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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 Laguna Beach's Petition and Memorandum of Points and Authorities Challenging San Diego RWQCB Regional MS4 Permit Adopted November 18, 2015

Dear Ms. Crowl:

Enclosed please find the City of Laguna Beach's Petition for Review to the State Water Resources Control Board ("State Board") and accompanying 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 Laguna Beach ("City" or "Petitioner"). The 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 Petition, Memorandum of Points and Authorities, and supporting exhibits on behalf of the City at this time, but request, pursuant to 23 CCR section 2050.5(d), that this 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 Petition, and its Memorandum of Points and Authorities, at such time as the 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.

If the Petition is 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 Petition.

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. David Shissler
Mr. Phillip D. Kohn, Esq.

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Attorneys for Petitioner
CITY OF LAGUNA BEACH

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of: The California Regional Water Quality Control Board, San Diego Region's Adoption of Order No. R9-2015-0001, Amending and Readopting Order No. R9-2013-0001, NPDES No. CAS0109266	**PETITION FOR REVIEW BY CITY OF LAGUNA BEACH** [Water Code § 13320 and Cal. Code Regs., Title 23, § 2050 *et seq.*] [Concurrently filed with Memorandum of Points and Authorities in Support of Petition for Review]

TO THE HONORABLE BOARD:

The City of Laguna Beach ("City") submits this Petition for Review pursuant to California Water Code ("Water Code") section 13320 and California Code of Regulations, title 23, section 2050 *et seq.* for review of Order No. R9-2015-0100 ("Final Permit") as approved by the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on November 18, 2015, which amended and readopted Order No. R9-2015-0001 and Order No. R9-2013-0001 ("Initial Permit"), NPDES Permit No. CAS0109266.

I. INTRODUCTION.

Petitioner is the City of Laguna Beach. All written correspondence and other communications regarding this matter should be addressed as follows:

1) City of Laguna Beach
Attn: David Shissler, Director of Water Quality
505 Forest Avenue
Laguna Beach, CA 92651

Telephone: (949) 497-0328
Email: dshissler@lagunabeachcity.net

With a copy to Petitioner's counsel:

2) Jeremy N. Jungreis
Philip D. Kohn
Travis Van Ligten
611 Anton Boulevard, 14th Floor
Costa Mesa, CA 92626

Telephone: 714-641-5100
Email: jjungreis@rutan.com
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II. SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD FOR WHICH REVIEW IS SOUGHT.

The City requests that the State Water Resources Control Board ("State Board") review the Regional Board's Order No. R9-2015-0100, which was rendered on November 18, 2015 and which amends and readopts Order No. R9-2015-0001and Order No. R9-

2013-0001, NPDES Permit No. CAS0109266. By its Petition, the City challenges the Regional Board's approval of the Final Permit with regard to specific legally objectionable terms and restrictions that are described in greater detail herein and in the accompanying Memorandum of Points and Authorities that are enclosed with the Petition. A copy of the Regional Board's Order for the Final Permit and the associated Fact Sheet are attached as Exhibit A to the Memorandum of Points and Authorities enclosed herewith.

III. DATE OF REGIONAL BOARD'S ACTION.

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

IV. STATEMENT OF REASONS THE REGIONAL BOARD'S ACTION WAS INAPPROPRIATE OR IMPROPER.

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

A. No Interim Compliance:

The Final Permit fails to conform to the State Board's prior legal direction and precedential orders in that the Final Permit holds all dischargers strictly liable if any City MS4 discharge is found to exceed receiving water limitations ("RWLs"). The City is informed and believes that unlike other regional boards in the state that have considered the issue of receiving water limitations, the Final Permit approved by the San Diego Regional Board does not provide the City and the other Co-Permittees with "interim compliance" protection from third party lawsuits, enforcement actions and criminal penalties that might otherwise pertain where non-compliance with the federal Clean Water Act is alleged. The failure of the Final Permit to provide interim compliance – an option specifically authorized by the State Board in its June 16, 2015 Precedential Decision in *Order WQ 2015-0075, In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm*

Sewer System (MS4) Discharges Within The Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4 ("2015 LA MS4 Order") – likely places the City and the other Co-Permittees in a state of non-compliance for at least the next two years while a Water Quality Improvement Plan ("WQIP") is prepared for southern Orange County. The lack of interim compliance is particularly troublesome for the City of Laguna Beach, which very recently has had to defend itself against a Clean Water Act citizen suit brought by California River Watch. The California River Watch litigation alleged illegal non-stormwater discharges into and out of the City's MS4. The City's defense of the lawsuit was extremely expensive and caused a substantial drain on staff time and City resources, which detracted from the City's robust stormwater and water quality improvement programs.

B. Liability for Non-Stormwater Discharges Where City Is Fully Implementing Its Illicit Discharge and Prevention Program:

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

C. Receiving Water Limitations:

Enforcing RWLs as water quality based effluent limits ("WQBELs") of enforceable numeric limits in the Final Permit, and then imposing strict liability on the City and the other Co-Permittees under the Clean Water Act when they cannot meet RWL-derived WQBELs, violates state and federal law in the following ways, among others:

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

requirements as enforceable WQBELs under the Final Permit.

2) Requiring strict compliance with a zero discharge limit, or stringent numeric standards for municipal stormwater in impaired water bodies, requires the City and the other Co-Permittees to comply with Final Permit terms that are not reasonably achievable, technically impossible, and financially infeasible.

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

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

The above issues, and others, were raised to the Regional Board's attention, either directly by the City or through the County of Orange (the lead Co-Permittee) in written and oral comments submitted to the Regional Board at various workshops, and in written comments submitted during the public comment period on the Final Permit, and through oral testimony and written evidence submitted by the City and its counsel at the November 18, 2015 hearing. Written comments submitted by the City during the September 2015 public comment period are attached hereto as Exhibit 1. Written materials submitted by the City, and discussed before the Regional Board at its November 18, 2015 hearing are attached as Exhibit E to the concurrently submitted Memorandum of Points and Authorities.[1]

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

The manner in which the City has been and is aggrieved by the Regional Board's action is described in greater detail in Section IV above and in the accompanying

[1] The verbal and written comments presented by the County of Orange in connection with and during the February 2015 hearing were also made on behalf of the City of Laguna Beach and the 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.

Memorandum of Points and Authorities, which is enclosed with the Petition. Additionally, the City is aggrieved in that notwithstanding the City's long history of aggressively pursuing and achieving improvements in water quality, the Final Permit needlessly exposes the City to a constant and continuing threat of litigation under the Clean Water Act for at least two years as a direct result of the Regional Board's decision to provide no interim compliance in association with RWLs while WQIPs are prepared. Despite having been awarded an "A" grade from Heal the Bay for its effective use of urban stormwater diversion units and the strong preservation of coastal waters, the City recently has had to expend substantial sums of money and resources to defend against a lawsuit under the Clean Water Act that was initiated by California River Watch. A failure to amend the Final Permit to address and meet the City's concerns will result in continued and new threats of litigation from third-party groups, despite the City's ongoing strong efforts to aggressively pursue and accomplish water quality improvements whenever feasible.

