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May 15, 2008

Via E-Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Comment Letter -- Ballona Creek Metals TMDL

Dear Ms. Townsend:

This firm represents the Cities of Bellflower, Carson, Cerritos, Downey, Paramount, Santa Fe Springs, Signal and Whittier, all of which have an interest in the compliance of the Ballona Creek Metals TMDL with the requirements of state law. The following comments are intended to address legal issues raised by the proposed approval by the State Water Resources Control Board ("State Board") of a Basin Plan Amendment setting forth a total maximum daily loads ("TMDL") for metals in Ballona Creek. We thank you for the opportunity to provide these comments on behalf of our clients.

On July 13, 2007, the Los Angeles County Superior Court issued a peremptory writ of mandate ordering the State Water Resources Control Board and the Regional Board to set aside the Ballona Creek Metals TMDL. The court further directed the water boards, if they choose to adopt a TMDL for Ballona Creek, to consider alternatives to the project prior to such adoption. The court issued the writ after finding that the Water Boards violated the California Environmental Quality Act ("CEQA") by failing in the original adoption of the TMDLs to discuss and analyze alternatives to the project, in violation of Pub. Res. Code § 21080.5 and 23 Cal. Code Reg. § 3777.

Prior the entry of the court's writ, and in apparent anticipation of its decision, Regional Board staff on June 22, 2007 indicated that it would seek readoption of the TMDL if the court ordered it to be vacated, but with the amendment that the TMDL would now contain new fixed compliance dates corresponding to the compliance dates contained in the original TMDLs. Staff issued an "Addendum to CEQA Documentation

Alternatives Analysis" discussing the TMDL proposed by staff as well as five alternatives, including a "no action" alternative.

I. *Comments on Addendum to CEQA Documentation Alternatives Analysis*

The requirement to consider project alternatives is enshrined both in the plain text of CEQA and in the CEQA regulations applicable to the Regional Board and State Board. Pub. Res. Code § 21080.5(d)(2)(A) and 23 Cal. Code Reg. § 3777. Numerous California cases have required that the CEQA documentation for a project include a discussion of project alternatives, even where the lead agency concludes that all environmental impacts would be mitigated. *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376.

The CEQA Guidelines provide than an EIR "shall describe a range of reasonable alternatives to the proposed project . . . that could feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." 14 Cal. Code Reg. § 15126.6.

We first note that in Section 1, the document indicates that the purpose of the TMDL (the "project") is in part to adopt a TMDL "in a manner timely enough to avoid federal intervention in state water quality planning, which would occur as a result of United States Environmental Protection Agency's obligations under section 303(d) [of the Clean Water Act] and under a federal consent decree that would require USEPA to establish these TMDLs if the State does not do so." Addendum, p. 1.

This is a change from the description of the original TMDL. That project description did not identify the need to adopt a TMDL before U.S. EPA as a project requirement. This is apparent from a review of the "Description of the Proposed Activity" section of the CEQA Checklist for the TMDL, dated March 25, 2005, and also from the Regional Board's June 2, 2005 resolution, which states that the "project itself is the establishment of a TMDL for toxic metals in Ballona Creek." Resolution No. R05-007, paragraph 19. (We request that these documents, if not already before the State Board as part of the record, be added to the record.) If the proposed TMDL is the same project as the original TMDL, as suggested by the proposed Resolution, then the purpose should be the same. If the purpose is now different, than it should be recognized that the project is also different.

A. Discussion of Alternatives in Addendum

While the Addendum discusses certain alternatives to the proposed TMDL (the "project"), we believe that the discussion does not always accurately set forth the advantages and disadvantages of those alternatives.

With respect to Alternative 1, the Addendum indicates, on page 8, that the original Staff Report, CEQA documentation and tentative Basin Plan Amendment "included extensive discussion" of the methods of compliance "and their foreseeable environmental impacts." We respectfully disagree. The Superior Court found in its Statement of Decision that the environmental discussion was barely adequate in many aspects. (We note that the CEQA checklist for this TMDL consisted of only 15 pages, as compared to the approximately 300-page CEQA substitute environmental document prepared for the Los Angeles River Trash TMDL.) In any event, the adequacy of the CEQA review is now before the Court of Appeals, and will not be further discussed in this letter.

