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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of:

THE CITY OF ARCADIA

FOR REVIEW OF ACTION BY THE
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, LOS
ANGELES REGION, IN ISSUING
ORDER NO. R4-2012-XXXX (NPDES
NO. CAS 004001)

PETITION FOR REVIEW OF ORDER NO.
R4-2012-0175 BY THE LOS ANGELES
REGIONAL WATER QUALITY CONTROL
BOARD

[Water Code § 13320(a)]

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I.

INTRODUCTION

The City of Arcadia, California (“City” or “Petitioner”) hereby submits this Petition for Review (“Petition”) to the California State Water Resources Control Board (“State Board”) pursuant to section 13320(a) of the California Water Code (“Water Code”), requesting that the State Board review an action by the California Regional Water Quality Control Board, Los Angeles Region (“Regional Board”). Specifically, Petitioner seeks review of the Regional Board’s November 8, 2012 Municipal Separate Stormwater Sewer System (“MS4”) Permit, Order No. R4-2012-0175, reissuing NPDES Permit No. CAS004001 (“Permit”).

Petitioner requests that this Petition be held in abeyance at this time pursuant to Section 2050.5, subdivision (d) of Title 23 of the California Code of Regulations. Petitioner further reserves the right to supplement the legal arguments and authorities raised herein with additional memoranda of points and authorities if and when the Petition is activated. As an initial matter, Petitioner has every intention in abiding by the Permit in good faith and is genuinely optimistic about working with the Regional Board to assess and implement the strategies and requirements necessary for compliance. Nevertheless, the Permit contains significant issues that concern Petitioner, and other aspects that the Petitioner believes are flawed. Thus, while Petitioner has every hope that it will not need to request that the State Board act on any of the issues raised herein, as a matter of prudence and protection against the uncertainty of such a momentous and unprecedented Permit and other potential legal challenges that may ultimately alter the Permit, the Petitioner wishes to file this Petition and have it held in abeyance until such time as Petitioner requests the State Board to act on the Petition.

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II.

NAME AND ADDRESS OF PETITIONER

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III.

ACTION OF THE REGIONAL BOARD UPON WHICH REVIEW IS SOUGHT

By this Petition, the City is challenging the Regional Board's November 8, 2012 adoption of the "Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except those Discharges

1 Originating from the City of Long Beach MS4,” Permit, Order No. R4-2012-0175, reissuing
2 NPDES Permit No. CAS 004001.

3 **IV.**

4 **THE DATE OF THE REGIONAL BOARD’S ACTION**

5 The Regional Board approved the challenged Permit on November 8, 2012.

6 **V.**

7 **STATEMENT OF THE REASONS THE ACTION WAS IMPROPER**

8 The Permit generally embodies a workable approach to improving water quality in the
9 County, while reflecting the work the permittees have initiated during the prior permit terms and
10 the work they have committed to perform in the future. However, several provisions of the
11 Permit, including the imposition of numeric standards in the Receiving Water Limitations
12 provisions, the manner of the incorporation of various Total Maximum Daily Loads (“TMDL”)
13 and numeric Water Quality Based Effluent Limitations (“WQBEL”), the monitoring
14 requirements, the Permit’s lack of economic considerations, joint liability, and certain minimum
15 control measures, are inappropriate or improper in that, among other things, they impose
16 obligations on Petitioner that are not mandated or supported by the Clean Water Act (“CWA”),
17 the Porter-Cologne Water Quality Control Act (“Porter-Cologne”), or other applicable law. A
18 more detailed discussion of these issues is provided in the Statement of Points and Authorities
19 below.

20 **VI.**

21 **THE MANNER IN WHICH THE PETITIONER HAS BEEN AGGRIEVED**

22 Petitioner is a permittee under the Permit. It, along with the other permittees, is
23 responsible for compliance with the Permit. Failure to comply with the Permit exposes Petitioner
24 to administrative liability under the CWA and Porter-Cologne and potential lawsuits by the
25 Regional Board and third parties under the CWA’s citizen suit provision. To the extent that
26 certain provisions in the Permit are improper or inappropriate, Petitioner should not be subject to
27 such actions.

28

VII.

SPECIFIC ACTION REQUESTED OF THE STATE BOARD WITH THIS PETITION

The issues raised in this Petition may be resolved or rendered moot by actions to be taken by the permittees, Regional Board staff actions, amendment of the Permit, and/or developments in other jurisdictions. Accordingly, Petitioner requests the State Board hold this Petition in abeyance at this time pursuant to Section 2050.5, subdivision (d) of Title 23 of the California Code of Regulations. Petitioner further reserves the right to supplement the legal arguments and authorities raised herein with additional memoranda of points and authorities if and when the Petition is activated. Depending on the outcome of these actions, Petitioner will, if necessary, request the State Board to act on all or some of the issues raised in the Petition and schedule a hearing. Petitioner will provide a complete list of specific actions requested if and when the Petitioner requests the State Board to act on this Petition.

VIII.