As the State Board no doubt knows, Laguna Beach is a community where water quality is highly valued and taken very seriously, and the City generally supports the actions of the State and Regional Boards to make beaches and watersheds in southern Orange County cleaner. In fact, as referenced above, the City has already invested in costly urban stormwater diversion units that collect dry weather runoff and divert it to the sanitary sewer system. To date, 25 urban water diversion units have been installed and they divert approximately 83% of the City's urban drainage area, which is the entirety of the area where diversion is feasible, a fact that strongly argues in favor of providing the City with interim and long-term compliance.

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

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

Regional Board and/or developments and judicial actions in other parts of the state.

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

The City's Memorandum of Points and Authorities in support of its Petition accompanies and is enclosed with this Petition, and its contents are incorporated in the Petition by this reference. The City reserves the right to supplement this Petition and its Memorandum of Points and Authorities at such time as the City may request that the State Board take all or a portion of the issues raised in the Petition out of abeyance, and/or once the record of the administrative proceedings and a complete transcript of the hearing to adopt the Final Permit becomes available.[2]

VIII. NOTICE TO REGIONAL BOARD.

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

IX. ISSUES PREVIOUSLY RAISED.

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

X. CONCLUSION.

For the reasons stated herein, and as may be submitted in supplemental pleadings as allowed by the State Board, the City has been aggrieved by the Regional Board's approval of the Final Permit and the obligations imposed by the Regional Board's order. However, until such time as the City requests the State Board to actively consider some or all of the

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[2] The City may also request to leave to provide the State Board with additional reasons 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.

issues in this Petition, the City respectfully requests the State Board hold this Petition in abeyance.

Dated: December 18, 2015

RUTAN & TUCKER, LLP
JEREMY N. JUNGREIS
PHILIP D. KOHN
TRAVIS VAN LIGTEN

By: _____
Jeremy N. Jungreis
Attorneys for Petitioner
CITY OF LAGUNA BEACH

EXHIBIT 1

Electronic Submission to sandiego@waterboards.ca.gov
Honorable Chairman Henry Abarbanel and Board Members
Attn: Mr. Wayne Chiu
San Diego Regional Water Quality Control Board
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

I am writing at the direction of a unanimous City Council of the City of Laguna Beach (the "City") to urge you to make certain changes to the language being proposed by staff to the Regional Board as amendments to the City's Regional Permit. This is a matter of great importance to the City. Specifically, we are concerned that the proposed amendments create undue liability for the City during the interim period prior to the adoption of a water quality improvement plan, and creates strict liability for the City for third party actions that it cannot control.

First, let me assure you that the City Council is fully committed to aggressively pursuing improvements in water quality. As demonstrated by our past actions, Laguna Beach is a community where water quality is taken very seriously, and we generally support the actions of the Board to make our beaches and watersheds cleaner. We are a leader in efforts to protect and improve water quality through a vigorous source control program and active investigation and enforcement of illicit discharges. As one of many examples of the City's strong commitment to improving water quality, the City has broadly invested in urban stormwater diversion units. These costly diversion units collect dry weather runoff and divert it to the sanitary sewer system. To date, 25 urban water diversion units have been installed and divert approximately 83% of the City's urban drainage area (all of the areas where diversion is feasible). This aggressive approach to stormwater pollution prevention has earned the City a summer and winter dry weather "grade" from Heal the Bay of an "A" or higher at all beaches within the City.

We understand Board staff is proposing to amend the Regional Permit with revisions that would impose strict liability on cities for any non-attainment of water quality standards, no matter what the cause, and irrespective of the feasibility of achieving numeric standards (at all times) in a water body. While we applaud the efforts of the Board to improve water quality in

the region, there are several aspects of what is being proposed that are likely to have adverse consequences. Accordingly, the City Council respectfully asks you and your staff to carefully consider the comments and recommendations in this letter, as well as those provided by our legal counsel (Exhibit A), and to work with the City to develop a fair resolution of our concerns.

The Proposed Amendments Unequivocally Should Require Interim Compliance While the City Develops a Water Quality Improvement Plan ("WQIP"). The draft language requires the City to develop a WQIP as a practical vehicle for improving water quality on a watershed basis but appears to impose strict liability on the City for discharges while the WQIP is being developed. A watershed approach to water quality improvement makes sense, and the City is generally supportive of the WQIP concept. However, the proposed Regional Permit's departure from the previous best management practice ("BMP") based approach in favor of a strict liability regime that mandates immediate attainment of numeric water quality objectives (some of which may be lower than natural background levels) poses a severe compliance challenge for the City. Under the proposed amendment, 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, it is not feasible (nor good for the environment) to divert all wet weather flows. Because of the extremely stringent standards for bacteria, nutrients, and metals—constituents that the City may have little to no ability to control—wet weather flows from the City's MS4 are likely, no matter what actions the City takes, to contain pollutants in excess of receiving water limitations. When exceedances occur, the City will face fines/penalties from the Board (and the likelihood of Clean Water Act citizen suits) whether the City caused exceedances of receiving water limitations or not. This is not a fair result, and arbitrarily imposing liability without culpability will not lead to cleaner water.

To be successful in improving water quality to the maximum extent within the City, the WQIP needs to be a deliberate, scientifically rigorous, and collaborative effort between all interested stakeholders ***that recognizes the need for interim and long term compliance by the City*** while the WQIP is developed and implemented. A hastily compiled plan, speedily prepared because of fear of immediate strict liability, will not be the sort of plan that will accomplish the Board's objectives or the needs of City residents. It will only lead to litigation and uncertainty for all involved. We urge you to add some form of interim compliance for southern Orange County agencies who aggressively pursue WQIP development and implementation.

The Regional Permit Should not Impose Strict Liability Where the City Fully Implements a Robust Illicit Discharge Prevention Program and Diverts All Feasible Dry Weather Flows. The Regional Permit amendments would create what amounts to a ban on runoff into the MS4 when it is not raining (except for separately authorized discharges). Unfortunately, as the State Water Board recently acknowledged in its LA MS4 decision, preventing all runoff into an MS4 system can be nearly impossible since third parties—such as residents watering their lawns in a

reasonable manner—may nevertheless cause at least some incidental runoff to enter the MS4. The City has limited ability to stop third party sewage spills or other third party actions (e.g., washing of vehicles) that may result in small amounts of runoff entering the MS4 when it is not raining (even where the City is fully implementing and enforcing its illicit discharge program). The City will follow the Clean Water Act and "effectively prohibit" all dry weather discharges to receiving waters with its illicit discharge prevention program and diversion of dry weather flows. What the City cannot do is guarantee that runoff or illicit discharges never reach the City's MS4 (as the amended permit can be read to require). Please strongly consider revising the Regional Permit to eliminate any inference of strict liability where the City fully implements its illicit discharge program by adding the clarifying language recommended by our legal counsel.

