

1 GREGORY W. STEPANICICH,  
CITY ATTORNEY

2 RICHARDS, WATSON & GERSHON  
3 A Professional Corporation  
4 NORMAN A. DUPONT,  
5 355 South Grand Avenue, 40th Floor  
6 Los Angeles, CA 90071-3101  
7 Telephone: (213) 626-8484  
8 Facsimile: (213) 626-0078  
9 Email: Ndupont@rwglaw.com

10 Attorneys for Petitioner,  
11 CITY OF FAIRFIELD

12 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

13 In Re Petition of CITY OF FAIRFIELD

14 Petitioner,

15 From the Decision of the SAN FRANCISCO  
16 REGIONAL WATER QUALITY  
17 CONTROL BOARD

Petition No. -----

Regional Board Order No: R2-2009-0074  
NPDES Permit No. CAS612008

**PETITION FOR REVIEW OF SAN  
FRANCISCO REGIONAL BOARD'S  
ACTION (APPROVAL OF MUNICIPAL  
REGIONAL PERMIT); REQUEST FOR  
SUPPLEMENT TO ADMINISTRATIVE  
RECORD**

**REQUEST TO HOLD PETITION IN  
ABEYANCE (27 CCR §2050.5)**

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21 The City of Fairfield ("Petitioner") hereby submits this Petition to the California  
22 State Water Resources Control Board ("State Water Board") pursuant to section 13320(a)  
23 of the California Water Code (the "Water Code"), requesting that the State Water Board  
24 review an action by the California Regional Water Quality Control Board, San Francisco  
25 Bay Region ("Regional Water Board"). Specifically, Petitioner seeks review of the  
26 Regional Water Board's October 14, 2009 Municipal Regional Storm Water Permit  
27  
28

1 Order No. R2-2009-0074, reissuing NPDES Permit No. CAS612008 (the “MRP”)<sup>1</sup>.  
2 Petitioner requests that this Petition be held in abeyance pending further notice by  
3 Petitioner to the State Water Board in the event that Petitioner wishes to request that the  
4 review process be activated. This request for holding this petition in abeyance is made  
5 pursuant to 23 California Code of Regulations §2050.5(d).

6 **I. INTRODUCTION/PETITION INFORMATIONAL REQUIREMENTS**

7 Pursuant to 23 California Code of Regulations Section 2050(a), Petitioner  
8 provides the following information:

9 **A. Name & Address of Petitioner:**

10 City of Fairfield  
11 Attention: George Hicks  
12 Assistant Director of Public Works/City Engineer  
13 1000 Webster Street  
14 Fairfield, CA. 94533  
(707) 428-7494  
e-mail: ghicks@ci.fairfield.ca.us

15 with copies to:  
16 Norman A. Dupont, Esq.  
17 Richards Watson Gershon  
18 355 So. Grand Avenue  
40th Floor  
19 Los Angeles, CA. 90071  
(213)626-8484  
20 e-mail: ndupont@rwglaw.com

21 **B. Specific Action State Board is Requested to Review**

22 The State Board is requested to review:

23 (a) Order No. R2-2009-0074(NPDES Permit No. CAS612008), the Municipal  
24 Regional Stormwater NPDES Permit (“MRP”).

25 <sup>1</sup> A copy of Order R2-2009-0074 may be accessed via the internet at  
26 [http://www.waterboards.ca.gov/sanfranciscobay/board\\_decisions/adopted\\_orders/2009/R2-2009-0074.pdf](http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0074.pdf). As the Order and its attachments are 279 pages, a hardcopy is not  
27 being provided concurrently with this Petition but will be provided to the State Water  
28 Board upon its further request should that be deemed necessary.

1 (b) Determination by Regional Board to exclude all written comments, including  
2 those submitted by the City of Fairfield before the October 14, 2009 Board hearing  
3 on the significant modifications made to the proposed Order and provided to the  
4 public for the first time on September 24, 2009.

5 **C. Date On Which Regional Board Acted**

6 October 14, 2009.

7 **D. State of Reasons for Petition**

8 The detailed set of reasons are contained in the preliminary Memorandum of legal  
9 authorities contained in Part III herein. A brief summary of the reasons for the Petition is  
10 as follows:

11 **1. The Regional Board Committed Procedural Errors in Arriving  
12 at its final Order No. R2-2009-0074 adopting the MRP**

13 The procedural errors are set forth in more detail in the Memorandum at  
14 Part III herein, but include:

- 15 ➤ The Board failed to accept written comments on the proposed final  
16 version of the MRP which included significant changes from the  
17 prior draft particularly those related to requirements for Low Impact  
18 Development (“LID”).  
19 ➤ The Board exacerbated its procedural failure to take written  
20 comments on significant revisions it made to the final MRP by  
21 limiting oral testimony to a maximum of five minutes.

22 **2. The Regional Board Committed Substantive Errors in Arriving  
23 at its final Order No. R2-2009-0072 adopting the MRP**

24 The substantive errors are set forth in more detail in the Memorandum at  
25 Part III, herein, but include:

- 26 • The Regional Water Board’s assertion that various MRP Provisions are  
27 required by the “maximum extent practicable” (“MEP”) standard set forth in  
28 the federal Clean Water Act and its implementing regulations is not  
sufficiently supported by findings;

- In fact, some of the MRP requirements *exceed* the federal MEP standard, thereby triggering legal obligations for the Regional Water Board to have conducted additional analysis of technical feasibility and economic and environmental impacts under section 13241 of the California Water Code and the California Environmental Quality Act, none of which were adequately performed before adoption of the MRP;
- Some of the new requirements in the MRP—including the LID requirements—are so prescriptive that they effectively specify the means and method of compliance in violation of Water Code section 13360;
- The MRP illegally contains provisions extending beyond the maximum five-year term of an NPDES permit, as limited by Water Code section 13378; and
- The Regional Board purported to exercise jurisdiction pursuant to the federal Clean Water Act’s regulation controlling discharges to the “waters of the United States” over individual surficial water flows and individual rain cisterns (or other capture devices). But, it failed to include adequate findings establishing Clean Water Act jurisdiction over such isolated or occasional surficial water flows as required by the Supreme Court’s decision in *Rapanos v. U. S.*, 537 U.S. 715, 126 S. Ct. 2208 (2006). To the extent that the Regional Board’s Order mandates harvest and re-use of rainwater to the exclusion of other methods, it also impacts the potential maintenance of existing wetlands.

