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6 CITY OF SAN CLEMENTE

7
8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
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In the Matter of:

THE CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION'S ADOPTION OF
ORDER NO. R9-2009-0002 REISSUING
NPDES PERMIT NO. CAS0108740

PETITION FOR REVIEW

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

1 This Petition for Review is submitted on behalf of the City of San Clemente
2 (“Petitioner” or “City”) pursuant to California Water Code Section 13320 and California
3 Code of Regulations (“CCR”) Title 23, Section 2050, for review of Order No. R9-2009-
4 0002, reissuing NPDES Permit No. CAS0108740, which was adopted by the California
5 Regional Water Quality Control Board, San Diego Region (the “Regional Board”) on
6 December 16, 2009.

7 **I. NAME, ADDRESS AND TELEPHONE NUMBER OF PETITIONER**

8 All written correspondence and other communications regarding this matter should
9 be addressed as follows:

10 City of San Clemente
11 Attn: Tom Bonigut, P.E., Assistant City Engineer
12 910 Calle Negocio, Suite 100
13 San Clemente, CA 92673
14 Telephone: 949-361-6187
15 Email: BonigutT@san-clemente.org

16 With a copy to Petitioner’s Counsel:

17 Jeffrey M. Oderman, Esq.
18 Richard Montevideo, Esq.
19 Peter J. Howell, Esq.
20 Rutan & Tucker, LLP
21 611 Anton Boulevard, Suite 1400
22 Costa Mesa, CA 92626
23 Telephone: 714-546-9035
24 Email: rmontevideo@rutan.com
25 phowell@rutan.com

26 **II. SPECIFIC ACTION OF THE REGIONAL BOARD FOR WHICH REVIEW**
27 **IS SOUGHT**

28 Petitioner is challenging certain terms and requirements contained in Regional
Board Order No. R9-2009-0002, reissuing NPDES Permit No. CAS0108740 (hereafter, the
“Permit”) and adopted on December 16, 2009. As of the date of the submission of this
Petition, the Regional Board has not made the final adopted Permit available for review.
Petitioners will supplement this Petition with a final Permit once it is made available by
the Regional Board.

1 **III. DATE OF REGIONAL BOARD'S ACTION**

2 The Regional Board adopted the Permit on December 16, 2009.

3 **IV. STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR**
4 **IMPROPER**

5 The subject Permit contains a series of new Permit requirements that were not
6 contained in the Municipal National Pollutant Discharge Elimination System ("NPDES")
7 Permit issued for South Orange County in 2002, and that were not supported by findings in
8 the reissued Permit nor by the evidence in the record. Further, such new Permit
9 requirements are contrary to State and/or federal law. The Regional Board's adoption of
10 the subject Permit was therefore arbitrary and capricious, and contrary to law, for the
11 following reasons:

12 (1) The numeric action levels for dry weather runoff ("NALs"), the stormwater
13 action levels for wet weather runoff ("SALs"), the incorporation of the numeric limits from
14 the waste load allocations within total maximum daily loads ("TMDLs"), along with the
15 low impact development ("LID") requirements, the new standard stormwater mitigation
16 plan ("SSMP") requirements, and the Retrofitting and new Hydromodification
17 requirements, are all new Permit requirements that go beyond the requirements of federal
18 law, and are all new Permit terms that were not developed in accordance with the
19 requirements of California Water Code ("CWC") sections 13263, 13241, and 13000.
20 Similarly, the prohibition on the discharge of certain dry weather discharges, specifically
21 "Landscaped Irrigation," "Irrigation Waters," and "Lawn Waters," are not prohibitions
22 required under federal law, and the deletion of these categories of discharges from the
23 "exempted" set of discharges within the Permit, are Permit changes from the prior 2002
24 Municipal NPDES Permit that were not made in accordance with the requirements of
25 CWC sections 13263, 13241, and 13000.

26 (2) The Permit contains a series of new investigation, monitoring and reporting
27 obligations upon the Permittees, mainly related to the new NALs, SALs, and TMDL
28 requirements in the Permit. However, such new investigation, monitoring, and reporting

1 requirements imposed upon the Permittees can only be imposed after the requirements of
2 CWC sections 13225(c) and 13267 have been complied with, *i.e.*, only after the Regional
3 Board has shown that the benefits of these new investigating/monitoring/reporting
4 requirements outweigh their costs. (CWC §§ 13225(c) and 13267(b).) Yet, there are no
5 findings in the Permit, and no evidence in the record showing that any such cost/benefit
6 analysis was ever conducted, or that the benefits of these requirements in fact outweigh
7 their costs.

8 (3) The Permit improperly classifies all dry weather runoff as “non-stormwater,”
9 and unlawfully deletes “Landscape Irrigation,” “Irrigation Waters” and “Lawn Waters”
10 from the list of exempted discharges allowed in the prior Municipal NPDES Permit for
11 South Orange County. Under federal law, however, Permittees must only control the
12 discharge of pollutants from their municipal separate storm sewer system (“MS4”) in
13 accordance with the Clean Water Act’s maximum extent practicable (“MEP”) standard,
14 and regardless of whether the pollutants are in “stormwater” or “non-stormwater.” Also,
15 federal law only explicitly requires that an MS4 Permit prohibit discharges “where such
16 discharges are identified by the municipality as sources of pollutants to water in the United
17 States.” (40 C.F.R. 122.26(d)(2)(iv)(B)(1).) Because the evidence does not support any
18 such finding, and because such discharges should be considered “stormwater” in any event
19 in accordance with the definition of “Stormwater” in the federal regulations (*see* 40 CFR
20 § 122.26(b) (13), the Regional Board had no authority under State or federal law to remove
21 the referenced discharges from the list of exempted discharges in the subject Permit.

22 (4) The Permit’s new LID, SSMP, Retrofitting and Hydromodification
23 requirements were all adopted contrary to law because such provisions conflict with the
24 requirements of the California Environmental Quality Act (“CEQA” – Public Resources
25 Code (“PRC”) § 21000 *et seq.*) Specifically, under PRC section 21081.6(c), a responsible
26 agency, such as the Regional Board having jurisdiction over a natural resource affected by
27 a particular development project, does not have the authority to limit the discretion of a
28 local government agency, *i.e.*, the City herein or other Permittees under the Permit, to

1 review and approve or deny development projects under CEQA. To the contrary, under
2 PRC section 21080.1, it is the City's and the other Permittees' responsibility to determine
3 the appropriate environmental review and necessary mitigation measures to address any
4 potentially significant adverse environmental impacts that may be expected from a
5 development project. It is further within the Permittees' discretion to approve a
6 development project, even if there are unmitigated potentially significant adverse
7 environmental impacts from the project, "in the event specific economic, social, or other
8 conditions make infeasible such project alternatives or such mitigation measures." (See
9 PRC §§ 21002 & 21081(b) [allowing a local agency to approve a project with unmitigated
10 adverse impacts if it adopts a Statement of Overriding Considerations.])

11 (5) The LID, SSMP, Retrofitting and Hydromodification requirements within the
12 Permit are similarly unlawful as they are all Permit terms through which the Regional
13 Board improperly seeks to impose a "particular manner" of compliance on the Permittees,
14 in direct violation of CWC section 13360(a).

15 Petitioner respectfully requests that the subject Petition be granted, and that the
16 challenged terms of the Permit be voided as they have not been adopted in accordance with
17 the requirements of State and federal law, and as there is insufficient evidence and findings
18 in the record to support such Permit requirements.

19 **V. HOW PETITIONER IS AGGRIEVED**

20 Petitioner is a Permittee under the subject Permit, who is responsible, along with the
21 other Permittees under the Permit, for compliance with all Permit terms applicable to its
22 jurisdiction. The failure of a Permittee to comply with any Permit term exposes the
23 Permittee to liability under the federal Clean Water Act ("CWA") and the California
24 Porter-Cologne Act, and subjects the Permittees to enforcement action, penalties and
25 potential lawsuits from the Regional Board, as well as to citizen suits under the CWA.
26 Petitioner is thus aggrieved by the adoption of unlawful and inappropriate Permit terms,
27 adopted without sufficient findings or evidence in the record, and adopted in a manner that
28 was contrary to law. For example, the disputed Permit requirements were all adopted

1 without any consideration of whether they “could reasonably be achieved,” or of their
2 “economic” impacts on the Permittees, particularly given the “environmental
3 characteristics” of the water bodies in issue, nor of any of the other factors and
4 considerations under CWC sections 13263, 13241 and 13000. All such defective Permit
5 requirements should therefore be set aside and should not be imposed until such time as
6 the Regional Board complies with applicable law and revises such terms accordingly.

