CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

June 27, 2005

Via Email and U.S. Mail

Mr. Bruce Wolfe, Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments of City of San Jose Concerning Proposed Modification of NPDES Permit No. CAS029718 (Santa Clara Valley Municipal Stormwater Runoff Permit)

Dear Mr. Wolfe:

By this letter I am submitting legal comments on behalf of the City of San Jose ("San Jose") on the Tentative Order, Notice of Public Hearing, and accompanying Fact Sheet that was transmitted to San Jose as a member of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP") on May 6, 2005.

Reason for Submitting Comments

San Jose appreciates your decision to continue this item from the Regional Board's June 15, 2005 meeting agenda, and the extension of the public comment deadline until today's date. San Jose also wants to acknowledge the substantial efforts that you and your staff have made to resolve the concerns that SCVURPPP staff has raised with the proposed permit amendment. **We specifically want to acknowledge that the proposed revised draft Tentative Order that was electronically transmitted to SCVURPPP staff on June 24, 2005 is substantially more acceptable to San Jose than the original Tentative Order that was circulated for public comment, and addressees many of our concerns that we raised with the original Tentative Order.** However, because we continue to be concerned with the manner in which the Board is proceeding in this matter, and in light of the circulation of a public review draft Tentative Order that is not acceptable

to San Jose, we believe it is necessary to ensure that San Jose's comments are part of the record in this proceeding.

Comments Will Focus on Tentative Order Provisions Dealing with Hydromodification

As you know, the Tentative Order proposes to amend two different provisions in the SCVURPPP permit; Provision C.3.c/d (hydraulic sizing requirements for stormwater treatment best management practices (BMPs) in new and redevelopment project); and Provision C.3.f (peak flow control, or "HMP", requirements for specified new and redevelopment projects.) **The proposed revised draft Tentative Order that was electronically transmitted to SCVURPPP staff on June 24, 2005 addresses all of our concerns with respect to proposed amendment of the stormwater treatment BMP provisions. San Jose fully supports the effort to conform the SCVURPPP permit to the permits issued to other stormwater programs in the Region.**

Since these comments are being submitted on the May 6th draft of the Tentative Order, to the extent that Regional Board staff believes that the comments have been addressed in the June 24th draft, we do not expect a response to our comments. However, we continue to have concerns with the aspects of the Tentative Order that would order San Jose and other SCVURPPP Dischargers to implement peak flow control measures before the Board has even reviewed, much less approved the HMPs submitted by other stormwater programs. We would be interested in an explanation of how the Board intends to ensure that HMP requirements are not delayed for other cities in the region, and that if less stringent requirements are adopted for other cities, the SCVURPPP permit will be quickly amended so that San Jose and other Santa Clara County cities will not, in effect, be penalized for early HMP implementation**.** The remainder of these comments will focus on our legal issues with the Tentative Order provisions relating to the SCVURPPP HMP.

Legal Objections to Tentative Order

1. The Record Does Not Demonstrate That The Proposed Requirements Are Practicable Or Necessary To Protect Water Quality.

We do not believe that the record developed to date demonstrates that the HMP requirements that would be imposed through the proposed modification meet the maximum extent practicable ("MEP") standard, which the U.S. Court of Appeals has determined to be *the* applicable statutory standard governing the substance of

permits regulating municipal stormwater discharges under the Clean Water Act. *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).[1]

Given the procedural requirements contained in the NPDES regulations discussed below, the initial burden of demonstrating that the Tentative Order requirements are within the MEP standard is on the permit writer, not the Discharger. We are particularly concerned with the lack of solid evidence that these requirements are practicable and necessary in light of the fact that the requirements are not yet uniformly applicable throughout the Bay Area. **The Tentative Order will impose significant administrative, budgetary, and economic development burdens on San Jose that are not currently being imposed on similarly situated cities, without any factual foundation for this disparate treatment.**

2. The Proposed Requirements Impermissibly Specify The Manner Of Performance.

Porter-Cologne specifically prohibits the Board from specifying the "design, location, type of construction, or particular manner in which compliance may be had . . . ." Cal. Water Code § 13360. However, the proposed requirements of the Tentative Order do just that – they attempt to prescribe for the municipalities, the types of planning, design, and land use standards and programs they are to impose at the local level. These requirements limit the manner in which San Jose might satisfy MEP. By specifying exactly how San Jose is to comply with MEP, the proposed Tentative Order violates the requirements under Porter-Cologne. **We are particularly concerned that issuance of the Tentative Order could lead to a situation where the requirements imposed on San Jose are more onerous that the requirements that are ultimately imposed on other similarly situated cities in the Region**. Indeed, this scenario is precisely what occurred with the hydraulic sizing requirements for stormwater treatment BMPs; and the disparate treatment of San Jose and other Santa Clara County municipalities is only now being corrected, over four years after the permit containing these provisions was issued.

[1] To the extent the Board may claim that "beyond-MEP" requirements are authorized under Porter-Cologne, the California Supreme Court recently held that analysis of economic impacts and burdens must be conducted pursuant to sections 13241 and 13263 of the Porter-Cologne Act. *See City of Burbank v. State Water Resources Control Board*, 05 C.D.O.S. 2861 (April 5, 2005).)

3. The Tentative Order Seeks To Impose An Unfunded Mandate.

The Tentative Order's requirements constitute imposition of an unfunded mandate on San Jose in violation of the California Constitution. *See* Cal. Const. Art. 13B § 6. Under the California Constitution, the State is required to reimburse local governments for State mandated programs. *See* Cal. Const. Art. 13B § 6. While the Clean Water Act is a federally mandated program, case law makes clear that the prohibition on unfunded mandates applies, unless the State has "no true choice" in the manner of implementing the federal program. *See Hayes v. Commission on State Mandates*, 11 Cal.App.4th 1564, 1593 (1992) (emphasis added).

Here, the State, through the Regional Board, has a very real choice about whether to impose the requirements in the Tentative Order. The U.S. Environmental Protection Agency has issued no mandate to require numeric design standards or the hydromodification management controls proposed here; indeed, they have not even issued a recommendation to this effect.

Hence, the costs associated with these requirements are not "costs mandated by the federal government" and may not be imposed in the absence of a concurrent provision of funding to the local government entities involved. Cal. Gov't Code § 17513. **Again, one of our biggest concerns is that the costs being imposed on San Jose are not being imposed on similarly situated cities**.

4. Issuance Of The Tentative Order Is Subject To CEQA

The California Environmental Quality Act (CEQA) applies to permits issued by the Regional Board to the extent any such permit is not an action required by the federal Clean Water Act ("CWA").[2] As indicated above, the HMP provisions of the Tentative Order are not required by the CWA.

CEQA contains very specific procedural and substantive requirements which have not been met. For example, CEQA requires a thorough analysis of the cumulative impacts of all potential environmental impacts. (CEQA Guidelines § 15130). No such analysis appears in the staff report, or anywhere in the record. For example, there has been no analysis of the cumulative impacts to the affordable housing

[2] See, e.g., *Committee for a Progressive Gilroy v. State Water Resources Control Board*, 192 Cal.App.3d 847,962 (1987) (limiting the CEQA exemption of Section 13389 of the California Water Code to those "actions required under" the federal CWA).

supply resulting from imposing a 2% "surcharge" on housing project costs. Also troubling is the lack of analysis of the functionality of controlling very low peak flows (which has not been tried in any other jurisdiction to our knowledge[3]), and whether mitigation measures will be needed to avoid unintended adverse consequences, such as standing water. **Deferring imposition of HMP requirements on San Jose until the Board is ready to move forward on a regional basis would allow time for these analyses to be performed in a cost effective and efficient manner for all municipal stormwater programs.**

5. Procedural Concerns With Tentative Order

a. Lack of Allowable Cause for Modification

The Tentative Order proposes that federal regulations governing permit modifications (40 C.F.R. §122.62) and condition C.11 of the existing permit establishes sufficient cause to reopen and modify the permit and incorporate new land use planning provision restrictions. **We are particularly concerned with reopening the permit to impose these new requirements so late in the current cycle, and before the Regional Board has completed its review of the HMPs submitted by other stormwater programs.**

Clean Water Act regulations allow modification for a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. In this case, the environmental conditions that were the basis for the existing permit are unchanged.

EPA's regulatory implementation and interpretation make only more clear and provide other bases to demonstrate that the Tentative Order and Fact Sheets do not establish sufficient cause for modification. EPA has explained that causes for modification are narrow and should be used sparingly. Modifications are abnormal situations. In the first instance, permittees require, and should be given, certainty about conditions during the term of the permit. Permit writers should be very conservative and favors leaving permit conditions unchanged. [4]The regulations are

[3] We note that in Western Washington, flows are controlled only down to 50%, not 10%, of the 10-year flow, as currently proposed by Contra Costa County.

