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VIA EMAIL (santaana@waterboards.ca.gov)

Kurt Berchtold
Executive Officer
C/O Adam Fischer
Environmental Scientist
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Re: Comments on Draft Orange County MS4 Permit, Tentative Order No. R8-2014-0002

Dear Mr. Fischer:

Best Best & Krieger represents City of Santa Ana ("City") in matters involving water quality. The City submits the following comments on the Draft Orange County Municipal Separate Storm Sewer System ("MS4") Permit, Order No. R8-2014-0002 ("Draft Permit"). The City is committed to improving and sustaining water quality in the Santa Ana and San Diego Creek Watersheds and has undertaken extensive efforts to further these goals. The City is aware that the County of Orange has prepared and submitted comments on the Draft Permit. The City would like to express its support for the County's comment letter and to join with the County in the submission of those comments. The comments in this letter supplement the County's letter and are intended to allow the City and other Co-permittees to continue working toward the common goal of improving water quality in the region.

1. THE DRAFT PERMIT NEEDS TO GIVE THE CITY FLEXIBILITY TO UNDERTAKE ACTIVITIES CURRENTLY REQUIRED OF THE PRINCIPLE PERMITTEE

The City requests that the Draft Permit be revised to include language clarifying that a Co-permittee may elect to undertake activities directly affecting the Co-permittee, which the County, as Principal Permittee, is currently required to undertake. For example, the Draft Permit requires the County to write a training curriculum on the City's enforcement tools (Draft Permit,

§ XVI.B), to establish thresholds for what constitutes "unusually large quantities of pollutants" (Draft Permit, § XIV.C.4)[1], and to conduct certain monitoring activities on behalf of the City (Draft Permit, MRP). The Co-permittees, rather than the County, may be better situated to undertake these or similar activities currently assigned to the County. The City therefore requests that the Draft Permit be revised to allow the City to undertake such activities either in conjunction with the County or on its own.

2. THE CITY REQUESTS THAT THE DRAFT PERMIT BE REVISED TO REMOVE REQUIREMENTS THAT FORCE THE CITY TO ADDRESS ISSUES THAT ARE OUTSIDE OF ITS PHYSICAL AND LEGAL JURISDICTION.

A. A Co-permittee cannot be liable or responsible for permit conditions for which it is not the operator

The City objects to the Draft Permit to the extent it creates or impliedly relies on a system of joint and several liability that contradicts the Clean Water Act and Porter-Cologne. Both the Clean Water Act and Porter-Cologne hold dischargers responsible only for those pollutants that discharge from their point sources. (33 U.S.C. §§ 1311, 1319, 1342, subd. (p)(3)(B) and 1362, subd. (12); Water Code §§ 13350, subd. (a), 13263, subd. (f) and 13376.)[2] The Clean Water Act's definition of "Co-permittee" is a permittee who "is only responsible for permit conditions relating to the discharge for which it is operator." (40 C.F.R. § 122.26, subd. (b)(1).) Although storm water permits may be issued on a system – or jurisdiction – wide basis, a Co-permittee need only comply with permit conditions relating to discharges from the MS4 which it is operating. (33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(3)(vi); *So. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (2004) 541. U.S. 95, 105; *Jones v. E.R. Shell Contractor, Inc.* (N.D. Ga. 2004) 333 F.Supp.2d 1344; *In re City of Irving, Texas, Mun. Separate Storm Sewer Sys.* (EPA July 16, 2001) 10 E.A.D. 11; 40 C.F.R. §§ 122.26, subd. (a)(3)(vi).)

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[1] The City does not waive the objection to the inclusion of this term as set forth in the County's comment letter. The City submits these comments in the event this term is included in the final permit contrary to the County's comments.

[2] The City acknowledges that EPA and others believe that the watershed approach would result in better water quality results. (*See, e.g.,* EPA's Watershed-Based NPDES Permitting Policy Statement dated January 7, 2003 and the conclusions of the National Research Council's 2009 Report on Urban Stormwater Management in the United States [concluding that the "course of action most likely to check and reverse degradation of the nation's aquatic resources would be to base all stormwater and other wastewater discharge permits on watershed boundaries instead of political boundaries."].) However, structural changes in the Clean Water Act and the laws of authorized states are required to implement such a watershed permitting approach. (*See, e.g.,* National Research Council Report, p 524 [noting that the "national watershed-based approach to stormwater is likely to require legislative amendments . . . ."].) In the absence of such structural changes, the Clean Water Act must be applied as currently written, and as currently written, its focus is on jurisdictional boundaries.

Porter-Cologne has a similar focus on individual discharges. (Water Code, § 13260.) For example, Porter-Cologne makes watershed planning an option that Co-permittees may pursue, not a mandatory requirement with which Co-permittees must comply. (Water Code, §§ 16101, subd. (a), 13263, 13350, subd. (a).) The purpose of such voluntary watershed planning is to allow permittees to implement existing and future water quality requirements and regulations on a watershed rather than a jurisdictional level. (*Id.*) If the Regional Board incorporates watershed planning into the waste discharge requirements issued to a permittee, the implementation of the plan by the permittee may represent compliance with waste discharge requirements. (Water Code, § 16102 subd. (d) and (c).) Thus, the voluntary watershed approach of Water Code section 16100 *et seq.* allows permittees to *elect* the pursue a watershed approach and *offers* the permittee a compliance option as an incentive to move from a jurisdictional approach to a watershed approach. Porter-Cologne does not require a Co-permittee to expend resources to address discharges beyond its jurisdiction. (40 C.F.R. § 122.26, subd. (b)(1).)

