

December 18, 2015

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

State Water Resources Control Board
Office of Chief Counsel
Attn: Adrianna M. Crowl
P.O. Box 100
Sacramento, CA 95812-0100

Re: Petitioner City of Dana Point's Second Amended Petition and Second Supplemental Memorandum of Points and Authorities in Support of Petition For Review, A-2254(K) (2013), A-2367 (2015)

Dear Ms. Crowl:

Enclosed please find the City of Dana Point's Second Amended Petition for Review to the State Water Resources Control Board ("State Board") and accompanying Second Supplemental Memorandum of Points and Authorities and supporting exhibits enclosed therewith. These documents are submitted pursuant to California Water Code section 13320 and Title 23 of the California Code of Regulations ("CCR"), section 2050, *et seq.*, on behalf of the City of Dana Point ("City" or "Petitioner"). The Second Amended Petition for Review challenges the decision of the California Regional Quality Control Board, San Diego Region ("Regional Board") reflected in the *Order Amending Order No. R9-2013-0001, NPDES No. CAS0109266, as Amended by Order No. R9-2015-0001, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region, adopted by the California Regional Water Quality Control Board, San Diego Region*, (the "Permit") that was approved by the Regional Board on November 18, 2015.

We ask that you accept the enclosed Second Amended Petition and Second Supplemental Memorandum of Points and Authorities on behalf of the City at this time, but request, pursuant to 23 CCR section 2050.5(d), that this Second Amended Petition be held in abeyance until such time as the Petitioner requests it be taken out of abeyance and considered by the State Board. Petitioner reserves the right to supplement this Second Amended Petition, and its Second Supplemental Memorandum of Points and Authorities, at such time as the Second Amended Petition is taken out of abeyance, and/or once the record of the administrative proceedings has been completed and made available, including the preparation of the transcripts of the hearings on the Amended and Readopted Permit.

State Water Resources Control Board

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If the Second Amended Petition, or the City's prior Petitions challenging prior versions of the Permit are taken out of abeyance, or if other petitions filed by south Orange County Co-Permittees or interested parties, and covering the same or related issues, are not put into, or are taken out of abeyance, the City may similarly request that the State Board address some or all of the issues raised in this Second Amended Petition or in the City's prior Petitions at that time.

If you have any questions with respect to the above or the enclosed, or need any additional information in this regard, please do not hesitate to contact me. Thank you for your assistance and cooperation in this matter.

Very truly yours,

RUTAN & TUCKER, LLP



Jeremy N. Jungreis

JNJ:mm

Enclosures

cc: San Diego Regional Water Quality Control Board
Mr. Brad Fowler
Ms. Lisa Zawaski
Patrick A Munoz, Esq.

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CITY OF DANA POINT

8

9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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12 In the Matter of:

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14 The California Regional Water Quality
Control Board, San Diego Region's
Adoption of Order No. R9-2015-0001,
15 amending Order No. R9-2013-0001,
NPDES No. CAS0109266

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**SECOND AMENDED PETITION
FOR REVIEW BY THE CITY OF
DANA POINT**

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

[Concurrently filed with Memorandum of
Points and Authorities in Support of Petition
for Review]

1 The City of Dana Point (“City”) submits this Second Amended Petition for Review
2 pursuant to California Water Code (“Water Code”) section 13320 and California Code of
3 Regulations, title 23, section 2050 for review of Order No. R9-2015-0100 (“Final Permit”)
4 as approved by the California Regional Water Quality Control Board, San Diego Region
5 (“Regional Board”) on November 18, 2015, which amended and readopted Order No. R9-
6 2015-0001 and Order No. R9-2013-0001 (“Initial Permit”), NPDES Permit No.
7 CAS0109266. This Second Amended Petition is intended to supplement, and not to
8 supersede or replace, either of the two prior petitions filed by the City of Dana Point on
9 Order No. R9-2013-0001, NPDES No. CAS0109266, and Order No. R9-2015-0001,
10 National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge
11 Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s)
12 Draining the Watersheds within the San Diego Region.

13 I. INTRODUCTION.

14 Petitioner is the City of Dana Point. All written correspondence and other
15 communications regarding this matter should be addressed as follows:

16 1) City of Dana Point
17 Attn: Brad Fowler, Director of Public Works and Engineering
18 33282 Golden Lantern
19 Dana Point, CA 92629
20 Telephone: (949) 248-3597
21 Email: bfowler@danapoint.org
22 lzawaski@danapoint.org

23 With a copy to Petitioner’s counsel:

24 2) Jeremy Jungreis
25 Patrick Muñoz
26 Travis Van Ligten
27 611 Anton Boulevard, 14th Floor
28 Costa Mesa, CA 92626
Telephone: 714-641-5100
Email: jjungreis@rutan.com
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1 **II. SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD FOR**
2 **WHICH REVIEW IS SOUGHT.**

3 The City requests that the State Water Resources Control Board (“State Board”)
4 review the Regional Board’s Order No. R9-2015-0100, which was rendered on November
5 18, 2015 and which amends and readopts Order No. R9-2015-0001 and Order No. R9-
6 2013-0001, NPDES Permit No. CAS0109266. By its Petition, the City challenges the
7 Regional Board’s approval of the Final Permit with regard to specific legally objectionable
8 terms and restrictions that are described in greater detail herein and in the accompanying
9 Memorandum of Points and Authorities that are enclosed with the Petition. A copy of the
10 Regional Board’s Order for the Final Permit (enclosing the Final Permit), and the
11 associated Fact Sheet for the Final Permit are collectively enclosed herewith as Exhibit A.

12 **III. DATE OF REGIONAL BOARD’S ACTION.**

13 The Regional Board adopted the Final Permit on November 18, 2015.

14 **IV. STATEMENT OF REASONS THE REGIONAL BOARD’S ACTION WAS**
15 **INAPPROPRIATE OR IMPROPER.**

16 The Regional Board failed to act in accordance with relevant governing law, and
17 acted arbitrarily and capriciously in violation of state and federal law with respect to
18 adoption of the Final Permit. Specifically, but without limitation, the following illustrative
19 acts and omissions of the Regional Board, which are described and analyzed more fully in
20 the accompanying Memorandum of Points and Authorities, were unlawful:

21 **1. No Interim Compliance:**

22 The Final Permit fails to conform to the State Board’s prior legal direction
23 and precedential orders in that the Final Permit holds all municipal dischargers strictly
24 liable if any City MS4 discharge is found to exceed receiving water limitations (“RWLs”).
25 The City is informed and believes that unlike other regional boards in the state that have
26 considered the issue of receiving water limitations, the Final Permit approved by the San
27 Diego Regional Board does not provide the City and the other Co-Permittees with “interim
28 compliance” protection from third party lawsuits, enforcement actions and criminal

1 penalties that might otherwise pertain where non-compliance with the federal Clean Water
2 Act is alleged. The failure of the Final Permit to provide interim compliance – an option
3 specifically authorized by the State Board in its June 16, 2015 Precedential Decision in
4 *Order WQ 2015-0075, In the Matter of Review of Order No. R4-2012-0175, NPDES*
5 *Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm*
6 *Sewer System (MS4) Discharges Within The Coastal Watersheds of Los Angeles County,*
7 *Except Those Discharges Originating from the City of Long Beach MS4* (“2015 LA MS4
8 Order”) – likely places the City and the other Co-Permittees in a state of non-compliance
9 for at least the next two years while a Water Quality Improvement Plan (“WQIP”) is
10 prepared for southern Orange County. The lack of interim compliance is particularly
11 troublesome for the City of Dana Point, whose immediate neighbor to the north, the City
12 of Laguna Beach, had to defend itself against a Clean Water Act citizen suit brought by the
13 environmental group California River Watch. The River Watch litigation alleged illegal
14 non-stormwater discharges into and out of the City of Laguna Beach’s MS4. Laguna
15 Beach’s defense of the lawsuit was extremely expensive and caused a substantial drain on
16 staff time and resources, which detracted from Laguna Beach’s robust stormwater and
17 water quality improvement programs.

18 **2. Liability for Non-Stormwater Discharges Where City Is Fully**
19 **Implementing Its Illicit Discharge and Prevention Program:**

20 The Final Permit unlawfully seeks to impose liability on MS4 permittees
21 who are not otherwise complicit or culpable in non-stormwater flows entering the City’s
22 MS4, and the Final Permit can be read to result in strict liability under the Final Permit
23 irrespective of whether non-stormwater flows ultimately reach a Water of the United
24 States.

25 **3. Receiving Water Limitations:**

26 Enforcing RWLs as water quality based effluent limits (“WQBELs”) or
27 enforceable numeric limitations in the Final Permit, and then imposing strict liability on
28 the City and the other Co-Permittees under the Clean Water Act when they cannot meet

1 RWL-derived WQBELs, violates state and federal law in the following ways, among
2 others:

3 1) Permit requirements that exceed the maximum extent
4 practicable (“MEP”) standard are imposed in the Final Permit under state law
5 and therefore must comply with Water Code sections 13241, 13263 and 13000.
6 The Regional Board did not comply with these provisions of the Water Code
7 when it required the City and the other Co-Permittees to comply with RWLs,
8 total maximum daily load (“TMDL”) numeric targets and WQIP numeric
9 requirements as enforceable WQBELs under the Final Permit.

10 2) Requiring strict compliance with a zero discharge limit, or
11 stringent numeric standards for municipal stormwater in impaired water bodies,
12 requires the City and other Co-Permittees to comply with Final Permit terms that
13 are not reasonably achievable and which may be impossible from a technical
14 perspective.

15 3) The Final Permit unlawfully seeks to jointly hold the City
16 responsible for sources of pollution that enter Clean Water Act jurisdictional
17 waters outside of the City’s jurisdiction or control.

18 4) The Final Permit improperly attempts to hold the City
19 responsible for discharges from the other Co-Permittees.

20 The above issues, and others, were raised to the Regional Board’s attention, either directly
21 by the City or through the County of Orange (the lead Co-Permittee) in written and oral
22 comments submitted to the Regional Board at various workshops, and in written comments
23 submitted during the public comment period on the Final Permit, and through oral
24 testimony and written evidence submitted by the City and its counsel at the November 18,
25 2015 hearing, and during the hearings on the two prior iterations of the Permit. Written
26 comments submitted by the City during the September 2015 public comment period are
27 attached hereto as Exhibit 1. Written materials submitted by the City, and presented to the
28 Regional Board during its November 18, 2015 hearing are attached as Exhibit E to the

1 concurrently submitted Memorandum of Points and Authorities.¹

2 V. THE MANNER IN WHICH THE CITY HAS BEEN AGGRIEVED BY THE
3 REGIONAL BOARD'S ACTION.

4 The manner in which the City has been and is aggrieved by the Regional Board's
5 action is described in greater detail in Section IV above and in the accompanying
6 Memorandum of Points and Authorities, which is enclosed with this Second Amended
7 Petition. Additionally, the City is aggrieved in that notwithstanding the City's long history
8 of aggressively pursuing and achieving improvements in water quality, the Final Permit
9 needlessly exposes the City to a constant and continuing threat of litigation under the
10 Clean Water Act for at least two years as a direct result of the Regional Board's decision to
11 provide no interim compliance in association with RWL enforcement while WQIPs are
12 prepared. A failure to amend the Final Permit to address and meet the City's concerns
13 may result in continued and new threats of litigation from third-party groups despite the
14 City's ongoing strong efforts to aggressively pursue and accomplish water quality
15 improvements whenever feasible.

16 As the State Board may know, Dana Point is a community where water quality is
17 highly valued and taken very seriously, and the City generally supports the actions of the
18 State and Regional Boards to make beaches and watersheds in southern Orange County
19 cleaner. In fact, as referenced above, the City has already invested in costly urban
20 stormwater diversion units that collect dry weather runoff and divert it to the sanitary
21 sewer system. Urban water diversion units have been installed and divert dry weather
22 flows from most of the City's drainage area, a fact that strongly argues in favor of
23 providing the City with interim and long-term compliance.

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26 ¹ The verbal and written comments presented by the County of Orange in connection
27 with and during the February 2015 hearing were also made on behalf of the City and the
28 other south Orange County Co-Permittees. The City also incorporates herein all of the
issues raised in the County's comments, albeit not specifically discussed in this Petition, to
the extent that such comments were not addressed by the Regional Board in its post-release
modifications to the Final Permit.

1 **VI. THE SPECIFIC ACTION REQUESTED OF THE STATE BOARD**
2 **THROUGH THIS PETITION.**

3 The City respectfully requests that the State Board place this Petition into abeyance
4 pursuant to section 2050.5(d) of title 23 of the California Code of Regulations. The City's
5 request is based on the fact that the issues raised in the Petition may be resolved or
6 rendered moot by subsequent actions and administration of the Final Permit by the
7 Regional Board and/or developments and judicial actions in other parts of the state.

8 **VII. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE**
9 **LEGAL ISSUES RAISED IN THIS PETITION.**

10 The City's Second Supplemental Memorandum of Points and Authorities in support
11 of its Second Amended Petition accompanies and is enclosed herewith, and its contents are
12 incorporated herein by reference. The City reserves the right to supplement this Second
13 Amended Petition, and its supporting Memorandum of Points and Authorities at such time
14 as the City may request that the State Board take all or a portion of the issues raised in the
15 Petition out of abeyance, and/or once the record of the administrative proceedings and a
16 complete transcript of the hearing to adopt the Final Permit becomes available.²

17 **VIII. NOTICE TO REGIONAL BOARD.**

18 A true and correct copy of this Second Amended Petition was sent to the Regional
19 Board by electronic mail and Federal Express on December 18, 2015.

20 **IX. ISSUES PREVIOUSLY RAISED.**

21 The substantive issues and objections raised in this Second Amended Petition were,
22 in sum and substance, all raised to the Regional Board through written and/or oral
23 comments that were provided to the Regional Board in the course of its adoption and
24 amendment of the Final Permit.

