CITY OF DANA POINT

CITY COUNCIL

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September 28, 2009

Dr. Richard Wright & Board Members
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Subject: Comments on August 12, 2009 Tentative Order No. R9-2009-0002
NPDES No. CAS0108740

Dear Dr. Wright and Fellow Board Members,

Water quality improvement has been the top priority strategic goal for the City of Dana Point this during past Permit Cycle. Dana Point and our fellow South Orange County Cities have been making great strides in Water Quality Improvement some of which we expressed in our Power Point presentation on July 1st. The San Diego Region's Draft 2008 303(d) listing proposal, released this August, proposes to delist or not list 28 of 42 locations covering the entire South Orange County coastline for the cities of Laguna Beach, Dana Point, and San Clemente. This is proof of our ongoing success in reducing current listings and using the iterative BMP approach for MEP, and non point sources without fines for compliance.

Yet as we turn our attention to better addressing dry weather flows in this new Permit Cycle, Staff has developed a new approach; mandatory minimum fines for Numeric Effluent Limits (NEL's). No other California NPDES Regional Permit has this regulatory bludgeon. There are multiple problems with this approach, seven of which we discuss below.

First, the Board has no flexibility in making reasonable decisions with this NEL proposal. Witness the July 1, 2009, Board Meeting when the Board's hands were tied, according to Staff, in fining SOCWA and SCWD $204,000 for what we believe the board recognized was a permit language violation, not a water quality violation at the ocean discharge point.

Second, inclusion of NEL's is the top priority concern with the draft permit for the County and the Co-Permittees. It really makes the Permit untenable and invites litigation. Similar concerns exist with the inclusion of language indicating that Permittees must strictly comply with waste load allocations in a TMDL, and strictly meet Stormwater Action Levels. Strict compliance with any of these numeric limits is not "reasonably achievable" as required by the California Water Code. Nor has there been any attempt to analyze the "economic" impacts of these requirements, as required under

the Water Code. Please see our attached legal comments, responding to the discussion at the July 1 Board.

Third, the potential costs of mandatory minimum fines, and their impacts could be astronomical. The State Board is contemplating a standard non-compliance fine of $2 per gallon per day for violations. As an example, Salt Creek dry weather flow is 300,000 to 600,000 gallons per day. This is just one medium sized outflow and fines could exceed one million-dollars a day. Per the proposed NEL criteria, we believe that Salt Creek will be in exceedance of NEL's from Day 1 of the new Permit for the Total Nitrogen standard. Nitrogen is abundantly found in the natural environment from air and decaying vegetation. Staff says that proof of natural occurrence will be accepted by RWQCB Staff as compliance. But what constitutes proof? How much study and cost justification will be acceptable? Will a Standard of Proof be litigated by a third party and will unfair fines be imposed by mandate?

Fourth, the NEL standards proposed by Staff are unattainable in some cases, even in naturally occurring and pristine creeks, indicator bacteria is an example. Indicator bacteria has been studied by expert scientists at SCCWRP and has been found to be at levels which may exceed the NEL's in reference watersheds – the watersheds that represent the untouched/undeveloped areas of the County. Why is bacteria included as an NEL when we already have TMDL's for bacteria that the Board has approved? The TMDL recognizes this complex non-point source will probably take 10 years to control in huge watersheds like San Juan Creek which drains a 135 square mile area, yet the NEL requires compliance as soon as the permit is in effect.

Fifth, dry weather flow is more characteristic of non-point source than point source flow. Every single property has the potential to over-irrigate and the source varies each day of the week. MS4 36" diameter pipes requiring monitoring each drain hundreds, and in many cases, more than 1000 properties each. The MEP standard for stormwater, which includes non rain water runoff, recognizes the practical unreasonableness of tracking down and treating every storm drain back to every watershed source to eliminate every pollutant immediately.

Sixth, the detailed Permit language is flawed – for example in determining if the dry water flow is natural (non-anthropogenic), it requires permittees must determine it is from a natural influence in both "origin and conveyance". Since the MS4 is generally manmade pipe (the conveyance) this is generally an impossible standard to meet on its face.

Seventh, Coastal bluff groundwater contributes heavily to South Orange County dry weather runoff. A confounding problem is that much of our dry weather flow is made up of groundwater. Our groundwater is known for having constituents such as Iron, Manganese, Nitrates, etc. Although the Permit language purports to "accept" natural constituents, again what is the standard of proof? This can be particularly difficult and costly to study and may be unable to yield completely definitive answers – again leading to potential third party litigation and potential fines.

In summary, regarding NEL's, we currently we have a successful program that meets the intent of the NEL's. Orange County's dry weather monitoring program to identify and then address controllable pollutants is well recognized for the investigative information it provides, and Permittees are required to address pollutant discoveries. Please further consider the County's proposed program as an effective alternative to the NEL's. Let's explore and evaluate reasonable standards, natural sources and positive effects of reducing irrigation runoff during this cycle together.

We are three months into the Fiscal Year and looking at how we can trim another 5% off of our operating budget due to declining revenues. The magnitude of the added costs for this Permit are addressed in the County's letter and are of significant concern. Please heed the facts stated therein as no economic analysis has been prepared or considered by Board Staff to date, in spite of the requirement under California Law to do so. Further, no cost consideration based changes have been made since the July 1 Board Meeting, despite Board Member inquiries, as well as the Board's expressed concern with imposing unfunded mandates on the Permittees.

Please reconsider the issues of consistent regulations with the North Orange County Santa Ana Region Permit as no consistency related changes to the tentative draft have been made since the July 1 Board Meeting, despite Board inquiries.

Please recognize that the City supports and incorporates by reference the comments submitted on this latest Draft Permit by the County of Orange. We thus hereby request that you take into consideration our comments contained herein and the County's comments, before adopting any final permit. Attached with this letter are legal comments on the Draft Permit that have been prepared through our City Attorney's office, and we would ask that the Board consider these comments in its deliberations on the final Draft Permit, and that it revise the Draft Permit so as to rectify the legal concerns set forth in these legal comments.

As you can see from the attached legal comments, as well as the comments submitted by the County of Orange, there continues to be fundamental disagreement on the propriety of including NEL's, SALs and TMDLs in the Permit, particularly without the Regional Board first complying with the requirements of California Water Code sections 13241 and 13000. Further, there continues to be a significant difference of opinion on the legality of the Regional Board Staff's new permit requirement which would force the City to prohibit all "dry weather" runoff, specifically including "landscape irrigation," "irrigation waters," and "lawn waters," from entering the City storm drain system. Not only does the City believe that this requirement goes far beyond what is required by federal law, as evidenced by the fact that these discharges are allowed to be discharged into the storm drain system under the current permit, but in addition, it is apparent that the Regional Board Staff is attempting to impose this mandate on the City without first complying with the requirements of California Water Code sections 13241 and 13000.