[4] The requirements now at 40 C.F.R. §122.62 (2005) have been renumbered and reorganized since previous promulgation, especially at 40 C.F.R. §122.15 (1980), when EPA explained the operative relevant requirements that are still in effect. (45 Fed.Reg. 33290, May 19, 1980).

explicit: "If cause does not exist….[,the permit writer] shall not modify … the permit." (40 C.F.R. §122.62).

Conditions C.11 (or 12) of the existing permit add no further basis to alter the EPA's strongly stated reluctance to remove the certainty permittees require during their permit terms or to deviate from the proscription that only changed conditions are grounds for modification. Sections C. 11 (12) state, in relevant part:

> It is anticipated that the Management Plan may need to be modified, revised, or amended from time to respond to changed conditions and to incorporate more effective approached to pollution control…. This Order may be modified…prior to the expiration date….to address *significant changed conditions* identified in the technical reports required by the Regional Board that were unknown at the time of the issuance of this Order. [5]

Neither the Tentative Order nor the Fact Sheet provide any explanation of how conditions are changed, much less significantly so, from the time the permit was issued. There is no evidence water quality has deteriorated as a result of the previously permitted discharge or that significant changes justify removing the "maximum certainty" that permittees require.

b. Deficiencies in Draft Permit and Fact Sheet.

Numerous state and federal procedural requirements have not been complied with in issuing this proposed modification to the Program members' National Pollutant Discharge Elimination System ("NPDES") municipal stormwater permit. Specifically, neither the Tentative Order, nor the accompanying Fact Sheet, contains a meaningful explanation of the basis of, or rationale for, how its requirements were calculated. Nor has any meaningful effort been made to conduct the required analysis of the reasonableness, practicality, or calculated benefits and/or impacts of the proposed modifications.

The NPDES regulations specifically mandate that a state permitting authority provide a fact sheet that sets forth "the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." The fact sheet must also include "the basis for the permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record," "reasons why any requested

[5] Emphasis added.

variances or alternatives to required standards do or do not appear justified," and "calculations or other necessary explanation of the derivation of specific . . . conditions . . . and reasons why they are applicable . . . " 40 CFR §§ 124.6, 124.8, and 124.56.

The fact sheet provided with the Tentative Order ("Fact Sheet") fails to contain the information required by these regulations. Nowhere are there references to the factual basis for the proposed modifications. Nor is there an analysis of the methodological and policy questions involved, the relevant administrative record, the numerous requests received from members of the Program concerning alternatives to these permit conditions, or the reasons why they (and not the alternatives suggested by the Program) are appropriate.

To the extent that the proposed modifications seek to go beyond the Clean Water Act's "maximum extent practicable" standard (see discussion above), sections 13241 and 13263 of the Porter-Cologne Act require that waste discharge requirements take into consideration "(a) [p]ast, present and probable future beneficial uses of water[,] (b) [e]nvironmental characteristics of the hydrographic unit under consideration . . . , (c) [w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area[,] (d) [e]conomic considerations[,] [and] (e) [t]he need for developing housing within the region." *See City of Burbank v. State Water Resources Control Board*, 05 C.D.O.S. 2861 (April 5, 2005). Porter-Cologne also requires that an analysis be conducted to ensure that the burden imposed through waste discharge requirements bear a "reasonable relationship to the need for the report and the benefits to be obtained . . . ." Cal. Water Code §§ 13263 and 13267.

Conclusion

In closing, we again want to acknowledge the substantial efforts that you and your staff have made to resolve our concerns with the proposed permit amendment. The proposed revised draft Tentative Order that was electronically transmitted to SCVURPPP staff on June 24, 2005 is substantially more acceptable to San Jose than the original Tentative Order that was circulated for public comment, and addressees many of our concerns that we raised with the original Tentative Order. We specifically support the portions of the June 24th revised draft concerning stormwater treatment BMP provisions, as these provisions would conform the SCVURPPP permit to the permits issued to other stormwater programs in the Region.

We are submitting these comments because the draft Tentative Order that is being circulated for public review and comment is not acceptable to San Jose, and we believe it is necessary to ensure that San Jose's comments are part of the record in this proceeding. We also want to take this opportunity to again express our strong reservations about adoption of a permit amendment that imposes HMP requirements on San Jose and other Santa Clara County municipalities before the Board has completed its review of the HMPs submitted by other municipal stormwater programs. We truly believe that completing this review will result in a more well-informed decision on this important new effort to improve water quality.

Sincerely yours,

RICHARD DOYLE
City Attorney

By /s/ MOLLIE J. DENT
MOLLIE J. DENT
Senior Deputy City Attorney