIEWED AND REVISED BEFORE THE BACTERIA TMDL CAN LAWFULLY BE ADOPTED

A. It Would Be Arbitrary And Capricious To Adopt The Bacteria TMDL Without First Reviewing And Revising The Designated Beneficial Uses For The River To Be Consistent With The "Actual Uses Attained In The Waterbody," And To Adjust The Water Quality Objectives Accordingly

The proposed Bacteria TMDL sets forth numeric targets that, according to the TMDL, "shall be strictly applied." (TMDL Report, p. 16.) The TMDL is designed to "compel" the Cities "to take aggressive action . . . to restore" a 55-mile long "mostly concrete" flood control channel (*id.* at 1), where, for much of it, "access is prohibited." (*Id.* at 15.) The Regional Board's estimated cost for this admittedly "aggressive action to restore" the River to allow for "Water Contact Recreation (REC-1)" uses, is "***$5.4 billion***" (TMDL Report, p. 76). Yet, no attempt has been made, before developing this TMDL, to evaluate the "reasonableness" of the

Standards in light of the "uses actually attained" in the LA River on and after November 28, 1975. Specifically, no consideration has been given to revising the designated "uses" in the Basin Plan to be consistent with the federal regulations which only require the designation of "existing uses" defined as "those uses actually attained in the waterbody on or after November 28, 1975" (*see* 40 CFR § 131.1(e)), or to similarly adjust the "water quality objectives" for such actually attained uses, in accordance with California Water Code sections 13241 and 13000. (*See, e.g.*, CWC § 13241 [allowing changes to objectives, such as the bacteria objectives in the Basin Plan, so long as such changes do not "unreasonably" affect [] beneficial uses"].)

It is arbitrary and irresponsible for the Regional Board to refuse to even consider conducting an evaluation of the propriety of the designated "uses" of the water body, along with the corresponding water quality objectives, particularly considering the staggering ***$5.4 billion price tag*** for this TMDL; the fact that it is unlikely that this $5.4 billion will even result in achieving the numeric objectives for bacteria in the River; and the fact that even if these bacterial objectives could be achieved, people will not be swimming or otherwise recreating in the concrete-lined portions of the channel because it is illegal and unsafe to do so. As recently recognized by the Santa Ana Regional Water Quality Control Board, in a memo urging the State Board not to use bacteria objectives designed to protect beaches as the sole basis for a Clean Water Act ("CWA") 303(d) listing, treating all surface waters as though they are designated beaches, regardless of the extent to which they are actually used for recreation **"reduces [the Boards'] credibility and ... causes needless expenditure of time, effort and money that is already in very short supply."** (Exhibit "6," p. 3.)

This necessary evaluation of the designated uses would entail a re-evaluation of all of the designated beneficial uses of the LA River (or, at a minimum, for Reaches 1 and 2, which are

entirely concrete-lined), along with modifications and/or deletions of the existing bacteria objectives to the extent such modifications/deletions do not "unreasonably affect" the beneficial uses that are ultimately designated for the River. (CWC § 132411 [allowing for changes to water quality objectives, so long as they do not "unreasonably" affect the designated uses] and CWC § 13000 ["The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the State shall be regulated to attain the highest water quality **which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible**."].)

The alleged legal justification for the development of this Bacteria TMDL is the federal Clean Water Act (33 U.S.C. § 1251, et seq. – "CWA" or "Act") along with the California Porter-Cologne Water Quality Control Act (CWC § 13000, et seq.). (*See* TMDL Report, p. 1.) According to the Regional Board, these laws require the development of the Bacteria TMDL in order to address "impairments of water quality standards for bacteria in the Los Angeles River watershed." (*Id.* at 1.) Yet, no mention is made in any of the Bacteria TMDL documents of the patently obvious problem with designating "uses" in the River for human recreation, when access is prohibited and when such uses are in fact dangerous and unlawful; nor is there any mention of the need to consider modifying the Standards in the Basin Plan to conform to the "uses actually attained in the water body on and after November 28, 1975." (*See* 40 C.F.R. § 131.3(e) ["*Existing uses* are those uses **actually attained** in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."].)

Moreover, once the presently designated "existing" uses have been properly re-designated to be consistent with the federal definition of "existing uses," for all other designated

uses under the federal regulations "States may remove a designated use which is not an existing use ... if the State can demonstrate" the following factors, among others:

> (2) **Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use ...**; or
>
> (3) **Human caused conditions or sources of pollution prevent the attainment of the use** and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
>
> (4) **Dams, diversions or other types of hydrologic modifications preclude the attainment of the use** ...; or
>
> (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in **substantial and widespread economic and social impact**.

(40 C.F.R. § 131.10(g).) Thus, federal law specifically recognizes that the very physical modifications that have been made to the LA River over the past 70 years are important considerations in designating/de-designating "uses" of the River. (It is understood that this particular regulation only applies to the re-designation of "uses," other than "existing" uses; yet as discussed above, the presently designated "existing uses" were not properly designated in the first instance pursuant to 40 CFR section 131.1(e).)

The evidence in the record for this TMDL shows that the LA River was "mostly concrete" lined in the 1940s and 1950s, "due to major flood events at the beginning" of the 1900s (TMDL Report, p. 5), and that "access is prohibited to much of the Los Angeles River" (*Id.* at 15). The record further shows that significant public resources have been expended since the 1930s to improve the LA River into a concrete-lined flood control channel (*see, e.g.*, Exhibit "2," and TMDL Report, p. 5), and that it would cost $5.4 billion or more to attempt to achieve

the bacteria limits in the TMDL to allow for swimming and other water contact recreation in the River (which is presently illegal in most portions of the River), without there being any real means of even complying with the wet weather component of the TMDL.

To blindly proceed down the path of developing the TMDL without first evaluating the propriety of the designated "uses," given the enormous investment of public resources required to even attempt to achieve the TMDL, and the substantial investment already made in developing the River into a concrete-lined flood control channel, without there being any legitimate likelihood that the concrete-lined portions of the River could ever safely be used for human contact water recreation activities, would be a clear abuse of discretion.

B. The Proposed Bacteria TMDL Should Not Be Adopted Until Such Time As The Review And Revision Process Of The Standards, As Required By The Superior Court In The *Arcadia* Case, Has Been Completed

There is no mention in any of the Bacteria TMDL documents of the existence of the Decision, Judgment and Writ of Mandate in the *Arcadia* Case; nor is there any mention of the importance of the Regional and State Boards conducting an analysis of the factors and considerations set forth under CWC sections 13000/13241 regarding Stormwater. The analysis required by the *Arcadia* Case of the Los Angeles River must be considered before adopting the subject TMDL. Moreover, the Board should correct the improperly designated "potential" use designations therein prior to considering the TMDL.

As recognized by the California Court of Appeal in *City of Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404, ***"[a] TMDL must be 'established' at a level necessary to implement the applicable water quality standards.***" Further, in a Report prepared by the National Research Council of the National Academies of Science entitled "*Assessing the TMDL Approach to Water Quality Management*," dated September, 2001 (Exhibit "7," hereto), the

NRC commented on the importance of developing proper Water Quality Standards right, and how flawed Standards could lead to flawed TMDLs, where it stated as follows:

> **Water quality standards are the benchmark for establishing whether a waterbody is impaired; if the standards are flawed (as many are), all subsequent steps in the TMDL process will be affected.** Although there is a need to make designated use and criteria decisions on a waterbody and watershed-specific basis, most states have adopted highly general use designations commensurate with the federal statutory definitions. **However, an appropriate water quality standard must be defined before a TMDL is developed.** (Exhibit "7," p. 90.)

In the *Arcadia* Case, the Orange County Superior Court ruled that the State and Regional Boards are legally required to undertake a CWC section 13000/13241 review of all Standards applicable to Stormwater, and to make appropriate revisions to these Standards based thereon, including revising the Standards so that they no longer include improper "potential" use designations. In the Superior Court's Notice of Ruling/Decision dated March 13, 2008 (hereafter "Decision," included within Exhibit "1" hereto), the Superior Court, the Honorable Thierry P. Colaw presiding, held, among other things, as follows:

> The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objective. . . . They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975." [Citation.] This was confirmed by the State Board in a 1991 Order when it stated: **"The Basin Plan specified requirements and controls for 'traditional' point sources, but storm water discharges were not covered. . . .** The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. **Clearly, the effluent limitations listed**

> **for other point sources are not meant to apply."** [Citation.] There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water. (*See* Decision p. 5-6; bolding in original.)

Similarly, the Superior Court found that the Water Boards' development of Standards based on mere "potential" beneficial uses was inappropriate, holding as follows:

> Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probable future beneficial uses of water." Water C. § 13241(a).
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> * * *
>
> **The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirements in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.)** The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. Of California* (2003) 31 Cal.App.4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. **Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.** (Decision, p. 5, bolding added.)

The Court also commented on the failures of the Regional Board to comply with law when conducting the 2004 Triennial Review of the Basin Plan, and concluded that this Regional Board had "rejected out of hand" the numerous comments submitted by a number of the Petitioning Cities, further finding that the Regional Board's actions in rejecting comments on the 2004 Triennial Review amounted to "an abuse of discretion." (Decision, pp. 6-7.) The Superior Court went on to conclude that: "The Board should not have brushed off the Petitioners' comments and urgings to perform the 13241/13000 analysis at the 2004 TR. . . . Here they

abused their discretion, did not proceed as the law required, and the writ should therefore issue." (Decision, p. 7.)

After issuing its Decision in November of 2008, the Superior Court issued a Writ of Mandate and Judgment setting aside the Regional Board's resolution on the 2004 Triennial Review (Resolution No. 2004-003), and directing that the Water Boards, either during a re-opening of the 2004 Triennial Review or during the next scheduled Triennial Review:

> (a) to review and, where appropriate, revise the Standards, which apply or are to be applied to storm water and urban runoff (collectively "Stormwater"), in light of the factors and requirements set forth under Water Code sections 13241 and 13000, including, but not limited to, the specific factors set forth under Water Code sections 13241(a) – (f), and the considerations provided under Water Code section 13000;
>
> (b) to revise the Standards that apply or are to be applied to Stormwater, such that no "potential" use designations for such Standards remain in the Basin Plan; and
>
> (c) to revise the Standards, as appropriate, during said triennial review process, consistent with subsection (a) and (b) above and state and federal law, after a full and fair public hearing or hearings, and before concluding the triennial review. (*See* Exhibit "1," Writ, pp. 2-3.)

In addition, in its Judgment, the Superior Court voided the Regional Board's 2004 Triennial Review Resolution, as follows:

> 3. The Court hereby finds and declares that it is contrary to law to base Water Quality Standards on "potential" beneficial uses, as such a practice is contrary to the clear and specific requirement set forth in Water Code section 13241(a) (which requires the consideration of "probable future beneficial uses" when establishing Standards), and as such practice is inconsistent with Water Code section 13000 (which requires a consideration of the "demands being made and to be made" on state waters).
>
> 4. The Court, having reviewed the applicable provisions of State and federal law governing the triennial review process to be

> followed when reviewing and revising Standards (see 33 U.S.C. § 1313(c)(1) and Cal. Water Code §§ 13143 and 13240), hereby further declares that a public hearing is to be conducted as a part of the triennial review process, and that such public hearing is to be conducted for the express purpose of reviewing and, as appropriate, modifying the Standards or adopting new Standards. (*See* 33 U.S.C. § 1313(c)(1).) The Court declares that, under applicable State and federal law, the triennial review process is not to be concluded until such time as the need for appropriate modifications to the Standards has been considered, and until such time as actual modifications, where appropriate, have been made to the Standards or determined not to be made. (*See* Exhibit "1," Judgment, pp. 3-4.)

The Superior Court's determinations were, in part, based on admissions within the Administrative Record that the State and Regional Boards had never previously complied with the CWC section 13000/13241 requirements when it comes to the application of the Standards to Stormwater. In fact, as recognized by the Court, when the Basin Plan was initially adopted by the Boards in 1975, it was recognized that there was no practical or economic means of treating Stormwater. The 1975 Basin Plan provided in this regard as follows:

> [N]o practical and economical means has yet been devised for containment and treatment of urban runoff wastes... nor are standards for such measures presently in existence or contemplated for the foreseeable future....
>
> There are presently no generally applicable effluent limits nor water pollution control facilities in connection with **urban runoff that appear practical or economical**. The emphasis for water quality control from this standpoint should be public education, public cooperation and improved (outdoor) housekeeping, and continued search for solutions to the air pollution problem.

(Exhibit "8," 1975 BP 5521-22; *also see* Exhibit "9" included herewith, which is the entire Administrative Record designated in the *Arcadia* Case before the Superior Court and is contained on four compact disks.)

Thus, in 1975 the Boards clearly did not envision directly applying the Standards in the Basin Plan to Stormwater. This fact was subsequently acknowledged in a 1991 State Board Order involving the 1990 Municipal NPDES Permit for the Los Angeles Region (State Board Order No. 91-04, included herewith as Exhibit "10"). In State Board Order No. 91-04, the Board confirmed that the Basin Plan adopted in 1975, which is, in sum and substance, the Basin Plan that exists today (but with the subject bacteria objectives having been added in 2002), was not developed to "***cover***" Stormwater. According to the State Board:

> The Basin Plan specified requirements and controls for "traditional" point sources, **but storm water discharges were not covered**.... The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that **the Basin Plan does not address controls on such discharges**, except for the few practices listed above. Clearly, the effluent limitations listed for other point sources are not meant to apply. In addition, **there are no numeric water quality standards which have yet been developed**.

(*See* Exhibit "10," State Board Order No. 91-04, pp. 6-7.)

Eleven years later, in 2002, when the State Board was amending the Basin Plan to include the very bacteria objectives in issue for this TMDL, the State Board discussed the difficulty of Stormwater discharges achieving the Standards in the Basin Plan, and described the problem as a "train wreck" and a "Basin Planning problem." The then State Board Chair initially raised the issue as follows:

> I guess I see 20 years from now the scene in L.A., you are going to **tertiary treat every drop of stormwater**. There is not going to be a drop of water in the LA River going to the ocean that is going to be used for groundwater recharge. **That is what I see as a long term – what this is driving things for, which isn't a benefit, in my opinion, to the fish, to the citizens, to those who recreate or anybody else**. We will certainly have clean water going to the beach because there won't be any. When the price gets to the point it is starting to move to, I guess whatever we can do to assist.... (Exhibit "11," July 18, 2002 State Board Transcript, p. 72.)

The Chair's comments were echoed by State Board Member Silva (presently EPA's Assistant Administrator, Office of Water), who stated:

> I agree. I was down in Orange County all last week looking at MS4 issues and stream flow issues. **I agree, we are headed for a train wreck**.... I'm frustrated." (Exhibit "11," p. 72.)

State Board Member Carlton then described the problem as a "Basin Planning problem":

> I think that these great controversies that we are facing now are going to get more intense because of the Basin Plan. I **think this is a Basin Planning problem**.... I think all the stakeholders are aware that the Boards are not well funded on their own to evaluate the Basin Plans. I think that what has happened in the Central Valley is those stakeholders impacted by provisions of the Basin Plan which need **reexamination have come forward and put the right foot forward with funding** and unbiased objective efforts to go ahead and make these evaluations. I think that is what has to happen around the state. (Exhibit "11," p. 73.)

Chair Baggett concluded the discussion, stating:

> **I would agree this is a train wreck. We probably – none of us will be here very likely when this wreck occurs. I think somebody has to start looking ten and 20 years out. What is the long-term solution? I don't know that it is going to benefit anybody or at least the people and the wildlife that live there.** (Exhibit "11," p. 74.)

Accordingly, in addition to the Water Boards' collective failure to initially develop Standards to "cover" Stormwater, the evolution of the Basin Planning process since, as recognized by the State Board, has been a "train wreck" and a "Basin Planning problem," requiring a "reexamination" of the Basin Plan along with funding "to put the right foot forward." (*Id.*)

Yet, even since this State Board direction in 2002, no effort has been made by either the State or Regional Boards to correct this "Basin Planning problem." Instead, the Regional and State Boards have collectively pushed ahead with this "train wreck" approach to Basin Planning, appearing entirely oblivious to the practical and economic realities of their actions, and caring

nothing of the impossible predicament they have created for local governments who are being forced to implement these deficient TMDLs, and for the public who must pay for their implementation. Ironically, it was the Bacteria Objective approved at the hearing in July of 2002, where the State Board members recognized this Basin Planning "train wreck," that is now being used as the foundation for the subject Bacteria TMDL, without either of the Water Boards having heeded the State Board's own advice to address the problem before it is too late.

In spite of the fact the Basin Plan was not and is not designed to "cover" Stormwater, and given the lack of any credible evidence to show that the Boards have ever conducted the CWC sections 13000/13241 analysis with respect to Stormwater,[3] the Regional Board appears to be intent on charging ahead with a $5.4 billion TMDL, knowing there is no real practical, let alone economical, means of ever achieving the TMDL, all for the purpose of allowing people to swim in a concrete-lined flood control channel. The Regional Board's proposed Bacteria TMDL is entirely arbitrary and capricious, and is inconsistent with State and federal law, as well as the Superior Court's Decision, Judgment and Writ of Mandate in the *Arcadia* Case.[4]

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[3] Instead of arguing that any CWC section 13000/13241 analysis was ever conducted (for Stormwater) to address the various factors and considerations required by the California Legislature, the Boards have consistently argued that they were never required to go back and perform such an analysis once they determined to apply the Standards to Stormwater through TMDLs.