Finally, because the imposition of NEL's, SALs, and WLAs from TMDLs are all new mandated limits that are not required under federal law, and similarly because a

prohibition on dry weather and irrigation waters from entering the MS4 is a new mandate not required by federal law, as are the new LID and retrofitting and related requirements, none of these requirements may lawfully be imposed without the Regional Board first providing funding as required under the California Constitution for such mandates. For example, the retrofitting provisions in the Permit specifically require the City to "develop and implement a retrofitting program." This is a new program being mandated on the City, but without the State first providing funding as required by the California Constitution.

We had hoped to be more supportive of this Permit as we have been in previous NPDES Permit Cycles. However, even as a beach city heavily dependent on the economic benefits of and moral obligations towards a clean ocean, we have grave concerns with the inflexible regulatory manner in which the current draft is written. Please send this back to the drawing board for Staff to readdress NEL's, cost/unfunded mandates & consistency, as well as the other issues referenced.

Sincerely,

Lisa Bartlett
Mayor of the City of Dana Point

Enc: Attachment A with Exhibit 1

CC: John Robertus, Jimmy Smith, SDRWQCB
Chris Crompton, Richard Boon, County of Orange
Doug Chotkevys, Brad Fowler, Lisa Zawaski, City of Dana Point
Richard Montevideo, Rutan & Tucker

Attachment A

Legal Comments Of The City Of Dana Point On Tentative Order No. R9-2009-0002 - August 12, 2009 Draft San Diego Regional Water Quality Control Board

Prepared by Rutan & Tucker, LLP
Richard Montevideo
September 25, 2009

I. INTRODUCTION

These legal comments are being submitted on behalf of the City of Dana Point to the most recent August 12, 2009 version of the Tentative Order No. R9-2009-0002, hereafter "Draft Permit" or "Draft Order." For the record, the City had previously submitted comments to earlier iterations of Draft Order with these prior comments being dated August 22, 2007, January 21, 2008, and May 15, 2009. All such prior comments, along with the exhibits included therewith, are already a part of the Administrative Record in this matter and will not be attached and repeated herein. As indicated in the Notice for Written Comment Period dated August 12, 2009 issued by the California Regional Water Quality Control Board, San Diego ("Regional Board"): "All comments submitted on earlier drafts of this Permit are part of the record for this matter and will be considered by the Regional Board. Therefore, it is not necessary to resubmit or repeat comments." Accordingly, the focus of these legal comments will be to address new issues and/or to elaborate further on the more critical legal issues raised by the Draft Order.

II. THE MEP STANDARD UNDER THE CLEAN WATER ACT APPLIES TO ALL "DISCHARGES OF POLLUTANTS" FROM THE MS4, REGARDLESS OF WHETHER THE POLLUTANTS IN THE DISCHARGE ARISE FROM "STORMWATER" OR ALLEGED "NON-STORMWATER."

The federal Clean Water Act ("CWA" or "Act") expressly applies the Maximum Extent Practicable ("MEP") Standard to all "pollutants" discharged "from" the Municipal Separate Storm Sewer System ("MS4"), whether the discharges are classified as "non-stormwater" or

"stormwater." Although "non-stormwater" is required to be "effectively prohibited" from entering "***into***" the MS4, the CWA does not treat discharges "***from***" the MS4 any differently if the "pollutants" in issue arose as a result of a "stormwater" versus an alleged "non-stormwater" discharge. (33 U.S.C. § 1342(p)(3)(B)(iii).)

As such, if "dry weather" is improperly classified as "non-stormwater," such a classification should not in any way change how the "pollutants" in the discharge are to be addressed. Instead, under the CWA, regardless of the nature of the discharge, i.e., be it "stormwater" or alleged "non-stormwater," the MEP standard continues to apply. Moreover, the MEP Standard is the only standard required under the CWA to be applied to discharges from a City's MS4, and no numeric limits are required by the Act, regardless of whether the original sources of the discharge is non-stormwater.

The language in the Act requires municipalities to "require controls to reduce the discharge of ***pollutant***s to the maximum extent practicable." (*Id.*) The Act then applies the MEP Standard to the "discharge of pollutants" from the MS4, not to the discharge of "stormwater" or "non-stormwater" from the MS4. As such, the State Board's attempted classification of "dry-weather" as "non-stormwater," for example, has no relevance to the issue of the types of "controls" required under the Act to address the "pollutants" in issue.

Section 1342(p)(3)(B) of the Act entitled "Municipal Discharge" provides, in its entirety, as follows:

> Permits for discharges **from** municipal storm sewers –
>
> (i) may be issued on a system– or jurisdictional– wide basis;
>
> (ii) shall include a requirement to effectively prohibit **non-stormwater** discharges **into** the storm sewers; and

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

This language in the CWA has consistently been interpreted as requiring an application of the MEP Standard to municipal discharges, rather than an application of a standard requiring strict compliance with numeric limits. Specifically, federal law only requires strict compliance with numeric effluent limits by industrial dischargers, but not by municipal dischargers. As the Ninth Circuit in *Defenders of Wildlife v. Brown* (*"Defenders"*) (9th Cir. 1999) 191 F.3d 1159 found, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' finding that the Clean Water Act was "***not merely silent***" regarding requiring "municipal" dischargers to strictly comply with numeric limits, but in fact found that the requirement for traditional industrial waste dischargers to strictly comply with the limits was "replaced" with an alternative requirement, i.e., "that ***municipal*** storm-sewer dischargers 'reduce the discharge ***of pollutants*** to the maximum extent practicable . . . ***in such circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).*** (*Id.* at 1165; emphasis added.)

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* ("*BIA*") (2004) 124 Cal.App.4th 866, there as well the Appellate Court, relying upon the Ninth Circuit's holding in *Defenders*, agreed that "with respect to ***municipal*** stormwater discharges, Congress clarified that the EPA has the authority to fashion

NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharger ***of pollutants*** to the maximum extent practicable.'" (*Id.* at 874, emphasis added.) The Court of Appeal in the *BIA* Case explained the reasoning for Congress' different treatment of Stormwater dischargers versus industrial waste dischargers when it stated that:

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

The Draft Permit, by attempting to impose a series of numeric effluent limits on municipal dischargers, goes beyond what was required by Congress with the 1987 Amendments to the CWA, and treats municipal dischargers in precisely the same manner as industrial waste dischargers. Because the Draft Permit imposes a standard of strict compliance with numeric limits on municipalities, it goes beyond the requirements mandated by the CWA, and as such, plainly triggers the need to comply with Water Code sections 13000 and 13241. Moreover, and as also discussed below, such a significant shift in policy is directly contrary to well-established State Board and US EPA policy.