With respect to the adoption of a U.S. EPA TMDL, Alternative 5, the Addendum concludes that the adverse impacts would be more severe because EPA would simply require compliance with the TMDL at the time of NPDES permit renewals. Addendum, p. 12. While Regional Board staff has cited, in their response to comments, to an isolated statement of a U.S. EPA official that if EPA adopted the TMDL there would not be an implementation schedule, this is speculative. U.S. EPA has stated that TMDLs may be reflected in municipal stormwater permits through BMPs and monitoring. *See* EPA Memorandum from Robert H. Wayland and James A. Hanlon to Water Division Directors, November 22, 2002, p. 2. A copy of this memorandum has been submitted to the State Board under separate cover.

B. Additional Reasonable and Feasible Alternatives

The Addendum states that it has been written to "explain the Regional Board's conclusion that no feasible alternatives actually exist that would result in less significant impacts, and that would achieve the project's purposes." Addendum, p. 4. We respectfully submit that there are, in fact, feasible and reasonable alternatives that would, if adopted, cause less significant impacts and achieve the project's purposes.

The Regional Board is not compelled to adopt the particular TMDL that has been proposed. We submit that there are a number of additional alternatives that should have been discussed in the Addendum and presented to the Regional Board for consideration.

Alternative 7: The TMDL Modified to Extend Compliance Dates – One alternative would be to modify certain interim compliance dates to allow additional time for the completion of special studies called for in the TMDL and the incorporation of the results of the studies into implementation of the TMDL. Under this alternative, deadlines for the submission of the special studies, for the reopening of the TMDL, for the submission of implementation plans and for the first jurisdictional group compliance demonstration all would reflect the compliance dates set forth in the original TMDL, which were anniversaries of the effective of the TMDL, not dates certain. All other compliance dates would remain as proposed. With regard to the LA River Metals

TMDL, a number of cities have commented that there is insufficient time to complete the special studies required in that watershed.

We believe that this alternative would provide significant environmental benefits. If the results of the special studies, which could well indicate that higher wasteload allocations and thus less rigorous implementation efforts are indicated, are incorporated into the TMDL, the environmental impacts associated with the construction and maintenance of structural and non-structural BMPs, including with respect to infiltration of contaminated water, air impacts, traffic impacts, recreational impacts, etc. could potentially be avoided or at least substantially mitigated.

At the same time, this alternative would still allow implementation of the TMDL without ultimate delay, since no extension of other compliance dates, including the final compliance date, is proposed. Thus, this alternative meets the requirement of a "reasonable alternative" that "feasibly attains" the goals of the project but also "substantially lessens" significant environmental effects.

Whether or not the State Board remands the proposed TMDL to the Regional Board for its failure to consider this alternative, we submit that the State Board should remand the TMDL so that the interim compliance dates can be appropriately adjusted to allow for the performance and consideration of the special studies.

Alternative 8: TMDL Addressing Atmospheric Deposition -- Another alternative would be a TMDL that assigned nonpoint source load allocations based on atmospheric deposition of metals. The issue of atmospheric deposition is potentially very significant to determining the cause of metals loadings in the Ballona Creek watershed. The State Board has required its staff and Regional Board staff to work with the California Air Resources Board and the South Coast Air Quality Management District to assist in developing control strategies. [1]

This alternative would assign nonpoint source load allocations based on atmospheric depositions and work in control strategies designed to reduce metals loadings. This would result in a reduction of the waste load allocations assigned to dischargers and would result in fewer environmental impacts from the installation and maintenance of structural and non-structural BMPs. In addition, a reduction in the metals emitted to the atmosphere would be a net benefit to the residents of the watershed. This alternative could still be designed to attain the water quality standards set in the proposed

[1] Regional Board staff indicated in the response to this comment that responsible jurisdictions were not precluded by the TMDL from controlling metals loading, "including reduction of air deposition of pollutants." As this Board recognized at the October 20, 2005 hearing, the agency with the authority to address air pollution are not individual cities but rather the California Air Resources Board and the various air districts. As then-Board Member Katz remarked, "we find ourselves in a position where the Air Board should be taking the lead . . . ."

TMDL and on a similar time frame. It would thus qualify as a feasible and reasonable alternative and, we believe, should have been considered by Regional Board staff.

Other Potential Project Alternatives – In addition to the alternatives noted above, there are other alternatives to the proposed TMDL that would both result in less significant environmental impacts and achieve project goals. For example, another alternative would be to require a reopening of the TMDL to consider advances in brake pad technology. As the Regional Board knows, current brake pads are a significant source of copper in urban waters and efforts are underway to reduce the amount of copper in brake pads.