[4] Although the Decision, Judgment and Writ of Mandate in the *Arcadia* Case are on appeal, the facts relied on by the Superior Court in the *Arcadia* Case remain undisputed, showing that the Basin Plan was never designed to "cover" Stormwater in the first instance, and that the Boards had never previously conduced the requisite CWC section 13241/13000 analysis of the Standards vis-a-vis Stormwater.. Nor can it be disputed that the "potential" use designations in the Basin Plan are, in part, being relied upon for the development of the Bacteria TMDL in issue, or that the "existing" or "intermittent" designated uses in the Basin Plan, as originally developed in 1975 for the Los Angeles River, are at best, suspect. As such, although the *Arcadia* Case remains on appeal, there are significant "Basin Planning problems" in the Los Angeles Region created by the Boards' development and application of Standards to Stormwater that were never designed to be applied to Stormwater. Thus, regardless of the outcome of the appeal in the

C. A 2008 Report By The National Academies Of Science Further Shows The Importance Of Evaluating The Propriety Of The Proposed TMDL Before Its Adoption

Although of little consolation, California is not alone in its difficulties in attempting to regulate Stormwater, as California's problems are consistent with similar problems occurring throughout the Country. A detailed 500 plus page report was prepared for U.S. EPA in 2008, again by the National Research Council ("NRC") of The National Academies entitled, *Urban Stormwater Management in the United States.* (*See* Exhibit "12," and Exhibit "13," hereto.) This 500 page Report (Exhibit "12") was prepared at EPA's request to "review [EPA's] current permitting program for stormwater discharge under the Clean Water Act and provide suggestions for improvement." (Exhibit "12," p. vii.) Further, as if addressing the very core of the Superior Court's Decision in the *Arcadia* Case, EPA's desire for the Report was based upon the recognition that "**the current regulatory framework . . . was originally designed to address sewage and industrial wastes**" and **"has suffered from poor accountability and uncertainty about its effectiveness at improving water quality**." (Exhibit "13," p. 1 (emphasis added).)

EPA's 2008 NRC Report expressly acknowledges that reducing Stormwater pollution has proven to be "notoriously difficult," with the NRC finding that the current approach to regulating Stormwater "**seems inadequate to overcome the unique challenges of stormwater**." (*Id.* at 23.) The NRC went on to conclude that because of the differences between Stormwater and traditional discharges, the current regulatory approach is a **"poor fit."** (*Id.* at 83.) According to the NRC, compared with traditional effluent streams, "the uncertainties and variability surrounding both the nature of stormwater discharges and the capabilities of various pollution controls . . . make it much more difficult to set precise limits in advance for stormwater sources."

Arcadia Case, the Cities respectfully request that this Basin Planning problem, *i.e.*, "train wreck," be addressed at this time prior to the development of this Bacteria TMDL or any other

(*Id.* at 84.) In sum, the NRC's research showed that **"the technical demands of the TMDL program make for a particularly bad fit with the technical impediments already present in monitoring and managing stormwater."** (*Id.* at 51.)

One of the specific solutions suggested by the NRC to address Stormwater is particularly relevant to the Superior Court's direction in the *Arcadia* Case to the Water Boards to eliminate improperly designated "potential" beneficial uses. According to the NRC, when designating **"beneficial uses"**:

> Some states, such as Ohio, have added important details to their beneficial uses by developing tiered aquatic life uses that **recognize a strong gradient of anthropogenic background disturbance that controls whether a waterbody can attain a certain water quality** and biological functioning. . . .
>
> **The concept of tiered beneficial uses and use attainability is especially important with regard to urban stormwater because of the potential irreversibility of anthropogenic development and the substantial costs that might be incurred in attempting to repair degraded urban watersheds to "swimmable-fishable" or higher status.** Indeed it is important to consider what public benefits and costs might occur for different designated uses. For example, large public benefits (in terms of aesthetics and safety) might be gained from initial improvements in an urban stream (*e.g.*, restoring base flow) that achieve modest aquatic use and protect secondary human contact. **However, achieving designated uses associated with primary human contact or exceptional aquatic habitat may be much more costly, such that the perceived incremental public gains may be much lower than the costs that must be expended to achieve that more ambitious designation.**

(Exhibit "12," pp. 46-47 (emphasis added).)

Consistent with the NRC's findings, the Decision in the *Arcadia* Case is a recognition not only of the fact that the Water Boards have failed to comply with State law in developing the Basin Plan for the LA Region, but also of the Water Boards' failure to develop a Basin Plan that

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TMDLs.

accounts for the differences between Stormwater and traditional discharges and that considers the concept of "tiered beneficial uses" and "use attainability" with respect to Stormwater. Accounting for these differences is imperative in this case "because of the potential irreversibility of anthropogenic development and the substantial costs that might be incurred in attempting to repair degraded watersheds to 'swimmable-fishable' or higher status," as well as because of the importance in developing a Basin Plan that considers the difficulty in "achieving designated uses associated with primary human contact or exceptional aquatic habitat," which may be "much more costly, such that the perceived incremental public gains may be much lower that the cost that must be expended to achieve that more ambitious designation." (Exhibit "12," pp. 46-47.)

The NRC's findings in 2008 could not be more relevant to the Board's proposed consideration of the proposed Bacteria TMDL for the LA River, in light of the clear "irreversibility of anthropogenic development and the substantial costs" incurred over the last 70 plus years to improve the LA River into a concrete-lined flood control channel, and particularly given the minimal, if any, "public gains" that would be achieved through "restoring" the LA River from its current concrete-lined condition to a soft bottom condition (which appears to be the desire of the Regional Board). In fact, given the significant risks of harm from redeveloping the LA River into a natural river, akin to its prior condition, such as the potential for "major" flooding to the surrounding communities, along with the risks of harm to individuals seeking to swim in the River during rain events, not only would there be no "public gain," more importantly, to do so may result in significant public harm.

In sum, the considerations raised by the NRC are the same considerations which the Cities have been requesting the Water Boards consider for the past five years, *e.g.*, that the Water

Boards consider the appropriateness of designating concrete-lined flood control channels as REC-1 and REC-2 uses, given that the accompanying bacteria objectives designed to achieve such REC-1 and REC-2 use designations cannot reasonably or economically be achieved. (*See,* TMDL Report, p. 76; ["costs for implementation for the Los Angeles River Watershed Bacteria TMDL could range up to $5.4 billion for full, inclusive, implementation costs."].)

IV. THE REGIONAL BOARD HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF CWC §§ 13000, 13240 AND 13241 IN DEVELOPING A BACTERIA TMDL FOR THE LOS ANGELES RIVER

The Regional Board, through the Tentative Resolution proposed for the subject TMDL, wrongly asserts that the development and adoption of this Bacteria TMDL "does not implicate California Water Code section 13241." (Tentative Resolution, p. 2, ¶ 6.) Initially, it is important to note that nothing in the TMDL documentation produced to date contains any discussion of the considerations required under CWC section 13000. The proposed Bacteria TMDL is defective on its face, as there are no findings and no supporting evidence to show the TMDL was developed in accordance with the requirements of CWC section 13000.

Turning to the discussion in the Tentative Resolution of the application of CWC section 13241, the Board's reasoning is flawed as it is based on the incorrect assumption that the Bacteria TMDL does not represent an establishment of a water quality objective, but rather is simply a program "to implement existing standards (including objectives)." (Tentative Resolution, p. 2, ¶ 6.) The claim ignores the fact that the adoption of the proposed Bacteria TMDL will, in fact, result in a revision to the Basin Plan, and specifically a revision to the water quality objectives themselves, by the establishment of specific geometric mean targets and allowable daily exceedances for the various segments and tributaries that make up the LA River. As such, the adoption of the Bacteria TMDL is indisputably a revision to the water quality

objectives, thus requiring compliance with the provisions of CWC section 13241, as well as CWC section 13000.

In addition, the Tentative Resolution attempts to hedge the Regional Board's bet that the requirements of section 13241 do not apply (but, as discussed above, without addressing the requirements of CWC section 13000), by setting forth a number of completely unsupportable and conclusory findings that the required factors and considerations under section 13241 have been met, *i.e.*, the Regional Board is arguing section 13241 does not apply, but just in case it does, it claims it has complied with said section. Yet, there is no "evidence" anywhere in the record to show, for example, that the Bacteria TMDL is "reasonably achievable," particularly in light of the "environmental characteristics" of the water body (as required by CWC subsections 13241(b) and (c)). In fact, the evidence is to the contrary, as provided for not only in these comments, but in a separate set of technical comments submitted by Dr. Susan Paulson of Flow Sciences, Inc. on behalf of the Cities. For example, although the TMDL presumes that a good portion of both dry weather and wet weather runoff is to be diverted and treated by the Sanitary Districts, the Los Angeles County Sanitation District has made it clear, in their CEQA Scoping Comments, that "under no circumstances will the Sanitation Districts accept wet weather diversions." As reflected in technical Comments submitted in connection with this TMDL, the volume of water generated by a moderate to high storm event would be approximately 5 billion gallons daily filling some 59 Rose Bowls. Even smaller rain events which would appear to clearly require treatment under the current proposed TMDL, would approach a billion gallons of water and fill some 11 Rose Bowls. Clearly the various Sanitation Agencies cannot accept wet weather runoff, and there is no viable means of meeting the wet weather portion of the TMDL.

Further, there are similar difficulties in treating dry weather runoff, as reflected in *"The Final Report – Supplemental Characterization of Los Angeles County Storm Drains,"* July, 2007 (Exhibit "14"). According to the Los Angeles County Sanitation Districts in this Report:

> As a general rule, the Districts do not accept urban runoff flows in sewers tributary to the WRPs due to the potential impact on the District's ability to meet discharge limitations, nor do the Districts accept storm water flows to any sewer due to the potential to cause overflow conditions." (Exhibit "14," p. 2.)

In addition, there is no evidence, nor supporting documentation of any kind, to show that the estimated $5.4 billion price tag for the Bacteria TMDL (*see* TMDL Report, p. 76), is justifiable under the circumstances, let alone being anything close to affordable. Nor is there any evidence showing that the $5.4 billion figure is even accurate, as this figure was based entirely on an extrapolation from Ballona Creek's $1.5 billion Bacteria TMDL estimate, without any discussion of the similarities and differences between the two watersheds, *e.g.*, no evidence of the sufficiency of the capacity within the County Sanitation District Treatment Plants to treat the diverted water from the LA River, was presented.

Moreover, the Board's consideration of the enormous cost of implementing this one TMDL should not take place in a vacuum; rather it must be considered with recognition that it is only a small part of the overall cost of treating Stormwater within the Region. As demonstrated by the fact the Board's own estimates indicate that addressing one type of pollutant, i.e. bacteria, in one watershed, will cost $5.4 billion, the cost of complying with all TMDLs to be adopted by the Board will be astronomical. Indeed, a study prepared back in 2002 by the University of Southern California Study, entitled *"An Economic Impact Evaluation of Proposed Storm Water Treatment for Los Angeles County,"* concluded that the cost of treating Storm Water in Los Angeles County could reach as high as $283.9 billion over 20 years. (Exhibit "15,"; *see also* Exhibit "16," "Financial and Economic Impacts of Storm Water Treatment Los Angeles County

NPDES Permit Area" presented to California Department of Transportation Environmental Program, Report I.D. #CTSWRT-98-72, November, 1998, by Stanley R. Hoffman Associates; Exhibit "17," "COST OF STORM WATER TREATMENT FOR THE LOS ANGELES NPDES PERMIT AREA," June 1998, by Brown & Caldwell, prepared for the California Department of Transportation [giving "conservatively low" estimates of the costs of treating Los Angeles Area Storm Water of $33-73 billion in capital costs, depending upon the level of treatment, with an additional $68-$199 million per year in operating and maintenance costs]; Exhibit "18," "COST OF STORM WATER TREATMENT FOR CALIFORNIA URBANIZED AREAS," October, 1998, prepared for California Department of Transportation, by Brown & Caldwell [concluding that "Statewide stormwater collection and treatment costs range from $70.5 billion for Level 1 to $113.7 billion for Level 3. Annual operations and maintenance costs range from $145.2 million/year for Level 1 to $423.9 million/year for Level 3."];. and Exhibit "19," a copy of a Report entitled "*NPDES Stormwater Costs Survey*" by Brian K. Currier, Joseph M. Jones and Glen L. Moelle, California University, Sacramento dated January, 2005 along with Appendix H included therewith entitled "*Alternative Approaches to Stormwater Control*" prepared by the Center for Sustainable Cities University of Southern California.)

Furthermore, a $5.4 billion project to enable the public to swim in a concrete-lined flood control channel where it is illegal and dangerous to do so, cannot come at a worse time economically for municipalities throughout the Region. In a Report entitled *Review of the Socio-Economic Environmental Justice Impacts of the Bacteria TMDL for the Los Angeles River,* dated June 3, 2010, and prepared by the Gateway Cities Council of Governments ("Gateway CCOG Report"), the Gateway CCOG concluded, in part, as follows:

- The environmental analysis for the Bacteria TMDL for the Los Angeles River has failed to take into account the worsening socio-economic conditions for the watershed.

- . . . We estimate that over 533,120 persons are currently unemployed in the watershed. Twenty-Three of the watershed's 40 communities have unemployment rates above 10% and 11 of the watershed communities have unemployment rates above 15%.

- The watershed communities are finding it increasingly difficult to provide for basic municipal services, due to dramatic drops in sales, tax and other local government revenues. Local sales tax, a major source of local government revenues, is in "free fall," with average decreases of 17% regionwide. A survey of 21 watershed cities revealed over $51.4 million in General Fund deficits for FY2009-2010. Cities are instituting staff layoffs, hiring freezes and other budget cutbacks to deal with these dramatic declines in revenues. A survey of the watershed cities indicates that the TMDL increase municipal budget deficits by 8.4% annually. Economists predict that local government revenues will lag the general economic recovery and local government job losses will continue into 2011, creating hardships for the watershed communities.

- There is an uneven distribution of unemployment and poverty in the watershed. Sixteen cities draining into the Lower Los Angeles River Watershed (Reaches 1 and 2) suffer from the highest unemployment rates in the watershed. There is a compelling socio-economic argument for the Regional Board to consider Reach specific implementation plans and a customized TMDL schedule in order to mitigate the adverse economic impacts of the proposed regulations on the economically disadvantaged communities that drain into the Lower Los Angeles River.

(Exhibit "20," Gateway CCOG Report, p. 3.) In a recent Economic Forecast prepared by the California State University, Long Beach, for the Sixteenth Annual Regional Conference for Southern California and its Counties, May 2010 (Exhibit "21," "Economic Forecast"), a grim picture was painted of the present state of the economy for local governments throughout the Region. According to this Economic Forecast:

> Last year, the region's economy shed 460,000 jobs. This was on top of the 138,000 jobs lost in 2008, raising the cumulative two-year loss to almost 600,000 jobs. The region has not experienced such a devastating job loss since the early 1990's. Over a three year period, 1991-93, the region lost 470,000. At that time it was thought to be the most significant downturn in the Southern California regional economy since the Great Depression."
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> * * *
>
> This recession is the longest and one of the steepest declines in the post World War II era. What made this recession different is that the economy had not faced a financial crises of such magnitude since the Great Depression. The housing bubble, subprime interest loans, lax lending standards, and securitization of mortgages led to the near collapse of financial markets, crating the first ever downtown in the global economy in the modern era... Unemployment surged as employers shed 4.7 million jobs in 2009. Bringing the total jobs lost since the onset of the recessing to 8.4 million.

(Exhibit "21," Economic Forecast, pp. 4 and 7; *also see* Exhibit "22," which includes a series of PowerPoint presentations presented at the Economic Forecast Conference on May 13, 2010, concerning the poor state of the national and regional economy.)

Furthermore, in a Report entitled "*A Guide to Consideration of Economics Under the California Porter-Cologne Act*," by David Sunding and David Ziberman, University of California, Berkeley, March 31, 2005 (Exhibit "23,"), the authors reviewed the requirements of the Porter-Cologne Act regarding the need to consider "economics" and the other factors under Section 13241, and concluded as follows:

> While the requirement to consider economics under Porter-Cologne is absolute, the legislature and the courts have done little to particularize it. **This report is an attempt to fill the gap and provide the Board with guidance as to how economics can and should be considered as required by Porter-Cologne.** We write from our perspective as professional economists and academics who have engaged in water quality research and who have extensive experience with the application of economics to environmental regulation. (Exhibit "23," p. iv.)

The Report's authors further recognized the importance of considering scarce resources when developing water quality regulations, where they concluded as follows:

> **Water quality regulations are necessary in a state like California, and a careful analysis of their consequences can provide a road map for investment of scarce resources.** Ideally, our recommended approach will increase the transparency of the rule-making process under Porter-Cologne. Further, it is our hope that adoption of the approach could help avoid the legal and political conflicts that have adversely affected recent water quality protection efforts in the state. (Exhibit "23," p. v.)