Thank you for considering our requests. Our staff is available to assist in crafting language to address City concerns while facilitating the Board's continued improvement of water quality. If you have any questions please feel free to contact our Director of Water Quality, David Shissler at (949) 497-0328.

Sincerely,

Bob Whalen, Mayor

CC: David Gibson, Executive Officer, SDRWQCB
Jeremy Jungreis, Rutan & Tucker, LLP

RUTAN

RUTAN & TUCKER, LLP

Jeremy N. Jungreis
Direct Dial: (714) 338-1882

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.

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

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[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."].)

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

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.

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

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-

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[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.

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 LAGUNA BEACH

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW FILED BY CITY OF LAGUNA BEACH

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

[Concurrently filed with Petition for Review]

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I. Introduction.

The City of Laguna Beach ("City") has filed a Petition for Review ("Petition") to the State Water Resources Control Board ("State Board") requesting that the State Board review and set aside all or portions of Order No. R9-2015-0100 ("the Final Permit") that was adopted by the California Regional Water Quality Control Board, San Diego Region ("SD Regional Board") on November 18, 2015, which amended and readopted in full Order No. R9-2015-0001 ("First Amended Permit") and Order No. R9-2013-0001, NPDES Permit No. CAS0109266 ("Initial Permit"). A copy of the Regional Board's Order approving the Final Permit is attached hereto as Exhibit A.

The City submits this Memorandum of Points and Authorities in support of its Petition.

A. Summary of Argument Regarding Unlawful Aspects of the Final Permit.

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

1. No Interim Compliance:

The Final Permit fails to conform to the State Board's prior legal direction and precedential orders by holding all dischargers strictly liable if any covered discharge, including a City MS4 discharge, is found to exceed receiving water limitations ("RWLs"). Unlike every other regional board in the state to consider the issue, the Final Permit approved by the SD Regional Board fails to provide the City and the other Orange County and Riverside County Co-Permittees with "interim compliance" protection from third-party lawsuits, enforcement actions and even criminal penalties that might otherwise apply where, notwithstanding the copermittees' implementation of robust best management practices ("BMPs") to control stormwater pollution, a permittee is found to have violated one or more conditions of its MS4 Permit. The failure of the Final Permit to provide meaningful interim compliance protection to the City and the other Co-Permittees – a

compliance option that was specifically authorized by the State Board in its June 16, 2015 Precedential Decision, *Order WQ 2015-0075, In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within The Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4* ("2015 LA MS4 Order") – unfairly places the City and the Orange County and Riverside County Co-Permittees in a state of noncompliance for at least the next two years, which is the minimum time it will take to complete and obtain approval of a Water Quality Improvement Plan ("WQIP"). After two years, and the expenditure of millions of public funds to pay for the development of WQIPs, thereby accomplishing watershed planning functions normally undertaken and funded by Regional Boards as part of the total maximum daily load ("TMDL") development process, the City has no guarantees of compliance even if it has done everything it is supposed to do under the Permit during the WQIP development process.

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

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

3. Receiving Water Limitations:

Enforcing RWLs as water quality based effluent limits ("WQBELs") in the Final Permit, and then imposing strict liability on the Co-Permittees under the Federal Water Pollution Control Act (hereinafter "Clean Water Act" or "CWA") when they cannot meet RWL-derived WQBELs, violates both state and federal law in the following ways:

a) Permit requirements that exceed the maximum extent practicable ("MEP") standard are imposed in the Final Permit under state law and therefore must comply with Water Code sections 13241, 13263 and 13000.

The SD Regional Board did not comply with these provisions of the Water Code when it required the Co-Permittees to comply with RWLs as WQBELs, and the billions of dollars it is anticipated to cost the Orange County Co-Permittees to meet the numeric effluent limits imposed in the Final Permit,[1] aptly demonstrates the SD Regional Board's failure to comply with Water Code sections 13000, 13241 and 13263 when it approved the Final Permit.

b) Requiring strict compliance with a zero discharge limit, or attainment of stringent numeric standards for municipal stormwater entering receiving water , requires the Co-Permittees to comply with Final Permit terms that are not reasonably achievable, and for the most part either technically or financially impossible to achieve.

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

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

B. Standard of Review.

The State Board, in reviewing a petition challenging final regulatory action by a regional board, must exercise its independent judgment to determine whether the regional board's action was reasonable.[2] The Final Permit in this matter, like any administrative decision, must be accompanied by findings that allow the State Board to "bridge the analytic gap between the raw evidence and ultimate decision or order."[3] Here, there are no such factually substantiated findings that bridge the analytic gap between the SD Regional

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[1] *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), attached hereto as Exhibit B.

[2] *In re Stinnes-Western Chemical Corp.*, WQ Order No. 86-16 (June 20, 1986).

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

Board's decision and the administrative record – as to the imposition of strict liability on what could amount to every municipality in three counties, potentially for an extended period of time,[4] for alleged impairments that the Co-Permittees may have little or no ability to control.

C. Incorporation of Prior Comments.

In written comments submitted to the SD Regional Board on September 14, 2015, the City incorporated by reference all prior letters, comments, reports, presentations, oral and written testimony, data, communications and other evidence ("Comments") made by, on behalf of and in support of the County of Orange and the Orange County Co-Permittees (collectively the "OC Co-Permittees") during the various workshops, hearings and meetings relevant to the adoption of Order No. R9-2015-0100, including written and verbal comments made during the adoption of Order No. R9-2013-0001 and Order No. R9-2015-0001. The Final Permit adopted by the SD Regional Board on November 18, 2015 consisted of three separate enrollments for San Diego, Riverside and Orange counties and the cities within each county. Thus, Comments made during the prior adoption proceedings are relevant to the adoption of Order No. 2015-0100 and should be included as part of the administrative record.

II. Preliminary Statement Why the Final Permit is Unlawful.

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

[4] Even with the SD Regional Board's grudging approval of a narrow "Alternative Compliance Option" in the Final Permit that, according to the Chair of the SD Regional 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.

Board did when it approved the Final Permit.

Even more troubling is the SD Regional Board's rationale for holding such a potentially large number of local governments out of compliance with the Clean Water Act. Comments made by SD Regional Board members and key staff at the November 18, 2015 hearing appear to reflect a belief that the City and the other Co-Permittees do not deserve compliance merely because some of the Co-Permittees cannot meet all of the RWLs and numeric limitations that the SD Regional Board, in 2013, placed in the Initial Permit as numeric effluent limits. By way of example, the Chair of the SD Regional Board voted to reject the Final Permit, in part, because it contained the prospect of a future alternative compliance option for municipal dischargers where such dischargers would be in "compliance" without meeting all of the standards and limitations of the Permit.

RWLs were never intended to be strictly enforced against municipal stormwater agencies under Section 301 of the CWA as numeric effluent limitations. (*See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 (holding Section 301 prohibitions related to water quality standards do not apply to MS4 discharges in the same manner as they do for other types of Clean Water Act regulated discharge ["Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."]); *see also* cases cited below in footnote 5.)

As recent cases considering the RWL issue have confirmed,[5] Congress understood the fundamental differences between municipal stormwater and other types of NPDES discharge, such as industrial discharges. It understood that MS4s cannot control when, and

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[5] *See e.g., Natural Resources Defense Council, Inc. v. New York State Dept. of Environmental Conservation* (N.Y.Ct.App. 2015) 25 N.Y.3d 373, 382, 34 N.E.3d 782 ("*NRDC v. New York*"); *Maryland Dept. of the Environment v. Anacostia Riverkeeper* (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 ("*Tualantin Riverkeepers*").

in what volume, it rains, nor entirely control the millions of potential sources of non-point source pollution that cumulatively add pollutants into a city's MS4 under wet and dry conditions. Congress therefore prescribed a different regulatory scheme for municipal stormwater discharges, a scheme that does not require strict compliance with RWLs.

As New York's highest court recently explained in rejecting a Clean Water Act lawsuit with legal issues similar to those raised in this Petition, the Clean Water Act recognizes municipal stormwater is regulated differently than other discharges: "[M]unicipal storm sewer systems thus differ from other entities that discharge effluents into our State's surface waters (for example, industrial or commercial facilities and sewage treatment plants) in three major ways: precipitation is naturally occurring, intermittent and variable and cannot be stopped; although municipalities operate sewer systems, stormwater contamination results from the often unforeseen or unpredictable choices of individual residents and businesses (for example, to let litter pile up or to use certain lawn fertilizers), as well as decisions made long ago about the design of roads, parking lots and buildings; and because stormwater runoff flows into surface waters through tens of thousands of individual outfalls, each locality's contribution to the pollution of a particular river or lake is difficult to ascertain or allocate through numeric limitations." (*NRDC v. New York*, *supra*, 34 N.E.3d at 783.) As such, imposing strict liability on a municipality's failure to attain RWLs in all of its stormwater outfalls makes little sense logistically, and imposes on municipalities, in some cases, an impossible burden. (*See ibid.; accord NRDC v. N.Y. Dept. of Environmental Conservation* (N.Y. 2nd App. Div. 2014) 120 A.D.3d 1235, 1246 ["Although Congress specifically provided that permits issued to industrial dischargers must be conditioned on compliance with effluent limitations set forth in [Section 301 of the CWA], it specifically provided that permits for municipal dischargers with respect to municipal storm sewers 'shall require controls to reduce the discharge of pollutants to the maximum extent practicable'. . . without reference to any numerical limitation established under the Clean Water Act in connection with any particular effluent."].)

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

It bears repeating that to date, the SD Regional Board appears to be the only Clean Water Act-permitting entity in California that is seeking to utilize section 402(p)(3)(B)(iii) of the CWA to characterize all of the MS4s that the SD Regional Board regulates – whether such permittees are good, bad or indifferent in the level of resources and effort expended on stormwater compliance – as chronic violators under the Clean Water Act. Comments of the SD Regional Board staff at the November 18, 2015 hearing illustrate the SD Regional Board's thinking on the subject of future compliance for municipal stormwater dischargers. According to staff, the SD Regional Board views MS4 non-compliance with the Clean Water Act as "the norm" and is unconcerned that such non-compliance paints both good and bad actors alike with the same brush as violators of federal law. The SD Regional Board, based upon staff presentations made at the November 18, 2015 hearing, evidently feels that obtaining protection from the citizen suits, fines, penalties and other aspects of Clean Water Act noncompliance (*see* 33 U.S.C. § 1365 *et seq.)* is a "privilege" that is to be afforded by the SD Regional Board to an exclusive few, only the most "worthy" invitees of the Board's choosing. Being "in compliance" according to staff's presentation, is tantamount to being allowed to join "an exclusive private club." Accordingly, until the Co-Permittees demonstrate to the Regional Board through the preparation of a WQIP that attainment of all numeric standards in the Final Permit will occur – in a region with some of the strictest RWLs in the state (*see U.S. v. Eastern Municipal Water District* (C.D. Cal. 2009) U.S. Dist. LEXIS 70786 at *140 [nutrient standards in Santa Margarita River of San Diego Region more than ten times as stringent as nutrient standards in Santa Ana Basin to immediate north]) – the Co-Permittees will be ineligible to be deemed in "compliance" under the Final Permit, whether

such compliance is couched as interim, permanent or otherwise.

The SD Regional Board's view of Clean Water Act compliance as akin to membership in a private club is inconsistent with the structure of the Act – where implementation of best management practices to the MEP standard, not the attainment of arbitrarily selected numeric effluent limits, is the hallmark of Clean Water Act compliance for municipal stormwater dischargers. (*See* 33 U.S.C. § 1342(p)(3)(B); *Accord Defenders, supra*; *NRDC v. New York, supra*; *Anacostia Riverkeeper, supra*; *Divers International, supra*; *Conservation Law Foundation v. Boston Water And Sewer Commission* (D. Mass. 2010) U.S. Dist. LEXIS 134838 at *18-19.)

Indeed, the approach currently advocated by the SD Regional Board in the Final Permit arguably turns the normal Clean Water Act enforcement paradigm on its head – resulting in a scenario where adverse enforcement consequences under the Act are largely random – because liability under the Final Permit is strict and all of the covered MS4s are, in large measure, out of compliance. True scofflaws will, in theory, be treated the same as good actors – inasmuch as both are, and will likely remain, out of compliance with numeric limitations and WQBELs in the Final Permit, regardless of whether a particular permittee is doing everything in their power to comply with the Final Permit.

To be sure, if the City's experience in its recent California River Watch litigation is any guide, Clean Water Act citizens suits are less likely to seek enforcement against poor cities that may be producing large amounts of stormwater pollution (due to the inability to afford dry weather diversions and expensive treatment systems). Instead, perceived wealthy cities, who apparently are assumed to have the ability to pay for new capital projects and attorneys' fees, are more likely to be the targeted by Clean Water Act citizen suit enforcement, whether or not such cities have been aggressively implementing their stormwater pollution prevention programs.[6] The SD Regional Board's unwillingness to

[6] For example, over the last two years a California environmental group, California River Watch, *seehttp://www.ncriverwatch.org/legal/current/index.php*, has sued multiple cities over alleged CWA violations, including alleged MS4 Permit violations associated with what River Watch claims are unlawful discharges into MS4s.

provide interim compliance during the WQIP preparation process, and refusal to clarify in the Final Permit that discharges to an MS4 that occur outside of the reasonable control of the MS4 owner, will not result in strict liability for the MS4 owner, further erodes the legitimacy of the Final Permit as a valid deterrent to unlawful conduct.

III. The SD Regional Board's Decision to Withhold Interim Compliance Across the San Diego Region Is Contrary to the 2015 LA MS4 Order, Inconsistent With State and Federal Law, and Bad Policy.

The interim compliance issue so hotly contested in the San Diego region is less of an issue in other parts of California. In the Los Angeles region, under the approach approved by the State Board in the 2015 LA MS4 Order, if MS4 owners agree to develop what are admittedly very expensive Watershed Management Plans ("WMPs") or Enhanced Watershed Management Plans ("EWMPs"), then the co-permittees may be deemed to be in compliance with RWLs for *both the period of plan preparation and implementation.*[7]

In the San Diego region, the MS4s were ordered to prepare WQIPs in 2013; but it was not until after the publication of the State Board's 2015 LA MS4 Order that the SD Regional Board offered up the WQIP process as an Alternative Compliance Option ("ACO") for RWLs. The SD Regional Board's Executive Officer testified at the May 8, 2013 adoption hearing on Order No. 2013-0001, on the Initial Permit, that the permit's receiving water limitations could not be met within the five-year term of the permit, and as such, the Orange, Riverside and San Diego County permittees would be out of compliance upon adoption of the permit. Numerous comments submitted during the adoption process for all three Regional Board Orders concluded that complying with the permit's RWL provisions is simply not achievable everywhere and all the time, given the variable nature

[7] The WMPs and EWMPs, the subject of numerous challenges by dischargers and environmental groups in the Los Angeles area, are themselves controversial. Many MS4 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, attached hereto as Exhibit C (detailing estimated multi-billion dollar cost of implementing WMPs and EWMPs in LA County).

of pollutant sources and urban runoff. Indeed, as discussed below in the context of Water Code sections 13000, 13241 and 13263, many of the RWLs converted to WQBELs and numeric limitations in the permit are not attainable because the sources of pollution are derived from outside of the MS4, and either cannot be reasonably controlled at all or can only be controlled at a cost of hundreds of millions of dollars per Co-Permittee. (*See* Exhibit D attached hereto [Index of Evidence Submitted to the SD Regional Board between 2013 and 2015 suggesting likely non-attainability of some RWLs in San Diego Region]; *see also* Exhibit B attached hereto [South OC Draft Initial Cost Opinion reflecting approximately 2 billion dollar cost to achieve RWLs in southern Orange County].)

Acknowledging the impossibility of achieving immediate compliance with the permit's receiving water limitations, SD Regional Board staff added a proposed ACO in a later draft of the Initial Permit (Order No. R9-2013-0001), and left it up to the SD Regional Board whether to approve the ACO. However, during deliberations on the Initial Permit, the SD Regional Board Executive Officer recommended against providing alternative compliance. Upon that recommendation, the Regional Board voted to eliminate the ACO from the Initial Permit, leaving the Co-Permittees with no way to comply with the receiving water limitations imposed as numeric effluent limits in the Initial Permit.

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

the SD Regional Board again declined to adopt any form of ACO for the OC Co-Permittees.

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

As previously discussed, SD Regional Board staff went on to testify that compliance was an "exclusive club" in which not all Co-Permittees would be allowed to share. It was evident from staff's testimony and demeanor at the hearing that the ACO was reluctantly recommended and would only be provided on the most limited basis possible despite the State Board's direction to the contrary in the 2015 LA MS4 Order, and the fact that the provision of an ACO was one of the seven core principles announced by the State Board for management of the RWL issue. Indeed, before SD Regional Board Counsel intervened to cut off further discussion, the Board Chair observed that the SD Regional Board was unhappy with the WQIPs received to date, and inferred that the Board might not be approving WQIPs in the near future as an ACO. This suggestion was consistent with the Chair's prior statement that the ACO was approved, at least in part, to avoid the perception that the SD Regional Board was "thumbing its nose" at the State Water Board, and not to actually provide the Co-Permittees with a meaningful ACO that would yield long term compliance.

The lack of a compliance option, particularly during the development of the WQIP, conflicts with State Board policy, federal law, and state law. The City and the other Co-Permittees testified at the Nov. 18, 2015 adoption hearing that certain stormwater

discharges would cause them to be out of compliance with the prohibitions and receiving water limitations of the Final Permit for at least a 2-3 year period, beginning from the date of the enrollment of the OC Co-Permittees under the Final Permit, and lasting until the WQIPs are approved by the SD Regional Board's Executive Officer. This time period leaves the City and other Co-Permittees in the untenable position of having to strictly comply with the numeric prohibitions and receiving water limitations of the Final Permit despite it being technically and economically infeasible to do so in many instances, particularly under wet weather conditions where flows may be of high volume, fast moving, and extremely difficult to divert and treat.

The RWLs and discharge prohibitions contained in the Final Permit do not provide the City and the other Co-Permittees with the necessary compliance pathway to ensure innovation and progress. Although there is some flexibility built into the WQIP process and implementation, without some form of interim compliance path the City and the other Co-Permittees remain strictly liable for any exceedance of RWLs until such time as the southern Orange County WQIP is approved by the SD Regional Board. This was not the intent of Congress or the EPA under the Clean Water Act, and was not the intent of the State Board under Water Quality Orders 1999-05 and 2001-15 (neither of which imposed strict liability for RWL exceedances). It also was not the intent of the 2015 LA MS4 Order, which in effect, replaced the iterative process with the EWMP/WMP process. While the SD Regional Board may not be overtly thumbing its nose at the State Board on the interim compliance issue, the distinct inference to be drawn from the November 18, 2015 hearing is that the SD Regional Board does not intend to offer interim compliance in a meaningful way, and only intends to provide ACO protection to only those Co-Permittees who are fortunate enough to be invited to join the SD Regional Board's exclusive "compliance club."