B. State and Federal Law do not permit the Draft Permit's creation of joint and several liability

Mandatory watershed requirements which are not linked directly to pollutants discharged to or from a Co-permittee's MS4 are contrary to the plain meaning of the Clean Water Act. Such requirements are also beyond the responsibility of that Co-permittee and should be removed from the Draft Permit. The Draft Permit's Receiving Waters Limitations, Total Maximum Daily Load ("TMDL") Implementation requirements, and Monitoring and Reporting Program ("MRP") include multiple requirements for joint efforts by the City, without regard to the City's jurisdictional boundaries. (Draft Permit, § IV, XIII, MRP.) For example, the Draft Permit creates a system of joint and several liability by requiring "Co-permittees [to] implement BMPs to achieve the Waste Load Allocations ("WLAs") specified in Appendices B through H of this Order."[3] (Draft Permit, § XVIII.A.) Under this provision, the City would be unable to establish compliance with its WLAs unless it is complying with its own WLAs and it can show that all other dischargers are also in full compliance with their WLAs. If only one Co-permittee fails to implement BMPs to achieve WLAs, all Co-permittees may be held liable for a resulting water quality exceedance contrary to the Clean Water Act and Porter-Cologne.

Co-permittees may develop and implement a plan to comply with WLAs and where an execcedance is measured, revise the TMDL WLA compliance plan. (Draft Permit, § XVIII.C.5.) Under this draft requirement, any time an exceedance is measured in a receiving water, the Co-permittees must participate in revising the compliance plan, even if all Co-permittees have complied with their WLAs and with the approved TMDL WLA compliance plan. (Draft Permit, § XVIII.C.5.) If a Co-permittee other than the City violates the TMDL WLA compliance plan

[3] Other Permit sections impose joint liability, including: MRP sections II.A.2; II.B.3; II.C.1.a; II.C.5; II.D.1; II.H; II.I; II.J.

and causes an exceedance, and that Co-permittee refuses to act, the City would not be able to comply with the Draft Permit's TMDL requirements. In that instance, the City could be held liable for failure to amend, revise, or comply with a TMDL WLA compliance plan, as required in the Draft Permit, even though the City fully complied with requirements applicable to the City. Such a result is unjust and contrary to the Clean Water Act and Porter-Cologne.

The Regional Board has no authority to impose such liability on the City. (40 C.F.R. § 122.26, subd. (b)(1); *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28; *In re Alvin Bacharach and Barbara Borsuk* (Order No. WQ 91-07, SWRCB 1991.) Any permit conditions that impose responsibility or liability for discharges or other Draft Permit violations that are not caused by the Co-permittee being held responsible or liable exceed the Regional Board's authority and must be removed from the permit. The City also seeks clarification incorporated into the Draft Permit that the Draft Permit does not intend to hold the City liable or responsible for permit conditions which do not relate to a discharge for which it is operator.

3. THE CITY REQUESTS THAT DRAFT PERMIT SECTION XII'S NEW DEVELOPMENT AND REDEVELOPMENT REQUIREMENTS BE REVISED TO INCORPORATE THE CITY'S EXISTING PROGRAM

A. Co-permittees' existing new and redevelopment program adequately regulates pollutants in storm water and the Draft Permit should not require any changes to the program.

The City and the other Co-permittees have expended great resources to develop a program for implementing new and redevelopment standards consistent with the current MS4 Permit. There is no reason that this program should be changed. The Draft Permit and its Technical Report do not include any evidence demonstrating that a change to the existing program is necessary or better for the environment. For this reason, the City requests that the Permit be revised to allow the existing program to continue.

Additionally, the City objects to the New Development and Redevelopment regulations in the Draft Permit on the grounds that they improperly regulate the discharge of storm water as a surrogate for the regulation of pollutants. (Draft Permit, § XII.) For this reason, the new development and redevelopment standards should be removed from the Draft Permit or be modified to incorporate the City's existing requirements.

B. The Draft Permit regulates storm water as a surrogate for pollutants

While stating that Co-permittees "must require priority projects to use source control, site design, and structural treatment control BMPs to remove pollutants in urban runoff[,]" the Draft Permit actually regulates storm water flows rather than pollutants. Draft Permit sections XII.A.1.c and XII.D mandate the methods by which Co-Permittees must minimize the quantity of "urban runoff" draining directly to impermeable surfaces and MS4s by establishing, in part, BMP requirements for all priority projects as defined in the Draft Permit. Priority projects include areas of new development and redevelopment. (Draft Permit, § XII.B.5.) The primary methods for attaining these goals is through the use of infiltration, evaporation, evapotranspiration, rainwater harvesting and use, green or brown roofs, and other low impact development ("LID") methods. (Draft Permit, §§ XII.A.1.c, e.) Urban runoff is defined as:

> [A]ll flows in a storm water conveyance system from urban areas which include residential, commercial, industrial, and construction areas. Urban runoff consists of the following components: (1) storm water runoff and (2) authorized non-storm water discharges (See Section III of this Order). Urban runoff does not include runoff from undeveloped open space, feedlots, dairies, farms, and agricultural fields. (Draft Permit, Glossary.)

Storm water on a priority project site does not qualify as "urban runoff" because it has not entered a storm water conveyance system. Further, storm water on a priority project site is not a "pollutant" under the Clean Water Act or a "Waste" under Porter-Cologne. The intent of section XII's New Development requirements appears to be the regulation of storm water runoff from priority project sites and authorized non-storm water discharges from priority project sites as a surrogate for the regulation of pollutants.

C. Regulation of storm water as a surrogate for pollutants is contrary to the Clean Water Act and Porter-Cologne

Contrary to the requirements of the Clean Water Act and Porter-Cologne, the Draft Permit regulates the discharge of storm water as a pollutant, rather than the pollutants in the storm water. (*Virginia Department of Transportation v. EPA* (E.D. Va., Jan. 3, 2013) 2013 U.S. Dist. Lexis 981, 43 ELR. 20002 ("*VDOT*").)

Regulation of storm water alone rather than pollutants or waste in storm water exceeds the Regional Board's authority under both the Clean Water Act and Porter-Cologne. (*Ibid.*) In *VDOT*, the US EPA had established a TMDL for Accotink Creek to limit the flow of storm water into the creek. The purpose of the TMDL was to regulate the amount of sediment into Accotink,

based on EPA's belief that the sediment was the primary cause of its impairment. The parties to the case and the court agreed that sediment is a "pollutant" under the Clean Water Act, and that storm water is not a pollutant. In an attempt to justify the storm water flow TMDL, the EPA claimed that the storm water flow rate was a "surrogate" for sediment. The Court, however, held that EPA had no authority under the CWA to regulate the flow of storm water into the creek, stating:

> The language of § 1313(d)(1)(C) is clear. EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulatable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its limited statutory authority. (*Id.* at pp. 14-15.)

By mandating the elimination of pollutants through the control of storm water and authorized non-storm water, the Draft Permit treats storm water as a surrogate for all, unspecified pollutants in the same way that the EPA treated storm water as a surrogate for sediment. Accordingly, the Regional Board in this case has no authority under the Clean Water Act to regulate discharges from completed project sites without specifically identifying a particular pollutant of concern.

Similar restrictions exist in State law. Porter-Cologne prohibits the discharge of "Waste" without a permit. (Water Code, §§ 13260; 12363; 13264.) Waste is defined as:

> sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal. (Water Code, § 13050, subd. (d).)

Storm water itself is not Waste, though it may contain Waste. The Clean Water Act only authorizes the regulation of pollutants. Porter-Cologne only authorizes the regulation of Waste. Draft Permit terms, such as section XII's New Development regulations, which seek to regulate storm water flows without identifying specific pollutants in such flows are beyond the authority of the Regional Board and must be removed from the Draft Permit. In the event such

requirements are modified to regulate only pollutants and Waste, the Draft Permit should also be revised to permit Co-permittees' current program to satisfy the section XII's revised requirements.

4. THE CITY REQUESTS THAT DRAFT PERMIT SECTION XII BE REVISED TO REMOVE REQUIREMENTS THAT THE CITY IMPOSE MITIGATION ON PROJECTS IN EXCESS OF THE PROJECT'S IMPACTS.

The City objects to the Draft Permit's LID provisions to the extent they require mitigation of pollutants in storm water which are not caused by a project. (Draft Permit, §§ XII.D, E, G, H, K [requiring treatment of runoff from tributary areas], B.5.iv ["numeric sizing requirements must be applied to runoff from the entire development"].) The City requests these changes to the Draft Permit to provide clarity that the intent of section XII is to control pollutants directly caused by a project. Forcing the City to require mitigation in excess of a project's impacts exposes the City to potential liability for takings claims.

A. The Draft Permit requires exactions on projects which exceed a project's scope.

As applied to redevelopment priority projects and nonpriority projects, the Draft Permit's hydromodification and LID requirements exceed the scope of both the City's and the Regional Board's authority regarding exactions under State and Federal law. For example, in areas where redevelopment results in the addition or replacement of more than 50% of the impervious surfaces of an existing developed site, compliance with Section XII will generally require a redevelopment project proponent to retain all storm water runoff on site or mitigate off-site, even where the runoff is not caused or increased by the redevelopment project. (Draft Permit, § B.5.a.iv.) In this way, the Draft Permit requires the City to impose mitigation and/or exactions for impacts that are not a result of the redevelopment project itself.

Similarly, the Draft Permit requires a Non-Priority Project Plan, source control and site design BMPs for all non-priority projects that modify, improve or affect areas exposed to storm water. (Draft Permit, § XII.M.) This requirement would apply to projects that do not create any additional run-off or change the type of pollutants in existing run-off, such as roof-top solar panel installations and patio covers. By requiring a Non-Priority Project Plan, source control and site design BMPs to address run-off that is not changed, caused, or affected by a project, the Draft Permit requires the City to impose mitigation and/or exactions for impacts that are not a result of the non-priority project itself.

