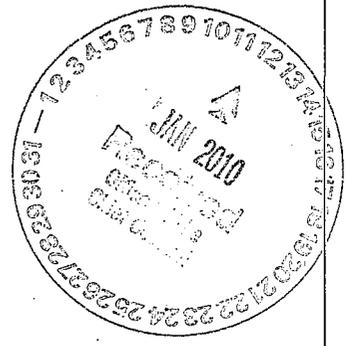


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CITIES OF CARSON, DOWNEY, DUARTE,
6 IRWINDALE, MONTEREY PARK, SAN
GABRIEL, SIGNAL HILL, SOUTH EL
7 MONTE AND SOUTH GATE



8
9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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In the Matter of:

California Regional Water Quality Control
Board, Los Angeles Region's Amendment of
December 10, 2009 to the County of Los
Angeles Municipal Separate Storm Sewer
System Permit, NPDES No. CAS004001

PETITION FOR REVIEW
[Water Code § 13320 and Title 23,
CCR § 2050, et seq.]

1 Petitioners, the Cities of Carson, Downey, Duarte, Irwindale, Monterey Park, San
2 Gabriel, Signal Hill, South El Monte and South Gate ("Cities") respectfully petition the
3 State Water Resources Control Board ("State Board") to review the decision of the
4 California Regional Quality Control Board, Los Angeles Region ("Regional Board") to
5 reopen the waste discharge requirements ("WDRs") for the Los Angeles County Municipal
6 Separate Storm Sewer System Permit, NPDES No. CAS004001 ("Permit") to incorporate
7 Waste Load Allocations established in the Los Angeles River Watershed Trash Total
8 Maximum Daily Load ("Trash TMDL" or "TMDL"). The Permit was amended through a
9 yet to be numbered resolution of the California Regional Quality Control Board, Los
10 Angeles Region ("Regional Board"), issued on December 10, 2009 ("Permit
11 Amendment").

12 **1. Names, Addresses, Telephone Numbers and Email Addresses of**
13 **Petitioners.**

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Please send notices for all
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1 **2. The Specified Action of the Regional Board Upon Which Review Is**
2 **Sought.**

3 By this Petition, the Cities are challenging the Regional Board's December 10, 2009
4 adoption of the Permit Amendment incorporating the Trash TMDL into the Permit. As of
5 the submission of this Petition, the Regional Board had yet to make the final resolution
6 adopting the Permit Amendment available to the public. Attached hereto as Exhibit "A" is
7 a copy of the most recent draft of the Permit Amendment made available by the Regional
8 Board.

9 **3. The Date of the Regional Board's Action.**

10 The Regional Board approved the challenged Permit Amendment on December 10,
11 2009.

12 **4. Statement of Reasons the Action of the Regional Board Was**
13 **Inappropriate and Improper.**

14 (1) The incorporation of the Trash TMDL into the Permit is premature at this
15 time and in error in light of the Orange County Superior Court's decision in *City of*
16 *Arcadia v. State Board*, OCSC Case No. 06CC02974 (the "*Arcadia Case*"), which is
17 currently on appeal before the California Court of Appeal, Fourth Appellate District,
18 Division 3. As recognized by the State Board in Order No. WQ 2001-06, and as quoted in
19 Order No. WQ 2009-0008, "water quality standards provide the *foundation* for identifying
20 impaired waters that require a TMDL." (Order No. 2009-0008, p. 2.) In the *Arcadia*
21 Case, the Superior Court issued a Judgment and Writ of Mandate requiring that the State
22 and Regional Boards review the "water quality standards" in the Basin Plan for the Los
23 Angeles Region ("Standards" or "Water Quality Standards") and comply with the
24 requirements of sections 13241 and 13000 with respect to Stormwater discharges (which
25 was defined by the Court and agreed to by the parties as including "urban runoff").¹ The
26 Superior Court also required the Boards to correct the improperly designated "potential"

27 _____
28 ¹ As used herein, consistent with the definition of "Stormwater" under the federal
regulations, the term "Stormwater" includes urban runoff, *i.e.*, "surface runoff and
drainage."

1 use designations upon which many of the Water Quality Standards in the Basin Plan are
2 based. If upheld on appeal, the Superior Court's Judgment and Writ of Mandate in the
3 *Arcadia* Case will require a review of all of the existing Standards in the Basin Plan *vis-à-*
4 *vis* Stormwater, and potential revisions based on such review, as well as revisions to all
5 Standards that are based on mere "potential" beneficial uses. Accordingly, the Trash
6 TMDL and all other adopted TMDLs must be reevaluated and readopted *before* being
7 incorporated in any fashion into the subject Permit. The Regional Board acted arbitrarily
8 and capriciously, and in a manner that was contrary to law by incorporating a TMDL that
9 has been based on defective and suspect Standards, into the subject Permit.

10 (2) Because the Clean Water Act (33 USC § 1251 *et seq.* – "CWA" or "Act")
11 does not require that the subject Permit include numeric effluent limits, the incorporation
12 of a numeric effluent limit into the Permit for purposes of the Trash TMDL goes beyond
13 the requirements of the Clean Water Act. Under the California Porter-Cologne Act
14 ("PCA" - California Water Code section ("CWC") 13000 *et seq.*), the inclusion of such
15 numeric effluent limits into the Permit can only lawfully be accomplished by the Regional
16 Board after it has first conducted the analysis and considered the factors required under
17 CWC sections 13263, 13241 and 13000.² (*See City of Burbank v. State Board* (2005) 35
18 Cal.4th 613 ("*Burbank*").) Since the Permit Amendment included provisions requiring
19 strict compliance with "numeric effluent limitations," and since the Regional Board has
20 admitted it did not even attempt to conduct a CWC section 13241/13000 analysis
21 (claiming such an analysis was not "necessary to support these effluent limitations") before
22 amending the subject Permit to incorporate the Trash TMDL, the incorporation of the
23 Trash TMDL was plainly contrary to law.

24 (3) CWC sections 13225(c) and 13267 require that a cost/benefit analysis be
25 conducted before any investigation, monitoring or reporting obligations may be imposed
26 upon the Cities and the other Permittees, and that no such requirements be imposed unless
27 their benefits outweigh their costs. The Permit Amendment includes new investigation,
28

² All section references are to the California Water Code unless otherwise specified.

1 monitoring and reporting requirements to be adhered to by the Cities, yet the record does
2 not indicate that any such cost/benefit analysis was conducted prior to the Regional
3 Board's adoption of the Permit Amendment. Accordingly, the investigation, monitoring
4 and reporting obligations set forth in the Permit Amendment were adopted in a manner that
5 was contrary to law.

6 **5. The Manner In Which The Cities Have Been Aggrieved.**

7 First, the Cities have been aggrieved by the Permit Amendment because they are all
8 Permittees under the subject Permit and are now being compelled to comply with numeric
9 limits that are based on a set of Water Quality Standards ("Standards") that were not
10 developed for application to Stormwater dischargers in accordance with applicable law,
11 namely as required by CWC sections 13241 and 13000. The Trial Court in the *Arcadia*
12 case issued a Writ of Mandate and Judgment which requires the Regional and State Boards
13 to remove all "potential" use designations from the Basin Plan. The Trash TMDL and the
14 waste load allocations therein (which have now been incorporated into the subject Permit
15 by the Permit Amendment), were, in part, designed to protect certain "potential"
16 designated uses. Such "potential" designated uses in the Basin Plan will need to be revised
17 if the Trial Court's Writ and Judgment are upheld on appeal.

18 Similarly, other designated beneficial uses in the Basin Plan may change once the
19 Regional and State Boards conduct the required CWC section 13241/13000 analysis.
20 Accordingly, to proceed with the incorporation of a TMDL into the subject Permit, when
21 the TMDL had been based on certain defective Standards, and with all the Standards upon
22 which the TMDL was based, being subject to review and revisions, is action that is
23 arbitrary and capricious, and is injurious to the Cities as it will result in the waste of scarce
24 public resources to comply with a TMDL that will likely change.

25 Second, the Cities are aggrieved by the adoption of the Permit Amendment in that
26 such action will require the Cities to install "full capture" devices to comply with these
27 new numeric limits in the Permit, at significant costs to the Cities, or alternatively will put
28 the Cities at substantial risk of being found in noncompliance with the Permit and subject

1 them to substantial penalties, including mandatory minimum penalties, along with being
2 subject to third-party citizen lawsuits. Yet, the numeric limits added through the Permit
3 Amendment by the Regional Board were added without any analysis of whether imposing
4 such numeric limits was “reasonable,” or of the “economic” consequences of doing so to
5 the Cities, and in general, without any consideration of the other factors and considerations
6 under CWC sections 13263, 13241 and 13000.

7 Many of the Permittees under the Permit, including certain Cities herein, have
8 already installed partial capture devices which have proven to be very effective at reducing
9 the amount of trash being discharged into State waters. Nonetheless, the Permit
10 Amendment contains only a single means of being deemed in full compliance with the
11 numeric limits, *i.e.*, the installation of full capture systems, meaning the Cities and other
12 Permittees who have already installed the partial capture devices will need to replace
13 and/or supplement these devices, at great expense. Also, because of the inclusion of strict
14 numeric limits into the Permit by the Permit Amendment, Cities will likely need to forego
15 utilizing partial capture devices in the future, even where such partial capture devices may
16 be equally protective of the environment in the areas they are to be installed.
17 Alternatively, the Cities and other Permittees utilizing partial capture devices may forego
18 installing full capture devices in place of, or in addition to the partial capture devices, but
19 then will ultimately be in noncompliance with the absolute zero trash requirement set forth
20 in the Permit Amendment.

21 The Regional Board acted contrary to law by refusing to conduct any analysis of
22 whether the marginal increased benefit of using full capture devices is economically
23 justified, and without conducting any analysis of whether such new Permit requirements
24 “could reasonably be achieved,” along with any analysis of the other considerations under
25 CWC sections 13241 and 13000.

26 Third, the Cities are further aggrieved by the Regional Board’s action in that the
27 Permit Amendment includes a series of investigation, monitoring and reporting
28 requirements which the Cities will be required to comply with, and which, if not complied

1 with, would again subject the Permittees to various penalties and enforcement action under
2 the PCA, as well as third-party citizen suits. No cost-benefit analysis of these
3 requirements was conducted, as required by sections 13225(c) and 13267, before their
4 incorporation into the Permit by the Permit Amendment, and no written or other
5 determination was made by the Regional Board that the benefits of such investigation,
6 monitoring and reporting requirements will exceed their expected costs.

7 **6. The Specific Action Requested of the State Board With This Petition.**

8 Through this Petition, the Cities respectfully request that the State Board set aside
9 the Permit Amendment as such action was premature and was arbitrary and capricious and
10 contrary to law. The Cities further request that when the Standards in the Basin Plan are
11 reviewed and revised, and the Trash TMDL thereafter accordingly reviewed and revised,
12 that at such time as the TMDL is proposed to be incorporated into the Permit, that the
13 Permit be revised only after the Regional Board has first complied with CWC sections
14 13263, 13241, 13000, 13225 and 13267. Specifically, any incorporation of the trash
15 TMDL should be accomplished consistent, not only with the "assumptions and
16 requirements of any available waste load allocation," but also with the assumptions and
17 requirements of applicable State law, including a consideration of the factors set forth in
18 CWC sections 13263, 13241 and 13000, and only after a cost-benefit analysis of any
19 investigation, monitoring and reporting requirements has been conducted, as required by
20 CWC sections 13225(c) and 13267, along with a showing that the benefits of all such
21 investigation, monitoring and reporting requirements outweigh their costs.

22 However, as the issues raised in this Petition may be resolved or rendered moot in
23 whole or in part by a final decision in the *Arcadia* Case, and/or by subsequent Regional or
24 State Board actions, the Petitioner Cities hereby request the State Board hold this Petition
25 in abeyance at this time, pursuant to 23 C.C.R. § 2050.5(d). Depending on the outcome of
26 the *Arcadia* case and future actions of the State and Regional Boards, Petitioners will, if
27 necessary, request the State Board take the Petition out of abeyance, and consider some or
28 all of the issues raised in the Petition at that time after a public hearing on such matters.

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10. Service of Petition.

As set forth in the attached Proof of Service, this Petition is being served upon the following parties via electronic mail, facsimile and U.S. mail:

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Respectfully submitted

RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO
PETER J. HOWELL

Dated: January 8, 2010

By: 
Richard Montevideo
Attorneys for Petitioners

EXHIBIT "A"

Findings

Section E. Federal, State, and Regional Regulations

Revisions: (Replace Finding 14 with the revised Finding 14 below)

14. The Regional Board on September 19, 2001, adopted amendments to the Basin Plan, to incorporate TMDLs for trash in the Los Angeles River Watershed (Resolution No. R01-013) and Ballona Creek Watershed (Resolution No. R01-014). The amendments were subsequently approved by the State Board, the Office of Administrative Law, and the United States Environmental Protection Agency. Twenty-two cities¹ ("Cities") sued the Regional Board and State Board to set aside the Los Angeles River Trash TMDL. The trial court entered an order deciding some claims in favor of the Water Boards and some in favor of the Cities. Both sides appealed, and on January 26, 2006, the Court of Appeal decided every one of the Cities' claims in favor of the Water Boards, except with respect to California Environmental Quality Act (CEQA) compliance (*City of Arcadia et al. v. Los Angeles Regional Water Quality Control Board et al.* (2006) 135 Cal.App.4th 1392). The Court therefore declared the Los Angeles River Trash TMDL void, and issued a writ of mandate that ordered the Water Boards to set aside and not implement the TMDL until it had been brought into compliance with CEQA. As a result of the appellate court's decision, in 2006, the Regional Board set aside its 2001 action incorporating the TMDL into the Basin Plan (Resolution R06-013) (*City of Arcadia et al. v. Los Angeles Regional Water Quality Control Board et al.* (2006) 135 Cal.App.4th 1392). After conducting the required CEQA analysis, the Regional Board readopted the Los Angeles River Watershed Trash TMDL on August 9, 2007 (Resolution No. R07-012). This TMDL was subsequently approved by the State Board (Resolution No. 2008-0024), the Office of Administrative Law (File No. 2008-0519-02 S), and the United States Environmental Protection Agency, and became effective on September 23, 2008. The Water Boards filed their final return to the writ of mandate on August 6, 2008, and on August 26, 2008, the superior court entered an order discharging the writ, and dismissing the case, thus concluding the legal challenges to the Trash TMDL.

Additions:

Findings Related to the Incorporation of the Los Angeles River Watershed Trash TMDL

40. The Regional Board adopted the Los Angeles River Trash Total Maximum Daily Load (TMDL) on August 9, 2007 as an amendment to the region's Water Quality Control Plan (Basin Plan) to address water quality impairments due to trash in the Los Angeles River Watershed that were identified in 1998 on the State's Clean Water Act Section 303(d) List. This TMDL was subsequently approved by the State Board, the Office of Administrative Law (OAL), and the USEPA, and it became effective on September 23, 2008.
41. By its adoption of the Trash TMDL, the Regional Board determined that trash discharged to the Los Angeles River and its tributaries discourages recreational activity, degrades aquatic habitat, threatens wildlife through ingestion and entanglement, and also poses risks to human health. Existing beneficial uses impaired by trash in the Los Angeles River are contact

¹ The cities include Arcadia, Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina, and Whittier.

recreation (REC-1) and non-contact recreation (REC-2); warm fresh water habitat (WARM); wildlife habitat (WILD); estuarine habitat (EST) and marine habitat (MAR); rare, threatened or endangered species (RARE); migration of aquatic organisms (MIGR) and spawning, reproduction and early development of fish (SPWN); commercial and sport fishing (COMM); wetland habitat (WET); and cold freshwater habitat (COLD).