7 **VI. ACTION PETITIONER REQUESTS THE STATE WATER BOARD TO**
8 **TAKE**

9 Petitioner requests: (i) that the State Board set aside and vacate the NAL, SAL, and
10 incorporated TMDL requirements in the Permit, because these provisions were not adopted
11 in accordance with State and federal law; (ii) that the State Board restore the “Landscape
12 Irrigation,” “Irrigation Waters” and “Lawn Waters” exemptions deleted by the Regional
13 Board from the list of exempted discharges in the subject Permit, because these previously
14 listed exempted discharges were deleted contrary to federal law, and without complying
15 with State law; (iii) that the State Board set aside and vacate the LID provisions, the new
16 SSMP requirements, the Retrofitting requirements, and the new Hydromodification
17 requirements contained in the new Permit, as such provisions were not adopted in
18 accordance with the requirements of State and federal law, and are in conflict with State
19 law, namely, CEQA and CWC section 13360; and (iv) that all new
20 investigation/monitoring/reporting obligations set forth in the Permit associated with the
21 NALs, SALs and TMDLs, be stricken, as there are no findings and no evidence to support
22 such provisions in the record, and as such provisions were not adopted in accordance with
23 the requirements of State law, *i.e.*, no cost/benefit analysis was conducted to show that the
24 benefits of these new investigation/monitoring/reporting requirements will exceed their
25 costs, as required by CWC sections 13225(c) and 13267.

26 However, as the issues raised in the Petition may be resolved or may be rendered
27 moot by subsequent actions and administration of the Permit by the Regional Board,
28 Petitioner respectfully requests that the State Board hold this Petition in abeyance at this

1 time, pursuant to Title 23, California Code of Regulation, section 2050.5(d). Depending
2 on the administration and enforcement of the disputed terms of the Permit by the Regional
3 Board, Petitioner will, if necessary, request that the State Board take the Petition out of
4 abeyance and consider some or all of the issues raised in this Petition at that time, and that
5 a public hearing be provided on the requested issues.

6 **VII. POINTS AND AUTHORITIES**

7 A Memorandum of Points and Authorities is attached hereto and incorporated
8 herein by this reference into this Petition. If deemed necessary by the State Board,
9 Petitioner will be prepared to submit a supplemental statement of points and authorities to
10 the State Board at such time as Petitioner may request that the State Board take the subject
11 Petition out of abeyance and review and act upon the Petition.

12 **VIII. NOTICE TO REGIONAL BOARD**

13 With the submission of this Petition and supporting Points and Authorities to the
14 State Board, copies are simultaneously being forwarded to the Executive Officer of the
15 Regional Board.

16 **IX. ISSUES PREVIOUSLY RAISED**

17 The substantive issues raised in this Petition were presented to the Regional Board
18 at or before the time the Regional Board acted to adopt the Permit on December 16, 2009,
19 including, but not limited to, through numerous oral and written comments and exhibits
20 submitted by Petitioner and/or by other Permittees and Commentors over the course of the
21 last several years since this Permit first came up for renewal in 2007.

22 **X. CONCLUSION**

23 For the reasons stated herein, Petitioner has been aggrieved by the Regional Board's
24 action in including various objectionable and unlawful terms in the subject Permit.
25 However, the issues raised in this Petition may be resolved or rendered moot by
26 subsequent Regional Board administrative action. Accordingly, until such time as the
27 Petitioner requests that the State Board act on this Petition, Petitioner requests that this
28 Petition be held in abeyance.

1 **XI. SERVICE OF PETITION**

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

4 State Water Resources Control Board
5 Office of Chief Counsel
6 Jeannette L. Bashaw, Legal Analyst
7 Post Office Box 100
8 Sacramento, CA 95812-0100
9 Fax: (916) 341-5199
10 jbashaw@waterboards.ca.gov

11 California Regional Water Quality Control Board
12 San Diego Region
13 David W. Gibson, Executive Officer
14 9174 Sky Park Court, Suite 100
15 San Diego, CA 92123-4340
16 Fax: (858) 571-6972
17 dgibson@waterboards.ca.gov

18 Respectfully submitted

19 RUTAN & TUCKER, LLP

20 Dated: January 14, 2010

21 By: 
22 Richard Montevideo
23 Attorneys for Petitioner

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PROOF OF SERVICE VIA FACSIMILE AND U.S. MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On January 14, 2010, I served on the interested parties in said action the within:

PETITION FOR REVIEW

by placing a true copy thereof in sealed envelope(s) addressed as stated below:

State Water Resources Control Board Office of Chief Counsel Jeannette L. Bashaw, Legal Analyst Post Office Box 100 Sacramento, CA 95812-0100 jbashaw@waterboards.ca.gov Facsimile No.: (916) 341-5199	California Regional Water Quality Control Board San Diego Region David W. Gibson, Executive Officer 9174 Sky Park Court, Suite 100 San Diego, CA 92123-4340 dgibson@waterboards.ca.gov Fax: (858) 571-6972
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In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I also caused the above document to be transmitted by facsimile machine, telephone number 714-546-9035, pursuant to California Rules of Court, Rule 2005. The total number of fax pages (including the Proof of Service form and cover sheet) that were transmitted was 10. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. Said fax transmission occurred as stated in the transmission record attached hereto and was directed as stated above.

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

Executed on January 14, 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)


(Signature)

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1 **I. INTRODUCTION**

2 Petitioner the City of San Clemente (“City” or “Petitioner”) submits these points
3 and authorities in support of its Petition to the State Water Resources Control Board
4 (“State Board”) requesting that the State Board review and set aside certain Permit terms
5 set forth in Order No. R9-2009-0002, NPDES Permit No. CAS0108740 (“Permit”), as
6 adopted by the California Regional Water Quality Control Board, San Diego Region
7 (“Regional Board”) on December 16, 2009. The Regional Boards’ adoption of the
8 reissued Permit was arbitrary and capricious, and otherwise contrary to law for the
9 following reasons:

10 (1) The numeric action levels for dry weather runoff (“NALs”), the stormwater
11 action levels for wet weather runoff (“SALs”), the incorporation of the numeric limits from
12 the waste load allocations within total maximum daily loads (“TMDLs”), along with the
13 low impact development (“LID”) requirements, the new standard stormwater mitigation
14 plan (“SSMP”) requirements, and the Retrofitting and new Hydromodification
15 requirements, are all new Permit requirements that go beyond the requirements of federal
16 law, and are all new Permit terms that were not developed in accordance with the
17 requirements of California Water Code (“CWC”) sections 13263, 13241, and 13000.
18 Similarly, the prohibition on the discharge of certain dry weather discharges, specifically
19 “Landscaped Irrigation,” “Irrigation Waters,” and “Lawn Waters,” are not prohibitions
20 required under federal law, and the deletion of these categories of discharges from the
21 “exempted” set of discharges within the Permit, are Permit changes from the prior 2002
22 Municipal NPDES Permit that were not made in accordance with the requirements of
23 CWC sections 13263, 13241, and 13000.

24 (2) The Permit contains a series of new investigation, monitoring and reporting
25 obligations upon the Permittees, mainly related to the new NALs, SALs, and TMDL
26 requirements in the Permit. However, such new investigation, monitoring, and reporting
27 requirements imposed upon the Permittees can only be imposed after the requirements of
28 CWC sections 13225(c) and 13267 have been complied with, *i.e.*, only after the Regional

1 Board has shown that the benefits of these new investigating/monitoring/reporting
2 requirements outweigh their costs. (CWC §§ 13225(c) and 13267(b).) Yet, there are no
3 findings in the Permit, and no evidence in the record showing that any such cost/benefit
4 analysis was ever conducted, or that the benefits of these requirements in fact outweigh
5 their costs.

6 (3) The Permit improperly classifies all dry weather runoff as “non-stormwater,”
7 and unlawfully deletes “Landscape Irrigation,” “Irrigation Waters” and “Lawn Waters”
8 from the list of exempted discharges allowed in the prior Municipal NPDES Permit for
9 South Orange County. Under federal law, however, Permittees must only control the
10 discharge of pollutants from their municipal separate storm sewer system (“MS4”) in
11 accordance with the Clean Water Act’s maximum extent practicable (“MEP”) standard,
12 and regardless of whether the pollutants are in “stormwater” or “non-stormwater.” Also,
13 federal law only explicitly requires that an MS4 Permit prohibit discharges “where such
14 discharges are identified by the municipality as sources of pollutants to water in the United
15 States.” (40 C.F.R. 122.26(d)(2)(iv)(B)(1).) Because the evidence does not support any
16 such finding, and because such discharges should be considered “stormwater” in any event
17 in accordance with the definition of “Stormwater” in the federal regulations (*see* 40 CFR
18 § 122.26(b) (13), the Regional Board had no authority under State or federal law to remove
19 the referenced discharges from the list of exempted discharges in the subject Permit.

20 (4) The Permit’s new LID, SSMP, Retrofitting and Hydromodification
21 requirements were all adopted contrary to law because such provisions conflict with the
22 requirements of the California Environmental Quality Act (“CEQA” – Public Resources
23 Code (“PRC”) § 21000 *et seq.*) Specifically, under PRC section 21081.6(c), a responsible
24 agency, such as the Regional Board having jurisdiction over a natural resource affected by
25 a particular development project, does not have the authority to limit the discretion of a
26 local government agency, *i.e.*, the City herein or other Permittees under the Permit, to
27 review and approve or deny development projects under CEQA. To the contrary, under
28 PRC section 21080.1, it is the City’s and the other Permittees’ responsibility to determine

1 the appropriate environmental review and necessary mitigation measures to address any
2 potentially significant adverse environmental impacts that may be expected from a
3 development project. It is further within the Permittees' discretion to approve a
4 development project, even if there are unmitigated potentially significant adverse
5 environmental impacts from the project, "in the event specific economic, social, or other
6 conditions make infeasible such project alternatives or such mitigation measures." (See
7 PRC §§ 21002 and 21081(b) [allowing a local agency to approve a project with
8 unmitigated adverse impacts if it adopts a Statement of Overriding Considerations.])

9 (5) The LID, SSMP, Retrofitting and Hydromodification requirements within
10 the Permit are similarly unlawful as they are all Permit terms through which the Regional
11 Board improperly seeks to impose a "particular manner" of compliance on the Permittees,
12 in direct violation of CWC section 13360(a).

13 Petitioner respectfully requests that the subject Petition be granted, and that the
14 challenged terms of the Permit be voided as they have not been adopted in accordance with
15 the requirements of State and federal law, and as there is insufficient evidence and findings
16 in the record to support such Permit requirements.

17 **II. THE REGIONAL BOARD FAILED TO COMPLY WITH CWC**
18 **SECTIONS 13263, 13241 AND 13000 IN ADOPTING THE DISPUTED**
19 **PERMIT REQUIREMENTS**

20 The Permit contains provisions requiring compliance with NALs for dry weather
21 runoff and SALs for wet weather runoff. In addition, the Permit requires Permittees to
22 comply with waste load allocations ("WLAs") and other numeric limits for both dry and
23 wet weather runoff, pursuant to adopted and to be adopted TMDLs. The Permit also
24 contains new requirements which, when compared to the existing municipal NPDES
25 Permit, require that the Permittees prohibit all "dry weather" discharges from entering the
26 MS4, except for certain identified exempted discharges. The prohibition on the discharge
27 of dry weather discharges into the MS4 specifically includes "Landscape Irrigation,"
28 "Irrigation Waters" and "Lawn Waters," all of which are permitted exemptions under

1 federal law and all which were exempted discharges under the 2002 Municipal NPDES
2 Permit for South Orange County.

3 Similarly, the Permit imposes the new LID, SSMP and new Retrofitting and
4 Hydromodification requirements. None of these Permit new requirements, however, were
5 developed in accordance with CWC sections 13263, 13241 and 13000.

6 The NALs, SALs, and TMDL requirements, as well as the new dry weather
7 prohibition requirement and the new LID, SSMP, Retrofitting, Hydromodification and
8 related requirements, are all Permit terms which are not required under the CWA or the
9 federal regulations. Accordingly, the Regional Board was required to comply with the
10 requirements of the Porter-Cologne Act, specifically including CWC sections 13263,
11 13241 and 13000, before adopting any of these requirements.

12 **A. The NAL, SAL and TMDL Permit Terms Were Not Adopted in**
13 **Accordance With CWC Sections 13263, 13241 and 13000.**

14 Section C.5 of the Permit requires each co-permittee to comply with “non-
15 stormwater dry weather action levels” set forth therein, including NALs for bacteria,
16 nitrogen, phosphorus, and other pollutants, including NALs for metals based on the
17 California Toxics Rule. There are also separate NALs for dry weather runoff for the Dana
18 Point Harbor and saline lagoon/estuaries, as well as for discharges to the surf zone.

19 The Permit also establishes various SALs, and provides that the “failure to
20 appropriately consider and react to SAL exceedences in an iterative manner creates a
21 presumption that the co-permittees have not complied with the MEP standard.” (Permit,
22 § D.1.) In addition, Section I of the Permit, entitled “Total Maximum Daily Loads,”
23 requires strict compliance with WLAs set forth in the Baby Beach bacteria TMDL, and
24 also provides that the WLAs “of fully approved and adopted TMDLs are incorporated as
25 Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by
26 watershed basis.” For Baby Beach, the Permit requires that WLAs “are to be met in Baby
27 Beach receiving waters by the end of the year 2019” and that “the numeric targets are to be
28 met once 100 percent of the WLA reductions have been achieved.”

1 Accordingly, the Permit imposes numeric limits on both dry weather and wet
2 weather discharges, in the form of NALs for dry weather discharges, SALs for wet weather
3 discharges, and TMDLs for both. But, as discussed below, the CWA does not require
4 municipalities to comply with numeric limits, but rather imposes only a “maximum extent
5 practicable” standard on all discharges “from” a municipalities’ MS4 system .

6 In addition, it has long since been the policy of the State of California not to require
7 the use of numeric limits for Stormwater dischargers, but rather to apply the MEP standard
8 through an iterative BMP process. (*See, e.g.*, State Board Order No. 91-04, p. 14 [“There
9 are *no numeric objectives or numeric effluent limits* required at this time, either in the
10 Basin Plan or any statewide plan that apply to storm water discharges.” p. 14]; State Board
11 Order No. 96-13, p. 6 [“*federal laws does not require* the [San Francisco Reg. Bd] to
12 dictate the specific controls.”]; State Board Order No. 98-01, p. 12 [“Stormwater permits
13 must achieve compliance with water quality standards, but they may do so by requiring
14 implementation of BMPs *in lieu of numeric water quality-based effluent limitations.*”];
15 State Board Order No. 2001-11, p. 3 [“*In prior Orders this Board has explained the need*
16 *for the municipal storm water programs and the emphasis on BMPs in lieu of numeric*
17 *effluent limitations.*”]; State Board Order No. 2001-15, p. 8 [“While we continue to
18 address water quality standards in municipal storm water permits, we also continue to
19 believe that *the iterative approach*, which focuses on timely improvements of BMPs, is
20 appropriate.”]; State Board Order No. 2006-12, p. 17 [“*Federal regulations do not require*
21 *numeric effluent limitations for discharges of storm water*”]; *Stormwater Quality Panel*
22 *Recommendations to The California State Water Resources Control Board – The*
23 *Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated*
24 *with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [“*It is not*
25 *feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and*
26 *in particular urban dischargers.*”]; and an April 18, 2008 letter from the State Board’s
27 Chief Counsel to the Commission on State Mandates, p. 6 [“*Most NPDES Permits are*
28 *largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the*

1 *other hand, usually require dischargers to implement BMPs.”].)*

2 Accordingly, before having adopted the various numeric limits contained in the
3 Permit, the Regional Board was required to comply with all aspects of the California
4 Porter-Cologne Act, including, but not limited to, conducting an analysis of the factors set
5 forth under CWC sections 13263 and 13241, as well as of the policies and factors in
6 section 13000. Yet, there is no indication anywhere in the record that such a 13241/13000
7 analysis was conducted by the Regional Board for any of the NALs, SALs, or WLAs
8 (from TMDLs) contained in the Permit, nor are there any findings anywhere in the Permit
9 indicating that the Regional Board complied with CWC sections 13263, 13241 and 13000,
10 particularly including, but not limited to, any considerations of whether such numeric
11 limits “could reasonably be achieved,” as well as the “economic” impacts on the
12 Permittees, and the “environmental characteristics” of the water bodies in issue.