B. California law prohibits exactions on a project in excess of a project's impact.

When imposing a condition on a development permit, a local government is required under the federal and state constitutions to impose only those conditions bearing a reasonable relationship to the impacts of the project. (*Building Indus. Assn v. City of Patterson* (2009) 171 Cal. App. 4th 886, 898.) This rule applies to legislatively enacted requirements and impact fees or exactions. (*Ibid.*) Fees imposed on a discretionary ad hoc basis are subject to heightened scrutiny under a two-part test. (*Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, 837 ("*Nollan*").) First, local governments must show that there is a substantial relationship between the burden created by the impact of development and any fee or exaction. (*Ibid.*) Second, a project's impacts must bear a "rough proportionality" to any development fee or exaction. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 ("*Dolan*").)

Under California law, the *Nollan/Dolan* heightened scrutiny test also applies to in-lieu fees. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876.) The Legislature has memorialized these requirements in the Mitigation Fee Act which establishes procedures that local governments must follow to impose impact fees. (Gov. Code, §§ 66000-66025.) By requiring certain redevelopment priority projects to retain all storm water on-site, the City would be requiring a project developer to make changes to the project site that are not related to the project's impacts. Imposing such requirements would exceed the City's (and the State's) authority under *Nollan, supra,* 483 U.S. at p. 837 and *Dolan, supra,* 512 U.S. at p. 391.

Draft Permit conditions requiring mitigation of pollutants in storm water which are not caused by a project violate the *Nollan/Dolan* limitations. For this reason, Draft Permit section XII must be revised to reflect the limitations of the City's and State's authority. Without requesting the inclusion of new and redevelopment standards or waiving the objections set forth herein, if the new and redevelopment standards are modified in such a way as to require exactions commensurate with a project's scope, the City and Co-permittees' existing program should be recognized as satisfying all such Draft Permit requirements.

5. SECTION XII'S LID REQUIREMENTS ARE NOT SUPPORTED BY EVIDENCE AND NEED TO BE REMOVED.

The City objects to the Draft Permit's new LID requirements on the grounds that there is no evidence in the record demonstrating that a universal requirement to implement LID requirements in every development and redevelopment priority and non-priority project improves water quality. (Draft Permit, § XII.) As described above, the City and other Co-permittees have expended great resources to develop a program for implementing LID requirement consistent with the current MS4 Permit. There is no evidence in the record

demonstrating that a change to the existing program is necessary or would benefit the environment.

The Regional Board admits that the LID requirements are based on "a *presumption* that carrying out the actions prescribed in the permit . . . will improve water quality." (Draft Permit, Technical Report, at p. 18 [emphasis added].) Instead of relying on substantial evidence, the Regional Board appears to base all New and Significant Redevelopment Draft Permit requirements on the findings of Appendix D, to the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures (Manual Update 2011). This document itself contains no evidence that LID requirements and their resulting reduction in flows of storm water to receiving waters results in water quality benefits. (*Ibid.*)

For these reasons, the hydromodification and LID requirements lack substantial evidence and are arbitrary and capricious under the California Administrative Procedure Act and violate the Clean Water Act in that the requirements do not, on their face, demonstrate water quality benefits. These requirements should be removed from the Draft Permit or modified to the extent that substantial evidence demonstrates: (1) the LID requirements control pollutants rather than storm water; and (2) an improvement to receiving water quality from reduced storm water flows.

6. THE PERMIT'S RECEIVING WATERS LIMITATIONS DISCHARGE PROHIBITIONS EXCEED THE REQUIREMENTS OF FEDERAL LAW

The City greatly appreciates the Regional Board's efforts to find a middle ground by incorporating an iterative compliance path for the Draft Permit's RWL requirements. However, because the Clean Water Act does not require receiving waters limitations to be incorporated into the Draft Permit, the City requests that the receiving waters limitations requirements in the Draft Permit simply be removed.

The City would like to highlight the fact that it views the current RWL requirements in the Draft Permit as a preferred alternative to the approaches taken by the San Diego and Los Angeles Regional Water Quality Control Boards. Nonetheless, the proposed requirements will impose a substantial burden on the City. If the Regional Board is going to look to other approaches on this issue, the City requests that the Regional Board adopt the approach taken by the Colorado Basin Regional Water Quality Control Board which provides a BMP-based, iterative compliance path. In all cases, it is the City's preference that the Regional Board simply remove the RWL prohibitions from the Draft Permit, as they are not required by Federal law.

A. *Federal Law does not require receiving waters limitations to be incorporated into the Draft Permit.*

The Clean Water Act does not require direct incorporation of water quality standards into municipal storm water permits. (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 ("*Defenders of Wildlife*").) When adopting Section 402, Congress chose "not to include a similar provision [i.e., strict compliance with state water quality standards] for municipal storm-sewer discharges." (*Id.* at p. 1165.) Although the Clean Water Act does not require incorporation of receiving waters limitations into the permit, the Draft Permit requires compliance with water quality standards until a draft plan for compliance is submitted to the Regional Board.