Another alternative would focus on a water quality objective modification alternative. The Water Boards have significant discretion in developing the various water quality objectives that are set forth in the Basin Plan, objectives which are then used to formulate TMDLs. Pursuant to Water Code §§ 13000 and 13241, a number of factors and policies must be taken into consideration when water quality objectives are adopted, and once adopted, these water quality objectives must be evaluated every three years through the "triennial review" process.

An alternative to the proposed TMDL would be to review the water quality objectives in the Basin Plan, and to revise those objectives considering their application to storm water, consistent with the requirements under Water Code §§ 13000, 13240 and 13241. If it was the case that the water quality objectives were improperly developed, their removal would result in a TMDL that addressed only objectives that were validly developed and whose implementation would cause far fewer environmental impacts. (A more complete discussion of concerns with the development of water quality objectives is contained in Section IV, below.)

Unfortunately, the limited array of alternatives discussed in the Addendum do not meet the requirements of CEQA – that alternatives which would eliminate or significantly lessen significant environmental impacts, yet still achieve most project requirements, be considered and analyzed.

III. *Need to Consider AB 32 Concerns*

As a separate and independent matter, we respectfully submit that the Regional Board should consider the impacts of the project on global warming. In 2006, the California Legislature adopted AB 32, the California Global Warming Solutions Act of 2006. As a general matter, AB 32 requires CARB to adopt rules and regulations that would, by 2020, achieve greenhouse gas emissions equivalent to statewide levels in 1990. The CEQA checklist for the Metals TMDL, while it discussed air emissions, did not in any sense address greenhouse gas emissions from TMDL implementation efforts.

A number of courts have overturned CEQA documents that did not analyze their project's impacts on greenhouse gas emissions. We submit that the Regional Board should evaluate the project's contribution of those emissions (in such ways as emissions from street sweepers (increased street sweeping being an identified BMP), from construction of BMPs, from increased traffic and other air emissions). The Regional Board has not done so.

IV. *Comments Regarding Water Quality Standards and Beneficial Use Designations*

In addition to the issues noted above, we also wish to bring to the State Board's attention that the TMDL cannot lawfully be adopted at this time, since, as proposed, it would be an attempt to apply to stormwater and urban runoff water quality standards and beneficial use designations that were not developed and adopted in accordance with the requirements of California law.

This issue recently was addressed by the Orange County Superior Court in *Cities of Arcadia v. State Water Resources Control Board,* Case No. 06CC02974. In that case, the Hon. Thierry P. Colaw held that the State Board and Regional Board had not, in fact, considered the factors set forth in Water Code §§ 13000 and 13241 in adopting water quality standards, including those applicable to the Ballona Creek Metals TMDL. A copy of Judge Colaw's opinion is attached hereto as Exhibit 1. We wish to note that no writ or judgment has yet been issued in this case.

In summary, Judge Colaw found that the State Board and Regional Board failed to consider the Water Code §§ 13000/13241 factors as they applied to stormwater and urban runoff when they adopted water quality standards. See Exhibit 1, pages 5-6. Judge Colaw also found that during the last triennial review, the Regional Board refused to consider these factors, an act that was an abuse of the Board's discretion. See Exhibit 1, pages 6-7. Judge Colaw also held that the designation of "potential" beneficial uses by the Water Boards was also an abuse of discretion, because the Water Code requires consideration of the "probable" future beneficial uses of water. See Exhibit 1, pages 4-5.

As noted in the Addendum, two reaches of Ballona Creek, Ballona Creek to Estuary and Sepulveda Canyon Channel, are designated only with potential beneficial uses for wildlife habitat and warm freshwater habitat.

Please also note that the fact that the TMDL is being developed to achieve a series of water quality standards which are based in part on CTR, a federal regulation, does not change the requirement to comply with Water Code §§ 13241 and 13000. To the point, CTR only provides the necessary criteria to be utilized in developing the water quality standard. However, if the designated beneficial use for the water body is not a condition that "could reasonably be achieved," or if "economic considerations" make the CTR

criteria unachievable, then the "use" designations must be changed, requiring the application of a less strict criteria under CTR because of this change in use. Moreover, the Water Boards have considerable discretion in implementing the requirements of CTR, and nothing in the CTR regulation prevents the Water Boards from either revising the implementation measures in the proposed TMDL or from establishing a set of water quality objectives (using CTR criteria) based on properly designated beneficial uses that "could reasonably be achieved" (Sections 13241(c) and 13000), based on the "environmental characteristics" of the waterbody (Section 13241(b)), on "economic considerations" (Section 13241(d) and 13000), "the need for developing housing within the region" (Section 13241(e)), or with respect to "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" (Section 13000; see also Water Code § 13240, requiring water quality control plans to conform to the policies set forth in Section 13000).