**STATEMENT OF AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE
PETITION**

The following is a brief discussion of the issues Petitioner raises in this Petition. In addition to the issues discussed below, to the extent not addressed or inadequately addressed by the Regional Board in its responses to comments, Petitioner also seeks review of the Permit on the grounds raised in Petitioner's previous written comments, copies of which are attached hereto as **Exhibit "A."** Petitioner will submit to the State Board a complete statement of points and authorities in support of this Petition, as necessary, if and when Petitioner requests the State Board to take the Petition out of abeyance and act upon it.

A. The Permit Should Be Revised To Be Consistent with the Maximum Extent Practicable Standard and State Policy by Allowing Compliance Through an Iterative Management Process and Not Require Strict Adherence to Numeric Standards in Receiving Waters and for WQBELs

Consistent with both State and Federal standards, and in particular the Federal Maximum Extent Practicable ("MEP") standard applicable to municipal storm water permits, permittees should be able to achieve compliance with the entire Permit through good faith adherence to a

1 best management practice (“BMP”)-based iterative approach. Contrary to controlling State and
2 Federal standards, the Permit appears to require adherence to strict numeric standards in receiving
3 water bodies and for WQBELs.

4 The Federal MEP standard for MS4 Permits is a BMP-based, iterative process that does
5 not require adherence to strict numeric standards. (*See* Permit, Attachment A, p. A-11; 2003 EPA
6 Memo, “Guidance on Definition of Maximum Extent Practicable”; *Defenders of Wildlife v.*
7 *Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999); *Divers Environmental Conservation Organization*
8 *v. State Water Resources Control Board*, 145 Cal.App.4th 246, 256 (2006); *BIA v. State Water*
9 *Quality Resources Control Board*, 124 Cal.App.4th 866, 889-90 (2004) (“*BIA*”); 1993 State
10 Board Memorandum, “Definition of Maximum Extent Practicable.”) Accordingly, the Permit’s
11 imposition of numeric standards exceeds the Federal MEP, which has numerous legal
12 ramifications discussed further below.

13 Under a regime of enforceable numeric standards, even if the permittees act in good faith
14 to implement required BMPs, they can still be held in violation of the Permit, for reasons that are
15 entirely beyond their control. The MS4 is too large, too complicated, and lacks a model to assess
16 and track the movement of pollutants into, through, and out of it. Holding permittees in violation
17 of standards, which they cannot meet is unfair, and contrary to law. (*BIA, supra*, 124 Cal.App.4th
18 at 889 [MEP standard requires showing of technical and economic feasibility]; *Hugley v. JMS*
19 *Dev. Corp.*, 78 F.3d 1523, 1529-30 (11th Cir. 1996) [The CWA does not require permittees to
20 achieve the impossible].) Accordingly, numeric standards are simply inappropriate at this time.

21 **1. The Receiving Water Limitations Language’s Numeric Standards**

22 The Receiving Water Limitation (“RWL”) provisions of the Permit improperly require
23 strict adherence to the numeric water quality standards in receiving waters, regardless of whether
24 a permittee adheres to a BMP-based iterative approach in good faith. (*See, e.g.*, Permit, part
25 V.A.1; Fact Sheet pp. F-36-37.) In prior permits, the RWL standard, despite having similar (but
26 not identical) language, was understood to be an iterative process where compliance would not be
27 measured according to numeric water quality exceedances, but through a BMP-based iterative
28 process. (*See* State Board Order No. 99-05; State Board Order No. 2001-15.)

1 The RWL language in the Permit is inconsistent with State Board Water Quality Order
2 No. 99-05 and other prior precedents and Orders. State Board Water Quality Order No. 99-05
3 unequivocally requires compliance with storm water management plans as a means of complying
4 with receiving water limitations and, therewith, water quality standards. In State Water Quality
5 Order No. 2001-15, the State Board affirmed the iterative approach in stating that “we will
6 generally not require ‘strict adherence’ with water quality standards through numeric effluent
7 limitations and we continue to follow an iterative approach.” (State Board Order No. 2001-15, p.
8 8.) Finally, most recently, the State Board, on September 7, 2012, found that “[i]t is not feasible
9 at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular
10 urban discharges.” (See Fact Sheet for NPDES Permit and Waste Discharges Requirements for
11 State of California Department of Transportation, NPDES Permit No. CAS000003, Order No.
12 2012-XX-DWG.)

13 Although these latter items regard numeric effluent limitations, the same logic is even
14 more applicable to receiving water limitations, over which individual permittees maintain even
15 less control. Imposing numeric standards for the receiving water body is thus infeasible,
16 unachievable, and will require the development of BMPs that violate and exceed the requirements
17 of law. (See Permit, Attachment A, p. A-11 [the Permit’s own definition of MEP states that
18 BMP’s must be effective, have public support, exhibit reasonable relationship between cost and
19 benefit achieved, and be technically feasible].)