Under Provision IV.D, a draft plan must be submitted *after* a determination has been made "that a discharge is causing or contributing to the exceedance of an applicable water quality standard." (Draft Permit, § IV.D.) Thus, compliance with water quality standards is mandatory, and only *after* non-compliance may a Co-permittee develop and submit a compliance plan. In this manner, the Draft Permit exceeds federal law by directly incorporating water quality standards and prevents compliance with receiving waters limitations through the iterative process until after an exceedance is demonstrated. Inclusion of the receiving waters limitations provision exceeds the Clean Water Act without the inclusion of an immediate compliance option and may function to impair water quality by: (1) preventing the development of a compliance plan until after an exceedance is detected, and (2) disregarding compliance plans developed in a manner other than the manner provided in Draft Permit Provision IV.D, such as TMDL compliance plans.

The Draft Permit should be revised to remove the mandatory receiving waters limitations language, or alternatively and in accordance with Comment 5B, below, to allow Co-permittees to comply with Provision IV by implementing plans developed in a manner other than the manner provided in Draft Permit Provisions IV.D, such as TMDL compliance plans.

B. *Inclusion of the receiving waters limitations provisions under Porter-Cologne is inconsistent with precedential state Board Orders*

Inclusion of the Receiving Waters Limitations requirements in the Draft Permit pursuant to Porter-Cologne must comply with precedential Water Resources Control Board ("State Board") orders. (Gov. Code, § 11425.60; State Board Order WQ 2001-15; State Board Order WR 96-1, footnote 11 ["the [State Board] designates all decisions or orders adopted by the [State Board] at a public meeting to be precedent decisions"].) State Board Order WQ 2001-15 states that compliance with water quality standards is to be achieved over time, through an iterative approach requiring improved BMPs. Compliance with precedential State Board orders is

mandatory. (See *California Assn of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438, 1461, fn. 20.)

By mandating immediate compliance with the Draft Permit's Receiving Waters Limitations requirements, the Draft Permit violates the State Board's precedential order. As demonstrated in State Board Order WQ 2001-15, compliance with receiving waters limitations must be achieved through the iterative process. The Draft Permit should recognize plans already developed for the purpose of attaining reductions in pollutant loads as satisfying the compliance plan provision under Draft Permit section IV.A. The Draft Permit cannot prevent compliance through the iterative process until after an exceedance occurs. Draft Permit Provision IV needs to be revised to align the language with the State Board's precedential orders.

7. THE CITY REQUESTS THAT THE DRAFT PERMIT'S TMDL REQUIREMENTS BE REVISED TO CLARIFY THAT COMPLIANCE IS TO BE ATTAINED THROUGH THE IMPLEMENTATION OF BMPS.

The Clean Water Act does not require TMDLs to be incorporated into the Draft Permit. (Draft Permit, § XVIII.) The City seeks clarification on the following points: (1) that the Permit does not require immediate compliance with all WLAs; (2) that the WLAs do not constitute numeric effluent limitations; and (3) that implementation of BMPs on an iterative basis constitutes compliance with the Permit.

A. *Federal Law does not require TMDLs to be incorporated into the Draft Permit.*

The Clean Water Act does not require a TMDL to be incorporated into the Draft Permit. (*Defenders of Wildlife, supra,* 191 F.3d 1159.) Unlike industrial dischargers, who must comply strictly with state water quality standards, municipal storm sewer discharges are not required to comply strictly with water quality standards. (*Id.* at p. 1165.)

Because any inclusion of TMDLs in the Draft Permit is not required under the Clean Water Act, any such inclusion in the Draft Permit is a function of State law at the discretion of the Regional Board. As explained more fully below, the manner in which the Regional Board included the nutrient, fecal coliform, organochlorine compounds, diazinon, chlorpyrifos, toxics, and sediment TMDLs for San Diego Creek and Newport Bay Watershed, and the Coyote Creek Metals TMDL for the San Gabriel River into the Draft Permit represents an abuse of discretion, and the Draft Permit must be revised.

B. *To the extent that any TMDL is incorporated as an effluent limit, the Regional Board is required to follow Federal Regulations.*

The City requests that the Regional Board clarify that the Draft Permit's TMDL requirements are not effluent limits.

Federal law does not require the inclusion of TMDLs in municipal storm water permits, when issuing NPDES permits, the Regional Board is required to follow federal regulations regarding such inclusion. (See 40 C.F.R. § 122.44, subd. (d); 23 Cal. Code Regs., § 2235.2 ["Waste discharge requirements for discharge from point sources to navigable waters shall be issued and administered in accordance with the currently applicable federal regulations for the National Pollutant Discharge Elimination System (NPDES) program"].) Before it can incorporate any TMDL Waste Load Allocations ("WLAs") into the Draft Permit as effluent limits, the Regional Board must first find that there is a "reasonable potential" that the discharge of the pollutant to be regulated "has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard." (40 C.F.R. § 122.44, subd. (d)(1)(iii).)[4]

To determine whether a permitted discharge "causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard[,]" the Regional Board must:

> use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water. (40 C.F.R. § 122.44, subd. (d)(1)(ii).)

There are two generally accepted approaches to conducting reasonable potential analysis: "A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques, or using a non-quantitative approach." (NPDES Permit Writers' Manual, September 2010, pages 6-23.)