13 **B. The Prohibition On Dry Weather Discharges.**

14 The Permit also attempts to mandate that the Permittees prohibit all dry weather
15 discharges from entering the MS4 by redefining all such discharges as “non-storm water”
16 discharges. It similarly deletes from the list of exempted discharges any “Landscape
17 Irrigation,” “Irrigation Water” and “Lawn Waters,” meaning all such discharges are no
18 longer permitted to enter the MS4 system. Yet, there are no findings and there is no
19 evidence showing that these changes to the Permit were made in accordance with the
20 analysis required under CWC sections 13263, 13241 and 13000.

21 Moreover, as discussed further herein, the definition of the term “stormwater”
22 includes “surface runoff” and “drainage.” (40 CFR § 122.26(b)(13).) As such, the
23 discharge of dry weather runoff including Landscape Irrigation, Irrigation Water and Lawn
24 Waters, cannot properly be classified as a “non-stormwater” discharge. Accordingly,
25 section 1342(b)(3)(B)(ii) of the CWA, which requires that Permittees effectively prohibit
26 the discharge of “non-stormwater” into the MS4, has no application to the discharge of
27 non-point source Landscape Irrigation, Irrigation Waters or Lawn Waters.

28 Further, the federal regulations define an “illicit” discharge as a discharge that is not

1 composed entirely of “stormwater” except for discharges allowed pursuant to an NPDES
2 Permit and discharges resulting from fire fighting activities. (40 C.F.R., § 122.26(b)(2).)
3 Because the term “stormwater,” as defined in the federal regulations, plainly includes
4 surface runoff and drainage in addition to precipitation, “Landscape Irrigation,” “Irrigation
5 Waters” and “Lawn Waters” cannot correctly be classified as “illicit” discharges, and the
6 CWA plainly does not require that the Permittees prohibit such discharges from entering
7 the MS4.

8 Deleting these previously exempted categories of discharges from entering the MS4
9 imposes additional requirements upon the Permittees that are not mandated by the CWA.
10 Consequently, the Regional Board was required to conduct the analysis required under
11 CWC sections 13263, 13241 and 13000, prior to deleting these categories. Since the
12 Regional Board failed to conduct such an analysis (as well as for other reasons discussed
13 herein), its deletion of these categories was improper.

14 **C. The LID, SSMP, Retrofitting And Hydromodification Terms Were Not**
15 **Adopted in Accordance With CWC Sections 13263, 13241 and 13000.**

16 The LID requirements and the related new SSMP, Retrofitting and new
17 Hydromodification requirements are similarly not mandated by the CWA. As such, these
18 provisions can only be imposed after the Regional Board has first complied with the
19 requirements of CWC sections 13263, 13241 and 13000, as well as with all other
20 applicable requirements under California law. There are no “findings” nor evidence in the
21 record, however, that these requirements “could reasonably be achieved” or that their
22 “economic” impacts on the Permittees justified their adoption, nor that any of the other
23 factors and consideration under CWC sections 13241 and 13000 were considered.

24 **III. UNDER FEDERAL LAW, MUNICIPAL STORMWATER DISCHARGERS**
25 **NEED ONLY REDUCE THE DISCHARGE OF POLLUTANTS TO THE**
26 **“MAXIMUM EXTENT PRACTICABLE”**

27 The federal Clean Water Act (“CWA” or “Act”) requires municipalities to “require
28 controls to reduce the discharge of *pollutants* to the maximum extent practicable.” (*Id.*)

1 This Maximum Extent Practicable (“MEP”) Standard is the only standard required under
2 the CWA to be applied to discharges from a City’s Municipal Separate Storm Sewer
3 System (“MS4”). Section 1342(p)(3)(B) of the Act entitled “Municipal Discharge”
4 provides, in its entirety, as follows:

5 Permits for discharges **from** municipal storm sewers –

6 (i) may be issued on a system– or jurisdictional– wide basis;

7 (ii) **shall include a requirement to effectively prohibit non-stormwater
8 discharges into the storm sewers; and**

9 (iii) shall require controls **to reduce the discharge of pollutants to the
10 maximum extent practicable**, including management practices, control
11 techniques and system, design and engineering methods, and such other
12 provisions as the Administrator or the State determines appropriate for the
13 control of such pollutants. (33 U.S.C. § 1342(p)(3)(B), emphasis added.)

12 This language in the CWA has consistently been interpreted as requiring an
13 application of the MEP Standard to municipal discharges, rather than an application of a
14 standard requiring compliance with numeric limits. Specifically, federal law only requires
15 strict compliance with numeric effluent limits by industrial dischargers. As indicated by
16 the Ninth Circuit in *Defenders of Wildlife v. Brown* (“*Defenders*”) (9th Cir. 1999) 191 F.3d
17 1159, in “requir[ing] municipal storm-sewer dischargers ‘to reduce the discharge of
18 pollutants to the maximum extent practicable’” Congress was “*not merely silent*”
19 regarding requiring “municipal” dischargers to strictly comply with numeric limits, but
20 specifically “replaced” the requirement applicable to traditional industrial waste
21 dischargers to strictly comply with the limits with an alternative requirement, *i.e.*, “that
22 *municipal* storm-sewer dischargers ‘reduce the discharge *of pollutants* to the maximum
23 extent practicable . . . *in such circumstances, the statute unambiguously demonstrates*
24 *that Congress did not require municipal storm-sewer discharges to comply strictly with*
25 *33 U.S.C. § 1311(b)(1)(C).*” (*Id.* at 1165; emphasis added.)

26 Similarly, in *Building Industry Association of San Diego County v. State Water*
27 *Resources Control Board* (“*BIA*”) (2004) 124 Cal.App.4th 866, the Appellate Court,
28 relying upon the Ninth Circuit’s holding in *Defenders*, agreed that “with respect to

1 *municipal* stormwater discharges, Congress clarified that the EPA has the authority to
2 fashion NPDES permit requirements to meet water quality standards without specific
3 numeric effluent limits and instead to impose ‘controls to reduce the discharge *of*
4 *pollutants* to the maximum extent practicable.’” (*Id.* at 874, emphasis added.) The Court
5 explained the reasoning for Congress’ different treatment of Stormwater dischargers versus
6 industrial waste dischargers as follows:

7 Congress added the NPDES storm sewer requirements to strengthen the
8 Clean Water Act by making its mandate correspond to the practical realities
9 of municipal storm sewer regulation. As numerous commentators have
10 pointed out, although Congress was reacting to the **physical differences**
11 **between municipal storm water runoff and other pollutant discharges**
12 that made the 1972 legislation’s blanket effluent limitations approach
13 **impractical and administratively burdensome**, the primary points of the
14 legislation was to address these administrative problems while giving the
15 administrative bodies the tools to meet the fundamental goals of the Clean
16 Water Act in the context of stormwater pollution. (*Id.* at 884, emphasis
17 added.)

18 The Permit, by imposing a series of numeric limits on the Permittees, goes beyond
19 the MEP Standard under federal law, *i.e.*, beyond what was required by Congress with the
20 1987 Amendments to the CWA, and thus treats municipal dischargers in a similar manner
21 as industrial waste dischargers. Thus, as discussed further below, the Regional Board was
22 clearly required to comply with CWC sections 13263, 13241 and 13000 in adopting these
23 Permit terms.

24 **IV. THE REGIONAL BOARD WAS REQUIRED TO COMPLY WITH CWC**
25 **SECTIONS 13263, 13241 AND 13000 BEFORE ADOPTING PERMIT**
26 **TERMS THAT GO BEYOND THE REQUIREMENTS OF FEDERAL LAW**

27 Under the California Supreme Court’s holding in *Burbank v. State Board* (2005) 35
28 Cal.4th 613 (“*Burbank*”), a regional board must consider the factors set forth in sections
13263, 13241 and 13000 when adopting an NPDES Permit, unless consideration of those
factors “would justify including restrictions that do not comply with federal law.” (*Id.* at
627.) As stated by the Court, “*Section 13263 directs Regional Boards, when issuing*
waste discharge requirements, to take into account various factors including those set
forth in Section 13241.” (*Id.* at 625, emphasis added.) Specifically, the *Burbank* Court

1 held that to the extent the NPDES Permit provisions in that case were not compelled by
2 federal law, the Boards were required to consider their “economic” impacts on the
3 dischargers themselves, with the Court finding that such requirement means that the Water
4 Boards must analyze the “*discharger’s cost of compliance.*” (*Id.* at 618.)

5 The Court in *Burbank* thus interpreted the need to consider “economics” as
6 requiring a consideration of the “cost of compliance” on the cities involved in that case.
7 (*Id.* at 625 [“The plain language of *Sections 13263 and 13241* indicates the Legislature’s
8 intent in 1969, when these statutes were enacted, that a regional board consider the costs of
9 compliance when setting effluent limitations in a waste water discharge permit.”].)

10 The Court further recognized the goals of the Porter-Cologne Act as provided for
11 under CWC section 13000, *i.e.*, to “attain the highest water quality which is reasonable,
12 considering all demands being made and to be made on those waters and the total values
13 involved, beneficial and detrimental, economic and social, tangible and intangible.” (*Id.* at
14 618, citing CWC § 13000.)

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

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

27 (§ 13241.) Furthermore, in a concurring opinion in *Burbank*, Justice Brown made several
28 significant comments regarding the importance of considering “economics” in particular,
and the CWC section 13241 factors in general, when adopting an NPDES Permit which

1 includes terms not required by federal law:

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

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

20 Justice Brown went on to find that:

21 **Accordingly, the Board has failed its duty to allow public discussion –**
22 **including economic considerations – at the required intervals when**
23 **making its determination of proper water quality standards.**
24 **What is unclear is why this process should be viewed as a contest. State**
25 **and local agencies are presumably on the same side. The costs will be**
26 **paid by taxpayers and the Board should have as much interest as any**
27 **other agency in fiscally responsible environmental solutions. (Id at 632-**
28 **33.)**

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

38 In formulating a water quality control plan, the Board is invested with wide
39 authority “to attain the highest water quality **which is reasonable**,
40 considering all demands being made and to be made on those waters and the
41 total values involved, beneficial and detrimental, **economic and social**,

1 **tangible and intangible.” (§ 13000.)** In fulfilling its statutory imperative,
2 the Board is **required** to “establish such water quality objectives . . . as in its
3 judgment will ensure the **reasonable protection** of beneficial uses . . .”
(§ 13241), a conceptual classification far-reaching in scope. (*Id* at 109-110,
emphasis added.)

* * *

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

* * *

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

10 Accordingly, before adopting any Permit terms that go beyond the requirements of
11 federal law, *e.g.*, requiring Permittees to go beyond the MEP standard or to prohibit
12 discharges which federal allows to be exempted, the Regional Board was required to
13 comply with CWC sections 13263, 13241, and 13000. In sum, there are no findings, and
14 there is no evidence in the record showing that the NAL, SAL and TMDL requirements in
15 the Permit, or the LID, SSMP, Retrofitted or Hydromodification requirements, nor the
16 provisions deleting “Landscape Irrigation,” “Irrigation Waters” or “Lawn Waters” from
17 the list of exempted discharges, were developed and adopted in accordance with CWC
18 sections 13263, 13241 and 13000.

19 **V. THE REGIONAL BOARD FAILED TO CONDUCT THE COST/BENEFIT**
20 **ANALYSIS REQUIRED BY CWC SECTIONS 13225 AND 13267 BEFORE**
21 **IMPOSING THE NEW INVESTIGATION, MONITORING AND**
22 **REPORTING OBLIGATIONS IN THE PERMIT**

23 Section C of the Permit requires Permittees to implement certain investigation,
24 monitoring and reporting programs to assure compliance with the NALs. Likewise,
25 Section D of the Permit imposes various investigation, monitoring and reporting
26 obligations on municipalities as a means of requiring compliance with SALs. Other
27 portions of the Permit similarly seek to impose investigation, monitoring and reporting
28 obligations upon the Permittees. Yet, under the Porter-Cologne Act, no investigation/

1 monitoring/reporting requirements may be imposed upon local agencies, without the
2 Boards first conducting a “cost/benefit” analysis. (CWC §§ 13225, 13267.)

3 CWC section 13225(c) provides as follows:

4 Each Regional Board, with respect to its region, shall, do all of the
5 following:

* * *

6 **(c) Require as necessary any state or local government to investigate
7 and report on any technical factors involved in water quality control or
8 to obtain and submit analyses of water; provided that the burden,
including costs, of such reports shall bear a reasonable relationship to
the need for the report and the benefits to be obtained therefrom.
(Water Code § 13225(c).)**

9 Similarly, CWC section 13267(b) provides, in relevant part, as follows:

10 **(b)(1). In conducting an investigation specified in subdivision (a), the
11 regional board may require that any person who has discharged . . . or
12 who proposes to discharge, waste within its region . . . shall furnish,
13 under penalty of perjury, technical or monitoring program reports
14 which the regional board requires. The burden, including costs, of these
15 reports shall bear a reasonable relationship to the need for the report
and the benefits to be obtained from the reports. In requiring those
reports, the regional board shall provide the person with a written
explanation with regard to the need for the reports, and shall identify
the evidence that supports requiring that person to provide the reports.
(Water Code § 13267(b), emph added.)**

16 Nonetheless, the Permit includes no findings showing that any such cost/benefit
17 analysis was ever conducted, nor does it indicate any finding showing that the burden,
18 including costs, of such monitoring and reporting obligations, bear a “reasonable
19 relationship” to the need for the same. In addition, there is no evidence that has been
20 identified anywhere in the record, either in the findings or otherwise, to show that the cost
21 benefit analysis required under CWC sections 13225 and 13267 was ever performed.

22 Accordingly, the City respectfully requests that the State Board vacate the above-
23 referenced investigation/monitoring/reporting requirements contained in the Permit, and
24 direct the Regional Board to conduct the requisite cost/benefit analysis and only impose
25 such requirements where the evidence shows that the benefits of such requirements exceed
26 their costs.

27
28

1 **VI. THE PERMIT IMPROPERLY TREATS DRY WEATHER RUNOFF AS**
2 **“NON-STORMWATER”**

3 The Permit improperly provides that: “Non-storm water (dry weather) discharge
4 from the MS4 is not considered a storm water (wet weather) discharge and therefore is not
5 subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA
6 402(p)(3)(B)(iii), which is explicitly for ‘Municipal . . . *Stormwater Discharges* (emphasis
7 added)’ from the MS4. Non-storm water discharges per CWA 402(p)(3)(B)(ii), are to be
8 effectively prohibited.” (Permit, Finding C.14.) The Permit then proceeds not only to
9 require that the Permittees prohibit all “non-storm water” discharges from entering into the
10 MS4, including prohibiting any dry weather runoff from entering the MS4 unless
11 otherwise expressly permitted under the Permit, but also to impose NALs upon all such
12 dry weather discharges.

13 To begin with, there is no basis for requiring that municipalities prohibit all non-
14 point source “Landscape Irrigation,” “Irrigation Waters,” “Lawn Waters,” and other
15 similar discharges from entering the MS4, since these discharges are clearly “stormwater”
16 under the federal regulations discussed below. Federal law only requires that an MS4
17 permit address these type of discharges “where such discharges are identified by the
18 municipality as sources of pollutants to waters of the United States.” (40 C.F.R.
19 122.26(d)(2)(iv)(B)(1).) As such, the deletion of these categories was not done in
20 accordance with federal law.

21 All three of these categories of discharges were listed as exempt categories of
22 discharge in the Permittees’ prior Municipal NPDES Permit, but have been improperly
23 deleted from the list of exempted discharges in the subject Permit. Yet, neither the
24 regulations nor EPA guidance allow the Regional Board to delete entire categories of
25 exempt discharges in the manner done so by the Regional Board. Moreover, before
26 making such Permit changes, the Regional Board was required to comply with CWC
27 sections 13263, 13241, and 13000, and to consider the factors therein. The Regional
28 Board failed to comply with these CWC sections, and failed to make any findings or

1 produce any evidence showing compliance therewith. Accordingly, the Petitioner
2 respectfully requests the State Board restore these categories of exempted discharges to the
3 Permit.

4 In addition, it is clear from the plain language of the regulations adopted to
5 implement the CWA, that the term “stormwater” includes all forms of “urban runoff,” in
6 addition to precipitation events. Specifically, section 122.26(b)(13) reads as follows:
7 “*Storm water* means storm water runoff, snow melt runoff, and surface runoff and
8 drainage.” (40 C.F.R. § 122.26(b)(13); italics in original.) This definition thus clearly
9 includes more than just “storm water runoff” and “snow melt runoff,” since it provides that
10 stormwater encompasses such runoff “and surface runoff and drainage.” The Regional
11 Board’s suggested interpretation of this definition improperly reads the references to
12 “surface runoff” and “drainage” out of the regulation. The Regional Board’s interpretation
13 is thus contrary to the plain language of the regulation itself, and is contrary to law. (See
14 e.g., *Astoria Federal Savings and Loan Ass’n v. Solimino* (1991) 501 U.S. 104, 112 [“[W]e
15 construe statutes, where possible, *so as to avoid rendering superfluous any parts*
16 *thereof.*”]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 [“We ordinarily
17 reject interpretations that render particular terms of a statute as mere surplusage, *instead*
18 *giving every word some significance.*”]; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86,
19 92 [“In construing the words of a statute . . . an interpretation *which would render terms*
20 *surplusage should be avoided*, and every word should be given some significance, *leaving*
21 *no part useless or devoid of meaning.*”]; *Brewer v. Patel* (1993) 20 Cal.App.4th 1017,
22 1022 [“*We are required to avoid an interpretation which renders any language of the*
23 *regulation mere surplusage.*”]; *Hart v. McLucas* (9th Cir. 1979) 535 F.2d 516, 519 [“*[I]n*
24 *the construction of administrative regulations, as well as statutes, it is presumed that*
25 *every phrase serves a legitimate purpose and, therefore, constructions which render*
26 *regulatory provisions superfluous are to be avoided.*”].)

27 Also, beyond the plain language of the federal regulation, prior orders of the State
28 Board confirm that the term “urban runoff” is included within the definition of “storm

1 water.” For example, in State Board Order No. 2001-15, the State Board regularly
2 interchanges the terms “urban runoff” with “storm water,” and discusses the “controls” to
3 be imposed under the Clean Water Act as applying equally to both. In discussing the
4 propriety of requiring strict compliance with water quality standards, and the applicability
5 of the MEP standard in Order No. 2001-15, the State Board asserted as follows:

6 **Urban runoff** is causing and contributing to impacts on receiving waters
7 throughout the state and impairing their beneficial uses. In order to protect
8 beneficial uses and to achieve compliance with water quality objectives in
9 our streams, rivers, lakes, and the ocean, we must look to controls on **urban**
10 **runoff**. It is not enough simply to apply the technology-based standards of
controlling discharges of pollutants to the MEP; 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.

11 While we will continue to address water quality standards in municipal storm
12 water permits, we also continue to believe that the iterative approach, which
13 focuses on timely improvements of BMPs, is appropriate. **We will**
14 **generally not require “strict compliance” with water quality standards**
15 **through numeric effluent limits and we will continue to follow a iterative**
16 **approach, which seeks compliance over time.** The iterative approach is
protective of water quality, but at the same time considers the difficulties of
achieving full compliance through BMPs that must be enforced through large
and medium municipal storm sewer systems. (*See* Order 2001-15, p. 7-8;
emphasis added.)

17 In State Board Order No. 91-04, the State Board specifically relied upon EPA’s
18 Stormwater Regulations, to find that: “Storm water discharges, by ultimately flowing
19 through a point source to receiving waters, are by nature more akin to non-point sources as
20 they flow from diffuse sources over land surfaces.” (State Board Order No. 91-04, p. 13-
21 14.) The State Board then relied upon EPA’s Preamble to said Stormwater Regulations,
22 and quoted the following from the Regulation:

23 For the purpose of [national assessments of water quality], **urban runoff**
24 was considered to be a diffuse source for non-point source pollution. From a
25 legal standpoint, however, most **urban runoff** is discharged through
26 conveyances such as separate storm sewers or other conveyances which are
point sources under the [Clean Water Act]. 55 Fed.Reg. 47991. (State
Board Order No. 91-04, p. 14; emphasis added.)

27 The State Board went on to conclude that the lack of any numeric objectives or
28 numeric effluent limits in the challenged permit would: “not in any way diminish the

1 permit's enforceability or its ability to reduce *pollutants in storm water discharges*
2 substantially. . . . In addition, the [Basin] Plan endorses the application of 'best
3 management practices' rather than numeric limitations as a means of reducing the level of
4 *pollutants in storm water discharges.*" (*Id.* at 14, emphasis added.) (*Also see* Storm
5 Water Quality Panel Recommendations to the California State Water Resources Control
6 Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm*
7 *Water Associated with Municipal, Industrial and Construction Activities*, June 19, 2008,
8 p. 1 ["MS4 permits require that the discharge of pollutants be reduced to the maximum
9 extent practicable (MEP)"], and p. 8 ["It is not feasible at this time to set enforceable
10 numeric effluent criteria for municipal BMPs *and in particular urban dischargers.*"];
11 State Board Order No. 98-01, p. 12 ["*Storm water permits* must achieve compliance with
12 water quality standards, but they may do so by requiring implementation of BMPs in lieu
13 of numeric water quality-based effluent limits."]; and State Board Order No. 2001-11, p. 3
14 ["In prior Orders this Board has explained the need for the *municipal stormwater*
15 *programs* and the emphasis on BMPs in lieu of numeric effluent limitations."].)

16 Furthermore, in the case *City of Arcadia v. State Board*, OCSC Case
17 No. 06CC02974, Fourth Appellate District, Division 3 Case No. G041545 ("*Arcadia*
18 *Case*"), in its Decision, Judgment and Writ of Mandate, the Superior Court found that the
19 term "stormwater" was defined in the federal regulations to include not only "stormwater"
20 but also "urban runoff." (*See* Decision, hereto, p. 1 [". . . the Standards apply to storm
21 water [*i.e.*, storm water and urban runoff.]; *see also* Judgment in the *Arcadia* Case, p. 2,
22 fn 2, [citing to 40 C.F.R. § 122.26(b)(13) and finding that: "Federal law defines 'storm
23 water' to include urban runoff, *i.e.*, 'surface runoff and drainage.'"]; *and* the Writ of
24 Mandate in the *Arcadia* Case, p. 2, n. 2 ["Federal law defines 'storm water' to include
25 urban runoff, *i.e.*, 'surface runoff and drainage.'"].) This interpretation of the term
26 "stormwater" as including "urban runoff," by the Superior Court in the *Arcadia* Case, has
27 not been challenged on appeal by the State or Los Angeles Regional Boards, and in fact,
28 was agreed to by both of these Boards, as well as by the environmental organizations

1 which intervened in the *Arcadia* Case. In particular, in the State and Los Angeles
2 Regional Boards' Opening Appellate Brief in the *Arcadia* Case, they agreed that the term
3 "Stormwater" is to include "urban runoff," stating:

4 "Storm water," when discharged from a conveyance or pipe (such as a
5 sewer system) is a "point source" discharge, but stormwater emanates
6 from diffuse sources, including surface run-off following rain events
(hence "storm water") and urban run-off. (See Water Boards' Opening
Appellate Brief in the *Arcadia* Case, p. 9, fn.5, emphasis added.)

7 The definition of the term "Stormwater" as including "urban runoff," was also
8 accepted by the Natural Resource Defense Council, the Santa Monica Baykeeper, and Heal
9 the Bay (collectively, "Arcadia Intervenors"). In the *Arcadia* Intervenors' Opening Brief
10 in the *Arcadia* Case, said Intervenors admitted as follows:

11 For ease of reference, throughout this brief, the terms "urban runoff" and
12 "stormwater" are used interchangeably to refer generally to the discharges
13 from the municipal Dischargers' storm sewer systems. The definition of
14 "stormwater" includes "storm water runoff, snow melt runoff, and surface
runoff and drainage." (40 C.F.R. § 122.26(b)(13).) (See Intervenors'
Opening Appellate Brief in the *Arcadia* Case, p. 6, fn.3, emphasis added.)

15 In sum, in light of the plain language of the federal regulation defining the term
16 "stormwater" to include "urban runoff," *i.e.*, "surface runoff" and "drainage" in addition to
17 "storm water" and "snow melt," and given the findings of the Superior Court in the
18 *Arcadia* Case, as well as the admissions by the State and Regional Boards and the
19 Intervenors in that case, it is clear that the term "Stormwater" as defined in the federal
20 regulations, includes "dry weather" runoff.

21 Moreover, dry weather flow is appropriately treated as "stormwater," because it is
22 more characteristic of non-point source than point source flow. Every single property in
23 the City has the potential to over-irrigate. Thus, the source of dry weather flow varies on a
24 daily basis. MS4 36" pipes each drain hundreds, and in many cases, more than a 1000
25 properties each, making it nearly impossible to determine the source of dry weather flow.
26 The MEP standard for "stormwater," which as discussed above includes non rainwater
27 runoff, recognizes the unreasonableness of tracking down every source of runoff to
28 eliminate every pollutant immediately.

1 In short, the definition of “stormwater” plainly includes dry-weather runoff, *i.e.*,
2 “surface runoff and drainage.” As such, there is no basis to treat “Landscape Irrigation,”
3 “Irrigation Waters” and “Lawn Waters” any differently under the Permit, *e.g.*, to prohibit
4 their discharge into the MS4, or to apply stringent numeric limits, rather than the MEP
5 Standard, to all such discharges.

6 **VII. THE LID AND NEW SSMP, RETROFITTING AND NEW**
7 **HYDROMODIFICATION PROVISIONS WITHIN THE PERMIT ARE IN**
8 **CONFLICT WITH CEQA.**

9 The Permit’s LID provisions, SSMPs requirements, Retrofitting requirements, and
10 Hydromodification requirements, all conflict with the requirements of the California
11 Environmental Quality Act (“CEQA” – PRC § 21000, *et seq.*). As such, these provisions
12 are contrary to law and were not appropriately included in the Permit.

13 For example, the LID provisions require the municipal Permittees to “require each
14 Priority Development Project to implement LID BMPs which will collectively minimize
15 directly connected impervious areas, limit loss of existing infiltration capacity, *and protect*
16 *areas that provide important water quality benefits necessary to maintain riparian and*
17 *aquatic biota, and/or are particularly susceptible to erosion and sediment loss.”* (Permit
18 § F.1.d(4).) The Permit goes on to require that LID BMPs be implemented unless the
19 subject city makes a “*finding of infeasibility* for each Priority Development Project,” and
20 further requires that the municipality “incorporate formalized consideration, such as
21 *thorough checklists*, . . . into the plan review process for Priority Development Projects.”
22 (Permit § F.1.d(4)(a)(i) & (ii).) The Permit also requires that LID BMPs be implemented
23 at all such priority Development Projects “where technically feasible,” and provides that if
24 onsite retention LID BMPs are “technically infeasible that LID bio-filtration BMPs may be
25 utilized.” (Permit § F.1.d(4)(b) & (d).) Further “source control BMPs” are required to be
26 implemented which must include BMPs to “eliminate irrigation runoff.” (Permit
27 § F.1.d(5)(c).)

28 In addition, the Permit requires Permittees to develop a BMP waiver program

1 allowing Priority Development Projects “to substitute implementation of all or a portion of
2 LID BMPs . . . with implementation of treatment control BMPs and a mitigation project,
3 payment into an in-lieu funding program, and/or water shed equivalent BMP(s). (Permit
4 § F.1.d(7).) The waiver program requires, at a minimum, that the net impact of Priority
5 Development Projects from pollutant loadings be above and beyond the impact caused by
6 projects meeting the LID requirements, after considering “mitigation and in lieu
7 payments.” It further requires a cost benefit analysis to be developed as a part of the
8 criteria for the technical feasibility analysis, along with various other mitigation measures
9 for pollutant loads expected to be discharged as a result of not implementing LID BMPs.
10 (Permit § F.1.d(7).)

11 Section F.3.d of the Permit requires the Permittees to “develop and implement a
12 Retrofitting program,” with the goal of reducing “hydromodification,” promoting “LID,”
13 and supporting “riparian and aquatic habitat restorations,” among other purposes. Beyond
14 these requirements, there are several provisions within the Permit that go so far as to
15 prevent “occupancy and/or the intended use of any portion” of the project, where the
16 various LID and SSMP requirements are not being met. (*See* Permit § F.1.d(9).)

17 These Permit terms are all designed to address potential adverse impacts on water
18 quality or riparian or aquatic habitat which may occur from the proposed development
19 project in issue. Such an analysis, however, is already required to be conducted by
20 municipalities under CEQA. In fact, CEQA imposes numerous specific requirements with
21 which municipalities must comply when considering development projects within their
22 respective jurisdictions, and particularly requires that municipalities consider and mitigate
23 potentially significant adverse environmental impacts that may be expected from the
24 project, specifically including potential impacts on water quality.

25 CEQA is a comprehensive statute that requires governments to analyze projects to
26 determine whether or not they may have significant adverse environmental impacts. If
27 such significant adverse impacts are determined to be present by the lead governmental
28 agency, then under CEQA, these impacts must be disclosed and reduced or mitigated to the

1 extent feasible. CEQA expressly provides local entities the discretion to analyze and
2 approve projects that are deemed appropriate for the local community, following the
3 environmental analysis directed by such statute, including an analysis of the impacts of the
4 project on water quality. Moreover, CEQA gives local agencies the discretion to adopt a
5 Statement of Overriding Considerations if the public agency finds that “specific overriding
6 economic, legal, social, technological, or other benefits of the project outweigh the
7 significant effects on the environment.” (PRC § 21081.)

8 By removing the City’s discretion under CEQA to approve local developments, the
9 Permit is in conflict with existing State law. For example, the Permit directly conflicts
10 with CEQA by unlawfully attempting to direct how a local governmental agency is to
11 approve a project. Under PRC section 21081.6(c), a responsible agency – such as the
12 Regional Board – cannot direct how a lead agency – such as a Permittee – is to comply
13 with CEQA's terms:

14 Any mitigation measures submitted to a lead agency by a responsible agency
15 or an agency having jurisdiction over natural resources affected by the
16 project shall be limited to measures which mitigate impacts to resources
17 which are subject to the statutory authority of an definitions applicable to,
18 that agency. **Compliance or non-compliance by a responsible agency or
19 agency having jurisdiction over natural resources affected by a project
20 with that requirement shall not limit...the authority of the lead agency to
21 approve, condition, or deny projects as provided by this division or any
22 other provision of law.** (PRC § 21081.6(c); emphasis added.)

23 In direct conflict with the terms of CEQA, the Permit adopted by the Regional
24 imposes Permit terms that “limit the authority of the lead agency to approve, condition, or
25 deny projects.”

26 In addition, PRC section 21081.1 states that the lead agency's determination “shall
27 be final and conclusive on all persons, including responsible agencies, unless challenged as
28 provided in Section 21167.” It similarly states that the lead agency “shall be responsible
for determining whether an environmental impact report, a negative declaration, or
mitigated negative declaration shall be required for any project which is subject to this
division.” (PRC § 21080.1(a).) Further, no additional procedural or substantive
requirements beyond those expressly set forth in CEQA may be imposed upon a local

1 agency's CEQA review process:

2 It is the intent of the Legislature that courts, consistent with generally
3 accepted rules of statutory interpretation, shall not interpret this division or
4 the state guidelines adopted pursuant to Section 21083 in a manner which
5 imposes procedural or substantive requirements beyond those explicitly
6 stated in this division or in the state guidelines. (PRC § 21083.1.)

7 PRC section 21001 provides that local agencies "should not approve projects as
8 proposed if there are feasible alternatives or feasible mitigation measures available which
9 would substantially lessen the significant environmental effects of such projects." (PRC
10 § 21001.) However, the conclusion in the Permit appears to be that all runoff from a wide
11 class of new development and redevelopment projects will result in significant adverse
12 impacts on the environment, and that such impacts must be mitigated by those particular
13 mitigation measures as mandated in the Permit. Thus, the Permit dictates the terms and
14 results of environmental review, without regard for CEQA's provisions, and eliminates a
15 local governmental agency's discretion to consider and approve feasible alternatives or
16 mitigation measures – even if alternative measures might have a lesser effect on the
17 environment.

18 In addition, PRC section 21002 provides that, "the Legislature further finds and
19 declares that in the event specific economic, social, or other conditions make infeasible
20 such project alternatives or such mitigation measures, individual projects may be approved
21 in spite of one or more significant effects thereof." PRC section 21081(b) then establishes
22 a mechanism for local agencies to approve projects with unmitigated adverse impacts, by
23 adopting a Statement of Overriding Considerations. The Permit's design standard
24 requirements would eliminate a municipality's discretion to approve a project without the
25 design standards being met, even if a municipality adopts a Statement of Overriding
26 Considerations.

27 The Permit's arbitrary requirements would thus prevent environmentally preferable
28 alternatives and/or mitigation measures that would otherwise be required pursuant to
29 CEQA from being pursued and required. As the Permit's LID provisions, SSMPs
30 requirements, Retrofitting requirements, and Hydromodification requirements are all in

1 conflict with State law, the City respectfully requests that the State Board vacate these
2 provisions of the Permit.

3 **VIII. THE PERMIT UNLAWFULLY SPECIFIES THE MANNER OF**
4 **COMPLIANCE, IN VIOLATION OF CWC SECTION 13360, OF THE**
5 **PERMIT'S LID, SSMP AND HYDROMODIFICATION REQUIREMENTS.**

6 As discussed above, the Permit requires that various development projects include
7 prescriptive LID requirements, and further compels compliance with very specific SSMP
8 development conditions, and requires the Permittees to develop and implement a
9 Hydromodification plan ("HMP") for the same development projects governed by the LID
10 requirements. Yet, as discussed above, these LID, SSMP and HMP provisions are not
11 compelled by federal law, and are directly contrary to State law because under State law,
12 the Regional Board is prohibited from dictating the specific manner of compliance with
13 such terms, as they have done.

14 CWC section 13360(a) provides, in relevant part, as follows:

15 No waste discharge requirement or other order of a regional board or the
16 state board or decree of a court issued under this division shall specify the
17 design, location, type of construction, or particular manner in which
18 compliance may be had with that requirement, order, or decree, and the
19 person so ordered shall be permitted to comply with the order in any lawful
20 manner. (CWC § 13360(a).)

19 CWC section 13360's prohibition on the Boards from prescribing the manner in
20 which compliance may be had, has been found to only allow the Boards to "identify the
21 disease and command that it be cured but not dictate the cure." (*Tahoe-Sierra*
22 *Preservation Council v. State Water Resources Control Board* ("Tahoe-Sierra") (1989)
23 210 Cal.App.3d 1421, 1438.)

24 Because the LID, SSMP and HMP provisions in the Permit specifically dictate the
25 "particular manner in which compliance may be had" with such Permit objectives, these
26 terms plainly violate the requirements of CWC section 13360, and the State Board should
27 direct that these Permit provisions be either deleted or revised so that the prohibition under
28 CWC section 13360 is not contravened.

1 **IX. CONCLUSION**

2 For the foregoing reasons, Petitioner respectfully requests that the State Board
3 vacate and set aside the disputed terms of the Permit, and direct the Regional Board to
4 reconsider such Permit terms only after it has complied with all applicable State and
5 federal requirements and revised such terms accordingly.

6
7 Respectfully submitted

8 RUTAN & TUCKER, LLP
9 RICHARD MONTEVIDEO

10 Dated: January 14, 2010

11 By: 
12 Richard Montevideo
13 Attorneys for Petitioner
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1 **PROOF OF SERVICE VIA FACSIMILE, U.S. MAIL AND ELECTRONIC MAIL**

2 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

3 I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of
4 California. I am over the age of 18 and not a party to the within action. My business address is
611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

5 On January 14, 2010, I served on the interested parties in said action the within:

6 **PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **SUPPORT OF PETITION FOR REVIEW OF THE CALIFORNIA**
8 **REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO**
9 **REGION'S ADOPTION OF ORDER NO. R9-2009-0002, NPDES PERMIT**
10 **NO. CAS0108740**

11 by placing a true copy thereof in sealed envelope(s) addressed as stated below:

12	State Water Resources Control Board Office of Chief Counsel	California Regional Water Quality Control Board San Diego Region
13	Jeannette L. Bashaw, Legal Analyst Post Office Box 100	David W. Gibson, Executive Officer 9174 Sky Park Court, Suite 100
14	Sacramento, CA 95812-0100	San Diego, CA 92123-4340
15	jbashaw@waterboards.ca.gov	dgibson@waterboards.ca.gov
16	Facsimile No.: (916) 341-5199	Fax: (858) 571-6972

17 In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand
18 personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection
19 and processing correspondence for mailing with the United States Postal Service. Under that
20 practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan &
21 Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day
22 in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP
23 with regard to collection and processing of correspondence and mailing were followed, and I am
24 confident that they were, such envelope(s) were posted and placed in the United States mail at
25 Costa Mesa, California, that same date. I am aware that on motion of party served, service is
26 presumed invalid if postal cancellation date or postage meter date is more than one day after date
27 of deposit for mailing in affidavit.

28 I also caused the above document to be transmitted by facsimile machine, telephone
number 714-546-9035, pursuant to California Rules of Court, Rule 2005. The total number of fax
pages (including the Proof of Service form and cover sheet) that were transmitted was 30. The
facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine.
Pursuant to Rule 2008(e), I caused the machine to print a record of the transmission, a copy of
which is attached to this declaration. Said fax transmission occurred as stated in the transmission
record attached hereto and was directed as stated above.

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

Executed on January 14, 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.

27 Cathryn L. Campbell
28 _____
(Type or print name)

Cathryn L. Campbell

(Signature)

**California Regional Water Quality Control Board
San Diego Region**

**Waste Discharge Requirements for
Discharges of Runoff from the
Municipal Separate Storm Sewer Systems
(MS4s)**

**Draining the Watershed of the County of Orange,
The Incorporated Cities of Orange County, and
The Orange County Flood Control District
Within the San Diego Region**

**Order No. R9-2009-0002
NPDES NO. CAS0108740**

December 16, 2009

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340

Phone • (858) 467-2952 • Fax (858) 571-6972

<http://www.waterboards.ca.gov/sandiego>

To request copies of the Orange County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: <http://www.waterboards.ca.gov/sandiego>