20 **2. Required Adherence to Numeric WQBELs Exceeds Federal Requirements and**
21 **Violates State and Federal Law and Policy**

22 **a. The Permit’s WQBELs Were Improperly Formulated**

23 The Regional Board failed to provide adequate justification for incorporating numeric
24 water quality based effluent limitations (“WQBELs”) in the Permit for each of the thirty-three
25 (33) incorporated Total Maximum Daily Loads (“TMDL”) to which they apply. A WQBEL is an
26 enforceable translation in an MS4 permit for attaining compliance with a TMDL WLA, which
27 serves to protect beneficial uses of a receiving water. (40 C.F.R. § 130.2.) The Permit fails to
28 establish that an adequate requisite Reasonable Potential Analysis (“RPA”) has been conducted.

1 The Permit fails to establish if discharges from any individual permittee's MS4 have the
2 reasonable potential to cause or contribute to an excursion above any "[s]tate water quality
3 standard including [s]tate narrative criteria for water quality." (See EPA's November 12, 2010
4 Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load
5 (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit
6 Requirements Based on those WLAs" ("EPA Memorandum").) The EPA Memorandum states:

7 Where the NPDES authority determines that MS4 discharges *have*
8 *the reasonable potential to cause or contribute to a water quality*
9 *excursion*, EPA recommends that, where feasible, the NPDES
10 permitting authority exercise its discretion to include numeric
11 effluent limitations as necessary to meet water quality standards.

12 EPA Memorandum, p. 2 (emphasis added).

13 There are two generally accepted approaches to conducting an RPA. According to
14 USEPA guidance, "A permit writer can conduct a reasonable potential analysis using effluent and
15 receiving water data and modeling techniques, as described above, or using a non-quantitative
16 approach." (NPDES Permit Writers' Manual, September 2010, page 6-23.)

17 Neither the administrative record nor the Permit's fact sheet contains any evidence of the
18 Regional Board having performed an RPA in accordance with either of the two foregoing
19 approaches. Regarding the first approach, such an analysis would have been impossible to
20 perform given that no outfall ("effluent") monitoring has been required for any Los Angeles
21 County MS4 permit since the MS4 program began in 1990. No modeling appears to have been
22 conducted either. Furthermore, the absence of any reference to WQBELs or RPA in any of the
23 Regional Board's TMDLs counters its assertion that the TMDL development process satisfied the
24 RPA requirement for establishing a numeric WQBEL in this instance.

25 Beyond this the Regional Board's failure to conduct an RPA to determine if an excursion
26 above a water quality standard is appropriate, federal regulations also require that the storm water
27 discharge be measured against an "allowable" ambient concentration. (40 C.F.R.
28 §122.44(d)(1)(iii).) Incomplete and partial wet and dry weather monitoring data relative to some
TMDLs cannot singularly serve to determine an excursion above a TMDL. Outfall monitoring

1 data would have to have been evaluated against in-stream generated ambient (dry weather) data to
2 make such a determination. The Regional Board, however, did not base the Permits WQBELs on
3 any such data.

4 As for the second, non-quantitative approach, the Regional Board also failed to provide
5 information in the Permit, its accompanying documents, or the administrative record indicating
6 that it had performed a non-quantitative analysis based on recommended criteria described in
7 USEPA guidance. In lieu of conducting either a quantitative or non-quantitative RPA, the
8 Regional Board concluded that reasonable potential can be demonstrated in several ways, one of
9 which is through the TMDL development process. (Fact Sheet, p. F-34.) No citation to any
10 authority was provided for this proposition. In essence, the Regional Board appears to claim that
11 the same analysis it used to establish a TMDL constitutes a type of RPA. The logic it used to
12 arrive at this conclusion is, however, faulty. A WQBEL is a means of attaining a TMDL WLA, a
13 translation of a WLA into prescribed actions or limits which has in the past been typically
14 expressed as a BMP. Before a WQBEL can be developed, however, a need for it must be
15 established. As the Writers' Manual points out:

16 The permit writer should always provide justification for the
17 decision to require WQBELs in the permit fact sheet or statement
18 of basis and must do so where required by federal and state
19 regulations. *A thorough rationale is particularly important when
the decision to include WQBELs is not based on an analysis of
effluent data for the pollutant of concern.*

20 (NPDES Permit Writers' Manual, September 2010, page 6-23 (emphasis added).)

21 The Regional Board provided no such "thorough rationale," which in the absence of
22 effluent data derived from outfall monitoring, is absolutely necessary to justify the need for a
23 numeric WQBEL. It is possible that outfall monitoring could demonstrate that existing BMPs
24 implemented through a MS4 permittee's storm water management plan is already meeting a
25 TMDL WLA, thereby obviating the need for any WQBELs. But that was not done, and simply
26 translating a TMDL WLA directly into a numeric WQBEL without the requisite analysis is a
27 clear violation of permit-writing standards, applicable law and good practice.

28

1 Finally, the EPA Memorandum is clear that reliance on numerics should be coupled with
2 the “disaggregation” of different storm water sources within permits. (See EPA Memorandum at
3 pp. 3-4.) The Permit fails to adequately disaggregate storm water sources within applicable
4 TMDLs regarding numeric WQBELs and for receiving water limitations, further making the
5 imposition of numeric standards inappropriate.