In State Board Order No. 91-04, the State Board addressed the propriety of the 1990 Municipal NPDES Permit for Los Angeles County, and particularly whether such permit, in order to be consistent with applicable State and federal law, was required to have included "numeric effluent limitations." In addition to the State Board's interchangeable use of the terms

"storm water" and "urban runoff" when discussing the applicable standard to be applied under the CWA (*see* discussion below), the State Board confirmed that the MEP standard applies to the ***"discharge of pollutants"*** from the MS4, and made no mention of the need to apply a different standard if the ***"discharge of pollutants"*** arose from alleged "non-stormwater" rather than "storm water." To the contrary, the State Board recognized the MEP standard applied to "pollutants in runoff," irrespective of the source of the pollutants, finding as follows:

> We find here also that the approach of the Regional Board, requiring the dischargers to implement **a program of best management practices** which will reduce **pollutants in runoff**, prohibiting non-stormwater discharges, is appropriate and proper. **We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expense such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program.** (State Board Order No. 91-04, p. 16-17, emph. added.)

This State Board Order, and others as discussed below, all show that although there are two requirements imposed upon municipalities under the CWA, one requiring that municipalities effectively prohibit "non-stormwater" "into" the MS4, and a second requiring municipalities to "reduce the discharge of pollutants to the maximum extent practicable," that the MEP standard applies to ***"pollutants in runoff"*** coming out of the MS4 system, regardless of whether such discharges are stormwater or non-stormwater. The only difference in the requirements to be imposed upon the municipalities between stormwater and non-stormwater, involves the need for municipalities to "effectively prohibit non-stormwater discharges into the" MS4.

In addition, it is the present policy of the State of California not to use strict numeric limits as a means by which to implement the MEP standard under the Act. Instead, it is State policy to apply the MEP standard through an iterative BMP process, and not through the use of strict numeric discharge limitations. This policy is reflected in numerous State Board orders and

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

Moreover, as to TMDLs, the WLAs within a TMDL are similarly not required under the CWA to be strictly complied with by municipal dischargers. This conclusion was confirmed by

U.S. EPA itself in an official November 22, 2002 EPA Guidance Memorandum, entitled "*Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs.*" In this official Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges, should be "***in the form of BMPs and that numeric limits will be used only in rare instances.***" (EPA Guidance Memo p. 6, emphasis added.) The EPA recommended that "***for NPDES-regulated municipal . . .dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits.***" (*Id.* at p. 4.) EPA went on to expressly recognize the difficulties in regulating stormwater discharges, explaining its policy as follows:

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

Because EPA has expressly found, particularly when it comes to the incorporation of a TMDL into a Municipal NPDES Permit, "that numeric limits will be used only in rare instances," and because in this case there is no evidence this Permit is a "rare instance" that would justify the inclusion of numeric limits, any incorporation of the subject TMDLs, or any other numeric limits, into the Municipal NPDES Permit in issue should be limited to the inclusion of MEP-complaint BMPs, and not "numeric limits."

In short, neither State or federal law, nor State or federal policy, provide for the incorporation of strict numeric limits into a Municipal NPDES Permit. In fact, they provide for the contrary, and recognize that numeric limits should only be incorporated into a municipal NPDES Permit in "rare instances," with the State Board's Numeric Effluent Limits Panel concluding going so far as to conclude that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Permit Report, p. 8.)

III. THE REGIONAL BOARD HAS FAILED TO COMPLY WITH WATER CODE SECTIONS 13241 AND 13000.

The Draft Permit contains a number of provisions requiring strict compliance with Numeric Effluent Limitations ("NELs") for dry weather runoff, Stormwater Action Levels ("SALs") for wet weather runoff, and waste load allocations ("WLAs") and other numeric limits for both, pursuant to adopted and to be adopted Total Maximum Daily Loads ("TMDLs"). It also contains new requirements when compared to the existing municipal NPDES Permit that, in effect, require the Permittees to prohibit all "dry weather" discharges from entering the MS4, except for identified exempted discharges. Moreover, the prohibition on the discharge of dry weather discharges into the MS4 now specifically includes "Landscape Irrigation," "Irrigation Waters," and "Lawn Waters," all of which are exempted discharges in the existing Municipal NPDES Permit for South Orange County. Similarly, the Draft Permit seeks to impose a number of provisions known as "low impact development" ("LID") requirements, including new Standard Stormwater Mitigation Plan ("SSMP") requirements, along with Retrofitting and new Hydromodification requirements. None of the aforementioned proposed Draft Permit terms, however, appear to have been developed in accordance with Water Code sections 13241 and 13000.

Moreover, the NELs, SALs, and TMDL requirements, as well as the new dry weather prohibition requirement and the new LID, Retrofitting, Hydromodification and related requirements, are all new permit terms which are not required under the CWA or under any of the regulations thereunder. As such, these are requirements which can only be imposed once the Regional Board complies with the requirements under the Porter-Cologne Act, specifically including Water Code sections 13241 and 13000.

A. The NEL, SAL And TMDL Draft Permit Terms.

Section C.5. of the Draft Permit requires each co-permittee to "obtain the non-stormwater dry weather numeric limitations" set forth therein, including NELs for bacteria, nitrogen, phosphorus, and others, and including NELs for metals based on the California Toxics Rule ("CTR"). There are also separate NELs for dry weather runoff for the Dana Point Harbor and saline lagoon/estuaries, as well as for discharges to the surf zone.

The Draft Permit also establishes various SALs, and provides that the "failure to appropriately consider and react to SAL exceedences in an iterative manner creates a presumption that the co-permittees have not complied with the MEP standard." (Draft Permit, ¶ D.1.)

In addition, Section I of the Draft Permit entitled "Total Maximum Daily Loads" requires strict compliance with the waste load allocations ("WLAs") set forth in the Baby Beach bacteria TMDL, and also provides that the WLAs "of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis." For Baby Beach, the Draft Permit requires that the WLAs "are to be met in Baby Beach receiving waters by the end of the year 2019" and that "the numeric targets are to be met once 100 percent of the WLA reductions have been achieved."

Accordingly, the Draft Permit seeks to impose strict numeric effluent limits on both dry weather and wet weather discharges, either in the form of NELs for dry weather discharges, SALs for wet weather discharges, or TMDLs for both. However, as discussed in prior comments and further elaborated on herein, the CWA plainly only imposes a "maximum extent practicable" standard on all discharges "from" a municipalities' separate storm sewer system ("MS4"). Because no aspect of the CWA, whether for dry weather or wet weather runoff, requires municipalities to strictly comply with numeric limits, but only requires compliance with the MEP Standard, all aspects of the California Porter-Cologne Act, Water Code section 13000, et seq., must be complied with, including, but not limited to, conducting an analysis of the factors set forth under Water Code section 13241, as well as of the policies and factors in section 13000. Yet, there is no indication anywhere in the record that such a 13241/13000 analysis has ever been conducted for any of the proposed NELs, SALs, or WLAs (from TMDLs), nor are there any findings anywhere in the Draft Permit indicating compliance with Water Code sections 13241 and 13000.

