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Attorneys for Petitioner
CITY OF DANA POINT

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

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

PETITION FOR REVIEW

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

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

I. NAME, ADDRESS AND TELEPHONE NUMBER OF PETITIONER

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

City of Dana Point
Attn: Brad Fowler, Director of Public Works and Engineering Services
Lisa Zawaski, Senior Water Quality Engineer
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Dana Point, California 92629
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Email: bfowler@danapoint.org
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With a copy to Petitioner's Counsel:

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

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

III. DATE OF REGIONAL BOARD'S ACTION

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

IV. STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

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

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

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

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

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

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

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

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

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

V. HOW PETITIONER IS AGGRIEVED

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

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

VI. ACTION PETITIONER REQUESTS THE STATE WATER BOARD TO TAKE

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

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

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

VII. POINTS AND AUTHORITIES

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

VIII. NOTICE TO REGIONAL BOARD

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

IX. ISSUES PREVIOUSLY RAISED

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

X. CONCLUSION

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

XI. SERVICE OF PETITION

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

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

California Regional Water Quality Control Board
San Diego Region
David W. Gibson, Executive Officer
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San Diego, CA 92123-4340
Fax: (858) 571-6972
dgibson@waterboards.ca.gov

Respectfully submitted

RUTAN & TUCKER, LLP

Dated: January 14, 2010

By: _____
Richard Montevideo
Attorneys for Petitioner

PROOF OF SERVICE VIA FACSIMILE AND U.S. MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

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

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

PETITION FOR REVIEW

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

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

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

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

Executed on January 14, 2010, at Costa Mesa, California.

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

Cathryn L. Campbell
(Type or print name)

Cathryn L. Campbell
(Signature)

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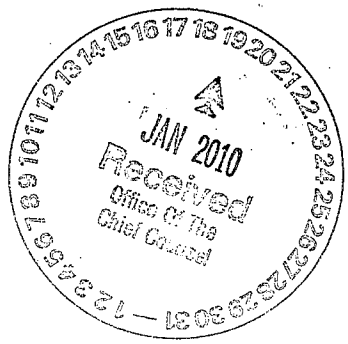
CITY OF DANA POINT



BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Page(s)

STATE STATUTES

REGULATIONS

I. INTRODUCTION

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

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

(2) The Permit contains a series of new investigation, monitoring and reporting obligations upon the Permitees, mainly related to the new NALs, SALs, and TMDL requirements in the Permit. However, such new investigation, monitoring, and reporting requirements imposed upon the Permittees can only be imposed after the requirements of CWC sections 13225(c) and 13267 have been complied with, *i.e.*, only after the Regional Board has shown that the benefits of these new investigating/monitoring/reporting

requirements outweigh their costs. (CWC §§ 13225(c) and 13267(b).) Yet, there are no findings in the Permit and no evidence in the record showing that any such cost/benefit analysis was ever conducted, or that the benefits of these requirements in fact outweigh their costs.

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

(4) The Permit's new LID, SSMP, Retrofitting and Hydromodification requirements were all adopted contrary to law because such provisions conflict with the requirements of the California Environmental Quality Act ("CEQA" – Public Resources Code ["PRC"] § 21000 *et seq.*) Specifically, under PRC section 21081.6(c), a responsible agency, such as the Regional Board having jurisdiction over a natural resource affected by a particular development project, does not have the authority to limit the discretion of a local government agency, *i.e.*, the City herein or other Permitees under the Permit, to review and approve or deny development projects under CEQA. To the contrary, under PRC section 21080.1, it is the City's and the other Permittees' responsibility to determine the appropriate environmental review and necessary mitigation measures to address any

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

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

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

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

The Permit contains provisions requiring compliance with NALs for dry weather runoff and SALs for wet weather runoff. In addition, the Permit requires Permittees to comply with waste load allocations ("WLAs") and other numeric limits for both dry and wet weather runoff, pursuant to adopted and to be adopted TMDLs. The Permit also contains new requirements which, when compared to the existing municipal NPDES Permit, require that the Permittees prohibit all "dry weather" discharges from entering the MS4, except for certain identified exempted discharges. The prohibition on the discharge of dry weather discharges into the MS4 specifically includes "Landscape Irrigation," "Irrigation Waters" and "Lawn Waters," all of which are permitted exemptions under federal law and all which were exempted discharges under the 2002 Municipal NPDES

Permit for South Orange County.

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

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

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

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

The 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." (Permit, § D.1.) In addition, Section I of the Permit, entitled "Total Maximum Daily Loads," requires strict compliance with 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 Permit requires that 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 Permit imposes numeric limits on both dry weather and wet

weather discharges, in the form of NALs for dry weather discharges, SALs for wet weather discharges, and TMDLs for both. But, as discussed below, the CWA does not require municipalities to comply with numeric limits, but rather imposes only a "maximum extent practicable" standard on all discharges "from" a municipalities' MS4 system .

In addition, it has long since been the policy of the State of California not to require the use of numeric limits for Stormwater dischargers, but rather to apply the MEP standard through an iterative BMP process. (*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 storm water***"]; *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.***"].)