6 **b. The Permit’s Numeric WQBELs Violate the Requirements of Law**
7 **Because They are Infeasible**

8 The Regional Board’s numeric WQBELs violate state and federal law and policy because
9 they are not feasible. The 2010 EPA Memorandum recommends “*where feasible*, the NPDES
10 permitting authority exercise its discretion to include numeric effluent limitations as necessary to
11 meet water quality standards.” (EPA Memorandum, p. 2 (emphasis added).) This position is
12 based on 40 CFR §122.44(k), which authorizes the use of BMPs “when numeric limitations are
13 infeasible.” In 1991, the State Board concluded that “numeric effluent limitations are infeasible
14 as a means of reducing pollutants in municipal storm water discharges, at least at this time.”
15 (State Water Resources Control Board Water Quality Order 91-03, page 49.)

16 Although this determination was made over twenty years ago, the State Board’s position
17 on this issue has not changed since then, as evidenced by its adoption of the Caltrans MS4 permit
18 in September of 2012. Citing the fact sheet for the Caltrans MS4 permit, the State Board affirmed
19 that “it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs
20 and in particular urban discharges.” (Fact Sheet for NPDES Permit and Waste Discharges
21 Requirements for State of California Department of Transportation, NPDES Permit No.
22 CAS000003, Order No. 2012-XX-DWG, September 7, 2012, page 9.)

23 The Caltrans MS4 permit’s fact sheet also supports the use of BMP-based WQBELs as a
24 means of meeting TMDLs and other water quality standards. The Caltrans MS4 permit is also
25 subject to TMDLs adopted by the Regional Board and USEPA. If this aspect of the Permit is not
26 corrected, Los Angeles County MS4 permittees will be compelled to comply strictly with
27 numeric WQBELs and receiving water limitations while Caltrans need only implement WQBEL
28 BMPs to achieve compliance with the same TMDLs. This inconsistency lacks any justification.

1 Moreover, the Permit allows the use of BMPs to meet federal TMDLs. Having two
2 different compliance standards, one for State adopted TMDLs that require meeting numeric
3 WQBELs and one for USEPA adopted TMDLs that require BMP-based WQBELs is improper
4 and inappropriate. While the State may impose requirements more stringent than federal
5 regulations, it must provide a justification and conduct required analysis that has not been done in
6 the Permit, its accompanying documents, or elsewhere in the administrative record. (Water Code
7 § 13241; *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627
8 (2005).)

9 **B. TMDLs and TMDL Requirements Incorporated into the Permit Are Contrary to**
10 **State and Federal Law and Policy**

11 The Permit improperly requires in-stream monitoring to determine compliance with
12 TMDL WLAs (dry and wet weather) in receiving waters, contrary to federal storm water
13 regulations and State Law. Examples include, but are not limited to, the Metals TMDLs for the
14 Los Angeles River adopted by the State, the Metals TMDL for the San Gabriel River adopted by
15 USEPA, the Los Angeles River Bacteria TMDL and the Dominguez Channel and Greater Los
16 Angeles and Long Harbor Waters Toxic Pollutants.

17 Federal regulations only require two types of monitoring for compliance: (1) effluent
18 (outfall) and (2) ambient (natural concentration of water quality constituents prior to mixing of
19 either point or nonpoint source load of contaminants). (*See* 40 C.F.R. §122.44(d)(viii)(B); *see*
20 *also* EPA Glossary of Terms (<http://water.epa.gov/scitech/datait/tools/warsss/glossary.cfm>).)
21 TMDLs and other water quality standards are supposed to be ambient standards, as the noted in a
22 USEPA commissioned report: “EPA is obligated to implement the Total Maximum Daily Load
23 (TMDL) program, the objective of which is attainment of ambient water quality standards
24 through the control of both point and nonpoint sources of pollution.”¹ Attainment of WLAs,
25 however, should be determined by outfall monitoring.
26

27 ¹ National Research Council, Assessing the TMDL Approach to Water Quality Management Committee
28 to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution
Reduction, Water Science and Technology Board, page 12.

1 Some TMDLs specify ambient monitoring, such as the Los Angeles River Metals and
2 Bacteria TMDLs, the Regional Board has misunderstood ambient monitoring to be a form of in-
3 stream compliance monitoring, along with TMDL effectiveness monitoring. For example, the Los
4 Angeles River Metals TMDL requires Los Angeles County MS4 permittees and Caltrans to
5 submit a Coordinated Monitoring Plan (“CMP”), which includes both “TMDL effectiveness
6 monitoring and ambient monitoring.”²

7 The CMP that was submitted to and approved by the Regional Board proposed a
8 monitoring plan that essentially treats TMDL effectiveness monitoring and ambient monitoring as
9 being one of the same, and which collectively serve the purpose of determining compliance with
10 dry and wet weather WLAs based on in-stream monitoring.

11 It is unclear why the Regional Board established two compliance standards, one of which
12 (*viz.*, wet weather WLAs) is clearly not authorized under federal law. More recently adopted
13 TMDLs, such as the Machado Lake Nutrients TMDL, do not require compliance in the receiving
14 water, but instead compliance at the outfall. The Regional Board improperly requires some
15 TMDLs to comply at the outfall while others required to comply in the receiving water.