In addition, beyond the fact that the estimated $5.4 billion calculation to comply with the TMDL is not supported by any substantial evidence in the record, is the fact that this massive expenditure is all designed to "compel" the Cities "to take aggressive action" to "restore" the LA River from its present concrete-lined condition in order to allow for water contact recreational uses of this large flood control channel, all the while recognizing that in fact "access is prohibited to much of the Los Angeles River." (TMDL Report, p. 15.) As such, a decision to impose a $5.4 billion regulation upon the Cities and the public in general, with virtually no corresponding public benefit, is action that is entirely arbitrary and capricious and without any evidentiary support.

The other conclusory findings regarding the Board's purported attempt at compliance with the remaining factors and considerations under section 13241, such as the need to consider the impacts of the adoption of the Bacteria TMDL on the development of "housing within the region" (CWC § 13241(e), are entirely unsupported and deficient. Specifically, with respect to the need for housing within the region, as evidenced by the long 70 year history surrounding the development of the LA River, the entire purpose of the development of River into a "flood control" channel was to protect those living and working in the area surrounding the River from "flooding" of their homes and livelihood. The goal was to move as much rainwater into the

concrete-lined flood control channel as quickly as possible, so as to avoid "flooding" the communities surrounding the channel. Yet, the stated principal means of complying with the Bacteria TMDL as written, appears to be to "divert" rainwater away from the LA River, thereby largely defeating the very purpose of the development of the LA River in the first instance, and creating significant risks of harm to the surrounding community. Thus, the statement that "the need for housing within the region has been considered, but this TMDL is unlikely to affect housing needs" (Tentative Resolution, p. 5, ¶ 17), is not only unsupportable, it is reckless.

The adoption of this Bacteria TMDL as is, would be arbitrary and capricious, and inconsistent with law, as it would fail to comply with the clear requirements of both sections 13000 and 13241. Specifically, the Board has repeatedly failed, either in this TMDL process, in the Basin Plan development process, or in any past Triennial Review, to comply with its statutory obligations under CWC sections 13000, 13240 and 13241, by failing to give full and complete consideration to the following, when imposing TMDLs or otherwise when requiring Stormwater discharges to be in strict compliance with numeric effluent limits: (a) the past, present or probable future beneficial uses of the waters in issue; (b) the environment characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) the water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; (f) the need to develop and use recycled water (*see* CWC § 13241), and the various considerations set forth in CWC section 13000.

CWC sections 13000, 13240 and 13241 provide, in relevant part, as follows:

> **§ 13000. Conservation, control, and utilization of water resources; quality; state wide program; regional administration.**

. . .

The Legislature further finds and declares that activities and factors which may affect the quality of the water of the state shall be regulated to attain the highest water quality which is reasonable, **considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.**

§ 13240 Adoption of plan; conformance with state policy.

Each regional board shall formulate and adopt water quality control plans for all areas within the region. **Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control.** During the process of formulating such plans the regional board shall consult with and consider the recommendations of affected state and local agencies. Such plans shall be periodically reviewed and may be revised.

§ 13241 Water quality objectives; beneficial uses; prevention of nuisances.

Each regional board shall establish water quality objectives in water quality control plans as in its judgment will ensure the **reasonable** protection of beneficial uses and the prevention of a nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree **without unreasonably affecting beneficial uses**. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

(a) Past, present, and **probable** future beneficial uses of water.

(b) Environmental **characteristics of the hydrographic unit** under consideration, including the quality of water available thereto.

(c) Water quality conditions that could **reasonably be achieved** through the coordinated control of all factors which affect water quality in the area.

(d) **Economic considerations.**

(e) The **need for developing housing in the region**.

(f) The need to develop and use recycled water.

Pursuant to the above provisions of the Porter-Cologne Act, in any formulation or amendment of a water quality control plan where water quality standards or objectives are being adopted or modified (as here, with the adoption of new, specific numeric objectives), the policies set forth in section 13000 must be complied with and the factors set forth in section 13241 fully considered. (*See United States of America v. State Water Resources Control Board, et al.* (1986) 182 Cal.App.3d 82 ("*U.S. v. State Board*"). Compliance with CWC section 13000 is specifically required during Basin Plan development given the express language of section 13240, requiring compliance with the policies under CWC section 13000. (CWC § 13240.) Yet, there is no indication anywhere in the record that the Regional Board has even made an attempt to comply with CWC section 13000.

In *U.S. v. State Board*, the State Board issued revised water quality standards for salinity control and for the protection of fish and wildlife because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento-San Joaquin Delta ("*Delta*"). (182 Cal.App.3d at 115.) The State Board approved these standards with the understanding it would impose more stringent salinity controls in the future. In invalidating the revised salinity standards, the Court consistently recognized the importance of complying with the policies set forth under section 13000 and the factors listed under section 13241. It emphasized the section 13241 need for an analysis of "economics," as well as the importance of establishing water quality objectives which are "reasonable," and adopting "reasonable standards consistent with overall State-wide interests."

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible**." (**§ 13000**.) In fulfilling its statutory imperative, the Board is

> **required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." (**§ 13241**), a conceptual classification far-reaching in scope.

(*Id.* at 109-110 (emphasis added).) The Court further stated:

> The Board's obligation is to attain the highest reasonable water quality "*considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000, italics added.)

(*Id.* at 116 (emphasis in original).) Finally, the Court pointed out:

> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also *all* competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider** . . . "[Water quality conditions that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area."

(*Id.* at 118 (italics in original, bolding added).)

In *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 ("*Burbank*"), the California Supreme Court addressed the issue of whether this Board and the State Board were required to comply with CWC section 13241, which, through section 13263, requires the Boards to consider "economics" when issuing an NPDES permit. (*Id.* at 626.) The *Burbank* Court found that where the State and Regional Boards adopt provisions that "exceed the requirements of the Federal Clean Water Act," State law, specifically section 13241, must be complied with. (*Id.* at 627.) The Court held that unless the specific requirement is mandated by federal law, section 13241 must be complied with even where a permit is being adopted pursuant to federal law. (*Id.*) The Court stated that: "because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a waste water discharge permit, to

use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards." (*Id.* at 626, (emphasis added).)

In short, the Supreme Court found that State law must be complied with unless it is in conflict with federal law or proposes something that "federal law forbids." (*Id.*) Consequently, as the Regional Board is required to comply with State Law, including specifically section 13241, whenever it adopts requirements that are not required by federal law, and as federal law does not require either the particulars of the subject Bacteria TMDL, or that municipalities strictly comply with the numeric limits set forth in TMDL, here, the Board is required to comply with section 13241 and section 13000, prior to adopting the TMDL.

Moreover, there is no federal requirement that the Water Boards adopt this or any TMDL. As explained by the State and Regional Boards' attorneys in pleadings submitted to the San Diego Superior Court in 2006: "No authority exists to compel the water boards to establish a TMDL." (Exhibit "24," p. 10.) This position that neither federal law nor any requirement under the Consent Decree compels the Regional or State Boards to adopt a TMDL, was then confirmed by the Water Boards' counsel in open court in a hearing on September 1, 2006, where he stated: "If we don't adopt a Trash TMDL under the Consent Decree I referenced, US EPA would have to adopt one. But we don't have to do one. And we can't guess, as staff, what the Regional Board is going to do on that project." (Exhibit "25," p. 25; (emphasis added).) Accordingly, there can be no dispute that nothing in federal law compels the State or Regional Boards to adopt the subject Bacteria TMDL. State law requirements must, therefore, be adhered to.

In addition, the State Board's Office of Chief Counsel has confirmed that the Boards must comply with State law when adopting TMDLs. In a memorandum dated January 4, 1994, from William R. Attwater, Office of Chief Counsel, State Water Resources Control Board, to all

Regional Board Executive Officers and Board Attorneys, on "Guidance on Consideration of Economics in the Adoption of Water Quality Objectives," (hereafter "Attwater Memo," a copy of which is marked as Exhibit "26," along with a Memo from Sheila Vassey of the Chief Counsel's Office ("Vassey Memo" attached thereto), the Board's Chief Counsel recognized that, in adopting water quality objectives, Boards "are required to exercise their judgment to 'ensure the reasonable protection of beneficial uses and the prevention of nuisance. (*See* Attwater Memo, p. 2.)

The Attwater Memo relies on the legislative history to the Porter-Cologne Act, which provides that although objectives are to be tailored on the high quality side of the needs of the present and future beneficial uses: "**nevertheless, objectives must be reasonable and economic considerations are a necessary part of the determination of reasonableness.**" (*Id.*) As discussed in the Attwater Memo, the Legislative History to the Porter-Cologne Act recognizes that:

> The Regional Boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality **which is reasonable**. (Exhibit ,"26," Attwater Memo, p. 3; (emphasis added).)

The Attwater Memo also specifically cites to the language in Water Code section 13000, including the reference to the need "**to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.**" (*Id.* at 3; (emphasis added).)

The Memo similarly reviewed the additional mandate to consider "economics" when adopting objectives set forth in Senate Bill 919 (adopted in 1993), and concluded that the Bill,

which amended CEQA to require, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, that the Boards conduct an environmental analysis of the reasonably foreseeable methods of compliance and that "[t]his analysis must take into account a reasonable range of factors, **including economics**." (*Id.* at 4; *also see* Exhibit "27," a document prepared by EPA Region 9 dated January 7, 2000 entitled "*Guidance For Developing TMDLs in California*," where EPA Region 9, at page 22, specifically referenced and attached the Vassey Memo referenced above.) (*Id.* at p. 22.)

The policies and factors under CWC sections 13000, 13240, and 13241 are thus all required to be complied with when the Boards develop TMDLs. However, because there are no findings showing that the Bacteria TMDL was developed in accordance with CWC section 13000, and because there is no evidence to support any of the very conclusionary findings regarding CWC section 13241, the proposed Bacteria TMDL is contrary to law.

V. THE PROPOSED BACTERIA TMDL IS DEFICIENT AS IT FAILS TO "REFLECT" THE FACT THAT IT MAY BE COMPLIED WITH THROUGH THE USE OF A BEST MANAGEMENT PRACTICES APPROACH, RATHER THAN THROUGH NUMERIC EFFLUENT LIMITS

The proposed Bacteria TMDL provides for a single sample target, with a limited number of allowable exceedence days for daily sampling and weekly sampling along with a geometric mean target which "may not be exceeded at any time." (Tentative Resolution, p. 3.) Similarly, the TMDL Report expresses the single sample target numeric limits as an allowable number of exceedence days of concentrations of *E. Coli*, along with a discussion of a geometric mean target which, similar to Tentative Resolution, "shall be strictly applied." (TMDL Report, p. 16; *also see* Tentative Basin Plan Amendment, p. 5 ["The WLAs for the geometric mean target during

any time of any river segment and tributary to the Los Angeles River watershed **is zero (0) days of allowable exceedences**."].)

The Tentative Basin Plan Amendment then confirms that the regulatory mechanism that will be used to implement the TMDL for the Cities and other municipalities throughout Los Angeles County, will include the "MS4 Permits covering jurisdictions within the Los Angeles River watershed," and that these MS4 Permits "shall be reopened or amended when the Order is re-issued, in accordance with applicable laws, **to incorporate the applicable WLA as a Permit requirement**." (Tentative Basin Plan Amendment, p. 6.) Thus, it is clear from the TMDL documentation that the TMDL is intended to be enforced as a strict numeric effluent limit, rather than through the use of maximum extent practicable ("MEP")-compliant best management practices ("BMPs"). (*See* 33 U.S.C. § 1342(p)(3)(B).)

In *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866, 874, the California Court of Appeal acknowledged that the CWA is to be applied differently to municipal Stormwater dischargers than to industrial Stormwater dischargers, finding as follows:

> **In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable."**

(*Id.*, citing 33 USC § 1342 (p)(3)(B)(iii) and *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 ("*Defenders*") (bolding added, italics in original).)

In *Defenders*, the Ninth Circuit recognized the different approach taken by Congress for Stormwater, finding that "**industrial discharges must comply strictly with state water-quality**

standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges." (191 F.3d at 1165; (emphasis added).) The Court found that "because 33 U.S.C. §1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. §1311," but instead section 1342(b)(3)(B)(iii) [of the CWA] **"replaces the requirements of §1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable...,'"** "the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C)." (*Id.* at 1165.)

Understanding the differences recognized by Congress in the Clean Water Act, EPA, in a November 22, 2002 Guidance Memorandum on *"Establishing Total Maximum Daily Load ("TMDL") Waste Load Allocations ("WLAs") for Stormwater Sources and NPDES Permit Requirements Based On Those WLAs,"* (Exhibit "28" hereto), explained that, for NPDES Permits regulating Stormwater discharges, any water quality-based effluent limits for such discharges should be "in the form of BMPs and that numeric limits will be used only in rare instances." (Exhibit "28," EPA Guidance Memo, p. 6.) EPA recommended that "for NPDES-regulated municipal . . . dischargers effluent limits, effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits." (Exhibit "28," at p. 4.) In fact, EPA went so far as to find as follows:

> If it is determined that a BMP approach (including an iterative BMP approach) is appropriate to meet the stormwater component of the TMDL, **EPA recommends that the TMDL reflect this**. (*Id.* at 5.)

EPA explained its recommendation that a Stormwater TMDL reflect the fact that it is to be implemented through the use of a BMP approach, rather than the use of numeric limits, as follows:

> EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, **only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges**. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, **permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances**. (*Id.* at 4 (emphasis added).)

EPA recognized that under the Clean Water Act, section 1342(p)(3)(B)(iii), and under the regulations to the Act, specifically 40 C.F.R. § 122.44(k)(iii), that for Stormwater NPDES Permits, water quality based effluent limits ("WQBELs") taken from the waste load allocations in a TMDL, "may be expressed in the form of best management practices ("BMPs")," and that "if BMPs alone adequately implement the WLAs, additional controls are not necessary." (Exhibit "28," p. 2.)

In a February 11, 1993 Memorandum issued by the State Board's Office of Chief Counsel by Elizabeth Jennings, subject *"Definition of Maximum Extent Practicable,"* (Exhibit "29," the Office of Chief Counsel provided guidance on determining whether a BMP was consistent with the maximum extent practicable or "MEP" standard and concluded that the following factors may be useful in this determination:

> 1. **Effectiveness: Will a BMP address a pollutant of concern?**
>
> * * *
>
> 3. **Public acceptance: Does the BMP have public support?**
>
> 4. **Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefit to be achieved?**

5. **Technical feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?**

(Exhibit "29," Jennings Memo, p. 4-5.)

Further, as reflected in a letter dated August 22, 2003, from EPA Headquarters to the Honorable Bart Doyle, EPA made it clear that it will "continue to work with the Regional Board **to make sure that they consider different implementation methods for TMDLs**," and that, with respect to EPA's November 22, 2002 Guidance Memorandum, EPA has "worked closely with all ten Regions on this memo and **expects that it will be followed by the states."** (Exhibit "30," August 27, 2003 Letter, p. 2.)

Similarly, in a recent EPA-issued draft technical document entitled "*TMDLs Stormwater Handbook, November, 2008"* (Exhibit "31," hereafter "Draft Handbook"), EPA seeks "to provide information to TMDL practitioners and NPDES stormwater permit writers" on various subjects, including:

- TMDL implementation plans including best management practice (BMP) and other stormwater management strategy recommendations
- Approaches for translating TMDL WLAs and implementation recommendations into NPDES stormwater permit requirements and implementation strategies.

(Exhibit "31," p. 1.)

The Draft Handbook is designed to assist in the development of "TMDL implementation plans that connect WLAs and stormwater permits by either (1) including specific recommendations (*e.g.*, performance standards, management measures) for implementing WLAs, or (2) providing technical information for permit writers and permitees on how to analyze, select, and implement provisions to implement the WLAs." (*Id.*) The Draft Handbook specifically references and quotes from the EPA Guidance Memo referenced above, and provides that: **"EPA expects that most WQBELs for NPDES-regulated municipal and small**

construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances." (Exhibit "31," p. 133 (emphasis added.)

Furthermore, in yet another Report issued by the NRC entitled "*Assessing the TMDL Approach to Water Quality Management,*" 2001 (*see* Exhibit "32"), the NRC concluded as follows:

> Many debates in the TMDL community have centered on the use of "phased" and "iterative" TMDLs. Because these terms have particular meanings, this report uses a more general term – adaptive implementation. Adaptive implementation is, in fact, the application of the scientific method to decision-making. It is a process of taking actions of limited scope commensurate with available data and information to continuously improve our understanding of a problem and its solutions, while at the same time making progress toward attaining a water quality standard. (Exhibit "32," p. 90.)

In a recent Appellate Court decision from the State of Oregon, *Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (April 28, 2010) Case No. A136050, 2010 Ore. App. LEXIS 465 (a copy of which is attached hereto as Exhibit "33"), the Oregon Court of Appeal looked at, among other issues, the need for waste load allocations contained within developed TMDLs to be enforced as strict numeric limits within a municipal NPDES Permit under Oregon law. The petitioners in that case argued that the Oregon Department of Environmental Quality ("DEQ") had erred because it issued a permit that did not "incorporate waste load allocations as enforceable effluent limits." The Oregon Court discussed the purpose of a TMDL, noting it is required to be established for pollutants and waters of the State that are identified pursuant to Section 1313(d) of the CWA, and went on to address petitioners' contention that the TMDLs were required under State law to have been incorporated into the Permit as a "enforceable effluent limitation." (*Id.* at *24-25.)