Accordingly, before having adopted the various numeric limits contained in the Permit, the Regional Board was required to comply with all aspects of the California Porter-Cologne Act, including, but not limited to, conducting an analysis of the factors set forth under CWC sections 13263 and 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 was conducted by the Regional Board for any of the NALs, SALs, or WLAs (from TMDLs) contained in the Permit, nor are there any findings anywhere in the Permit indicating that the Regional Board complied with CWC sections 13263, 13241 and 13000, particularly including, but not limited to, any considerations of whether such numeric limits "could reasonably be achieved," as well as the "economic" impacts on the Permittees, and the "environmental characteristics" of the water bodies in issue.

B. <u>The Prohibition On Dry Weather Discharges.</u>

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

Moreover, as discussed further herein, the definition of the term "stormwater" includes "surface runoff" and "drainage." (40 CFR § 122.26(b)(13).) As such, the discharge of dry weather runoff including Landscape Irrigation, Irrigation Water and Lawn Waters, cannot properly be classified as a "non-stormwater" discharge. Accordingly, section 1342(b)(3)(B)(ii) of the CWA, which requires 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.

Further, 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 C.F.R., § 122.26(b)(2).) Because the term "stormwater," as defined in the federal regulations, plainly includes surface runoff and drainage, in addition to precipitation, discharges of "Landscape Irrigation," "Irrigation Waters" and "Lawn Waters" cannot correctly be classified as "illicit" discharges, and the CWA therefore plainly does not require that the Permittees prohibit such discharges from entering the MS4.

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

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

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

III. UNDER FEDERAL LAW, MUNICIPAL STORMWATER DISCHARGERS NEED ONLY REDUCE THE DISCHARGE OF POLLUTANTS TO THE "MAXIMUM EXTENT PRACTICABLE"

The federal Clean Water Act ("CWA" or "Act") requires municipalities to "require controls to reduce the discharge of ***pollutants*** to the maximum extent practicable." (*Id.*) This Maximum Extent Practicable ("MEP") Standard is the only standard required under

the CWA to be applied to discharges from a City's Municipal Separate Storm Sewer System ("MS4"). 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 compliance with numeric limits. Specifically, federal law only requires strict compliance with numeric effluent limits by industrial dischargers. As indicated by the Ninth Circuit in *Defenders of Wildlife v. Brown* (*"Defenders"*) (9th Cir. 1999) 191 F.3d 1159, in "requir[ing] municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable'" Congress was "***not merely silent***" regarding requiring "municipal" dischargers to strictly comply with numeric limits, but specifically "replaced" the requirement applicable to traditional industrial waste dischargers to strictly comply with the limits 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, 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 discharge ***of pollutants*** to the maximum extent practicable.'" (*Id.* at 874, emphasis added.) The Court explained the reasoning for Congress' different treatment of Stormwater dischargers versus industrial waste dischargers as follows:

> Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have 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 Permit, by imposing a series of numeric limits on the Permitees, goes beyond the MEP Standard under federal law, *i.e.,* beyond what was required by Congress with the 1987 Amendments to the CWA, and thus treats municipal dischargers in a similar manner as industrial waste dischargers. Thus, as discussed further below, the Regional Board was clearly required to comply with CWC sections 13263, 13241 and 13000 in adopting these Permit terms.

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

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

federal law, the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that such requirement means that the Water Boards must analyze the ***"discharger's cost of compliance."*** (*Id.* at 618.)

The Court in *Burbank* thus interpreted the need to consider "economics" as requiring a 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."].)

The Court further recognized the goals of the Porter-Cologne Act as provided for under CWC section 13000, *i.e.*, 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 CWC § 13000.)

As such, under the *Burbank* decision, CWC section 13263 requires a consideration of the factors set forth under CWC section 13241. CWC section 13241 then 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.**

(§ 13241.) Furthermore, in a concurring opinion in *Burbank*, Justice Brown made several significant comments regarding the importance of considering "economics" in particular, and the CWC section 13241 factors in general, when adopting an NPDES Permit which includes terms not required by federal law:

> **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.)

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

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

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

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

Section C of the Permit requires Permittees to implement certain investigation, monitoring and reporting programs to assure compliance with the NALs. Likewise, Section D of the Permit imposes various investigation, monitoring and reporting obligations on municipalities as a means of requiring compliance with SALs. Other portions of the Permit similarly seek to impose investigation, monitoring and reporting obligations upon the Permittees. Yet, under the Porter-Cologne Act, no investigation/ monitoring/reporting requirements may be imposed upon local agencies, without the

Boards first conducting a "cost/benefit" analysis. (CWC §§ 13225, 13267.)

CWC 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, CWC 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), emph added.)

Nonetheless, the Permit includes no findings showing that any such cost/benefit analysis was ever conducted, nor does it indicate any finding showing 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 the cost benefit analysis required under CWC sections 13225 and 13267 was ever performed.

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

VI. THE PERMIT IMPROPERLY TREATS DRY WEATHER RUNOFF AS "NON-STORMWATER"

The 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." (Permit, Finding C.14.) The Permit then proceeds not only to require that the Permittees prohibit all "non-storm water" discharges from entering into the MS4, including prohibiting any dry weather runoff from entering the MS4 unless otherwise expressly permitted under the Permit, but also to impose NALs upon all such dry weather discharges.