25
26 _____
27 ² The City may also request to leave to provide the State Board with additional reasons
28 why the Final Permit is inappropriate and/or improper. Any such additional reasons will
be submitted to the State Board as a proposed amendment to this Petition. Petitioner also
may dispute certain findings that form the basis of the Final Permit, which similarly will be
detailed in any proposed amendment to this Petition.

1 X. CONCLUSION.

2 For the reasons stated herein, and as may be submitted in supplemental pleadings as
3 allowed by the State Board, the City has been aggrieved by the Regional Board's approval
4 of the Final Permit and the obligations imposed by the Regional Board's order. However,
5 until such time as the City requests the State Board to actively consider some or all of the
6 issues in this Second Amended Petition, the City respectfully requests the State Board hold
7 this Petition, and its two prior Petitions on this Permit, in abeyance.

8 Dated: December 18, 2015

RUTAN & TUCKER, LLP
JEREMY N. JUNGREIS
A. PATRICK MUÑOZ
TRAVIS VAN LIGTEN

9
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11 By: 
12 Jeremy N. Jungreis
13 Attorneys for Petitioner
14 CITY OF DANA POINT
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EXHIBIT 1



Carlos N. Olvera
Mayor

John A. Tomlinson
Mayor Pro Tem

Joseph L. Muller

J. Scott Schoeffel

Richard A. Viczorek

September 14, 2015

Via Electronic Submission to sandiego@waterboards.ca.gov, Attn: Wayne Chiu

Honorable Henry Abarbanel, Chair
Honorable Board Members
Attn: Mr. Wayne Chiu
California Regional Water Quality Control Board
San Diego - Region 9
2375 Northside Drive, Suite 100
San Diego, California 92108

Dear Chairman Abarbanel, Honorable Board Members, and Mr. Chiu:

Subject: Comment Letter — Tentative Order No. R9-2015-0100 Place ID: 786088WChiu

As the Mayor of the City of Dana Point, I write to express the City's serious concerns with certain aspects of the proposed amendments to San Diego Regional Water Quality Control Board ("Board") Tentative Order No. R9-2015-0100 (Tentative Order) amending Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 ("Regional Permit"). I understand from my staff that the current revisions to the Regional Permit, if they are not amended to address the concerns raised in this letter, put the City of Dana Point (and other southern Orange County Cities) at risk of large unfunded liabilities without a meaningful path to obtain "compliance" with the Regional Permit (and by extension the Clean Water Act) for up to 18 months (and potentially longer). Of even greater concern, the open ended liability potentially created by the Regional Permit in its current form is likely to lead to litigation and piecemeal development of projects in response to specific federal court orders rather than a careful and collaborative process to develop and implement achievable watershed-wide water quality improvement plans ("WQIPs") for southern Orange County that will protect water quality within the City. I hope that the Board will seriously consider the City's comments provided in this letter and make revisions to the Regional Permit accordingly. I'd also ask that you carefully consider the comments provided by the legal counsel (attached to this letter as Exhibit A) in making needed changes to the Regional Permit prior to approval.

1. *The City is Already an Environmental Leader With a Strong Ethos for Clean Water*

I would not have sent this letter unless I was convinced the current approach advocated in the Regional Permit is likely to do more harm than good for the City's and Region's water quality improvements. I also realize that the City owes much of its success and economic prosperity to its high quality water resources and beaches. A clean environment is one of the things that draws people to the City of Dana Point. Dana Point citizens want clean water, but they also want regulations that achieve desired environmental outcomes in a reasonable manner, and at a cost that is proportional to benefits

received. The City's ethos of practical and proactive water quality regulation owes much to the City's former Mayor, Wayne Rayfield, a long-time advocate for ocean water quality, who served on the San Diego Regional Board from 2007 until 2012 and currently serves as the President of the Board for South Coast Water District, the City's main water and sewer agency. During Mr. Rayfield's tenure in City leadership, the City became a pioneer in efforts to eliminate stormwater pollution, and the City's extensive program to systematically improve and maintain water quality can be found on the City's website at www.danapoint.org/waterquality.

In addition to implementing source control management strategies and a robust illicit discharge control program, the City championed watershed-based management and elimination/diversion of dry weather discharges long before the City was directed to do so by the Regional Board. The City's approach to water quality is catalogued in the City's Strategic Plan (www.danapoint.org/index.aspx?page=54) and in the City's Guidance Document entitled "Protect Our Earth, Protect Our Ocean, a Paradigm for Water Quality." The Guidance Document is available online at www.danapoint.org/Modules/ShowDocument.aspx?documentid=3195, and it describes on pages 6-7 the City's 18 existing dry weather diversions that effectively capture most of the dry weather flows attributable to non-stormwater discharges of human origin within the City. These sanitary sewer diversion facilities were constructed at a cost of approximately 12 million dollars—primarily funded by City residents. The City also has pioneered innovative and extensive dry weather treatment Best Management Practices, such as the award-winning Salt Creek ozone Treatment Facility, bans on styrofoam and other types of plastics likely to wind up in City waters, a robust street sweeping program, and partnerships with local water districts to curb and eliminate excess irrigation that leads to runoff. Dana Point, as its Guidance Document and extensive list of water quality improvement projects can attest, is a City that is willing to do its share to address stormwater pollution and maximize water quality. Unfortunately, as addressed below, it does not appear that the Regional Permit (as proposed) is likely to lead to measurable water quality improvements within the City, only new costs and potential liabilities.

2. *Areas of Concern and Recommendations for Improvement*

a. *The City Needs Interim Compliance While it Develops the Required WQIP for Southern Orange County.* Dana Point supports in principle the WQIP concept as a practical vehicle for solving difficult water quality problems on a watershed-wide basis. The County and City staff have already demonstrated success in working collaboratively with other southern Orange County stakeholders, public and private, as evidenced by the South Orange County Watershed Management Area (SOCWMA), and will build on this experience and success to develop a scientifically defensible plan and associated projects that have the potential for enhanced protection of City waters. However, the proposed Regional Permit's departure from the previous best management practice ("BMP") based iterative approach to water quality improvement in favor of a strict liability framework during WQIP development is likely to pose severe compliance challenges for the City—making it far more difficult to adopt a collaborative problem solving posture.

Under the current language proposed by Board staff, the City will be potentially liable for a violation of the Regional Permit, and thus the Clean Water Act, every time it rains. While the City has

already diverted the vast majority of dry weather flows to the sanitary sewer (at great expense), it is not feasible to do so during wet weather due to sanitary sewer facility capacity and cost, and indeed trying to do so would risk drying up existing beneficial uses in San Juan Creek and other drainages within the City (indeed the drought has had a severe effect on riparian habitat in some locations—a condition that removing all runoff from the City MS4s could exacerbate). Because the San Diego Board has some of the most stringent water quality objectives in the state for bacteria, nutrients, and other contaminants that are in many cases caused by natural processes, it is likely that wet weather discharges from the City's MS4, at least some of the time, will contain pollutant concentrations in excess of the very stringent receiving water limitations contained in the San Diego Basin Plan. When that happens, if the Regional Permit is not amended, the City will presumably be strictly liable to third parties under the CWA—notwithstanding that any exceedances may have little or no nexus to controllable pollution within the City's boundaries. This is not a fair outcome, and we believe that it is not what Congress intended when it required regulation of municipal stormwater under the CWA in 1987.

It is my understanding that other Regional Boards around the state are also developing alternative compliance options ("ACOs") that would avoid the potentially harsh results associated with exceedances of receiving water limitations described in the last paragraph. Under the approach sanctioned by the State Water Resources Control Board ("State Board") in June of this year, municipal stormwater permittees that agree to participate in development of a WQIP, or a WQIP like plan for improving water quality, are deemed to be in compliance during the preparation and implementation of the WQIP if the permittee otherwise complies with the terms and timelines of its MS4 Permit (and the WQIP once it is developed/approved). The ACOs proposed in the current version of the Regional Permit, on the other hand, would leave the City strictly liable for any exceedance of basin plan standards (whether the result of City culpability or not), even as the City continues to aggressively implement its water pollution prevention efforts—leaving it vulnerable, potentially on a permanent basis, to third party lawsuits for any random exceedance even as it aggressively implements its robust clean water program.

Fundamentally, the City is most concerned with the current framework because it mandates the development of expensive projects and the City's extensive regulation of the day to day behavior of City residents where such actions may do very little to actually achieve water quality objectives (since impairment in the San Diego Region may be a result of non-point sources of pollution or non-controllable sources), while at the same time providing no assurances that the City will ever obtain compliance during and after WQIP development. At minimum, the current proposed ACOs proposed in the Regional Permit would have the City out of compliance with the Regional Permit, and subject to increasingly frequent CWA litigation, for a period of up to two years while the WQIP is in development, and this assumes that the Regional Board quickly acts to approve a southern Orange County WQIP. To be successful in improving water quality and maximizing the likelihood of obtaining numeric water quality objectives, the WQIP needs to be a data intensive and collaborative effort between the City, environmental advocates, the Regional Board and all of the other south Orange County stormwater permittees (and recycled water producers—who themselves may contribute significant loading to area streams). The WQIP, in order to obtain the reductions in non-point source pollution that are likely to be required, will have to be creative—with opportunities for offsets and other "credits" that provide compliance to municipal dischargers in exchange for undertaking projects that reduce or eliminate non-

point sources of pollution that the dischargers did not cause. The WQIP for southern Orange County, if it is to be effective, will not be a plan that can be developed quickly, or in a vacuum. Thus, the ability of the City to have interim compliance while working with its neighbors to develop a scientifically rigorous and effective WQIP—a plan that will accomplish what it was intended to do—becomes all the more important.

The City understands that most of the other Regional Boards around the state appear intent on providing ACOs for municipal dischargers that include some form of interim compliance while watershed based plans are in development. The San Diego Board should follow suit. Failure to provide interim compliance is fundamentally unfair for Cities like Dana Point that are already aggressively combatting stormwater pollution. The City would rather work collaboratively with the Regional Board (and the City's neighbors), as a full partner in the development of a robust WQIP that will result in significant and meaningful reductions in water pollution throughout southern Orange County. However, the current Regional Permit language that imposes strict liability for exceedances of water quality objectives—exceedances that appear inevitable no matter what action the City takes or doesn't take—will, because of the likelihood of liability to third parties, push the City away from collaborative efforts and towards a more defensive posture associated with litigation defense. This outcome is not good for the Regional Board, the City, or for southern Orange County watersheds. I accordingly ask you to strongly consider adding to the Regional Permit a mechanism for interim compliance for southern Orange County agencies who aggressively pursue WQIP development and implementation. It is the right thing to do, and the Regional Board can only gain by providing such a provision.

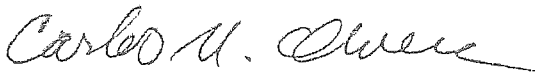
b. *It is Unfair to Impose Strict Liability for Non-Stormwater Discharges to the MS4 Where Nuisance Flows Are Diverted, and the Permittee Is Aggressively Implementing Its Illicit Discharge Program:* As the SWRCB acknowledged in its recent LA MS4 precedential order, preventing all non-stormwater runoff into an MS4 system can be a nearly impossible standard to meet at times since third parties—such as residents watering their lawns in a reasonable manner— may cause at least some incidental runoff to enter the City's MS4. Other Regional Boards have determined that permittees are in compliance with the CWA's direction to "effectively prohibit" all dry weather discharges when the City is implementing its illicit discharge prevention program and diverting, where feasible, residual "nuisance" flows to the sanitary sewer prior to entering a stream or the ocean. However, the Regional Permit in proposed paragraph E.2 of the Regional Permit, would arguably impose liability on the City even where: (1) all or most dry weather flows are diverted before the water reaches a Water of the State; (2) the discharge to the MS4 resulted from actions that the City may have very limited ability to control (such as sewer spills that are the responsibility of separate sewer agencies and runoff from irrigation of the steep slopes that predominate in Dana Point); (3) the City was fully implementing its illicit discharge prevention program. I respectfully ask that the Board direct its staff to work with the City to develop clarifying language, such as that recommended by our legal counsel in Exhibit A, that explains liability for non-stormwater discharges entering the MS4 is only appropriate when discharges are the result of culpability on the part of the City.

The City has other concerns that are reflected in Exhibit A, all of which the City incorporates herein by reference and formally requests that the Board consider. The City also reincorporates and reiterates here all of the comments it previously made on prior iterations of the Regional Permit and the

comments provided by the County of Orange submitted under separate cover. However, resolution of the issues discussed in this letter would go a long way towards resolving the City's concerns with the Regional Permit on a permanent basis.

I thank you for your consideration, and I look forward to a productive dialogue between our respective staffs that produces a win-win outcome for the City, the Regional Board and water quality in the San Diego Region.

Sincerely,



Carlos N. Olvera
Mayor

Attachment: Exhibit A

CC: David Gibson, Executive Officer, SDRWQCB
Patrick Munoz, Jeremy Jungreis, Rutan & Tucker LLP
Doug Chotkevys, Brad Fowler, Lisa Zawaski, Dana Point
Orange County Copermittees

Exhibit A

September 14, 2015

VIA ELECTRONIC MAIL

Mr. Wayne Chiu
Regional Water Quality Control Board, San
Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108
sandiego@waterboards.ca.gov

Re: Comments of the Cities of Dana Point and Laguna Beach on Proposed Tentative
Order No. R9-2015-0100, Place ID: 786088

Dear Mr. Chiu:

This letter, which supplements and augments the letters submitted concurrently by the Mayors of the Cities of Dana Point and Laguna Beach, constitutes the further legal and technical comments of the Cities of Laguna Beach and Dana Point (the "Cities") to proposed amendments to San Diego Regional Water Quality Control Board ("Board") Order No. R9-2013-0001 (as amended by Order No. R9-2015-0001), proposed as Tentative Order No. R9-2015-0100 (the "Regional Permit"). The Cities also incorporate by reference, and assert as if separately stated herein, the comments submitted by the County of Orange ("County") on September 14, 2015, and the previous comments on the Regional Permit submitted by, or on behalf of, the City of Dana Point.¹

The Cities appreciate the efforts of Regional Board staff to collaboratively engage the Permittees and other stakeholders in workshops where a variety of views on the question of receiving water limitations ("RWLs"), and how they should be achieved, were expressed. This manner of comment and stakeholder participation worked well in allowing all viewpoints to be expressed with sufficient time for vigorous discussion of issues with the Regional MS4 Permit. The Cities are hopeful that the issues addressed in this letter can be resolved via further

¹ The Cities by this reference incorporate, to the maximum extent allowed by law, all prior letters, comments, reports, presentations, oral and written testimony, data, communications, and other evidence made by, on behalf of, and in support of the County of Orange during the various workshops, hearings, and meetings relevant to the adoption of Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and Tentative Order No. R9-2015-0100. The Cities reserve the right to provide further comment as applicable.