The attempted development of a TMDL based on water quality standards to be applied to stormwater and urban runoff that were not developed and adopted in compliance with the requirements of the Porter-Cologne Act, and further, that are in part based on "potential beneficial uses," requires that the Ballona Creek Metals TMDL not be approved until such time as appropriate and lawful water quality standards have been developed and incorporated into the Basin Plan. We therefore submit that the State Board should remand the proposed Basin Plan Amendment to the Regional Board with instructions to defer further action until compliance is achieved with the requirements of the Porter-Cologne Act.

* * *

We appreciate this opportunity to provide comments on the Metals TMDL for Ballona Creek. If you or other members of State Board staff have any questions on these comments, please do not hesitate to call me at the number noted above.

Very truly yours,

David W. Burhenn

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
COMPLEX LITIGATION CENTER

MINUTE ORDER

Date: 03/13/2008 Time: 09:52:22 AM Dept: CX104
Judicial Officer Presiding: Judge Thierry Patrick Colaw
Clerk: P. Rief

Bailiff/Court Attendant: Allison Hreha

Reporter: None

Case Init. Date: 02/09/2006

Case No: 06CC02974 Case Title: CITIES OF ARCADIA VS STATE WATER RESOURCES CONTROL

Case Category: Civil - Unlimited Case Type: Judicial Review - Other

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Event Type: Chambers Work

Causal Document: Answer to Complaint; Appendix of Authorities; Case Management Statement; Complaint; Declaration - Other; Demurrer - Other; Demurrer to Complaint; Document - Other; Ex Parte

Appearances:

PETITION FOR A WRIT OF MANDATE AND FOR DECLARATORY RELIEF

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on February 27, 2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

SEE ATTACHED RULING.

Court orders clerk to give notice.

THE CITIES OF ARCADIA, BELLFLOWER CARSON, CERRITOS, CLAREMONT, COMMERCE, DOWNEY, DUARTE, GARDENA, GLENDORA, HAWAIIAN GARDENS, IRWINDALE, LAWNDALE, MONTEREY PARK, PARAMOUNT, SANTE FE SPRINGS, SIGNAL HILL, VERNON, WALNUT, WEST COVINA, and WHITTIER, municipal corporations, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a non-profit corporation,
Petitioner Plaintiffs

vs.

THE STATE WATER RESOURCES CONTROL BOARD; and THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, etc., *et alia*,
Respondent Defendants

ORANGE COUNTY SUPERIOR COURT CASE NO. 06CC02974

NOTICE OF RULING/DECISION

The Court has before it the Petition by multiple government entity Petitioners ["Cities" or "Petitioners"] for a Writ of Mandate and for Declaratory Relief as against the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region ["Boards"] which has been extensively briefed and argued at a full day hearing on 27 February 2008. What follows is the ruling and decision by the Court on this complex and serious matter.

I. The Basic Controversy:

A. Petitioners contend that Respondents never considered Water Quality Standards ["Standards"] in relation to how the Standards apply to storm water [i.e. storm waters and urban runoff].

They urge the court to consider that pursuant to Water Code § 13000 et seq. and specifically Water C. § 13241 ["13241/13000"] the Respondents must consider several factors including, but not limited to, probable future beneficial uses of water, environmental characteristics of the water, water quality conditions that could be reasonably be achieved through the coordinated control of all factors which might affect the quality of water, economic considerations, and the need for developing housing within the region. See Water C. § 13241 (a) – (e).

B. Respondents argue that they did consider these 13241/13000 Standards originally in 1975 and in later reviews and that any challenge to those considerations and reviews has long since passed by way of expiration of the statute of limitations.