What was not even argued in *Tualatin River Keepers* was that federal law required a TMDL to be incorporated into a municipal NPDES Permit as a "numeric effluent limitation." Instead, the Court found that under the CWA, best management practices were considered to be a "type of effluent limitation," and that such best management practices were authorized to be used pursuant to the CWA, section 33 U.S.C. § 1342(p) as a means of controlling "storm water discharges." (*Id.* citing 33 U.S.C. § 1342(p) and 40 CFR § 122.44(k)(2)-(3).)

The Court in *Tualatin* went on to conclude that the State did not require that TMDLs be enforced through the use of numeric effluent limits, finding as follows:

> The applicable TMDLs in this case set forth specific waste load allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. **The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process." . . . Adequate progress toward achieving assigned wasteload allocations will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants."** Pursuant to that section, permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [stormwater management plan]."
>
> * * *
>
> **Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress towards meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits.** *See* 40 CFR § 122.44(k)(2)-(13). Furthermore, the permits incorporate benchmarks, through incorporation of the

> storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

(*Id.* at *26-*27 (emphasis added).)

The Oregon Appellate Court opinion confirms established authority that numeric limits are not required as a means of implementing wasteload allocations in a TMDL.

In addition, it has long since been the policy of the State of California not to require the use of strict numeric limits to Stormwater dischargers, but rather to apply the MEP standard through an iterative BMP process. (*See, e.g.*, Exhibit "10," State Board Order No. 91-04, p. 14 ["There are **no numeric objectives** or **numeric effluent limits** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; Exhibit "34," State Board Order No. 96-13, p. 6 ["**federal laws does not require** the [San Francisco Reg. Bd] to dictate the specific controls."]; Exhibit "35," State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs **in lieu of numeric water quality-based effluent limitations**."]; Exhibit "36," State Board Order No. 2000-11, p. 3 **["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."]**; Exhibit "37," State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that **the iterative approach**, which focuses on timely improvements of BMPs, is appropriate."]; Exhibit "38," State Board Order No. 2006-12, p. 17 ["**Federal regulations do not require numeric effluent limitations for discharges of storm water**"]; Exhibit "39," *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater*

Associated with Municipal, Industrial and Construction Activities, June 19, 2006, p. 8 ["**It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers.**"]; and Exhibit "40,"an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["**Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.**"].)

In sum, neither State or federal law, nor State or federal policy, provide for the incorporation of WLAs as strict numeric limits into an MS4 Permit. To the contrary, both EPA and the State have long recognized that numeric limits should only be incorporated into an MS4 Permit in "rare instances," with the State Board's Numeric Effluent Limits Panel concluding that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Exhibit "38," p. 8.) Adopting the proposed Bacteria TMDL without language confirming that, with respect to the Cities and other municipal permittees, the TMDL is not to be implemented through the use of strict numeric effluent limits, but rather through the use of an iterative BMP approach, is arbitrary and capricious action, and is action contrary to law.

VI. THE DEVELOPMENT OF THE BACTERIA TMDL TO PROTECT MERE "POTENTIAL" BENEFICIAL USES, REGARDLESS OF WHETHER THE USES ARE FORMERLY DESIGNATED AS "POTENTIAL," IS DIRECTLY CONTRARY TO LAW, AND ALL DESIGNATED "USES" OF THE LA RIVER MUST BE REVIEWED AND REVISED

CWC section 13000, which the Board has not disputed as being applicable in this case, specifically requires that the quality of the water of the State be protected "to attain the highest water quality which is reasonable, considering **all demands being made and to be made on those waters**..." (CWC § 13000.) Moreover, under CWC section 13240, the Basin Plan must "conform to the policy set forth in Chapter 1 (commencing with section 13000)." (§ 13240.)

Thus, the California Legislature envisioned the development of regulations to protect only existing **"demands being made" as well future demands "to be made"** on such waters. A development of a TMDL to protect mere "potential" uses of the LA River, after it may or may not be "restored" to allow for swimming in this concrete flood control channel, whether such "potential" uses are "probable" or not, is directly contrary to the plain language of section 13000.

Pursuant to section 13241, the factors to be considered when establishing water quality objectives "shall include": "(a) past, present and **probable future beneficial uses** of water." (CWC § 13241(a); (emphasis added).) The development of a TMDL to protect mere "potential" uses which are not "probable future" uses, *i.e.*, the development of a TMDL to protect "improbable" future uses of the LA River, is action contrary to law.

In State Board Order No. 2005-0004, the Board determined that the Regional Board had improperly refused to remove a "potential" REC-1 [*i.e.*, swimming] use designation for Ballona Creek's two upper reaches (consisting of concrete channels that are fenced to prevent public use). Although the State Board conceded it was "possible" these reaches could someday be restored to a condition that would permit swimming, it found that since there was no evidence it was "feasible" to attain such uses in the near future, the use designations were inappropriate. (Exhibit "41," p. 7.) The State Board explained its reasoning for overturning the LA Regional Board's prior refusal to down-grade the referenced "potential" REC-1 use, as follows:

> The record indicates that the creek was converted to a concrete-lined flood control channel many years ago. Since then, the surrounding area has become highly urbanized. [] [R]estoring the creek's use for full REC-1 uses associated with swimming would require substantial changes in existing land use patterns. These types of changes require extensive time, planning, funding, and construction. They are likely to occur over very long time periods.

(Exhibit "41," p. 13.) The State Board's reasoning in down-grading the potential "REC-1" use in that case is particularly applicable to the LA River, and to the Regional Board's desire for "all

parties" to "take aggressive action" in this case "to restore" the LA River. In effect, as recognized by the State Board in Order No. 2005-0004, "the record indicates that the [Los Angeles River] was converted to a concrete-lined flood control channel many years ago. Since, the surrounding area has become highly urbanized . . .[and] restoring the [LA River's] use for full REC-1 uses associated with swimming would require substantial changes in existing land use patterns. These types of changes require extensive time, planning, funding and construction. They are likely to occur over very long periods." (*Id.*)

It is thus apparent that while the desire of the Regional Board to "restore" the LA River to allow for swimming in the River may, in theory, be a laudable goal, and may arguably be "possible" at some far off date into the future, in reality, because of the decades and effort that have already been invested to improve the LA River to address "major" flooding problems in the "highly urbanized" area of the community surrounding the LA River, such a restoration process would not only be lengthy and expensive, it would be dangerous. In short, unless there were "substantial changes in existing land use patterns," where a majority of the community surrounding the LA River was replaced with open space, so as to provide for large diversion areas for rainwater, rather than current conditions where rainwater is conveyed into this behemoth flood control channel, the restoration of the LA River to accommodate swimming is not remotely realistic. The "environmental characteristics" of the River preclude this use for most all portions of the River.

In addition, under the plain language of the Clean Water Act ("CWA"), a TMDL is only to be developed once a water body has first been listed as being impaired for a particular pollutant. Pursuant to section 303(d)(1)(A) of the CWA [33 U.S.C. § 1313(d)(1)(A)], the State is to make a determination on listing the water body as being impaired only after it first takes "into

account the severity of the pollution and the **uses to be made of such waters**." The CWA, therefore, does not envision the development of a TMDL to address a particular pollutant of concern where its severity impairs some "potential" or theoretical use in the future, after "substantial changes in existing land use patterns" have been made; instead, it requires an evaluation of the **"uses to be made"** of such waters. (*See also* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) [providing that "standards shall be established taking into consideration **their use and value** . . . , and also taking into consideration their **use and value** for navigation"].)

With respect to the designation of the "existing" and "intermittent" beneficial uses in the Basin Plan, the regulations to the CWA specifically reference the need to protect **"existing in stream water uses** and the level of water necessary to protect the **existing uses.**" (40 C.F.R. § 131.1(e).) The CWA defines "existing" uses as "those uses actually attained in the water body on or after November 28, 1975." (40 C.F.R. § 131.1(e).) In this case, there is no credible evidence anywhere that the REC-1 or REC-2 designations for the Los Angeles River were ever based on "uses actually attained in the water body on or after November 28, 1975." In fact, the evidence is to the contrary, as recognized in the TMDL Report itself, where it acknowledges that "most of the Los Angeles River was lined with concrete between the 1940s to 1950s," with "[o]nly three sections of main channel remain soft-bottom" (TMDL Report, p. 5) (with Reaches 1 and 2 being entirely lined with concrete). The TMDL Report further acknowledges that, in fact, "access is prohibited to much of the Los Angeles River and the concrete-channelized areas of Tujunga, Verdugo, Burbank Western Channel, Arroyo Seco, and Rio Hondo." (TMDL Report, p. 15.) The mere designation of uses as "intermittent" uses in the Basin Plan is further recognition of the point.

To emphasize the problems with swimming in the LA River, the Regional Board itself has developed what it calls a "High Flow Suspension" Basin Plan Amendment, wherein it has suspended all REC-1 and 2 uses during any .5 inch storm event and for 24 hours thereafter. (*See* TMDL Report, p. 4.) The High Flow Suspension policy only reinforces the record that the alleged REC-1 and REC-2 uses of the LA River are not now, and have never been, "uses actually obtained in the water body." Accordingly, certain uses were improperly designated as "existing" and "intermittent" in the Basin Plan; thus, not only should the "potential" use designations within the Basin Plan be deleted, but these improperly designated "existing" and "intermittent" uses should similarly be reviewed and properly designated..

VII. THE BACTERIA TMDL IS NOT SUITABLE FOR CALCULATION, AND FAILS TO PROVIDE INCLUDE "TOTAL MAXIMUM *DAILY* LOADS"

A TMDL should be established only when the pollutant at issue is "suitable for such calculation," and where the load allocations can be established "at a level **necessary** to implement the applicable water quality standards." (33 U.S.C. § 1313(d)(1)(C) (emphasis added).) Based on a 1978 EPA-adopted Rule, a TMDL is "**suitable for calculation**" only under "**proper technical conditions**." (43 Fed. Reg. 60662; Exhibit "42;" (emphasis added).) "Proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (Exhibit "42" 43 Fed. Reg. 60662.) According to EPA in its *Guidance for Developing TMDLs in California*:

> An understanding of pollutant loading sources and the amounts and timing of pollutant discharges is vital to the development of effective TMDLs. . . . [P]ollutant sources or causes of the problem need to be documented based on studies, literature reviews or other sources of information. Because the source analysis provides the key basis for determining the levels of pollutant reductions needed to meet water quality standards, and the allowable assimilative capacity, TMDL, wasteload allocations, and load allocations, quantified source analyses are required. . . .

(Exhibit "27," EPA TMDL Guidance for California, p. 4; also see Exhibit "43," US EPA's "*The Twenty Needs Report: How Research Can Improve the TMDL Program,*" dated July, 2002, p. 7-8 [describing the needs relating to the "scientific bases for steps in TMDL establishment and implementation" and providing that the "quality of modeling is one of the essential factors determining the quality of nearly all TMDLs."].)

As discussed in the technical comments submitted to the Regional Board on the subject TMDL, the Bacteria TMDL and waste load allocations therein are not supported by the data, and are not scientifically supported by the evidence. In short, the Bacteria TMDL is not presently "suitable for calculation," for the following reasons:

(1) The level of regrowth and/or resuscitation of *E. Coli* in the various reaches of the LA River have not been analyzed. According to the TMDL Report itself, "regrowth or resuscitation in Reach 2 of the Los Angeles River during dry weather could not be ruled out." (TMDL Report, p. 30.) The TMDL Report further discusses a field study in Orange County which "concluded that bacteria were resuscitated to a degree after dry-weather runoff was UV-treated (County of Orange, 2004)" and that "resuscitation can occur after injury (but not death) by treatment or environmental stress." (*Id.*) The TMDL Report also acknowledges that "[l]aboratory studies under ideal conditions have highlighted the potential for post-disinfection resuscitation," and that regrowth in sediments "was considered to have moderate likelihood of being a significant component of in-channel *E. Coli* loading to Reach 2 by the BSI Study." (*Id.* at pp. 29-30.) As such, concerns of a regrowth and resuscitation in the LA River must be further evaluated, raising significant concerns that the billions of dollars of public funds that will be needed to attempt to reduce the loads of *E. Coli* into the LA River may be spent to no avail.

(2) Even after all the study conducted by CREST in connection with the dry weather TMDL, presently there is no known technical, let alone economical, means of achieving the Waste Load Allocation proposed for the Cities in the TMDL. Nor has there been even an attempt to analyze whether and to what extent, if any, the existence of bacteria in the LA River has any impact on the actual uses of the property surrounding the River, *e.g.*, walking, jogging or biking. In short, there is no data or any empirical evidence compiled to determine the allowable load of bacteria that may be discharged from City-storm drains to the LA River without adversely impacting the actual uses of the property adjacent to the flood control channel.

(3) In addition, no analysis has been conducted on how and to what extent reducing or eliminating the total load of bacteria entering the LA River from storm drains will ultimately have on the actual amount of bacteria that will exist in the River. Rather than conducting any analysis on the actual impact of reducing the bacteria loads entering the River through the storm drain system, the Regional Board appears to have simply conducted an analysis of whether swimming in water coming out of storm drains alone (without considering the quality of the water body itself) would be harmful to humans. No analysis has been conducted on the impact the reduction of the total load of bacteria coming out of the storm drains would actually have on the LA River. In fact, the lack of data on the actual ability of the River to support REC-1 uses, even if the MS4 waste load allocations were met, shows that the subject TMDL is not presently "suitable for calculation."

(4) In addition, no attempt has been made to establish a "daily" load of bacteria that may be discharged to the LA River from the Storm Drains; nor have any "daily" waste load allocations of "total" bacteria been established. Instead of developing a total "daily" load of bacteria to the LA River from storm drains, the TMDL wrongly sets forth total concentration-

based WLAs, based either on a daily or weekly sample, or a geometric mean, without even developing a total "daily" load of bacteria which a particular stormwater discharger may discharge to the River.

In an August 9, 2001 Ruling, EPA delayed implementation of a July 13, 2000 TMDL Rule because of concerns expressed by the regulated community that "**there is not enough data to support TMDLs, that some pollutants are not suitable for TMDL calculation, that the section 303(d) lists are not based on scientifically-defensible data, or that the delisting criteria are too inflexible.**" (66 Fed. Reg. 41817, 41819; (emphasis added.) Despite comprehensive efforts to address the problem and extensive public commentary on the issue, the unresolved concerns resulted in EPA again delaying (66 Fed. Reg. 41817, 41819), and ultimately abandoning altogether, its proposed Rule, with the EPA recognizing that the controversial regulations could not serve as an "efficient and effective TMDLs program without significant revisions." (68 Fed. Reg. 13609.)

Similarly, in *Friends of the Earth, Inc. v. Environmental Protection Agency* (D.C. Circuit 2006) 446 F.3d 140 ("*Friends of the Earth*"), the U.S. Court of Appeals for the District of Columbia found that if a total maximum daily load of a particular pollutant for a particular water body is not yet "suitable for calculation," it is not proper for EPA to adopt the TMDL. (*Id.* at 146 [invalidating "non-daily 'daily' loads" and recommending that EPA reconsider its position that "all pollutants . . . are suitable for the calculation of total maximum daily loads"].) There, because EPA conceded "that nothing forecloses the agency from reconsidering" its general position that "all pollutants" are suitable for the calculation of TMDLs, the Court held that "[g]iven that EPA's entire justification for establishing non-daily loads is **that certain pollutants are unsuitable for daily load limits, we are at a loss as to why it neglected this**

straightforward regulatory fix in favor of the tortured argument that 'daily' means something other than daily." (*Id.* at 146 (emphasis added).)

With the proposed Bacteria TMDL, the Regional Board has similarly failed to develop any "daily" loads of bacteria that may be discharged by a particular municipal discharger or group of dischargers. Instead, it has simply developed a concentration-based TMDL, based on the concentration of *E. Coli* that may exist in any particular bacteria sample, with the resulting waste load allocations not being based on any "total maximum *daily* load" of *E. Coli*, but instead on the number of days of exceedences of *E. Coli* density in a single day or week sample event, and with the TMDL allowing for no exceedences of the "geometric mean target" limit.

In short, the Bacteria TMDL, as proposed by the Regional Board, suffers from exactly the same deficiencies as the TMDLs that were of concern in the *Friends of the Earth.* Thus, for the same reasons the *Friends of the Earth* Court found that the TMDLs in that case to be deficient (EPA's failure to establish a *"daily"* load), the Bacteria TMDL in issue is similarly deficient. According to the Court in *Friends of the Earth*:

> Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." *See Webster's Third New International Dictionary* 570 (1993) (defining "daily" to mean "occurring or being made, done, or acted upon every day"). Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of "Give us this day our daily bread" as a prayer for substance on a seasonal or annual basis. *Matthew* 6:11 (King James).

(*Id.* at 144.) The Court also noted that: "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be a better policy.'" (*Id.* at 145.) Accordingly, the Court held as follows:

> To sum up, noting in this record tempts us to substitute EPA's policy preference for the CWA's plain language. While Congress

> almost assuredly never considered combined sewer systems when enacting the CWA, it spoke unambiguously in requiring daily loads. If adherence to this mandate leads to unintended consequences for water quality or for municipal pocketbooks, interested parties should direct their concerns to EPA or to Congress, either of which can take steps to mitigate any fallout from the CWA's unambiguous directive. We, however, have no such authority.

(*Id.* at 148.)

In a Memo issued to EPA's employees, EPA's Administrator stressed the need to rigorously adhere to sound science and the "rule of law," stating:

> **Science must be the backbone for EPA programs**. The public health and environmental laws that Congress has enacted depend on **rigorous adherence to the best available science**. . . . When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.
>
> The laws that Congress has written and directed EPA to implement leave room for policy judgments. However, **policy decisions should not be disguised as scientific findings**. I [the new EPA Administrator] pledge that I will **not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome**.

(Exhibit "44," Memo to EPA Employees, p. 1 (emphasis added).)

Because the proposed Bacteria TMDL is not supported by sound science, with there being (i) no analysis of "regrowth" or "resuscitation" of bacteria, (ii) no analysis of the actual ability of the LA River to support REC-1 uses, even if the assigned concentration-based WLAs are met for Stormwater, and (iii) no development of a total maximum *"daily"* waste load to allow for either swimming in the River or hiking, jogging or walking along portions of the property around the River, the TMDL has not been shown scientifically to be of value in achieving the bacteria objective, and clearly the TMDL is not "suitable for calculation" as required by the CWA (33 U.S.C. § 1313(d)(1)(C).) Its adoption at this time would be contrary to law.

VIII. THE BACTERIA TMDL IS CONTRARY TO LAW BECAUSE NO IMPLEMENTATION PLAN OR OTHER MEANS OF REDUCING NON-POINT SOURCES OF BACTERIA HAVE BEEN DEVELOPED FOR THE "LOAD ALLOCATIONS" ASSIGNED TO NON-POINT SOURCES, AND BECAUSE NOT ALL NON-POINT SOURCES OF BACTERIA HAVE EVEN BEEN IDENTIFIED

By definition, a TMDL includes the sum of the individual waste load allocations for point sources and load allocations "for nonpoint sources," plus natural background. (40 C.F.R. § 130.2(i).) Under the federal regulations, storm water discharges from sources that are not currently regulated by an NPDES permit are required to be addressed by the "load" allocation of a TMDL. (*See* 40 C.F.R. § 130.2(g) [Definition of Load Allocation ("LA")].) Further, according to EPA's November 22, 2002 Guidance Memo:

> Decisions about allocations of pollutant loads within a TMDL are driven by the quantity and quality of existing and readily available water data. . . . **Nevertheless, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated storm water discharges (in the form of WLAs) and unregulated storm water (in the form of LAs).** It may be reasonable to quantify the allocations through estimates or extrapolations, based either on knowledge of land use patterns and associated literature values for pollutant loadings or on actual, albeit limited, loading information.

(Exhibit "28" pp. 3-4 (emphasis added.)

Allocating a load allocation for nonpoint sources, and developing implementation measures to address nonpoint sources, is of particular importance given EPA's prior finding that: "54% of California's substandard rivers and waters are impaired by nonpoint sources," and "another 45% are impaired by combination of both point and nonpoint sources." (*See Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1338 (N.D. Cal. 2000).)

The proposed Bacteria TMDL contains little discussion of non-point sources of bacteria, such as natural loads or bacteria arising from unpermitted sources, such as school districts and State and federal facilities. In fact, the only actual data used to support the "natural source"

discussion in the TMDL Report, involves samples taken from the headwaters of Arroyo Seco (which drains a portion of the Angeles National Forest), with the Board recognizing in the TMDL Report that: "**This is the only available data for natural runoff specific to the Los Angeles River watershed.** The samples from the Arroyo Seco reference site exhibited a low rate of bacterial exceedence during dry-weather – as was also observed in other natural areas in the same study." (TMDL Report, p. 28.) Thus, the entirety of the scientific discussion concerning "natural sources" of bacteria is limited to a single study, and even worse, to dry weather alone.

The TMDL Report does includes a limited discussion of key significant "in channel sources," including groundwater discharges, homeless persons, direct illicit discharges, wildlife and birds, as well as regrowth and resuscitation. (TMDL Report, p. 28.) The discussion of the bacteria loads from groundwater and the homeless was dispensed with by a one-paragraph discussion on each, in the TMDL Report, with the conclusion being that groundwater was "not a significant in-channel" source of *E. Coli*, and that the homeless were not considered to be a "predominant in-channel" source. (*Id.*)

As to birds and wildlife, according to the TMDL Report, "Birds were commonly observed by field personnel in the Los Angeles River channel between 6th Street and Rosecrans Avenue, and were classified as potentially important in-channel sources of bacteria." (TMDL Report, p. 29.) Yet, the TMDL Report contains no discussion of how these "potentially important in-channel sources of bacteria" are to be addressed.

The discussion of regrowth/resuscitation is no more revealing on how these two non-point sources are to be addressed. As recognized in a field study conducted in Orange County (as referenced in the TMDL Report at p. 30) even after being UV-treated, bacteria in dry weather

runoff will resuscitate (*see* TMDL Report, p. 30). The only LA River specific report cited in the TMDL Report was the BSI Study, which the TMDL Report acknowledges was based on a "simple approach" "to determine whether or not regrowth in the water column could be ruled out as an important *E. Coli* source to Reach 2." The TMDL Report then concluded that: "Based on this comparison, regrowth or resuscitation in Reach 2 of the Los Angeles River during dry weather could not be ruled out. These results do not demonstrate that regrowth/resuscitation is occurring; instead, they highlight it as a potential source that could be further evaluated." (*Id.*) The discussion of regrowth/resuscitation is no more revealing on how these two non-point sources are to be addressed. (*Id.*)

Thus, although the TMDL Report recognizes that regrowth/resuscitation may be a significant problem, the scope of this problem has never been analyzed by the Regional Board; nor has the Board put forth any plan or even a general approach to address the non-point source problem of regrowth/resuscitation. The Regional Board's failure to even attempt to address the non-point sources of bacteria to the LA River will likely substantially undermine, if not entirely negate, whatever bacteria reductions are achieved by the Cities in attempting to comply with the subject TMDL.

In addition to failing to identify the extent of the potentially significant loads from natural sources, the Regional Board has also failed to prepare or even outline a non-point source implementation plan, thus significantly undermining the likelihood the objective of the TMDL will ever be achieved, *i.e.,* restoring the LA River to allow for swimming in the River.

The Regional Board's approval of a regulation of this magnitude, with such severe economic impacts, that is not "reasonably" or otherwise "achievable," without addressing

significant non-point sources of bacteria to the River, makes the proposed adoption of the TMDL entirely arbitrary, capricious and contrary to law.

IX. THE PROPOSED BACTERIA TMDL WAS NOT DEVELOPED IN CONSULTATION WITH LOCAL AGENCIES AS REQUIRED BY LAW

Pursuant to CWC section 13240, in the process of formulating a basin plan, "the Regional Boards **shall consult with and consider** the recommendations of affected state and local agencies." (CWC § 13240.) A similar obligation is imposed upon the State Board under CWC section 13144, whereby the California Legislature provided that during the process of formulating or revising state policy for water quality control, the State Board "**shall consult with and carefully evaluate** the recommendations of concerned federal, state and local agencies." (CWC § 13144.)

Further, under the CWA, the process of establishing BMPs and a program to control nonpoint source discharge is to include inter-governmental coordination and public participation to identify best management practices, as well as measures to control nonpoint sources so as "to reduce, to maximum extent practicable, the level of pollution resulting" from such nonpoint sources. (33 USC § 1329(a)(1)(C).) Similarly, EPA's TMDL Guidance for California provides: "EPA strongly encourages the State to develop detailed workplans to guide the technical analysis and stakeholders participation aspects of the TMDL **before** starting the TMDL." (*See* EPA's TMDL Guidance for California, Exhibit "27," p. 19.)

In EPA's Draft Handbook, EPA again recognizes that the process for developing TMDLs typically includes: "Stakeholder involvement and public participation to engage affected parties and solicit input, feedback and buy-in for a successful TMDL. This process can occur throughout the TMDL development (and implementation) process." (Exhibit "31," Draft Handbook, p. 5.)

Finally, in the EPA Administrator's recent memo to all EPA Employees, the importance of public trust and connecting with local agencies in meeting their environmental responsibilities is expressly called out:

> Public trust in the Agency **demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively,** and that we further disclose the information that forms the basis for our decisions. . . . **We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including, . . . small business, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.**

(Exhibit "44," Memo to EPA Employees, p. 2; (emphasis added).)

With the Bacteria TMDL in issue, although the TMDL Report acknowledges the TMDL is partially based on work conducted by the "Cleaner Rivers Through Effective Stakeholder-Led TMDLs" (CREST), a stakeholder-led effort initiated by the City of Los Angeles "for the purpose of developing TMDLs to restore and protect water quality in the Los Angeles River," the TMDL fails to recognize that the CREST effort was limited solely to the development of a dry weather TMDL for Bacteria for the LA River. No effort has been made to date by CREST, nor by any other stakeholder in the Region, to develop a Bacteria TMDL for wet weather for the LA River. Nor was there any consultation with the impacted local governments on the development of a wet weather TMDL prior to the issuance of the subject TMDL. Further, even CREST's work on the dry weather component of a Bacteria TMDL, remains unfinished.

Moreover, the impacted municipalities are not aware of any means of actually achieving the wet weather portion of the TMDL, and even with respect to the dry weather portion, they do not believe that compliance is "reasonably achievable." The Cities also do not believe that the

"in-stream" bacteria objective within the LA River can ever be reached, and nothing in the record shows that the in-stream bacteria objective is achievable.

Given the magnitude of the economic, physical and environmental impacts of the Proposed TMDL, and the admittedly limited data upon which it was based, as well as the many technical problems with the TMDL (*see* Technical Comments of Dr. Susan Paulsen to the Bacteria TMDL), the Regional Board has failed to meet its obligation to coordinate the development of the Bacteria TMDLs with local agencies, and specifically the impacted Cities.

X. THE MONITORING PROVISIONS IN THE BACTERIA TMDL ARE CONTRARY TO LAW BECAUSE NO COST BENEFIT ANALYSIS HAS BEEN CONDUCTED, AS REQUIRED BY CWC §§ 13165, 13225(C) AND 13267

The California Legislature has mandated that the Boards conduct a cost-benefit analysis before imposing monitoring and reporting obligations, provide a written explanation for the need for the reports, and identify the evidence that supports requiring the provision of the reports. CWC section 13267, entitled "Investigation of Water Quality; Report; Inspection of Facilities," provides in relevant part, as follows:

> (a) A regional board, in establishing and reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
>
> (b) (1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this State . . . that could affect the quality of waters within its region shall furnish, under penalty of perjury, **technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.** In requiring those reports, the regional board **shall provide the person with a written explanation** with regard to the need for the reports, and

> **shall identify the evidence** that supports requiring that person to provide the reports.

(CWC § 13267 (emphasis added).) In addition to section 13267, CWC section 13225(c) mandates that the Regional Board similarly conduct a cost/benefit analysis if it requires **a local agency** to investigate and report on technical factors involved with water quality. Section 13225(c) of the Water Code requires that each regional board, with respect to its region, shall:

> (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; **provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom**.

(CWC section 13225(c) (emphasis added); *see also* Water Code § 13165 [imposing this same requirement on the State Board where it requires a "local agency" to "investigate and report on any technical factors involved in water quality control; **provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom**"].)

According to the proposed Amendment to the Bacteria TMDL: "Monitoring shall be conducted by the responsible MS4 Permittees. Monitoring entails compliance monitoring to assess attainment of WLAs and monitoring in support of Load Reductions Strategies and wet weather implementation plans." (Tentative Basin Plan Amendment, p. 8.) The TMDL Report further confirms that "a monitoring program is necessary to determine compliance with the TMDL and to assess attainment of beneficial uses," with the TMDL Report setting forth required "compliance monitoring," as well as "monitoring in support of load reduction strategies in Wet-Weather Implementation Plans." (TMDL Report, pp. 72-74.) However, all such monitoring and reporting requirements imposed by the TMDL can only be imposed upon the Cities where a cost/benefit analysis has been conducted, *i.e.*, where the burden, including the costs of these

monitoring and reporting obligations, have been shown to bear a reasonable relationship to the need for the reports, and the benefits to be obtained from such reports. A **written explanation** is also required with regard to the need for the reports, and **specific evidence** must be identified that supports requiring the Cities to provide these reports. (CWC § 13267(b).)

Because no cost benefit analysis has been conducted anywhere in the TMDL documentation, as required by CWC sections 13267, 13225 and 13165, adoption of the proposed Bacteria TMDL is action that would be arbitrary and capricious and action that is contrary to law.

XI. THE PROPOSED BACTERIA TMDL, IF ADOPTED, WOULD BE A VIOLATION OF THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT

The California Administrative Procedures Act (the "APA"), Government Code sections 11340 *et seq.*, is intended to advance meaningful public participation in the adoption of administrative regulations by state agencies, and to create an administrative record assuring effective judicial review. (*Pulaski v. Cal. OSHA* (1999) 75 Cal.App.4th 1315.) The APA establishes minimum procedural requirements for the adoption and repeal of administrative regulations, and it is designed to give "interested parties an opportunity to present statements and arguments . . . and calls upon the agency to consider all relevant matter presented to it." (*Id.*)

In Executive Order S-2-03 issued by the Governor of the State of California in November of 2003, the Governor characterized California's Administrative Procedures Act as requiring "that all adopted regulations be **easily understandable**, the least burdensome and effective alternative, be consistent with underlying legislative authority and **minimize the economic impact** to the regulated communities." (*See* State of California Executive Order S-2-03, Exhibit "45," p.1; emph. added.)

Under Government Code section 11349.1, any regulation to be adopted by the State must comply with the following standards: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. (Gov. Code § 11349.1.) The primary APA deficiencies with the proposed Bacteria TMDL concern its lack of "necessity" and "clarity."

To begin with, the TMDL is not "necessary" as it is not required to be adopted under any Consent Decree, as suggested by the Regional Board; nor is it otherwise required to be adopted by any State or federal law. As discussed above, in defending a prior State-developed TMDL for the LA River, the Boards' counsel conceded that: "No authority exists to compel the Water Boards to establish a TMDL." (Exhibit "24," p. 10.) Moreover, as acknowledged by the Regional Board itself in its TMDL documentation, if the State and Regional Boards do not adopt the proposed TMDL, EPA may ultimately itself adopt the TMDL because of the existing Consent Decree. However, neither of the Water Boards are parties to the Consent Decree, and under the Consent Decree, even EPA need not adopt a TMDL if the Basin Plan has been modified such that the TMDL is no longer appropriate. (*See* Exhibit "46," EPA Consent Decree, p. 11, ¶ 8, ["EPA is under no obligation to establish TMDLs for any pairing of a WQLS and a pollutant that EPA determines for purposes of this Decree only, . . . does not require a TMDL."].)

In this case, the TMDL is being proposed exclusively to allow for human water-contact recreational use. Yet, because these water contact uses of the River were not uses "actually obtained in the water body on or after November 28, 1975" (*see* 40 CFR § 131.1(e)), the proposed Bacteria TMDL regulation is not "necessary." Instead of adopting the proposed TMDL, the State and Regional Boards should alternatively evaluate the propriety of the REC-1

and REC-2 use designations, to determine whether these uses are uses "actually obtained in the water body on or after November 28, 1975."

In addition, the proposed Bacteria TMDL is contrary to the requirements of the APA because it lacks the "clarity" demanded by the California Legislature in an administrative regulation. Specifically, the proposed TMDL is ambiguous, given the confusion created by the competing deadlines as to when a city must comply. The TMDL provides varying deadlines for various segments of the River, *e.g.,* "18 years after effective date of the TMDL" for Segment B (Tentative Basin Plan Amendment, p. 14), and a deadline for "all Los Angeles River Segments and Tributaries" of "25 years after effective date of the TMDL." (*Id.* at 18.) Thus it is unclear how the "25 year deadline" would apply, for example, for any of the municipalities, other than for those that fall within Segment C in the TMDL, which is the only segment that contains an outside deadline as late as "25 years." Ambiguity exists because it is unclear whether the "25 year deadline" on page 18 of the Tentative Amendment applies to "all Los Angeles River Segments and Tributaries" or just to Segment C. And, if it applies to all, what is the significance of the other more restrictive deadlines for the various segments? If it applies to just Segment C, what is the purpose of the general "25 year deadline"?

In addition, the TMDL is ambiguous and lacks the clarity required by the APA in its description of the "allowable number of exceedence days" for High-Flow Suspension Water Bodies. Although the TMDL Report discusses the High-Flow Suspension policy for certain water bodies for wet weather, indicating that "26 days are excluded from the calculation, since the REC-1 use does not apply on these days in these reaches and tributaries" (TMDL Report, p. 42), the Tentative Basin Plan Amendment does not reference these 26 days of suspension, but instead seems to imply that the "High-Flow Suspension Water Bodies Wet-Weather" allowable

exceedances for daily sampling would be a total of "10," as compared to a total of "15" for Non-High Flow Suspension Water Bodies during wet weather. Moreover, the allowable number of exceedances for weekly sampling for all water bodies during wet weather remains at two for both Non-High Flow Suspension Water Bodies and High-Flow Suspension Water Bodies, and there is no explanation as to how the High-Flow Suspension Policy would even apply when only weekly sampling is being conducted.

Finally, although there is a fair amount of discussion, both in the Tentative Basin Plan Amendment and in the TMDL Report, as to the "load reduction strategy" or "LRS," a strategy which was developed by CREST for dry weather discharges, the proposed TMDL is ambiguous as to how the LRS would apply, or would in any way be effective, for wet weather discharges.

Accordingly, the proposed TMDL regulation lacks the clarity required by the APA, and its adoption at this time would be arbitrary, capricious and contrary to law.

XII. THE PROPOSED BACTERIA TMDL, ONCE EFFECTIVE AND ENFORCEABLE, WOULD RESULT IN AN UNFUNDED STATE MANDATE, IN VIOLATION OF THE CALIFORNIA CONSTITUTION

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides in relevant part as follows:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service. . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it

"**was intended to preclude the state from shifting financial responsibility to local entities that were ill equipped to handle the task.**" (*Id.*)

As noted, the costs to implement the TMDLs will be enormous. Despite the massive compliance and implementation costs, there are **no** provisions within the TMDL that provide any funds or funding mechanisms for the Cities throughout the Basin to comply with the mandated bacteria targets imposed by the TMDL.

Due to the numerous unfunded mandates imposed on the Cities through added responsibilities to be included within their NPDES permits (*see* Tentative Basin Plan Amendment, pp. 6-7), and through other responsibilities to be added to regulate all non-point source dischargers within their respective jurisdictions, the TMDLs, without a funding source, are unfunded mandates that violate Article XIII B, Section 6 of the California Constitution. (*County of Fresno*, 53 Cal.3d at 486; *see also Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1570.)

The unlawful unfunded mandates imposed by the TMDL are underscored by Proposition 218's severe limitations on a City's ability to impose fees upon residents as a means to alleviate the enormous compliance costs imposed. (*Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App.4th 1351, 1353-1354, 1358-59.) There, the Court struck down the City of Salinas' "Storm Water Management Utility Fee" because it was not enacted by a required majority vote of affected property owners. (*Id.*)

Proposition 218 shares identical purposes with Proposition 4, which resulted in the constitutional amendment prohibiting unfunded mandates in 1979, *i.e.*, to provide permanent protection for taxpayers from excessive taxation and to provide discipline in tax spending at both State and local levels. (*See County of Fresno*, 53 Cal.3d at 486.) The Regional Board's attempt

to transfer these mandates down to municipalities, which in turn necessarily must attempt to recoup their costs from taxpayers, violates the California Constitution.

Moreover, it is evident from the TMDL itself that although the Cities may only legally be regulated by the subject TMDL through NPDES permits for point source discharges from their MS4s, the TMDL imposes upon the Cities the obligation of complying with the TMDL for **all non-point source dischargers to the River, since the TMDL sets forth no implementation measures for the Boards to achieve objectives for these nonpoint sources of bacteria.** As such, the TMDL is indirectly imposing a responsibility on the Cities to reduce the discharge of pollutants from non-point source dischargers, an obligation that remains an obligation of the State of California, and one that cannot legally be imposed on municipalities without further State or federal statutory authority.

Because the regulations to the CWA specifically require the Boards to identify implementation measures necessary to carry out any proposed amendment to the Basin Plan, "including financing," and to consider the "financial capability" of the Cities, and because no such financing has been identified or financial capability considered, the requirements of the CWA have not been complied with. (40 C.F.R. § 130.6(c)(5) & (6).)

Moreover, as discussed at length above, for municipal NPDES Permits, federal law clearly does not require that numeric limits within TMDLs be included in such permits as "never to be exceeded" numeric effluent limits. Instead, as reflected in EPA's November 2, 2002 Guidance Memo, as well as State Board Order after State Board Order, municipalities need only control the discharge of pollutants from their storm drain systems in accordance with the "maximum extent practicable" ("MEP") standard. (*See* 33 U.S.C. § 1342(p((3)(B).) Yet, the Tentative Basin Plan Amendment provides that "for each discharger assigned a WLA, the

appropriate Regional Board Order shall be reopened or amended when the Order is re-issued, in accordance with applicable laws, **to incorporate the applicable WLA as a Permit requirement."** (Tentative Basin Plan Amendment, p. 6.)

The Regional Board's desire to impose the WLA as a "Permit requirement" within a municipal NPDES Permit, is action that is not mandated by federal law, and thus constitutes an unfunded State mandate upon the municipalities, requiring funding under the California Constitution. Without the State first providing sufficient funding, the proposed mandate (the Bacteria TMDL) will become unenforceable.

XIII. THE SUBSTITUTE DOCUMENTS VIOLATE THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Cities urge the Board to substantially revise the Substitute Environmental Document ("SED") prepared for the project. As explained below, the SED is flawed in a number of ways and fails to satisfy the requirements of CEQA (Pub. Resources Code, §§ 21000 *et seq.*) and the CEQA Guidelines (14 Cal. Code Regs. §§ 15000 *et seq.*). By providing these comments, the Cities intend to foster a productive dialogue with the Board so that the environmental issues of pressing concern to the Cities and the public at large are fully addressed.

The following comments detail the Cities' general and specific concerns about problems raised by the project and the SED. When responding to these comments, the Regional Board must describe the disposition of the significant environmental issues raised and provide "good faith reasoned analysis." (*See* 14 Cal. Code Regs. § 15088(c); *see also Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1359-1360.)

A. THE SED'S ALTERNATIVES ANALYSIS IS FATALLY DEFECTIVE

1. The SED Fails to Establish Project Objectives and Unlawfully Confuses the Concept of "Alternatives to the Project" with the Concept of "Alternative Methods of Compliance With the TMDL"

The purpose of an environmental impact report ("EIR") is to give the public and governmental decision makers the information needed to make informed decisions, thus protecting not only the environment, but also informed self-government. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) That same rationale applies to the SED here. (*Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1420-1422.)

CEQA requires that an EIR, in addition to analyzing the environmental effects of a project, also consider and analyze project alternatives that would reduce adverse impacts. The process of selecting the alternatives to be included in the EIR begins with the establishment of project objectives. "A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings. . . . The statement of objectives should include the underlying purpose of the project." (*Id.*, 1163, quoting 14 Cal. Code Regs. § 15124(b) (emphasis added).)

Although the SED includes a general statement of the ultimate purpose of the project – to adopt a TMDL to restore the water contact recreational uses to the LA River Watershed – it does not include a clearly written statement of project objectives, which is a separate, more detailed requirement than the statement regarding the purpose of the project.

This defect has led to a flaw in the fundamental approach to the "alternatives analyses." An "alternatives analysis" and the application of "mitigation measures" are two separate means of identifying ways to avoid the potential environmental impacts of a project. The SED, however, improperly treats mitigation measures and alternatives analyses as overlapping

approaches to mitigation. Thus, while the SED acknowledges impacts to several resource areas, the "alternatives" in the SED were clearly not selected in a manner calculated to address those potentially significant environmental impacts.

Indeed, the methodology for selecting potential alternatives is not clearly defined at all in the SED. Because the SED fails to include an alternatives analysis designed to address the potentially significant environmental impacts of the project, the SED fails to evaluate a "reasonable range of alternatives," and therefore is legally flawed. Consequently, the process of selecting the alternatives to be included in the SED has been irreparably impacted, which is evident in the deficient alternatives analysis included in the SED. The SED must be revised to include "project" alternatives designed to reduce identified environmental impacts from the project.

The SED process followed for selecting alternatives to the project is further legally flawed by the fact that the SED frequently, but incorrectly, assumes that it is complying with the obligation to analyze alternatives to the "project" (the TMDL), by purportedly analyzing alternative "methods of compliance" with the TMDL. Under both CEQA and the Board's certified regulatory program, the SED must analyze alternatives to the project to minimize any potentially significant adverse impacts of the project. (Pub. Res. Code §§ 21002 [EIR must evaluate alternatives to proposed project], 21080.5(d)(3)(A) [regulatory program must include alternatives "to the activity"]; 14 Cal. Code Regs. § 15126.6(a) [EIR shall describe a range of reasonable alternatives to the project]; 23 Cal. Code Regs. §§ 3777(a)(2) [environmental review under regulatory program must include alternatives "to the proposed activity"], 3780 [board shall not approve an activity if there are feasible alternatives to the activity that would lessen any significant impacts of the activity].)

In addition to evaluating alternatives to the project, Public Resources Code section 21159(a)(3) requires that the SED also evaluate the reasonably foreseeable "alternative methods of compliance" with the TMDL. The SED conflates the two concepts of alternatives analysis, and thus fails to include either a legally adequate alternative "project" analysis, or a legally sufficient alternatives analysis of the "methods of compliance" with the TMDL. For example, the SED erroneously (and misleadingly) states that the Cities "may use this SED to assist in the selection and approval of project alternatives," and that "Section 5 [of the SED] summarizes the components that comprise the project alternatives analyzed." (SED, 2 (emphasis added).) Both of those statements, however, refer not to alternatives to the project, but to alternative "methods of compliance" with the TMDL. By attempting to analyze alternative *methods of compliance* with the TMDL, the SED does not fulfill its obligation under CEQA to analyze alternatives *to the project.*

2. The SED Fails to Analyze a Reasonable Range of Legitimate Project Alternatives

a. The *Goleta II* Criteria

Under CEQA, the SED must evaluate a reasonable range of alternatives to the proposed activity being considered by the Board, here the Bacteria TMDL. (14 Cal. Code Regs. § 15126.6 (a).) This requirement applies even where, as here, the environmental documents are prepared under a certified regulatory program. If the documents do not contain a discussion of legitimate alternatives, including a "no project" alternative, the documentation is deficient. (*Arcadia v. State Board, supra,* 135 Cal.App.4th at 1422; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1404.)

The alternatives selected must meet certain criteria to be considered legitimate alternatives. In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 ("*Goleta II*"), the California Supreme Court held that to satisfy CEQA, the alternatives considered in an EIR must meet two requirements: (i) They must potentially offer substantial environmental advantages over the project proposed; and (ii) they must be potentially capable of being feasibly accomplished in a successful manner considering the economic, environmental, social, and technological factors involved. (*Id.* at 566.) As stated in CEQA's Guidelines: "The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project." (14 Cal. Code Regs. § 15126.6(f) (emph. added).)

The whole purpose of an alternatives analysis is to discuss project alternatives that could meet most of the project's objectives at a lower environmental cost. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406.) The SED's failure to discuss a reasonable range of potentially feasible alternatives, with potentially substantial environmental advantages over the project, contravenes CEQA's purpose of ensuring that public agencies regulate activities that affect environmental quality so as to give major consideration to preventing environmental damage, and thus violates CEQA. (Pub. Res. Code §§ 21000 (g); 21001 (g); 21002.)

Although the SED purports to examine three alternatives to the project, that analysis is misleading and incomplete. In actuality, the SED fails to analyze even one legitimate project alternative.

b. The SED Does Not Analyze Three Alternatives As Alleged

First, the SED misleadingly represents that it analyzes three project alternatives. (SED, 9.) Such statement is false on its face because included within the three purported "alternatives"

is the proposed project, itself. (*Id.*) The proposed project cannot be an alternative to itself. (Pub. Res. Code § 21100(b)(4) [EIR must review alternatives "to the proposed project"].)

c. The "No Project" Alternative is Not a Legitimate Alternative

Second, of the two purported "alternatives" that were actually included, the "no project" alternative cannot be considered within a reasonable range of project alternatives because, as framed in the SED, it would not accomplish the most basic objectives of the project. (14 Cal. Code Regs. § 15126.6(c) [the range of potential alternatives to the proposed project "shall include those that could feasibly accomplish most of the basic objectives of the project. . . ."].) As the SED itself provides, the "no project" alternative "is not a feasible alternative." (SED, 11.) This "no project" alternative is included not because it offers "substantial environmental advantages" over the project proposed or is "feasible," but only because, under CEQA, an EIR's discussion of alternatives must include a "no project" alternative. (14 Cal. Code Regs. § 15126.6(e)(1).) Because the "no project" alternative does not satisfy either of the criteria of *Goleta II*, its inclusion in the SED does not satisfy the requirement of disclosing a reasonable range of potentially feasible project alternatives.

Moreover, the SED's analysis of the "no project" alternative does not comply with CEQA because it assumes the existing environment would be maintained if the project were not approved. (SED, 10-11.) That assumption is inaccurate, as the SED acknowledges. (SED, 11.) In circumstances like these, CEQA requires that the "no project" analysis identify the "practical result" of the project's non-approval. (14 Cal. Code Regs. § 15126.6(e)(3)(B) ["where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment"] (emphasis added).) The SED does not analyze the "practical result" of non-

approval, and thus, is legally flawed. For example, the SED assumes for the "no project" alternative that although the Cities could implement new BMPs if the project were not approved, the Cities would not do so. (SED, 10-11.) The SED provides no explanation of why that would be the case and cites to no evidence to support its supposition. In fact, the Cities have suggested several other means of addressing bacteria in the River in lieu of the proposed project. (*See* letters submitted during the scoping process and others submitted by various Cities in response to the SED, which Comments are incorporated herein by this reference.) It is not unreasonable to expect that these alternative methods of treatment would occur were the project not approved.

Nor does the "no project" alternative make any mention of the numerous ongoing efforts at restoration of the Los Angeles River by the U.S. Army Corps of Engineers, the City of Los Angeles Bureau of Engineering, and the Los Angeles Department of Water and Power, all of which efforts are designed to enhance and expand on River revitalization. For example, in 2007 the City of Los Angeles adopted the Los Angeles River Revitalization Master Plan ("LARRMP") to serve as a blueprint for implementing a variety of greening projects along the 32-mile stretch of the River within the City of Los Angeles. The Final Programmatic Environmental Impact Report/Programmatic Environmental Impact Statement Findings and Statement of Overriding Considerations for that project ("FPEIR/PEIS") points out that:

"[T]he theme of revitalization of the Los Angeles River is also a prominent theme in other current environmental planning projects. This is especially true for the County of Los Angeles' LA River Master Plan, prepared in 1996. Although the LARRMP is designed to enhance and expand upon the river revitalization goals and objectives inherent in the County's LA River Master Plan, even without the LARRMP, some of the river revitalization themes common to both plans would likely be realized under the County Master Plan, as well as the

ongoing habitat restoration efforts of the Army Corps of Engineers in conjunction with the City of Los Angeles Bureau of Engineering and the Los Angeles Department of Water and Power." (Exhibit "47," LARRMP's FPEIR/PEIS, 15 (emphasis added).)

Significantly, the LARRMP's FPEIR/PEIS further states that its plan "of treating stormwater runoff with bioswales and bio-filtration areas would help the City and County meet TMDL . . . and other NPDES . . . requirements." (*Id.*, 20 (emph. added).) Moreover, several of the specific areas along the River that are evaluated in the LARRMP's FPEIR/PEIS "already have initiatives in progress to begin to transform the Los Angeles River." (*Id.*, 16.)

All of the ongoing programs designed to enhance and expand on River revitalization should be discussed as part of the "no project" alternative, as it is reasonably foreseeable that these projects would continue in their revitalization efforts without the proposed project. Failure to discuss these programs misleads the public and the decision makers about the true environmental cost of proceeding with the proposed project.

Finally, the SED suggests that because the "no project" alternative "is contrary to state and federal law" (SED 11), the failure to approve this particular TMDL would result in the adoption of a Bacteria TMDL by the US EPA (SED, 7). The US EPA TMDL is the only other alternative mentioned in the SED. Thus, the "no project" alternative, in effect, is the same as the US EPA TMDL. This means that the SED actually considered only one alternative.

d. The US EPA TMDL Alternative is Not a Legitimate Alternative

As for that one "alternative," *i.e.*, the US EPA TMDL, it similarly cannot be considered within a reasonable range of project alternatives because if, as the SED erroneously speculates, a US EPA TMDL must be fully implemented in less than five years, it also would not meet *Goleta II*'s requirement that a legitimate alternative offer substantial environmental advantages over the

project proposed. Indeed, the SED expressly asserts that the environmental impacts of this alternative would be "of greater severity [than the proposed project] given the increased intensity of implementation actions with[in] the shorter time frame." (SED, 11.) Thus, the US EPA TMDL alternative would not satisfy CEQA's requirements because it would not be "capable of avoiding or substantially lessening any significant effects of the proposed project," as legitimate alternatives are required to do. (14 Cal. Code Regs. § 15126.6(b).)

Consequently, it is beyond dispute that the SED fails to analyze even one alternative that meets the requirements of CEQA. At the risk of stating the obvious, zero alternatives is not a reasonable range of alternatives.[5] Thus, the SED's alternatives analysis does not produce information sufficient to permit a reasonable choice and plainly violates the rule of reason. (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029.) *Goleta II* stands for the proposition that where no alternative meeting the *Goleta II* reasonable range parameters is reviewed in-depth in an EIR, or in this case an SED (*see Arcadia v. State Board, supra,* 135 Cal.App.4th at 1422), the lead agency abuses its discretion in certifying such a document.

To compound the inadequacy of the alternatives analysis, the SED is misleading regarding the US EPA TMDL's actual effects. As it does with the "no project" alternative (by failing to discuss "what would reasonably be expected to occur in the foreseeable future if the project were not approved" (14 Cal. Code Regs. § 15126.6(e)(2), (3)), the SED mischaracterizes the US EPA TMDL alternative by making a series of unexplained and sometimes inaccurate assumptions. For example, the SED assumes, without analysis or quantification, that the technical portions and the waste load allocations of a US EPA TMDL would be essentially the

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[5] The word "range" refers to "a sequence, series, or scale between limits . . . [*e.g.*] a range of

same as those of the proposed project. (SED, 10.) The SED further assumes, again without analysis or quantification, that if US EPA adopts a Bacteria TMDL, "the WLAs will be implemented through NPDES permit limits as the permits are renewed without consideration of a compliance schedule." Thus, all municipalities "will be required to be in full compliance immediately following the TMDL adoption by US EPA, or within five years." (SED, 10.) Based on these unfounded assumptions, the SED concludes the environmental impacts of the US EPA TMDL would be "of greater severity" than those of the proposed project because of the abbreviated compliance schedule. (SED, 11.)

The SED's assumptions and conclusions about a US EPA TMDL are not supported by substantial evidence. Indeed, because a TMDL is not self-executing and only becomes enforceable after being incorporated into an NPDES permit (*see Arcadia v. U.S. EPA* (N.D. Cal 2003) 265 F.Supp.2d 1142, 1148), nothing would preclude the State of California from adopting its own implementation plan in connection with a US EPA TMDL, either through a new Basin Plan Amendment, or through an implementation plan developed in accordance with a re-issued or amended NPDES Permit or Permits. Thus, with a US EPA TMDL, the Water Boards could adopt an implementation plan similar to the 25-year schedule set forth in the proposed project, or an even longer implementation plan. Moreover, the Boards could require compliance with US EPA's TMDL through iterative MEP-compliant BMPs. For example, the Metals TMDL for the San Gabriel River was adopted by US EPA in 2007. Yet, three years later, no Municipal NPDES Permit for the Region has been re-issued or amended to require any implementation of this Metals TMDL. And, as admitted by the State and Regional Boards' counsel in connection with the Trash TMDL for the Los Angeles River, "we can't guess, as staff, what the Regional Board

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possible solutions. . . ." (Webster's New Internat. Dict. (3d ed. 1971), 1880.)

is going to do on that project." (Exhibit "25," p. 25.) The same would be true were US EPA to adopt a Bacteria TMDL for the Los Angeles River. The SED's unsubstantiated mischaracterization of the US EPA TMDL, which mischaracterization is the very ground stated for its rejection, forecloses an accurate evaluation of its environmental impacts.

Because the SED fails to evaluate any alternative that potentially offers substantial environmental advantages over the project proposed and that is potentially capable of being feasibly accomplished in a successful manner, the Board and the public are precluded from accurately identifying whether any alternative would substantially lessen the significant environmental effects of the proposed project. Consequently, the SED does not comply with CEQA. (*See* Pub. Res. Code § 21102.)

e. An Example of an Alternative Project Analysis That Should Have been Conducted in the SED

The deficiencies of the SED's alternatives analysis is starkly revealed by comparing it to the analysis undertaken in *In re Bay-Delta, supra,* 43 Cal.4th 1143. There, a program EIS/EIR was prepared for a long-term plan to restore the Bay-Delta's ecological health and to improve water management. A series of public workshops was held for over a year just to define the Bay-Delta's problems and to develop a range of potential alternative solutions. (*Id.*, 1157.)

Four primary objectives were then developed, and six solution principles were adopted to provide a measure of acceptability of alternatives. (*Id.*, 1158.) Initially, fifty categories of potential action, including hundreds of individual actions within these categories, were identified to achieve the project's objectives, and these action categories became the building blocks of the alternatives; *i.e.*, each alternative was a combination of action categories reflecting different approaches to achieving program objectives. The agency then narrowed the alternatives by defining approaches to resolve critical conflicts among the beneficial users of the water. (*Id.*)

The process, which took over five years to complete, yielded 32 approaches and 100 alternatives that were later reduced to 10. Then, after several more public meetings, the draft program EIS/EIR was finally released, which evaluated the proposed project and twelve variations of three basic alternatives, as well as a "no action" alternative. (*Id.*, 1158.) Fifteen public workshops were held on the draft PEIS/EIR; the Final PEIS/EIR was not certified until 2½ years later. (*Id.*, 1160.) Even then, the court of appeal invalidated the PEIS/EIR based, in part, on a deficient alternatives analysis. Ultimately, the Supreme Court reversed that ruling based on the thorough analysis which had been undertaken by the agency as described above.

No such thorough alternative project analysis was undertaken for the proposed Bacteria TMDL. While the program EIS/EIR in *In re Bay-Delta* clearly defined project objectives, which helped the agency in ultimately selecting three legitimate alternatives with twelve variations of each, plus a "no action" alternative, here the SED does not clearly define project objectives, and only one project "alternative" has been cursorily analyzed, *i.e.*, the US EPA TMDL, which, as discussed above, is one and the same as the "no project" alternative. And, neither of those so-called "alternatives" constitutes a legitimate alternative under CEQA for the reasons set forth above. The deficiencies with the SED's alternatives analysis are clear, and unless corrected, the Regional Board's certification of the SED and approval of the subject TMDL would be an abuse of discretion and action contrary to law.

3. The SED Fails to Provide an Adequate Review of the Alternatives it Does Evaluate

CEQA also requires that the alternatives selected for an EIR be reviewed in-depth. (*Goleta II*, 52 Cal.3d at 569; 14 Cal. Code Regs. § 15126.6(f) [legitimate alternatives must be examined "in detail" and "discussed in a manner to foster meaningful public participation and

informed decision making"].§ 15126.6(d) ["EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project".)

The SED does not contain the "in depth" alternatives analysis required under CEQA. Thus, the EPA TMDL and "no project" alternatives discussion violates CEQA because the discussion is extremely cursory and unsupported by the record. Indeed, the SED devotes a scant three pages to the entire alternatives analysis. (SED, 9-11.) No evaluation is undertaken of the alternatives' impacts in each of the resource areas as compared to the project's alleged impacts in those areas, and the conclusory statements in the SED are unsupported by any quantitative or comparative analysis. At a minimum, a matrix displaying the major characteristics and significant environmental effects of each alternative in each of the resource areas should have been included to summarize the comparison of the project and the alternatives, as recommended by 14 California Code of Regulations section 15126.6(d). By offering no "factual informational underpinning" (*Laurel Heights Improvement Assn., supra,* 47 Cal.3d at 403) for its boilerplate conclusions or quantitative data for its bald characterizations, the SED offers no useful or reliable bases for comparisons.

The SED's failure in this regard underscores the more basic failure of the SED to select alternatives that meet the *Goleta II* criteria – since the alternatives offer no potentially substantial environmental advantages over the project, the SED apparently assumes there is little point in evaluating them.

4. The SED Fails to Explain Why It Selected and Rejected Alternatives and Fails to Identify an Environmentally Superior Alternative

The SED's alternatives analysis also violates CEQA because it:

(i) fails to disclose its reasoning for selecting the alternatives it chose, which it is required to do under 14 California Code of Regulations section 15126.6(a), (c);

(ii) fails to identify the alternatives, other than a "partial" TMDL, that were considered and explain why they were rejected, which it is required to do under 14 California Code of Regulations section 15126.6(c)); and

(iii) fails to identify an environmentally superior alternative, which is required under 14 California Code of Regulations section 15126.6(e)(2)).

5. The SED Does Not Comply With 14 Cal. Code Regs. Section 15123

The discussion of alternatives in the SED also fails to meet the requirements of 14 California Code of Regulations section 15123. That CEQA Guideline requires that the SED's summary identify: each significant effect with proposed mitigation measures and alternatives that would reduce or avoid that effect. The SED acknowledges several potentially significant effects, but makes absolutely no effort to identify, on an impact-by-impact basis, how any alternative would better address environmental impacts. The failure to conduct this analysis reveals a disturbing lack of effort at identifying feasible alternatives. Equally important, the plain requirements of 14 California Code of Regulations section 15123(b)(1) have not been met. The SED simply has not identified how each alternative would reduce each significant effect, if at all. The SED is accordingly legally defective and its certification would be an abuse of discretion and action contrary to law.

6. Other Feasible Alternatives Are Not Analyzed

Other potentially feasible alternatives that offer substantial environmental advantages over the proposed project do exist. Thus, it is surprising that the SED fails to evaluate even a single alternative that satisfies the requirements of CEQA. Although it is the Board's duty to formulate alternatives for inclusion in the SED, the SED fails to do so even though several alternatives are readily apparent. For example:

(1) Revised Beneficial Use Designations Alternative. The SED should evaluate a TMDL alternative that is based on first reviewing and revising the Standards in the Basin Plan (hereafter, the "Revised Beneficial Use Designations Alternative"). Specifically, the Water Boards have discretion to develop the various Standards set forth in the Basin Plan, Standards that are then used to formulate TMDLs, such as the proposed Bacteria TMDL. As discussed above, pursuant to Water Code sections 13000 and 13241, a number of factors and policies are to be taken into consideration when Standards are developed and applied to dischargers, and once adopted, those Standards are to be evaluated every three years (a "triennial review" process). An alternative to the proposed TMDL project would be to review the existing Standards in the Basin Plan, and particularly the propriety of the beneficial use designations therein, so that only those uses "actually attained" in the Los Angeles River "on or after November 28, 1975," are designated as the "beneficial uses" for the River. Revising the Standards to only protect "uses actually attained" in the LA River, particularly for the wholly concrete-lined portions of the River (such as Reaches 1 and 2) would then result in either a much more limited TMDL project, thereby greatly reducing the environmental impacts from its implementation, or potentially even obviating the need for a TMDL for bacteria for most of the River. Thus, one alternative to the proposed TMDL project would be to (i) revise the designated "beneficial uses" in the Basin Plan so that only "uses actually attained" in the River "on or after November 28, 1975" (40 CFR § 131.1(e)) are the designated beneficial uses for the River; and (ii) to then base the Bacteria TMDL on the new, properly designated, beneficial uses. The TMDL project would then only be developed based on water quality objectives designed to protect those "uses actually attained on or after November 28, 1975." (*See, e.g.,* CWC § 13241, allowing for modifications to water quality objectives, so long as such modifications do not "unreasonably affect[] beneficial uses.")

Because the Rec-1 and Rec-2 uses have never been "actually attained" in the concrete-lined portions of the River (such as Reaches 1 and 2) "on or after November 28, 1975," this alternative to the proposed TMDL project must be evaluated.

(2) Review Standards Applied to Stormwater Discharges. The SED should evaluate a TMDL alternative that requires compliance with Judge Colaw's Decision, Judgment, and Writ of Mandate issued in the *Arcadia* Case (*see* Exhibit "1" hereto) before developing a Bacteria TMDL for the River. Under this alternative, the Board would conduct a review of the Basin Plan, delete the "potential" use designations, and determine the propriety of the Standards pursuant to Water Code sections 13241/13000 in light of the application of the Standards to Stormwater. This alternative would result in a broader review and set of revisions to the Basin Plan than the Revised Beneficial Use Designations Alternative discussed above, as it would entail a review of the Standards for all water bodies within the Region as they are applied to Stormwater discharges.

(3) Lower Los Angeles River Water Conservation Plan. The SED should evaluate a TMDL alternative that is based on a Water Conservation BMP Plan, where instead of focusing on the levels of bacteria in Stormwater, the Cities would focus their efforts on better conserving dry weather runoff by diverting it to settling areas, spreading grounds, and detention basins, or potentially two new small treatment plants to be constructed for dry weather. This conservation plan would then indirectly limit the amount of bacteria entering the River through the storm drain systems. A pilot program and regrowth study could also be conducted to determine the impacts on the water levels in the River from diverting or otherwise treating Stormwater discharges to the River.

(4) Lengthier Implementation Schedule. The SED should evaluate a TMDL alternative that contains a lengthier implementation schedule, *e.g.,* 35 years, given the Regional Board's Staff admission that a longer schedule will result in less severe environmental impacts.

(5) MEP-Compliant BMP Iterative Approach. The SED should evaluate a TMDL alternative that uses a maximum extent practicable ("MEP")-compliant BMP iterative approach, rather than being based on strict compliance with numeric limits. No explanation is provided as to why this approach was not evaluated. The TMDL could provide a menu of BMPs to implement over 25 years in "high priority" outfalls, and the Cities would be "in compliance" as long as they were monitoring conditions and following an iterative MEP-compliant BMP approach. An alternative that evaluates a less aggressive approach would inform the decision makers and the public of the environmental price that will be paid if the proposed project, with its highly aggressive reduction requirements, is approved. The SED concedes that a higher (less intense) numeric target would have fewer environmental impacts, but rejects such a concept under the theory that it would constitute a "partial" TMDL that would not meet water quality standards as required by the Clean Water Act. (SED, 9.) Yet, there is no evidence that "zero" geometric mean exceedance days for bacteria is the only target that would preclude a nuisance or avoid adversely affecting properly designated beneficial uses of the River.

Because alternative targets are not evaluated, stakeholders (the decision makers, the Cities, and the public) have no way of knowing whether such an alternative would be effective, while causing fewer environmental impacts. Rather than arbitrarily selecting a zero geometric mean target or an overly restrictive allowable exceedance-days limit, both of which are unreasonable on their face (with an estimated price tag of over $5 billion), the SED needs to investigate and determine, based on quantifiable factors, what threshold concentrations of

bacteria would actually cause a nuisance or adversely affect the beneficial uses of the River. The Board and the public would then be apprised of whether the requirements of the Clean Water Act could be achieved at a lower environmental cost.

(6) Dry Weather Only TMDL. The SED should evaluate a TMDL alternative that focuses on dry weather only, and that is based on the alternatives for implementation presented in the Cleaner Rivers Through Effective Stakeholder-led TMDLs ("CREST") Implementation Plan that include longer implementation schedules (31 years), and the Traditional Approach, the Outfall-Based Load Reduction Strategy, and the Downstream Load Reduction Strategy for dry weather only. No data has yet been developed by CREST for wet weather, and thus a TMDL for wet weather is not reasonably or economically feasible at this time, and nor is it suitable for calculation.

(7) Indicator Bacteria Standards Based on Controllable Water Quality Factors. The SED should evaluate a TMDL alternative that sets indicator bacteria Standards that are based on controllable water quality factors (*i.e.*, Standards that focus on the elimination of human sources of bacteria) only, *e.g.* the recently adopted State Sanitary Sewer Overflow program.

(8) In-City BMPs. The SED should evaluate a TMDL alternative that focuses on "in-city" BMPs in lieu of requiring participation in a regional low-flow diversion project.

(9) Phased-In TMDL. The SED should evaluate a TMDL alternative that is based on a phased-in TMDL, with WLAs that are contingent on the conducing of additional studies to determine the effectiveness of specific implementation measures.

(10) Watershed TMDL. The SED should evaluate a "watershed TMDL alternative;" *i.e.*, it should evaluate the implementation of all of the required TMDLs for the River (metals, trash, bacteria, nitrogen, etc.) as a single project. Such an alternative might well avoid some of

the problems that will likely result from implementing the TMDLs *seriatim*, such as where the implementation of a set of controls for one TMDL could be altered or negated by the next TMDL in line or could exacerbate conditions for a future TMDL (*e.g.*, installing wetlands to control metals, only to violate future bacteria standards). The Board has previously conceded that the various TMDLs will impact each other. (*See* SED for Metals TMDL for the Los Angeles River, 235 [the SED acknowledges that the placement of structural BMPs for the Metals TMDL, such as infiltration trenches or filters, in series with the systems being installed to meet the Trash TMDL, could result in more efficient operations and less maintenance in connection with those filters, which in turn would result in fewer, or less severe, environmental impacts].) Consequently, because such an alternative could substantially lessen the significant environmental impacts of the proposed project, it should be evaluated in the SED. The failure to evaluate the implementation of all of the required TMDLs for the River (metals, trash, bacteria, nitrogen, etc.) as a single project also results in an unlawful segmentation, or piecemealing, of the project, as explained below.

For all of the reasons discussed herein, the Board must revise and recirculate the SED for the project. In its current state, the SED is profoundly flawed, both legally and factually. And, those flaws prohibit either the public or the Board from conducting an independent and informed analysis of the project, which is CEQA's core purpose. When revised analyses are performed, they will likely reveal additional significant impacts and other significant new information, requiring re-circulation. (*See* Pub. Resources Code § 21092.1; CEQA Guidelines § 15088.5; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112.) The revised environmental document must be subjected to the same "critical evaluation that occurs in the draft stage," so that the public is not denied "an opportunity to test, assess and evaluate the

data and make an informed judgment as to the validity of the conclusions to be drawn therefrom." (*Sutter Sensible Planning, Inc. v. Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822; *see also Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 131.)