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

All three of these categories of discharges were listed as exempt categories of discharge in the Permittees' prior Municipal NPDES Permit, but have been improperly deleted from the list of exempted discharges in the subject Permit. Yet, neither the regulations nor EPA guidance allow the Regional Board to delete entire categories of exempt discharges in the manner done so by the Regional Board. Moreover, before making such Permit changes, the Regional Board was required to comply with CWC sections 13263, 13241, and 13000, and to consider the factors therein. The Regional Board failed to comply with these CWC sections, and failed to make any findings or produce any evidence showing compliance therewith. Accordingly, the Petitioner respectfully requests the State Board restore these categories of exempted discharges to the Permit.

In addition, it is clear from the plain language of the regulations adopted to implement the CWA, 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.) This definition thus clearly includes more than just "storm water runoff" and "snow melt runoff," since it provides that stormwater encompasses such runoff "***and surface runoff and drainage***." The Regional Board's suggested interpretation of this definition improperly reads the references to "surface runoff" and "drainage" out of the regulation. The Regional Board's interpretation is thus 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."***]; *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."***].)

Also, 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.)

In State Board Order No. 91-04, 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 would: "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."].)

Furthermore, in the case *City of Arcadia v. State Board*, OCSC Case No. 06CC02974, Fourth Appellate District, Division 3 Case No. G041545 ("*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, hereto, p. 1 [". . . the Standards apply to storm water [*i.e.,* storm water and urban runoff]."]; *see also* 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* the 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.'"].) 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, was agreed to by both of these Boards, as well as by the environmental organizations which intervened in the *Arcadia* Case. In particular, in the State and Los Angeles Regional Boards' Opening Appellate Brief in the *Arcadia* Case, they agreed that the term "Stormwater" is to include "urban runoff," stating:

> "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* Water Boards' Opening Appellate Brief in the *Arcadia* Case, p. 9, fn.5, emphasis added.)

The definition of the term "Stormwater" as including "urban runoff," was also accepted by the Natural Resource Defense Council, the Santa Monica Baykeeper, and Heal the Bay (collectively, "Arcadia Intervenors"). In the Arcadia Intervenors' Opening Brief in the *Arcadia* Case, said Intervenors admitted 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* Intervenors' Opening Appellate Brief in the *Arcadia* Case, p. 6, fn.3, 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.

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

In short, the definition of "stormwater" plainly includes dry-weather runoff, *i.e.*, "surface runoff and drainage." As such, there is no basis to treat "Landscape Irrigation," "Irrigation Waters" and "Lawn Waters" any differently under the Permit than rain water,

e.g., to prohibit their discharge into the MS4, or to apply stringent numeric limits rather than the MEP Standard to all such discharges.

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

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

For example, the LID provisions require the municipal Permittees 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."*** (Permit § F.1.d(4).) The 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." (Permit § F.1.d(4)(a)(i) & (ii).) The 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." (Permit § F.1.d(4)(b) & (d).) Further "source control BMPs" are required to be implemented which must include BMPs to "eliminate irrigation runoff." (Permit § F.1.d(5)(c).)

In addition, the Permit requires Permittees to develop a BMP waiver program allowing Priority Development Projects "to substitute implementation of all or a portion of LID BMPs . . . with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or water shed equivalent BMP(s). (Permit

§ F.1.d(7).) The waiver program requires, at a minimum, that the net impact of Priority Development Projects from pollutant loadings 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. (Permit § F.1.d(7).)

Section F.3.d of the 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 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* Permit § F.1.d(9).)

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

project on water quality. Moreover, CEQA gives local agencies the discretion 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." (PRC § 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 Permit directly conflicts with CEQA by unlawfully attempting to direct how a local governmental agency is to approve a project. Under PRC 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.** (PRC § 21081.6(c); emphasis added.)

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

In addition, PRC section 21081.1 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 § 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 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 Permit. Thus, the Permit dictates the terms and results of 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, by adopting a Statement of Overriding Considerations. The 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.

The Permit's arbitrary requirements would thus prevent environmentally preferable alternatives and/or mitigation measures that would otherwise be required pursuant to CEQA from being pursued and required. As the Permit's LID provisions, SSMPs requirements, Retrofitting requirements, and Hydromodification requirements are all in conflict with State law, the City respectfully requests that the State Board vacate these provisions of the Permit.

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

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

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

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

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

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

IX. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the State Board

vacate and set aside the disputed terms of the Permit, and direct the Regional Board to reconsider such Permit terms only after it has complied with all applicable State and federal requirements and revised such terms accordingly.

Respectfully submitted

RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO

Dated: January 14, 2010

By: _____
Richard Montevideo
Attorneys for Petitioner

PROOF OF SERVICE VIA FACSIMILE, U.S. MAIL 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 January 14, 2010, I served on the interested parties in said action the within:

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

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

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

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

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

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

Executed on January 14, 2010, at Costa Mesa, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cathryn L. Campbell
(Type or print name)

Cathryn L. Campbell
(Signature)