B. The Prohibition On Dry Weather Discharges.

The Draft Permit also attempts to mandate that the Permittees prohibit the discharge of all dry weather discharges from entering the MS4, by redefining all such discharges as "non-storm water" discharges. Specifically, the Draft Permit deletes from the list of exempted discharges any "Landscape Irrigation," "Irrigation Water," and "Lawn Waters." Deleting these previously exempted categories of discharges from entering the MS4, is an attempt to impose additional requirements upon the Permittees that are not mandated by the CWA, and as such, is an attempt to impose non-federal mandates without the Regional Board having first conducted the analysis required under Water Code sections 13241 and 13000.

As discussed further herein, and in other legal comments being submitted on behalf of the County of Orange, the definition of the term "stormwater" includes "surface runoff" and "drainage," and as such, the discharge of all dry weather runoff including Landscape Irrigation, Irrigation Water and Lawn Waters, cannot properly be classified as "non-stormwater," and, thus should not be categorically prohibited from entering the MS4. Accordingly, section 13241(b)(3)(B)(ii) of the CWA requiring that Permittees effectively prohibit the discharge of "non-stormwater" into the MS4, has no application to the discharge of non-point source Landscape Irrigation, Irrigation Waters or Lawn Waters. For example, the federal regulations define an "illicit" discharge as a discharge that is not composed entirely of "stormwater" except for discharges allowed pursuant to an NPDES Permit and discharges resulting from fire fighting activities. (40 CFR § 122.26(b)(2).) Because the term "stormwater," as discussed below, plainly includes surface runoff and drainage in addition to precipitation (discussed below), all such Landscape Irrigation, Irrigation Waters and Lawn Waters cannot correctly be classified as an "illicit" discharge, and the CWA plainly does not require that the Permittees prohibit such discharges from entering the MS4. If the CWA did so require, then of course the Regional Board would have included such a prohibition in prior Municipal NPDES Permits.

C. The LID, SSMP, Retrofitting And Hydromodification Terms.

The LID requirements and the related new SSMP, Retrofitting and Hydromodification requirements are similarly not mandated under the CWA. As such, these provisions can only be imposed after the Regional Board has first complied with the requirements of Water Code sections 13241 and 13000, as well as all other applicable requirements under California law.

D. Water Code Section 13000 Must Be Complied With When Adopting Any Permit Term Not Specifically Required By Federal Law.

As discussed above, in *BIA San Diego County v. State Board, supra*, 124 Cal.App.4th 866, 874, the Court held that under the CWA, Congress distinguished between industrial and storm water discharges and clarified that with respect to municipal storm water discharges, "the EPA has the authority to fashion NPDES Permit requirements to meet storm water quality standards without specific numeric effluent limits . . . ." Accordingly, any attempt to proceed at this time and impose a permit term that requires strict compliance with any numeric limit, is a requirement that clearly goes beyond what is mandated under federal law.

In addition, clearly federal law does not require that municipalities prohibit the discharge of "Landscape Irrigation," "Irrigation Waters" or "Lawn Waters" from entering the MS4 or from treating all dry weather discharge as non-stormwater. If this were, in fact, a requirement under the CWA, such a prohibition would have been included in prior Municipal NPDES permits issued by the Regional Board. Because the definition of "stormwater," "surface runoff" and "drainage," in addition to "storm water" runoff and "snow melt," as discussed below, includes all landscape runoff and other dry weather runoff, it cannot properly be defined as "non-stormwater" under the CWA.

Furthermore, there is nothing in the CWA or the federal regulations, or otherwise, that would suggest that such discharges are to be classified as "illicit" discharges, or to otherwise be prohibited from entering the MS4. The fact that these discharges were previously consistently permitted in prior Municipal NPDES Permits issued by this Regional Board, is confirmation of the fact that the CWA does not ***require*** such a prohibition of these types of discharges from entering the MS4. Accordingly, any attempt at this time to force the Permittees to prohibit the discharge of all dry weather runoff, including but not limited to, Landscape Irrigation, Irrigation

Waters or Lawn Waters, from entering the MS4, is a new requirement that goes beyond the requirements of the CWA, and is thus a new requirement that can only be imposed after the Regional Board has first complied with all aspects of the Porter-Cologne Act, specifically including, but not limited to, Water Code sections 13241 and 13000.

In addition, the new LID and related new SSMP, Retrofitting and Hydromodification requirements in the Draft Permit, are all provisions that are not required under any provision of the CWA or the regulations thereunder. As such, compliance with Water Code sections 13000 and 13241 is necessary before any such new permit terms can be imposed upon the Permittees.

Under the California Supreme Court's holding in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, a regional board must consider the factors set forth in Water Code sections 13000 and 13241 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.*. at 627.) According to the Supreme Court in *Burbank*, "Section 13263 directs Regional Boards, when issuing waste discharger requirements, to take into account various factors including those set forth in Section 13241."

In *Burbank,* the California Supreme Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, that the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the ***"dischargers cost of compliance."*** (*Id.*. at 618.) The Court specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that case. (*Id.*. at 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the costs of compliance when setting effluent limitations

in a waste water discharge permit."].) And according to the California Supreme Court, the goal of the Porter-Cologne Act is to "attain the highest water quality which is reasonable, 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." (*Id.* at 618, citing Water Code § 13000.)

Accordingly, under the *Burbank* decision, Section 13241 compels the Boards to consider the following factors when developing NPDES Permit terms.

(a) Past, present, and probable future beneficial uses of water.

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

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

(d) Economic considerations.

(e) The need for developing housing in the region.

(f) The need to develop and use recycled water.

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 recognized the importance of complying with the policies and factors set forth under both Water Code sections 13000 and 13241, and emphasized section 13241's requirement of an analysis of "economics," finding:

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, 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.)** 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.)
>
> * * *
>
> The Board's obligation is to attain the highest reasonable water quality "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.)

Justice Brown in her concurring opinion in *Burbank* also made several significant comments regarding the importance of considering "economics" in particular, and the Water Code section 13241 factors in general, before including numeric effluent limitations in an NPDES Permit. These comments are equally relevant today to the Regional Board's Draft Order:

> **Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) – the body responsible to enforce the statutory framework –failed to comply with its statutory mandate.**
>
> **For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical,**

> **but precluding them when they have the ability to do so.** (*Id.* at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

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

The above-referenced statutory, regulatory and case authority all confirm not only that municipal dischargers are to be treated differently than industrial dischargers, but also that "numeric limits" may only be applied to municipal dischargers after the analysis under Sections 13241/13000 have been complied with. They also confirm that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, p. 8.) Accordingly, strict compliance with any numeric limits in a municipal NPDES Permit cannot be required at this time, and to the extent a numeric limit is attempted to be incorporated into the Draft Permit and strictly enforced as such through a means other than through the use of MEP-complaint BMPs, then all applicable requirements of State law, specifically including the analysis required under Water Code sections 13241/13000, must be plainly met.

Moreover, the new proposed requirements in the Draft Permit mandating that the Permittees prohibit the discharge of "Landscape Irrigation," "Irrigation Waters" or "Lawn Waters," from entering the MS4, are not requirements found anywhere in the CWA, and are thus

new permit requirements that can only be imposed after the Regional Board has first complied with the requirements of Water Code sections 13241 and 13000.

Finally, as none of the LID, SSMP, Retrofitting and Hydromodification requirements are requirements that are mandated under federal law, the above-referenced provisions of Water Code sections 13241 and 13000 must be met before any such permit terms can lawfully be imposed under California law.

IV. THE DEFINITION OF "STORMWATER" INCLUDES "DRY WEATHER" RUNOFF.

The Draft Permit improperly provides that: "Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for 'municipal . . . Stormwater Discharges (emphasis added)' from the MS4 Non-storm water discharges per CWA 402(p)(3)(B)(ii), are to be effectively prohibited." (Draft Permit, Finding C.14.) The Draft Order then proceeds to not only require that the co-permittees prohibit all "non-storm water" discharges into the MS4, including prohibiting any dry weather runoff from entering the MS4 unless otherwise expressly permitted under the Permit, but also to impose strict numeric effluent limitations, *i.e.*, NELs upon all such dry weather discharges.

Yet, the assertion that "dry weather" is something other than "storm water" is inaccurate and is directly controverted by the very regulations cited in the Draft Order. In addition, this purported finding that the term "storm water" does not include "dry weather," *i.e.*, "urban runoff," was already been rejected by the Orange County Superior Court in that case entitled *City of Arcadia v. State Board*, OCSC Case No. 06CC02974, Fourth Appellate District Case No. G041545 (hereafter the "*Arcadia* Case"). This fact that the definition of "stormwater" includes

"urban runoff," was also recently admitted to by the State Board and the Los Angeles Regional Board in the Arcadia Case, as well as by the NRDC, the Santa Monica Baykeeper and Heal the Bay. As such, any attempt to redefine the term "stormwater" to exclude "dry weather," is contrary to law and should be rejected.

First, it is clear from the plain language of the regulations that the term "Stormwater" includes all forms of "urban runoff" in addition to precipitation events. Specifically, section 122.26(b)(13) reads as follows: "*Storm water* means storm water runoff, snow melt runoff, ***and surface runoff and drainage***." (40 C.F.R. § 122.26(b)(13); italics in original, bolding and underlining added.) This definition starts with the inclusion of "storm water" and "snow melt runoff," and is then further expanded to include not only "storm water" and "snow melt runoff," but also "surface runoff" and "drainage."

The Regional Board's proposed interpretation of this definition is an attempt to read the terms "surface runoff" and "drainage" out of the regulations. Such an interpretation is contrary to the plain language of the regulation itself, and is contrary to law. (*See e.g., Astoria Federal Savings and Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 112 ["[W]e construe statutes, where possible, ***so as to avoid rendering superfluous any parts thereof.***"]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 ["We ordinarily reject interpretations that render particular terms of a statute as mere surplusage, ***instead giving every word some significance.***"]; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 92 ["In construing the words of a statute . . . an interpretation ***which would render terms surplusage should be avoided***, and every word should be given some significance, ***leaving no part useless or devoid of meaning.***"]; *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1022 [***"We are required to avoid an interpretation which renders any language of the regulation mere surplusage."***; and *Hart v. McLucas* (9th Cir. 1979) 535

F.2d 516, 519 [***"[I]n the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided."***].)

Second, beyond the plain language of the federal regulation, prior orders of the State Board confirm that the term "urban runoff" is included within the definition of "storm water." For example, in State Board Order No. 2001-15, the State Board regularly interchanges the terms "urban runoff" with "storm water," and discusses the "controls" to be imposed under the Clean Water Act as applying equally to both. In discussing the propriety of requiring strict compliance with water quality standards, and the applicability of the MEP standard in Order No. 2001-15, the State Board asserted as follows:

> **Urban runoff** is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on **urban 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.
>
> While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. **We will generally not require "strict compliance" with water quality standards through numeric effluent limits and we will continue to follow a iterative 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.)

Moreover, at the urging of the petitioner in Order No. 2001-15, the State Board went so far as to modify the "Discharge Prohibition A.2" language, which was challenged by the Building Industry Association of San Diego County ("BIA"), because such Discharge Prohibition was not subject to the iterative process. The State Board found as follows in this regard: "The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. . . . Language clarifying that the iterative approach applies to that prohibition is also necessary." (State Board Order No. 2001-15, p. 9.)

The State Board further required that the Municipal NPDES permit challenged in that case be modified because the permit language was overly broad, as it sought to apply the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s, with the BIA claiming that it was inappropriate to require the treatment and control of discharges "prior to entry ***into*** the MS4," and with the State Board agreeing that such a regulation of discharges ***"into"*** the MS4 was inappropriate. [*Id* at 9 ["We find that the permit language is overly broad because it applies the MEP standard not only to discharges 'from' MS4s, but also to discharges "into' MS4s."].)

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

> For the purpose of [national assessments of water quality], **urban runoff** was considered to be a diffuse source for non-point source pollution. From a legal standpoint, however, most **urban runoff** is discharged through 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.)

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

Third, in the *Arcadia* Case, in its Decision, Judgment and Writ of Mandate, the Superior Court found that the term "stormwater" was defined in the federal regulations to include not only "stormwater" but also "urban runoff." (*See*, Decision, Exhibit "1" hereto, p. 1 [" . . . the Standards apply to storm water [*i.e.*, storm water and urban runoff]."]; Exhibit "2," Judgment in

the *Arcadia* Case, p. 2, fn 2, [citing to 40 C.F.R. § 122.26(b)(13) and finding that: "Federal law defines 'storm water' to include urban runoff, *i.e.,* 'surface runoff and drainage'".]; and Exhibit "3," Writ of Mandate in the *Arcadia* Case, p. 2, n. 2 ["Federal law defines 'storm water' to include urban runoff, *i.e.,* 'surface runoff and drainage.'"].)

It is further important to note that this interpretation of the term "stormwater" as including "urban runoff," by the Superior Court in the *Arcadia* Case, has not been challenged on appeal by the State or Los Angeles Regional Boards, and in fact, has been agreed to by both of these Boards, as well as by the Intervenor environmental organizations. Specifically, in the State and Regional Boards' Opening Appellate Brief in the *Arcadia* Case, they agreed that the term "Stormwater" is to include "urban runoff," where they stated as follows:

> **"Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but stormwater emanates from diffuse sources, including surface run-off following rain events (hence "storm water") and urban run-off**. (See Exhibit "4" hereto, which is a true and correct copy of the cited portion from the Boards' Opening Appellate Brief in the *Arcadia* Case; emphasis added.)

