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CITY OF FAIRFIELD

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In Re Petition of CITY OF FAIRFIELD

Petitioner,

From the Decision of the SAN FRANCISCO REGIONAL WATER QUALITY 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 ABYANCE (27 CCR §2050.5)

The City of Fairfield ("Petitioner") hereby submits this Petition to the California State Water Resources Control Board ("State Water Board") pursuant to section 13320(a) of the California Water Code (the "Water Code"), requesting that the State Water Board review an action by the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Water Board"). Specifically, Petitioner seeks review of the Regional Water Board's October 14, 2009 Municipal Regional Storm Water Permit.
Order No. R2-2009-0074, reissuing NPDES Permit No. CAS612008 (the "MRP")¹. Petitioner requests that this Petition be held in abeyance pending further notice by Petitioner to the State Water Board in the event that Petitioner wishes to request that the review process be activated. This request for holding this petition in abeyance is made pursuant to 23 California Code of Regulations §2050.5(d).

I. INTRODUCTION/PETITION INFORMATIONAL REQUIREMENTS

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

A. Name & Address of Petitioner:

City of Fairfield
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B. Specific Action State Board is Requested to Review

The State Board is requested to review:

(a) Order No. R2-2009-0074(NPDES Permit No. CAS612008), the Municipal Regional Stormwater NPDES Permit ("MRP").

¹ A copy of Order R2-2009-0074 may be accessed via the internet at 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 being provided concurrently with this Petition but will be provided to the State Water Board upon its further request should that be deemed necessary.
(b) Determination by Regional Board to exclude all written comments, including those submitted by the City of Fairfield before the October 14, 2009 Board hearing on the significant modifications made to the proposed Order and provided to the public for the first time on September 24, 2009.

C. Date On Which Regional Board Acted

October 14, 2009.

D. State of Reasons for Petition

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

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

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

➢ The Board failed to accept written comments on the proposed final version of the MRP which included significant changes from the prior draft particularly those related to requirements for Low Impact Development ("LID").

➢ The Board exacerbated its procedural failure to take written comments on significant revisions it made to the final MRP by limiting oral testimony to a maximum of five minutes.

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

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

• The Regional Water Board's assertion that various MRP Provisions are required by the "maximum extent practicable" ("MEP") standard set forth in 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., 557 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
feasibility of harvesting and reuse, infiltration, or evapotranspiration for each Regulated Project.”

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

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

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

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

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

H. Statement that Issues Were Raised Below

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

\(^2\) This Petition is being transmitted to the State Board electronically, and in that 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.
requirements in the final Order, and therefore, the Regional Board was at least aware of the issue based solely upon oral comments made at the hearing. Indeed, even at the outset of the hearing, the Board was informed by Dr. Mumley that one of the “key revisions” (from the prior draft of the proposed MRP) was the “low impact development requirements.” (Tr. of Hearing, p. 8).

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. Federal and State Statutory Scheme.

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

Permits for discharges from municipal storm sewers –

(i) may be issued on a system or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.


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3 Petitioner reserves the right to supplement and expand upon this Petition if it is taken out of abeyance and once the record had been assembled.
California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water Quality Control Act. See Water Code §§ 13160 and 13370 et seq. Respondent State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act—Water Code § 13160.4 State and Regional Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued for terms not to exceed five years. Id. § 13378 ("Such requirements or permits shall be adopted for a fixed term not to exceed five years.").

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

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

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4 Water Code Sections 13160 and 13370 et seq. reference the Federal Water Pollution Control Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water Act.
Courts have read these provisions together to mean that the Regional Water Board cannot rely on the requirement for consideration of economic conditions under section 13241 as justification for imposing conditions that are less stringent than those required under the federal Act. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 626-27 (2005). However, nothing in the federal or state statutory scheme prohibits consideration of economic factors in fashioning permits that meet federal standards. *Id.* at 629 (Brown, J., concurring). As implied by the remand order issued by the court in the *City of Burbank*, sections 13236 and 13241 together require that economic factors must be considered when imposing conditions that exceed federal requirements. *Id.* at 627 n.8 & 629 (remanding to the trial court “to decide whether any numeric limitations, as described in the permits, are ‘more stringent’ than required under federal law and thus should have been subject to ‘economic considerations’ by the Los Angeles Regional Board before inclusion in the permits”).

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

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

Public participation

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

5 Issuance of NPDES permits as required to implement the Clean Water Act are exempt from CEQA’s requirement of preparation of an environmental impact report for all projects that are expected to have a significant environmental impact. Water Code § 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.
Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.

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

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

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

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

In the context of a NPDES permit, particularly one that imposes conditions
beyond the requirements of federal law, such findings must, at a minimum, demonstrate
that such conditions are necessary to protect specific beneficial uses. Southern Cal.
(rejecting conditions in an NPDES permit based on the State Ocean Plan that were
unsupported by findings that such standards were “necessary to protect specific beneficial
uses... The absence of such evidence makes it impossible to determine whether stricter
regulations than those found in the Ocean Plans are in fact “necessary.”