C. Petitioners counter that the record of events shows, and Respondents admit, that they never actually considered 13241/13000 requirements for storm water at any time, that the appropriate time to do so only became ripe at the time of the 2004 Triennial Review, and that Respondents abused their discretion by not appropriately considering the 13241/13000 factors in the 2004 Triennial Review. They want the court to order the Respondents inter alia to go back and redo the 2004 Triennial Review ["2004 TR"] and, in conformance with law, properly consider the 13241/13000 factors in relation to storm water.

II. The Decision:

A. Standard of Review

The standard of review in this matter under C.C.P. § 1085 is whether the action by a respondent was arbitrary or capricious or totally lacking in evidentiary support [i.e., substantial evidence] or whether the agency in question failed to follow the required procedure and act according to the law. *City of Carmel-by-the Sea v. Board of Supervisors* (1986) 183 Cal. App. 3d 229; *Corrales v. Bradstreet* (2007) 153 Cal. App. 4th 33, 47.

B. Specific Issues

1. As argued by the Respondents, is it too late pursuant to limitations periods to consider 13241/13000 in relation to storm water?

It is not.

(a) The 5th, 6th, and 8th causes of action are not barred by the statute of limitations. The 5th cause of action challenges the 2004 TR, clearly within the four year statute of C.C.P. § 343. The 6th cause of action is for declaratory relief regarding future Basin Plan amendments, Total Maximum Daily Loads of pollutants ["TMDLs"], National Pollution Discharge Eliminations System ["NPDES"] permits, and

Triennial Reviews. On its face it is not affected by the statute of limitations. Likewise is the case with the 8th cause of action.

(b) The law is clear that no statute of limitations applies to a "continuing violation of an ongoing duty." See *California Trout, Inc. v. State Board* (1989) 207 Cal. App. 3d, 585, 628. Here periodic triennial reviews were required under Water C. § 13143 and the federal Clean Water Act ["CWA"] section 1313(c) (1) as well as the duty required by Boards to consider the "discharger's cost of compliance" when the 13241/13000 factors are applicable. *City of Burbank v. State Water Resources Control Bd.* 35 Cal.4th 613, 625. Respondents had a duty to at a minimum to appropriately consider the Standards when they were presented with evidence of the deficiencies during the 2004 TR. [See below].

The case of *Howard Jarvis Taxpayers Assn. v. City of la Habra* (2001) 25 Cal.4th 809 is also instructive here. While the *Jarvis* decision was limited to tax assessments, the same reasoning applies here, that is, a new cause of action applies every time the regulation is applied to the Petitioner. Here, the Boards are applying what are purported to be defective Standards to Petitioners on a continuing and ongoing basis. The Petitioners are seeking prospective relief regarding application of the Standards until the correct 13241/13000 analysis has been performed. Each TMDL has been based upon alleged defective standards, and the relief requested involves continuing and ongoing violations of the law.

Respondents' arguments imply that Petitioners failed to challenge an invalid regulation upon its adoption, even if it did not apply to Petitioners when adopted [i.e. storm water]. They further argue that Petitioners have no right to later challenge the regulation once it is applied to them. These arguments are not supported by appropriate authority. The authority offered by Petitioners is persuasive. (See *Solid Waste Agency, Inc. v. United States Army Corps of Eng'rs* (7th Cir. 1999) 191 F. 3d 845,853 ["we doubt that a party must (or even may) bring an action [challenging an environmental regulation] before it knows that a regulation may injure it or even be applied to it"].

2. Do the doctrines of Res Judicata or Collateral Estoppel apply here?

The Petitioners have never challenged the Standards in the Basin Plan before this challenge and the doctrines of res judicata and collateral estoppel are not applicable. Some of the Petitioners previously sued the Boards based upon other matters such as purported unlawful adoption of an NPDES Permit or unlawful adoption of trash or metal TMDLs. Those lawsuits challenged particular decisions of the Boards concerning the adoption of permits and TMDLs. They did not challenge the legality of applying Standards to storm water without the Boards first appropriately considering the 13241/13000 factors. The 2004 TR process was never previously challenged. Those previous lawsuits involved entirely different

decisions of the Boards and completely different administrative records. They concerned completely separate primary rights. These were not identical issues, previously decided between the same parties or parties in privity. Res judicata and collateral estoppel do not apply here.