Thus, both the State and the Los Angeles Regional Boards have acknowledged that the term "stormwater" includes not only "stormwater" runoff from "rain events," but also other discharges from a storm sewer conveyance system, specifically including "urban runoff." (*Id.*)

This definition of the term "Stormwater" as including "urban runoff," has also been accepted by the NRDC, the Santa Monica Baykeeper, and Heal the Bay (collectively, "Intervenors"). In the Intervenor's Opening Brief in the *Arcadia* Case, said Intervenors admit as follows:

> For ease of reference, throughout this brief, **the terms "urban runoff" and "stormwater" are used interchangeably to refer generally to the discharges from the municipal Dischargers' storm sewer systems. The definition of "stormwater" includes "storm water runoff, snow melt runoff, and surface runoff and**

> **drainage." (40 C.F.R. § 122.26(b)(13).)** (See Exhibit "5," hereto, which is a true and correct copy of the cited portion of the Intervenors' Opening Appellate Brief in the *Arcadia* Case; emphasis added.)

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

In short, the definition of "stormwater" plainly includes dry-weather runoff, i.e., "surface runoff and drainage," and as such, there is no basis to treat "dry-weather runoff" any differently under the CWA, *e.g.,* to apply numeric effluent limits rather than the MEP Standard to dry-weather runoff, or to require that municipalities prohibit all non-point source "Landscape Irrigation," "Irrigation Waters," "Lawn Waters," and other similar discharges, from entering the MS4.

V. THE INCLUSION OF NUMERIC EFFLUENT LIMITS, ALONG WITH THE NEW PROHIBITION ON DRY WEATHER DISCHARGES FROM ENTERING THE MS4, AS WELL AS THE NEW LID, SSMP, RETROFITTING AND HYDROMODIFICATION REQUIREMENTS, ARE ALL UNFUNDED MANDATES IN VIOLATION OF THE CALIFORNIA CONSTITUTION.

Any requirements that goes beyond what is otherwise required under federal law, *e.g.,* forcing the municipalities to strictly comply with numeric limits, as opposed to requiring compliance through the use of MEP-complaint BMPs, and any other accompanying mandates that go beyond the requirements of federal law, such as requiring municipalities to prohibit the discharge of Landscape Irrigation or other similar dry weather runoff from entering the MS4, or the new LID, SSMP, Retrofitting, and Hydromodification and related requirements, can only be

imposed where adequate funds have first been provided to the municipalities to comply with such mandates. For example, Section F.3 of the Permit seeks to force the Permittees to "develop and implement a retrofitting program." Yet, this new mandated "restoration program" the Regional Board is attempting to force the Permittees to carry out, is not being funded by the State. Rather, the Draft Permit leaves it to the Municipal Permittees to fund this and many other new "programs" imposed by the Draft Permit."

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides, in relevant part, as follows:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service. . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it "***was intended to preclude the state from shifting financial responsibility to local entities that were ill equipped to handle the task***." (*Id.*)

Accordingly, because the Regional Board is proposing to require strict compliance with numeric limits, a requirement that exceeds the MEP Standard set forth in federal law; is requiring municipalities to prohibit dry weather runoff including irrigation waters from entering their storm drain system, another requirement not found in the CWA; and is imposing new LID, SSMP, Retrofitting and Hydromodification requirements, none of which are required under the

CWA; all such requirements are plainly new unfunded State mandates which may only be imposed where necessary funding has first been made available to the Permittees.

The incorporation of new permit requirements that are not mandated by federal law, and that go unfunded by the State, plainly violate Article XIII B, Section 6 of the California Constitution. (*See County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 914 ["We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."].)

VI. VARIOUS TERMS OF THE DRAFT PERMIT MAY ONLY LAWFULLY BE ADOPTED AFTER A COST BENEFIT ANALYSIS HAS BEEN CONDUCTED UNDER WATER CODE SECTIONS 13225 AND 13267.

Under Section C. of the Draft Permit imposing numeric effluent limitations for dry weather runoff, the municipalities are required to implement certain monitoring programs to assure compliance with the NELs. Also, under Section D. of the Draft Permit involving the SALs, again the Regional Board is proposing to impose various monitoring obligations on the municipalities as a means of requiring compliance with such SALs. Other portions of the Draft Permit, some of which were discussed in prior comments, similarly seek to impose monitoring and reporting obligations upon the permittees. Yet, under the Porter-Cologne Act, no monitoring and/or reporting requirements may be imposed upon local agencies, without the Boards first conducting a "cost/benefit" analysis. To begin with, Water Code section 13225(c) provides as follows:

> **Each Regional Board, with respect to its region, shall, do all of the following:**
>
> * * *
>
> **(c) Require as necessary any state or local government to investigate and report on any technical factors involved in water quality control or 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).)**

Similarly, Water Code Section 13267(b) provides, in relevant part, as follows:

* * *

> (b)(1). In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged . . . or who proposes to discharge, waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these 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).)

With the Draft Permit, although the Porter-Cologne Act expressly requires the Regional Board in this context to conduct a cost/benefit analysis, and specifically requires that the Regional Board provide the Permitees with a "written explanation with regard to the need for the reports" and "identify the evidence that supports requiring the person to provide the reports," there are no purported findings anywhere in the Draft Permit showing that any such cost/benefit analysis was conducted, or any finding that the burden, including costs, of such monitoring and reporting obligations bear a "reasonable relationship" to the need for the same.

In addition, there is no evidence that has been identified anywhere in the record, either in the findings or otherwise, to show that any such cost benefit analysis, as required under Water Code Sections 13267 and 13225, has ever been performed. Accordingly, no monitoring or reporting obligations associated with any NEL, SAL, or TMDL can be imposed upon the municipalities through the Draft Permit, until the requirements of Water Code sections 13225 and 13267 have first been met.

VII. THE LID AND NEW SSMP, RETROFITTING AND HYDROMODIFICATION PROVISIONS WITHIN THE DRAFT PERMIT ARE IN CONFLICT WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA").

The LID provisions in the Draft Permit, along with the accompanying new SSMPs requirements and the Retrofitting and new Hydromodification requirements for development and redevelopment within the jurisdictional boundaries of the various municipalities, are all provisions that conflict with the requirements of the California Environmental Quality Act ("CEQA"). As such these provisions are contrary to law and cannot appropriately be included in the subject NPDES Permit. For example, the LID provisions require the municipalities to "require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, ***and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss."*** (Draft Permit, F.1.d.(4).)