16 **C. The Regional Board Failed to Adequately Consider Economic Impacts Pursuant**
17 **to Water Code Section 13241**

18 The Regional Board’s failure to adequately consider the economic impacts of the Permit,
19 as required by Water Code Sections 13000, 13241 and 13623 render the Permit invalid. The
20 Regional Board incorrectly asserts that consideration of economics is not required in this Permit.
21 (*See* Permit, p. 26.) Because the Permit requires exceeds the Federal MEP standard for storm
22 water permits in numerous key regards, consideration of economic factors is necessary. (*City of*
23 *Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 618, 627 (2005).)

24 The alleged facts in the economic consideration section of the Fact Sheet misrepresent the
25 permittees’ data and fail to consider the economic impact of new, costly aspects of the Permit.
26 The Permit’s economic analysis uses the 2001 permit as its basis. Accordingly, the Permit fails to

27 ²Total Maximum Daily Loads for Metals and Los Angeles River and Tributaries, U.S. Environmental
28 Protection Agency, Region 9, California Regional Water Quality Control Board, Los Angeles Region,
May 27, 2005, page 79.

1 take into account 33 new TMDLs, new Minimum Control Measures (“MCMs”), Watershed
2 Management Programs, and the loss of the County of Los Angeles as principal permittee, among
3 other factors.

4 The Regional Board prematurely and improperly assumes that permittees will obtain
5 funding from proposed ballot measures and other sources of funding which have not even been
6 approved, much less voted on by the public. *See* Permit, Fact Sheet, p. F-153. If the Regional
7 Board wants to rely on initiatives, such as the Los Angeles County Flood Control District’s Water
8 Quality Funding Initiative, as sources of funding to offset the costs of storm water management, it
9 should have delayed its public hearing and approval of the Permit until after the voters have
10 actually voted on such initiatives. Otherwise, if such initiatives fail to pass, the co-permittees will
11 be left to implement the Permit’s requirements without these much-needed funds. Even if the
12 Water Quality Funding Initiative is approved by the voters, the funds generated by the Initiative
13 would not even be available until 2014 – well after the deadline for certain compliance deadlines
14 set forth in the Permit. Moreover, the Water Quality Initiative will not cover all the costs
15 imposed on all permittees by the Permit.

16 **D. The Permit’s Monitoring Program Exceeds the Requirements of Law**

17 The Permit’s Receiving Water Monitoring Program improperly exceeds the scope of
18 monitoring authorized under Water Code Sections 13267 and 13383. Water Code Section 13383
19 states, in relevant part:

20 (a) The . . . regional board may establish monitoring, inspection,
21 entry, reporting, and recordkeeping requirements . . . for any
22 person who discharges, or proposes to discharge, to navigable
waters. . . .

23 (b) The . . . the regional boards may require any person subject to
24 this section to establish and maintain monitoring equipment or
25 methods, including, where appropriate, biological monitoring
methods, sample effluent as prescribed, and provide other
information as may be reasonably required.

26 The Regional Board’s failure to conduct and communicate the requisite cost-benefit
27 analysis pursuant to the monitoring requirements in the Permit constitutes an abuse of discretion.
28 Water Code §§ 13267 and 13225(c). The Permit goes far beyond a requirement that a permittee

1 “monitor” the effluent from its own storm drains. The Permit’s Receiving Water Monitoring
2 Program seems to require a complete hydrogeologic model found in the receiving water body,
3 which will in many cases be miles away from many of the individual permittees’ jurisdictions.
4 To the extent the Permit requires individual permittees to compile information beyond their
5 jurisdictional control, they are unauthorized. Although Water Code Section 13383(b) permits the
6 Regional Board to request “other information[,]” such requests can only be “reasonably”
7 imposed. (Water Code § 13383(b).) The Permit requires co-permittees to analyze discharges and
8 make assumptions regarding factors well beyond their individual boundaries. This is not
9 reasonable, and is therefore not permitted under Water Code Sections 13225, 13267, and 13383.
10 It is equally unreasonable to require the monitoring of authorized or unknown discharges. (*See*
11 Permit at p. 108.) The monitoring program also exceeds federal requirements which, in line with
12 state requirements, do not require monitoring beyond the MS4. (*See* 40 C.F.R. §122.26.)

13 **E. Provisions in the Permit Imposing Joint or Joint and Several Liability for**
14 **Violations are Contrary to Law**

15 The Permit improperly imposes joint liability and joint and several liability for water
16 quality based effluent limitations and receiving water exceedances. The Permit states that
17 “Permittees with co-mingled MS4 discharges are jointly responsible for meeting the water
18 quality-based effluent limitations and receiving water limitations assigned to MS4 discharges in
19 this Order.” (Permit, p. 23.) The Permit then states that permittees are responsible for
20 implementing programs within their jurisdictions “to meet the water quality-based effluent
21 limitations and/or receiving water limitations assigned to such commingled MS4 discharges.”
22 (*Ibid.*)

23 It is unlawful and inequitable to make a permittee liable for the actions of other permittees
24 over which it has no control. A party to an MS4 Permit is responsible only for its own discharges
25 or those over which it has control. (*Jones v. E.R. Shell Contractor, Inc.*, 333 F. Supp. 2d 1344,
26 1348 (N.D. Ga. 2004).) Because the City cannot prevent another permittee from failing to
27 comply with the Permit, the Regional Board cannot, as a matter of law, hold the City jointly or
28 jointly and severally liable with another permittee for violations of water quality standards in

1 receiving water bodies or for TMDL violations. Under the Water Code, the Regional Board
2 issues waste discharge requirements to “the person making or proposing the discharge.” (Water
3 Code § 13263(f).) Enforcement is directed towards “any person who violates any cease and
4 desist order or cleanup and abatement order . . . or . . . waste discharge requirement.” (Water
5 Code § 13350(a).) In similar fashion, the CWA directs its prohibitions solely against the
6 “person” who violates the requirements of the Act. (33 U.S.C. § 1319.) Thus, there is no
7 provision for joint or joint and several liability under either the Water Code or the CWA.

8 Furthermore, joint liability is proper only where joint tortfeasors act *in concert* to
9 accomplish some common purpose or plan in committing the act causing the injury, which will
10 generally never be the case regarding prohibited discharges. (*Kesmodel v. Rand*, 119 Cal. App.
11 4th 1128, 1144 (2004); *Key v. Caldwell*, 39 Cal. App. 2d 698, 701 (1940).) For any such
12 discharge, it would be unlawful to impose joint liability and especially joint and several liability.
13 Furthermore, the issue of imposing liability for contributions to “commingled discharges” of
14 certain constituents, such as bacteria, is especially problematic because there is no method of
15 determining the elements or amounts each entity has contributed to an exceedance.

16 Permittees should not be required to prove they did not contribute to another permittee’s
17 exceedance, when the Regional Board has failed to raise even a rebuttable presumption that the
18 contamination results from a particular permittee’s actions. Yet, by stating that the Permit
19 “allows a Permittee to clarify and distinguish their individual contributions and demonstrate that
20 its MS4 discharge did not cause or contribute to exceedances of applicable water quality-based
21 effluent limitations and/or receiving water limitations,” that is precisely what the Permit does.
22 (Permit, p. 24.) Such a reversed burden of proof is contrary to law, and illicitly creates a
23 presumption of “guilty until proven innocent.” (Evid. Code § 500; *Sargent Fletcher, Inc. v. Able*
24 *Corp.*, 110 Cal. App. 4th 1658, 1667-1668 (2003).)

25 The Regional Board has the burden of proof to establish a CWA violation, and requiring
26 permittees to prove a negative in the case of a commingled discharge is unfair and unlawful.
27 (*Rapanos v. United States*, 547 U.S. 715, 745 (2006); *Sacket v. E.P.A.*, 622 F.3d 1139, 1145-47
28 (9th Cir. 2010) [“We further interpret the CWA to require that penalties for noncompliance with a

1 compliance order be assessed only after the EPA proves, in district court, and according to
2 traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the
3 manner alleged in the compliance order.”].)

4 **F. The Permit Improperly Intrudes on Permittees’ Local Land Use Authority**

5 To the extent that this Permit relies on federal authority under the CWA to impose land
6 use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of
7 the U.S. Constitution. Furthermore, to the extent the Permit requires a municipal permittee to
8 modify its city ordinances in a specific manner, it also violates the Tenth Amendment. According
9 to the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution, nor
10 prohibited by it to the States, are reserved to the States respectively, or to the people.”

11 Article XI, section 7 of the California Constitution guarantees municipalities the right to
12 “make and enforce within [their] limits all local police, sanitary and other ordinances and
13 regulations not in conflict with general laws.” (See also *City of W. Hollywood v. Beverly Towers*,
14 52 Cal. 3d 1184, 1195 (1991).) The United States Supreme Court has held that the ability to
15 enact land use regulations is delegated to municipalities as part of their inherent police powers to
16 protect the public health, safety, and welfare of its residents. (See *Berman v. Parker*, 348 U.S. 26,
17 32-33 (1954).) Neither the CWA nor the Porter-Cologne Act provisions regarding NPDES
18 permitting indicate that the Legislature intended to preempt local land use authority. (*Sherwin*
19 *Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn. v. City*
20 *of West Hollywood*, 66 Cal. App. 4th 1302, 1309 (1998) [Preemption of police power does not
21 exist unless “Legislature has removed the constitutional police power of the City to regulate” in
22 the area]; see also Water Code §§ 13374 and 13377 and 33 U.S.C. § 1342 (b)(1)(B).) Because
23 they are constitutionally conferred powers, land use powers cannot be overridden by a regulatory
24 permit.

25 The Permit, however, essentially establishes the Regional Board as a “super municipality”
26 responsible for setting zoning policy and requirements throughout Los Angeles County. The
27 Regional Board asserts that “the permit does not impose land use regulations, nor does it restrict
28

1 or control local land-use decision-making authority.” (Responses to Comments H-53.) However,
2 the permit improperly imposes numerous mandatory land use requirements, including but not
3 limited to the adoption of low impact development (“LID”) ordinances. (*See, e.g.*, Ex. A at pp.
4 96-115 (Planning and Land Development Program).)

5 **G. The Permit Exceeds the Regional Board’s Authority by Requiring the City to**
6 **Enter Into Contracts and Coordinate With Other Co-permittees**

7 The Regional Board improperly requires the City to enter into agreements and coordinate
8 with other co-permittees. The requirements that permittees engage in interagency agreements
9 (Permit at p. 39) and coordinate with other co-permittees as part of their storm water management
10 program (Permit at p. 56-58) are unlawful and exceed the authority of the Regional Board. The
11 Regional Board lacks the statutory authority to mandate the creation of interagency agreements
12 and coordination between permittees in an NPDES Permit. (*See Water Code §§ 13374 and*
13 *13377.*) The Permit creates the potential for City liability in circumstances where the permittee
14 cannot ensure compliance due to the actions of third party state and local government agencies
15 over which the City has no control. Such requirements are not reasonable regulations, and thus
16 violate state law. (*Communities for a Better Environment v. State Water Resources Control Bd.*,
17 132 Cal. App. 4th 1313, 1330 (2005) [regulation pursuant to NPDES program must be
18 reasonable].)

19 **H. Non-Stormwater Discharge Provisions Are Inconsistent with Federal Law and**
20 **Contrary to State Law**

21 The Permit improperly prohibits “non-storm water discharges *through* the MS4 to
22 receiving waters ...” (Permit, p. 27.) The previous 2001 permit, however, required MS4
23 permittees to “effectively prohibit non-storm water discharges *into* the MS4.” The previous
24 Permit also provided for several exceptions of non-stormwater discharges that could be legally
25 discharged to the MS4. Non-stormwater discharges that were not exempted were deemed illicit
26 discharges. The adopted Permit, on the other hand, revises the non-stormwater discharge
27 prohibition by replacing “to” the MS4 with “through” the MS4 and in the case of TMDL
28 discharges “from the MS4” to a receiving water.

1 The Regional Board's revised non-stormwater provision is not authorized under Federal
2 storm water regulations. Nevertheless, the Regional Board attempts to rely on 40 C.F.R.
3 §122.26(a)(3)(iv) to assert that an MS4 permittee is only responsible for discharges of storm
4 water and non-storm water from the MS4. The Regional Board's citation mentions nothing about
5 permittees being responsible for storm water and non-stormwater from the MS4. Instead, it states
6 that co-permittees need only comply with permit conditions relating to discharges from the
7 municipal separate storm sewer system. But the term "discharges" as used in the regulation refers
8 to storm water discharges only.

9 Section 402(p)(B)(ii) of the CWA contradicts the Regional Board's position and clearly
10 specifies that MS4 permits "shall include a requirement to effectively prohibit non-stormwater
11 discharges into the storm sewers." Nothing in this section or anywhere else in the CWA
12 authorizes a prohibition of non-stormwater discharges "through" or "from" the MS4. In fact, the
13 Regional Board cites no legal authority either in the Permit or the Fact Sheet to support changing
14 the discharge prohibition from "to" or "into" the MS4 to "through" or "from" the MS4. By doing
15 do, the Regional Board has illicitly expanded the non-stormwater discharge requirements beyond
16 their permissible or reasonable scope, and beyond the MEP standard.

17 Additionally, the Permit improperly defines non-stormwater to expansively include all
18 dry-weather runoff. This is contrary to State and Federal definitions of storm water, which
19 include "surface runoff," "drainage," and "urban runoff." (40 C.F.R. § 122.26(b)(13); *see also*
20 State Water Board Order No. 2001-15, pp. 7-8.) This further expansion of the non-stormwater
21 provisions exceeds the Federal requirements and places an additional, unfair burden on permittees
22 to prohibit these discharges.

23 **I. The Timing and Procedures of the Permit Adoption Were Contrary to Law and**
24 **Deny the Permittees' Due Process Rights**

25 The period provided to review and comment on the Permit was unreasonably short given
26 the breadth of the Permit. Furthermore, the "dual" procedure the Regional Board adopted
27 whereby part of the Permit could be discussed on October 4 and 5, 2012, without the benefit of
28 seeing a revised draft tentative Permit or responses to comments, and then only allowing

1 comments on “changes” to the Permit at the November 8, 2012 hearing, unreasonably limited the
2 ability of the permittees to comment on the Permit as a whole based on the changes to the
3 permittees’ original comments. (See Regional Board 9/26/12 “Order on Proceedings.”) By
4 denying the permittees a meaningful opportunity to review and comment on a Permit that so
5 drastically affects the permittees’ rights and finances, the Regional Board has denied the
6 permittees due process rights under state and federal law. (See *Spring Valley Water Works v. San*
7 *Francisco*, 82 Cal. 286 (1890) [reasonable notice and opportunity to be heard are essential
8 elements of “due process of law,” whatever the nature of the power exercised].) Furthermore,
9 under the CWA, a reasonable and meaningful opportunity for stakeholder participation is
10 mandatory. (See, e.g., *Arkansas Wildlife Fed’n v. ICI Ams.*, 29 F.3d 376, 381 (8th Cir. 1994)
11 [“the overall regulatory scheme affords significant citizen participation, even if the state law does
12 not contain precisely the same public notice and comment provisions as those found in the federal
13 CWA.”].)