3. The Petitioners were not required to challenge the 1990 or 1996 NDPES permits. Respondents claim that Petitioners cannot challenge the Standards since they did not exhaust administrative remedies by filing a challenge to the NDPES permits issued by the Regional Board in 1990 and 1996 pursuant to the process described in Water C. sections 13320 and 13330. Those sections do not apply to this challenge made by Petitioners. It is not the adoption of an NPDES permit that triggered the application of the Standards which Petitioners challenge. It is rather the adoption of TMDLs followed by their incorporation into the NPDES permit that triggers the application of the Standards. *City of Arcadia v. State Board* (2006) 135 Cal. App. 4th 1392, 1404; *City of Arcadia v. US EPA* (9th Cir. 2005) 411 F.3d 1103, 1105.
The Boards in this record aptly explained the process whereby the imposition of TMDLs trigger the injury or wrong claimed here:
"we use water quality standards to determine which water bodies are impaired and, thus, to identify water bodies for which we must develop total maximum daily loads (TMDLs). These standards translate into the numeric targets in a TMDL." (AR 2002 BAC 6.)
It would not have been timely or ripe for the Petitioners to challenge the Standards by challenging the 1990 or 1996 NDPES permits.

4. Does Water C. § 13241 require consideration by the Boards of "probable" not "potential" future uses?
This portion of the Petitioners' challenge was not argued orally to any great extent, but it was briefed at some length in the Petition, Opposition and Reply.
Responding Parties characterize this as a side battle over semantics (page 34 opposition Brief).
In the Prayer for Relief of the Petition, Moving Parties ask for specific exclusion of "potential" use designations in the 2004 Triennial Review as opposed to "probable" use designations. Since it is integral to the relief requested it requires examination and analysis.
Petitioners argue that 13241(a) specifies "probable future beneficial uses of water" rather than "potential" uses. By using a vague "potential uses" objective the Boards are not in compliance with the mandate of the statute, and are using improperly designated uses which will lead to improper Standards. These in turn will lead to unreasonable and unachievable TMDLs. (Page 32 of Petitioners' Brief.)

Respondents argue that the Boards designation of "potential uses" is well founded in both state and federal law.

Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probable future beneficial uses of water." Water C. § 13241 (a).

The Boards argue that the statutory wording "factors to be considered in establishing water quality objectives shall include, but not necessarily be limited to ...." (Water C. § 13241 emphasis added.) *authorizes* the Boards to consider other factors such as potential uses. When terms are not clearly defined in statutes, interpreting such terms is a matter "within a regional board's discretion" and worthy due deference. (Citing *City of Arcadia v. State Water Resources Control Bd.* 135 Cal. App. 4th 1392, 1415 [Jan. 2006]. They argue further that the potential label is really the Board's nomenclature for "probable future beneficial uses". (Opposition page 30, citing AR 2004 TR 1348).

As pointed out by Petitioners, however, "the text of the Basin Plan itself shows that the difference between the terms "probable future beneficial uses" and "potential uses" is not merely semantics. According to the Basin Plan, "potential" beneficial uses can be designated for water bodies for any of five reasons, including: (1) implementation of the State Board's policy entitled "Sources of Drinking Water Policy"; (2) plans to put the water to such future use; (3) **"potential to put the water to such future use"**; (4) designation of a use by the Regional Board **"as a regional water quality goal,"** or (5) **"public desire"** to put the water to such future use. (AR 1994 AMD 2731; emphasis added.)" Petitioners argue persuasively that the third reason above, that there is some undefined "potential to put the water to such future use" is remarkably vague.

The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirement in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. of California* (2003) 31 Cal. App. 4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.

5. The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards

to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objectives. In *City of Burbank, supra,* the California Supreme Court held that if NDPES permit conditions were not compelled by federal law, the Boards were required to consider economic impacts including the "discharger's cost of compliance." (Id. at 618.) The Court interpreted the need to consider economics as requiring a consideration of the cost of compliance on the cities. (Id. at 625.) So, under *Burbank*, the 13241 factors cannot be evaluated in a vacuum. They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975". (Opposition at page 23:24-25.)
This was confirmed by the State Board in a 1991 Order when it stated:
"The Basin Plan specified requirements and controls for "traditional" point sources, but storm water discharges were not covered... The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. **Clearly, the effluent limitations listed for other point sources are not meant to apply."**
(Second RJN, Ex. "A", p.6; emphasis added.)
There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water.