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productive dialogue prior to the approval hearing for the Regional Permit scheduled for November 18.

1. LEGAL CONCERNS WITH RECEIVING WATER LIMITATIONS AND ALTERNATIVE COMPLIANCE OPTIONS.

a. IT IS LIKELY IMPOSSIBLE, AND CERTAINLY NOT "PRACTICABLE," TO COMPLY WITH ALL OF THE DISCHARGE PROHIBITIONS IN THE REGIONAL PERMIT UNDER ALL CIRCUMSTANCES

Part II.A.2 (a) of the Regional Permit strictly prohibits discharges of municipal stormwater to Waters of the U.S. that do not meet all water quality objectives—notwithstanding that such discharges may in fact control pollutants to the “maximum extent practicable,” and notwithstanding that exceedances of numeric objectives in the San Diego Basin Plan may be the result of factors that the Cities have no ability to control. In other words, as currently drafted, the Regional Permit will impose strict liability on the Cities for regulatory requirements that will, in some cases, be impossible to meet,² no matter how robust or aggressive the WQIP ultimately developed. Imposing strict liability on the Cities and thereby subjecting them to CWA Citizen Suits and Regional Board enforcement every time it rains,³ when there is no realistic possibility of ever achieving the currently applicable numeric RWLs, is inconsistent with both state and federal law. Neither requires municipal stormwater permittees, who unlike private businesses do not have the option to “go out of business” (or otherwise shut down non-compliant stormwater facilities), to achieve the impossible, or to control what MS4 permittees have no ability or authority to control. (See CA Civ. Code, § 3531 [“The law never requires impossibilities”]; CA.

² As Regional Board staff is aware, some of the existing water quality objectives in the San Diego Basin Plan which give rise to the receiving water limitations referenced in Section II.A.2, may be at or below natural background levels, or be set at levels so low that they cannot be achieved without diverting all of the water in the MS4 to a reverse osmosis (“RO”) treatment plant—thereby in most cases removing the water from the watershed altogether and changing its composition in ways that could be harmful to the watershed if reintroduced post-treatment (See, e.g., <http://news.stanford.edu/news/2015/september/arsenic-mystery-solved-090215.html> [Stanford study showing association between rising arsenic levels and water treated with RO]). Even with RO treatment, it still would not be possible to reliably meet the current default San Diego Basin Plan standard for total nitrogen in surface waters of 1 part per million. (See, e.g., *U.S. v. Eastern Municipal Water District* Case. No. CV 04-8182 (C.D. Ca 2010) (noting infeasibility of meeting 1 ppm total nitrogen standard required for NPDES issuance).

³ (See, e.g., *NRDC v. County of Los Angeles* (C.D. Cal. Mar. 30, 2015) 2015 U.S. Dist. LEXIS 40761 [“Defendants are liable for the 147 exceedances described in Defendants’ monitoring reports, which the Ninth Circuit found were conclusively demonstrated to be Permit violations by Defendants’ own pollution monitoring.”].)

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Civ. Code, § 3526 ["No man is responsible for that which no man can control"]; *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1162; *Hughey v. JMS Dev. Corp.*, (11th Cir. 1996) 78 F.3d 1523, 1527-29; *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, (2d Cir. 1993) 12 F.3d 353.)

The *Hughey* case referenced above is material to the scenario faced by the Cities with regard to the Regional Permit. In *Hughey*, the Plaintiff sued Defendant JMS for an alleged failure to obtain a storm water permit for the discharge of storm water from its construction project. The Plaintiff argued JMS had no authority to discharge any quantity or type of storm water from the project, i.e. a "zero discharge standard." until JMS had first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was discharged from its property and that it had not obtained an NPDES permit (allegedly in contravention of 33 U.S.C. § 1311), but claimed it was not in violation of the Clean Water Act because the Georgia Environmental Protection Division, the NPDES permitting authority, was not yet able to issue such permits. As a result, it was impossible for JMS to comply. (*Id.*) The Eleventh Circuit Court of Appeal held that the CWA does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (*Id.* at 1529.) Specifically, the 11th Circuit found that: "*Congress could not have intended a strict application of the zero discharge standard in section 1311 (a) when compliance is factually impossible.* The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge. . . Lex non cogit ad impossibilia: The law does not compel the doing of impossibilities." (*Id.*)

b. IT IS PARAMOUNT THAT THE REGIONAL PERMIT PROVIDE INTERIM COMPLIANCE

The ultimate outcome of imposing an unachievable discharge prohibition during the preparation and implementation of WQIPs will not be to improve water quality, but instead to increase litigation and costs incurred by public agencies in fighting enforcement actions and citizen suits, an opportunity not lost on entrepreneurial plaintiffs' attorneys. As the Regional Board is aware, the State Water Resources Control Board ("SWRCB") issued WQ 2015-0075 (hereinafter LA MS4 Order) in June of 2015. The LA MS4 Order is a precedential order that provides an alternative compliance option ("ACO") to permittees that would at least permit the Cities to remain in compliance with the CWA notwithstanding the current inability to demonstrate current attainment of all water quality standards in receiving waters at all times. Under the approach approved by the SWRCB, a city that agrees to participate in the development of the LA Regional Board's equivalent of a WQIP is deemed to be in compliance during the preparation of the WQIP if the city otherwise complies with the terms and timelines of its MS4 Permit. The "in compliance" status remains for as long as the city continues to diligently perform its obligations under the ACO in furtherance of projects and management actions that

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result in the ultimate achievement of water quality objectives (which the LA Regional Board admitted would likely take decades in some cases). The ACO proposed in the current version of the Regional Permit, on the other hand, would hold the Cities strictly liable immediately for any exceedance (whether the result of the Cities' culpability or not), even as the Cities continue to spend substantial sums to develop projects that reduce pollution.

Perhaps more significantly, the approach proposed in the Regional Permit is, from what the Cities have learned, different from the approach currently being considered by other Regional Board in the state, in that the WQIP provides no interim compliance of any kind while the WQIP is in development (a period of 18 months in Orange County assuming no extensions are granted), and indeed the proposed ACO provides no compliance to any MS4 until such time as all of the watersheds within southern Orange County can demonstrate to a level of certainty that implementation of the WQIP will actually result in the complete achievement of all numeric water quality objectives—a task in and of itself that, as previously referenced, may not be physically possible in some locations for certain naturally occurring constituents such as bacteria, nutrients and metals. To be successful in improving water quality to the maximum extent within the Cities, the WQIP needs to be deliberate, scientifically rigorous, and a collaborative effort between the Cities, concerned citizens, the Regional Board and all of the other south Orange County stormwater permittees.

The current version of the Regional Permit would make such an effort difficult to achieve. All of the Orange County Co-Permittees, being currently out of compliance (and unlike the San Diego County permittees having no draft plan already completed), and facing CWA citizen suits at any time during plan development, will be forced to rush to develop a plan that may have little chance of being funded (Prop 218 and Prop 26 limitations) or implemented, while at the same time Co-Permittee funds that would otherwise go to collaboratively developing scientifically validated projects with immediate water quality benefits will need to be held back to facilitate ability to defend against filed by environmental groups seeking to impose strict liability. Meanwhile, the Regional Board will presumably have less and less influence over the process of improving water quality as collaborative efforts break down and decisions about water quality projects, improvement plans, and pertinent timelines, shift to Federal Judges and environmental plaintiffs rather than the Regional Board. All sides would benefit from a carefully tailored interim compliance option that ensures rapid preparation of the WQIP while also ensuring the WQIP effort is not rendered superfluous by Federal Court decisions and consent decrees that may impose disparate and conflicting obligations on different permittees throughout the San Diego Region.

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c. THE REGIONAL PERMIT SHOULD PROVIDE FOR THE DEVELOPMENT OF SITE SPECIFIC OBJECTIVES

The impossibility/impracticability of ever attaining RWLs in San Diego Region watersheds could be mitigated by specific reference in the Regional Permit to the potential development of site specific objectives that would potentially be attainable while also ensuring full protection of existing beneficial uses in southern Orange County. However, the San Diego Regional Board Staff has historically resisted stakeholder efforts to develop attainable site specific objectives for bacteria, nutrients and toxics, and has not offered the possibility of site specific objective development as a potential mechanism for the Cities to obtain long term compliance in conjunction with WQIP development. Taken to its logical conclusion, the Regional Board's current position on strict liability of MS4s for non-attainment of existing numeric objectives could result in development moratoria, and inability of local water agencies to undertake any kind of significant recycled water project requiring storage or conveyance of recycled water (or otherwise resulting in increased nutrient or salinity loading to southern Orange County streams).

San Juan Creek, which has been discussed as a potential site for a large scale indirect potable reuse ("IPR") project to recharge the depleted San Juan Groundwater Basin (classified as a surface water by the SWRCB), is already listed as being impaired for total nitrogen and phosphorous according to the 2012 SWRCB 303 (d) list. Since RO cannot reliably take recycled water below 1 ppm total nitrogen, and the 303 (d) listing indicates that there is no current assimilative capacity in San Juan Creek, it is unclear how such a project could ever be permitted by the Regional Board—notwithstanding the San Diego Region's dire need for additional local water supplies, and the Regional Board's desire to curtail existing ocean outfall discharges whenever practicable. Accordingly, the Cities, both of whom could benefit from the development of additional recycled water supplies in the Region, recommend that the Regional Permit and Staff Report specifically acknowledge the potential wisdom of developing site specific objectives in concert with the mandated WQIP development—even where site specific development may extend the period required to complete the WQIP process.

2. DISCHARGES OF NON-STORMWATER SHOULD NOT GIVE RISE TO LIABILITY UNDER THE PERMIT WHERE THE PERMITTEE IS FULLY IMPLEMENTING ITS ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM.

The Cities understand the desire of the Regional Board to prohibit discharges of non-stormwater "dry weather" or "nuisance" flows to the MS4. Such flows may, at times, contain significant amounts of pollutants that impair beneficial uses, so diversion of such flows where feasible makes sense. And that is precisely what both Cities have done in their respective service areas with the installation of dry weather flow diversion units that divert nuisance flows

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whenever feasible.⁴ However, language in Section E.2 can be read to hold the owner of the MS4 strictly liable under the Regional Permit where non-permitted discharges enter the MS4 and the owner of the MS4 did not otherwise prevent them from occurring. Indeed, it is often difficult for an MS4 operator to even identify the source of the broad universe of what the Regional Permit defines as illicit discharges on a given day (e.g., numerous houses in a neighborhood may be the cumulative cause of small amounts of runoff entering an MS4 with the “source” of the “non-stormwater discharge” varying each day according to residential irrigation patterns).⁵ As the SWRCB acknowledged in footnote 133 of its recent decision in the LA MS4 Decision, Order No. WQ 2015-0075, “[w]e recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges.”

Because of the apparent intention of some environmental groups, as evidenced by recent Federal Court filings initiating Clean Water Act citizen suits (and seeking strict liability for alleged violations of MS4 permits), to impose liability on cities who are otherwise fully implementing their illicit detection programs (and diverting non-stormwater flows, whenever feasible, to the sanitary sewer),⁶ the Cities urge the Regional Board to clarify that it does not intend to impose liability on MS4 permittees who are not otherwise complicit or culpable in dry weather flows entering the MS4 (and subsequently a Water of the U.S.). Accordingly, the Cities respectfully request that the Regional Board amend Section II.E.2 of the Regional Permit to read as follows:

“Each Copermittee must implement a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit. Compliance with the terms of this Provision E.2 shall constitute compliance with the requirement under Provision A.1.b to “effectively prohibit” non-

⁴ Dry weather diversions may be infeasible within the Cities where inadequate sewer line or wastewater treatment plant capacity exists, where the flows are a mix of non-stormwater runoff and rising groundwater, or where the geography or hydrology of the location makes installation of the units impracticable to install or maintain.

⁵ It will also be very difficult for the Cities to determine on any given day what volume of dry weather (and wet weather) discharges are derived from separately permitted activities, or activities that fall outside of the CWA altogether such as agricultural return flows. To the extent that such identification is even physically possible, it may nevertheless be impossible for the Cities to determine which sources of dry weather flows are benign and which ones contain pollutants above RWLs.

⁶ On at least two occasions within the past six months, the environmental group River Watch has sued MS4 operators for allegedly violating the prohibitions on municipal stormwater discharges that exceed RWLs, and for allegedly permitting non-stormwater discharges to enter the MS4 from non-permitted sources. The concerns expressed herein regarding third party liability associated with the Regional Permit are far from theoretical.

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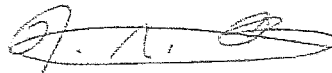
storm discharges into the MS4, provided the Copermittee is in full compliance with all requirements in this Provision E.2 or is otherwise working diligently to address any identified deficiency. The illicit discharge detection and elimination program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements . . .”

It would also be beneficial for the Regional Board to clarify the definition of “discharges from potable water sources” in Section II.E.2.a (3)(f). Potable water used for residential irrigation that runs off in small quantities (and not otherwise invoking an issue of wasteful water use) would potentially be appropriate for exclusion from treatment as an illicit discharge (allowing permittees to focus on illicit discharges with significant water quality ramifications). However, as currently drafted, it is not clear whether “potable discharges” are intended to include runoff derived from turf or ornamental plant irrigation.

Thank you for the opportunity to comment. Both Cities look forward to working with Regional Board staff to develop language that will address the concerns expressed herein.

Very truly yours,

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CITY OF DANA POINT

8
9
10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
11

12 In the Matter of:

13
14 The California Regional Water Quality
Control Board, San Diego Region's
15 Adoption of Order No. R9-2015-0001,
amending Order No. R9-2013-0001,
16 NPDES No. CAS0109266

**PETITIONER CITY OF DANA
POINT'S SECOND SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SECOND AMENDED PETITION FOR
REVIEW, A-2254(k)**

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

[Concurrently filed with Petition for Review]

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1 **I. PRELIMINARY STATEMENT AND RESERVATION OF RIGHTS.**

2 The City of Dana Point ("City") has filed this Second Amended Petition for Review
3 ("Second Amended Petition" or "Petition") to the State Water Resources Control Board
4 ("State Board") requesting that the State Board review and set aside all or portions of
5 Order No. R9-2015-0100 ("the Final Permit" or "Permit") that was adopted by the
6 California Regional Water Quality Control Board, San Diego Region ("SD Regional
7 Board") on November 18, 2015, which amended and readopted in full Order No. R9-2015-
8 0001 ("First Amended Permit") and Order No. R9-2013-0001, NPDES Permit No.
9 CAS0109266 ("Initial Permit"). A copy of the Regional Board's Order approving the
10 Final Permit, and the Fact Sheet for the Final Permit, are collectively attached hereto as
11 Exhibit A.¹

12 In written comments submitted on September 14, 2015, the City incorporated by
13 reference all prior letters, comments, reports, presentations, oral and written testimony,
14 data, communications and other evidence, made by, on behalf of and in support of the
15 City, the County of Orange, and the various Orange County Co-Permittees that submitted
16 comments or petitions on the Initial Permit, the First Amended Permit, or the Final Permit,
17 and during the various workshops, hearings and meetings relevant to the adoption of Order
18 No. R9-2015-0100, including comments made during the adoption of Order No. R9-2013-
19 0001 and Order No. R9-2015-0001 ("Comments"). The Final Permit has been adopted as
20 a phased approach consisting of three separate enrollments for San Diego, Riverside and
21 Orange counties. Thus, Comments made during the prior adoption proceedings are
22 relevant to the adoption of the Final Permit and should be included as part of the

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25 ¹ Given the procedural irregularity of three separate permit adoption hearings, each of
26 which building on the last one, it was unclear to the City whether it needed to file an
27 additional amended Petition, or file a new Petition for Review. The Regional Board's re-
28 adoption of the Permit on November 18, 2015, and application of the readopted Permit to
dischargers who had never before been subject to its terms, did not provide additional
clarity. Accordingly, to the extent that the filing of a petition captioned as an amended
petition is in any way procedurally improper, the City requests that the State Board treat
this Petition as a Petition for Review challenging the Board's November 18, 2015 approval
of the Permit.

1 administrative record. The Regional Board has previously acknowledged that Comments
2 made during the various adoption proceedings for the Permit would be incorporated by
3 reference and a part of the administrative record.

4 The City submits this Memorandum of Points and Authorities in support of its
5 Petition, but asks that the entire Petition, this Memorandum of Points and Authorities, and
6 all other exhibits and supporting materials enclosed herewith be held in abeyance.
7 Additionally, the City joins with and incorporates, by this reference, the portion of the
8 Memorandum of Points and Authorities submitted by the County of Orange and the
9 Orange County Flood Control District, which challenges the Regional Board's authority to
10 issue a region-wide permit on the grounds that: a) The Permit Requires Strict Compliance
11 with Water Quality Standards, b) Federal Law Does Not Require Strict Compliance with
12 Numeric Limits, c) The Regional Board Acted Contrary to State Board Precedential Order
13 WQ 2015-0075, d) The WQIP Development Process is Sufficiently Constrained and
14 Reasonable Such That Compliance Should Be Afforded During This Time Period.
15 However, as with the City's other arguments, **the City asks that any arguments**
16 **incorporated by reference herein be held in abeyance.**

17 **A. Summary of Argument: Unlawful Aspects of the Final Permit.**

18 This Second Amended Petition is ripe because the approval of the Final Permit by
19 the SD Regional Board is a final action of the Regional Board pursuant to California Water
20 Code section 13320(a). The City respectfully requests that the State Board review and set
21 aside all or portions of the Final Permit for the following principal reasons:

22 **1. No Interim Compliance:**

23 The Final Permit fails to conform to the State Board's prior legal direction and
24 precedential orders in that the Final Permit holds all dischargers strictly liable if any City
25 MS4 discharge is found to exceed receiving water limitations ("RWLs"). Unlike every
26 other regional board in the state to consider the issue, the Final Permit approved by the SD
27 Regional Board fails to provide the City and the other Co-Permittees with "interim
28 compliance" protection from third-party lawsuits, enforcement actions and even criminal

1 penalties that might otherwise apply where, notwithstanding the implementation of robust
2 best management practices (“BMPs”) to control stormwater pollution, a permittee is found
3 to have violated one or more conditions of its MS4 Permit. The failure of the Final Permit
4 to provide meaningful interim compliance protection to the City and the other Co-
5 Permittees – a compliance option that was specifically authorized by the State Board in its
6 June 16, 2015 Precedential Decision, *Order WQ 2015-0075, In the Matter of Review of*
7 *Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements*
8 *for Municipal Separate Storm Sewer System (MS4) Discharges Within The Coastal*
9 *Watersheds of Los Angeles County, Except Those Discharges Originating from the City of*
10 *Long Beach MS4* (“2015 LA MS4 Order”) – unfairly places the City and the Orange
11 County and Riverside County Co-Permittees in a state of noncompliance for at least the
12 next two years, which is the minimum time it will take to complete and obtain approval of
13 a Water Quality Improvement Plan (“WQIP”) as an alternative compliance option
14 (“ACO”). After two years, and the expenditure of millions of public funds to pay for the
15 development of WQIPs, thereby accomplishing watershed planning functions normally
16 undertaken and funded by Regional Boards as part of the total maximum daily load
17 (“TMDL”) development process, the City has no guarantees of compliance even if it has
18 done everything it is supposed to do under the Permit during the WQIP development
19 process.

20 **2. Liability for Non-Stormwater Discharges Where City Is Fully**
21 **Implementing Its Illicit Discharge Prevention Program:**

22 The Final Permit unlawfully seeks to impose liability on MS4 permittees who are
23 not otherwise complicit or culpable in non-stormwater flows entering a permittee’s MS4,
24 and irrespective of whether such non-stormwater flows ultimately reaches a “Water of the
25 United States.”

26 **3. Receiving Water Limitations:**

27 Enforcing RWLs as water quality based effluent limits (“WQBELs”) or other
28 numeric limitations in the Final Permit, and then imposing strict liability on the Co-

1 Permitees under the Federal Water Pollution Control Act (hereinafter “Clean Water Act”
2 or “CWA”) when they cannot meet RWL-derived WQBELs and numeric limitations,
3 violates state and federal law in the following ways:

4 a) Permit requirements that exceed the maximum extent
5 practicable (“MEP”) standard are imposed in the Final Permit under state law
6 and therefore must comply with Water Code sections 13241, 13263 and 13000.
7 The SD Regional Board did not comply with these provisions of the Water Code
8 when it required the Co-Permitees to comply with RWLs as WQBELs, and the
9 billions of dollars it is anticipated to cost the Orange County Co-Permitees to
10 meet the numeric effluent limits imposed in the Final Permit,² aptly
11 demonstrates the SD Regional Board’s failure to comply with Water Code
12 sections 13263, 13241 and 13000 when it approved the Final Permit.

13 b) Requiring strict compliance with a zero discharge limit, or
14 attainment of stringent numeric standards for municipal stormwater entering
15 receiving waters, requires the Co-Permitees to comply with Final Permit terms
16 that are not reasonably achievable, and in some cases impossible to achieve.

17 c) The Final Permit unlawfully seeks to jointly and severally hold
18 the City responsible for sources of pollution that enters CWA jurisdictional
19 waters outside of the City’s jurisdiction or control.

20 For these and other reasons, as demonstrated in greater detail below, the City respectfully
21 requests that its Petition be granted and that the challenged terms of the Final Permit be
22 disapproved.

23 **B. Standard of Review.**

24 The State Board, in reviewing a petition challenging final regulatory action by a
25 regional board, must exercise its independent judgment to determine whether the regional
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27
28 ² See County of Orange, Draft Initial Cost Opinion, South Orange County Water Quality
Improvement Plan, November 6, 2015 (hereinafter “South OC Draft Initial Cost Opinion”
(submitted to SD Regional Board on November 18, 2015), enclosed herewith as Exhibit B.

1 board's action was reasonable.³ The Final Permit in this matter, like any administrative
2 decision, must be accompanied by findings that allow the State Board to "bridge the
3 analytic gap between the raw evidence and ultimate decision or order."⁴ Here, there are no
4 such factually substantiated findings that bridge the analytic gap between the SD Regional
5 Board's decision and the administrative record – as to the imposition of strict liability on
6 what could amount to every municipality in three counties, potentially for an extended
7 period of time,⁵ for alleged impairments that the Co-Permittees may have little or no
8 ability to control.

9 **C. Incorporation of Prior Comments.**

10 In written comments submitted to the SD Regional Board on September 14, 2015,
11 the City incorporated by reference all prior Comments made by, on behalf of and in
12 support of the OC Co-Permittees during the various workshops, hearings and meetings
13 relevant to the adoption of Order No. R9-2015-0100, including written and verbal
14 comments made during the adoption of Order No. R9-2013-0001 and Order No. R9-2015-
15 0001. The Final Permit adopted by the SD Regional Board on November 18, 2015
16 consisted of three separate enrollments for San Diego, Riverside and Orange counties and
17 the cities within each county. Thus, Comments made during the prior adoption
18 proceedings are relevant to the adoption of Order No. 2015-0100 and should be included
19 as part of the administrative record. As previously indicated herein, the City also
20 submitted comments, and Petitions to the State Board, on the Initial Permit and the First
21 Amended Permit.

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23
24 ³ *In re Stinnes-Western Chemical Corp.*, WQ Order No. 86-16 (June 20, 1986).

25 ⁴ *Topanga Ass'n for a Scenic County v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

26 ⁵ Even with the SD Regional Board's grudging approval of a narrow "Alternative
27 Compliance Option" in the Final Permit that, according to the Chair of the SD Regional
28 Board, was approved, in part, because it "saves us from having to send our Executive
Officer in the next six months to Sacramento to explain to the State Board why we
thumbed our nose at them," the Alternative Compliance Option approved in section
II.B.3.c of the Final Permit is likely to be of little value if approval of such an option is
contingent upon a Permittee proving it can guarantee future attainment of water quality
standards.

1 **II. PRELIMINARY STATEMENT WHY THE FINAL PERMIT IS UNLAWFUL.**

2 The SD Regional Board's decision on November 18, 2015 may be the first of its
3 kind. Unfortunately, it is unique for the wrong reasons. No other court or administrative
4 board, to the City's knowledge, has ever ordained that an entire region should be, and
5 should remain, in non-compliance under the Clean Water Act for pollutant loadings that
6 may be beyond the ability of MS4s to reasonably control. But that is what the SD
7 Regional Board did when it approved the Final Permit.

8 Even more troubling is the SD Regional Board's rationale for holding such a
9 potentially large number of local governments out of compliance with the Clean Water
10 Act. Comments made by SD Regional Board members and key staff at the November 18
11 hearing appear to reflect a belief that the City and the other Co-Permittees do not deserve
12 compliance merely because some of the Co-Permittees cannot meet all of the RWLs and
13 numeric limitations that the SD Regional Board, in 2013, placed in the Initial Permit as
14 final numeric effluent limits. By way of example, the Chair of the SD Regional Board
15 voted to reject the Final Permit, in part, because it contained the prospect of a future
16 alternative compliance option for municipal dischargers where such dischargers would be
17 in "compliance" without meeting all of the standards and limitations of the Permit. The
18 Chair posited that the SD Regional Board has a "moral obligation" to "speak truth" about
19 the "fact" that cities in the highly urbanized San Diego Region cannot consistently
20 demonstrate compliance with RWLs that the Regional Board has incorporated into the
21 Permit as final, and enforceable, numeric limitations.

22 This desire to "speak truth" is misplaced however. RWLs were never intended to
23 be strictly enforced against municipal stormwater agencies under Section 301 of the CWA
24 as numeric effluent limitations. (*See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191
25 F.3d 1159, 1165 (holding Section 301 prohibitions related to water quality standards do
26 not apply to MS4 discharges in the same manner as they do for other types of Clean Water
27 Act regulated discharge ["Where Congress includes particular language in one section of a
28 statute but omits it in another section of the same Act, it is generally presumed that

1 Congress acts intentionally and purposely in the disparate inclusion or exclusion."]; see
2 also cases cited in footnote 5.)

3 As recent cases to consider the RWL issue have confirmed,⁶ Congress understood
4 the fundamental differences between municipal stormwater and other types of NPDES
5 discharge. It understood that MS4s cannot control when, and in what volume, it rains, nor
6 entirely control the millions of potential sources of non-point source pollution that
7 cumulatively add pollutants into a city's MS4 under wet and dry conditions. Congress
8 therefore prescribed a different regulatory scheme for municipal stormwater discharges, a
9 scheme that does not require compliance with RWLs.

10 As New York's highest court recently explained in rejecting a Clean Water Act
11 lawsuit with legal issues similar to those raised in this Petition, the Clean Water Act
12 recognizes municipal stormwater is regulated differently than other discharges:
13 "*[M]unicipal storm sewer systems thus differ from other entities that discharge effluents*
14 *into our State's surface waters (for example, industrial or commercial facilities and*
15 *sewage treatment plants) in three major ways: precipitation is naturally occurring,*
16 *intermittent and variable and cannot be stopped; although municipalities operate sewer*
17 *systems, stormwater contamination results from the often unforeseen or unpredictable*
18 *choices of individual residents and businesses (for example, to let litter pile up or to use*
19 *certain lawn fertilizers), as well as decisions made long ago about the design of roads,*
20 *parking lots and buildings; and because stormwater runoff flows into surface waters*
21 *through tens of thousands of individual outfalls, each locality's contribution to the*
22 *pollution of a particular river or lake is difficult to ascertain or allocate through numeric*

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24
25 ⁶ See e.g., *Natural Resources Defense Council, Inc. v. New York State Dept. of*
26 *Environmental Conservation* (N.Y.Ct.App. 2015) 25 N.Y.3d 373, 382, 34 N.E.3d 782
27 (*"NRDC v. New York"*); *Maryland Dept. of the Environment v. Anacostia Riverkeeper*
28 (*Md. Ct. Spec. App. 2015*) 222 Md.App. 153, 171-176, cert. granted sub nom. *Maryland*
Dept. of Environment v. Anacostia Riverkeeper (2015) 443 Md. 734 (*"Anacostia*
Riverkeeper"); *Divers' Environmental Conservation Organization v. State Water*
Resources Control Board (2006) 145 Cal.App.4th 246, 256 (*"Divers' Environmental"*);
Tualatin Riverkeepers v. Oregon Dept. of Environmental Quality (Ore. App. 2010) 235
Ore. App. 132, 230 P.3d 559, 564 n.10 (*"Tualatin Riverkeepers"*).

1 limitations.” (*NRDC v. N.Y.*, *supra*, 34 N.E.3d at p. 783.) As such, imposing strict liability
2 on a municipality’s failure to attain RWLs in all of its stormwater outfalls makes little
3 sense logistically, and imposes on municipalities, in some cases, an impossible burden.
4 (*See id.*; accord *NRDC v. N.Y. Dept. of Environmental Conservation* (2014 N.Y. 2nd App.
5 Div.) 120 A.D.3d 1235, 1246 [“Although Congress specifically provided that permits
6 issued to industrial dischargers must be conditioned on compliance with effluent
7 limitations set forth in [Section 301 of the CWA], it specifically provided that permits for
8 municipal dischargers with respect to municipal storm sewers "shall require controls to
9 reduce the discharge of pollutants to the maximum extent practicable" . . . without
10 reference to any numerical limitation established under the Clean Water Act in connection
11 with any particular effluent.”].)

12 Simply put, because the Clean Water Act does not mandate strict compliance with
13 RWLs for municipal stormwater, where a state permitting agency, such as the SD Regional
14 Board, seeks to mandate strict compliance with RWLs in municipal stormwater permits, it
15 must do so in compliance with state law since federal law plainly does not provide such
16 authority.

17 It bears repeating that to date, the SD Regional Board appears to be the only Clean
18 Water Act permitting entity in California that is seeking to utilize its CWA permitting
19 authority to characterize all of the MS4s the SD Regional Board regulates – whether such
20 permittees are good, bad or indifferent in the level of resources and effort expended on
21 stormwater compliance – as chronic violators under the Clean Water Act. Comments of
22 the SD Regional Board staff at the November 18, 2015 hearing illustrate the SD Regional
23 Board’s thinking on the subject of future compliance for municipal stormwater
24 dischargers. According to staff, the SD Regional Board apparently views MS4 non-
25 compliance with the Clean Water Act as “the norm” and is unconcerned that such non-
26 compliance paints both good and bad actors alike with the same brush as violators of
27 federal law. The SD Regional Board, based upon staff presentations made at the
28 November 18 hearing, evidently feels that obtaining protection from the citizen suits, fines,

1 penalties and other aspects of Clean Water Act noncompliance (*see* 33 U.S.C. § 1365 *et*
2 *seq.*) is a “privilege” that is to be afforded by the SD Regional Board to an exclusive few,
3 only the most “worthy” invitees of the Board’s choosing. Being “in compliance”
4 according to staff’s presentation, is tantamount to being allowed to join “an exclusive
5 private club.” Accordingly, until the Co-Permittees demonstrate to the Regional Board
6 through the preparation of a WQIP that attainment of all numeric standards in the Final
7 Permit will occur – in a region with some of the strictest RWLs in the state (*see U.S. v.*
8 *Eastern Municipal Water District* (2009 C.D. Ca.) U.S. Dist. LEXIS 70786 at *140
9 [default nutrient standards in San Diego Region more than ten times as stringent as nutrient
10 standards in Santa Ana Basin to immediate north]) – the Co-Permittees will be ineligible to
11 be deemed in “compliance” under the Final Permit, whether such compliance is couched as
12 interim, permanent or otherwise.

13 The SD Regional Board’s stated view of Clean Water Act compliance being akin to
14 membership in a private club is inconsistent with the structure of the CWA – where
15 implementation of BMPs to the MEP standard, not the attainment of arbitrarily selected
16 numeric effluent limits, is the hallmark of Clean Water Act compliance for municipal
17 stormwater dischargers. (*See* 33 U.S.C. § 1342(p)(3)(B); *Accord Defenders, supra; NRDC*
18 *v. N.Y., supra; Anacostia Riverkeeper, supra; Divers International, supra; Conservation*
19 *Law Foundation v. Boston Water And Sewer Commission* (D. Mass) 2010 U.S. Dist.
20 LEXIS 134838 at pp. *18-19.)

21 Indeed, the approach currently advocated by the SD Regional Board in the Final
22 Permit arguably turns the normal Clean Water Act enforcement paradigm on its head –
23 resulting in a scenario where adverse enforcement consequences under the Act are largely
24 random – because liability under the Final Permit is strict and all of the covered MS4s are,
25 in large measure, out of compliance. True scofflaws will, in theory, be treated the same as
26 good actors – inasmuch as both are, and will likely remain, out of compliance with
27 numeric limitations and WQBELs in the Final Permit.

28 To be sure, if the experience of the City’s neighbors in Orange and San Diego

1 County is any guide, Clean Water Act citizens suits are less likely to seek enforcement
2 against poor cities that may be producing large amounts of stormwater pollution (due to
3 the inability to afford dry weather diversions and expensive treatment systems). Instead,
4 wealthy cities, who may be perceived to have the ability to pay for new capital projects
5 and attorneys' fees, seem more likely to be the targets of Clean Water Act citizen suit
6 enforcement, whether or not such cities have been aggressively implementing their
7 stormwater pollution prevention programs.⁷ The SD Regional Board's unwillingness to
8 provide interim compliance during the WQIP preparation process, and refusal to clarify in
9 the Final Permit that discharges to an MS4 that occur outside of the reasonable control of
10 the MS4 owner, will not result in strict liability for the MS4 owner, further erodes the
11 legitimacy of the Final Permit as a valid deterrent to unlawful conduct.

12 **III. THE SD REGIONAL BOARD'S DECISION TO WITHHOLD INTERIM**
13 **COMPLIANCE ACROSS THE SAN DIEGO REGION IS CONTRARY TO THE**
14 **2015 LA MS4 ORDER, INCONSISTENT WITH STATE AND FEDERAL LAW,**
15 **AND BAD POLICY.**

16 The interim compliance issue so hotly contested in the San Diego region is less of
17 an issue in other parts of California. Under the approach approved by the State Board in
18 the 2015 LA MS4 Order, if MS4 owners agree to develop what are admittedly very
19 expensive Watershed Management Plans ("WMPs") or Enhanced Watershed Management
20 Plans ("EWMPs"), then the co-permittees may be deemed to be in compliance with RWLs
21 for both the period of plan preparation and implementation.⁸

23 ⁷ For example, over the last two years a California environmental group, California River
24 Watch, see <http://www.ncriverwatch.org/legal/current/index.php>, has sued multiple cities
25 over alleged CWA violations, including alleged MS4 Permit violations associated with
what River Watch claims are unlawful discharges into MS4s.

26 ⁸ The WMPs and EWMPs, the subject of numerous challenges by dischargers and
27 environmental groups in the Los Angeles area, are themselves controversial. Many MS4
28 operators query whether the pertinent RWLs are actually achievable, and whether the
billions of dollars it is likely to cost to achieve such compliance will be approved by the
voters. See Attachment A to County of Orange September 14, 2015 Comment Letter on
this Permit, enclosed herewith as Exhibit C (detailing estimated multi-billion dollar cost of
implementing WMPs and EWMPs in LA County).

1 In San Diego, the MS4s were ordered to prepare WQIPs in 2013; but it was not
2 until after the publication of the State Board's 2015 LA MS4 Order that the SD Regional
3 Board offered up the WQIP process as an Alternative Compliance Option ("ACO") for
4 RWLs. The SD Regional Board's Executive Officer testified at the May 8, 2013 adoption
5 hearing on Order No. 2013-0001, on the Initial Permit, that the permit's receiving water
6 limitations could not be met within the five-year term of the permit, and as such, the
7 Orange, Riverside and San Diego County permittees would be out of compliance upon
8 adoption of the permit. Numerous comments submitted during the adoption process for all
9 three Regional Board Orders concluded that complying with the permit's RWL provisions
10 is simply not achievable, everywhere and all the time, given the variable nature of
11 pollutant sources and urban runoff. Indeed, as discussed below in the context of Water
12 Code sections 13241 and 13263, many of the RWLs converted to WQBELs and numeric
13 limitations in the Permit are not attainable because the sources of pollution are derived
14 from outside of the City's MS4, and either cannot be reasonably controlled at all or can
15 only be controlled at a cost of hundreds of millions of dollars per Co-Permittee. (*See*
16 Exhibit D [Index of Evidence Submitted to the SD Regional Board between 2013 and 2015
17 suggesting likely non-attainability of some RWLs in San Diego Region]; *see also* Exhibit
18 B [South OC Draft Initial Cost Opinion reflecting approximately 2 billion dollar cost to
19 achieve RWLs in southern Orange County].)

20 Acknowledging the impossibility of achieving immediate compliance with the
21 permit's receiving water limitations, SD Regional Board staff added a proposed ACO in a
22 later draft of the Initial Permit (Order No. R9-2013-0001), and left it up to the SD Regional
23 Board whether to approve the ACO. However, during deliberations on the Initial Permit,
24 the SD Regional Board Executive Officer recommended against providing alternative
25 compliance to the Co-Permittees on the grounds that the permittees were "not ready" for
26 compliance. Upon that recommendation, the Regional Board voted to eliminate the ACO
27 from the Initial Permit, leaving the Co-Permittees with no way to comply with the
28 receiving water limitations imposed as numeric effluent limits in the Initial Permit.

1 Upon the February 11, 2015 enrollment of the South Orange County Permittees in
2 the permit, the OC Co-Permittees reiterated to the SD Regional Board the need for an
3 ACO. It seemed only fair since other MS4 dischargers around the state remained in
4 compliance with their respective MS4 permits. The OC Co-Permittees again set forth the
5 legal and factual basis for the SD Regional Board to provide an ACO. The OC Co-
6 Permittees requested, at the very least, that due to the effectiveness of the Orange County
7 stormwater program, and the successful effort of many of the Orange County Cities, such
8 as Dana Point, to divert all—or nearly all—dry weather flows to the sanitary sewer, that
9 the SD Regional Board should fashion a limited scope ACO for the OC Co-Permittees
10 through adoption of an individual NPDES permit. After extensive testimony, the SD
11 Regional Board again declined to adopt any form of ACO for the OC Co-Permittees.

12 Finally, at the November 18, 2015 Final Permit adoption hearing, and after review
13 of the 2015 LA MS4 Order, SD Regional Board staff finally recommended that the Board
14 approve an ACO that, in theory, could provide compliance during implementation of the
15 WQIPs, but not during WQIP development. In recommending a partial ACO, SD
16 Regional Board staff stated that despite the State Board’s precedential order on the LA
17 Permit, the State Board only directed regional boards to “consider” an ACO, and that the
18 regional boards retained discretion to exclude an ACO while strictly mandating attainment
19 of RWLs as numeric effluent limits in MS4 Permits, a point upon which the City and the
20 other OC Co-Permittees vehemently disagreed at the hearing.

21 As previously discussed, SD Regional Board staff went on to testify that
22 compliance was an “exclusive club” in which not all Co-Permittees would be allowed to
23 share. It was evident from staff’s testimony and demeanor at the hearing that the ACO
24 was reluctantly recommended and would only be provided on the most limited basis
25 possible despite the State Board’s direction in the 2015 LA MS4 Order, and the fact that
26 the provision of an ACO was one of the seven core principles announced by the State
27 Board for management of the RWL issue. Indeed, before SD Regional Board Counsel
28 intervened to cut off further discussion, the Board Chair observed that the SD Regional

1 Board was unhappy with the WQIPs received to date, and inferred that the Board might
2 not be approving WQIPs in the near future as an ACO. This suggestion was consistent
3 with the Chair's prior statement that the ACO was approved by the SD Regional Board, at
4 least in part, to avoid the perception that the SD Regional Board was "thumbing its nose"
5 at the State Water Board, and not to actually provide the Co-Permittees with a meaningful
6 ACO that would yield long term compliance.

7 The lack of a compliance option, particularly during the development of the WQIP,
8 conflicts with State Board policy, federal law, and state law. The City and the other Co-
9 Permittees testified at the Nov. 18, 2015 adoption hearing that certain stormwater
10 discharges would cause them to be out of compliance with the prohibitions and receiving
11 water limitations of the Final Permit for at least a 2-3 year period, beginning from the date
12 of the enrollment of the OC Co-Permittees under the Final Permit, and lasting until the
13 WQIPs are approved by the SD Regional Board's Executive Officer. This time period
14 leaves the City and other Co-Permittees in the untenable position of having to strictly
15 comply with the numeric prohibitions and receiving water limitations of the Final Permit
16 despite it being technically and economically infeasible to do so in many instances,
17 particularly under wet weather conditions where flows may be of high volume, fast
18 moving, and extremely difficult to divert and treat.