B. THE SED FAILS TO EVALUATE AND MITIGATE FLOODING, HOUSING, AND GOVERNMENTAL SERVICES IMPACTS FROM THE TMDL PROJECT

The SED also fails to evaluate certain potential impacts of the project, including possible flooding in the watershed area due to the diversion of wet weather runoff. The primary methods of compliance with the Bacteria TMDL under the project are diversion and treatment. As the Sanitation Districts of Los Angeles County have made clear, however, they lack treatment capacity for the diverted flows so that even dry weather flows would likely be available at off-peak hours only, which would necessitate building storage tanks or mini-treatment plants along the River, a major additional expense. (Exhibit 49," Los Angeles River Watershed Management Committee Scoping Letter, p. 2; Exhibit "49," Sanitation Districts of Los Angeles County scoping e-mail, p. 1.) "Under no circumstances will the Sanitation Districts accept wet weather diversions." (*Id.*) Thus, rain water would be diverted away from the River by the project, contrary to the design and operation of the River as a flood control channel, which diversion would potentially create major flooding problems in the area adjacent to the River. This flooding threat could be even more severe in light of scientific predictions regarding the effects of climate change. Whereas the River has been constructed as a flood control channel *to which Stormwater is to be directed*, the project stands this concept on its head by calling for the *diversion of Stormwater away from the River* in what can only be described as Quixotian scheme to make the

River swimmable.[6] Pertinent to the project's perversion of the original purpose of the River is the point made in a recent Federal Interagency Floodplain Management Task Force document: "Floods are an act of God; flood damages result from acts of men." (*See* Exhibit "50," Galloway, *50 Years of Floodplain Management: Concepts & Actions*, May 10, 2010, p. 5.)

The potential flooding impacts of the project are significant, and include disruption of transportation infrastructures and other critical services. (*See* Exhibit "51," Knight, *FEMA*, Federal Interagency Floodplain Management Task Force, May 10, 2010, pp. 2-6.) As recognized by FEMA, the cost of disaster assistance for uninsured flood losses cost the Nation billions of dollars each year, and "Environmental Recovery Costs are often overlooked following floods." (*Id.*, pp. 8-9.) In an especially ironic twist, the SED for the project, which is intended to *lower* bacteria counts in the flood control channel, fails to even address the fact that the cost of flooding includes the prevention and treatment of *flood-borne diseases*. (*Id.*, p. 7.) None of these potential flooding impacts are evaluated in the SED.

Diversion also has the potential to cause displacement of existing housing and the elimination of potential housing sites near the River due to (i) flooding issues; (ii) the need to locate wetlands, settling areas, spreading grounds, detention basins, storage tanks, or mini-treatment plants near the River; and (iii) the need to construct new water lines and treatment plants to address the bacteria issues. These potential impacts have not been evaluated.

Moreover, the impacts of the project on the provision of government services have not been adequately evaluated. As set forth in Exhibit "20," local government agencies within the watershed area do not have sufficient resources to fund the construction of the facilities

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[6] That is, the project isolates facts of experience and accepts only those facts that support the premise that the River can be made swimmable, while discarding facts that call that premise into question.

necessary to comply with the project (with costs estimated at over $5 Billion), and consequently the project will necessarily result in a diversion of funds from other governmental services, such as police, fire, capital improvements, etc. (Exhibit "20," *Review of the Socio-Economic Environmental Justice Factors of the Bacteria TMDL for the Los Angeles River,* June 3, 2010.) The project will also necessitate an increase in expenditures for sanitary services. These potential governmental services impacts have not been evaluated.

Because none of these impacts have been adequately evaluated, none of the potential ways to mitigate these impacts have been identified. CEQA's purposes are clearly not served with the subject SED.

C. THE SED FAILS TO EVALUATE THE PROJECT'S IMPACTS ON GREENHOUSE GASES

In 2006, the California State Legislature adopted AB 32, the California Global Warming Solutions Act of 2006. As a general matter, AB 32 requires the California Air Resources Board, the State agency charged with regulating statewide air quality, to adopt rules and regulations that would achieve greenhouse gas ("GHG") emissions equivalent to statewide levels in 1990 by 2020. Consistent with the public policy rationale underlying AB 32, the SED must fully analyze the project's impacts on greenhouse gas emissions. The project's contribution of these emissions should be evaluated, and impacts and mitigation measures should be analyzed, as the proposed project may contribute to global climate change. (*See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89-96 [the Legislature has expressly acknowledged that greenhouse gases have a significant environmental effect].)

The SED fails in its analysis in that it does not quantify the total GHG emissions from the project; *i.e.*, it does not disclose the calculations necessary to determine how much extra carbon dioxide equivalencies would be emitted as a result of the project. Rather, it looks at only the

emissions from "diversion and treatment" (SED, 59-60), but fails to adequately explain in any detail how those calculations came about. What emission factors, fuels, source data, etc. were used? Without disclosure of the calculations and factors utilized in the calculations, it is impossible to evaluate the accuracy of the numerical estimates. Thus, the SED fails to (i) adequately inventory greenhouse gas emissions from the project, or (ii) identify potential reduction opportunities.

Moreover, the SED underestimates GHG emissions from the project because it does not provide the quantification of GHG emissions for any other alternative methods of complying with the TMDL or their cumulative impacts, and does not quantify emissions from pumping, construction, or vehicles. Nor does the SED set forth what threshold of significance it uses or provide the underlying calculations for the quantification it does provide. Thus, there is no way to verify the conclusions in the SED regarding GHG emissions or potential climate change impacts of the project. For example, how many treatment plants will be necessary, what are the energy requirements of these plants, and what are the likely sources of this energy. None of these questions have even been attempted to be addressed, and the SED is wholly deficient in its discussion of GHG Emissions.

D. THE MITIGATION MEASURES' DISCUSSION IN THE SED IS DEFICIENT

Throughout the SED, it is represented that certain mitigation measures can reduce potential project impacts to "less than significant." However, no performance goals are identified anywhere in the SED or its attachments. Such performance goals and the monitoring and remediation measures that will be ongoing to ensure project impacts meet those performance goals are required under CEQA. Absent this information, there is no verifiable means to confirm whether the SED's environmental conclusions are accurate. Methods for achieving the

performance goals must be integrated into the SED as mitigation measures, because the success of those remediation efforts are part-and-parcel of the assumptions underlying the SED's conclusions regarding environmental impacts.

The SED provides that the TMDL will rely on a menu of best management practices. Without knowing which of those practices will likely ultimately be implemented, *i.e.,* without assessing the environmental impacts from reasonably foreseeable implementation measures, and without providing any mechanism to monitor the implementation of those practices, there is no device in place to either verify the environmental conclusions in the SED, or to ensure that those forecasted conclusions will come to fruition. The SED is thus deficient for this reason as well.

The SED must provide language that ensures implementation of mitigation efforts so as to ensure that mitigation actually occurs. The details of those efforts must be described in the SED, or specific performance standards must be included to ensure that mitigation works as advertised. (See, e.g., *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793-796; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) It is unfortunate and disappointing that a mitigation program has not been included within the SED.

By deferring presentation of that information to the public, the opportunity to assure that the mitigation monitoring and reporting program has sufficient devices in it to ensure implementation of all mitigation measures over time, is lost. This is of critical importance because the project is scheduled to proceed over the course of 25 years. Over that period of time it will be important that a stable, reliable, actively enforced set of enforcement mechanisms are in place. From the mitigation information provided in the SED, it appears that the goals have not

been satisfied despite the mandate of 14 California Code of Regulations section 15126.4(a)(2). (*See also* 14 Cal. Code Regs. § 15126.4(a)(1)(A).)

E. THE SED FAILS TO IDENTIFY AND EVALUATE CUMULATIVE IMPACTS OF THE PROJECT

An EIR must evaluate both project-specific and cumulative impacts for significance. There are two methods for satisfying the cumulative impacts analysis requirement: The list-of-projects approach and the summary-of-projections approach. (14 Cal. Code Regs. § 15130 (b).) Under either method, the EIR must summarize the expected environmental effects of the project and related projects, provide an analysis of cumulative impacts, and examine options for mitigating the project's contribution to any significant cumulative impacts.

The SED's cumulative impacts analysis does none of these things. Although it purports to analyze certain resource areas, it does so entirely in a cursory fashion in a single page. (SED, 115.) Not only does the SED ignore several of the resource areas, but it also fails to disclose just what other projects may be contributing to cumulative impacts; indeed, the SED even fails to disclose upon which method of analysis (the list-of-projects approach or the summary-of-projections approach) it is purportedly based. Nor does the SED even consider the impacts of the other TMDLs for the Los Angeles River that may make the incremental impacts of the project cumulatively considerable. (*See* Pub. Res. Code § 21083(b); 14 Cal. Code Regs. § 15065(c).) These fatal flaws render the SED defective under CEQA. (*Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 406-411.)

F. THE SED FAILS TO ANALYZE SPECIFIC SITES

Public Resources Code section 21159(c) and 14 California Code of Regulations section 15187(d) mandate that the SED take into account "specific sites," and the SED apparently recognizes this obligation by labeling Chapter 5 as "Implementation Alternatives and site

specific analysis." (SED, 12.) Unfortunately, the chapter discusses only implementation alternatives without discussing any specific sites. In contrast, the LARRMP's FPEIR/PEIS sets forth five specific site analyses that it evaluates as "Opportunity Areas" in many of the environmental resource areas throughout the document (including Canoga Park, River Glen, Taylor Yard, Chinatown-Cornfields, and Downtown Industrial). (*See, e.g.*, Exhibit "47," LARRMP's FPEIR/PEIS, 8-13, 22, 25, 29.) Thus, it is clearly feasible to perform this analysis in a programmatic document, and it should have been done in the SED as mandated by CEQA. (PRC § 21159(c).)

G. THE SED DOES NOT INCLUDE REQUIRED INFORMATION

14 California Code of Regulations section 15120(c) mandates that the SED include certain information, such as a separate "summary" section that identifies each significant effect of the project with proposed mitigation measures, areas of controversy known to the Board, including issues raised by agencies and the public, and issues to be resolved, including the choice among alternatives and whether or how to mitigate the significant effects. (14 Cal. Code Regs. § 15123.) Typically, much of this information is provided in the Executive Summary, setting forth in table form (i) the proposed project's potential impacts, (ii) their level of significance, (iii) the mitigation measures proposed to address the impacts, and (iv) the level of significance of each impact after mitigation. This information was not set forth in the SED as required.

CEQA also requires that energy conservations measures, including those in CEQA Guidelines Appendix F, be discussed. (14 Cal. Code Regs. § 15126.4(a)(1)(C).) This has not been done.

Also, the potential Environmental Justice impacts, general population and housing impacts, and S. B. 375 impacts and related issues potentially caused by the project have not been analyzed. (*See* Exhibit "20," *Review of the Socio-Economic Environmental Justice Factors of*

the Bacteria TMDL for the Los Angeles River, June 3, 2010, for a more comprehensive discussion of the socio-economic impacts of the project.)

H. THE SED UNLAWFULLY SEGMENTS THE PROJECT IN VIOLATION OF CEQA

For purposes of CEQA coverage, a "project" is defined as comprising "the whole of an action" that has the potential of resulting in either a direct, or reasonably foreseeable indirect, physical change in the environment. (14 Cal. Code Regs. § 15378 (a).) An agency must describe a project in a manner that will encompass the entire activity's potential impacts, and may not avoid preparing comprehensive environmental documents by segmenting a project into stages of approval, focusing on isolated parts; *i.e.*, an agency may not chop a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure. (14 Cal. Code Regs. § 15003 (h); *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.) The SED violates CEQA by engaging in just this sort of segmentation of the project.

First, the lack of specificity in the mitigation measures discussed in the SED amounts to an illegal segmentation of the project because, by deferring until the project level stage any review of the problems associated with the acknowledged environmental impacts that will result from the project, the SED illegally truncates the project and treats those various impacts as separate, independent projects. (See *Inyo County v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193 ["A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and the public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR"].)

Second, the SED and TMDL Report indicate the project is necessary because of the Consent Decree. Aside from the fallacy that the Consent Decree imposes any obligation on the Regional or State Board, under the Consent Decree the "project" should be the establishment of a series of TMDLs for the Los Angeles River and other impaired waters in the Basin. However, instead of evaluating the whole series of TMDLs together, or even the series of TMDLs for the Los Angeles River alone, the Board has separated each TMDL into an individual project, thus focusing on the constituent parts of the real project, minimizing the real project's environmental impacts, and avoiding full environmental disclosure. Indeed, other SEDs for other TMDLs have conceded that the implementation of the various TMDLs for the Los Angeles River watershed impact one another and their effectiveness. (*See, e.g.*, the Trash TMDL SED, 235.) The SED should evaluate the environmental impacts of developing all the TMDLs at the same time.

I. THE FINDINGS AND EVIDENCE ARE DEFICIENT

The findings of the Tentative Resolution do not support the decision, and the evidence in the record does not support the findings. When an EIR identifies potentially significant environmental impacts from the project, such as here, the agency must make specific findings for each impact as follows: That changes have been required in the project that will avoid or substantially lessen the impacts; that impacts are within the jurisdiction of another agency and the lead agency does not have concurrent jurisdiction to impose the suggested mitigation measures; or that specific economic, social, or other conditions render identified mitigation measures or project alternatives infeasible. (Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15091.) Moreover, the agency must make findings concerning the project alternatives unless it finds that all of the project's significant impacts will be avoided or substantially lessened by mitigation measures. The Resolution is deficient in this respect because it fails to make any of these findings.

Similarly, the draft Statement of Overriding Considerations is deficient. Although the SED concludes that the project may result in significant environmental impacts, it concludes that the project has "overriding considerations" that outweigh the project's significant impacts. Thus, it inappropriately predetermines that the undisclosed, unknown, and perhaps unmitigable adverse impacts are outweighed by the necessity of implementing this particular Bacteria TMDL. This determination is unsupported and uninformed by substantial evidence, and thus the analytic route of the Board is not disclosed, because the extent of the impacts has not even been evaluated by the Board (*e.g.*, there is no hint as to why a different bacteria reduction schedule would not achieve most of the project's objectives at a fraction of the environmental cost).

A Statement of Overriding Considerations cannot properly be made unless the potentially significant adverse impacts have been fully identified and analyzed and a conclusion has been reached that they are significant and cannot be mitigated. Further, such a conclusion cannot be reached until the significant impacts have been analyzed in comparison to the benefits that will result from the project. (14 Cal. Code Regs. § 15043.) No such analysis is conducted within the SED.

Moreover, the Statement improperly preempts the decisions of local agencies, which as the lead agencies on the implementation decisions, are the appropriate bodies to determine whether the impacts of a particular implementation method are overridden by project benefits.

J. CONCLUSIONS ON CEQA ANALYSIS

In short, the SED is fatally flawed and must be substantially revised and recirculated before adoption of the TMDL because it fails to evaluate a reasonable range of alternatives that meets the requirements of CEQA; it provides an inadequate analysis of the alternatives it does include, while mischaracterizing them; it fails to explain why it chose or rejected alternatives, and fails to set forth a potentially environmentally superior alternative; it fails to analyze the

cumulative impacts of the project; it fails to evaluate the project's impacts on flooding, housing, governmental services, or greenhouse gases and global warming; and it unlawfully segments the project. Moreover, the SED, draft Resolution, and draft statement of overriding considerations are deficient because they fail to include adequate findings and the findings they do include are erroneous and not supported by substantial evidence.

XIV. CONCLUSION.

The proposed Bacteria TMDL for the LA River, a river that is "unlike any other river" because it has been "so greatly altered it is now sometimes maligned as mere 'concrete ditch,'" contains an estimated price tag of $5.4 billion. The TMDL presumes that the benefit to the public from this $5.4 billion is that the public will be free from exposure to bacteria when swimming in this concrete-lined flood control channel. Of course, the TMDL addresses neither the physical challenges of swimming in a steep, fenced-off and concrete-lined channel, nor the legal impediments of doing so – *i.e.,* swimming or otherwise entering the channel is illegal for much of the River. (*See* Exhibit "52," DVD of Tonight Show Skit of Conan O'Brien's attempt at canoeing in the LA River.) Adoption of the subject TMDL, as proposed, would thus be nothing short of irresponsible public policy and arbitrary action by the Regional Board.

State and federal law demand that instead of proceeding with an inordinately expensive, unachievable and irresponsible regulation, that the Regional Board re-evaluate the underpinnings of the proposed TMDL and correct the improperly designated "beneficial uses" for the LA River to reflect the "actual uses attained in the water body." Reason, public policy, and the law also dictate that the Decision, Judgment and Writ of Mandate in the *Arcadia* Case be complied with **before** this TMDL is adopted.

At some point before its adoption, either in the course of evaluating the propriety of the "use" designations, complying with the *Arcadia* Case Judgment and Writ of Mandate, or in

conducting the CWC section 13000/13241 analysis of the TMDL itself, the **"environmental characteristics"** of the LA River **must** be taken into consideration, and the Board must address whether the TMDL is "reasonably" and "economical" achievable, and what its impacts will be on "housing within the region." It must also only develop a TMDL that is based on maximum "daily" loads, and only after it is "suitable for calculation."

Further, any TMDL ultimately adopted, should, at a minimum, reflect the fact that the waste load allocations therein are **not** to be strictly applied as numeric effluent limits to municipalities, and that only MEP-compliant iterative BMPs need to be utilized. Moreover, the requirements of the California Administrative Procedures Act must be adhered to, and any mandates imposed upon the municipalities that go beyond the requirements of the Clean Water Act, must be funded as required by the California Constitution. Finally, as discussed at length above, the SED is not in compliance with the many requirements of the California Environmental Quality Act, and cannot be adopted until such requirements have been met.

The Cities respectfully request that the subject TMDL not be adopted until the numerous legal and technical deficiencies with its terms have been fully addressed.

Respectfully submitted,

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Dated: June 4, 2010

Richard Montevideo