#### **E. The Manner in which Petitioner Is Aggrieved**

Petitioner is one of 76 cities, towns, counties and other public entities subject to the MRP. As such, it is aggrieved by the procedural and substantive legal defects in the MRP described above. The City of Fairfield specifically faces the prospect of Regional Board supervision of each and every significant development project in the City’s jurisdictional limits with respect to whether the regulated project (over 10,000 square feet of impervious surface initially, later shifting to only 5,000 square feet) complies with the overly prescriptive and form-mandating LID requirements of the MRP. Regional Board staff introducing the MRP at the October 14, 2009 hearing made it very clear that both the Regional Board and the public at large will have the opportunity to review and comment upon the required reports to be submitted by individual (or collective groups) of Permittees by May 2011 and December 2013. (*Tr. of Hearing, Item No. 7, Remarks of Dr. Mumley* at 10-11). The December 2013 report, for example, must contain: “Guidance for the Permittees to make a consistent and appropriate determination of the

1 feasibility of harvesting and reuse, infiltration, or evapotranspiration for each Regulated  
2 Project.”

3 In addition, the City of Fairfield is also specifically aggrieved because the  
4 potential LID implementation plans imposed by the adopted MRP threaten the viability  
5 of various wetlands within its jurisdictional boundaries. The affected wetlands depend in  
6 large part upon rainwater from various storm events to replenish and nourish the  
7 wetlands. A program of large-scale compelled harvesting and immediate on-site reuse or  
8 infiltration of rainwater will impact and seriously damages wetlands within the City’s  
9 jurisdiction.

10 **F. Points and Authorities in Support of Legal Issues Raised in the Petition**

11 Petitioner respectfully refers to Part III, *infra* for a detailed statement of these  
12 points and authorities.

13 **G. Service of Petition Upon San Francisco Regional Board And**  
14 **Dischargers**

15 A copy of this petition has been mailed to the California Regional Water Quality  
16 Control Board for the San Francisco region and upon all other co-permittees to the MRP.

17 **H. Statement that Issues Were Raised Below**

18 The City of Fairfield submitted written comments by letter to the Regional Board  
19 before the October 14, 2009 hearing. A copy of the City’s written comments is attached  
20 hereto as Exhibit “A”<sup>2</sup>. Since the Regional Board refused to accept written comments at  
21 the time of the October 14, 2009 hearing (even those received by the Board prior to the  
22 date of the hearing), the Petitioner itself was unable to raise these substantive issues or  
23 objections before the Regional Board. Nonetheless, other co-permittees orally raised  
24 concerns with the significant modifications proposed by Board staff to the LID

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26  
27 <sup>2</sup> This Petition is being transmitted to the State Board electronically, and in that  
28 format, a copy of the City’s written comments will be labeled as “Exhibit A” but will  
appear as a separate .PDF document for convenience in electronic transmittal.

1 requirements in the final Order, and therefore, the Regional Board was at least aware of  
2 the issue based solely upon oral comments made at the hearing.<sup>3</sup> Indeed, even at the  
3 outset of the hearing, the Board was informed by Dr. Mumley that one of the “key  
4 revisions” (from the prior draft of the proposed MRP) was the “low impact development  
5 requirements.” (*Tr. of Hearing*, p. 8).

6  
7 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

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

9 The federal Clean Water Act Section 402 generally prohibits the “discharge” of  
10 any “pollutant” from a “point source” to the “waters of the United States” without a  
11 permit, typically called a National Pollution Discharge Elimination System (NPDES)  
12 permit. Discharge of stormwater is specifically regulated by Section 402(p) which  
13 governs permits for such discharges. 33 U.S.C. § 1342(p). With respect to a  
14 municipality’s discharge of storm water from a municipal separate storm sewer system  
15 (“MS4”), Section 402(p)(3)(B) provides:

16 Permits for discharges from municipal storm sewers –

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

25 33 U.S.C. § 1342(p)(3)(B).

26  
27 <sup>3</sup> Petitioner reserves the right to supplement and expand upon this Petition if it is  
28 taken out of abeyance and once the record had been assembled.

1 California is among the states that are authorized to implement the NPDES permit  
2 program. 33 U.S.C. § 1342(b). California's implementing provisions are found in the  
3 Porter-Cologne Water Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.*  
4 Respondent State Water Board is designated as the state water pollution control agency  
5 for all purposes stated in the Clean Water Act. Water Code § 13160.<sup>4</sup> State and Regional  
6 Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES  
7 permits are issued for terms not to exceed five years. *Id.* § 13378 ("Such requirements or  
8 permits shall be adopted for a fixed term not to exceed five years.").

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

17 The Water Code requires the Regional Water Board, when issuing NPDES  
18 permits, to implement "any relevant water quality control plans that have been adopted,  
19 and shall take into consideration the beneficial uses to be protected, the water quality  
20 objectives reasonably required for that purpose, other waste discharges, the need to  
21 prevent nuisance, and the provisions of Section 13241." Water Code § 13263(a).  
22 Section 13241 requires the consideration of a number of factors, including technical  
23 feasibility and economic considerations. *Id.* § 13241.

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25  
26 \_\_\_\_\_  
27 <sup>4</sup> Water Code Sections 13160 and 13370 *et seq.* reference the Federal Water  
28 Pollution Control Act. After the Federal Water Pollution Control Act was amended, it  
commonly became known as the Clean Water Act.

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

14 Permit conditions that are imposed pursuant to state law reaching beyond the  
15 mandatory requirements of the federal Clean Water Act would also trigger review of their  
16 environmental impact under the California Environmental Quality Act, Pub. Res. Code §  
17 21000 et seq. (“CEQA”).<sup>5</sup>

18  
19 **B. Procedural Requirements Not Met by Regional Board at its October  
14, 2009 Hearing**

20 **Public participation**

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

24  
25 <sup>5</sup> Issuance of NPDES permits as required to implement the Clean Water Act are  
26 exempt from CEQA’s requirement of preparation of an environmental impact report for  
27 all projects that are expected to have a significant environmental impact. Water Code §  
28 13389. But municipal storm water permits that contain provisions exceeding the  
“maximum extent practicable” standard set by the federal Clean Water Act fall outside  
the exemption established by Water Code section 13389.