19 The RWLs and discharge prohibitions contained in the Final Permit do not provide
20 the City and the other Co-Permittees with the necessary compliance pathway to ensure
21 innovation and progress. Although there is some flexibility built into the WQIP process
22 and implementation, without some form of interim compliance path the City and the other
23 Co-Permittees remain strictly liable for any exceedance of RWLs until such time as the
24 southern Orange County WQIP is approved by the SD Regional Board. This was not the
25 intent of Congress or the EPA under the Clean Water Act, and was not the intent of the
26 State Board under Water Quality Orders 1999-05 and 2001-15 (neither of which imposed
27 strict liability for RWL exceedances). It also was not—the City believes—the intent of the
28 2015 LA MS4 Order, which can be read to have replaced the iterative process with the

1 EWMP/WMP process. While the SD Regional Board may not be overtly thumbing its
2 nose at the State Board on the interim compliance issue, the distinct inference to be drawn
3 from the November 18 hearing is that the SD Regional Board does not intend to offer
4 interim compliance in a meaningful way, and only intends to provide ACO protection to
5 only those Co-Permittees who are fortunate enough to be invited to join the SD Regional
6 Board's exclusive "compliance club." That is not the way that municipal stormwater
7 regulation is supposed to work under the CWA.

8 Meanwhile, as Clean Water Act citizens suits are filed against the Co-Permittees
9 over conditions they may have no short term ability to change, the SD Regional Board will
10 presumably have less and less influence over the process of improving water quality in the
11 San Diego region as collaborative efforts break down and decisions about water quality
12 projects, improvement plans, and pertinent timelines, shift to federal courts and
13 environmental plaintiffs rather than the SD Regional Board. All sides would benefit from
14 a carefully tailored interim compliance option that ensures rapid preparation of the WQIP
15 while also ensuring the WQIP effort is not rendered superfluous by federal court decisions
16 and consent decrees that may impose disparate and conflicting obligations on different
17 MS4 permittees throughout the San Diego region.

18 **IV. THE EFFECTIVE PROHIBITION OF ALL NON-STORMWATER DISCHARGES**
19 **IS INAPPROPRIATE.**

20 Section II.A.1 of the Final Permit, entitled "Discharge Prohibitions," requires the
21 Permittees to not only "effectively prohibit" non-storm water discharges, but also, through
22 subsection II.E.2 (entitled "Illicit Discharge Retention and Elimination"), to take action to
23 prevent "non-stormwater" from entering the MS4. In effect, all "non-storm water
24 discharges," unless they are otherwise conditionally permitted to be discharged under
25 subsection E.2. of the Final Permit, are prohibited.

26 This prohibition improperly imposes a "zero" discharge limit for all dry-weather
27 runoff, unless the discharge is specifically exempted under section II.E.2 of the Final
28 Permit. For example, all landscape irrigation runoff, unless otherwise permitted through a

1 separate NPDES permit, may neither enter “into” the MS4, nor be discharged “from” the
2 MS4. Subsection II.A.1.b of the Final Permit, exceeds the requirements of the Clean
3 Water Act, and the State Board’s prior precedent. (*See In re Petition of Building Industry*
4 *of San Diego County*, Order No. WQ 2001-15 at pp. 9-10 [disapproving blanket
5 prohibition on discharges to the MS4 without pretreatment].) Subsection II.A.1.b should
6 be modified to clarify that a city fully implementing its Illicit Discharge Detection and
7 Elimination Program is deemed to have “effectively prohibited” non-stormwater
8 discharges as required by the CWA. The City requested remedial language and provided
9 supporting evidence that would have fixed the legal deficiency of Subsection II.A.1.b
10 identified herein, but the City’s request was disregarded by the SD Regional Board at the
11 November 18 hearing. The City’s proposed language and supporting justification are
12 attached hereto as Exhibit E. The City respectfully requests that the State Water Board
13 address this deficiency in Subsection II.A.1.b of the Permit by revising the Permit as
14 requested herein.

15 When California River Watch sued the neighboring City of Laguna Beach earlier
16 this year for alleged Clean Water Act violations, California River Watch alleged that
17 discharges into Laguna Beach’s MS4 that occurred without Laguna Beach’s permission,
18 were nevertheless sufficient to trigger liability under the Clean Water Act because of the
19 overly broad manner in which the Permit is drafted. The State Water Board can eliminate
20 the potential for frivolous Clean Water Act lawsuits against cities with strong illicit
21 discharge detection and elimination programs, such as the City of Dana Point, by adding a
22 footnote to the prohibition language in Section II.A.1.b (page 16 of the Final Permit) that
23 reads:

24 *“Where a Copermittee fully implements the requirements of Provision E.2,*
25 *then the Copermittee is deemed in compliance with the effective prohibition*
26 *of non-storm water discharges to the MS4 required under Provision*
27 *II.A.1.b.”*

28 ///

1 **V. THE SD REGIONAL BOARD FAILED TO PROVIDE THE CITY WITH**
2 **REASONABLE MEANS TO COMPLY WITH NUMERIC LIMITS IN THE**
3 **FINAL PERMIT DERIVED FROM RWLs; AND AS SUCH, THE SD**
4 **REGIONAL BOARD WAS REQUIRED TO DEMONSTRATE**
5 **COMPLIANCE WITH WATER CODE SECTIONS 13241, 13263 AND 13000.**

6 All of the referenced numeric limits in the Final Permit go beyond the MEP
7 standard envisioned by Congress because MEP does not mandate permit terms that are
8 impracticable, such as where an MS4 Permit requires strict compliance with numeric
9 limits. The Ninth Circuit Court of Appeals squarely found that neither Congress, through
10 its adoption of the 1987 Amendments to the Clean Water Act (in particular 33 U.S.C.
11 section 1342(p)(3)(B)(iii) (“Subsection (iii)”) nor EPA, through its implementing
12 regulations, has imposed minimum numeric standards derived from RWLs on municipal
13 discharges. Further, all of the court decisions after *Defenders* have held that if a state
14 wants to require compliance above and beyond the MEP standard, it must require such
15 compliance under state law.⁹

16 The State Board’s recent decision in the 2015 LA MS4 Order appears to be in
17 agreement on this point. For example, the State Board made the following observations
18 regarding State Board policy in the 2015 LA MS4 Order, which could only be made if
19 operating under state law (since the State Water Board cannot change or otherwise
20 supersede federal law):

- 21 • p. 11: “[S]ince the State Water Board has discretion under federal law to
22 determine whether to require strict compliance with the water quality
23 standards of the water quality control plans for MS4 discharges, the State
24 Water Board may also utilize the flexibility under the Porter-Cologne Act to
25

26 ⁹ See *Natural Resources Defense Council, Inc. v. U.S. E.P.A.* (9th Cir. 1992) 966 F.2d
27 1292, 1308 (“*NRDC II*”); *Defenders, supra*, 191 F.3d at 1167. See also *NRDC v. N.Y.*,
28 *supra*; *Anacostia Riverkeeper, supra*; *Tualatin Riverkeepers, supra*. See generally, *City*
of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 625-627
 (“*Burbank*”).

1 *decline to require strict compliance with water quality standards for MS4*
2 *discharges.”*

- 3 • Page 14: *“Although it would be inconsistent with USEPA’s general practice*
4 *of requiring compliance with water quality standards over time through an*
5 *iterative process, we may even have the flexibility to reverse our own*
6 *precedent regarding receiving water limitations and receiving water*
7 *limitations provisions and make a policy determination that, going forward,*
8 *we will either no longer require compliance with water quality standards in*
9 *MS4 permits, or will deem good faith engagement in the iterative process to*
10 *constitute such compliance.”*
- 11 • Page 78: *“We further find that the development of numeric WQBELs was a*
12 *reasonable exercise of the Los Angeles Water Board’s policy discretion,*
13 *given its experience in developing the relevant TMDLs and the significance*
14 *of storm water impacts in the region. However, we find that numeric*
15 *WQBELs are not necessarily appropriate in all MS4 permits or for all*
16 *parameters in any single MS4 permit.”*

17 These quotes evidence the obvious—when a state agency requires stormwater
18 controls beyond those mandated under the CWA, it does so under state law—and the State
19 Board’s reference to the flexibility provided Porter Cologne, a state statute, is an
20 acknowledgement that state law is what allows Regional Boards the flexibility to “push the
21 envelope” beyond what Congress ordained, where there is a policy reason to do so.
22 Relatedly, the plain language of subsection (iii) of section 402(P)(3)(B) of the Clean Water
23 Act shows that the CWA only requires permit terms that are “practicable.” Because the
24 federal MEP standard only involves the imposition of permit terms that are “practicable,”
25 any permit term that is “impracticable” or “infeasible,” is a term that goes beyond what is
26 required by federal law. Utilizing the two-step test for judicial deference of a federal
27 agency’s interpretation of a congressional statute,¹⁰ the Ninth Circuit Court of Appeals

28 _____
¹⁰ *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* (1984) 467 U.S.

1 analyzed the specific wording of the Clean Water Act in *Defenders*, and in particular
2 Subsection (iii) of Section 402(p)(3)(B), and found that “where Congress includes
3 particular language in one section of a Statute but omits it in another section of the same
4 Act, it’s generally presumed that Congress acts intentionally and purposely in the disparate
5 inclusion or exclusion.”¹¹

6 The *Defenders* court went on to require industrial stormwater dischargers, but not
7 municipal dischargers, to strictly comply with water quality standards, thereby finding that
8 Congress set forth a different, less stringent standard for municipal dischargers that does
9 not “require” compliance with WQBELs and other numeric limits for municipal
10 stormwater.¹² Accordingly, under the plain language of the Clean Water Act, the MEP
11 standard is, by definition, a standard that only requires the imposition of practicable permit
12 terms, and the Final Permit ignores this fundamental distinction by mandating strict
13 compliance with RWLs as final effluent limits in the permit and withholding, perhaps
14 permanently, any ACO.

15 “Practicable” is defined to mean “reasonably capable of being accomplished;
16 feasible in a particular situation.”¹³ This definition has been routinely adopted by federal
17 courts. In *National Wildlife Federation v. Norton* (E.D. Cal. 2004) 306 F.Supp.2d 920, the
18 district court specifically discussed the meaning of the phrase “maximum extent
19 practicable,” and in particular focused its analysis on the meaning of “practicable,” opining
20 as follows:

21
22 837.

23 ¹¹ *Defenders, supra*, 191 F.3d at p. 1165 (citing *Russello v. United States* (1983) 464 U.S.
16, 23).

24 ¹² 191 F.3d at 1165 (“Congress chose not to include a similar provision for municipal
25 storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges ‘to
26 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 . . . determines appropriate for the control
of such pollutants.’”).

27 ¹³ *Black’s Law Dict.*, p. 1361, col. 2 (10th ed. 2014), see also *Ballentine’s Law*
28 *Dictionary* (2010) (defining “practicable” as “feasible; workable; usable” and defining “at
the earliest practicable moment” as “. . . within a reasonable time under the
circumstances.”).

1 The implication in the plaintiffs' briefs is that "maximum
2 extent practicable" means the most that can possibly be done –
3 in other words, the most the developers could pay while still
4 going forward with the project. While the meaning of the term
5 "practicable" in the statute is not entirely clear, the term does
6 not simply equate to 'possible.' "Practicable" is often used in
7 the law to mean something along the lines of "reasonably
8 capable of being accomplished." For example, "practicable" is
9 defined in a Federal Highway Administration regulation as
10 "capable of being done within reasonable natural, social, or
11 economic constraints." "Practicable" is used twice in
12 Fed.R.Civ.P. 23 and neither time is it synonymous with
13 "possible." Courts also universally interpret the phrase "as
14 soon as practicable," which is common in insurance policies, to
15 mean 'within a reasonable time.'

16 (*Id.* at p. 927, fn. 12 (internal citations omitted).) Other courts have similarly held that
17 "practicable" refers to doing what is reasonable under the particular circumstances, and
18 does not equate to doing what is "possible" under the circumstances.¹⁴

19 State appellate courts in Maryland, New York and Oregon have recently joined the
20 Ninth Circuit in emphasizing that the Clean Water Act only requires states to include
21 permit terms that will reduce discharges to the "maximum extent practicable." Requiring
22 municipal stormwater permittees to strictly meet RWLs under federal law would render
23 section 402(p)(3)(B) superfluous as mandating strict compliance with RWLs puts
24 municipal stormwater into the same compliance framework as every other type of NPDES
25 discharger – with section 301 of the Clean Water Act generally prohibiting discharges that
26 violate water quality standards outside the municipal stormwater context.

27 Moreover, the current approach in the Final Permit of holding MS4s, who have no
28 way to ever stop discharging completely, strictly liable for failing to meet RWLs arguably

14 *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866, 874, 889 ("In other contexts, courts have similarly recognized that the word 'practicable' does not necessarily mean the most that can possibly be done."), internal citations omitted; *Ormet Primary Aluminum Corp. v. Emplrs. Ins. of Wausau* (Ohio 2000) 725 N.E.2d 646, 655 ("Thus, a notice provision requiring notice to the insurer 'as soon as practicable' requires notice within a reasonable time in light of the surrounding facts and circumstances."); and *Primavera Familienstiftung v. Askin* (N.Y. 1998) 178 F.R.D. 405, 409 ("impracticability does not mean impossibility, but rather difficulty or inconvenience.").

1 renders section 303 of the Clean Water Act superfluous in the municipal stormwater
2 context since— taking the SD Regional Board’s argument to its logical extent— the SD
3 Regional Board can presumably initiate enforcement against one or more Co-Permittees
4 for violating the RWL prohibitions in the Permit, and would no longer have the need to
5 ever draft another TMDL because the Regional Board could just draft an enforcement
6 order instead. It seems unlikely Congress intended to insert completely superfluous
7 language in Section 402(p)(3)(B)(iii), or intended to allow state permitting agencies to
8 completely ignore the regulatory process for addressing impairment via the Section 303 (d)
9 listing and TMDL development process. Yet, that is exactly what accepting the Regional
10 Board’s position on RWLs would produce. The SD Regional Board has provided no legal
11 authority to support such a result because no such authority exists. As such, MS4 Permit
12 terms that are impracticable¹⁵ or “infeasible,” cannot be properly classified as permit
13 requirements “mandated” by the Clean Water Act.

14 **VI. THE FINAL PERMIT TERMS IMPOSING ZERO DISCHARGE LIMITS,**
15 **NUMERIC WQBELs (INCLUDING TMDLs), RECEIVING WATER**
16 **LIMITS AND WQIP NUMERIC LIMITS GO BEYOND THE CLEAN**
17 **WATER ACT AND VIOLATE STATE LAW AND POLICY.**

18 Section II.A.2. of the Final Permit, which governs “Receiving Water Limitations,”
19 provides that “discharges from MS4s must not cause or contribute to the violation of water
20 quality standards and/or receiving waters. . . .” However, this language appears to conflict
21 with prior State Water Board precedent that is directly applicable to MS4 permits issued by
22 the SD Regional Board. In 2001, the State Water Board in *In re Petition of Building*
23 *Industry of San Diego County*, Order No. WQ 2001-15, pp. 8-10 (hereinafter “*BIASD*
24 *Petition*”), clarified that prohibiting RWL exceedances is generally beyond the regulatory
25 authority of a Regional Board, and may only be authorized where a Regional Board makes
26

27 _____
28 ¹⁵ The term “impracticable” is defined in Webster’s 9th New Collegiate Dictionary as: “1:
not practicable: incapable of being performed or accomplished by the means employed or
at command 2: IMPASSABLE.” Webster’s 9th New Collegiate Dict., p. 605 (1993).

1 specific site specific findings justifying imposition of a numeric standard. (*Id.* at p. 8 [“We
2 will generally not require “strict compliance” with water quality standards through
3 numeric effluent limitations and we will continue to follow an iterative approach, which
4 seeks compliance over time”].)

5 Section II.A.3 of the Final Permit, entitled “Effluent Limitations,” and specifically
6 subsection (b), entitled “Water Quality Based Effluent Limitations, requires that: “Each
7 Co-permittee must comply with applicable WQBELs [Water Quality Based Effluent
8 Limitations] established for the TMDLs in Attachment E to this Order, pursuant to the
9 applicable TMDL compliance schedules.” Attachment E then requires either strict
10 compliance with the various interim WQBELs, or the implementation of an approved
11 WQIP, which must provide “reasonable assurances” the interim WQBELs will be
12 achieved. Final TMDL WQBELs must also be strictly met, albeit an approved WQIP is
13 arguably instrumental in analyzing compliance.

14 Section II.A.4 of the Final Permit requires compliance with an iterative, adaptive
15 management process for the Discharge Prohibitions and RWL requirements of the Final
16 Permit. But it does not provide that so long as the Permittees are acting in good faith and
17 complying with the iterative process, they will be considered in compliance with numeric
18 limitations in the Permit. Comments by the SD Regional Board at the November 18
19 hearing made clear that the Regional Board interprets Section II.A.4 to impose strict
20 liability on the Co-Permittees for any exceedance of RWLs attributable to one or more
21 MS4s, an interpretation that appears to be foreclosed by the *BIASD Petition* and arguably
22 the 2015 LA MS4 Order as well.

23 Section II.B.3 of the Final Permit, entitled “Water Quality Improvement Goals,
24 Strategies and Schedules,” requires, among other things, the development and
25 implementation of a WQIP which is to include interim and final numeric goals, along with
26 interim dates and dates for achieving such goals, including the development of strategies to
27 be implemented in the watershed management area in order to “achieve the interim and
28 final numeric goals identified.”

1 Section II.C of the Final Permit, entitled “Action Levels,” imposes a series of Non-
2 stormwater Action Levels (“NALs”) and Stormwater Action Levels (“SALs”), as numeric
3 “goals” to be achieved. To the extent an NAL or SAL is based on an interim or final
4 effluent limitation from a TMDL, then such a NAL or SAL becomes an “enforceable
5 effluent limitations” for which strict compliance is required.

6 All of the above-referenced numeric permit terms, whether a zero discharge limit or
7 the various numeric limitations imposed are requirements that go beyond the MEP
8 standard, and are requirements that exceed federal law. There is no dispute that federal
9 law does not compel the use of numeric effluent limits in municipal NPDES permits. For
10 example, in *BIA of San Diego County* 124 Cal.App.4th at p. 874, the court acknowledged
11 that the CWA is to be applied differently to municipal stormwater dischargers than to
12 industrial Stormwater dischargers, finding as follows:

13 In 1987, Congress amended the Clean Water Act to add
14 provisions that specifically concerned NPDES permit
15 requirements for storm sewer discharges. [Citations.] In these
16 amendments, enacted as part of the *Water Quality Act of 1987*,
17 Congress distinguished between industrial and municipal storm
18 water discharges. . . . With respect to municipal storm water
19 discharges, Congress clarified that the EPA has the authority
20 to fashion NPDES permit requirements to meet water quality
21 standards without specific numeric effluent limits and instead
22 to impose “controls to reduce the discharge of pollutants to the
23 maximum extent practicable.”

24 (*Id.*, citing 33 USC § 1342 (p)(3)(B)(iii) and *Defenders of Wildlife, supra*, 191 F.3d at
25 1163 (bolding and underlining added, italics in original).)

26 In *Defenders*, the Ninth Circuit recognized the different approach taken by
27 Congress for municipal stormwater, finding that “*industrial discharges must comply*
28 *strictly with state water-quality standards,*” while Congress chose “*not to include a*
similar provision for municipal storm-sewer discharges.” (191 F.3d at 1165, emphasis
added.) The court found that “because 33 U.S.C. § 1342(p)(3)(B) is not merely silent
regarding whether municipal discharges must comply with 33 U.S.C. § 1311,” but instead
section 1342(p)(3)(B)(iii) [of the CWA] “*replaces the requirements of § 1311 with the*

1 *requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants*
2 *to the maximum extent practicable.’”* The *Defenders* court then held that “*the statute*
3 *unambiguously demonstrates that Congress did not require municipal storm-sewer*
4 *discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).*” (*Id.* at 1165; *see also*
5 *Divers’ Environmental* 145 Cal.App.4th at p. 256, emphasis added [“*In regulating*
6 *stormwater permits the EPA has repeatedly expressed a preference for doing so by the*
7 *way of BMPs, rather than by way of imposing either technology-based or water quality-*
8 *based numerical limitations.*”].)

9 Similarly, in *Tualatin River Keepers*, the court also found that under the CWA, best
10 management practices are considered to be a “type of effluent limitation,” and that such
11 best management practices are authorized to be used pursuant to section 33 U.S.C.
12 § 1342(p) of the Clean Water Act as the proper permitting means of controlling “storm
13 water discharges.” (*Id.* at 141-142 [citing 33 U.S.C. § 1342(p) and 40 CFR
14 § 122.44(k)(2)-(3)].) The court in *Tualatin* concluded that Oregon law did not require
15 TMDLs be enforced through the use of numeric effluent limits, instead finding that
16 municipal stormwater in a TMDL could properly be addressed via BMPs and adaptive
17 management in an MS4 permit. (*Id.* at 148-149.)

18 Finally, it is worth reiterating that strict imposition of RWLs has never been the law
19 in California, and the City does not read the 2015 LA MS4 Order as changing that
20 dynamic. As evidenced by the *BIASD Petition, Order No. WQ 2001-15* discussed
21 previously, it has long been the policy of the State of California not to require the use of
22 strict numeric limits for municipal stormwater, but rather instead to apply the MEP
23 standard through an iterative BMP process. (*See, e.g., State Board Order WQO No. 91-04,*
24 p. 14 [“There are *no numeric objectives* or *numeric effluent limits* required at this time,
25 either in the Basin Plan or any statewide plan that apply to storm water discharges.”]; *State*
26 *Board Order No. 91-03* [“*We . . . conclude that numeric effluent limitations are not*
27 *legally required. Further, we have determined that the program of prohibitions, source*
28 *control measures and ‘best management practices’ set forth in the permit constitutes*

1 *effluent limitations as required by law.*”]; State Board Order No. 96-13, p. 6 [*“federal law*
2 *does not require* the [San Francisco Reg. Bd] to dictate the specific controls.”]; State
3 Board Order No. 98-01, p. 12 [*“Stormwater permits must achieve compliance with water*
4 *quality standards, but they may do so by requiring implementation of BMPs in lieu of*
5 *numeric water quality-based effluent limitations.*”]; State Board Order No. 2000-11, p. 3
6 [*“In prior Orders this Board has explained the need for the municipal storm water*
7 *programs and the emphasis on BMPs in lieu of numeric effluent limitations.*”]; State
8 Board Order No. 2001-15, p. 8 [*“While we continue to address water quality standards in*
9 *municipal storm water permits, we also continue to believe that the iterative approach,*
10 *which focuses on timely improvements of BMPs, is appropriate.*”]; State Board Order No.
11 2006-12, p. 17 [*“Federal regulations do not require numeric effluent limitations for*
12 *discharges of storm water*”]; *Blue Ribbon Stormwater Quality Panel Recommendations to*
13 *The California State Water Resources Control Board – The Feasibility of Numeric Effluent*
14 *Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and*
15 *Construction Activities*, June 19, 2006, p. 8 [*“It is not feasible at this time to set*
16 *enforceable numeric effluent criteria for municipal BMPs and in particular urban*
17 *dischargers.*”]; and an April 18, 2008 letter from the State Board’s Chief Counsel to the
18 Commission on State Mandates, p. 6 [*“Most NPDES Permits are largely comprised of*
19 *numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually*
20 *require dischargers to implement BMPs.*”] [emphasis added in each citation above].)

21 Moreover, as noted in a February 11, 1993 Memorandum issued by the State
22 Board’s Office of Chief Counsel on the subject of “Definition of Maximum Extent
23 Practicable” (hereafter “Chief Counsel Memo”), the term “MEP” as used by Congress was
24 intended to include a requirement “*to reduce the discharge of pollutants, rather than*
25 *totally prevent such discharge,*” and Congress presumably applied an MEP standard,
26 rather than a strict numeric standard with the “*knowledge that it is not possible for*
27 *municipal discharges to prevent the discharge of all pollutants in storm water.*” (Chief
28 Counsel Memo, p. 2, emphasis added.)

1 Both the definition of MEP in the Final Permit, and in the Chief Counsel Memo
2 acknowledge the need to consider both “technical feasibility” and “cost,” including
3 specifically asking: “*Will the cost of implementing the BMP have a reasonable*
4 *relationship to the pollution control benefits to be achieved.*” In effect, both the
5 Memorandum and the Final Permit’s definition of MEP confirm that the imposition of
6 “impracticable” BMPs, whether technically or economically impracticable, to achieve a
7 numeric effluent limit or otherwise, are requirements that go beyond what is required by
8 Congress under the Clean Water Act, and are, in effect, terms that are not suitable for
9 imposition on municipal dischargers. If they are to be imposed on municipal dischargers
10 they must find their basis under state law.

11 In this case, the zero discharge limit for all dry-weather runoff (excepting only
12 specific exempted dry-weather discharges), and prohibitions on exceedances of RWLs are
13 clearly a requirement that is more stringent than the MEP requirements imposed under the
14 Clean Water Act. If the Act required strict imposition of RWLs as final numeric effluent
15 limits, the SD Regional Board would have long ago been compelled to have included these
16 terms in all past permits. This did not occur, and it did not occur because federal law
17 requires municipal stormwater to comply with the MEP standard, not RWLs expressed as
18 numeric effluent limits in an MS4 permit.

19 The Final Permit was thus improperly approved as it fails to recognize the technical
20 and economic realities of an MS4 permittee strictly meeting numeric limits, and
21 accordingly the Petition should be granted and the terms of the Final Permit revised to
22 provide for an iterative/adaptive management process that provides compliance as long as
23 City is acting in good faith and aggressively implementing MEP compliant BMPs.

24 **VII. REQUIRING STRICT COMPLIANCE WITH A ZERO DISCHARGE**
25 **LIMIT AND OTHER NUMERIC LIMITS IS TO REQUIRE COMPLIANCE**
26 **WITH TERMS THAT ARE IMPOSSIBLE TO ACHIEVE.**

27 As a matter of federal law, the Clean Water Act does not require municipal
28 stormwater permittees to achieve the impossible. And this rule is well founded; as

1 previously discussed, the Co-Permittees do not have the option of simply shutting down
2 operations where compliance with numeric effluent limits becomes impossible. Unlike
3 other types of NPDES permittees, public safety, among other things, compels the City and
4 other Co-Permittees to continue operating and maintaining its MS4. A private company
5 can close down in the face of unattainable RWLs, but the City cannot shut down its MS4
6 system. If they did, people would likely die, and property damage from floods would be
7 catastrophic. Fortunately, the law does not require the City to shut down its MS4 in the
8 face of unattainable numeric standards, as federal law prohibits exactly the type of strict
9 liability for unattainable conditions that the Permit, left unchallenged, would yield. In
10 *Hughey v. JMS Dev. Corp.* (11th Cir. 1996) 78 F.3d 1523, *cert. den.* (1996) 519 U.S. 993,
11 the plaintiff sued JMS Development Corporation for failing to obtain a storm water permit
12 that would authorize the discharge of storm water from its construction project. The
13 plaintiff argued JMS had no authority to discharge any quantity or type of storm water
14 from the project, *i.e.* a “zero discharge standard,” until JMS had first obtained an NPDES
15 permit. (*Id.* at 1527.) JMS did not dispute that storm water was being discharged from its
16 property and that it had not obtained an NPDES permit, but claimed it was not in violation
17 of the Clean Water Act (even though the Act required the permit) because the Georgia
18 Environmental Protection Division, the agency responsible for issuing the permit, was not
19 yet prepared to issue such permits. As a result, it was impossible for JMS to comply, even
20 though it desired to do so. (*Id.*)

21 The Eleventh Circuit Court of Appeals held that the Clean Water Act, and federal
22 law generally, does not require a permittee to achieve the impossible, finding that
23 “Congress is presumed not to have intended an absurd (impossible) result.” (*Id.* at 1529.)
24 The court then found that:

25 *In this case, once JMS began the development, compliance*
26 *with the zero discharge standard would have been impossible.*
27 *Congress could not have intended a strict application of the*
28 *zero discharge standard in section 1311(a) when compliance is*
factually impossible. The evidence was uncontroverted that
whenever it rained in Gwinnett County some discharge was

1 going to occur; nothing JMS could do would prevent all rain
2 water discharge.

