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July 27, 2009

VIA OVERNITE EXPRESS

Mr. Ivar Ridgeway
Storm Water Permitting Unit
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Comments on Modifications to Incorporate Provisions of the Los Angeles River Watershed Trash Total Maximum Daily Load (TMDL) into the Los Angeles County Municipal Stormwater Discharge Permit (NPDES No. CAS004001)

Dear Mr. Ridgeway:

These comments are being submitted on behalf of the Cities of Downey and Signal Hill, and the ad hoc group of cities known as the Coalition for Practical Regulation[1] (hereafter collectively "Cities"), in connection with a July 6, 2009 Notice from the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") requesting comments and scheduling a workshop on proposed action to incorporate provisions of the Los Angeles River Trash Total Maximum Daily Load ("TMDL") into the existing Los Angeles County Municipal Stormwater Discharge Permit ("NPDES No. CAS004001," hereafter "NPDES Permit" or "Permit").

As further discussed below and as supported by the attached documentation, the Cities strongly believe it is premature at this time to be incorporating either this particular TMDL or any TMDL into the existing NPDES Permit, in light of the Orange County Superior Court's recent decision in *City of Arcadia v. State Board*, OCSC Case No. 06CC02974 (the "*Arcadia*

[1] The Coalition for Practical Regulation also known as "CPR" is an ad hoc group of municipalities in Los Angeles County committed to obtaining clean water through cost-effective and reasonable storm water regulations, and consists of the following Cities: Arcadia, Artesia, Baldwin Park, Bell, Bell Gardens, Bellflower, Carson, Cerritos, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Canada Flintridge, La Mirada, Lakewood, Lawndale, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pico Rivera, Pomona, Rancho Palos Verdes, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Vernon, Walnut, West Covina, and Whittier.

Case"), and given that the term of the existing NPDES Permit expired as of December 13, 2006, with various renewal applications presently pending before the Regional Board for the renewal of the NPDES Permit (including separate permit applications having been filed by the Cities of Downey and Signal Hill, as well as by other cities). As such, any incorporation of this TMDL or any other TMDL, should be done in conjunction with the adoption of the renewed NPDES Permits through the pending permit applications, i.e., Reports of Waste Discharge ("ROWD") submissions, and only after all Appeals in the *Arcadia* Case have been completed, and if the Superior Court's Decision therein has been upheld (Exhibit "1" hereto), then only after the changes resulting from the deletion of the "potential" use designations and the Water Code Sections 13241/13000 analysis of the Water Quality Standards ("Standards") have been made.

Moreover, at such time as the required review of the Standards in the Basin Plan has been completed, as required by the Superior Court in the *Arcadia* Case,[2] and the Regional Board is considering the incorporation of this or a revised trash TMDL or TMDLs into any Municipal NPDES Permit, any incorporation of the TMDL into a Municipal NPDES Permit must then take into account the following:

(1) Any incorporation of a TMDL into a Municipal NPDES Permit in the Los Angeles Region is premature at this time.

(2) That Federal law and State policy do not require or even recommend compliance with TMDLs through the use of numeric limits, i.e., strict compliance with the waste load allocations ("WLAs") in a TMDL. Instead, both State and federal policy provide for the compliance with TMDLs through the use of iterative Maximum Extent Practicable ("MEP") compliant BMPs, and not through strict compliance with WLAs (which are a form of numeric effluent limits).

(3) Any amendment to or reissuance of an NPDES Permit to incorporate new terms, as confirmed by the California Supreme Court in the *City of Burbank v. State Board ("Burbank")* (2005) 35 Cal.4th 613, can only be adopted once the factors and considerations required under Water Code section 13241, as well as section 13000, have first been met.

(4) To the extent any monitoring or other requirements involving an investigation of water quality is to be required as part of the incorporation of a TMDL into a Municipal NPDES Permit, Water Code Sections 13225, 13165 and 13257 all require that a cost/benefit analysis be conducted.

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[2] The Cities acknowledge that the *Arcadia Case* is presently on appeal but contend the Superior Court's determinations on the need to comply with the requirements of Water Code Sections 13241/13000, and the need to delete the "potential" use designations, will be upheld.

(5) To the extent this or any other TMDL is to be incorporated into a Municipal NPDES Permit, in a fashion that is not otherwise required by federal law, such a requirement cannot be imposed unless the State first provides funding for this non-federal mandate to the Cities, consistent with the requirements of the California Constitution.

I. INCORPORATION OF THE TRASH TMDL INTO ANY MUNICIPAL NPDES PERMIT IS PREMATURE.

A. No TMDL Should Be Incorporated Into The NPDES Permit Until The *Arcadia* Case Has Been Resolved And The Review And Necessary Revisions Of The Water Quality Standards Ordered Therein, Completed.

The incorporation of a TMDL into an NPDES Permit is, in effect, the final step in the process of seeking to enforce Water Quality Standards as against storm water ("Stormwater")[3] dischargers. As recognized by the Court of Appeal in *City of Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404, "[a] TMDL must be 'established' at a level necessary to implement the applicable water quality standards." (*Also see City of Arcadia v. EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1145 ["each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES Permits or establishing nonpoint source controls."].)

In the recent *Arcadia* Case, a number of cities successfully challenged the propriety of the Standards in the Basin Plan, and particularly the Water Boards' failure to conduct a Water Code Section 13241/13000 analysis during the course of the 2004 Triennial Review, and their failure to correct the improperly designated "potential" use designations in the Basin Plan. As discussed below, the trial court in the *Arcadia* Case determined that the State and Regional

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[3] The term "storm water" is defined under federal law to include both dry weather and wet weather runoff, i.e., "storm water" plainly includes not only precipitation events but also urban runoff. (See Exhibit "2" hereto, 11/26/2008 Judgment of Superior Court in the *Arcadia* Case, p. 2, fn. 2, citing 40 C.F.R. § 122.26(b)(13) and finding as follows: "Federal law defines 'storm water' to include urban runoff, i.e., 'surface runoff and drainage'." In their Opening Brief filed on June 11, 2009, the Appellant State and Regional Boards conceded that "storm water emanates from diffuse sources, including surface run-off following rain events (hence, 'storm water') and urban run-off." (Appellant Boards Opening Brief in the *Arcadia* Case, p. 9, n. 5.) Also see the Opening Appellate Brief of the Appellants/Intervenors NRDC, et al. filed on 6/09/09 in *City of Arcadia v. State Board*, Case No. G041545, p. 6, n. 3, where said Appellants, stated as follows: "For ease of reference, throughout this brief the terms 'urban runoff' and stormwater' are used interchangeably to refer generally to the discharges from the municipal discharger storm sewer systems. A definition of stormwater includes 'stormwater runoff, snow melt runoff, and surface runoff and drainage.' (40 C.F.R. § 122.26(b)(13).)."

Boards were now required to conduct this 13241/13000 review and to make appropriate revisions to the Standards, including deleting the "potential" use designation.

Thus, any consideration of the incorporation of the trash TMDL, or any other TMDL, into a Municipal NPDES Permit for the Los Angeles Region, should be delayed until such time as the propriety of the Standards upon which the TMDL is based, have been reviewed and corrected. For example, in this case, the trash TMDL is based on various "potential" use designations, which as the Superior Court found in the *Arcadia* Case is improper, and thus, any attempt to enforce the trash TMDL to protect mere "potential" beneficial uses, will likely be a significant waste of scarce public resources as the Standards are likely to change.

Moreover, although the *Arcadia* Case is presently on appeal, at a minimum, in light of the significance of the Superior Court's rulings that the "potential" use designations are improper and are to be replaced with other more appropriate use designation, and that other changes to the Standards may be necessary once the review under Water Code Sections 13241 and 13000 has been completed, any decision to attempt to enforce the existing Standards through the incorporation of the trash TMDL or other TMDLs into a Municipal NPDES Permit, should at a minimum be delayed until such time as the *Arcadia* has been finally decided. To proceed with the incorporation of this trash TMDL into the existing NPDES Permit, blindly, understanding that the Standards supporting the TMDL have been adjudicated as being defective, and thus, that the TMDL itself may need to be revised, is arbitrary and capricious action that will only lead to further litigation.

In the *Arcadia* Case, with respect to the propriety of the Standards in the existing Basin Plan as they are to be applied to Stormwater, in a Notice of Ruling/Decision dated March 13, 2008 (Exhibit "1" hereto, hereafter "Decision"), the Superior Court, the Honorable Thierry P. Colaw presiding, held, among other things, as follows:

> The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objective. . . . They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975." [Citation.] This was confirmed by the State Board in a 1991 Order when it stated: **"The Basin Plan specified requirements and**

> **controls for 'traditional' point sources, but storm water discharges were not covered . . .** The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. **Clearly, the effluent limitations listed for other point sources are not meant to apply."** [Citation.] There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water. (*See* Exhibit "1," Decision p. 5-6; bolding in original.)

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

> **Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probably future beneficial uses of water." Water C. § 13241(a).**
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> **The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirements in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. Of California* (2003) 31 Cal.App.4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.** (Exhibit "1," Decision, p. 5.)

In light of the fact that the trash TMDLs have been based on a set of Standards that, as of this point in time, have been determined to be defective because of the improper inclusion of "potential" use designations as well as the possible defects created by the Boards' failure to comply with Water Code Sections 13241/13000 as they relate to Stormwater, at a minimum, the

Cities respectfully request that the trash TMDL, and any other TMDL, not be incorporated into the subject NPDES Permit, or any other NPDES Permits, until such time as the final decision has been rendered in the *Arcadia* Case, and if the Superior Court's decision is upheld, until such time as the Judgment and Writ of Mandate set forth in that case have been complied with. (*See* Exhibits "2" and "3" hereto, the Judgment and Writ of Mandate entered in the *Arcadia* Case by the superior court.)

B. The Term Of The Existing NPDES Permit Expired On December 13, 2006, And The Incorporation Of This Or Any Other TMDL Should Be Addressed In Accordance With The Pending Renewal Process.

The existing Municipal NPDES Permit for Los Angeles County was issued on December 13, 2001, and by its own terms expired on December 13, 2006 (albeit under the federal regulations, the terms of the existing Municipal NPDES Permit are to remain in effect until a replacement permit is adopted). In accordance with the requirements of the applicable federal regulations governing the renewal of NPDES Permits, the City of Downey, the City of Signal Hill, and several other small cities within Los Angeles County, along with the County of Los Angeles and numerous other cities in the County, filed ROWDs to renew their Municipal NPDES Permit. To date, as far as the Cities are aware, none of these various ROWD applications have not been processed by the Regional Board, and it is unclear when the Regional Board will commence the renewal process. It is clear, however, that the renewal process is long overdue, as the term of the existing Municipal NPDES Permit expired well over two and one-half years ago, and that, to date, the Regional Board has not provided any justification for the delay in moving forward with the issuance of new Municipal NPDES Permits for the applying Cities.

In light of the fact that the renewal process is long overdue, and given the importance of the issue of incorporating TMDLs into a Municipal NPDES Permit, as well as the complexities created by doing so, any incorporation of the trash TMDL or any other TMDLs into the Municipal NPDES Permits, should be conducted as part of the permit renewal process. To do otherwise at this time is to proceed in a manner that is arbitrary and capricious.

II. ANY PERMIT TERM INCORPORATING A TMDL MUST BE IN COMPLIANCE WITH APPLICABLE STATE AND FEDERAL LAW AND POLICIES.

A. Federal And State Policies Provide For The Use Of Best Management Practices ("BMPs") In Lieu Of Numeric Water Quality-Based Effluent Limitations, When Enforcing a TMDL Or Otherwise.

At the time when either this TMDL or any other TMDL is appropriately being evaluated for purposes of incorporating it into any Municipal NPDES Permit, the Regional Board must consider existing federal and State laws, as well as applicable policies governing whether and how any such TMDL is best incorporated into a Municipal NPDES Permit.

Initially it must be recognized that existing federal law does ***not*** require that Stormwater dischargers strictly comply with WLAs, as set forth in a TMDL, but instead only requires compliance with WLAs through the use of the maximum extent practicable ("MEP") standard, and importantly, through the use of best management practices ("BMPs"). In fact, time and again the Courts, US EPA and the State Board have all recognized that Stormwater discharges are different from traditional point source discharges, and that Stormwater must be analyzed and treated as such in accordance with the requirements of the Clean Water Act.

For example, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the Appellate Court determined that "in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'" (*Id*, emphasis in original, citing 33 USC § 1342 (p)(3)(B)(iii) & *Defenders of Wildlife v. Browner ("Defenders")* (9th Cir. 1999) 191 F.3d 1159, 1163.)

In *Defenders, supra,* 191 F.3d 1159, relied upon by the *BIA* Court of Appeal, the Ninth Circuit similarly recognized the different approach taken by Congress when addressing storm water discharges versus industrial discharges, finding that "industrial discharges must comply strictly with state water-quality standards," with Congress choosing "not to include a similar provision for municipal storm-sewer discharges." (*Id* at 1165.) As the *Defenders* Court held, instead, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' . . . ." (*Id.*) The Ninth Circuit went on to find, after reviewing the relevant portions of the Clean Water Act, 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) "*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable . . . . In such circumstances, the statue unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)." (*Id* at 1165, emphasis in original.)

With respect to TMDLs specifically, that WLAs within a TMDL are not required under the Clean Water Act to be strictly met, was confirmed by U.S. EPA itself in a November 22, 2002 EPA Guidance Memorandum on "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs." (Exhibit "4" hereto.) In the EPA Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges, should be "***in the form of BMPs and that numeric limits will be used only in rare instances.***" (Exhibit "4," p. 6, emphasis added.) The EPA recommended that "***for NPDES-regulated municipal . . . dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits.***" (*Id* at p. 4.) EPA went on to expressly recognize the difficulties in regulating Stormwater discharges, explaining its policy as follows:

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

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

In addition, the policy of the State of California is that strict numeric limits are ***not*** an appropriate means by which to implement the MEP standard under the Clean Water Act. The State's policy to apply the MEP standard through an iterative BMP process, and not through the use of strict numeric discharge limitations, is reflected in numerous prior orders and other documentation from the State Board. (*See*, e.g., State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14] [Ex. 5]; State Board Order No. 96-13, p. 6 [***"federal laws does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."] [Ex. 6]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."] [Ex. 7]; State Board Order No. 2001-11, p. 3 ***["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."]*** [Ex. 8]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."] [Ex. 9]; State Board Order No. 2006-12, p. 17 [***"Federal regulations do not require numeric effluent limitations for discharges of stormwater***"] [Ex. 10]; *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [***"It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."] [Ex. 11]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 [***"Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"] [Ex.12].)

In short, neither State nor federal law, nor any state and federal policy, provide for the incorporation of WLAs as strict numeric limits into a municipal NPDES Permit. In fact, they provide for the contrary, and recognize that numeric limits should only be incorporated into a municipal NPDES Permit in "rare instances" with the State Board's numeric effluent limits panel concluding that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."

B. Any Attempt To Impose Strict Compliance With WLAs In A Stormwater Permit, Or To Impose Other Requirements That Go Beyond Federal Law Or That Do Not Exist In Federal Law, Require Compliance With Water Code Sections 13241 And 13000.

As explained by the Court of Appeal in *BIA San Diego County v. State Board, supra,* 124 Cal.App.4th 866, 874, in the Clean Water Act, Congress distinguished between industrial and storm water discharges and clarified that with respect to municipal storm water discharges, "the

EPA has the authority to fashion NPDES Permit requirements to meet storm water quality standards without specific numeric effluent limits . . . ." Accordingly, any attempt to proceed at this time and impose a permit term that requires strict compliance with a WLA, *i.e.*, a numeric effluent limit, is clearly a requirement that goes beyond what is compelled under federal law. As such, all aspects of State law must be adhered to before any such permit term can be adopted.

In *Burbank, supra,* 35 Cal.4th 613, the California Supreme Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, that the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the "dischargers cost of compliance." (*Id* at 618.) The Supreme Court in *Burbank* also specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that particular case. (*Id* at 625.)

Sections 13000 and 13241 of the Porter-Cologne Act clearly require a consideration of a series of factors in not only establishing water qualify policy and developing water quality standards, but also in developing applicable permit terms. (*See City of Burbank v. State Board, supra,* 35 Cal.4th 613, 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the costs of compliance when setting effluent limitations in a waste water discharge permit."].) The goal of the Porter-Cologne Act is to ***"attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible."*** (Water Code § 13000; *see also Burbank*, 35 Cal.4th 613, 618.)

Accordingly, when establishing water quality objectives, the Water Boards must "ensure the reasonable protection of beneficial uses," recognizing that it "may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (Water Code § 13241.) Section 13241 thus compels the Boards to consider the following factors, including when developing NPDES Permit terms (*see Burbank*, 35 Cal.4th 613, 625):

> **(a) Past, present, and probable future beneficial uses of water.**
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> **(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.**
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> **(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.**

(d) Economic considerations.

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

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

In *Burbank, supra,* 35 Cal.4th 613, the California Supreme Court held that: "The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a waste water discharge permit." (*Id* at 625, emphases in original.)

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

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible**." **(§ 13000.)** In fulfilling its statutory imperative, the Board **is required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." **(§ 13241)**, a conceptual classification far-reaching in scope. (*Id* at 109-110, emphasis added.)
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> The Board's obligation is to attain the highest reasonable water quality "considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, *economic* and social, tangible and intangible." (§13000, italics added.) (*Id* at 116.)

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> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also all competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider** . . . "[water] quality conditions that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area." (*Id* at 118, emph. added.)