14 **J. The Regional Board’s Forced Recusal of Board Member Mary Ann Lutz was**
15 **Improper and Prejudiced the Municipal Permittees**

16 Ms. Lutz was, at the time of the hearings, the Board member appointed to reflect the
17 perspective of municipal governments. She was improperly forced by the Regional Board to
18 recuse herself from the proceedings. By improperly forcing her recusal, the Regional Board staff
19 and counsel purposefully and unduly prejudiced the municipal permittees by denying the Board,
20 the permittees, and the public Ms. Lutz’ valuable perspective as a municipal representative,
21 public servant and Mayor.

22 **K. The Permit as a Whole Constitutes an Unfunded State Mandate, Which Is Not**
23 **Permitted by the California Constitution Unless Funding is Provided by the State**

24 The Permit contains mandates imposed at the Regional Board’s discretion that are
25 unfunded and exceeds the specific requirements of the CWA and the USEPA’s regulations
26 implementing the CWA, and thus exceeds the MEP standard. Accordingly, these aspects of the
27 Permit constitute non-federal state mandates. (See *City of Sacramento v. State of California*, 50
28 Cal. 3d 51, 75-76 (1990).) Indeed, the Court of Appeal has previously held that NPDES permit

1 requirements imposed by the Regional Board under the Clean Water and Porter-Cologne Acts can
2 constitute state mandates subject to claims for subvention. (*County of Los Angeles v. Commission*
3 *on State Mandates*, 150 Cal.App.4th 898, 914-16 (2007).)

4 **i. The Permit's Minimum Control Measure Program is an Unfunded**
5 **State Mandate**

6 The Permit's Minimum Control Measure program ("MCM Program") qualifies as a new
7 program or a program requiring a higher level of service for which State funds must be provided.

8 The particular elements of the MCM Program that constitute unfunded mandates are:

- 9
- 10 • The requirements to control, inspect, and regulate non-municipal permittees and
11 potential permittees;
 - 12 • The public information and participation program;
 - 13 • The industrial/commercial facilities program;
 - 14 • The public agency activities program; and
 - 15 • The illicit connection and illicit discharge elimination program.

16 (*See Permit*, p. 69-143.)

17 The MCM Program requirement that the permittees inspect and regulate other, non-
18 municipal NPDES permittees is especially problematic and clearly constitutes an unfunded
19 mandate. (*See, e.g., Permit at pp. 38-40.*) These are unfunded requirements which entail
20 significant costs for staffing, training, attorney fees, and other resources. Notably, the
21 requirement to perform inspections of sites already subject to the General Construction Permit is
22 clearly excessive. Permittees would be required to perform pre-construction inspections, monthly
23 inspections during active construction, and post-construction inspections. The Regional Board is
24 requiring a higher level of service in this Permit than required by federal law.

25 Furthermore, there are no adequate alternative sources of funding for inspections. User
26 fees will not fully fund the program required by the Permit. (Gov't Code, § 17556(d).) NPDES
27 permittees already pay the Regional Water Quality Control Boards fees that cover such
28 inspections in part. It is inequitable to both cities and individual permittees for the Regional

1 Board to charge these fees and then require cities to conduct and pay for inspections without
2 providing funding.

3 **ii. Imposition of Numeric Standards Render are an Unfunded Mandate**

4 If strict compliance with numeric state water quality standards is required in the form of
5 WQBELs and Receiving Water Limitations, as discussed above, the entire Permit will constitute
6 an unfunded mandate because such a requirement clearly exceeds both the Federal standard and
7 the requirements of prior permits, despite the fact no funding will be provided to help meet
8 targets. (*See Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*,
9 124 Cal. App. 4th 866, 873, 884-85 (2004) [though the State and Regional Boards may require
10 compliance with California state water quality standards pursuant to the CWA and state law,
11 these requirements exceed the Federal Maximum Extent Practicable standard].)

12 **IX**

13 **STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD**

14 A copy of this Petition is being served upon the Executive Officer of the Regional Board,
15 and upon all other permittees to the Permit.

16 **X**

17 **STATEMENT THAT ISSUES/OBJECTIONS WERE RAISED BEFORE THE**
18 **REGIONAL BOARD**

19 The substantive issues raised in this Petition were raised to the Regional Board before the
20 Regional Board acted on November 8, 2012.

21 **XI**

22 **SERVICE OF PETITION**

23 This Petition is being served upon the following parties via electronic mail, facsimile, or
24 U.S. Mail:

25
26
27
28

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XII
CONCLUSION

For the reasons stated herein, Petitioner has been aggrieved by the Regional Board's action in adopting the Permit. Issues raised in this Petition, however, may be resolved or rendered moot by Regional Board actions or developments in other jurisdictions. Accordingly, until such time as Petitioner requests the State Board to consider this Petition, Petitioner requests the State Board hold this Petition in abeyance.

Dated: December ____, 2012

By:  _____

DOMINIC LAZZARETTO
CITY MANAGER
City of Arcadia