3 (Id. at 1530.) The court concluded, “*Lex non cogit ad impossibilia*: The law does not
4 compel the doing of impossibilities.” (Id.) The same rule applies to the Regional Board’s
5 effort to impose impossible or prohibitively expensive RWL attainment requirements on
6 the Co-Permittees.

7 The Clean Water Act does not require municipal permittees to do the impossible
8 and comply with unachievable zero discharge limits or unattainable RWLs imposed as
9 numeric effluent limits. Because municipal permittees are involuntary permittees, that is,
10 because they have no choice but to obtain a municipal storm water permit, the Permit, as a
11 matter of law, cannot impose terms that are unobtainable. (Id.; accord *Atlantic States*
12 *Legal Foundation, Inc. v. Eastman Kodak Co.* (2d Cir. 1994) 12 F.3d 353, 357.)

13 A similar result pertains under state law. State agencies and state courts are
14 prohibited under the Civil Code from requiring the doing of impossible acts. (See Civ.
15 Code §§ 3526, 3531.)

16 For purposes of this Petition, as reflected in the extensive evidence of non-
17 attainability submitted during the Permit adoption process, summarized in Exhibit D
18 enclosed herewith, complying with numeric RWLs imposed in the Final Permit will be
19 technically and economically unachievable for many pollutants, particularly bacteria,
20 nutrients, and some toxicants, given the extreme variability of the potential sources of
21 pollutants and difficulty in controlling and treating urban runoff during wet conditions
22 where pollutant loading often originates outside of the MS4.

23 For many of the numeric limits, the “technical” and “economic” feasibility to
24 comply simply do not exist, and imposing such requirements that go beyond “the limits of
25 practicability” (*Defenders, supra*, 191 F.3d at 1162), is nothing more than an attempt to
26 impose an impossible standard on the Co-Permittees that cannot withstand legal scrutiny.

27 Because the law does not compel doing the impossible, the numeric limits imposed
28 on the City’s discharges in the Final Permit must be stricken unless the Regional Board

1 can demonstrate, based on substantial evidence in the record, that the RWLs imposed in
2 the Permit are reasonably attainable for the City to achieve. (See Water Code § 13241 (c).)

3 **VIII. THE FINAL PERMIT TERMS IMPOSING NUMERIC LIMITS,**
4 **IRRESPECTIVE OF THE MEP STANDARD, ALONG WITH THE**
5 **“DISCHARGE PROHIBITION” AND “ILLICIT CONNECTION”**
6 **PROVISIONS, WERE ADOPTED IN VIOLATION OF WATER CODE**
7 **SECTIONS 13000, 13263 AND 13241.**

8 **A. Permit Terms That Go Beyond the MEP Standard Are Not Required**
9 **Under Federal Law, and No Appellate Court – Anywhere – Has Ever**
10 **Upheld a Permit Such as the Final Permit Here.**

11 As discussed above, with the various numeric limits imposed pursuant to the terms
12 of the Final Permit, as well as the zero discharge limit on dry-weather runoff (and other
13 discharge prohibition and illicit connection terms of the Final Permit), the SD Regional
14 Board is seeking to require strict compliance with numeric limits, irrespective of whether
15 such terms will result in the need to develop and implement “impracticable” BMPs that are
16 not technically and/or economically feasible or cost effective.

17 By imposing requirements that go beyond the MEP standard as defined in the Final
18 Permit itself, *i.e.*, by imposing permit terms that will result in a Permittee having to
19 implement “impracticable” BMPs, the SD Regional Board is, by definition, seeking to
20 impose terms that not only go beyond the requirements of federal law, it is also seeking to
21 impose terms that go beyond what is allowed under state law, namely Water Code sections
22 13241, 13263 and 13000, and the California Supreme Court’s decision in *Burbank v. State*
23 *Board* (2005) 35 Cal.4th 613.

24 Water Code sections 13241, 13263 and 13000 all directly or indirectly require a
25 consideration of “economics,” and further compel an affirmative finding by the SD
26 Regional Board that the Final Permit terms are “reasonably achievable,” including a
27 balancing of the benefits of the requirement, e.g., “the total values involved, beneficial and
28 detrimental, economic and social, tangible and intangible” (Wat. Code § 13000), and the

1 “water quality conditions that could reasonably be achieved through the coordinated
2 control of all factors which affect water quality in the area.” (*Id.*, § 13241)

3 B. Water Code Sections 13000, 13263 and 13241 Prevent the SD Regional
4 Board From Imposing MS4 Permit Terms Beyond The MEP Standard.

5 Under the California Supreme Court’s holding in *Burbank, supra*, 35 Cal.4th 613,
6 627, a regional board must consider the factors set forth in Water Code sections 13263,
7 13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors
8 “would justify including restrictions that do not comply with federal law.” As stated by
9 the Supreme Court: “*Section 13263 directs Regional Boards, when issuing waste*
10 *discharge requirements, to take into account various factors including those set forth in*
11 *Section 13241.*” (*Id.* at 625, emphasis added.) Specifically, the Supreme Court held that
12 to the extent the NPDES Permit provisions in that case were not compelled by federal law,
13 regional boards are required to consider their “economic” impacts on the dischargers
14 themselves, with the Court finding that such requirement means that the boards must
15 analyze the “*discharger’s cost of compliance*” and whether a discharger could reasonably
16 achieve the state law derived permit standard. (*Id.* at 618.)

17 The Supreme Court thus interpreted the need to consider “economics” as requiring a
18 consideration of the “cost of compliance” on the cities involved in that case. (*Id.* at 625
19 [“The plain language of *Sections 13263 and 13241* indicates the Legislature’s intent in
20 1969, when these statutes were enacted, that a regional board *consider the costs of*
21 *compliance when setting effluent limitations in a waste water discharge permit.*”].) The
22 Supreme Court further recognized that the goals of the Porter-Cologne Act as provided for
23 under Water Code section 13000 are to “attain the highest water quality *which is*
24 *reasonable*, considering all demands being made and to be made on those waters *and the*
25 *total values involved, beneficial and detrimental, economic and social, tangible and*
26 *intangible.*” (*Id.* at 618.) Moreover, under Water Code section 13263(a), waste discharge
27 requirements developed by a regional board “shall implement any relevant water quality
28 control plans that have been adopted, and take into consideration the beneficial uses to be

1 protected, the water quality objectives *reasonably required for that purpose*, other waste
2 discharges, the need to prevent nuisance, *and the provisions of Section 13241.*” (*Id.*
3 Emphasis added.)

4 In addition, Water Code section 13241 compels regional boards to consider the
5 following factors when developing NPDES Permit terms:

- 6 (a) Past, present, and probable future beneficial uses of
7 water.
- 8 (b) Environmental characteristics of the hydrographic unit
9 under consideration, including the quality of water available
10 thereto.
- 11 (c) Water quality conditions that could reasonably be
12 achieved through the coordinated control of all factors which
13 affect water quality in the area.
- 14 (d) Economic considerations.
- 15 (e) The need for developing housing in the region.
- 16 (f) The need to develop and use recycled water.

17 In a concurring opinion in *Burbank*, Justice Brown made several significant
18 observations regarding the importance of considering “economics,” and Section 13241
19 factors in general, when adopting NPDES terms not required by federal law:

20 Applying this federal-state statutory scheme, it appears that
21 throughout this entire process, the Cities of Burbank and Los
22 Angeles (Cities) were unable to have economic factors
23 considered because the Los Angeles Regional Water Quality
24 Control Board (Board) – the body responsible to enforce the
25 statutory framework – failed to comply with its statutory
26 mandate. For example, as the trial court found, the Board did
27 not consider costs of compliance when it initially established
28 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...

///
28

1 Justice Brown went on to state:

2 Accordingly, the Board has failed its duty to allow public
3 discussion – including economic considerations – at the
4 required intervals when making its determination of proper
5 water quality standards. What is unclear is why this process
6 should be viewed as a contest. State and local agencies are
7 presumably on the same side. The costs will be paid by
8 taxpayers and the Board should have as much interest as any
9 other agency in fiscally responsible environmental solutions.

10 (*Id.* at 632-33.)

11 In this case the OC Co-Permittees have submitted evidence, un rebutted by the SD
12 Regional Board, that: (1) complying with all of the RWLs imposed in the Permit will cost
13 approximately two billion dollars—making the cost of compliance for the City, if
14 compliance is even possible, in excess of 100 million dollars;¹⁶ (2) several of the RWLs,
15 such as the numeric effluent limits for bacteria and nutrients imposed via the Permit, are
16 likely physically impossible to ever attain;¹⁷ (3) achieving some of the RWLs, such as by
17 diverting all wet weather flows out of the MS4s to treatment facilities, would create
18 substantial risk of inadvertently damaging beneficial uses (such as fisheries) that rely upon
19 sufficient amounts of water.

20 As such, it would appear that the Regional Board failed to conduct the mandatory
21 analysis required by *Burbank* since: (1) the Regional Board is imposing RWLs as numeric
22 effluent limits under state law; (2) the costs of compliance for the Co-Permittees are
23 enormous, and the Regional Board did not articulate, per Water Code § 13241 (d) during
24 the Permit adoption process why such massive costs are justified particularly since
25 attaining RWLs is likely to be impossible for some constituents; (3) there is no evidence
26 for any of the RWLs that the numeric standards imposed in the Permit are, in fact
27 reasonably achievable, as Water Code § 13241 (c) and *Burbank* require prior to imposition
28 in a permit; (4) the RWL provisions would appear to potentially wipe out other beneficial

16 See Exhibit B (Orange County Draft Initial Cost Opinion)

17 See Exhibit D (Index of Evidence Submitted to the SD Regional Board between 2013 and 2015)

1 uses, contrary to Water Code § 13241 (a), by forcing the Co-Permittees to divert as much
2 water as they can out of their MS4s so as to avoid the risk of future exceedances at the end
3 of pipe. Given the foregoing, the State Water Board is obliged to disapprove the strict
4 imposition of RWLs in the Permit until such time as the Regional Board, if it can,
5 complies with *Burbank* and Water Code §§ 13241 and 13263.

6 **IX. THE FINAL PERMIT IMPROPERLY ATTEMPTS TO HOLD THE CITY**
7 **RESPONSIBLE FOR DISCHARGES FROM OTHER CO-PERMITTEES.**

8 The provisions of Attachment E of the Final Permit can be read to unlawfully
9 attempt to impose joint and several liability on the Permittees, through the use of language
10 requiring compliance by the “Co-permittees” rather than by individual dischargers. Any
11 attempt to impose joint and several liability on the Co-Permittees, however, is contrary to
12 law. Under the Clean Water Act and state law, each “co-permittee” is only responsible for
13 its own discharges. (*See* 40 C.F.R. § 122.26(a)(3)(vi) [“Co-permittees need only comply
14 with permit conditions relating to discharges from the municipal separate storm sewers for
15 which they are operators.”].) Of greatest concern under the Final Permit, a Co-Permittee
16 may be found out of compliance with a WQIP requirement, or an interim or final TMDL
17 target, based solely on discharges from other co-permittees, and this is a particular concern
18 in the context of bacteria – which may have multiple sources, naturally occurring and
19 anthropogenic. Joint and several liability is arguably imposed by each section of the
20 Permit that provides for the “co-permittees” to ensure compliance with WQIP mandates or
21 the various TMDLs that are incorporated into the Final Permit.¹⁸

22 As a matter of law, and as acknowledged by the State Water Board in its 2015 LA
23 MS4 Order at pp. 66-70, the SD Regional Board cannot impose joint and several liability
24 on the Permittees absent evidence that the discharges of a particular Permittee caused a
25 TMDL or WQIP violation, or the exceedance of some other legally promulgated and
26

27 ¹⁸ In addition to the problematic sections of the Final Permit referenced above, Final
28 Permit sections that can be read to impose joint liability are: Attachment E, Sections
1.b(3)(d); 2.b(3)(d)(iv-v); 3.b(3)(d); 3.b(3)(e)(iv-v); 3.c(2)(d); 3.c(2)(e); 4.b(3)(d);
4.c(2)(e); 5.b(3)(d-g); 5.c(1)(b)(iv-viii); 6.b(3)(d-f); 6.c(3)(d-h).

1 enforceable effluent standard. The numerous provisions of the Final Permit that still imply
2 joint liability without evidence of specific responsibility by a particular permittee should
3 be stricken by the State Water Board in accordance with its 2015 LA MS4 Order.

4 **X. CONCLUSION.**

5 For the foregoing reasons, at such time as this Petition may be heard in the future,
6 or in the event that settlement discussions with the SD Regional Board during the abeyance
7 period do not produce permit conditions that address the concerns raised herein, the City
8 respectfully requests that the State Board vacate and set aside the disputed terms of the
9 Final Permit, as amended, including the problematic permit conditions and terms identified
10 for the State Board herein. However, in the interest of finding accommodation with the
11 SD Regional Board, and in the hope of developing a compromise solution that moves
12 southern Orange County forward in an attainable manner, the City respectfully asks that
13 the State Board hold the City's Petition in abeyance at this time.

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15 Dated: December 18, 2015

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