42. The Los Angeles River Watershed Trash TMDL identifies discharges from the municipal separate storm sewer system as the principal source of trash to the Los Angeles River and its tributaries. As such, WLAs were assigned to MS4 Permittees that discharge to the MS4 system in the watershed. The WLAs are expressed as progressively decreasing allowable amounts of trash discharges from jurisdictional areas within the watershed. The Trash TMDL requires MS4 Permittees to make annual reductions of their discharges of trash to the Los Angeles River Watershed over a 9-year period, until the numeric target of zero trash discharged from the MS4 is achieved for the 2013-2014 storm year. The Basin Plan assigns MS4 Permittees within the Los Angeles River Watershed baseline Waste Load Allocations from which annual reductions are to be made. (See Basin Plan, Table 7-2.2.) The Basin Plan also specifies interim and final Waste Load Allocations as decreasing percentages of the Table 7-2.2 baseline WLAs, and specifies the corresponding "Compliance Points". (See Basin Plan, Table 7-2.3.)
43. The Los Angeles River Watershed Trash TMDL specifies that the WLAs shall be implemented through MS4 permits. Federal regulations require that NPDES permits be consistent with the assumptions and requirements of any available waste load allocation. (40 CFR 122.44(d)(1)(vii)(B).) State law requires both that the Regional Board implement its Basin Plan when adopting waste discharge requirements (WDRs) and that NPDES permits apply "any more stringent effluent standards or limitations necessary to implement water quality control plans..." (Wat. Code §§ 13263, 13377).
44. The Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Browner* ruled that the Clean Water Act grants the permitting agency discretion either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159). In a precedential decision, the State Board acknowledged that the holding in *Browner* allows the issuance of MS4 permits that limit their provisions to BMPs that control pollutants to the MEP, and which do not require compliance with water quality standards. However, the Water Boards have declined to adopt that approach in light of the impacts of discharges from MS4s on waters throughout the State and Los Angeles region (see Order WQ 2001-15 and Part 2 of the LA County MS4 Permit). The State Board concluded and the Regional Board agrees that "where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances" (Order WQ 2001-15, p. 8).
45. In a recent decision, the State Board also concluded that incorporation of the provisions of TMDLs into MS4 permits requires extra consideration. Specifically, the State Board held: "TMDLs, which take significant resources to develop and finalize, are devised with specific implementation plans and compliance dates designed to bring impaired waters into compliance with water quality standards. It is our intent that federally mandated TMDLs be given substantive effect. Doing so can improve the efficacy of California's NPDES storm water permits." The State Board stated that TMDLs should not be an "academic exercise", and indicated that in some instances when implementing TMDLs, numeric effluent

limitations may be an appropriate means of controlling pollutants in storm water, provided the Regional Board's determination is adequately supported in the permit findings (Order WQ 2009-0008). The following paragraphs support the Regional Board's determination to implement the Trash TMDL with numeric effluent limitations.

46. The Trash TMDL specified a specific formula for calculating and allocating annual reductions in trash discharges from each jurisdiction. The formula results in specified annual amounts of trash that may be discharged from each jurisdiction into the receiving waters. Translation of the compliance points described in the TMDL into jurisdiction-specific load reductions from the baseline levels, as specified in the TMDL, logically results in the articulation of an annual limit on the amount of a pollutant that may be discharged. The specification of allowable annual trash discharge amounts meets the definition of an "effluent limitation", as that term is defined in subdivision (c) of section 13385.1 of the California Water Code. Specifically, the trash discharge limitations constitute a "numeric restriction ... on the quantity [or] discharge rate ... of a pollutant or pollutants that may be discharged from an authorized location." While there may be other ways to incorporate the compliance points from the TMDL into permit conditions, the Regional Board is not aware of any other mechanisms that would result in actual compliance with the requirements of the TMDL as it was intended.
47. The process to establish the Trash TMDL was exceedingly lengthy, heavily litigated and scrutinized, and contained extensive analysis. The essence of this TMDL has been twice ~~approved-adopted~~ by the Regional Board, and approved by the State Board, OAL, and the US EPA, and has been subject to considerable judicial review. Therefore, the assumptions underlying this TMDL have been thoroughly vetted by staff, stakeholders, other agencies, and the courts over a significant period of time.
48. In its resolution establishing the Trash TMDL, the Regional Board already determined that the implementation schedule was reasonable and feasible, and noted that the MS4 Permittees had notice of the trash impairment since at least 1998 (with its listing on the 1998 303(d) list) and had been required to attain water quality standards for trash in the receiving waters since this order was first adopted in December of 2001. (See e.g., Resolution R07-012, finding 14.) The Court of Appeal affirmed the Regional Board's determination that the final waste load allocations were attainable and not inordinately expensive. (*Cities of Arcadia*, 135 Cal.App.4th at 1413 and 1427-1430.) Full capture systems, partial capture devices, and institutional controls are presently available to feasibly and practicably attain the interim and final effluent limitations, and it is anticipated that this order will precipitate additional innovations in control strategies and technologies, just as the adoption of the Trash TMDL resulted in the proffering and certification of seven full capture systems.
49. The Trash TMDL and this order include provisions that allow Permittees to be deemed in compliance with their effluent limitations through the installation of certain best management practices (certified full capture systems). Any Permittee that is deemed in compliance through the use of certified full capture systems would not be in violation of the effluent limitations even if some trash is discharged in excess of the annual limitations.
50. The Trash TMDL includes provisions requiring its reconsideration after a trash reduction of 50% has been achieved and sustained in the watershed, which provides an opportunity to reexamine some of the assumptions of the TMDL after tangible and meaningful progress has been made in the watershed. —(See Basin Plan, Table 7-2.3, fn. 2.) Should this reconsideration result in a modification to the final waste load allocations, the permit will be reopened pursuant to Part 6., paragraph I.1.b, to ensure the effluent limitations contained in

Tables 1a and 1b of Appendix 7-1 are consistent with the assumptions and requirements of any revised waste load allocations. (40 CFR § 122.44(d)(1)(vii)(B).)

51. Depending upon the compliance strategy selected by each Permittee, compliance with the effluent limitations set forth in Appendix 7-1 may require a demonstration that the Permittee is in strict compliance with water quality standards. It remains the Permittee's choice, however, to comply via certified full capture systems (which do not require a demonstration of strict compliance with water quality standards), or partial capture devices and/or institutional controls.
52. Section 402(p)(3)(B)(iii) of the Clean Water Act, requires MS4 Permittees to reduce the pollutants in their storm water discharges to the "maximum extent practicable" (MEP). As set forth herein, "practicable" options presently exist to achieve compliance with the effluent limitations. Since the effluent limitations can be practicably achieved, their imposition is within the federally mandated MEP standard, and no analysis contemplated by *City of Burbank v. SWRCB* (2005) 35 Cal.4th 613 pursuant to Water Code section 13241 is necessary to support these effluent limitations.
53. In its discretion, the Regional Board may administratively impose civil liability of up to \$10,000 for "each day in which the violation [of waste discharge requirements] occurs." (Wat. C. § 13385, subd (c).) Not every storm event may result in trash discharges. The Los Angeles River Trash TMDL adopted by the Regional Board states that improperly deposited trash is mobilized during storm events of greater than 0.25 inches of precipitation. Therefore, violations-violations of the effluent limitations, therefore, are limited to the days of a storm event of greater than 0.25 inches. Once a Permittee has violated the annual effluent limitation, any subsequent discharges of trash during any day of a storm event of greater than 0.25 inches during the same storm year constitutes an additional "day in which the violation [of the effluent limitation] occurs."
54. Unlike subdivision (c) of Water Code section 13385 where violations of effluent limitations are assessed on a per day basis, the mandatory minimum penalties subdivisions (Wat. Code § 13385, subd. (h) and (i)) require the Regional Board to assess mandatory minimum penalties for "each violation" of an effluent limitation. The effluent limitations in Appendix 7-1 are expressed as annual limitations. Therefore, there can be no more than one violation of each interim or final effluent limitation per year. Trash is considered a Group I pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal Regulations. Therefore, each annual violation of an effluent limitation in Appendix 7-1 by forty percent or more would be considered a "serious violation" under subdivision (h). With respect to the final effluent limitation of zero trash, any detectable discharge of trash necessarily is a serious violation, in accordance with the State Board's Enforcement Policy. Violations of the effluent limitations in Appendix 7-1 would not constitute "chronic" violations that would give rise to mandatory liability under subdivision (i) because four or more violations of the effluent limitations subject to a mandatory penalty cannot occur in a period of six consecutive months.
55. Therefore, the modifications to the Order include effluent limitations in a manner consistent with the assumptions and requirements of the WLAs from which they are derived as well as an allowance to comply with these effluent limitations [*i.e.* WLAs] through proper installation and maintenance of certified full capture systems.
56. Modifications consistent with the assumptions and requirements of the TMDL are therefore included in Parts 4 (Special Provisions) and 5 (Definitions) of this Order. Part 7 (Total

Maximum Daily Load Provisions) is added to this Order and incorporates provisions to assure that Los Angeles County MS4 Permittees achieve the Waste Load Allocations (WLAs) and comply with other requirements of Total Maximum Daily Loads (TMDLs) covering impaired waters impacted by the Permittees' discharges. These modifications are made pursuant to 40 CFR sections 122.41(f), 122.44.(d)(1)(vii)(B), and 122.62, and Part 6.I.1 of this Order. Tables 7-2.1, 7-2.2, and 7-2.3 of the Basin Plan set forth the pertinent provisions of the Los Angeles River Watershed Trash TMDL. The interim and final effluent limitations consistent with the assumptions and requirements of the waste load allocations, and related provisions required of Permittees within the watershed are provided in Part 7 of this Order.

57. Permittees identified as responsible agencies in the Trash TMDL may achieve compliance with interim and final effluent limitations through progressive installation of BMPs meeting the definition of "full capture" throughout their jurisdictions' drainage areas. Alternatively, Permittees may install "partial capture" devices and/or implement institutional controls to meet their respective interim and final effluent limitations. Where partial capture devices are utilized as the sole trash control measure, the degree of compliance may be demonstrated based upon performance data specific to the jurisdictional area. However, compliance with the final effluent limitation cannot be achieved through the exclusive use of partial capture devices. In the latter case, where a combination of partial capture devices and institutional controls are used, compliance shall be determined based on the direct measurement approximation of jurisdiction-specific trash discharges or site specific performance data.
58. The Executive Officer will develop a standard reporting form, consistent with these provisions, which shall be used by Permittees to report compliance with the effluent limitations on an annual basis.
60. Pursuant to federal regulations at 40 CFR sections 124.8 and 125.56, a Fact Sheet was prepared to provide the basis for incorporating the Los Angeles River Watershed Trash TMDL into this Order. This Fact Sheet is hereby incorporated by reference into these findings.

Revisions to:

Part 4. SPECIAL PROVISIONS, F. Public Agency Activities Programs

5. Storm Drain Operation and Management

- a) Each Permittee shall designate catch basin inlets within its jurisdiction as one of the following:

Priority A: Catch basins that are designated as consistently generating the highest volumes of trash and/or debris.

Priority B: Catch basins that are designated as consistently generating moderate volumes of trash and/or debris.

Priority C: Catch basins that are designated as generating low volumes of trash and/or debris.

- b) Permittees subject to a trash TMDL (Los Angeles River and Ballona Creek WMAs) shall continue to implement the requirements listed below until trash implementation measures are adopted. Thereafter, the subject Permittees shall implement programs in conformance with the TMDL implementation schedule, which shall include an effective combination of measures such as street sweeping, catch basin cleaning, installation of treatment devices and trash receptacles, or other BMPs. Default requirements include:

- (1) Inspection and cleaning of catch basins between May 1 and September 30 of each year;
- (2) Additional cleaning of any catch basin that is at least 40% full of trash and/or debris;
- (3) Record keeping of catch basins cleaned; and
- (4) Recording of the overall quantity of catch basin waste collected.

If the implementation phase for the Los Angeles River and Ballona Creek Trash TMDLs has not begun by October 2003, subject Permittees shall implement the requirements described below in subsection 5(c), until such time programs in conformance with the subject Trash TMDLs are being implemented.

Permittees subject to the Los Angeles River Watershed Trash TMDL shall implement the requirements set forth in Part 7. Total Maximum Daily Load Provisions, subsection 1 "TMDL for Trash in the Los Angeles River Watershed".

- c) Permittees not subject to a trash TMDL shall:

- (1) Clean catch basins according to the following schedule:

Priority A: A minimum of three times during the wet season and once during the dry season every year.

Priority B: A minimum of once during the wet season and once during the dry season every year.

Priority C: A minimum of once per year.

In addition to the schedule above, between February 1, 2002 and July 1, 2003, Permittees shall ensure that any catch basin that is at least 40% full of trash and/or debris shall be cleaned out. After July 1, 2003, Permittees shall ensure that any catch basin that is at least 25% full of trash and debris shall be cleaned out.

(2) For any special event that can be reasonably expected to generate substantial quantities of trash and litter, include provisions that require for the proper management of trash and litter generated, as a condition of the special use permit issued for that event. At a minimum, the municipality who issues the permit for the special event shall arrange for either temporary screens to be placed on catch basins or for catch basins in that area to be cleaned out subsequent to the event and prior to any rain event.

(3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all other transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

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Additions to Part 5, incorporated into existing Part 5 alphabetically:

PART 5 - DEFINITIONS

“Baseline Waste Load Allocation” means the Waste Load Allocation assigned to a Permittee before reductions are required. The progressive reductions in the Waste Load Allocations are based on a percentage of the Baseline Waste Load Allocation. The Baseline Waste Load Allocation for each jurisdiction was calculated based on the annual average amount of trash discharged to the storm drain system from a representative sampling of land use areas, as determined during the Baseline Monitoring Program. The Baseline Waste Load Allocations are incorporated into the Basin Plan at Table 7-2.2.

“Daily Generation Rate (DGR)” means the estimated amount of trash deposited within a representative drainage area during a 24-hour period, derived from the amount of trash collected from streets and catch basins in the area over a 30-day period.

“Drainage” includes all drainage into the MS4, including urban runoff (non-storm water) and storm water.

“Full Capture System” means any single device or series of devices, certified by the Executive Officer, that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour storm in the sub-drainage area. The Rational Equation is used to compute the peak flow rate:

$$Q = C \times I \times A,$$

Where:

Q = design flow rate (cubic feet per second, cfs);

C = runoff coefficient (dimensionless);

I = design rainfall intensity (inches per hour, as determined per the Los Angeles County rainfall isohyetal maps relevant to the Los Angeles River watershed),¹ and

A = sub-drainage area (acres).

“Partial Capture Device” means any structural trash control device that has not been certified by the Executive Officer as meeting the “full capture” performance requirements.

“Institutional Controls” means programmatic trash control measures that do not require construction or structural modifications to the MS4. Examples include street sweeping, public education, and clean out of catch basins that discharge to storm drains.

¹ The isohyetal map may be updated annually by the Los Angeles County hydrologist to reflect additional rain data gathered during the previous year. Annual updates published by the Los Angeles County Department of Public Works are prospectively incorporated by reference into this Order.

Addition of New Part 7:

PART 7 - TOTAL MAXIMUM DAILY LOAD PROVISIONS

The provisions of this Part implement and are consistent with the assumptions and requirements of Waste Load Allocations from TMDLs for which some or all of the Permittees in this Order are responsible.

1. TMDL for Trash in the Los Angeles River Watershed

A. Waste Load Allocations: Each Permittee identified in Appendix 7-1 shall comply with the interim and final effluent limitations set forth in Appendix 7-1 hereto.²

B. Compliance:

(1) Permittees may comply with the effluent limitations using any lawful means. Such compliance options are broadly classified as *full capture*, *partial capture*, or *institutional controls*, as described below, and any combination of these may be employed to achieve compliance:

(a) Full Capture Systems:

- 1) The Basin Plan authorizes the Executive Officer to certify *full capture systems*, which are systems that meet the operating and performance requirements as described in this Order, and the procedures identified in "Procedures and Requirements for Certification of a Best Management Practice for Trash Control as a Full Capture System." (See Appendix 7-2.)³
- 2) Permittees are authorized to comply with their effluent limitations through certified *full capture systems* provided the requirements of paragraph 3), immediately below, and any conditions in the certification, continue to be met.
- 3) Permittees may comply with their effluent limitations through progressive installation of *full capture systems* throughout their jurisdiction until all areas draining to the Los Angeles River system are addressed. For purposes of this Permit, attainment of the effluent limitations shall be conclusively presumed for any drainage area to the Los Angeles River (or its tributaries) where

² The interim and final effluent limitations set forth in Appendix 7-1 are equivalent to the Compliance Points identified in Table 7-2.3 of the Basin Plan.

³ The Regional Board currently recognizes eight *full capture systems*. These are: Vortex Separation Systems (VSS) and seven other Executive Officer certified *full capture systems*, including specific types or designs of trash nets; two gross solids removal devices (GSRDs); catch basin brush inserts and mesh screens; vertical and horizontal trash capture screen inserts; and a connector pipe screen device.

certified *full capture systems* treat all drainage from the area, provided that the *full capture systems* are adequately sized, and maintained, and that maintenance records and performance data are maintained up-to-date and available for inspection by the Regional Board.