The first approach requires end of pipe monitoring data to be evaluated against in-stream generated ambient (dry weather) data. There is no evidence in the Draft Permit or the Draft Technical Report that the Regional Board based the Draft Permit's requirements on any such

[4] Pursuant to the *Defenders of Wildlife* decision, 40 C.F.R. § 122.44(d) does not require incorporation of TMDLs or WQBELs into municipal storm water permits. When incorporated, however, Section 122.44(d) requires implementation of WQBELs to attain water quality standards.

data. (Draft Technical Report, pages 63-67.) Nor is there any information regarding the performance of the second approach, a non-quantitative analysis based on recommended criteria described in the EPA guidance. Neither the Draft Permit nor the Draft Technical Report contain any evidence that a reasonable potential analysis has been performed in accordance with 40 C.F.R. section 122.44(d).

If the TMDL requirements are being imposed as effluent limits, the Regional Board must comply with requirements for developing those limits instead of passing those on to the Co-permittees.

C. *The Draft Permit's TMDL requirements need to be consistent with applicable implementation plans developed for each TMDL.*

Consistent with TMDL requirements, Co-permittees have developed and implemented or are in the process of developing and implementing compliance plans for several TMDLs in the Newport Bay watershed. The Executive Officer has reviewed and approved some of these plans, and the Co-permittees are implementing the plans. Where a TMDL provides for the development and implementation of a compliance plan, the Draft Permit should reflect such a provision. Implementation of BMPs and other requirements consistent with these plans should be sufficient for permit compliance.

8. SECTION XII.B.1 SHOULD BE REVISED TO EXEMPT CO-PERMITTEE PROJECTS FROM COMPLYING WITH NEW REQUIREMENTS ONCE A PROJECT IS FUNDED

Section XII.B.1 of the Draft Permit requires Co-permittee-initiated "projects for which funding is approved on the date of the adoption of this Order" to comply with the new and redevelopment standards set out in the Draft Permit. The intent of this provision appears to be to exempt projects for which funding is approved on the date of the adoption of the Draft Permit from complying with the standards. The language, however, accomplishes the opposite and requires such projects to comply with the Permit requirements. If the Draft Permit's intent is the require such compliance, all projects which have been approved, funded, or are partially constructed on the date of the Draft Permit's adoption must cease all construction activity, be redesigned, deconstructed, and reconstructed to comply with the new requirements. Such interference with City projects may result in an unconstitutional impairment of contracts in violation of the contract clauses of the United States and California Constitutions. (U.S. Const. art. I, § 10; Cal. Const. art. I, § 9.)

The City offers the following revised language:

> The requirements of Section XII.B., and subsequent sub-sections of Section XII., apply to initial project applications received by the Co-Permittees 12 months after adoption of this Order. For projects initiated by the Co-permittees, the requirements of Section XII. do not apply to projects that have been approved within 12 months after the date of the adoption of this Order. In the interim, the relevant requirements of Order No. R8-2009-0030 shall apply.

9. THE REGIONAL BOARD HAS FAILED TO COMPLY WITH WATER CODE SECTIONS 13000, 13263, AND 13241

Under the California Supreme Court's holding in *Burbank v. State Board* (2005) 35 Cal.4th 613 ("*Burbank*"), a regional board must consider the factors set forth in sections 13263, 13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.* at 627.) Section 13263 directs regional boards, when issuing waste discharge requirements, to take into account various factors including those set forth in Section 13241." (*Id.* at 625, emphasis added.) Specifically, the Court held that to the extent NPDES Permit requirements are not compelled by federal law, the regional boards are required to consider, among other factors, the "economic" impacts of such requirements on the dischargers themselves; such a requirement means that the boards must analyze the "discharger's cost of compliance." (*Id.* at 618.)

A. Finding 31 and Technical Report section X do not adequately consider economic impacts of complying with the state mandated requirements.

To the extent the Draft Permit provisions are not compelled by federal law, a regional board must consider the factors set forth in sections 13263, 13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Burbank*, *supra*, 35 Cal.4th 6 at p. 627.) Specifically, regional boards are required to consider the "economic" impacts of Draft Permit requirements on Co-permittees, with the Court finding that such a requirement means that the boards must analyze the "discharger's cost of compliance." (*Id.* at 618.)

The Draft Permit does not undertake a complete analysis of the Co-permittees' costs of complying with the Draft Permit's requirements which exceed the federal minimum. According to the Draft Permit, a lack of comprehensive or reliable economic data on the costs and benefits makes performing a formal economic analysis impractical at this time. (Draft Permit, Draft

Technical Report, at p. 31.) After asserting that such an analysis is impractical and not required, the Draft Permit then considers economic factors. (*Id.* at pp. 30-31.) The Draft Permit relies on the partial, outdated and irrelevant data provided by the US EPA, State Water Resources Control Board and regional boards, as well as a Willingness to Pay and Travel Cost Analysis to conclude that the "benefits of protecting beneficial uses . . . considerably exceed the annual per-household costs of the MS4 programs summarized in [the studies]." (*Id.* at p. 33.) Despite concluding that the benefits exceed the costs, the economic considerations set out in the Draft Permit expressly excludes "a Cost-Benefit analysis or other formal economic analyses." (*Id.* at p. 31.)

Section 13241 is not satisfied by relying on partial and unreliable data or its irrelevant "per household" consideration of an informal cost-benefit analysis. As a result, the Draft Permit's economic consideration is arbitrary and capricious and must be reconsidered to include data relevant to the Co-permittees and to the Draft Permit's specific requirements. Nothing in the Draft Technical Report links the permits studied by the US EPA and the state and regional boards generally with any of the specific requirements of the Draft Permit. Therefore, the studies tell the public nothing about the costs to implement the Draft Permit.

The data included in the Technical Report are outdated, ranging from 9 to 17 years old. The costs and benefits are also calculated on a meaningless basis in terms of a Co-permittee's funding of the Draft Permit's costs: a per household basis. Co-permittees do not incur costs or collect revenues to implement Draft Permit requirements on a per household basis. Indeed, Co-permittees cannot collect revenues on such a basis unless the public approves such a method in an election. (Cal. Const. arts. XIIIC, XIIID.) Since 1995, only 67% of such water-specific storm water measures have been approved by voters. (Public Policy Institute of California, Paying For Water in California, Technical Appendix E (Mar. 2014), p. 11 ("PPIC Report").) Not only are the data in the PPIC Report nearly a decade more recent than the data in the Draft Permit, the PPIC Report considered Draft Permit requirements which did not exist when the studies cited in the Draft Permit were conducted. The PPIC Report concludes that, even using state wide household cost estimates, "the total annual costs of meeting urban storm water permit requirements are currently in the range of $1 billion to $1.5 billion, with costs likely to continue to rise as new permit requirements come due." (*Ibid.*) Public agencies, such as the City, "are likely to have stable funding for no more than half that amount, leaving a gap of $500 million to $800 million per year, or $40 to $65 per household." (*Ibid.*) Not only is the annual funding gap identified by the most recent data twice as much as the Draft Permit estimates as the total per-household cost to comply with the Draft Permit, the City currently has no authority to address the funding gap on a per-household basis. (Cal. Const. arts. XIIIC, XIIID.)

In addition to relying on outdated and inapplicable data, the Regional Board's cost analysis is fundamentally flawed because it tells the public nothing at all about the relationship between the cost of any particular BMP and the pollution control benefits to be achieved by

implementing that BMP. Under this "generalized" approach, extremely costly requirements that bear little or even no relationship (or even a negative relationship) to the pollution control benefits to be achieved could be "justified" as long as the "overall" program costs are within what the Regional Board deems to be an acceptable range.

A generalized approach to economic considerations is not a proper way to assess the cost of complying with the Draft Permit's particular requirements. A more individualized assessment of cost is required. Otherwise, dischargers may be required to implement very costly controls that have no relationship to pollution control benefits, a result inconsistent with MEP. This analytical flaw in the Technical Report is compounded by the approach taken to assess the benefits of the Draft Permit. The Draft Permit relies on the Willingness to Pay and Travel Cost Analysis to calculate the benefit of the Draft Permit requirements at $180 per household (2005 dollars). (Draft Permit, Technical Report, at p. 33.) Here again, the assessment approach misses the mark because it tells the public nothing about the pollution control benefits to be achieved by implementation of the controls in the Draft Permit and ignores the Co-permittees' inability to collect such funds on a per-household basis without an affirmative vote of such households. All the Technical Report indicates, in essence, is that people like clean water and, in theory, may be willing to pay for it. The PPIC Report demonstrates that, for as much as people like clean water, only 67% of the time are they willing to actually pay for it. (2014 PPIC Report, Appendix E, at p. 11.) The Draft Permit's analysis sheds no light on the relationship between the actual cost of complying with the Draft Permit and the pollution control benefits to be achieved by implementing the Draft Permit's requirements and must be reconsidered using current and relevant data.

B. Section XVIII does not adequately consider economic or non-economic factors required by Water Code sections 13000, 13263, and 13241.

As described above, Federal Law does not require TMDLs to be included in municipal storm water permits. (*Defenders of Wildlife*, *supra*, 191 F.3d at p. 1165; 40 C.F.R. § 122.44, subd. (d).) Consequently, the Regional Board is required to consider the factors listed in Water Code sections 13000, 13263 and 13241 before including the TMDL in the Draft Permit. (*Burbank, supra,* 35 Cal.4th 613.)

Water Code sections 13000, 13263, and 13241 require much more than an economic analysis. They require an analysis, in part, of the following elements:

(a) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto;

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

(c) The need for developing housing within the region;

(d) The need to develop and use recycled water;

(e) An analysis of whether the proposed Permit terms are "reasonable, considering all demands being made and to be made on [receiving] waters[;]" and

(f) whether specific Permit requirements are necessary, given "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges." (Water Code, §§ 13000, 13241, subds. (b)-(f), 13263, subd. (a).)

The Draft Permit ignores the environmental characteristics of the watershed. (Water Code, § 13241, subd. (b).) Co-permittees have undertaken extensive programs to improve water quality and have prepared a thorough report on the quality of waters in the watershed. The Draft Permit disregards these efforts and the present state of the waters and increases Co-permittees obligations under the Draft Permit without any reference to the water quality conditions that could reasonably be achieved through the Draft Permit's additional requirements. The Draft Permit should be based on the state of the environment and only impose requirements on Co-permittees designed to address specific environmental problems.