Justice Brown in her concurring opinion in *Burbank,* made several significant comments regarding the importance of considering "economics" in particular, and the Water Code section 13241 factors in general, when considering including numeric effluent limitations in an NPDES Permit:

> **Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) – the body responsible to enforce the statutory framework –failed to comply with its statutory mandate.**
>
> **For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.** (*Id* at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

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

The above-referenced statutory, regulatory and case authority all confirm, not only that municipal dischargers are to be treated differently than other industrial dischargers, but also that numeric limits should not be applied to any municipal discharger at this time. "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, Exhibit "9," p. 8.) Accordingly, strict compliance with WLAs in the trash TMDL or any other TMDL, should not be required at this time, and to the extent a WLA is attempted to be incorporated into a municipal NPDES Permit, and enforced as such and through a means other than through the use of the MEP-complaint BMPs, all applicable requirements of State law, including the analysis required under Water Code Sections 13241/13000, must be met.

C. Any Additional Monitoring Or Required Investigation Into Water Quality Would Trigger The Need For A Cost-Benefit Analysis Pursuant To Water Code Sections 13225, 13165 And 13267.

Before incorporating any aspect of a TMDL into a municipal NPDES Permit, the Regional Board must also give consideration to the potential need to conduct a cost-benefit analysis, in accordance with Water Code Sections 13225(c), 13165 and 13267. That is, to the extent the Regional Board seeks to require a city to investigate and report on technical factors involved in water quality control, or to require a city to implement additional monitoring requirements, a cost-benefit analysis will need to be performed beforehand to justify the inclusion of any such additional reporting and monitoring requirement.

Under these Water Code Sections, where any investigation, monitoring or reporting requirements are imposed upon a city, the State and Regional Boards are required to consider the burdens of conducting the analysis, and preparing the monitoring reports, and may only require such reporting and monitoring, where "the burden, including costs, of such reports" bears "a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Moreover, under Water Code Section 13267 specifically, where such an investigation or reports are required, "the regional board shall provide the person with a written explanation

with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." (Water Code § 13267.)

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

Accordingly, any incorporation of the trash TMDL, or any other TMDL, into a Municipal NPDES Permit, that includes additional reporting or monitoring requirements, can only be imposed upon the Cities after a cost-benefit analysis, showing that the costs do not exceed the benefits of such requirements, has been conducted.

D. Any Added Mandates On The Cities With New Permit Forms That Are Not Mandated By Federal Law, Must Be Funded In Accordance With The California Constitution.

Finally, to the extent the Regional Board seeks to impose new requirements in the existing NPDES Permit that go beyond what is otherwise required under federal law, i.e., to force the Cities to strictly comply with the WLAs, as opposed to requiring compliance with the WLAs through the use of MEP-complaint BMPs, such a requirement and any other accompanying mandates that go beyond the requirements of federal law, can only be imposed where adequate funds have been provided to the cities to comply with these mandates.

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

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

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

Accordingly, to the extent the Regional Board will seek to impose additional requirements that exceed the requirements provided for under federal law, it is seeking to impose new mandates upon municipalities that can only be imposed where necessary funding has been provided to the cities to comply with such new mandates. The incorporation of new permit requirements that are not mandated by federal law, and that go unfunded by the State, would violate Article XIII B, Section 6 of the California Constitution. (*See County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 914 ["We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."].)

III. CONCLUSION.

The Cities appreciate the opportunity to submit these legal comments, and based on the above and the attached exhibits, respectfully request that the trash TMDL not be incorporated into the subject NPDES Permit until such time as (1) the *Arcadis* Case has been finally concluded, and if the Superior Court's Decision is upheld, until after the required 13241/13000 analysis has been completed, and the necessary changes have been made to the Standards (including correcting the "potential" use designations), and (2) the pending ROWDs have been processed, with the trash TMDL and other TMDLs being addressed in conjunction with the development of the renewed Municipal NPDES Permits. Further, once commenced, any incorporation of this trash TMDL, or any other TMDL, into a Municipal NPDES Permit, must be conducted in accordance with all applicable State and federal laws and governing policy.[4]

Sincerely,

RUTAN & TUCKER, LLP

Richard Montevideo

Enclosures
RM:ctm

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[4] It should also be recognized that any proceeding to modify an existing NPDES Permit is an "adjudicative" proceeding, and that, because of the complex factual and legal issues involved in this case to incorporate the trash TMDL into the Permit, as well as the highly controversial nature of the issues involved in incorporating the TMDL into the NPDES Permit, ***the procedures for formal adjudicative hearings should be followed.*** (*See, e.g.,* State Board Order No. WQ 2000-11, p. 14, fn. 25 ["For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage the regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et seq."] [Ex. 8 hereto].)