- i. A Permittee relying entirely on *full capture systems* shall be deemed in compliance with its final effluent limitation if it demonstrates that all drainage areas under its jurisdiction are serviced by appropriate certified *full capture systems* as described in paragraph (a)(3).
- ii. A Permittee relying entirely on *full capture systems* shall be deemed in compliance with its interim effluent limitations:
 1. By demonstrating that *full capture systems* treat the percentage of drainage areas in the watershed that corresponds to the required trash abatement.
 2. Alternatively, a Permittee may propose a schedule for jurisdiction-wide installation of *full capture systems*, targeting first the areas of greatest trash generation (based upon the information on drainage area and litter generation rates by land use provided in Appendices I and III of the Los Angeles River Trash TMDL Staff Report) for the Executive Officer's approval. The Executive Officer shall not approve any such schedule that does not result in timely compliance with the final effluent limitations. A Permittee shall be deemed in compliance with its interim effluent limitations provided it is fully in compliance with any such approved schedule.

- (b) Partial Capture Devices and Institutional Controls:
Permittees may comply with their interim and final effluent

limitations through the installation of *partial capture devices* and the application of *institutional controls*.⁴

- 1) Trash discharges from areas serviced solely by *partial capture devices* may be estimated based on demonstrated performance of the device(s) in the jurisdictional area.⁵ That is, trash reduction is equivalent to the *partial capture devices*' trash removal efficiency multiplied by the percentage of drainage area serviced by the devices.
- 2) Except as provided in subdivision 3), below, trash discharges from areas addressed by *institutional controls* and/or *partial capture devices* (where site-specific performance data is not available) shall be calculated using a mass balance approach, based on the daily generation rate (DGR) for a representative area.⁶ The DGR shall be determined from direct measurement of trash deposited in the drainage area during any thirty-day period between June 22nd and September 22nd exclusive of rain events⁷, and shall be re-calculated every year thereafter. The DGR shall be calculated as the total amount of trash collected during this period divided by 30 (the length of the collection period).

$$DGR = (\text{Amount of trash collected during a 30-day collection period}^8) / (30 \text{ days})$$

The DGR for the applicable area of the jurisdiction shall be extrapolated from that of the representative drainage area. A mass balance equation shall be used to estimate the amount of trash discharged during a storm event.⁹ The *Storm Event Trash Discharge* for a given rain event in a Permittee's drainage area shall be calculated by multiplying the number of days since the last street sweeping by the DGR and subtracting the amount of any trash recovered in the catch basins.¹⁰ For each day of a

⁴ While interim effluent limitations may be complied with using partial capture devices, compliance with final effluent limitations cannot be achieved with the exclusive use of partial capture devices.

⁵ Performance shall be demonstrated under different conditions (e.g. low to high trash loading).

⁶ The area should be representative of the land uses within the jurisdiction and shall be approved by the Executive Officer prior to the 30-day collection period.

⁷ Provided no special events are scheduled that may affect the representative nature of that collection period.

⁸ Between June 22nd and September 22nd

⁹ Amount of trash shall refer to the uncompressed volume (in gallons) or drip-dry weight (in pounds) of trash collected.

¹⁰ Any negative values shall be considered to represent a zero discharge.

storm event that generates precipitation greater than 0.25 inches, the Permittee shall calculate a *Storm Event Trash Discharge*.

*Storm Event Trash Discharge = [(Days since last street sweeping*DGR)] - [Amount of trash recovered from catch basins]¹¹*

The sum of the *Storm Event Trash Discharges* for the storm year shall be the Permittee's calculated annual trash discharge.

Total Storm Year Trash Discharge = ∑ Storm Event Trash Discharges from Drainage Area

- 3) The Executive Officer may approve alternative compliance monitoring approaches for calculating total storm year trash discharge, upon finding that the program will provide a scientifically-based estimate of the amount of trash discharged from the MS4.

(c) Combined Compliance Approaches:

Permittees may comply with their interim and final effluent limitations through a combination of *full capture systems*, *partial capture devices*, and *institutional controls*.

Permittees relying on a combination of approaches shall demonstrate compliance with the interim and final effluent limitations as specified in (a)(3) in areas where *full capture systems* are installed and as specified in (b)(2) in areas where *partial capture devices* and *institutional controls* are applied.

- (2) Permittees that are not in compliance with the applicable interim and/or final effluent limitations as identified in Appendix 7-1 shall be in violation of this permit.

- (a) Permittees relying on *partial capture devices* and/or *institutional controls* that have violated their interim or final effluent limitations as identified in Appendix 7-1 shall be presumed to have violated the applicable limitation for each day of each storm event that generated precipitation greater than 0.25 inches during the applicable storm year, except those storm days on which they establish that their cumulative Storm Event Trash Discharges have not exceeded the applicable effluent limitation.

¹¹ When more than one storm event occurs prior to the next street sweeping the discharge shall be calculated from the date of the last assessment.

(b) For Permittees relying on full capture systems who have failed to demonstrate that the *full capture systems* for any drainagedrainage area are adequately sized, and maintained, and that maintenance records and performance data are maintained up-to-date and available for inspection by the Regional Board, and that they are in compliance with any conditions of their certification, shall be presumed to have discharged trash in an amount that corresponds to the percentage of the baseline waste load allocation represented by the drainagedrainage area in question.

1) A ~~permittee~~Permittee may overcome this presumption by demonstrating ~~(using any of the methods authorized in this Part 7.1 B(f)(b)-)~~ that the actual or calculated discharge for that drainagedrainage area is in compliance with the applicable interim or final effluent limitations as specified in Appendix 7-1.

~~(3)~~ Any Permittee that fails to demonstrate that it is in compliance with the interim and final effluent limitations as specified in this Part 7.1 shall be presumed to have violated the applicable interim and/or final effluent limitations.

~~(4)~~(3) Each Permittee shall be held liable for violations of the interim or final effluent limitations assigned to its jurisdiction. Any Permittee whose compliance strategy includes full or partial capture devices, that demonstrates that it has failed to comply with the effluent limitations in Appendix 7-1 because the Los Angeles County Flood Control District (District) has without good cause denied entitlements or other necessary authority for the timely installation and/or maintenance of such devices in parts of the MS4 physical infrastructure that are under the authority of the District, may be held jointly and severally liable with the District for violations of the interim or final effluent limitations assigned to that jurisdiction. The District's liability, however, shall be limited to violations related to the drainage areas within the jurisdiction where the District has authority over the relevant portions of the MS4 physical infrastructure. In determining whether the District's action was without good cause, the burden shall be on the Permittee making the claim, and the Regional Board will consider the mission and responsibilities of the District, and any reasons the District may present for its decision. Nothing in this Order, or a determination as to good cause in an order to enforce the terms of this Order, shall affect the right of either the District or the jurisdiction to seek indemnity or other recourse from the other as they deem appropriate. Any Permittee that establishes that it lacks authority over the MS4

physical infrastructure because it is under the authority of the Los Angeles County Flood Control District shall be held jointly and severally liable with the Los Angeles County Flood Control District for violations of the interim or final effluent limitations assigned to that jurisdiction unless the Permittee and the Flood Control District submit a duly executed agreement (the terms of which has been approved by the Executive Officer to ensure it is consistent with the requirements of this Order) that allocates between them all responsibility for compliance with these provisions, and further provided that the Permittee is in compliance with its respective obligations under the agreement.

C. Monitoring and Reporting Requirements (pursuant to Water Code section 13383)

(1) Within 60 days of adoption of Part 7, Section 1 (Los Angeles River Trash TMDL) and on October 31, 2010 and every year thereafter, each Permittee identified in Appendix 7-1 shall submit a TMDL Compliance Report detailing compliance with the interim and final effluent limitations. Reporting shall include the information specified below. The report shall be submitted on a reporting form to be specified by the Executive Officer. The report shall be signed under penalty of perjury by the Director of Public Works or other agency head (or their delegee) that is responsible for ensuring compliance with this permit. Permittees shall be charged with and shall demonstrate compliance with the relevant effluent limitations beginning with their October 31, 2010 TMDL Compliance Report.

(a) Reporting Compliance based on Full Capture Systems:

Permittees identified in Appendix 7-1 shall provide information on the number and location of full capture installations, the sizing of each full capture installation, the drainage areas addressed by these installations, and compliance with the applicable interim or final effluent limitation, in their TMDL Compliance Report. The Regional Board will periodically audit sizing, performance, and other data to validate that a system satisfies the criteria established for a *full capture system* and any conditions established by the Executive Officer in the certification.

(b) Reporting Compliance based on Partial Capture Systems and/or Institutional Controls:

(1) Using Site-Specific Performance Data:

Permittees identified in Appendix 7-1 shall provide (i) site-specific performance data for the applicable device(s), (ii) information on the number and location of such installations, and the drainage areas addressed by these installations, and (iii) calculated compliance

with the applicable effluent limitations, in their TMDL Compliance Report.

- (2) Using Direct Measurement of Trash Discharge: Permittees identified in Appendix 7-1 shall provide an accounting of DGR and trash removal via street sweeping, catch basin clean outs, etc., in a database to facilitate the calculation of discharge for each rain event. The database shall be maintained and provided to the Regional Board for inspection upon request. Permittees identified in Appendix 7-1 shall provide the annual DGR, calculated storm year discharge, and compliance with the applicable effluent limitation, in their TMDL Compliance Report.

(c) Reporting Compliance based on Combined Compliance Approaches:

Permittees identified in Appendix 7-1 shall provide the information specified in subsection (a) for areas where full capture systems are installed and that specified in subsection (b)(1) or (b)(2), as appropriate, for areas where partial capture devices and institutional controls are applied. Permittees shall also provide information on compliance with the applicable effluent limitation based on the combined compliance approaches, in their TMDL Compliance Report

- (2) Violation of the reporting requirements of this Part shall be punishable pursuant to inter alia Water Code subdivision (a)(1) of section 13385.1 and/or subdivision (a)(3) of section 13385.

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Appendix 7-1

Interim and Final Effluent Limitations for Trash for Permittees Identified as Responsible Jurisdictions in the Los Angeles River Watershed Trash TMDL

TENTATIVE

Table 1a: Los Angeles River Watershed Trash Effluent Limitations¹² per Storm Year¹³
(gallons of uncompressed trash)

Permittees	2010 (50%)	2011 (40%)	2012 (30%)	2013 (20%)	2014 (10%)	2015 (3.3%)	2016 ¹⁴ (0%)
Alhambra	19952	15961	11971	7981	3990	1317	0
Arcadia	25054	20043	15032	10022	5011	1654	0
Bell	8013	6410	4808	3205	1603	529	0
Bell Gardens	6750	5400	4050	2700	1350	446	0
Bradbury	2139	1711	1283	855	428	141	0
Burbank	46295	37036	27777	18518	9259	3055	0
Calabasas	11253	9002	6752	4501	2251	743	0
Carson	3416	2733	2050	1366	683	225	0
Commerce	29367	23493	17620	11747	5873	1938	0
Compton	26596	21276	15957	10638	5319	1755	0
Cudahy	2968	2374	1781	1187	594	196	0
Downey	19532	15625	11719	7813	3906	1289	0
Duarte	6105	4884	3663	2442	1221	403	0
El Monte	21104	16883	12662	8442	4221	1393	0
Glendale	70157	56126	42094	28063	14031	4630	0
Hidden Hills	1832	1465	1099	733	366	121	0
Huntington Park	9580	7664	5748	3832	1916	632	0
Irwindale	6176	4941	3706	2470	1235	408	0
La Cañada Flintridge	16748	13398	10049	6699	3350	1105	0
Los Angeles	687423	549938	412454	274969	137485	45370	0
Los Angeles County	155112	124089	93067	62045	31022	10237	0
Lynwood	14101	11280	8460	5640	2820	931	0
Maywood	3065	2452	1839	1226	613	202	0
Monrovia	23344	18675	14006	9337	4669	1541	0
Montebello	25185	20148	15111	10074	5037	1662	0
Monterey Park	19450	15560	11670	7780	3890	1284	0
Paramount	13726	10981	8236	5490	2745	906	0
Pasadena	55999	44799	33599	22400	11200	3696	0
Pico Rivera	6977	5581	4186	2791	1395	460	0
Rosemead	13653	10922	8192	5461	2731	901	0
San Fernando	6974	5579	4184	2789	1395	460	0
San Gabriel	10172	8137	6103	4069	2034	671	0
San Marino	7196	5756	4317	2878	1439	475	0
Santa Clarita	451	360	270	180	90	30	0
Sierra Madre	5806	4644	3483	2322	1161	383	0
Signal Hill	4717	3774	2830	1887	943	311	0
Simi Valley	69	55	41	27	14	5	0
South El Monte	8000	6400	4800	3200	1600	528	0
South Gate	21952	17562	13171	8781	4390	1449	0
South Pasadena	7454	5963	4472	2981	1491	492	0
Temple City	8786	7029	5272	3514	1757	580	0
Vernon	23602	18881	14161	9441	4720	1558	0

¹² Effluent limitations are expressed as allowable trash discharge relative to baseline Waste Load Allocations specified in Table 7-2.2 of the Basin Plan.

¹³ Storm year is defined as October 1 to September 30 herein.

¹⁴ Permittees shall achieve their final effluent limitation of zero trash discharge for the 2015-2016 storm year and every year thereafter.

**Table 1b: Los Angeles River Watershed Trash Effluent Limitations¹⁵ per Storm Year¹⁶
(pounds of drip-dry trash)**

Permittees	2010 (50%)	2011 (40%)	2012 (30%)	2013 (20%)	2014 (10%)	2015 (3.3%)	2016 ¹⁷ (0%)
Alhambra	34381	27504	20628	13752	6876	2269	0
Arcadia	46518	37214	27911	18607	9304	3070	0
Bell	12669	10135	7601	5067	2534	836	0
Bell Gardens	11686	9348	7011	4674	2337	771	0
Bradbury	6080	4864	3648	2432	1216	401	0
Burbank	85195	68156	51117	34078	17039	5623	0
Calabasas	26115	20892	15669	10446	5223	1724	0
Carson	5104	4083	3062	2042	1021	337	0
Commerce	42741	34192	25644	17096	8548	2821	0
Compton	43178	34542	25907	17271	8636	2850	0
Cudahy	5031	4024	3018	2012	1006	332	0
Downey	34254	27403	20552	13701	6851	2261	0
Duarte	11844	9475	7106	4737	2369	782	0
El Monte	34134	27307	20480	13653	6827	2253	0
Glendale	146749	117399	88049	58700	29350	9685	0
Hidden Hills	5411	4328	3246	2164	1082	357	0
Huntington Park	15465	12372	9279	6186	3093	1021	0
Irwindale	8956	7164	5373	3582	1791	591	0
La Cañada Flintridge	36874	29499	22124	14749	7375	2434	0
Los Angeles	1286250	1029000	771750	514500	257250	84893	0
Los Angeles County	325903	260722	195542	130361	65181	21510	0
Lynwood	23234	18587	13940	9293	4647	1533	0
Maywood	5275	4220	3165	2110	1055	348	0
Monrovia	50494	40395	30296	20198	10099	3333	0
Montebello	41854	33483	25112	16741	8371	2762	0
Monterey Park	35228	28182	21137	14091	7046	2325	0
Paramount	22245	17796	13347	8898	4449	1468	0
Pasadena	103757	83006	62254	41503	20751	6848	0
Pico Rivera	11275	9020	6765	4510	2255	744	0
Rosemead	23689	18951	14213	9476	4738	1563	0
San Fernando	11539	9231	6923	4615	2308	762	0
San Gabriel	18219	14575	10931	7287	3644	1202	0
San Marino	14574	11659	8744	5829	2915	962	0
Santa Clarita	1163	930	698	465	233	77	0
Sierra Madre	12596	10077	7558	5038	2519	831	0
Signal Hill	7110	5688	4266	2844	1422	469	0
Simi Valley	172	138	103	69	34	11	0
South El Monte	12160	9728	7296	4864	2432	803	0
South Gate	36167	28933	21700	14467	7233	2387	0
South Pasadena	14179	11343	8507	5671	2836	936	0
Temple City	15910	12728	9546	6364	3182	1050	0
Vernon	33407	26726	20044	13363	6681	2205	0

¹⁵ Effluent limitations are expressed as allowable trash discharge relative to baseline Waste Load Allocations specified in Table 7-2.2 of the Basin Plan.