III. POINTS AND AUTHORITIES IN SUPPORT OF PETITION

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

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

The MRP is the culmination of nearly five years of work by the Regional Water
Board, permittees, and stakeholders. The process has been iterative, and the Regional
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
December 14, 2007. This was followed by a public workshop held by the Regional Water Board in March 2008. Nearly a year later, on February 11, 2009, the Regional Water Board produced a revised draft. On May 13, 2009, the Regional Water Board held a public hearing to discuss revisions to the December 2007 draft. At each preliminary stage of the permitting process, the Regional Water Board provided sufficient notice and solicited public comment on revisions from the prior draft in keeping with the public participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

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

2. The Regional Water Board deprived Petitioner of the opportunity to comment on substantive new requirements in the MRP.

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

6 Board staff explained that their “goal” was to publish the proposed “final” proposed MRP three weeks before the final hearing (October 14, 2009), but conceded at the hearing that they fell “a day or two” short of even their own three-week goal. (Tr. of Hearing, Dr. Mumley 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.
changes from February 2009 tentative order.) The September 24, 2009 draft also replaced some more flexible provisions of the prior draft tentative orders with more prescriptive and inflexible requirements.

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

- A requirement that 100 percent of qualifying storm water from regulated projects be dealt with through a handful of prescribed methods, with alternatives such as bioremediation allowed only where the permittee can demonstrate that the Board’s preferred methods are “infeasible”;

- A requirement that the municipal permittees produce a report determining feasibility or infeasibility of LID measures within the next 18 months;

- A requirement that the municipal permittees propose an LID treatment reduction Special Project credit system within one year for projects that have demonstrated environmental benefits to allow a portion of the storm water runoff onsite to be treated by non-LID, or so-called “conventional,” treatment measures.

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

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

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

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

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

8 This could relate to brownfield sites, low-income housing, senior citizen housing, transit oriented development projects and other infill or redevelopment projects.
comments or evidence. Instead, participation by the permittees who would be subject to these burdensome new requirements was limited to five-minute oral testimony at the Regional Water Board’s October 14, 2009 hearing on the MRP. The Regional Water Board’s statement that these revisions were the “outgrowth of comments” submitted by Permittees and other interested persons is not accurate and does not justify the refusal to allow written comments on these revisions.

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

Yet despite the scope and additional burdens of these new and controversial provisions, each interested entity was allowed only five minutes to speak, and was encouraged by the chair to limit remarks to less than three minutes. (Tr. at p. 51) Permittees who wished to present more than one witness were required to split their five-minute allotment among those witnesses. (Id.) The only exception was granted to a witness appearing on behalf of one group that favored the new provisions. This witness was allotted ten minutes. (Id. at p. 92.) While the Regional Water Board staff was allowed to respond to all comments with no time limit, and was questioned by the members of the Regional Water Board, no additional time was allotted for Permittees to question staff directly or to submit additional evidence. (See, e.g., Tr. at p. 82 (refusing to allow a witness to provide the Regional Water Board with a copy of written comments).)
Witnesses who appeared on behalf of Permittees objected to the imposition of these costly, burdensome and inflexible new provisions being added so late in the process and without the opportunity to provide more detailed comments, and testified to the lack of available public resources to fund them. (See, e.g., Tr. at p. 102 (comments of Melody Tovar: "We do look at the new draft, though, and note some new changes in the permit, and that the revised draft was not circulated for public review and comment, and we think it should have been. For us, that means that my testimony here today does not benefit from the direction and feedback from our City Council, and that is something we have thoughtfully done for every draft of this permit."); see also, Tr. at pp. 58, 83, 85, 111-113, 121-22, 129.)

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

"But we are concerned that at the . . . hearing, interested persons and permittees were not given adequate time to review late revisions or to comment on them. Given the intense interest in this issue, the Regional Water Board should have diverged from its strict rule limiting individual speakers to three minutes and 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).

In the Bellflower case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board’s regulations. Id. at *24 n.25 ("For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et seq.") Those regulations require the Regional Water Board to allow interested parties the opportunity to cross-examine witnesses and present contrary evidence. 23 Cal. Code Regs. § 648.5(a). The Regional Water Board here ignored the
State Water Board’s admonition. As a result, Petitioner has thus far been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); Bellflower, WQ 2000-11.

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

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

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

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

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

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

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

\textsuperscript{12} Likewise, the Santa Clara Program submitted comments on Provision C.15 of the MRP noting that it had previously developed and obtained approval of a

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

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

(...continued)
comprehensive non-stormwater discharge management program. It asked the Regional Water Board staff to explain why that program was no longer adequate or could not simply be grandfathered, thereby saving significant public resources while continuing to 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
deadlines for their implementation. (Final Tentative Order C.3.g.ii(5); C.3.a.ii.) While
the response therefore facially responds to the comment in question, its identification of
changes made in response is inaccurate and misleading, and it is therefore inadequate and
legally insufficient.

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

B. The Regional Board’s Adoption of the MRP Was Substantively Flawed

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

13 Comments in the record submitted by and on behalf of Bay Area municipalities
raise the issues to which this section of the Petition is addressed with respect to many
other requirements of the MRP, including, but not limited to: Provisions C.3 (e.g., C.3.g,
C.3.i), C.8 (e.g., C.8.b.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),
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. The Regional Water Board's imposition of LID measures and new requirements for trash capture are not supported by legally sufficient findings.

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

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

To the extent that Dr. Mumley attempted to explain the major revision to impose the LID requirements, it was a "it's nothing new, everyones already doing it already response." (Tr. pp.9-10). It may be true that other Regional Board's (such as the North Coast) have recently issued MS4 NPDES permits with a LID requirement, but the federal Clean Water Act regulations require more than slavish copying of other Boards, they require express findings. Moreover, the very reason that Regional Boards were established was to take into account watershed based differences in their separate regions. Thus, unlike universally applicable procedural standards which each Board should adhere
to with consistency, substantive standards (such as imposition of LID) should not be imposed merely because a different region adopted the standard, at least in the demonstrated absence of any identical set of circumstances and watershed-based facts between the North Coast and San Francisco (or any other regional board).

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

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

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

14 See fn. 9, supra.

15 Even if this rationale were sufficient and supported by evidence, a statement in the Staff Report or other supporting document cannot substitute for findings in the permit. In re City and County of San Francisco et al., State Board Order WQ 95-4, at pp. *28-29 (Sept. 12, 1995).
a conclusion that LID measures are necessary or appropriate under state law. Indeed, the evidence on the record does not support such findings.

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

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

This is great, we have a five year permit, we can look forward to the future, the bar has been raised; but I caution all of you, as an elected official, and you all know in your own communities, the budgetary considerations are not just ending at the end of this year, they are going to be next year, the year after. Concord alone will have $9.7 million more we will have to cut. We just lost close to 78 employees, 20 percent of our workforce. We will be cutting 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,
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.\(^{16}\) 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

\(^{16}\) Municipalities submitted many such analyses; but these were dismissed or ignored.
have strong concerns that fully implementing this requirement on certain types of projects
will be very difficult. In fact, complying with the LID requirement as it is written may
not be possible for some projects and may deter responsible redevelopment.”) Witness
testimony also supported revisions to the Final Tentative Order suggested by Regional
Water Board members to allow greater flexibility in choosing from among
environmentally sound treatment methods by eliminating language in the permit that
discourages the use of bioremediation. (See, e.g., Tr. at pp. 105, 120, 124, 130.) These
revisions were not included.

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

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

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

The Water Code expressly prohibits permit terms that specify the means of
compliance. Water Code § 13360 (“No waste discharge requirement or other order of a
regional board or the state board or decree of a court issued under this division shall
specify the design, location, type of construction, or particular manner in which
compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.”\(^\text{17}\)

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

5. The MRP contains provisions extending beyond the permit term.

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

"The Permittees shall demonstrate compliance with Discharge..."

\(^{17}\) The LID requirements are again illustrative. First, they require all covered development projects to treat 100% of storm water on site. (Final MRP, section C.3.c.i(2)(b).) This requirement clearly specifies the “location” of treatment in contravention of section 13360. In addition, by eliminating the use of underground vaults or bioremediation except where none of the prescribed treatment methods are feasible, the MRP is specifying the design and type of construction, as well as the manner of compliance. (Id.)
Prohibition A.2 and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems (MS4s) by 40% by 2014, 70% by 2017, and 100% by 2022 as further specified below. (Final MRP, at section C.10 (emphasis added).)

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

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

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

In the Ninth Circuit which provides precedential decisions for the State of California and many others, it is clear that merely because a body of water is somehow
“adjacent” to the San Francisco Bay that this alone does not suffice to impose Clean Water Act jurisdiction. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 701 (9th Cir. 2007) ("mere adjacency [to a regulated waters of the U.S.] provides a basis for CWA coverage only when the relevant waterbody is a ‘wetland’").

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

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

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

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

It is clear that in an adjudicative-style hearing such as this one considerable liberality is granted in admitted evidence. *City of Rancho Cucamonga v. California State 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
Regional Board in determining what evidence it will consider and what evidence it will not consider. In this case, the City of Fairfield submitted additional written comments specifically addressed to the significantly new provisions of the Final Tentative Order which was only posted on September 24, 2009. The City's comments were submitted by letter to the Regional Board's executive officer on October 6, 2009, which was one full calendar week before the scheduled hearing date. Thus, there can be no question about the timeliness of the City's written submission. It is also consistent with 23 Cal. Code Regs. §648.4(c), which provides for a submittal of "direct testimony" in writing prior to the hearing. Notwithstanding the controlling rules and its own admission of a significant set of new LID "requirements", the Regional Board arbitrarily refused to accept Fairfield's October 6, 2009 letter and place it in the administrative record.

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

V. CONCLUSION

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

Dated: November 13, 2009

By: [Signature]
Norman A. Dupont
Counsel for Petitioner,
CITY OF FAIRFIELD
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.
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 14th. 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).
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).
Letter to Mr. Bruce Wolfe  
Re: Comments on Final Tentative Order, NPDES Permit No. CAS612008  
October 6, 2009  
Page 4

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.
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