The Draft Permit goes on to require that LID BMPs be implemented unless the subject city makes a ***"finding of infeasibility*** for each Priority Development Project," and further requires that the municipality "incorporate formalized consideration, such as ***thorough checklists***, . . . into the plan review process for Priority Development Projects." (Draft Permit, F.1.d.(4)(a)(i) & (ii).) The Draft Permit also requires that LID BMPs be implemented at all such priority Development Projects "where technically feasible," and provides that if onsite retention LID BMPs are "technically infeasible that LID bio-filtration BMPs may be utilized." (Draft Permit, F.1.d.(4)(b) & (d).) Further "source control BMPs" are required to be implemented which must include BMPs to "eliminate irrigation runoff." (Draft Permit, F.1.d.(5)(c).)

The Draft Permit also includes a BMP waiver program allowing Priority Development Projects to substitute the implementation of LID BMPs in certain instances, with the

implementation of treatment control BMPs and payment into an in lieu funding program and/or water shed equivalent BMPs. The waiver program requires, at a minimum, the net impact of Priority Development Projects from pollutant loadings to be above and beyond the impact caused by projects meeting the LID requirements, after considering "mitigation and in lieu payments." It further requires a cost benefit analysis to be developed as a part of the criteria for the technical feasibility analysis, along with various other mitigation measures for pollutant loads expected to be discharged as a result of not implementing LID BMPs. (Draft Permit, F.1.d.(7).) The LID waiver program goes so far as to allow for a "pollutant credit system," and requires a number of other conditions as a part of the waiver process. (*Id.*) Section F.3.d of the Draft Permit requires the Permittees to "develop and implement a retrofitting program" with the goal of reducing "hydromodification," promoting "LID," and supporting "riparian and aquatic habitat restorations," among other purposes. Beyond these requirements, there are several provisions within the Draft Permit that go so far as to prevent "occupancy and/or the intended use of any portion" of the project, where the various LID and SSMP requirements are not being met. (*See* Draft Permit, F.1.d.(9).)

It is apparent from these Draft Permit terms that they are all designed to address potential adverse impacts on water quality or riparian or aquatic habitat etc., which may occur from the proposed development project in issue. Such an analysis, however, is already required to be conducted by municipalities under the requirements of California Environmental Quality Act ("CEQA" – Public Resources Code Sections 21000 et. seq.). In fact, CEQA imposes numerous specific requirements on municipalities when considering development projects within their respective jurisdictions, and particularly requires that the municipalities consider and mitigate

potentially significant adverse environmental impacts that may be expected from the project, specifically including impacts that may be expected on water quality.

CEQA is a comprehensive statute that requires governments to analyze projects to determine whether or not they may have significant adverse environmental impacts. If such significant adverse impacts are determined to be present by the lead governmental agency, then under CEQA, these impacts must be disclosed and reduced or mitigated to the extent feasible. CEQA expressly provides local entities the discretion to analyze and approve projects that are deemed appropriate for the local community, following the environmental analysis directed by the Statute, including an analysis of the impacts of the project on water quality. One example of this discretion is the ability of municipalities to adopt a Statement of Overriding Considerations if the public agency finds that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Public Resources Code [PRC] Section 21081)

By removing the City's discretion under CEQA to approve local developments, the Permit is in conflict with existing State law. For example, the Draft Permit directly conflicts with CEQA by unlawfully attempting to direct how a local governmental agency is to approve a project. Under Public Resources Code Section 21081.6(c), a responsible agency – such as the Regional Board – cannot direct how a lead agency – such as a Permittee – is to comply with CEQA's terms:

> Any mitigation measures submitted to a lead agency by a responsible agency or an agency having jurisdiction over natural resources affected by the project shall be limited to measures which mitigate impacts to resources which are subject to the statutory authority of an definitions applicable to, that agency. **Compliance or non-compliance by a responsible agency or agency having jurisdiction over natural resources affected by a project with that requirement shall not limit...the authority of**

> **the lead agency to approve, condition, or deny projects as provided by this division or any other provision of law.** (Pub. Res. Code § 21081.6(e); emphasis added.)

In direct conflict with the terms of CEQA, the Regional Board, through the Draft Permit, unlawfully seeks to impose Permit terms that plainly seek to "limit the authority of the lead agency to approve, condition, or deny projects."

PRC Section 21081.1 also states that the lead agency's determination "shall be final and conclusive on all persons, including responsible agencies, unless challenged as 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 Section 21080.1(a).)

Further, no additional procedural or substantive requirements beyond those expressly set forth in CEQA may be imposed upon a local agency's CEQA review process:

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

PRC section 21001 provides that local agencies "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (PRC § 21001.) However, the conclusion in the Draft Permit appears to be that all runoff from a wide class of new development and redevelopment projects will result in significant adverse impacts on the environment, and that such impacts must be mitigated by those particular mitigation measures as mandated in the Draft Permit. Thus, the Draft Permit dictates the environmental review, without

regard for CEQA's provisions, and eliminates a local governmental agency's discretion to consider and approve feasible alternatives or mitigation measures – even if alternative measures might have a lesser effect on the environment.

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

Under the Draft Permit, therefore, environmentally preferable alternatives and/or mitigation measures that would otherwise be required pursuant to CEQA, could not be pursued and required because of the arbitrary requirements set forth in the Draft Permit. The Draft Permit must be revised so as to avoid conflict with State law, and the referenced provisions in issue should be deleted.

EXHIBIT “1”

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

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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,
GLENDORA, 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
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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

EXHIBIT “2”

RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO (State Bar No. 116051)
PETER J. HOWELL (State Bar No. 227636)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1950
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Attorneys for Petitioners

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE , CENTRAL JUSTICE CENTER

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

Petitioners/Plaintiffs,

vs.

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

Respondents/Defendants.

vs.

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

Intervenors.

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

~~[Proposed]~~ JUDGMENT

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

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

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

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

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

(b) during the course of the reopened 2004 Triennial Review, or if Respondents determine not to reopen the 2004 Triennial Review, then during the course of the next scheduled triennial review: (i) to review and, where appropriate, revise the Water Quality Standards ("Standards")[1] in the Basin Plan, which apply or are to be applied to storm water and urban runoff (collectively "Stormwater"),[2] in light of the factors and requirements set forth under Water Code sections 13241 and 13000, including, but not limited to, the specific factors set forth under Water Code sections 13241(a) – (f), and the considerations provided under Water Code section 13000; (ii) 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 (iii) to revise the Standards, as appropriate, during the Triennial Review process, after a full and fair public hearing or hearings, and before concluding the triennial review.

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

[1] As referenced herein, the term "Water Quality Standards" or "Standards" shall mean the designated beneficial uses of the waters, as well as the water quality 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).)