The Draft Permit likewise ignores the present state of the law and the scheme of joint and several liability established by the Draft Permit in facilitating coordination among Co-permittees. (Water Code, § 13241, subd. (c).) The practical effect of the Draft Permit's scheme and the Ninth Circuit's decision in *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194 will be to reduce coordination among Co-permittees. Where the City may be liable for another Co-permittee's failure to implement TMDL requirements, for example, the City is unlikely to participate with other Co-permittees in developing or implementing a TMDL compliance plan. (See Draft Permit, § XVIII.C.) A scheme of joint and several liability that discourages coordination is also unnecessary to protect beneficial uses and attain water quality objectives. (Water Code, § 13263, subd. (a).) Because the Draft Permit does not identify how a scheme of joint and several liability promotes coordination and is necessary to protect beneficial uses, such a scheme should be removed or explicitly denounced in the Draft Permit.

Finally, the Draft Permit does not address how its requirements affect the need for developing housing within the region (Water Code, § 13241, subd. (e)); the need to develop and

use recycled water (Water Code, § 13241, subd. (f)); or whether the proposed Draft Permit terms are "reasonable, considering all demands being made and to be made on [receiving] waters" (Water Code, § 13000).

The inclusion of the TMDL in the Draft Permit violates sections 13263, 13241 and 13000, as well as the California Supreme Court's decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. For these reasons, the TMDL requirements should be removed from the Draft Permit or modified to address the concerns raised in this letter.

10. THE STATE MANDATES ANALYSIS IN FINDING 32 AND TECHNICAL REPORT SECTION VI.E CONSIDER IMPROPER FACTORS AND IS NOT SUPPORTED BY THE EVIDENCE.

The only agency charged with determining whether a mandate is imposed by the state is the Commission on State Mandates ("Commission"). (Gov. Code, § 17552.) The Draft Permit, however, concludes that the Draft Permit's requirements are federal mandates. (Draft Permit, Finding 32; Draft Permit, Technical Report, VI.E.) This conclusion is based on improper factors, such as a comparison of the Co-permittee's obligations with the obligations imposed on non-governmental and new dischargers. (Draft Permit, Finding 32.b.) The proper analysis for determining whether a requirement is a state mandate is to compare the express requirements of federal law with the requirements of the state action. (See *San Diego Unified School District v. Commission on State Mandates* (23004) 33 Cal.4th 859, 868.) Because the Commission has authority to determine whether the Draft Permit's requirements are State mandates and because the analysis set forth in the Draft Permit does not apply a proper state mandates analysis, the Draft Permit should be revised to remove all state mandates analyses.

11. FINDINGS 10, 31, TECHNICAL REPORT SECTION V, AND THE GLOSSARY IMPROPERLY CLASSIFY NATURAL WATERS AS PART OF THE MS4.

Natural waters cannot be both receiving waters and part of the MS4. (40 C.F.R. § 122.26, subd. (b)(8); (*Los Angeles County v. NRDC* (2013) 133 S.Ct. 710.) The Draft Permit states that development often makes use of natural drainage patterns and features as conveyances for runoff. (Draft Permit, Finding 13.) Finding 13 goes on to state that rivers, streams and creeks in developed areas used in this manner and under the ownership and control of the Co-permittees are part of an MS4, whether the river, stream or creek is natural, anthropogenic or partially modified. It further states that these natural water bodies are both an MS4 and a receiving water.

Finding 13 is expressly contradicted by the Federal Regulation defining an MS4 and by recent United States Supreme Court case law. Federal Regulations define a municipal separate storm sewer system as:

> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> i. Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to state law) ... including special districts under state law such as a sewer district sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States;
>
> ii. Designed or used for collecting or conveying stormwater;
>
> iii. Which is not a combined sewer; and
>
> iv. Which is not part of a publicly owned treatment works (POTW) as defined at 40 C.F.R. 122.2. (40 C.F.R. § 122.26, subd. (b)(8).)

The definition of a municipal separate storm sewer system is specifically limited to *man-made* channels and systems and does not encompass natural water bodies. Discharging to a natural water body does not transform a natural water body into an MS4. A discharge makes a natural water body a "receiving water." Similarly, improving natural rivers, streams and creeks does not make them MS4s, or part of an MS4. They simply become improved waters of the United States. The US Supreme Court recently confirmed this conclusion when it determined that the flow of water from an improved portion of a navigable flood control channel into an unimproved portion of the same waterway is not a "discharge of a pollutant" under the Clean Water Act. (*Los Angeles County v. NRDC* (2013) 133 S.Ct. 710.)

Lastly, municipalities do not generally own, control or operate natural rivers, streams and creeks. Such water bodies are often administrated by the State of California in the public trust for

the right of the people to use such waters for certain purposes or are privately owned. The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the trust and may often be the final arbiter of permissible uses of trust lands. Such waters are not therefore, part of the City's MS4. For these reasons, Finding 13 and Technical Report section V, and reference to "natural drainage features or channels" and "modified natural channels" in the Glossary's definition of Municipal Separate Storm Sewer System should be deleted.

CONCLUSION

The City appreciates this opportunity to comment on the Draft Permit. The City believes that the Regional Board has a genuine interest in working with all interested parties to develop a permit that protects the waters in the Santa Ana and Newport Bay/San Diego Creek Watersheds while at the same time giving dischargers such as the City the ability to comply with the permit's requirements.

Thank you for considering the City's comments and feel free to contact me if you have any questions.

Sincerely,

J. G. Andre Monette
for BEST BEST & KRIEGER LLP