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

5 ~~33 U.S.C. § 1251(e) (emphasis added).~~ Thus, among other things, federal regulations  
6 require a state permitting agency to provide at least 30 days for public comment on a  
7 draft NPDES permit. 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit  
8 such as the MRP that has taken so long in its development and applies to so many  
9 Permittees

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

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

IRIN RICHARDS | WATSON | GERSHON  
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

1                   **1.     Legally Sufficient Findings Requirements**

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

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

20  
21                   **III.    POINTS AND AUTHORITIES IN SUPPORT OF PETITION**

22                   **A.     The Regional Water Board’s Adoption of the Final MRP Was**  
23                   **Procedurally Defective.**

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

26                   The MRP is the culmination of nearly five years of work by the Regional Water  
27 Board, permittees, and stakeholders. The process has been iterative, and the Regional  
28 Water Board has established a pattern of allowing time between iterations to facilitate  
public participation. The first draft permit was published for notice and comment on

1 December 14, 2007. This was followed by a public workshop held by the Regional  
2 Water Board in March 2008. Nearly a year later, on February 11, 2009, the Regional  
3 Water Board produced a revised draft. On May 13, 2009, the Regional Water Board held  
4 a public hearing to discuss revisions to the December 2007 draft. At each preliminary  
5 stage of the permitting process, the Regional Water Board provided sufficient notice and  
6 solicited public comment on revisions from the prior draft in keeping with the public  
7 participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40  
8 C.F.R. § 124.10(b)(2).

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

18  
19 **2. The Regional Water Board deprived Petitioner of the**  
20 **opportunity to comment on substantive new requirements in the**  
21 **MRP.**

22 The September 24 Final Tentative Order contained significant substantive changes  
23 from the February 2009 draft. (See Appendix B to Final Tentative Order, showing  
24

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25 <sup>6</sup> Board staff explained that their “goal” was to publish the proposed “final” proposed  
26 MRP three weeks before the final hearing (October 14, 2009), but conceded at the hearing that  
27 they fell “a day or two” short of even their own three-week goal. (*Tr. of Hearing*, Dr. Mumley  
28 statement at p.5). There was no explanation for why Board staff selected a three-week period as  
a goal (that was ultimately not met) rather than the 30-day guideline set forth in the federal  
NPDES rules.

1 changes from February 2009 tentative order.)<sup>7</sup> The September 24, 2009 draft also  
2 replaced some more flexible provisions of the prior draft tentative orders with more  
3 prescriptive and inflexible requirements.

4 For example, for new development and redevelopment projects, the Final Tentative Order  
5 included the following new LID-only requirements:

- 6 • A requirement that 100 percent of qualifying storm water from  
7 regulated projects be dealt with through a handful of prescribed  
8 methods, with alternatives such as bioremediation allowed only where  
9 the permittee can demonstrate that the Board's preferred methods are  
10 "infeasible";
- 11 • A requirement that the municipal permittees produce a report  
12 determining feasibility or infeasibility of LID measures within the next  
13 18 months;
- 14 • A requirement that the municipal permittees propose an LID treatment  
15 reduction Special Project credit system within one year for projects that  
16 have demonstrated environmental benefits to allow a portion of the  
17 storm water runoff onsite to be treated by non-LID, or so-called  
18 "conventional," treatment measures.<sup>8</sup>

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

20 The Final Tentative Order also introduced prescriptive and burdensome new  
21 structural requirements for the capture and containment of trash. Regional Water Board  
22 staff acknowledged that these new provisions would be costly to permittees; it estimated  
23 that the associated capital cost alone will be around \$28 million dollars over the permit  
24 term, and further admitted that it has identified only \$5 million in available funds.

25 (Appendix D to Final Tentative Order, at p. 6.)

26 Despite the extensive and substantive nature of the changes from the February  
27 2009 Tentative Order, the Regional Water Board accepted no further written public  
28

<sup>7</sup> Provision C.3.c. regarding LID was nearly completely rewritten and Provision C.10 regarding Trash Load Reduction was replaced in its entirety.

<sup>8</sup> This could relate to brownfield sites, low-income housing, senior citizen housing, transit oriented development projects and other infill or redevelopment projects.

1 comments or evidence. Instead, participation by the permittees who would be subject to  
 2 these burdensome new requirements was limited to five-minute oral testimony at the  
 3 Regional Water Board's October 14, 2009 hearing on the MRP. The Regional Water  
 4 Board's statement that these revisions were the "outgrowth of comments" submitted by  
 5 Permittees and other interested persons is not accurate and does not justify the refusal to  
 6 allow written comments on these revisions.

7 During the hearing, members of the Regional Water Board and the witnesses who  
 8 testified agreed that the new provisions were significantly different from the draft  
 9 discussed at the May 2009 hearing. (*See, e.g., Tr.* at p. 8 (comments of Dr. Mumley,  
 10 referencing among the "key revisions" to the prior draft order the "LID requirements");  
 11 *Tr.* at p. 31 (comments of Mr. Moore: "particularly between the pilot project work you  
 12 just discussed, and the low impact development requirements. Because I think they both  
 13 progressed very - on a pretty significant pace since May."). A witness for a group  
 14 favoring the new trash provisions testified that the changes were not just significant but  
 15 "historic." (*Tr.* at p. 78 (comments of David Lewis: "This is a big improvement from  
 16 May. *And we call these historic changes . . .*").)

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

1           Witnesses who appeared on behalf of Permittees objected to the imposition of  
2 these costly, burdensome and inflexible new provisions being added so late in the process  
3 and without the opportunity to provide more detailed comments, and testified to the lack  
4 of available public resources to fund them. (*See, e.g.*, Tr. at p. 102 (comments of Melody  
5 Tovar: “We do look at the new draft, though, and note some new changes in the permit,  
6 and that the revised draft was not circulated for public review and comment, and we think  
7 it should have been. For us, that means that my testimony here today does not benefit  
8 from the direction and feedback from our City Council, and that is something we have  
9 thoughtfully done for every draft of this permit.”); *see also*, Tr. at pp. 58, 83, 85, 111-  
10 113, 121-22, 129.)

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

14                   “But we are concerned that at the . . . hearing, interested persons  
15 and permittees were not given adequate time to review late  
16 revisions or to comment on them. Given the intense interest in this  
17 issue, the Regional Water Board should have diverged from its  
18 strict rule limiting individual speakers to three minutes and  
19 conducted a more formal process. Such a process should provide  
adequate time for comment, including continuances where  
appropriate.” *In re The Cities of Bellflower et al.*, State Water  
Board Order WQ 2000-11, at \*24 (Oct. 5, 2000) (emphasis added).

20           In the *Bellflower* case, the State Water Board admonished Regional Water Boards  
21 to employ the proceedings for hearings set forth in section 648 of the Regional Board’s  
22 regulations. *Id.* at \*24 n.25 (“For future adjudicative proceedings that are highly  
23 controversial or involve complex factual or legal issues, we encourage regional water  
24 boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit.  
25 23, section 648 et seq.”) Those regulations require the Regional Water Board to allow  
26 interested parties the opportunity to cross-examine witnesses and present contrary  
27 evidence. 23 Cal. Code Regs. § 648.5(a). The Regional Water Board here ignored the  
28

1 State Water Board's admonition.<sup>9</sup> As a result, Petitioner has thus far been denied the  
2 right to full and fair participation in the permitting process, as required under both federal  
3 and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11.

4  
5 **3. The Regional Water Board Failed to Adequately Respond to**  
6 **Comments Made by Petitioner and Others on its Prior Draft**  
7 **Tentative Orders.**

8 Federal regulations require that states issuing NPDES permits seek, consider, and  
9 provide responses to public comments on draft permits. 40 C.F.R. § 124.17(a). The  
10 Regional Water Board failed to provide timely responses to comments submitted on its  
11 draft tentative orders, and ignored or, at most, gave lip service to many comments  
12 suggesting pragmatic modifications that would, among other things, help avoid wasting  
13 resources and/or mitigate the economic impacts of the MRP on fiscally stressed  
14 municipalities.<sup>10</sup> The Final Order indeed includes hundreds of pages of charts containing  
15 purported responses to written comments received on earlier iterations of the MRP. (See  
16

17  
18 <sup>9</sup> For a less significant NPDES stormwater permitting issue—the possible limited  
19 reopener of an existing MS4 permit to incorporate trash TMDL requirements-- the Los  
20 Angeles Regional Board provided for a formal hearing procedure to the affected  
21 municipal permittees. *See, e.g.*, Notice of Public Hearing, Public Notice No. 09-117,  
22 NPDES NO. CAS004001 (10/8/2009). While Regional Boards may and sometimes  
23 should differ in imposing differing substantive requirements depending upon specific  
24 water conditions in a particular watershed or region, there can be no excuse for  
25 inconsistency between the Regional Boards with respect to a fundamental procedural  
26 right and hearings for major NPDES permit modifications that affect a number of  
27 permittees.

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

1 Appendices E and F of Final Order.)<sup>11</sup> However, a closer examination of it reveals that it  
2 is insufficient. Each comment is summarized in a few sentences, and the responses are  
3 often limited to two or three words. (*Id.*) Few, if any, meaningful changes were made in  
4 response to comments submitted. In other words, despite providing a voluminous and  
5 nice-looking chart, the responses were substantively too little and too late to be  
6 meaningful as is required by law.

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

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

24  
25  
26 <sup>11</sup> The Final Order and all associated documents are available at  
[http://www.swrcb.ca.gov/sanfranciscobay/water\\_issues/programs/stormwater/mrp.shtml](http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/stormwater/mrp.shtml).

27 <sup>12</sup> Likewise, the Santa Clara Program submitted comments on Provision C.15 of  
28 the MRP noting that it had previously developed and obtained approval of a

(...continued)



1           The City of Fairfield submitted written comments on the February 2009 draft of  
2 the MRP, including comments on the Low Impact Development sections specifically  
3 noted that the sections were “overly prescriptive.” (*City of Fairfield Comment Ltr. dated*  
4 *4/9/09* at p. 4). The apparent response to the City’s public comment was to implement a  
5 final order that expressly stated the Board’s dictate that three specific types of LID, i.e.,  
6 “harvesting and re-use, infiltration, or evapotranspiration” are “the” LID treatment  
7 methods. The Final Order allowed a fourth method, biotreatment, but stated that it may  
8 considered only if it is “infeasible” to implement one of the first three preferred LID  
9 methods at a project site. (*Final Order, Provision C.3.c.i(2)(b)(i)-(ii)*). This response is  
10 inadequate because it assumes that the preferred LID measures are “practicable.” Indeed,  
11 as discussed in more detail below, the Regional Water Board has effectively admitted that  
12 it has no factual basis for such a conclusion by requiring the Permittees to study the very  
13 *feasibility* of LID measures imposed in the MRP.

14           A number of commenters also requested more time for implementation of new  
15 requirements in the February 2009 draft MRP based on the impacts that the new  
16 provisions for development and redevelopment projects in that version of the permit  
17 would have on existing Hydromanagement (“HM”) programs that are already being  
18 implemented by Permittees. In the response to comments, the Regional Water Board  
19 indicated that it had accommodated this request by moving all immediate deadlines back.  
20 (Appendix E to Final Tentative Order, at pp. 2-3.) However, because the Final Tentative  
21 Order fails to acknowledge that the new MRP will have an immediate effect on changing  
22 the requirements in some existing HM programs, no such revision was made to the

23 \_\_\_\_\_  
24 (...continued)  
25 comprehensive non-stormwater discharge management program. It asked the Regional  
26 Water Board staff to explain why that program was no longer adequate or could not  
27 simply be grandfathered, thereby saving significant public resources while continuing to  
28 protect water quality; it also asked the staff to explain where the existing program had  
failed to protect water quality. The response fails to provide any data or analysis, merely  
paying lip service to these important points while attempting to put the ball back in the  
municipalities’ court. *Id.* at 502-503

1 deadlines for their implementation. (Final Tentative Order C.3.g.ii(5); C.3.a.ii.) While  
2 the response therefore facially responds to the comment in question, its identification of  
3 changes made in response is inaccurate and misleading, and it is therefore inadequate and  
4 legally insufficient.

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

13  
14 **B. The Regional Board's Adoption of the MRP Was Substantively Flawed**

15 The MRP as adopted fails to satisfy the requirements of federal and state law  
16 governing the issuance of an NPDES permit. Two of the new provisions included in the  
17 final MRP – the LID and trash provisions – are highlighted below. While the defects  
18 discussed here may also affect other permit provisions, these two were the focus of much  
19 of the testimony presented at the October 14, 2009 hearing, and are used here as  
20 illustrations.<sup>13</sup>

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23  
24 <sup>13</sup> Comments in the record submitted by and on behalf of Bay Area municipalities  
25 raise the issues to which this section of the Petition is addressed with respect to many  
26 other requirements of the MRP, including, but not limited to: Provisions C.3 (e.g., C.3.g,  
27 C.3.i), C.8 (e.g., C.8.d.iii, C.8.f), C.9e, C.11 (e.g., C.11.e, C.11.f, C.11.h, C.11.i, C.11.j),  
28 C.12 (e.g., C.12.e, C.12.f, X.12.h, C.12.i), C.13 (e.g., C.13.e), and C.14. Should this  
Petition be removed from abeyance, Petitioner reserves the right to elaborate on these and  
the illustrations above.

1                   **1. The Regional Water Board’s imposition of LID measures and**  
2                   **new requirements for trash capture are not supported by legally**  
3                   **sufficient findings .**

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

10                  But, the Final Order as approved by the Regional Water Board, lacks any  
11                  additional findings supporting its conclusion that the new LID measures required under  
12                  the Final MRP represent the “maximum extent practicable.” Indeed, the evidence before  
13                  the Regional Water Board was to the contrary. As the Regional Water Board staff  
14                  admitted, the permittees uniformly testified that the new requirements would be difficult  
15                  and expensive to implement, and may well be out of reach. (*See e.g.*, Tr. at pp. 53-54,  
16                  58, 83, 121-122, 125.) As one Regional Water Board member summarized succinctly:  
17                  “Well, the state of the economy, or the state of the cities is such that, really, going  
18                  backward, they cannot have it, they cannot afford it.” (Tr. at p. 159.)

19                  To the extent that Dr. Mumley attempted to explain the major revision to impose  
20                  the LID requirements, it was a “it’s nothing new, everyone’s already doing it already  
21                  response.” (Tr. pp.9-10). It may be true that other Regional Board’s (such as the North  
22                  Coast) have recently issued MS4 NPDES permits with a LID requirement, but the federal  
23                  Clean Water Act regulations require more than slavish copying of other Boards, they  
24                  require express findings. Moreover, the very reason that Regional Boards were  
25                  established was to take into account watershed based differences in their separate regions.  
26                  Thus, unlike universally applicable procedural standards which each Board should adhere  
27  
28

1 to with consistency<sup>14</sup>, substantive standards (such as imposition of LID) should not be  
2 imposed merely because a different region adopted the standard, at least in the  
3 demonstrated absence of any identical set of circumstances and watershed-based facts  
4 between the North Coast and San Francisco (or any other regional board).

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

21 **2. The Regional Water Board has failed to perform the analysis of**  
22 **countervailing economic factors required under State law.**

23 The Regional Water Board has also failed to make any findings that would support

24  
25 <sup>14</sup> See fn. 9, *supra*.

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

1 a conclusion that LID measures are necessary or appropriate under state law. Indeed, the  
2 evidence on the record does not support such findings.

3 Imposition of LID measures based solely as a measure that is more stringent than  
4 required under federal law triggers the need for additional analysis. *City of Burbank v.*  
5 *State-Water Resources Control Bd.*, 35 Cal. 4th 613, 626-27, 629 (2005). As a start, the  
6 Regional Water Board would have to undertake a careful analysis of technical feasibility  
7 and economic reasonableness of its proposed requirements. Water Code §§ 13241(d),  
8 13263(a). It did not do so. In fact, at least one member of the Regional Water Board  
9 expressed the strong belief that the LID provisions as written were too inflexible to be  
10 feasible, especially in the urban infill context that many of the permittees will have to  
11 address. (Tr. at pp. 36-37.)

12 Numerous witnesses provided testimony about the economic unreasonableness of  
13 the MRP's requirements given the tenuous financial conditions facing municipal  
14 permittees. Addressing the permit's extensive monitoring requirements, one witness in  
15 particular testified in detail about the dire short-term and long-term economic realities  
16 facing elected officials and the taxpayers who must fund the studies and other mandatory  
17 provisions in the new MRP, rebutting the Regional Water Board's belief that deferring  
18 the most expensive provisions to the end of the permitting period would alleviate such  
19 concerns:

20  
21 This is great, we have a five year permit, we can look forward to  
22 the future, the bar has been raised; but I caution all of you, as an  
23 elected official, and you all know in your own communities, the  
24 budgetary considerations are not just ending at the end of this year,  
25 they are going to be next year, the year after. Concord alone will  
26 have \$9.7 million more we will have to cut. We just lost close to  
27 78 employees, 20 percent of our workforce. We will be cutting  
28 again more staff. So these monitoring requirements [are] still of  
concern, a very large concern, because the amount of money it is  
going to take to [conduct] these studies, even though they are  
spread over a period of time, you are still talking anywhere from  
\$6 to \$43 million in capital costs throughout the permit over that  
five years to address some of the issues identified in those studies,  
possibly, and you are talking about \$12, 15, 18 million of studies,

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of getting data. . . . I think, in reality, I want to go on record that you may hear from us in another year or two, saying, “You know what? There is not enough money to do all the studies that you ask for in the time frame that you put out in this permit.”

(Tr. at 111-113.)

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

Moreover, the Regional Water Board has not made any specific findings supporting the conclusion that these new requirements are necessary to maintain any specific beneficial use tied to local receiving waters. Instead, for LID, for example, the Regional Water Board simply points in a staff report to storm water permits adopted in *other regions* that have implemented “extensive requirements for LID measures.” (Staff Report, at p. 6.) It also failed to consider how the more extensive new and redevelopment controls and hydromodification requirements implemented in the permittees’ jurisdictions as a result of their prior permit compliance may already be adequate to achieve protection of beneficial uses (as their prior permits’ findings determined they would). This “fire, aim, ready” approach is simply not sufficient to justify permit conditions in excess of those required under federal law. *Southern Cal. Edison Co. v. State Water Resources Control Bd.*, 116 Cal. App. 3d 751, 758-59 (1981).

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

Multiple witnesses testified at the October 14, 2009 hearing that the imposition of rigid new LID requirements could actually have an *adverse* environmental impact, by discouraging environmentally responsible infill projects. (*See, e.g.*, Tr. at 121-23: “We

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<sup>16</sup> Municipalities submitted many such analyses; but these were dismissed or ignored.

1 have strong concerns that fully implementing this requirement on certain types of projects  
2 will be very difficult. In fact, complying with the LID requirement as it is written may  
3 not be possible for some projects and may deter responsible redevelopment.”) Witness  
4 testimony also supported revisions to the Final Tentative Order suggested by Regional  
5 Water Board members to allow greater flexibility in choosing from among  
6 environmentally sound treatment methods by eliminating language in the permit that  
7 discourages the use of bioremediation. (See, e.g., Tr. at pp. 105, 120, 124, 130.) These  
8 revisions were not included.

9 The provisions relating to LID and trash removal cannot be demonstrated to  
10 satisfy federally mandated MEP. Thus, they are not exempt from the requirements of  
11 CEQA pursuant to section 13389 of the Water Code. The potential environmental  
12 impacts of these provisions must be analyzed before they may be applied solely pursuant  
13 to the authority provided under state law.

14 **4. The new LID provisions violate the prohibition on specifying the**  
15 **means of compliance.**

16 Both Petitioner the City of Fairfield and a number of other commenters and  
17 witnesses objected to the prescriptiveness of this permit. For example, the replacement in  
18 the final MRP of rigid, prescriptive LID requirements that severely limit options  
19 available to permittees in planning new development and redevelopment projects was the  
20 subject of specific testimony at the October 14 adoption hearing. (See, e.g., Tr. at pp. 60-  
21 61.) At least one Regional Water Board member admitted at that hearing that he felt the  
22 Regional Water Board was “treading in dangerous territory here, from my perspective, in  
23 specifying the method and means of compliance.” (Tr. at p. 171.) The Board member  
24 was correct.

25 The Water Code expressly prohibits permit terms that specify the means of  
26 compliance. Water Code § 13360 (“No waste discharge requirement or other order of a  
27 regional board or the state board or decree of a court issued under this division shall  
28 specify the design, location, type of construction, or particular manner in which

1 compliance may be had with that requirement, order, or decree, and the person so ordered  
2 shall be permitted to comply with the order in any lawful manner.”).<sup>17</sup>

3 With respect to the MRP’s preference for LID measures other than  
4 bioremediation, the MRP contains a patina of flexibility—it allows an individual  
5 permittee, such as Fairfield, to make its determination of “infeasibility” of the more  
6 preferred options and then proceed. But, a permittee does so only to have the Regional  
7 Board review these determinations under the guise of report submittals. The final MRP  
8 requires that by May 2011 the Permittees must report on the criteria and procedures they  
9 use to determine whether the preferred LID options are “infeasible” at a regulated project  
10 site. (*MRP, Provision C.3.c.i.(2)(b)(iv)*). The Board staff clearly intends to review this  
11 report and also subject it to public review and comment. Dr. Mumley stated that for  
12 “some” municipalities the report could show “insufficient” compliance that could led to  
13 “Board action.” (*Tr. pp. 10-11*). Thus, why superficially allowing a municipality some  
14 discretion in making the “infeasible” determination, the MRP permit when read as a  
15 whole demonstrates clearly the intention to subject municipalities to close review and  
16 potential fines and sanctions under the Clean Water Act for any “insufficiency” as found  
17 by Board staff. This is prescriptive regulation in its very essence.

18 **5. The MRP contains provisions extending beyond the permit**  
19 **term.**

20 The Final MRP identifies several items extending its reach well beyond the MRP’s  
21 five-year term. For example:

22 The Permittees shall demonstrate compliance with Discharge  
23 \_\_\_\_\_

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



1 Prohibition A.2 and trash-related Receiving Water Limitations  
2 through the timely implementation of control measures and other  
3 actions to reduce trash loads from municipal separate storm sewer  
4 systems (MS4s) by 40% *by 2014*, 70% *by 2017*, and 100% *by 2022*  
as further specified below. (*Final MRP, at section C.10* (emphasis  
added).)

5 The MRP is effective December 1, 2009. By law, an NPDES permit term cannot  
6 exceed five years. Water Code § 13378. For this reason, only the 2014 date referenced  
7 above is legally valid and those extending beyond it should be stricken from the final  
8 MRP. When the MRP or another successor NPDES permit is reissued, the Regional  
9 Water Board can reassess the necessity, feasibility, and cost of additional reduction goals  
10 and impose any incremental increase as supported by the evidence before it at that time.

11 **6. The Efforts to Regulate Surficial Waters Created by**  
12 **Occasional Rainfall Events Is Beyond the Limits of the**  
13 **Water Board's Clean Water Act Jurisdiction**

14 The MRP's regulation of LID may be well intended, but it simply extends beyond  
15 the Board's jurisdiction under the Clean Water Act. The Clean Water Act requires  
16 NPDES permits only for "discharges" of "pollutants" that reach the jurisdictional "waters  
17 of the United States." (Clean Water Act, 33 U.S.C. §1362(7)(defining the term  
18 'navigable waters' to mean the waters of the United States). The term "waters of the  
19 United States" has been the subject of Supreme Court cases in recent years, including  
20 most directly *Rapanos v. U. S.*, 547 U.S. 715 (2006). While *Rapanos* dealt with a  
21 wetlands area that emptied into unnamed smaller tributaries that ultimately connected  
22 with larger and 'navigable waters', a plurality of the Court explained that generally the  
23 term "waters of the United States" required a relatively continuous surface connection  
24 that was more than a merely seasonal occurrence. Justice Kennedy concurred only in the  
25 judgment of the plurality, and wrote a separate opinion to describe his separate test that a  
26 wetlands or other water system must be demonstrated to have a "substantial nexus" to a  
demonstrated "waters of the United States."

27 In the Ninth Circuit which provides precedential decisions for the State of  
28 California and many others, it is clear that merely because a body of water is somehow

1 “adjacent” to the San Francisco Bay that this alone does not suffice to impose Clean  
2 Water Act jurisdiction. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 701  
3 (9th Cir. 2007)(“mere adjacency [to a regulated waters of the U.S.] provides a basis for  
4 CWA coverage only when the relevant waterbody is a ‘wetland’”).

5 In this case, the Regional Board is attempting to contain and control water caused  
6 by periodic rainfall by LID methods such as the “harvest and re-use” of rainwater or the  
7 implementation of “infiltration” systems that allow the rainwater to be absorbed into the  
8 subsurface groundwater. As the County of Los Angeles’ Low Impact Development  
9 Standards Manual (January 2009) puts it plainly: “LID is a new approach *to managing*  
10 *rainfall* and stormwater runoff.” (p.1, emphasis added).

11 But, the Regional Board’s MRP lacks any findings, or even hint of findings,  
12 showing that there is a jurisdictional basis for asserting control over water resulting from  
13 the occasional rainstorm. As Dr. Mumley put it, the Regional Board is attempting to  
14 harvest and re-use water from the “design storm” and rainfall that is less in volume that  
15 such a “design storm.” (*Tr.* at p.10). But there is simply no showing that such “design  
16 storm” rainwater, *before* it flows into an MS4, either has a “relatively constant surface  
17 connection” to the jurisdictional Clean Water Act waters or has a “substantial nexus” to  
18 such waters.

19 Without such findings, the Regional Board simply lacks jurisdiction to impose its  
20 desired LID regulations on the municipal permittees such as Fairfield.

21  
22 **IV. THE REGIONAL BOARD ERRED IN EXCLUDING THE CITY OF**  
23 **FAIRFIELD’S WRITTEN COMMENTS FROM THE ADMINISTRATIVE**  
24 **RECORD WHICH SHOULD BE SUPPLEMENTED TO INCLUDE THOSE**  
25 **COMMENTS**

26 It is clear that in an adjudicative-style hearing such as this one considerable  
27 liberality is granted in admitted evidence. *City of Rancho Cucamonga v. California State*  
28 *Water Resources Control Bd.*, 135 Cal. App. 4th , 1377, 1395 (2006). But considerable  
liberality does translate into *carte blanche* for an exercise in complete arbitrariness by the

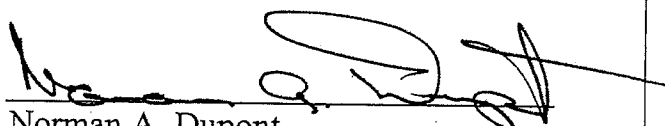
1 Regional Board in determining what evidence it will consider and what evidence it will  
2 not consider. In this case, the City of Fairfield submitted additional written comments  
3 specifically addressed to the significantly new provisions of the Final Tentative Order  
4 which was only posted on September 24, 2009. The City's comments were submitted by  
5 letter to the Regional Board's executive officer on October 6, 2009, which was one full  
6 calendar week before the scheduled hearing date. Thus, there can be no question about  
7 the timeliness of the City's written submission. It is also consistent with 23 Cal. Code  
8 Regs. §648.4(c), which provides for a submittal of "direct testimony" in writing prior to  
9 the hearing. Notwithstanding the controlling rules and its own admission of a significant  
10 set of new LID "requirements", the Regional Board arbitrarily refused to accept  
11 Fairfield's October 6, 2009 letter and place it in the administrative record.

12 Petitioner has attached a copy of its October 6, 2009 letter as Exhibit "A" to the  
13 electronic version of this Petition. Petitioner respectfully submits that the Administrative  
14 Record should be augmented to include this letter in the record.

15  
16 **V. CONCLUSION**

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

21  
22 Dated: November 13, 2009

23  
24 By:   
25 Norman A. Dupont  
26 Counsel for Petitioner,  
27 CITY OF FAIRFIELD  
28



# CITY OF FAIRFIELD

Founded 1856

Incorporated December 12, 1903

## COUNCIL

Mayor  
Harry T. Price  
707.428.7395

Vice-Mayor  
John Mraz  
707.429.6298

Councilmembers  
707.429.6298

Chuck Timm

Catherine Moy

Rick Vaccaro

...

City Manager  
Sean Quinn  
707.428.7400

...

City Attorney  
Greg Stepanich  
707.428.7419

...

City Clerk  
Ariella Cortright  
707.428.7384

...

City Treasurer  
Oscar G. Reyes, Jr.  
707.428.7496

## DEPARTMENTS

Community Development  
707.428.7461

...

Community Resources  
707.428.7465

...

Finance  
707.428.7496

...

Fire  
707.428.7375

...

Human Resources  
707.428.7394

...

Police  
707.428.7551

...

Public Works  
707.428.7485

## PUBLIC WORKS DEPARTMENT

October 6, 2009

Mr. Bruce Wolfe, Executive Officer  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Re: **Comments on Final Tentative Order, NPDES Permit No. CAS612008**

Dear Mr. Wolfe:

This letter is submitted on behalf of the City of Fairfield ("City") regarding the Final Tentative Order for the Municipal Regional Permit dated September 24, 2009 ("FTO"). The City is aware that the Regional Board's website has indicated that it will take no further written comments on the modifications to the FTO from the prior Tentative Order draft of February 11, 2009. The City will present the enclosed comments to the Regional Board at the oral hearing on October 14, 2009, and wishes to provide a written copy of its intended oral comments to Board members and staff prior to the meeting date. To the extent, however, that the Board refuses to hear testimony from the City at the October 14, 2009 hearing and refuses to include these written comments in the administrative record, then the City reserves all of its state and federal constitutional due process rights to contest the exclusion of these comments.

The City acknowledges and appreciates that Board staff have incorporated a number of the City's comments on the prior Tentative Order draft of February 11, 2009 into the modified FTO. The City's comments on the prior Tentative Order were contained in its letter to your attention dated April 3, 2009.

The City, however, continues to have serious concerns with respect to the modifications made in the FTO concerning the mandatory implementation of Low Impact Development ("LID") measures and will make the following comments with respect to the FTO's discussion of LID measures in its oral testimony.

Letter to Mr. Bruce Wolfe

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**Comment No. 1:** The language in Modified FTO Section C.3.c is very untimely, added less than 3 weeks before the adoption date of October 14<sup>th</sup>. The City has numerous concerns with the language contained within this Section:

1. It states that the goal of LID is to mimic a site's predevelopment hydrology. Retention through the use of water harvesting and evapotranspiration does not mimic predevelopment conditions.
2. Permeable pavement is listed as an LID alternative. The soils in Fairfield are almost completely impermeable (clay), therefore the use of permeable pavement over saturated soils will promote greatly accelerated street failure.
3. Requiring each Regulated Project to treat 100% of the amount of runoff is infeasible, especially if previously accepted methods of treatment such as mechanical filters are no longer accepted.
4. It states that biotreatment may be considered ONLY if it is infeasible to implement harvesting/re-use, infiltration, or evapotranspiration at a project site. Biotreatment should be weighted equally to the other three methods, especially within the City of Fairfield, where these three other methods are infeasible for various reasons. At a minimum, economic infeasibility should be added to the list under Section C.3.c.(2)(b)(iii). For example, the cost of purchasing rain barrels and cisterns vastly exceeds the cost of the water it would be storing (55 gallons of water costs less than \$0.10).

**Comment No. 2:** The language in Modified FTO Section C.3.c.(i)(2)(b) is overly prescriptive and constitutes an unfunded state mandate. The FTO contains modified language in Section C.3.c.(i)(2)(b) that imposes an artificial preference for certain types of Low Impact Development over other types of such Low Impact Development. Modified Section C.3.c.(i)(2)(b)(ii) states:

"A properly engineered and maintained biotreatment system may be considered *only if it is infeasible to implement harvesting and re-use, infiltration, or evapotranspiration at a project site.*" (emphasis added).

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This language inserts into the proposed NPDES permit an unjustified preference for harvesting and re-use, infiltration, or evapotranspiration at the expense of biotreatment systems for achieving Low Impact Development. The City is unaware of any justification for such a preference by the Regional Water Board. The City is certainly unaware of how one method of Low Impact Development (i.e., biotreatment systems) is demonstrably inferior to other methods of Low Impact Development (e.g., infiltration or harvest and re-use) in terms of an impact to the water flowing into the regulated waters of the United States. Either type of Low Impact Development systems would appear to reduce the volume of stormwater entering the waters of the United States, and thereby achieve the Regional Board's water quality goals.

To the extent that the Regional Board imposes through the NPDES permit a requirement that City staff rigorously review, analyze and provide documented reports on the "infeasibility" of each and every regulated project to determine the permissibility of use of a biotreatment system to the Board's preferred harvesting and re-use, infiltration, or evapotranspiration systems, then it is imposing an unfunded mandate. The requirement for any Low Impact Development system for new development is not found in the federal Clean Water Act, so this is clearly a state-imposed mandate. Thus, this permit condition clearly appears to qualify as an unfunded state mandate.

**Comment No. 3:** The language in Modified FTO Section C.3.c.(i)(2)(b) goes beyond the Board's jurisdictional limits to regulate water quality impacts to waters of the United States. As the U.S. Supreme Court has made clear, the jurisdictional limits of the Clean Water Act do not extend to isolated gravel pits or ponds unconnected with the regulated waters of the United States (*Solid Waste Agency of Northern Cook Cty v. Army Corps*, 531 U.S. 159 (2001)). Nor can a state (or federal government) regulate as a "water of the United States" a mere creek or tributary that lacks a "substantial nexus" to the jurisdictional waters of the United States. *Rapanos v. U.S.*, 537 U.S. 715, 126 S. Ct. 2208 (2006).

In this case, the Regional Board seeks to regulate rainwater and other surficial waters by imposing Low Impact Development regulations upon defined regulated projects. There has been no demonstration or showing that the rainwater sought to be regulated has a "substantial nexus" to the waters of the United States as required in *Rapanos*. Even if there was a generalized showing that increased amounts of surface water did impact the quality of stormwater that flowed into a jurisdictional waters of the United States, there is no evidence to support the claim that one type of reduction (infiltration) is superior to another type of reduction in stormwater (biotreatment).

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The City submits that the Board cannot impose its preferences for Low Impact Development systems without establishing that such a preference at least has a "substantial nexus" with the jurisdictional waters of the United States. There is no such showing in the FTO, and therefore, the Board's efforts to mandate a particular type of Low Impact Development is beyond the limits of Clean Water Act jurisdiction.

**Comment No. 4:** The language in Modified FTO Section C.3.c. imposing a Low Impact Development Program could result in a claim of diversion of waters to downstream users and the Board should expressly insert findings and permission to protect the city against future claims of unlawful diversion.

The imposition by the Regional Board of a Low Impact Development strategy may have many benefits, but also an unintended consequence—potential lawsuits from downstream users of the surface water that the City is now purportedly "diverting." As one attorney expert in the field of water law has put it:

"First, to the extent that one can obtain a right to capture diffuse surface waters. . . any capture of diffuse surface waters without a permit from the State Water Resources Control Board could well be a trespass against the State of California. Second, even if one cannot obtain a 'right' to diffuse surface waters, though, the capture of such waters in a manner that interferes with the diversion of the same water once it reaches a watercourse constitutes injury to legal users of water that rely on such diffuse surface water contributing to the water that they are able to divert." D. Aladjem, *Who Owns the Water? The Looming Conflict Between Low Impact Development and the Water Rights System* at p.5 ( Paper given at American Bar Association 17th Environmental Law Fall Section Meeting, Sept. 24, 2009).

The City believes that the law in this area, particularly with respect to ownership of diffuse surface waters, is quite uncertain. But, the City also believes that to the extent that the Regional Board imposes additional obligations upon the City pursuant to the NPDES permit, then the Regional Board should insert sufficient findings and authorization for the capture of surface water through Low Impact Development systems to protect the City against claims of either a trespass against the State or claims of unlawful diversion of stormwater that would otherwise flow into watercourses that might be the subject of claims of diversion rights by downstream users.

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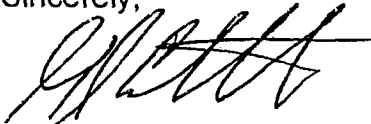
**Comment No. 5:** The language in Modified FTO Section C.3.c.ii.(1) states that "For any private development project for which a planning application has been deemed complete by a Permittee on or before the Permit effective date, Provision C.3.c.1 shall not apply so long as the project applicant is diligently pursuing the project." The City is concerned that this language fails to fully and properly exempt projects for which the City has granted final discretionary approvals (i.e., design review, tentative map, etc.), or certain legislative approvals such as development agreements, where those approvals *have not yet expired*. In these cases, state law precludes the City from imposing new conditions such as LID requirements under C.3.c.1, regardless of "diligent" action on the part of the recipient. As such, for entitled projects, new requirements under Section C.3.c.i are wholly *unenforceable*. We therefore request that Section C.3.c.ii.(1) be modified to exempt as well projects which have received entitlements, and whose entitlements have not expired.

We note for reference adopted legislation AB 1185 and SB 333, which could extend the life of some tentative maps to as long as 2015. Entitled maps that remain valid per these laws would be exempt as well.

The City will attend the hearing on October 14, 2009 to orally present these comments and would welcome the opportunity to speak with you, your staff, or Board counsel at that time.

If you have any questions or comments, please feel free to contact George Hicks, City Engineer at (707) 428-7494.

Sincerely,



GENE S. CORTRIGHT  
Public Works Director

GSC/jjp

c: George Hicks  
Erin Beavers  
Dave Feinstein  
Norman A. Dupont, Richards Watson Gershon