Meanwhile, as Clean Water Act citizens suits are filed against the Co-Permittees over conditions they may have no short term ability to change, the SD Regional Board will presumably have less and less influence over the process of improving water quality in the

San Diego region as collaborative efforts break down and decisions about water quality projects, improvement plans, and pertinent timelines, shift to federal courts and environmental plaintiffs rather than the SD 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 MS4 permittees throughout the San Diego region.

IV. The Effective Prohibition Term for Non-Stormwater Discharges is Inappropriate.

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

This prohibition improperly imposes a "zero" discharge limit for all dry-weather runoff, unless the discharge is specifically exempted under section II.E.2 of the Final Permit. For example, all landscape irrigation runoff, unless otherwise permitted through a separate NPDES permit, may neither enter "into" the MS4, nor be discharged "from" the MS4. Subsection II.A.1.b of the Final Permit, exceeds the requirements of the Clean Water Act, and the State Board's prior precedent. (*See* Order No. WQ 2001-15 at pp. 9-10 [disapproving blanket prohibition on discharges to the MS4 without pretreatment].) Subsection II.A.1.b should be modified to clarify that a city fully implementing its Illicit Discharge Detection and Elimination Program is deemed to have "effectively prohibited" non-stormwater discharges as required by the CWA. The City requested remedial language and provided supporting evidence that would have fixed the legal deficiency of Subsection II.A.1.b identified herein, but the City's request was disregarded by the SD Regional Board at the November 18, 2015 hearing. The City's proposed language and

supporting justification are attached hereto as Exhibit E. The City respectfully requests that the State Water Board address this deficiency in subsection II.A.1.b of the Final Permit by revising the Final Permit in accordance with the City's proposed language.

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

> "Where a Copermittee fully implements the requirements of Provision E.2, then the Copermittee is deemed in compliance with the effective prohibition of non-storm water discharges to the MS4 required under Provision II.A.1.b."

V. The SD Regional Board Failed to Provide the City With Reasonable Means to Comply With Numeric Limits in the Final Permit Derived from RWLs; and As Such, the SD Regional Board Was Required to Demonstrate Compliance With Water Code Sections 13241, 13263 and 13000.

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

compliance under state law.[8]

The State Board's recent decision in the 2015 LA MS4 Order is in agreement on this point. For example, the State Board made the following observations regarding State Board policy in the 2015 LA MS4 Order, which could only be made if operating under state law (since the State Water Board cannot change or otherwise supersede federal law or EPA directives on matters of federal law):

- p. 11: "[S]ince the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the ***State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.***" (Emphasis added.)
- Page 14: "Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process, we may even have the flexibility to reverse our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance."
- Page 78: "We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all

[8] *See Natural Resources Defense Council, Inc. v. U.S. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1308 ("*NRDC II*"); *Defenders*, *supra*, 191 F.3d at 1167. *See also NRDC v. New York*, *supra*; *Anacostia Riverkeeper*, *supra*; *Tualantin Riverkeepers*, *supra*. *See generally*, *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625-627.

parameters in any single MS4 permit."

Relatedly, the plain language of subsection (iii) of section 402(P)(3)(B) of the Clean Water Act shows that the Act only requires permit terms that are "practicable." Because the federal MEP standard only involves the imposition of permit terms that are "practicable," any permit term that is "impracticable" or "infeasible," or has costs that outweigh its benefits, is a term that goes beyond what is required by federal law. Utilizing the two-step test for judicial deference of a federal agency's interpretation of a congressional statue,[9] the Ninth Circuit Court of Appeals analyzed the specific wording of the Clean Water Act, and in particular Subsection (iii), and found that "where Congress includes particular language in one section of a Statute but omits it in another section of the same Act, it's generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[10]

The Ninth Circuit went on to find that industrial stormwater dischargers, *but not municipal dischargers*, must strictly comply with water quality standards under the Clean Water Act, thereby finding that Congress set forth a different, less stringent standard, under the Clean Water Act, for municipal dischargers that does not "require" strict compliance with numeric WQBELs.[11] Accordingly, under the plain language of the Clean Water Act, the MEP standard is, by definition, a standard that only requires the imposition of practicable permit terms, and the Final Permit ignores this fundamental distinction by mandating strict compliance with RWLs as final effluent limits in the permit and withholding, perhaps permanently, any ACO.

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[9] *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* (1984) 467 U.S. 837.

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

[11] 191 F.3d at 1165 ("Congress chose not to include a similar provision for municipal storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges 'to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.'").

"Practicable" is defined to mean "reasonably capable of being accomplished; feasible in a particular situation."[12] This definition has been routinely adopted by federal courts. In *National Wildlife Federation v. Norton* (E.D. Cal. 2004) 306 F.Supp.2d 920, 927, fn. 12, the district court specifically discussed the meaning of the phrase "maximum extent practicable," and in particular focused its analysis on the meaning of "practicable," opining as follows:

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

(Internal citations omitted.) Other courts have similarly held that "practicable" refers to doing what is reasonable under the particular circumstances, and does not equate to doing what is "possible" under the circumstances.[13]

State appellate courts in Maryland, New York and Oregon have recently joined the Ninth Circuit in emphasizing that the Clean Water Act only requires states to include

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[12] Black's Law Dict., p. 1361, col. 2 (10th ed. 2014), see also Ballentine's Law Dictionary (2010) (defining "practicable" as "feasible; workable; usable" and defining "at the earliest practicable moment" as ". . . within a reasonable time under the circumstances.").

[13] *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* (S.D.N.Y. 1998) 178 F.R.D. 405, 409 ("impracticability does not mean impossibility, but rather difficulty or inconvenience.").

permit terms that will reduce discharges to the "maximum extent practicable." (See footnote 5, *supra*.) Requiring municipal stormwater permittees to strictly meet RWLs under federal law would render section 402(p)(3)(B) of the Clean Water Act superfluous as mandating strict compliance with RWLs puts municipal stormwater into the same compliance framework as every other type of NPDES discharger – with section 301 of the Clean Water Act generally prohibiting discharges that violate water quality standards outside the municipal stormwater context.

Moreover, the current approach in the Final Permit of holding MS4s, who have no way to ever stop discharging completely, strictly liable for failing to meet RWLs arguably renders section 303 of the Clean Water Act superfluous in the municipal stormwater context since— taking the SD Regional Board's argument to its logical extent— the SD Regional Board can presumably initiate enforcement against one or more Co-Permittees for violating the RWL prohibitions in the Permit, and would no longer have the need to draft another TMDL. It seems unlikely that Congress intended to insert completely superfluous language in Section 402(p)(3)(B)(iii) or intended to allow state permitting agencies to completely ignore the regulatory process for addressing impairment via the Section 303(d) listing and TMDL development process. Yet, that is exactly what accepting the Regional Board's position on RWLs would produce. The SD Regional Board has provided no legal authority to support such a result because no such authority exists. As such, MS4 Permit terms that are "impracticable"[14] or "infeasible," or which have costs that outweigh their benefits, cannot be properly classified as permit requirements "mandated" by the Clean Water Act.

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[14] The term "impracticable" is defined as: "1: not practicable: incapable of being performed or accomplished by the means employed or at command. . . ." (*Webster's 9th New Collegiate Dict.* (1993) at p. 605.)

VI. The Final Permit Terms Imposing Zero Discharge Limits, Numeric WQBELs (Including TMDLs), Receiving Water Limits and WQIP Numeric Limits Go Beyond the Clean Water Act and Violate State Law and Policy.

Section II.A.2. of the Final Permit, which governs "Receiving Water Limitations," provides that "discharges from MS4s must not cause or contribute to the violation of water quality standards and/or receiving waters. . . ." However, this language appears to conflict with prior State Water Board precedent that is directly applicable to MS4 permits issued by the SD Regional Board. In 2001, the State Water Board in *In re Petition of Building Industry of San Diego County*, Order No. WQ 2001-15, pp. 8-10 ("*BIASD Petition*"), clarified that prohibiting RWL exceedances is generally forbidden, and may only be authorized where a Regional Board makes specific site specific findings justifying imposition of a numeric standard. (*Id.* at p. 8 ["We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time"].)

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

Section II.A.4 of the Final Permit requires compliance with an iterative, adaptive management process for the Discharge Prohibitions and RWL requirements of the Final Permit. But it does not provide that so long as the Permittees are acting in good faith and complying with the iterative process, they will be considered in compliance with numeric limitations in the Permit. Comments by the SD Regional Board at the November 18, 2015

hearing made clear that the Regional Board interprets Section II.A.4 to impose strict liability on the Co-Permittees for any exceedance of RWLs attributable to one or more MS4s, an interpretation foreclosed by the *BIASD Petition* and arguably the 2015 LA MS4 Order as well.

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

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

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

> 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.

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

In *Defenders*, the Ninth Circuit recognized the different approach taken by Congress for municipal stormwater, finding that "***industrial discharges must comply 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 requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable***.'" The *Defenders* court then held that "***the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)***." (*Id.* at 1165; *see also Divers' Environmental, supra*,145 Cal.App.4th at 256, emphasis added ["***In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations***."].)

Similarly, in *Tualatin River Keepers, supra*, the court also found that under the CWA, best management practices are considered to be a "type of effluent limitation," and that such best management practices are authorized to be used pursuant to section 33 U.S.C. § 1342(p) of the Clean Water Act as the proper permitting means of controlling "storm water discharges." (235 Ore. App. at 141-142, citing 33 U.S.C. § 1342(p) and 40 CFR § 122.44(k)(2)-(3).) The court in *Tualatin* concluded that Oregon law did not require TMDLs be enforced through the use of numeric effluent limits, instead finding that municipal stormwater in a TMDL could properly be addressed via BMPs and adaptive management in an MS4 permit. (*Id.* at 148-149.)

Finally, it is worth reiterating that strict imposition of RWLs has never been the law in California, and the City does not read the 2015 LA MS4 Order as changing that dynamic. As evidenced by the *BIASD Petition* [Order No. WQ 2001-15], discussed previously, it has long been the policy of the State of California not to require the use of strict numeric limits for municipal stormwater , but rather to apply the MEP standard through an iterative BMP process. (*See, e.g.*, State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; State Board Order No. 91-03 [*"We . . . **conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law.**"*]; State Board Order No. 96-13, p. 6 [*"**federal law does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."]; State Board Order No. 2000-11, p. 3 [*"**In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations.***"]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that the ***iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; State Board Order No. 2006-12, p. 17 [*"**Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; *Blue Ribbon Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [*"**It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers.***"]; and an April 18, 2008 letter from the State Board's Chief Counsel to the

Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"] [emphasis added in each citation above].)

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

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

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

numeric effluent limits in an MS4 permit.

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

VII. Requiring Strict Compliance with a Zero Discharge Limit and the Other Numeric Limits Is to Require Compliance with Terms that are Impossible to Achieve.

As a matter of federal law, the Clean Water Act does not require municipal stormwater permittees to achieve the impossible. And this rule is well founded; as previously discussed, the Co-Permittees do not have the option of simply shutting down operations where compliance with numeric effluent limits becomes impossible. Unlike other types of NPDES permittees, public safety, among other things, compels the City and other Co-Permittees to continue operating and maintaining its MS4. A private company can close down in the face of the unattainable RWLs, but the City cannot shut down its MS4 system. Fortunately, the law does not require it to, as federal law prohibits exactly the type of strictly liability for unattainable conditions that the Permit, left unchallenged, would yield. In *Hughey v. JMS Dev. Corp.* (11th Cir. 1996) 78 F.3d 1523, *cert. den.* (1996) 519 U.S. 993, the plaintiff sued JMS Development Corporation for failing to obtain a storm water permit that would authorize 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 being discharged from its property and that it had not obtained an NPDES permit, but claimed it was not in violation of the Clean Water Act (even though the Act required the permit) because the Georgia Environmental Protection Division, the agency responsible for issuing the permit, was not yet prepared to issue such permits. As a result, it was impossible for

JMS to comply, even though it desired to do so. (*Ibid.*)

The Eleventh Circuit Court of Appeals held that the Clean Water Act does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (78 F.3d at 1529.) The court then found that:

> In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. 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.

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

The Clean Water Act does not require municipal permittees to do the impossible and comply with unachievable zero discharge limits or unattainable RWLs imposed as numeric effluent limits. Because municipal permittees are involuntary permittees, that is, because they have no choice but to obtain a municipal storm water permit, the Permit, as a matter of law, cannot impose terms that are unobtainable. (78 F.3d at 1530; *accord Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.* (2d Cir. 1994) 12 F.3d 353, 357.)

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

For purposes of the City's Petition, as reflected in the extensive evidence of non-attainability submitted during the Final Permit adoption process, summarized in Exhibit C

attached hereto, complying with numeric RWLs imposed in the Final Permit will be technically and economically unachievable for many pollutants, particularly bacteria, nutrients, and some toxicants, given the extreme variability of the potential sources of pollutants and difficulty in controlling and treating urban runoff during wet conditions where pollutant loading often originates outside of the MS4 from not anthropogenic sources.

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

Because the law does not compel doing the impossible, the numeric limits imposed on the City's discharges in the Final Permit must be stricken unless the Regional Board can demonstrate, based on substantial evidence in the record, that the RWLs imposed in the Permit are reasonably attainable for the City to achieve. (*See* Water Code § 13241(c).)