¹⁶ Storm year is defined as October 1 to September 30 herein.

¹⁷ Permittees shall achieve their final effluent limitation of zero trash discharge for the 2015-2016 storm year and every year thereafter.



Terry Tamminen
Secretary for
Environmental
Protection

California Regional Water Quality Control Board

Los Angeles Region

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TO: Jonathan Bishop
Interim Executive Officer

FROM: Michael Yang, P.E.
LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD

DATE: August 3, 2004

SUBJECT: PROCEDURES AND REQUIREMENTS FOR CERTIFICATION OF A BEST MANAGEMENT PRACTICE FOR TRASH CONTROL AS A FULL CAPTURE SYSTEM

This memorandum describes Regional Board procedures and information required in order to perform a technical evaluation to certify a best management practices (BMP) as a "full capture system" for the control of trash.

Background

The Los Angeles Regional Water Quality Control Board adopted the definition of "full capture system" for the Ballona Creek Trash TMDL per Resolution No. 04-023 on March 4, 2004. This definition will be considered applicable for all receiving waters in the Los Angeles Region identified as being impaired for Trash. The Regional Board staff will analyze all future proposed BMPs for certification as a "full capture system" based on the Ballona Creek Trash TMDL definition.

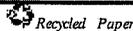
The definition of a "full capture system" as defined in the Resolution No. 04-023 is as follows:

" A full capture system is any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate (Q) resulting from a one-year, one-hour, storm in the subdrainage area. Rational equation is used to compute the peak flow rate: $Q = C \times I \times A$, where Q = design flow rate (cubic feet per second, cfs); C = runoff coefficient (dimensionless); I = design rainfall intensity (inches per hour, as determined per the rainfall isohyetal map), and A = subdrainage area (acres)."

Essential Technical Information

In order to perform a technical analysis and consider for certification approval, the Regional Board staff requests the following information from dischargers for evaluation of their BMPs as a "full capture system" for trash:

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations

Jonathan Bishop

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August 3, 2004

1. Subdrainage area, A that only drains into the pipe containing BMP.
2. Hydraulic capacity of the pipe containing BMP at cubic feet per second.
3. Average runoff coefficient , C where

$$C = (A1 \cdot C1 + A2 \cdot C2 + A3 \cdot C3 + \dots + An \cdot Cn) / (A1 + A2 + A3 + \dots + An)$$

A1 through An represents subareas for each land use, and
C1 through Cn represents runoff coefficients for each land use

4. The reported BMP treatment capacity at cubic feet per second.

Los Angeles County Department of Public Works (LACDPW) has already provided an isohyetal map for one-year, one- hour rainfall intensity per definition of a full capture system. For certification, BMP must trap all particles retained by a 5-mm mesh screen, and have a treatment capacity exceeding peak flow rate resulting from a one-year, one-hour, storm in the subdrainage area. In addition, the following requirements must be met:

- End-of-Pipe Configuration: Certain BMPs, which can create a pressure drop, must have an end-of-pipe configuration and not rely on diversion weirs.
- Adequate Pipe Sizing: The pipes carrying the flows from the subdrainage area should be able to handle peak flows.
- Regular Inspections and Maintenance: The full capture system must be regularly inspected and serviced to continually maintain adequate flow through capacity.

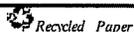
Conditional Transferability

The determination and certification that the BMP satisfies the "full capture system" definition of the trash TMDL will allow the system to be used elsewhere in the region. Dischargers will have an on-going obligation to demonstrate that the installation of a particular system is appropriately sized. Likewise, dischargers will be responsible for on-going maintenance to ensure the systems perform to design specifications. The Regional Board will review and consider performance data on continuing basis. In the event data demonstrate that the systems are not performing to the full capture design standard established by the trash TMDL, then the Regional Board reserves the ability to rescind the certification for subsequent installations.

Process for Submittal

A letter requesting "full capture system certification" along with supporting documentation must be submitted to the Regional Board Executive Officer to start the process. Within thirty (30) days of receipt of the letter and documentation, the Regional Board staff will contact the proponent, and schedule a time for a presentation to Regional Board staff and to perform a site survey if necessary. At the conclusion of the presentation, Regional Boards staff will

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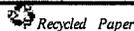
Jonathan Bishop

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August 3, 2004

communicate orally to the proponent any supplemental documentation or information that needs to be submitted to complete the evaluation of the proposed BMP as a "full capture system". A letter acknowledging the receipt of the certification request and identifying any supplemental documentation to be submitted will be sent within 15 days of the completion of the presentation. Regional Board staff will make a written determination on the certification of the proposed BMP as a full capture system within ninety (90) days after the receipt of all requested documentation.

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7 AND SOUTH GATE

8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9
10

11 In the Matter of:

12 California Regional Water Quality Control
13 Board, Los Angeles Region's Amendment of
December 10, 2009 to the County of Los
14 Angeles Municipal Separate Storm Sewer
System Permit, NPDES No. CAS004001
15
16
17

**PETITIONERS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PETITION FOR
REVIEW OF DECEMBER 10, 2009
ACTION OF THE CALIFORNIA
REGIONAL WATER QUALITY
CONTROL BOARD, LOS ANGELES
REGION, AMENDING THE LOS
ANGELES COUNTY MUNICIPAL
NPDES PERMIT TO INCORPORATE
THE LOS ANGELES RIVER TRASH
TMDL**

[Water Code § 13320 and Title 23,
CCR § 2050, *et seq.*]

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1 **I. INTRODUCTION**

2 Petitioners, the Cities of Carson, Downey, Duarte, Irwindale, Monterey Park, San
3 Gabriel, Signal Hill, South El Monte and South Gate (“Cities” or “Petitioners”)
4 respectfully petition the State Water Resources Control Board (“State Board”) to review
5 the decision of the California Regional Quality Control Board, Los Angeles Region
6 (“Regional Board”) to reopen the Los Angeles County Municipal Separate Storm Sewer
7 System Permit, NPDES No. CAS004001 (“Permit”) to incorporate Waste Load
8 Allocations established in the Los Angeles River Watershed Trash Total Maximum Daily
9 Load (“Trash TMDL” or “TMDL”). The Permit was amended through a yet to be
10 numbered or publicly released final resolution of the California Regional Quality Control
11 Board, Los Angeles Region (“Regional Board”), by action of the Regional Board on
12 December 10, 2009 (“Permit Amendment”).

13 The Regional Board’s adoption of the Permit Amendment was improper for the
14 following reasons:

15 (1) The incorporation of the Trash TMDL into the Permit was arbitrary,
16 capricious and contrary to law in light of the Orange County Superior Court’s decision in
17 *City of Arcadia v. State Board*, OCSC Case No. 06CC02974 (the “*Arcadia Case*”), which
18 decision is currently on appeal to the California Courts of Appeal, Fourth Appellate
19 District, Division 3, Case No. G041545. As recognized by the State Board in Order No.
20 WQ 2001-06, and as quoted in Order No. WQ 2009-0008, “water quality standards
21 provide the *foundation* for identifying impaired waters that require a TMDL.” (Order No.
22 2009-0008, p. 2.) In the *Arcadia Case*, the Superior Court issued a Judgment and Writ of
23 Mandate requiring that the State and Regional Boards review the “water quality standards”
24 in the Basin Plan for the Los Angeles Region (“Standards” or “Water Quality Standards”)
25 and comply with the requirements of sections 13241 and 13000 with respect to Stormwater
26 discharges (defined by the Court and agreed to by the parties as including “urban runoff”).¹

27 _____
28 ¹ As used in the *Arcadia Case* and herein, consistent with the definition of “Stormwater”
under the federal regulations, the term “Stormwater” includes urban runoff, *i.e.*, “surface
runoff and drainage.”

1 The Superior Court also required the Boards to correct the improperly designated
2 “potential” use designations upon which many of the Standards in the Basin Plan are
3 based. If upheld on appeal, the Superior Court’s Decision, Judgment and Writ of Mandate
4 in the *Arcadia* Case (collectively attached hereto as Exhibit “1”) will require a review and
5 potential modifications of all existing Standards in the Basin Plan *vis-a-vis* Stormwater, as
6 well as revisions to all Standards that are developed to protect “potential” beneficial uses.
7 Accordingly, the Trash TMDL and all other adopted TMDLs must be reevaluated and
8 readopted *before* being incorporated in any fashion into the subject Permit, and as such,
9 the subject Permit Amendment is arbitrary, capricious and contrary to law.

10 (2) Because the Clean Water Act (33 USC § 1251 *et seq.* – “CWA” or “Act”)
11 does not require that the subject Permit include numeric effluent limits, the incorporation
12 of such limits into the Permit for purposes of the Trash TMDL goes beyond the
13 requirements of the Act. Under the California Porter-Cologne Act (“PCA” – California
14 Water Code sections 13000, *et seq.*)² the inclusion of such numeric effluent limits in the
15 Permit can only lawfully be adopted by the Regional Board after it has first conducted the
16 analysis and considered the factors required under sections 13263, 13241 and 13000. (*See*
17 *City of Burbank v. State Board* (2005) 35 Cal.4th 613 (“*Burbank*”).) Because the Permit
18 Amendment includes strict “numeric effluent limitations,” and because the Regional Board
19 admitted it did not conduct a section 13241/13000 analysis (claiming such an analysis was
20 not “necessary to support these effluent limitations”) before amending the Permit to
21 incorporate the Trash TMDL, the incorporation of the Trash TMDL was improper and
22 contrary to law.

23 (3) Sections 13225(c) and 13267(b) require that a cost/benefit analysis be
24 conducted before any investigation, monitoring or reporting obligations may be imposed
25 upon the Cities and other Permittees under the Permit. The Permit Amendment includes
26 various additional investigation, monitoring and reporting requirements to be adhered to by
27 the Permittees, yet the record does not indicate that any cost/benefit analysis was
28

² All section references are to the California Water Code unless otherwise specified.

1 conducted in this regard prior to the Regional Board's adoption of the Permit Amendment,
2 nor that the benefits from such requirements would outweigh the costs. Accordingly, the
3 investigation, monitoring and reporting obligations set forth in the Permit Amendment
4 were not adopted in accordance with law.

5 **II. BACKGROUND**

6 The Trash TMDL was initially adopted in January of 2001, with the Regional Board
7 thereafter rescinding this January 2001 TMDL and adopting a substantively similar TMDL
8 in September of 2001. Both versions included only one means of being deemed in full
9 compliance with the TMDL, *i.e.*, the installation of Vortex Separation System ("VSS")
10 full-capture Units.

11 The State Board and the Office of Administrative Law ("OAL") both approved the
12 Regional Board's September 2001 TMDL in July of 2002. However, prior to this
13 approval, US EPA adopted its own Trash TMDL for the Los Angeles River in March of
14 2002. On August 1, 2002, EPA rescinded its March, 2002 Trash TMDL and
15 simultaneously then approved the State Trash TMDL (the Regional Board's September
16 2001 Trash TMDL).

17 In August of 2002, three separate lawsuits were then filed, one by the County of
18 Los Angeles, one by the City of Los Angeles, and a third by the twenty-two cities involved
19 in the *Cities of Arcadia, et al. v. State Board* Trash TMDL case, which resulted in a
20 published decision at 135 Cal.App.4th 1392 ("*Arcadia v. State Board*"). The lawsuits filed
21 by the County and the City of Los Angeles were settled, with the Regional Board
22 committing to, among other things, reopen the Trash TMDL once fifty percent reductions
23 in trash had been achieved. The *Arcadia v. State Board* lawsuit filed by the twenty-two
24 cities proceeded to trial, with a majority of the substantive issues raised by the twenty-two
25 cities being resolved in favor of the cities by the trial court.

26 On appeal, the Court in the *Arcadia v. State Board* case upheld the trial court's
27 determination that the Regional and State Boards had failed to comply with the California
28 Environmental Quality Act ("CEQA"), Public Resources Code sections 21000, *et seq.*,

1 finding, in part, as follows:

2 As a matter of policy, in CEQA cases a public agency must explain the
3 reasons for its actions to afford the public and other agencies a meaningful
4 opportunity to participate in the environmental review process, and to hold it
5 accountable for its actions. [Citation.] The Water Boards' CEQA
6 documentation is inadequate, and remand is necessary for the preparation of
7 an EIR [Environmental Impact Report] or tiered EIR, or functional
8 equivalent, as substantial evidence raises a fair argument the Trash TMDL
9 may have significant impacts on the environment. The [trial] court correctly
10 invalidated the Trash TMDL on CEQA grounds. (*Cities of Arcadia v. State
11 Board* (2006) 135 Cal.App.4th 1392, 1426.)

12 As stated above, the Trash TMDL adopted by the Regional Board in September of
13 2001 identified only one deemed full compliant measure, *i.e.*, the VSS Units. Yet, the
14 Court of Appeal in *Arcadia v. State Board* recognized that the cost to install such VSS
15 Units, as estimated by the Regional Board, ranged from \$332 million to \$945 million, with
16 the Court finding that “[n]either the checklist nor the Trash TMDL includes an analysis of
17 the reasonably foreseeable impacts of construction and maintenance of pollution control
18 devices or mitigation measures, and in fact the Water Boards’ developed no argument as to
19 how they ostensibly complied with the statute. . . . the Trash TMDL sets forth various
20 compliance methods, the general impacts of which are reasonably foreseeable but not
21 discussed.” (*Id.* at 1425-26.) The lack of an environmental analysis of the potential
22 environmental impacts created by the September 2001 Trash TMDL was the primary
23 reason the Appellate and trial courts both found that the Water Boards violated CEQA.

24 The Regional Board thereafter adopted the present Trash TMDL in August of 2007.
25 The 2007 TMDL was then approved by the State Board and the OAL, as well as US EPA,
26 in September of 2008. The present Trash TMDL is markedly different from the September
27 2001 Trash TMDL in that it identifies a series of full-capture devices which are much less
28 costly to install and maintain than the very costly VSS Units. These other deemed-
compliant full-capture devices include: trash nets, two gross solid removal devices, catch
basin brush inserts and mesh screens, vertical and horizontal trash capture screen inserts
and a connector pipe screen device. These other deemed compliant full-capture systems
are the full-capture systems many of the Cities have chosen to rely upon for

1 implementation purposes, and such alternative full-capture devices are universally
2 preferred by the Cities over the full-capture VSS Units.

3 The Permit Amendment incorporates the Waste Load Allocations (“WLAs”) from
4 the most recent Trash TMDL into the Permit, and enforces these WLAs as “numeric
5 effluent limitations,” asserting that “while there may be other ways to incorporate the
6 compliance points from the TMDL into permit conditions, the Regional Board is *not*
7 *aware of* any other mechanisms that would result in actual compliance with the
8 requirements of the TMDL as it was intended.” (Permit Amendment, Findings 45 and 46.)
9 Finding 51 then describes the compliance strategy under the Permit Amendment as
10 allowing the Regional Board to “require” a demonstration that the Permittee is in “strict
11 compliance with water quality standards,” with the Fact Sheet similarly indicating the
12 Regional Board’s intent to obtain “strict enforcement of the WLAs.”

13 The claim that the Regional Board “*is not aware*” of other mechanisms to achieve
14 compliance with the WLAs is, of course, not a legitimate “finding” that can rightfully be
15 used to support applying “numeric effluent limitations” to Stormwater discharges, and
16 specifically is not an appropriate finding to support the “rare instance” noted by EPA as to
17 when “numeric effluent limits” may appropriately be applied to Municipal Stormwater
18 dischargers. (*See* EPA November 2002 Guidance Memorandum, p. 4.) The historical
19 discussion above not only shows that a good number of “other mechanisms” were
20 developed over time since the January 2001 Trash TMDL was adopted, consistent with the
21 iterative Best Management Practices (“BMPs”) approach referenced by US EPA in its
22 November 2002 Guidance Memorandum, but also shows that “actual compliance” with the
23 final WLA of “zero” in the Trash TMDL is a fiction. The fact that “actual compliance”
24 with the zero WLA is never referenced anywhere in the Permit Amendment as being
25 achievable (with the Permit Amendment instead providing that compliance with the Permit
26 Amendment is “practicable” because of the availability of deemed full-capture BMPs),
27 confirms that “strictly” complying with the “zero” trash limit is unreasonable and not
28 economically achievable, and that “strict compliance” with the WLAs is only possible

1 through an iterative deemed-compliance BMP approach.