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

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

5. Petitioners are awarded their costs of suit incurred.

Dated: 26 November, 2008

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

RESPECTFULLY SUBMITTED BY:

RUTAN & TUCKER, LLP

By:
Richard Montevideo
Attorney for Petitioners/Plaintiffs

PROOF OF SERVICE BY FIRST CLASS AND ELECTRONIC 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 November 21, 2008, I served on the interested parties in said action the following documents:

[Proposed] JUDGMENT

Jennifer F. Novak, Esq.
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Attorney for Intervenors

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 served a copy of the above-referenced document on the interested parties by electronic mail at their email address(es) listed below their mailing addresses as stated above. The transmission of the document(s) was reported as complete and without error.

Executed on November 21, 2008, 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)

EXHIBIT "3"

EDMUND G. BROWN JR., Attorney General
of the State of California
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CONTROL BOARD. LOS ANGELES REGION

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

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

Petitioners/Plaintiffs,

vs.

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

Respondents/Defendants.

vs.

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

Intervenors.

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

[Proposed] PEREMPTORY WRIT OF MANDATE

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

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

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

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

(2) During the course of reopened 2004 Triennial Review, or if Respondents determine not to reopen the 2004 Triennial Review, then during the course of the next scheduled triennial review of the Water Quality Standards ("Standards")[1] in the Basin Plan:

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

[1] As referenced herein, the term "Water Quality Standards" or "Standards" shall mean the designated beneficial uses of the waters, as well as the water quality 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).)

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: _____

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

LET THE FOREGOING WRIT ISSUE.

Dated: 10 November 2008

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

RESPECTFULLY SUBMITTED BY:

By: _____
JENNIFER F. NOVAK
Attorney for Respondents/Defendants

EXHIBIT "4"

Case No. G041545

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE CITIES OF ARCADIA, et al.,
Plaintiffs and Appellants,

v.

STATE WATER RESOURCES CONTROL BOARD; et al.,
Defendants and Appellants,

and

NATURAL RESOURCES DEFENSE COUNCIL, et al.
Intervenors and Appellants.

Appeal from the Superior Court of Orange County
Honorable Thierry Patrick Colaw, Judge Presiding
Superior Court Case No. 06CC02974

APPELLANT WATER BOARDS' OPENING BRIEF ON APPEAL

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(*Pronsolino, supra*, 291 F.3d at p. 1127.) Thus, water quality standards protect water bodies, regardless of whether the pollution comes from a "point" or "non-point" source.[4] For purposes of the Act, water quality standards do not depend on whether the source of pollution is diffuse or difficult to regulate. The standards look to the overall condition of the water itself. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620 (*Burbank*); see also 33 U.S.C. § 1313.) Separate statutory provisions address the technological feasibility of each source's pollution control requirements. (See, e.g., 33 U.S.C. § 1311(b)(1)(A), (b)(1)(B), (b)(2), (b)(3), & § 1342(p)(3)(B)(iii).)

To achieve water quality standards, the Act prohibits discharges of pollutants from point sources to waters of the United States unless they meet federal requirements. (33 U.S.C. § 1311; *Burbank, supra*, 35 Cal.4th at p. 620.) Two such types of discharges are industrial and municipal urban storm water run-off,[5] one of the most significant sources of water pollution in the nation. (*Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 840-841.)

Congress amended the Act in 1987 to require NPDES permits for urban run-off. (See 33 U.S.C. § 1342(p)(3)(B).) The 1987 changes did not affect any designated uses, other components of the water quality standards, or the need to protect water quality. Neither Congress nor U.S. EPA required states to revise their water quality standards in response to the

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[4] Point sources of pollution come from a discrete conveyance, such as a pipe. Nonpoint sources are non-discrete sources, such as sediment run-off. (*Pronsolino, supra,* at p. 1125; 33 U.S.C.§ 1362(14).)

[5] "Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but storm water emanates from diffuse sources, including surface run-off following rain events (hence, "storm water") and urban run-off.

CONCLUSION

Appellant Water Boards request that this court overturn the judgment, vacate the writ of mandate and enter judgment in their favor.

Dated: June 11, 2009

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EXHIBIT "5"

Case No. G041545

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE CITIES OF ARCADIA et al.,
Plaintiffs, Petitioners, and Cross-Appellants,

v.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION et al.,
Defendants, Respondents, and *Appellants,*

and

NATURAL RESOURCES DEFENSE COUNCIL et al.,
Intervenors, Respondents, and Appellants.

From the Judgment of the Orange County Superior Court,
The Hon. Thierry Patrick Colaw, Presiding,
Superior Court Case No. 06CC02794

Intervenors, Respondents, and Appellants' Opening Brief

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Sometimes the EPA establishes and issues water quality criteria. For instance, EPA set criteria for toxic pollutants for the State called the California Toxics Rule ("CTR"). The CTR regulates 126 pollutants, including arsenic, lead, mercury, cyanide, asbestos, benzene, dioxin, and PCBs. (40 C.F.R. § 131.36.) Aside from some specified instances, the CTR applies "without exception" to "[a]ll waters assigned any aquatic life or human health use classifications . . . ." (40 C.F.R. § 131.36(d)(10)(i).) Sometimes the Regional Board establishes and issues water quality criteria to meet the purposes of the Clean Water Act. As the California Supreme Court recognized, "EPA provides States with substantial guidance in the drafting of water quality standards." (*Burbank,* 35 Cal.4th at 621.) For instance, the Clean Water Act requires a set of baseline pathogen standards in coastal recreation waters, such as Santa Monica Bay. (33 U.S.C. § 1313(i)(1)(A).) Accordingly, the Regional Board established limits for enterococci in coastal recreation marine waters and E.coli in freshwater recreation waters that match the federally-required criteria. (Compare 40 C.F.R. § 131.41(c)(1)-(2), with AR 2002 BAC 236.)

Water bodies that do not meet water quality standards cause, among other things, documented public health impacts. For example, in 2000, swimming in water contaminated with pathogens caused beachgoers between 627,800 and 1,479,200 excess gastrointestinal illnesses in Los Angeles and Orange Counties alone. (8 AA 1719.) One of the largest sources of pollution contributing to these health impairments is urban runoff.[3] (8 AA 1729; AR 2004 TR 6161.) Urban runoff is a two-part

[3] For ease of reference, throughout this brief the terms "urban runoff" and "stormwater" are used interchangeably to refer generally to the discharges from the municipal Dischargers' storm sewer systems. The definition of stormwater includes "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).)

Water Act. (See *Abreu v. Svenhard's Swedish Bakery* (1989) 208 Cal.App.3d 1446, 1456 (court refused to apply a state law that would toll the statute of limitations, because doing so would "inevitably frustrate" federal national labor-management policy).)

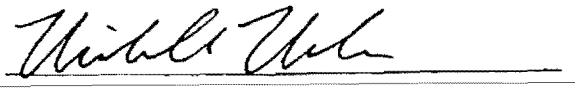
Conclusion

For the foregoing reasons, the Environmental Groups respectively request that this Court reverse the trial court's judgment.

DATED: June 5, 2009

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL



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