VIII. The Final Permit Terms Imposing Numeric Limits, Irrespective of the MEP Standard, Along With the "Discharge Prohibition" and "Illicit Connection" Provisions, Were Adopted in Violation of Water Code Sections 13000, 13263 and 13241.

A. Permit Terms That Go Beyond the MEP Standard Are Not Required Under Federal Law, and No Appellate Court – Anywhere – Has Ever Upheld a Permit Such as the SD Regional Board's Final Permit.

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

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By imposing requirements that go beyond the MEP standard as defined in the Final Permit itself, *i.e.*, by imposing permit terms that will result in a Permittee having to implement "impracticable" BMPs, the SD Regional Board is, by definition, seeking to impose terms that not only go beyond the requirements of federal law, but also goes beyond what is allowed under State law, namely Water Code sections 13000, 13241, and 13263, and the California Supreme Court's decision in *Burbank*, *supra*, 35 Cal.4th 613.

Water Code sections 13241, 13263 and 13000 all directly or indirectly require a consideration of "economics," and further compel an affirmative finding by the SD Regional Board that the Final Permit terms are "reasonably achievable," including a balancing of the benefits of the requirement, e.g., "the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (Wat. Code § 13000), and the "***water quality conditions*** that ***could reasonably be achieved*** through the coordinated control of all factors which affect water quality in the area." (*Id.*, § 13241.)

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

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

The Supreme Court thus interpreted the need to consider "economics" as requiring a consideration of the "cost of compliance" on the cities involved in that case. (35 Cal.4th at 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board ***consider the costs of compliance when setting effluent limitations in a waste water discharge permit.***"].) The Supreme Court further recognized that the goals of the Porter-Cologne Act as provided for under Water Code section 13000 are to "attain the highest water quality ***which is reasonable***, considering all demands being made and to be made on those waters ***and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.***" (*Id.* at 618.) Moreover, under Water Code section 13263(a), waste discharge requirements developed by a regional board "shall implement any relevant water quality control plans that have been adopted, and take into consideration the beneficial uses to be protected, the water quality objectives ***reasonably required for that purpose***, other waste discharges, the need to prevent nuisance, ***and the provisions of Section 13241.***" (Emphasis added.)

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

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

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In a concurring opinion in the *Burbank* case (at pp. 632-633), Justice Brown made several significant comments regarding the importance of considering "economics" in particular, and the Section 13241 factors in general, when adopting an NPDES Permit that includes terms not required by federal law:

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

In the case at hand, the OC Co-Permittees submitted evidence, unrebutted by the SD Regional Board, that: (1) complying with all of the RWLs imposed in the Permit will cost approximately two billion dollars—making the cost of compliance for the City, if

compliance is even possible, in excess of 100 million dollars;[15] (2) several of the RWLs, such as the numeric effluent limits for bacteria and nutrients imposed via the Permit, are likely physically impossible to ever attain;[16] (3) achieving some of the RWLs, such as by diverting all wet weather flows out of the MS4s to treatment facilities, would create substantial risk of inadvertently damaging beneficial uses (such as fisheries) that rely upon sufficient amounts of water.

As such, it would appear, at least on the surface, that the SD Regional Board failed to conduct the mandatory analysis required by *Burbank* since: (1) the SD Regional Board is imposing RWLs as numeric effluent limits under state law; (2) the costs of compliance for the Co-Permittees are enormous, and the SD Regional Board did not articulate pursuant to Water Code section 13241(d) during the Final Permit adoption process why such massive costs are justified particularly since attaining RWLs is likely to be impossible for some constituents; (3) there is no evidence for any of the RWLs that the numeric standards imposed in the Permit are, in fact reasonably achievable, as Water Code section 13241(c) and the California Supreme Court decision in *Burbank* require prior to imposition in a permit; (4) the RWL provisions would appear to potentially wipe out other beneficial uses, contrary to Water Code section 13241(a), by forcing the Co-Permittees to divert as much water as they can out of their MS4s so as to avoid the risk of future exceedances at the end of pipe. Given the foregoing, the State Water Board is obliged to disapprove the strict imposition of RWLs in the Final Permit until such time as the SD Regional Board proves, if it can, compliance with *Burbank* and Water Code sections 13000, 13241 and 13263.

IX. The Final Permit Improperly Attempts to Hold the City Responsible for Discharges From Other Co-Permittees.

The provisions of Attachment E of the Final Permit can be read to unlawfully attempt to impose joint and several liability on the Permittees, through the use of language

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[15] *See* Exhibit B attached hereto (Orange County Draft Initial Cost Opinion).

[16] *See* Exhibit D attached hereto (Index of Evidence Submitted to the SD Regional Board between 2013 and 2015).

requiring compliance by the "Co-permittees" rather than by individual dischargers.

Any attempt to impose joint and several liability on the Co-Permittees, however, is contrary to law. Under the Clean Water Act and state law, each "co-permittee" is only responsible for its own discharges. (*See* 40 C.F.R. § 122.26(a)(3)(vi) ["Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators."].)

Of greatest concern here, under the Final Permit, a Co-Permittee may be found out of compliance with a WQIP requirement, or an interim or final TMDL target, based solely on discharges from other co-permittees, and this is a particular concern in the context of bacteria – which may have multiple sources, naturally occurring non-anthropogenic sources and anthropogenic sources. Joint and several liability is arguably imposed by each section of the Permit that provides for the "co-permittees" to ensure compliance with WQIP mandates or the various TMDLs that are incorporated into the Final Permit.[17]

As a matter of law, and as acknowledged by the State Water Board in its 2015 LA MS4 Order at pages 66-70, the SD Regional Board cannot impose joint and several liability on the Co-Permittees absent evidence that the discharges of a particular Permittee caused a TMDL or WQIP violation, or the exceedance of some other legally promulgated and legally enforceable effluent standard. The numerous provisions of the Final Permit that still imply liability without evidence of specific responsibility by a particular Permittee should be stricken by the State Board in accordance with its 2015 LA MS4 Order.

X. Conclusion.

For the foregoing reasons, at such time as this Petition may be heard in the future, or in the event that settlement discussions with the SD Regional Board during the abeyance period do not produce permit conditions that address the concerns raised herein, the City respectfully requests that the State Board vacate and set aside the disputed terms of the

[17] In addition to the problematic sections of the Final Permit referenced above, Final 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).

Final Permit, as amended, including the problematic permit conditions and terms identified for the State Board in the Petition.

However, in the interest of finding accommodation with the SD Regional Board, and in the hope of developing a compromise solution that moves southern Orange County forward towards better water quality in an attainable manner, the City respectfully asks that the State Board hold this Petition in abeyance at this time.

Dated: December 18, 2015

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