2 Accordingly, the litigation history described above and the iterative development of
3 the various full-capture devices to be utilized as “deemed” compliance with the TMDL,
4 reinforces the fact that that TMDL is not the “rare case” where numeric effluent limits
5 must be applied to achieve strict compliance with the WLAs, and that the opposite is the
6 case here, *i.e.*, that compliance is only “reasonably achievable” through the use of iterative
7 BMPs. In sum, it was because of the lengthy litigation process, including the decision of
8 the Court of Appeal in *Arcadia v. State Board, supra*, 135 Cal.App.4th 1392 to require the
9 Water Boards to finally comply with the requirements of CEQA, that viable and more
10 cost-effective deemed-compliant devices were able to be developed through the iterative
11 process to address the problem of trash within the Los Angeles River, rather than the
12 forced expenditure of \$332 million to \$945 million to install VSS Units throughout the
13 Region. As such, contrary to the Findings in the Permit Amendment, the iterative BMP
14 process has already been shown to be effective for trash.

15 The incorporation of the Trash TMDL into the subject Permit was not conducted in
16 accordance with applicable State and federal law, specifically including, but not limited to,
17 the need to develop “reasonably achievable” and “economically” defensible Permit
18 requirements thereunder. (*See* CWC §§ 13263, 13241 and 13000.) In addition, the Permit
19 Amendment could only have lawfully been adopted after the “foundation” for the Trash
20 TMDL, *i.e.*, the Standards upon which they are based, had first been developed in
21 accordance with applicable law, as required by the Superior Court in the *Arcadia* Case.
22 The adoption of the Permit Amendment at this time to incorporate a TMDL that has been
23 developed based on defective Standards which must be modified (if the Writ and Judgment
24 in the *Arcadia Case* are upheld), is thus arbitrary and capricious action by the Regional
25 Board.

26 Moreover, before imposing investigation, monitoring and reporting obligations on
27 the Cities, CWC sections 13225 and 13267 require a cost/benefit analysis and prevent the
28 adoption of such Permit provisions unless the expected benefits from these requirements

1 exceed their costs. The subject Permit Amendment was not adopted in accordance with
2 the requirements of CWC sections 13263, 13241, 13000, 13225 and 13267, and said
3 Permit Amendment contains no findings, and the record contains no evidence that such
4 State law requirements have been met.

5 **III. INCORPORATION OF THE TRASH TMDL INTO THE PERMIT IS**
6 **PREMATURE IN LIGHT OF THE *ARCADIA* CASE**

7 The incorporation of a TMDL into an NPDES Permit is the final step in the process
8 by which Water Quality Standards are made enforceable against Stormwater dischargers.
9 As recognized by the Court of Appeal in *City of Arcadia v. State Board* (2006) 135
10 Cal.App.4th 1392, 1404, “[a] TMDL must be ‘established’ at a level necessary to
11 implement the applicable water quality standards.” (*Also see City of Arcadia v. EPA* (N.D.
12 Cal. 2003) 265 F.Supp.2d 1142, 1145 [“each TMDL represents a goal that may be
13 implemented by adjusting pollutant discharge requirements in individual NPDES Permits
14 or establishing nonpoint source controls.”].) As further confirmed by the State Board in
15 Order No. 2001-06, and reiterated in State Board Order No. 2009-08, “water quality
16 standards provide the *foundation* for identifying impaired waters that require a TMDL.”

17 In the recent *Arcadia* Case, a number of cities successfully challenged at the
18 Superior Court level the propriety of the Standards in the Basin Plan, and specifically the
19 Water Boards’ failure to conduct a CWC section 13241/13000 analysis of the Standards
20 during the course of the 2004 Triennial Review, as well as the Boards’ failure to correct
21 the improperly designated “potential” use designations in the Basin Plan. As discussed
22 herein, the Trial Court in the *Arcadia* Case determined that the State and Regional Boards
23 are now required to conduct this 13241/13000 review and to make appropriate revisions to
24 the Standards, including revising the Standards so that they no longer include “potential”
25 use designations.

26 Thus, the incorporation of the Trash TMDL into the Permit should have been
27 delayed until such time as the propriety of the Standards, *i.e.*, the “foundation” upon which
28 the TMDL is based, was reviewed and the Standards corrected. For example, the current

1 Trash TMDL is based on various “potential” use designations, designations which the
2 Superior Court has found in the *Arcadia* Case to be improper. (See the *Arcadia* Case
3 Decision, Judgment and Writ of Mandate all included herewith collectively as
4 Exhibit “1.”) Thus, any attempt to enforce the Trash TMDL to protect mere “potential”
5 beneficial uses will likely be a waste of significant scarce public resources.

6 Moreover, although the *Arcadia* Case is presently on appeal, in light of the
7 significance of the Superior Court’s rulings that the “potential” use designations are
8 improper and are to be replaced with more appropriate use designations, and that other
9 changes to the Standards may be necessary once the review under CWC sections
10 13241/13000 has been completed, the incorporation of the Trash TMDL into the subject
11 Permit should, at a minimum, have been delayed until the *Arcadia* Case was finally
12 decided. The Regional Board’s decision to proceed with the incorporation of the Trash
13 TMDL, understanding that the Standards supporting the TMDL have been adjudicated as
14 being defective, and thus, that the TMDL itself may need to be revised, was an arbitrary
15 and capricious decision.

16 In the *Arcadia* Case, in a Notice of Ruling/Decision dated March 13, 2008
17 (hereafter “Decision” included within Exhibit “1” hereto), the Superior Court, the
18 Honorable Thierry P. Colaw presiding, held, among other things, as follows:

19 The Standards cannot be applied to storm water without appropriate
20 consideration of the 13241/13000 factors. There is no substantial evidence
21 showing that the Boards considered the 13241/13000 factors before applying
22 the Standards to storm water in the 1975 Plan Adoption, the 1994
23 Amendment, or the 2002 Bacteria Objective. . . . They must be considered
24 in light of the impacts on the “dischargers” themselves. The evidence before
25 the court shows that the Board did not intend that the Basin Plan of 1975 was
26 to be applied to storm waters when it originally was adopted. The
27 Respondents admit this. “[T]he regional board considered storm water to be
28 essentially uncontrollable in 1975.” [Citation.] This was confirmed by the
State Board in a 1991 Order when it stated: “**The Basin Plan specified
requirements and controls for ‘traditional’ point sources, but storm
water discharges were not covered . . .** The Regional Board has not
amended the portions of its Basin Plan relating to storm water and urban
runoff since 1975. Therefore, we conclude that the Basin Plan does not
address controls on such discharges, except for the few practices listed
above. **Clearly, the effluent limitations listed for other point sources are
not meant to apply.**” [Citation.] There is no substantial evidence in the
record to show that the Boards have ever analyzed the 13241/13000 factors
as they relate to storm water. (See Decision p. 5-6; bolding in original.)

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

3 Section 13241 does not use the word "potential" anywhere in the statute. It
4 does describe the factors previously discussed and specifically states that a
5 factor "to be considered" is "Past, present, and probable future beneficial
6 uses of water." Water C. § 13241(a).

* * *

7 The real problem is that basing Standards on "potential" uses is inconsistent
8 with the clear and specific requirements in the law that Boards consider
9 "probable future" uses. It is also inconsistent with section 13000 which
10 requires that the Boards consider the "demands being made and to be made"
11 on state waters. (Water C. § 13000 emphasis added.) The factors listed by
12 the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd.
13 Of California* (2003) 31 Cal.App.4th 1255, 1265 [courts will "not accord
14 deference" to an interpretation which "is incorrect in light of the
15 unambiguous language of the statute"]. Respondents have acted contrary to
16 the law by applying the vague "potential" use designations to storm water.
17 (Decision, p. 5.)

18 In light of the fact that the Trash TMDLs has been based on a set of Standards that,
19 as of this point in time, has been determined to be defective because of the improper
20 inclusion of "potential" use designations, as well as the possible defects created by the
21 Boards' failure to comply with CWC sections 13241/13000 as they relate to Stormwater,
22 the Cities respectfully request that the State Board set aside the Regional Board's
23 incorporation of the Trash TMDL into the Permit, until such time as a final decision has
24 been rendered in the *Arcadia* Case, and if the Superior Court's decision is upheld, until
25 such time as the Judgment and Writ of Mandate set forth in that case have been fully
26 complied with. (See the Judgment and Writ of Mandate entered in the *Arcadia* Case by the
27 Superior Court included with Exhibit "1" hereto.)

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1 IV. THE REGIONAL BOARD FAILED TO COMPLY WITH CWC SECTIONS
2 13241 AND 13000 IN ADOPTING REQUIREMENTS THAT GO BEYOND
3 THE REQUIREMENTS OF FEDERAL LAW

4 A. Federal Law Provides for the Use Of Best Management Practices
5 ("BMPs") In Lieu Of Numeric Effluent Limitations in Stormwater
6 Permits When Enforcing a TMDL

7 As recognized in the both the Permit Amendment itself and the Fact Sheet prepared
8 in connection with the Regional Board's consideration of the Permit Amendment, federal
9 law does *not* require that Stormwater dischargers strictly comply with the WLAs set forth
10 in the subject TMDL. Instead federal law requires only compliance with WLAs in
11 accordance with the maximum extent practicable ("MEP") standard, and importantly,
12 through the use of best management practices ("BMPs"). Indeed, time and again the
13 Courts, US EPA, and the State Board have all recognized that Stormwater discharges are
14 different from traditional point source discharges, and that Stormwater must be analyzed
15 and treated as such in accordance with the requirements of the Act.

16 Both the Permit Amendment (New Finding 44) and the Fact Sheet (p. 12) reference
17 the Ninth Circuit Court of Appeals' decision in *Defenders of Wildlife v. Browner*
18 ("*Defenders*") 191 F.3d 1159 (9th Cir. 1999), wherein, the Court found that, under the
19 CWA, municipalities were not required to "strictly" comply with Water Quality Standards.
20 As noted in the Fact Sheet, the *Defenders*' Court specifically granted the permitting agency
21 in that case "discretion either to require 'strict compliance' with water quality standards
22 through the imposition of numeric effluent limitations, *or to employ an iterative approach*
23 *toward compliance with water quality standards, by requiring improved BMPs.*" (Fact
24 Sheet, p. 24, emphasis added.)

25 In doing so, the *Defenders*' Court specifically recognized the different approach
26 taken by Congress when addressing Stormwater discharges versus industrial discharges,
27 finding that "industrial discharges must comply strictly with state water-quality standards,"
28 while Congress chose "not to include a similar provision for municipal storm-sewer

1 discharges.” (*Id* at 1165.) Instead, “Congress required municipal storm-sewer dischargers
2 ‘to reduce the discharge of pollutants to the maximum extent practicable’” (*Id.*) The
3 Ninth Circuit went on to find, after reviewing the relevant portions of the Clean Water Act,
4 that “because 33 U.S.C. § 1342(p)(3)(B) *is not merely silent* regarding whether municipal
5 discharges must comply with 33 U.S.C. § 1311,” but instead Section 1342(p)(3)(B)(iii)
6 “*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer
7 dischargers ‘reduce the discharge of pollutants to the maximum extent practicable In
8 such circumstances, the statute unambiguously demonstrates that Congress did not require
9 municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).” (*Id*
10 at 1165, emphasis in original.)

11 In *Building Industry Association of San Diego County v. State Water Resources*
12 *Control Board* (2004) 124 Cal.App.4th 866, 874, the Appellate Court similarly found:

13 in 1987, Congress amended the Clean Water Act to add provisions that
14 specifically concerned NPDES permit requirements for storm sewer
15 discharges. [Citations.] In these amendments, enacted as part of the *Water*
16 *Quality Act of 1987*, Congress distinguished between industrial and
17 municipal storm water discharges. . . . With respect to *municipal* storm
18 water discharges, Congress clarified that the EPA has the authority to fashion
19 NPDES permit requirements to meet water quality standards without specific
20 numeric effluent limits and instead to impose ‘controls to reduce the
21 discharge of pollutants to the maximum extent practicable.’” (*Id*, emphasis
22 in original, citing 33 USC § 1342 (p)(3)(B)(iii) & *Defenders, supra*, 191
23 F.3d 1159, 1163.)

24 With respect to TMDLs specifically, the fact that WLAs within a TMDL are not
25 required under the CWA to be strictly enforced through a Stormwater Permit was
26 confirmed by U.S. EPA itself in a November 22, 2002 EPA Guidance Memorandum on
27 “Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for
28 Storm Water Sources and NPDES Permit Requirements Based on those WLAs.” In this
29 EPA Guidance Memorandum, EPA explained that for NPDES Permits regulating
30 municipal storm water discharges, any water quality based effluent limit for such
31 discharges should be “*in the form of BMPs and that numeric limits will be used only in*
32 *rare instances.*” (EPA Guidance Memo, p. 6, emphasis added.) EPA further
33 recommended that “*for NPDES-regulated municipal . . . dischargers effluent limits*

1 *should be expressed as best management practices (BMPs), rather than as numeric*
2 *effluent limits.” (Id at p. 4.)*

3 EPA went on to expressly recognize the difficulties in regulating Stormwater
4 discharges, explaining its policy as follows:

5 **EPA’s policy recognizes that because storm water discharges are due to**
6 **storm events that are highly variable in frequency and duration and are**
7 **not easily characterized, only in rare cases will it be feasible or**
8 **appropriate to establish numeric limits for municipal and small**
9 **construction storm water discharges. The variability in the system and**
10 **minimal data generally available make it difficult to determine with**
11 **precision or certainty actual and projected loadings for individual**
12 **dischargers or groups of dischargers. Therefore, EPA believes that in**
13 **these situations, permit limits typically can be expressed as BMPs, and**
14 **that numeric limits will be used only in rare instances. (EPA Guidance**
15 **Memo, p. 4.)**

16 Given EPA’s statement “that numeric limits will be used only in rare instances”
17 when incorporating a TMDL into a municipal NPDES Permit, and as well as the fact that
18 there is no evidence that this is a “rare instance” that would justify the inclusion of a
19 numeric limit, any incorporation of the Trash TMDL into the subject Municipal NPDES
20 Permit should have been limited to the inclusion of MEP-complaint BMPs, not terms
21 requiring “strict compliance” with numeric effluent limits.

22 The Cities are aware of recent EPA Region IX comments which appear to seek to
23 undermine EPA’s Guidance Memorandum, with Region IX asserting, in part, that the EPA
24 Headquarters’ Guidance Memorandum is nearly seven years old and that permitting
25 agencies typically do not have the necessary supporting documentation to show that BMPs
26 are expected to be sufficient to implement the WLAs within a TMDL. However, EPA’s
27 Official policy, as reflected in its November 22, 2002 Guidance Memorandum, is of
28 greater weight and takes precedence over any informal communication that has been or
may be issued by a staff member within a particular Region of EPA. Further, the fact that
EPA’s Guidance Memorandum was issued seven years ago does not in any way undermine
its application to this TMDL, or to any other TMDL incorporation, particularly given that
no other official EPA policy has been issued since then, and given that neither EPA
Region IX, nor any other party has provided any evidence to show that the assumptions

1 and bases for EPA's Guidance Memorandum are no longer valid.

2 In addition, EPA Region IX's assertion that permitting agencies often do not have
3 the necessary supporting documentation in the administrative record to show that BMPs
4 will be sufficient to implement the WLA, is not applicable to this Trash TMDL. As
5 described above, with respect to this Trash TMDL, a series of effective BMPs have in fact
6 been developed over a number of years, and thus the record is replete with evidence
7 showing that the iterative BMP process is effective and appropriate for this TMDL. As
8 such, there is no basis for the argument that the administrative record for the decision in
9 issue did not contain sufficient evidence showing BMPs could be implemented to
10 effectively achieve the WLA's goals.

11 In addition, EPA Region IX's comment that numeric limits set forth within a
12 TMDL must be strictly enforced through an MS4 Permit where there is not sufficient
13 evidence of BMPs that can achieve the WLAs, is problematic and contradictory. Broken
14 down to its core, EPA Region IX's argument is that strict compliance with numeric limits
15 is required where municipalities have no practical means of complying with such numeric
16 limits, i.e. numeric limits must be strictly complied with where there are *no* BMPs that can
17 effectively be utilized to achieve compliance. Such an argument is in conflict with the
18 MEP standard set forth under the CWA, and beyond that, is entirely unsupportable given
19 the provisions of California Law requiring a consideration of the section 13241/13000
20 factors, including whether permit terms are "reasonably achievable," and "economically"
21 achievable in light of the "environmental characteristics" of the water body in issue, and
22 other factors.

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

1 The Permit Amendment relies upon language in Order No. 2009-0008 to assert that
2 “in some instances when implementing TMDLs, numeric effluent limitations may be an
3 appropriate means of controlling pollutants in storm water, provided the Regional Board’s
4 determination is adequately supported in the permit findings.” (New Finding 45.) The
5 problem with this assertion is that there is no indication and no findings to support the
6 claim that the subject TMDL is the “rare instance” referenced by EPA in its Guidance
7 Memo. Instead, the Permit Amendment attempts to justify requiring strict compliance
8 with the numeric WLAs based on a disjointed argument that the annual trash discharge
9 amounts meet the definition of an “effluent limitation” under CWC section 13385.1(c), and
10 that as such the WLAs must be strictly complied with when incorporated into an NPDES
11 Permit. Yet, no logical reason or “finding” is provided for requiring strict compliance with
12 the WLAs, and no “findings” are contained anywhere in the Permit Amendment to support
13 the contention that a Trash TMDL is the “rare case” justifying the inclusion of numeric
14 limits in this Stormwater Permit.

15 In fact, to the contrary, trash is primarily mobilized through major storm events,
16 which, as EPA recognized in its Guidance Memorandum, are “highly variable in frequency
17 and duration and are not easily characterized,” and thus is anything but the “rare case”
18 where it would be feasible or appropriate to establish a numeric limit to include in the
19 subject NPDES Permit. No findings or other evidence are contained or referenced
20 anywhere in the Permit Amendment or the Administrative Record below to support the
21 contention that this Trash TMDL is the “rare case,” and the evidence is directly to the
22 contrary.

23 Moreover, the contention in New Finding 46 of the Permit Amendment that the fact
24 the “Regional Board is not aware of any other mechanisms that would result in actual
25 compliance with the requirements of the TMDL as it was intended,” somehow justifies
26 incorporation of the WLAs as strict numeric limits, is frivolous. To begin with, the
27 Regional Board’s lack of knowledge is not a “finding” supporting the inclusion of strict
28 numeric limits in an NPDES Permit. Second, none of the mechanisms referenced in the

1 Trash TMDL, be it the VSS Units or any of the other deemed full-capture devices, will
2 achieve “actual compliance” with the zero WLA. Thus, there is no way to “actually”
3 comply with the WLAs within the TMDL, outside of the use of deemed complaint full-
4 capture BMPs. Therefore, the Regional Board’s lack of knowledge of any means of
5 achieving “actual compliance” with the TMDL merely proves the inappropriateness of
6 requiring strict compliance with the “zero” WLA. Mandating compliance with a numeric
7 limit that cannot actually be achieved not only exposes the Cities to inappropriate
8 enforcement actions by the Regional Board, but also exposes the Cities to unjustified third-
9 party citizen suits under the CWA.

10 In addition, it has long since been the policy of the State of California not to require
11 the use of strict numeric limits to Stormwater dischargers, but rather to apply the MEP
12 standard through an iterative BMP process. (See, e.g., State Board Order No. 91-04, p. 14
13 [“There are *no numeric objectives* or *numeric effluent limits* required at this time, either
14 in the Basin Plan or any statewide plan that apply to storm water discharges.” p. 14]; State
15 Board Order No. 96-13, p. 6 [“*federal laws does not require* the [San Francisco Reg. Bd]
16 to dictate the specific controls.”]; State Board Order No. 98-01, p. 12 [“Stormwater
17 permits must achieve compliance with water quality standards, but they may do so by
18 requiring implementation of BMPs *in lieu of numeric water quality-based effluent*
19 *limitations.*”]; State Board Order No. 2001-11, p. 3 [“*In prior Orders this Board has*
20 *explained the need for the municipal storm water programs and the emphasis on BMPs*
21 *in lieu of numeric effluent limitations.*”]; State Board Order No. 2001-15, p. 8 [“While
22 we continue to address water quality standards in municipal storm water permits, we also
23 continue to believe that *the iterative approach*, which focuses on timely improvements of
24 BMPs, is appropriate.”]; State Board Order No. 2006-12, p. 17 [“*Federal regulations do*
25 *not require numeric effluent limitations for discharges of storm water*”]; *Stormwater*
26 *Quality Panel Recommendations to The California State Water Resources Control Board –*
27 *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater*
28 *Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [“*It*

1 *is not feasible at this time to set enforceable numeric effluent criteria for municipal*
2 *BMPs and in particular urban dischargers.”*]; and an April 18, 2008 letter from the State
3 Board’s Chief Counsel to the Commission on State Mandates, p. 6 [*“Most NPDES*
4 *Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater*
5 *permits, on the other hand, usually require dischargers to implement BMPs.”*].)

6 In short, neither State or federal law, nor State or federal policy, provide for the
7 incorporation of WLAs as strict numeric limits into an MS4 Permit. To the contrary, both
8 EPA and the State have recognized that numeric limits should only be incorporated into an
9 MS4 Permit in “rare instances,” with the State Board’s Numeric Effluent Limits Panel
10 concluding that “it is not feasible at this time to set enforceable numeric effluent criteria
11 for municipal BMPs and in particular urban dischargers.”

12 **B. The Regional Board Was Required to Comply With CWC Sections**
13 **13241 And 13000 Before Imposing Requirements That Go Beyond**
14 **Federal Law, Including Requiring Compliance With WLAs In A**
15 **Stormwater Permit.**

16 As explained by the Court of Appeal in *BIA San Diego County v. State Board*,
17 *supra*, 124 Cal.App.4th 866, 874, in the Clean Water Act Congress distinguished between
18 industrial and Stormwater discharges, and clarified that with respect to municipal
19 Stormwater discharges, “the EPA has the authority to fashion NPDES Permit requirements
20 to meet storm water quality standards without specific numeric effluent limits”
21 Accordingly, the Regional Board’s imposition of Permit Terms that requires strict
22 compliance with the WLAs, *i.e.*, numeric effluent limits, is a requirement that clearly goes
23 beyond what is mandated under federal law. As such, all aspects of State law must be
24 adhered to before any such permit term may be adopted.

25 Under the California Supreme Court’s holding in *Burbank v. State Board, supra*, 35
26 Cal.4th 613, a regional board must consider the factors set forth in sections 13000 and
27 13241 when adopting an NPDES Permit, unless consideration of those factors “would
28 justify including restrictions that do not comply with federal law.” (*Id.* at 627.) As stated

1 by the Court, “*Section 13263 directs Regional Boards, when issuing waste discharge*
2 *requirements, to take into account various factors including those set forth in*
3 *Section 13241.*” (*Id.* at 625, emphasis added.) Specifically, the *Burbank* Court held that
4 to the extent the NPDES Permit provisions in that case were not compelled by federal law,
5 the Boards were required to consider their “economic” impacts on the dischargers
6 themselves, with the Court finding that the Water Boards must analyze the “*discharger’s*
7 *cost of compliance.*” (*Id.* at 618.)

8 The Court in *Burbank* thus interpreted the need to consider “economics” as
9 requiring the consideration of the “cost of compliance” on the cities involved in that case.
10 (*Id.* at 625 [“The plain language of *Sections 13263 and 13241* indicates the Legislature’s
11 intent in 1969, when these statutes were enacted, that a regional board consider the costs of
12 compliance when setting effluent limitations in a waste water discharge permit.”].) The
13 Court further recognized the goals of the Porter-Cologne Act as provided for under
14 section 13000, i.e., to “attain the highest water quality which is reasonable, considering all
15 demands being made and to be made on those waters and the total values involved,
16 beneficial and detrimental, economic and social, tangible and intangible.” (*Id.* at 618,
17 citing CWC § 13000.)

18 As such, under the *Burbank* decision, CWC section 13263 requires a consideration
19 of the factors set forth under CWC section 13241. CWC section 13241 then compels the
20 Boards to consider the following factors when developing NPDES Permit terms:

- 21 (a) **Past, present, and probable future beneficial uses of water.**
22 (b) **Environmental characteristics of the hydrographic unit under**
23 **consideration, including the quality of water available thereto.**
24 (c) **Water quality conditions that could reasonably be achieved through the**
25 **coordinated control of all factors which affect water quality in the area.**
26 (d) **Economic considerations.**
27 (e) **The need for developing housing in the region.**
28 (f) **The need to develop and use recycled water.**

1 (§ 13241.)

2 Furthermore, in a concurring opinion in *Burbank*, Justice Brown made several
3 significant comments regarding the importance of considering “economics” in particular,
4 and the CWC section 13241 factors in general, when considering including numeric
5 effluent limitations in an NPDES Permit:

6 **Applying this federal-state statutory scheme, it appears that throughout**
7 **this entire process, the Cities of Burbank and Los Angeles (Cities) were**
8 **unable to have economic factors considered because the Los Angeles**
9 **Regional Water Quality Control Board (Board) – the body responsible**
10 **to enforce the statutory framework –failed to comply with its statutory**
11 **mandate.**

12 **For example, as the trial court found, the Board did not consider costs of**
13 **compliance when it initially established its basin plan, and hence the**
14 **water quality standards. The Board thus failed to abide by the statutory**
15 **requirements set forth in Water Code section 13241 in establishing its**
16 **basin plan. Moreover, the Cities claim that the initial narrative**
17 **standards were so vague as to make a serious economic analysis**
18 **impracticable. Because the Board does not allow the Cities to raise their**
19 **economic factors in the permit approval stage, they are effectively**
20 **precluded from doing so. As a result, the Board appears to be playing a**
21 **game of “gotcha” by allowing the Cities to raise economic considerations**
22 **when it is not practical, but precluding them when they have the ability**
23 **to do so. (*Id* at 632, J. Brown, concurring; emphasis added.)**

24 Justice Brown went on to find that:

25 **Accordingly, the Board has failed its duty to allow public discussion –**
26 **including economic considerations – at the required intervals when**
27 **making its determination of proper water quality standards.**

28 **What is unclear is why this process should be viewed as a contest. State**
and local agencies are presumably on the same side. The costs will be
paid by taxpayers and the Board should have as much interest as any
other agency in fiscally responsible environmental solutions. (*Id* at 632-
33.)

In *U.S. v. State Board* (1986) 182 Cal.App.3d 82, the State Board issued revised
water quality standards for salinity control because of changed circumstances which
revealed new information about the adverse affects of salinity on the Sacramento–San
Joaquin Delta (“Delta”). (*Id* at 115.) In invalidating the revised standards, the Court of
Appeal recognized the importance of complying with the policies and factors set forth
under sections 13000 and 13241, and emphasized section 13241’s requirement of an
analysis of “economics.” The Court also stressed the importance of establishing water
quality objectives which are “reasonable,” and the need for adopting “reasonable standards

1 consistent with overall State-wide interests”:

2 In formulating a water quality control plan, the Board is invested with wide
3 authority “to attain the highest water quality **which is reasonable**,
4 considering all demands being made and to be made on those waters and the
5 total values involved, beneficial and detrimental, **economic and social,**
6 **tangible and intangible.**” (§ 13000.) In fulfilling its statutory imperative,
the Board is **required** to “establish such water quality objectives . . . as in its
judgment will ensure the **reasonable protection** of beneficial uses . . .”
(§ 13241), a conceptual classification far-reaching in scope. (*Id* at 109-110,
emphasis added.)

* * *

7 The Board’s obligation is to attain the highest reasonable water quality
8 “considering all demands being made and to be made on those waters and
the total values involved, beneficial and detrimental, *economic* and social,
tangible and intangible.” (§13000, italics added.) (*Id* at 116.)

* * *

9 In performing its dual role, including development of water quality
10 objectives, **the Board is directed to consider** not only the availability of
unappropriated water (§ 174) **but also all competing demands for water in**
11 **determining what is a reasonable level** of water quality protection
(§ 13000). (*Id* at 118, emph. added.)

12
13 Accordingly, before amending the Permit to require strict compliance with WLAs
14 in the Trash TMDL or any other TMDL, the Regional Board was required to comply with
15 all applicable requirements of State law, including conducting the analysis required under
16 CWC sections 13241/13000. Nonetheless, the Regional Board ignored all of this authority
17 in adopting the Permit Amendment, contending that no CWC section 13241 (and
18 presumably CWC section 13000) analysis was necessary to support the inclusion of
19 numeric effluent limits in the Permit, because according to the Regional Board,
20 “practicable” options exist to achieve compliance with the effluent limitations. (Permit
21 Amendment, New Finding 52.)

22 The Regional Board’s analysis is off the mark. The Clean Water Act plainly does
23 not require the inclusion of “numeric effluent limits” in a Stormwater NPDES Permit, and
24 does not require “strict compliance” with any such limits or with any “water quality
25 standards.” Accordingly, a Permit term that requires strict compliance with numeric
26 effluent limits is a Permit term that, on its face, goes beyond the requirements of the Clean
27 Water Act. As such, whether the deemed-compliant measures to meet these strict numeric
28

1 limits are “practicable” is not the relevant issue.³ Since numeric limits clearly are not
2 required under federal law, the Regional Board was required to comply with the
3 requirements of the Porter-Cologne Act before adopting the Permit Amendment, *i.e.*,
4 conducting the analysis required under CWC sections 13263, 13241 and 13000. Yet, as
5 reflected in the Permit Amendment itself, no such CWC section 13241/13000 analysis was
6 conducted, as the Regional Board wrongly concluded that no such analysis was “necessary
7 to support these effluent limitations.” (Permit Amendment, New Finding 52.)

8 Moreover, the initial Trash TMDL was adopted in 2001, with the Regional Board at
9 that time providing the Cities with a twelve year implementation period, *i.e.*, two years of
10 monitoring and investigation, followed by ten, ten percent (10%) annual reductions in the
11 amount of trash allowed to be discharged to the Los Angeles River. Now, however, with
12 the incorporation of the WLAs into the MS4 Permit in 2009, some eight years later, the
13 starting point for reductions in trash are 50%, rather than 10% after three years, as was the
14 case in 2001, meaning that a much more significant effort, with accelerated capital and
15 implementation costs, must be undertaken to install the various full-capture devices in
16 issue. No analysis has been performed on whether such an expedited implementation
17 schedule “could reasonably be achieved” in the necessary time frame, nor has any analysis
18 been performed on the costs of installing and maintaining these deemed-compliant
19 structural BMPs on an expedited basis.

20 For example, in order for the Gateway Cities (which received a recent State Grant
21 for purposes of complying with the TMDL) to meet the 60% Waste Load Allocation as of
22 September 30, 2010, it is estimated that thousands of catch basin inserts will need to be
23 installed, *i.e.*, several thousand catch basin inserts will need to be installed over the course
24 of the next 9 months in the Gateway Cities alone. Whether the market can even
25 manufacture a sufficient number of catch basins in time has not been demonstrated, let
26 alone whether the permittees can manage the significant capital cost that must be

27
28 ³ As discussed above, there is *no* practicable method of achieving actual rather than
deemed compliance with the numeric limits incorporated into the Permit from the TMDL.

1 undertaken to install these catch basins, as well as the cost to purchase or install catch
2 basin inserts throughout other parts of the Region to comply with the 60% requirement by
3 the end of September, 2010.

4 Nor is there any evidence in the record to indicate that installing so many catch
5 basins in such a short period of time is in fact “reasonably achievable.” Beyond this, the
6 experience to date by the Cites has shown that for those deemed compliant full-capture
7 catch basin inserts that have been installed, the actual cost to maintain such devices is
8 excessive, as is the repair cost, and there has been no analysis by the Regional Board of the
9 overall cost to continue to maintain, repair and subsequently replace such devices as
10 required by CWC sections 13241/13000.

11 The Regional Board has failed to comply with the clear requirements of CWC
12 sections 13263, 13241 and 13000, even though it is admittedly requiring strict compliance
13 with numeric limits, *i.e.*, a Permit Amendment requiring strict compliance with the WLAs
14 in the Trash TMDL.

15 **V. THE REGIONAL BOARD FAILED TO CONDUCT THE COST BENEFIT**
16 **ANALYSIS REQUIRED BY CWC SECTIONS 13225 AND 13267 BEFORE**
17 **IMPOSING NEW INVESTIGATION, MONITORING AND REPORTING**
18 **OBLIGATIONS**

19 The Permit Amendment also includes a series of investigation, monitoring and
20 reporting requirements as a part of the incorporation of the subject Trash TMDL, which if
21 not complied with, would subject the Permittees to various penalties and enforcement
22 action under the PCA. Yet, under CWC sections 13225(c) and 13267, the Regional Board
23 was required to first conduct a cost-benefit analysis before imposing such requirements on
24 the Cities, and to only adopt such Permit terms where the benefits of these requirements
25 exceed their costs.

26 Specifically, where any investigation, monitoring or reporting requirements are
27 imposed upon a city, the Regional Board is required to consider the burdens of conducting
28 the analysis and preparing the monitoring reports, and may only require such reporting and

1 monitoring where “the burden, including costs, of such reports” bears “a reasonable
2 relationship to the need for the report and the benefits to be obtained from the reports.”
3 (§§ 13267 & 13225(c).) Moreover, under section 13267, where such an investigation or
4 reports are required, “the regional board shall provide the person with a written
5 explanation with regard to the need for the reports, and shall identify the evidence that
6 supports requiring that person to provide the reports.” (§ 13267.)

7 Likewise, under CWC section 13225(c), a regional board only has the authority to
8 “require as necessary any state or local agency to investigate and report on any technical
9 factors involved in water quality or to obtain and submit analyses of water; provided that
10 the burden, including costs, of such reports shall bear a reasonable relationship to the need
11 for the report and the benefits to be obtained therefrom.” (§ 13225(c); *also see* § 13165
12 placing an identical obligation on the State Board.)

13 Here, the Regional Board failed to comply with any of the requirements of CWC
14 sections 13225(c) and 13267. There are no findings and no evidence in the Administrative
15 Record to support any findings that the required cost benefit analysis compelled by
16 sections 13267 and 13225 was conducted, and that the benefits of such investigation,
17 monitoring and reporting requirements exceed its costs. Accordingly, the Investigation
18 and Monitoring and Reporting Requirements in the Permit Amendment were not adopted
19 in accordance with law.

20 The Cities respectfully request that the State Board vacate these requirements and
21 direct the Regional Board to conduct the requisite cost/benefit analysis and only impose
22 such requirements where the evidence shows that the benefits of such requirements exceed
23 their costs.

24 VI. CONCLUSION

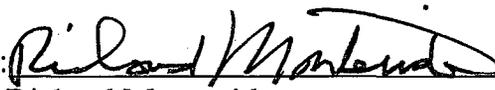
25 For the foregoing reasons, the Cities respectfully request that the State Board vacate
26 the Permit Amendment and direct the Regional Board not to revise the subject Permit to
27 incorporate the Trash TMDL or any other TMDL, until after such time as the *Arcadia* Case
28 has been finally concluded, the *Arcadia* Court-ordered review/revision of the Standards

1 has been completed, and any necessary modifications to the Trash TMDL have been made.
2 In addition, the Regional Board should be directed to comply with all requirements
3 of State law, including specifically the requirements of CWC sections 13000, 13263,
4 13241, 13267, and 13225, if and when it reconsiders the proper incorporation of the Trash
5 TMDL into the Permit.

6 Respectfully submitted

7 RUTAN & TUCKER, LLP
8 RICHARD MONTEVIDEO

9 Dated: January 8, 2010

By: 
Richard Montevideo
Attorneys for Petitioners

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EXHIBIT "1"

Decision

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
COMPLEX LITIGATION CENTER
MINUTE ORDER**

Date: 03/13/2008

Time: 09:52:22 AM

Dept: CX104

Judicial Officer Presiding: Judge Thierry Patrick Colaw

Clerk: P. Rief

Bailiff/Court Attendant: Allison Hreha

Reporter: None

Case Init. Date: 02/09/2006

Case No: 06CC02974

Case Title: CITIES OF ARCADIA VS STATE WATER
RESOURCES CONTROL

Case Category: Civil - Unlimited

Case Type: Judicial Review - Other

Event Type: Chambers Work

Causal Document: Answer to Complaint; Appendix of Authorities; Case Management Statement;
Complaint; Declaration - Other; Demurrer - Other; Demurrer to Complaint; Document - Other; Ex Parte

Appearances:

PETITION FOR A WRIT OF MANDATE AND FOR DECLARATORY RELIEF

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on February 27, 2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

SEE ATTACHED RULING.

Court orders clerk to give notice.

THE CITIES OF ARCADIA, BELLFLOWER
CARSON, CERRITOS, CLAREMONT,
COMMERCE, DOWNEY, DUARTE, GARDENA,
GLENDDORA, HAWAIIAN GARDENS, IRWINDALE,
LAWNDALE, MONTEREY PARK, PARAMOUNT,
SANTE FE SPRINGS, SIGNAL HILL, VERNON,
WALNUT, WEST COVINA, and WHITTIER,
municipal corporations, and BUILDING
INDUSTRY LEGAL DEFENSE
FOUNDATION, a non-profit corporation,
Petitioner Plaintiffs

vs.

THE STATE WATER RESOURCES
CONTROL BOARD; and THE CALIFORNIA
REGIONAL WATER QUALITY CONTROL
BOARD, LOS ANGELES REGION, etc.,
et alia,
Respondent Defendants

ORANGE COUNTY SUPERIOR COURT CASE NO. 06CC02974

NOTICE OF RULING/DECISION

The Court has before it the Petition by multiple government entity Petitioners ["Cities" or "Petitioners"] for a Writ of Mandate and for Declaratory Relief as against the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region ["Boards"] which has been extensively briefed and argued at a full day hearing on 27 February 2008. What follows is the ruling and decision by the Court on this complex and serious matter.

I. The Basic Controversy:

A. Petitioners contend that Respondents never considered Water Quality Standards ["Standards"] in relation to how the Standards apply to storm water [i.e. storm waters and urban runoff].

They urge the court to consider that pursuant to Water Code § 13000 et seq. and specifically Water C. § 13241 [“13241/13000”] the Respondents must consider several factors including, but not limited to, probable future beneficial uses of water, environmental characteristics of the water, water quality conditions that could be reasonably be achieved through the coordinated control of all factors which might affect the quality of water, economic considerations, and the need for developing housing within the region. See Water C. § 13241 (a) – (e).

B. Respondents argue that they did consider these 13241/13000 Standards originally in 1975 and in later reviews and that any challenge to those considerations and reviews has long since passed by way of expiration of the statute of limitations.

C. Petitioners counter that the record of events shows, and Respondents admit, that they never actually considered 13241/13000 requirements for storm water at any time, that the appropriate time to do so only became ripe at the time of the 2004 Triennial Review, and that Respondents abused their discretion by not appropriately considering the 13241/13000 factors in the 2004 Triennial Review. They want the court to order the Respondents inter alia to go back and redo the 2004 Triennial Review [“2004 TR”] and, in conformance with law, properly consider the 13241/13000 factors in relation to storm water.

II. The Decision:

A. Standard of Review

The standard of review in this matter under C.C.P. § 1085 is whether the action by a respondent was arbitrary or capricious or totally lacking in evidentiary support [i.e., substantial evidence] or whether the agency in question failed to follow the required procedure and act according to the law. *City of Carmel-by-the Sea v. Board of Supervisors* (1986) 183 Cal. App. 3d 229; *Corrales v. Bradstreet* (2007) 153 Cal. App. 4th 33, 47.

B. Specific Issues

1. As argued by the Respondents, is it too late pursuant to limitations periods to consider 13241/13000 in relation to storm water?

It is not.

(a) The 5th, 6th, and 8th causes of action are not barred by the statute of limitations. The 5th cause of action challenges the 2004 TR, clearly within the four year statute of C.C.P. § 343. The 6th cause of action is for declaratory relief regarding future Basin Plan amendments, Total Maximum Daily Loads of pollutants [“TMDLs”], National Pollution Discharge Eliminations System [“NPDES”] permits, and

Triennial Reviews. On its face it is not affected by the statute of limitations. Likewise is the case with the 8th cause of action.

(b) The law is clear that no statute of limitations applies to a “continuing violation of an ongoing duty.” See *California Trout, Inc. v. State Board* (1989) 207 Cal. App. 3d, 585, 628. Here periodic triennial reviews were required under Water C. § 13143 and the federal Clean Water Act [“CWA”] section 1313(c) (1) as well as the duty required by Boards to consider the “discharger’s cost of compliance” when the 13241/13000 factors are applicable. *City of Burbank v. State Water Resources Control Bd.* 35 Cal.4th 613, 625. Respondents had a duty to at a minimum to appropriately consider the Standards when they were presented with evidence of the deficiencies during the 2004 TR. [See below].

The case of *Howard Jarvis Taxpayers Assn. v. City of la Habra* (2001) 25 Cal.4th 809 is also instructive here. While the *Jarvis* decision was limited to tax assessments, the same reasoning applies here, that is, a new cause of action applies every time the regulation is applied to the Petitioner. Here, the Boards are applying what are purported to be defective Standards to Petitioners on a continuing and ongoing basis. The Petitioners are seeking prospective relief regarding application of the Standards until the correct 13241/13000 analysis has been performed. Each TMDL has been based upon alleged defective standards, and the relief requested involves continuing and ongoing violations of the law.

Respondents’ arguments imply that Petitioners failed to challenge an invalid regulation upon its adoption, even if it did not apply to Petitioners when adopted [i.e. storm water]. They further argue that Petitioners have no right to later challenge the regulation once it is applied to them. These arguments are not supported by appropriate authority. The authority offered by Petitioners is persuasive. (See *Solid Waste Agency, Inc. v. United States Army Corps of Eng’rs* (7th Cir. 1999) 191 F. 3d 845,853 [“we doubt that a party must (or even may) bring an action [challenging an environmental regulation] before it knows that a regulation may injure it or even be applied to it”].

2. Do the doctrines of Res Judicata or Collateral Estoppel apply here?

The Petitioners have never challenged the Standards in the Basin Plan before this challenge and the doctrines of res judicata and collateral estoppel are not applicable. Some of the Petitioners previously sued the Boards based upon other matters such as purported unlawful adoption of an NPDES Permit or unlawful adoption of trash or metal TMDLs. Those lawsuits challenged particular decisions of the Boards concerning the adoption of permits and TMDLs. They did not challenge the legality of applying Standards to storm water without the Boards first appropriately considering the 13241/13000 factors. The 2004 TR process was never previously challenged. Those previous lawsuits involved entirely different

decisions of the Boards and completely different administrative records. They concerned completely separate primary rights. These were not identical issues, previously decided between the same parties or parties in privity. Res judicata and collateral estoppel do not apply here.

3. The Petitioners were not required to challenge the 1990 or 1996 NDPES permits. Respondents claim that Petitioners cannot challenge the Standards since they did not exhaust administrative remedies by filing a challenge to the NDPES permits issued by the Regional Board in 1990 and 1996 pursuant to the process described in Water C. sections 13320 and 13330. Those sections do not apply to this challenge made by Petitioners. It is not the adoption of an NPDES permit that triggered the application of the Standards which Petitioners challenge. It is rather the adoption of TMDLs followed by their incorporation into the NPDES permit that triggers the application of the Standards. *City of Arcadia v. State Board* (2006) 135 Cal. App. 4th 1392, 1404; *City of Arcadia v. US EPA* (9th Cir. 2005) 411 F.3d 1103, 1105.

The Boards in this record aptly explained the process whereby the imposition of TMDLs trigger the injury or wrong claimed here:

“we use water quality standards to determine which water bodies are impaired and, thus, to identify water bodies for which we must develop total maximum daily loads (TMDLs). These standards translate into the numeric targets in a TMDL.” (AR 2002 BAC 6.)

It would not have been timely or ripe for the Petitioners to challenge the Standards by challenging the 1990 or 1996 NDPES permits.

4. Does Water C. § 13241 require consideration by the Boards of “probable” not “potential” future uses?

This portion of the Petitioners’ challenge was not argued orally to any great extent, but it was briefed at some length in the Petition, Opposition and Reply.

Responding Parties characterize this as a side battle over semantics (page 34 opposition Brief).

In the Prayer for Relief of the Petition, Moving Parties ask for specific exclusion of “potential” use designations in the 2004 Triennial Review as opposed to “probable” use designations. Since it is integral to the relief requested it requires examination and analysis.

Petitioners argue that 13241(a) specifies “probable future beneficial uses of water” rather than “potential” uses. By using a vague “potential uses” objective the Boards are not in compliance with the mandate of the statute, and are using improperly designated uses which will lead to improper Standards. These in turn will lead to unreasonable and unachievable TMDLs. (Page 32 of Petitioners’ Brief.)

Respondents argue that the Boards designation of “potential uses” is well founded in both state and federal law.

Section 13241 does not use the word “potential” anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor “to be considered” is “Past, present, and probable future beneficial uses of water.” Water C. § 13241 (a).

The Boards argue that the statutory wording “factors to be considered in establishing water quality objectives shall include, but not necessarily be limited to” (Water C. § 13241 emphasis added.) *authorizes* the Boards to consider other factors such as potential uses. When terms are not clearly defined in statutes, interpreting such terms is a matter “within a regional board’s discretion” and worthy due deference. (Citing *City of Arcadia v. State Water Resources Control Bd.* 135 Cal. App. 4th 1392, 1415 [Jan. 2006]. They argue further that the potential label is really the Board’s nomenclature for “probable future beneficial uses”. (Opposition page 30, citing AR 2004 TR 1348).

As pointed out by Petitioners, however, “the text of the Basin Plan itself shows that the difference between the terms “probable future beneficial uses” and “potential uses” is not merely semantics. According to the Basin Plan, “potential” beneficial uses can be designated for water bodies for any of five reasons, including: (1) implementation of the State Board’s policy entitled “Sources of Drinking Water Policy”; (2) plans to put the water to such future use; (3) **“potential to put the water to such future use”**; (4) designation of a use by the Regional Board **“as a regional water quality goal,”** or (5) **“public desire”** to put the water to such future use. (AR 1994 AMD 2731; emphasis added.)” Petitioners argue persuasively that the third reason above, that there is some undefined “potential to put the water to such future use” is remarkably vague.

The real problem is that basing Standards on “potential” uses is inconsistent with the clear and specific requirement in the law that Boards consider “probable future” uses. It is also inconsistent with section 13000 which requires that the Boards consider the “demands being made and to be made” on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. of California* (2003) 31 Cal. App. 4th 1255, 1265 [courts will “not accord deference” to an interpretation which “is incorrect in light of the unambiguous language of the statute”]. Respondents have acted contrary to the law by applying the vague “potential” use designations to storm water.

5. The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards

to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objectives. In *City of Burbank, supra*, the California Supreme Court held that if NDPES permit conditions were not compelled by federal law, the Boards were required to consider economic impacts including the “discharger’s cost of compliance.” (Id. at 618.) The Court interpreted the need to consider economics as requiring a consideration of the cost of compliance on the cities. (Id. at 625.) So, under *Burbank*, the 13241 factors cannot be evaluated in a vacuum. They must be considered in light of the impacts on the “dischargers” themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. “[T]he regional board considered storm water to be essentially uncontrollable in 1975”. (Opposition at page 23:24-25.)

This was confirmed by the State Board in a 1991 Order when it stated:

“The Basin Plan specified requirements and controls for “traditional” point sources, but storm water discharges were not covered... The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. Clearly, the effluent limitations listed for other point sources are not meant to apply.” (Second RJN, Ex. “A”, p.6; emphasis added.)

There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water.

C. The 2004 Triennial Review

The 2004 TR was the appropriate vehicle at the appropriate time for the Board to consider the 13000 factors. Even Respondents agree with this. As they state in the opposition:

“If petitioners are truly interested in a new 13241 analysis related to existing objectives, and believe the analysis to date has been inadequate, they plainly have recourse. Petitioners may submit specific evidence during the triennial review process demonstrating why any specific objective is not currently appropriate. The triennial review hearing (the first phase of the review process) is the proper and legally contemplated time and place to consider such evidence.” (Opposition page 28-29.)

This is precisely what Petitioners did do when they submitted extensive comments along with a Basin Plan Review Report (AR 2004 TR177 *et seq.*) to the Regional Board. Those comments and the suggestions in the Basin Plan Review Report [“Review Report”] were rejected out of hand by the Board as being “legally

deficient” and “beyond the scope of the triennial review.” This was an abuse of discretion. Both sides agreed in oral argument that the court could look to AR 2004 TR 1342 *et seq.*, and from reading the comments and responses determine whether or not the Board abused their discretion. The Board and staff may have read portions or even all of the comments and Review Report, but it is clear that they did not consider it or, more to the point, conduct the analysis of the Standards required under 13241/13000.

To quote from the response to comments:

“The staff does agree that economic considerations and housing (along with the other factors identified in Water Code section 13241) are to be addressed when establishing a water quality objective or amending an existing water quality objective.”

“The plain language of the Porter-Cologne Act only requires consideration of economics, housing, and other factors **when establishing the water quality objectives in the first instance. Moreover, the Water Code does not contemplate a continual reassessment of those considerations, which is what the commentator desires.** The section 13241 considerations do not become a part of the Basin Plan and hence are not part of regular review.

For the forgoing reasons and as discussed with more specificity in Response to comments 26.4-26.8, the **commentators objection is legally incorrect and beyond the scope of the Triennial Review.**” (AR 2004 TR 1342-1343, *emph. added*; also similar comments at 1344, 1346 [“The commentator’s economic contentions are noted, but they are beyond the scope of this triennial review.”], 1347 [“commentator’s procedural objections ... (are) beyond the scope of the triennial review.”], and 1352 [“... is beyond the scope of triennial review.”]).

To argue that the Petitioners should have attacked the Standards back in 1975, 1990, or 1994 when they had no reason to and were not harmed thereby, to suggest that the triennial review is the proper time and place to urge changes and then to fail to conduct the triennial review as suggested by the Boards themselves and as required by law is precisely the type of behavior that was so bitterly criticized in a concurring opinion of *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 632-633.

The Board should not have brushed off the Petitioners’ comments and urgings to perform the 13241/13000 analysis at the 2004 TR. Had they included the petitioners in the process, studied, considered, and weighed their suggestions in light of 13241 factors, and then decided to make no changes, then this court would have deferred to their properly exercised discretion. Here they abused their discretion, did not proceed as the law required, and the writ should therefore issue.

The Legislature's finding in Water C. § 13000 of the people's primary interest in clean water and in the "conservation, control, and utilization of the water resources of the state" is the law of the land. Everyone wants the highest water quality "which is reasonable, considering all demands being made and to be made on those waters". (Id.) That legislative mandate as set forth in sections 13000 and 13241 including the requirements of reasonable consideration of "probable future beneficial uses of water" and "economic considerations" must be followed in compliance with the law.

D. Judicial Notice

The request by Respondents for Judicial Notice of Exhibits 9, 14 and 15 are denied. Respondents should have sought to augment the Administrative Record for these documents and Nos. 14 and 15 are irrelevant in any event. Exhibit 9 is a trial court opinion concerning the propriety of adopting a TMDL for metals for the Los Angeles River based upon "potential use" designations. It is not proper authority and is irrelevant to this proceeding.

III. Disposition

A. The Petition for a Writ of Mandate is granted and a Writ shall issue as to the 1st through 8th Causes of Action as set forth in the prayer at paragraphs (1) – (7) as to water quality Standards and objectives of the Basin Plan as those Standards and objectives affect storm water discharges and urban runoff.

B. The prevailing parties are the Petitioners. They shall prepare the appropriate Writ and any Order for Court review and signature.

C. The Clerk shall give Notice.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

CITY OF ARCADIA, et al. Plaintiff(s) v. STATE WATER RESOURCES CONTROL BOARD, et al. Defendant(s)	CASE NUMBER: 06CC02974 CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 3-13-08
--	--

I, ALAN SLATER, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 3-13-08, I served the Minute Order, dated 3-13-08, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

Peter J. Howell, Esq.
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626

Richard Montevideo, Esq.
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626

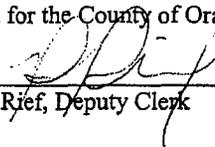
Jennifer Novak, Esq.
State of California, Dept. of Justice
Office of the Attorney General
300 South Spring Street, Suite 5000
Los Angeles, CA 90013

Michael W. Hughes, Esq.
State of California, Dept. of Justice
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Michael J. Levy, Esq.
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, CA 95814

ALAN SLATER,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 3-13-08

By: 
P. Rief, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL

Judgment

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX LITIGATION CENTER

NOV 26 2008

ALAN CARLSON, Clerk of the Court
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BY P RIER

1 RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO (State Bar No. 116051)
2 PETER J. HOWELL (State Bar No. 227636)
611 Anton Boulevard, Fourteenth Floor
3 Costa Mesa, California 92626-1950
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

Nov 26 2008

ALAN CARLSON, Clerk of the Court

5 Attorneys for Petitioners

8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE , CENTRAL JUSTICE CENTER

10

11 THE CITIES OF ARCADIA,
12 BELLEFLOWER, CARSON,
13 CERRITOS, CLAREMONT,
COMMERCE, DOWNEY, DUARTE,
14 GARDENA, GLENDORA, HAWAIIAN
GARDENS, IRWINDALE,
15 LAWNDALE, MONTEREY PARK,
PARAMOUNT, SANTA FE SPRINGS,
16 SIGNAL HILL, VERNON, WALNUT,
WEST COVINA, and WHITTIER,
17 municipal corporations, and BUILDING
INDUSTRY LEGAL DEFENSE
FOUNDATION, a non-profit
corporation,

Case No. 06CC02974
Honorable Thierry Patrick Colaw
Dept: CX-104

~~THE~~
[Proposed] JUDGMENT

18 Petitioners/Plaintiffs,

19 vs.

20 THE STATE WATER RESOURCES
21 CONTROL BOARD; and THE
CALIFORNIA REGIONAL WATER
22 QUALITY CONTROL BOARD, LOS
ANGELES REGION

24 Respondents/Defendants.

25 vs.

26 NATURAL RESOURCES DEFENSE
COUNCIL; HEAL THE BAY; and
27 SANTA MONICA BAYKEEPER,

28 Intervenors.

Rutan & Tucker, LLP
attorneys at law

227/063121-0072
971760.01 a11/20/08

1 This matter came on regularly for hearing and trial at 10:00 a.m. on February
2 27, 2008, in Department CX-104 of the above entitled court, the Honorable Thierry
3 Patrick Colaw, presiding. Richard Montevideo and Peter J. Howell of Rutan &
4 Tucker, LLP appeared on behalf of Petitioners and Plaintiffs, the Cities of Arcadia,
5 Bellflower, Carson, Cerritos, Claremont, Commerce, Downey, Duarte, Glendora,
6 Hawaiian Gardens, Irwindale, Lawndale, Monterey Park, Paramount, Santa Fe
7 Springs, Signal Hill, Vernon, and Whittier, and the Building Industry Legal Defense
8 Foundation (collectively "Petitioners"). Jennifer F. Novak and Michael W. Hughes
9 of the California Attorney General's Office appeared on behalf of Respondents and
10 Defendants, the State Water Resources Control Board and the California Regional
11 Water Quality Control Board, Los Angeles Region (collectively "Respondents").
12 The Petition/Complaint as filed also included as Petitioners and Plaintiffs the Cities
13 of Gardena, Walnut and West Covina, but these cities had previously separately
14 voluntarily dismissed their claims without prejudice. Intervenors, the Natural
15 Resources Defense Council, Inc. ("NRDC"), Heal the Bay and the Santa Monica
16 Baykeeper ("Intervenors") represented by David S. Beckman and Michelle S. Mehta
17 of the NRDC, were permitted to intervene in this action on the side of the
18 Respondents, by Order of this Court dated May 1, 2008.

19 The matter having been extensively briefed, and the Court having reviewed
20 the administrative record of Respondents' proceedings in this matter, along with the
21 pleadings, the briefs submitted by counsel and the judicially noticed materials,
22 having considered the oral arguments of counsel and having issued its Notice of
23 Ruling/Decision on March 13, 2008, and with the Court having previously signed
24 judgments on July 2 and November 10, 2008, which were subsequently vacated,

25 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

26 1. Judgment is hereby entered in favor of Petitioners and against
27 Respondents and Intervenors on the Petition for Writ of Mandate and Complaint for
28 Declaratory and Injunctive Relief.

1 2. A Peremptory Writ of Mandate shall issue under the seal of this Court
2 commanding the Respondents, and their board members, officers, agents, attorneys,
3 employees, and persons and entities acting on behalf of, or through color of the
4 authority of said Respondents, in accordance with each Respondent's respective
5 obligations under the law:

6 (a) to void and set aside Los Angeles Regional Water Quality
7 Control Board Resolution No. 2005-003, dated March 3, 2005, wherein the
8 2004 Triennial Review of the Water Quality Control Plan for the Los Angeles
9 Region ("Basin Plan") was concluded;

10 (b) during the course of the reopened 2004 Triennial Review, or if
11 Respondents determine not to reopen the 2004 Triennial Review, then during
12 the course of the next scheduled triennial review: (i) to review and, where
13 appropriate, revise the Water Quality Standards ("Standards")¹ in the Basin
14 Plan, which apply or are to be applied to storm water and urban runoff
15 (collectively "Stormwater"),² in light of the factors and requirements set forth
16 under Water Code sections 13241 and 13000, including, but not limited to, the
17 specific factors set forth under Water Code sections 13241(a) – (f), and the
18 considerations provided under Water Code section 13000; (ii) to revise the
19 Standards that apply or are to be applied to Stormwater, such that no
20 "potential" use designations for such Standards remain in the Basin Plan; and
21 (iii) to revise the Standards, as appropriate, during the Triennial Review
22 process, after a full and fair public hearing or hearings, and before concluding
23 the triennial review.

24 3. The Court hereby finds and declares that it is contrary to law to base
25

26 ¹ As referenced herein, the term "Water Quality Standards" or "Standards" shall
27 mean the designated beneficial uses of the waters, as well as the water quality
objectives established to achieve such designated beneficial uses.

28 ² Federal law defines "storm water" to include urban runoff, *i.e.*, "surface runoff
and drainage." (See 40 C.F.R. § 122.26(b)(13).)

1 Water Quality Standards on "potential" beneficial uses, as such a practice is contrary
2 to the clear and specific requirement set forth in Water Code section 13241(a)
3 (which requires the consideration of "probable future beneficial uses" when
4 establishing Standards), and as such practice is inconsistent with Water Code section
5 13000 (which requires a consideration of the "demands being made and to be made"
6 on state waters).

7 4. The Court, having reviewed the applicable provisions of State and
8 federal law governing the triennial review process to be followed when reviewing
9 and revising Standards (*see* 33 U.S.C. § 1313(c)(1) and Cal. Water Code §§ 13143
10 and 13240), hereby further declares that a public hearing is to be conducted as a part
11 of the triennial review process, and that such public hearing is to be conducted for
12 the express purpose of reviewing and, as appropriate, modifying the Standards or
13 adopting new Standards. (*See* 33 U.S.C. § 1313(c)(1).) The Court declares that,
14 under applicable State and federal law, the triennial review process is *not* to be
15 concluded until such time as the need for appropriate modifications to the Standards
16 has been considered, and until such time as actual modifications, where appropriate,
17 have been made to the Standards or determined not to be made.

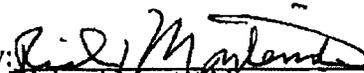
18 5. Petitioners are awarded their costs of suit incurred.

19
20 Dated: 26 November, 2008


The Honorable Thierry Patrick Colaw
Judge of the Superior Court of California

21
22
23 RESPECTFULLY SUBMITTED BY:

24 RUTAN & TUCKER, LLP

25 By: 
26 Richard Montevideo
27 Attorney for Petitioners/Plaintiffs
28

Writ of Mandate

1 EDMUND G. BROWN JR., Attorney General
of the State of California
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7 Attorneys for Respondents/Defendants
STATE WATER RESOURCES CONTROL BOARD
8 and CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD. LOS ANGELES REGION

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

Nov 07 2008

ALAN CARLSON, Clerk of the Court

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

11
12
13 THE CITIES OF ARCADIA, BELLFLOWER,
CARSON, CERRITOS, CLAREMONT,
14 COMMERCE, DOWNEY, DUARTE,
GARDENA, GLENDORA, HAWAIIAN
GARDENS, IRWINDALE, LAWNSDALE,
15 MONTEREY PARK, PARAMOUNT, SANTA
FE SPRINGS, SIGNAL HILL, VERNON,
16 WALNUT, WEST COVINA, and WHITTIER,
municipal corporations, and BUILDING
17 INDUSTRY LEGAL DEFENSE
FOUNDATION, a non-profit corporation,

18
19 Petitioners/Plaintiffs,

20 vs.

21 THE STATE WATER RESOURCES
CONTROL BOARD; and THE CALIFORNIA
22 REGIONAL WATER QUALITY CONTROL
BOARD, LOS ANGELES REGION, and DOES
23 1 through 50, inclusive,

24 Respondents/Defendants.

25 vs.

26 NATURAL RESOURCES DEFENSE COUNCIL,
INC.; HEAL THE BAY; and SANTA MONICA
27 BAYKEEPER

28 Intervenors.

Case No. 06CC02974
Honorable Thierry Patrick Colaw
Dept: CX-104

TC
[Proposed] PEREMPTORY
WRIT OF MANDATE

1 TO RESPONDENTS STATE WATER RESOURCES CONTROL BOARD
2 AND THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
3 LOS ANGELES REGION, AND TO THEIR BOARD MEMBERS, OFFICERS,
4 AGENTS, ATTORNEYS, EMPLOYEES, AND TO ALL PERSONS ACTING ON
5 THEIR BEHALF, OR THROUGH OR UNDER COLOR OF THEIR
6 AUTHORITY:

7 Judgment having been entered in this action, ordering that a peremptory writ
8 of mandate be issued from this Court,

9 YOU ARE HEREBY DIRECTED AND COMMANDED, UPON RECEIPT
10 OF THIS WRIT, IN ACCORDANCE WITH YOUR RESPECTIVE
11 OBLIGATIONS UNDER THE LAW:

12 (1) To void and set aside Los Angeles Regional Water Quality Control
13 Board Resolution No. 2005-003, dated March 3, 2005, wherein the 2004 Triennial
14 Review of the Water Quality Control Plan for the Los Angeles Region (“Basin
15 Plan”) was concluded;

16 (2) During the course of reopened 2004 Triennial Review, or if
17 Respondents determine not to reopen the 2004 Triennial Review, then during the
18 course of the next scheduled triennial review of the Water Quality Standards
19 (“Standards”)¹ in the Basin Plan:

20 (a) to review and, where appropriate, revise the Standards which
21 apply or are to be applied to storm water and urban runoff (collectively
22 “Stormwater”),² in light of the factors and requirements set forth under Water
23 Code sections 13241 and 13000, including, but not limited to, the specific
24 factors set forth under Water Code sections 13241(a) – (f), and the

25
26 ¹ As referenced herein, the term “Water Quality Standards” or “Standards” shall
27 mean the designated beneficial uses of the waters, as well as the water quality
28 objectives established to achieve such designated beneficial uses.

² Federal law defines “storm water” to include urban runoff, *i.e.*, “surface runoff
and drainage.” (*See* 40 C.F.R. § 122.26(b)(13).)

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considerations provided under Water Code section 13000;

(b) to revise the Standards that apply or are to be applied to Stormwater, such that no "potential" use designations for such Standards remain in the Basin Plan; and

(c) to revise the Standards, as appropriate, during said triennial review process, consistent with subsections (a) and (b) above and State and federal law, after a full and fair public hearing or hearings, and before concluding the triennial review.

(3) To make and file a Return to this Writ within ninety (90) days from the date Respondents have taken all action necessary to comply with paragraphs (1) & (2), above.

WITNESS the Honorable Thierry Patrick Colaw, Judge of the Superior Court.

ATTEST my hand and the seal of this Court, this 10 day of NOVEMBER 2008.

ORANGE COUNTY SUPERIOR COURT
CLERK **ALAN CARLSON**

Dated: 11/10/08

By: [Signature]



LET THE FOREGOING WRIT ISSUE.

Dated: 10 November
2008

[Signature]
The Honorable Thierry Patrick Colaw
Judge of the Superior Court of California

RESPECTFULLY SUBMITTED BY:

By: _____

JENNIFER F. NOVAK
Attorney for Respondents/Defendants

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I also caused the above document to be transmitted to the e-mail addresses set forth above.

Executed on January 8, 2010, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cathryn L. Campbell
(Type or print name)

Cathryn L. Campbell
(Signature)