C. **The 2004 Triennial Review**
The 2004 TR was the appropriate vehicle at the appropriate time for the Board to consider the 13000 factors. Even Respondents agree with this. As they state in the opposition:

"If petitioners are truly interested in a new 13241 analysis related to existing objectives, and believe the analysis to date has been inadequate, they plainly have recourse. Petitioners may submit specific evidence during the triennial review process demonstrating why any specific objective is not currently appropriate. The triennial review hearing (the first phase of the review process) is the proper and legally contemplated time and place to consider such evidence."
(Opposition page 28-29.)

This is precisely what Petitioners did do when they submitted extensive comments along with a Basin Plan Review Report (AR 2004 TR177 *et seq.*) to the Regional Board. Those comments and the suggestions in the Basin Plan Review Report ["Review Report"] were rejected out of hand by the Board as being "legally

deficient" and "beyond the scope of the triennial review." This was an abuse of discretion. Both sides agreed in oral argument that the court could look to AR 2004 TR 1342 *et seq.*, and from reading the comments and responses determine whether or not the Board abused their discretion. The Board and staff may have read portions or even all of the comments and Review Report, but it is clear that they did not consider it or, more to the point, conduct the analysis of the Standards required under 13241/13000.

To quote from the response to comments:
"The staff does agree that economic considerations and housing (along with the other factors identified in Water Code section 13241) are to be addressed when establishing a water quality objective or amending an existing water quality objective."
"The plain language of the Porter-Cologne Act only requires consideration of economics, housing, and other factors **when establishing the water quality objectives in the first instance. Moreover, the Water Code does not contemplate a continual reassessment of those considerations, which is what the commentator desires.** The section 13241 considerations do not become a part of the Basin Plan and hence are not part of regular review.
For the forgoing reasons and as discussed with more specificity in Response to comments 26.4-26.8, the **commentators objection is legally incorrect and beyond the scope of the Triennial Review.**" (AR 2004 TR 1342-1343, emph. added; also similar comments at 1344, 1346 ["The commentator's economic contentions are noted, but they are beyond the scope of this triennial review."], 1347 ["commentator's procedural objections ... (are) beyond the scope of the triennial review."], and 1352 ["... is beyond the scope of triennial review."]).

To argue that the Petitioners should have attacked the Standards back in 1975, 1990, or 1994 when they had no reason to and were not harmed thereby, to suggest that the triennial review is the proper time and place to urge changes and then to fail to conduct the triennial review as suggested by the Boards themselves and as required by law is precisely the type of behavior that was so bitterly criticized in a concurring opinion of *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 632-633.
The Board should not have brushed off the Petitioners' comments and urgings to perform the 13241/13000 analysis at the 2004 TR. Had they included the petitioners in the process, studied, considered, and weighed their suggestions in light of 13241 factors, and then decided to make no changes, then this court would have deferred to their properly exercised discretion. Here they abused their discretion, did not proceed as the law required, and the writ should therefore issue.

The Legislature's finding in Water C. § 13000 of the people's primary interest in clean water and in the "conservation, control, and utilization of the water resources of the state" is the law of the land. Everyone wants the highest water quality "which is reasonable, considering all demands being made and to be made on those waters". (Id.) That legislative mandate as set forth in sections 13000 and 13241 including the requirements of reasonable consideration of "probable future beneficial uses of water" and "economic considerations" must be followed in compliance with the law.

D. Judicial Notice

The request by Respondents for Judicial Notice of Exhibits 9, 14 and 15 are denied. Respondents should have sought to augment the Administrative Record for these documents and Nos. 14 and 15 are irrelevant in any event. Exhibit 9 is a trial court opinion concerning the propriety of adopting a TMDL for metals for the Los Angeles River based upon "potential use" designations. It is not proper authority and is irrelevant to this proceeding.

III. **Disposition**

A. The Petition for a Writ of Mandate is granted and a Writ shall issue as to the 1st through 8th Causes of Action as set forth in the prayer at paragraphs (1) – (7) as to water quality Standards and objectives of the Basin Plan as those Standards and objectives affect storm water discharges and urban runoff.

B. The prevailing parties are the Petitioners. They shall prepare the appropriate Writ and any Order for Court review and signature.

C. The Clerk shall give Notice.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CITY OF ARCADIA, et al. Plaintiff(s) v. STATE WATER RESOURCES CONTROL BOARD, et al. Defendant(s)	CASE NUMBER: 06CC02974 CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 3-13-08

I, ALAN SLATER, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 3-13-08, I served the Minute Order, dated 3-13-08, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

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ALAN SLATER,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 3-13-08

By: _____
P. Rief, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL