

2009 NOV 12 PM 3:44

DN. OF WATER RIGHTS
SACRAMENTO

1 John D. Bakker (SBN: 198563)
jbakker@meyersnave.com
2 Gregory J. Newmark (SBN: 190488)
gnewmark@meyersnave.com
3 MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
4 Oakland, CA 94607
Tel: (510) 808-2000
5 Fax: (510) 444-1108

6 Attorneys for
Petitioner,
7 CITY OF DUBLIN

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11
12
13
14 **IN THE MATTER OF THE CITY OF**
15 **DUBLIN'S PETITION FOR REVIEW OF**
16 **ACTION AND FAILURE TO ACT BY THE**
17 **CALIFORNIA REGIONAL WATER**
18 **QUALITY CONTROL BOARD, SAN**
19 **FRANCISCO BAY REGION, IN ADOPTING**
20 **THE MUNICIPAL REGIONAL**
21 **STORMWATER NPDES PERMIT ORDER**
22 **NO. R2-2009-0074, NPDES PERMIT NO.**
23 **CAS612008**

24 **CITY OF DUBLIN'S PETITION FOR**
25 **REVIEW; PRELIMINARY POINTS**
26 **AND AUTHORITIES IN SUPPORT**
27 **OF PETITION (Wat. Code § 13320)**

28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

The City of Dublin ("Petitioner") hereby submits this Petition to the California State Water Resources Control Board ("State Water Board") pursuant to section 13320(a) of the California Water Code (the "Water Code"), requesting that the State Water Board review the California Regional Water Quality Control Board, San Francisco Bay Region's ("Regional Water Board") issuance of Municipal Regional Storm Water Permit Order No. R2-2009-0074, reissuing NPDES Permit No. CAS612008 (the "MRP")¹. The issues and a summary of the bases for this Petition

¹ A copy of Order R2-2009-0074 may be accessed via the internet at

(Footnote continues on next page.)

1 follow. Petitioner reserves the right to file a more detailed memorandum in support of this
2 Petition when the full administrative record is available and any other material has been
3 submitted.² Petitioner is not seeking immediate review of this Petition and instead requests that it
4 be held in abeyance pending further notice by Petitioner to the State Water Board in the event that
5 Petitioner wishes to request that the review process be activated.

6 After several iterations and nearly five years of work by its staff, permittees, and other
7 stakeholders, the Regional Water Board inexplicably and abruptly cut short Petitioner's rights to
8 meaningful public participation in the permitting process. On September 24, 2009—less than
9 three weeks before the meeting at which the full Regional Water Board adopted the MRP—the
10 Regional Water Board staff published what it then termed a "Final Tentative Order."³ In addition,
11 the Fact Sheet (98 pages) was not released until October 7, 2009, and Response to Comments
12 Received on the December 2007 Tentative Order (451 pages) and Response to Comments
13 Received on the February 2008 Tentative Order (676 pages) were not released until October 5,
14 2009. The Final Tentative Order imposed numerous new substantive requirements that had not
15 appeared in the last version made available for public comment in February 2009.

16 The changes were significant. Indeed, one witness advocating for the new provisions at
17 the October 14, 2009, hearing described their addition to the MRP as "historic." The new terms—
18 including the far-reaching so-called "low impact development" or "LID" provisions and extensive
19 new requirements for trash capture—are heavily prescriptive, impose substantial new financial
20 burdens on Petitioner and other local governments that are subject to the MRP, and could even

21 (Footnote continued from previous page.)

22 http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0074.pdf. As the Order and its attachments are 279 pages, a hardcopy is not being provided
23 concurrently with this Petition but will be provided to the State Water Board upon its further
24 request should that be deemed necessary.

25 ² The State Water Board's regulations require submission of a statement of points and authorities
26 in support of a petition (23 C.C.R. § 2050(a)(7)), and this document is intended to serve as a
27 preliminary memorandum. However, it is impossible to prepare a complete statement and
28 memorandum in the absence of the complete administrative record, which is not yet available.

³ The final actually-adopted version of the MRP, containing additional changes in text, was not
made available until the day before the hearing.

1 entail temporal, longer term and/or cumulative consequences that adversely affect the environment
2 on the whole. Yet the Regional Water Board did not adequately address these and other issues and
3 did not even allow the public to submit additional written comments analyzing or providing
4 evidence concerning the new requirements in the Final Tentative Order. Instead, Petitioner and
5 most other participants were allotted only five minutes each at the Regional Water Board's
6 October 14, 2009 hearing to verbally explain their positions and lodge objections.

7 In addition to these and other serious defects, the Regional Water Board's adoption of the
8 MRP is legally inappropriate and invalid in a number of respects, including the following:

- 9 • The Regional Water Board's assertion that various MRP provisions are
10 required by the "maximum extent practicable" ("MEP") standard set forth
11 in the federal Clean Water Act and its implementing regulations is not
12 sufficiently supported by findings;
- 13 • In fact, some of the MRP requirements *exceed* the federal MEP standard,
14 thereby triggering legal obligations for the Regional Water Board to
15 conduct additional analysis of technical feasibility and economic and
16 environmental impacts under section 13241 of the California Water Code
17 and the California Environmental Quality Act, none of which were
18 adequately performed before adoption of the MRP;
- 19 • Some of the new requirements in the MRP—including the LID and
20 structural trash capture requirements—are so prescriptive that they
21 effectively specify the means and method of compliance in violation of
22 Water Code section 13360; and
- 23 • The MRP illegally contains provisions extending beyond the maximum
24 five-year term of an NPDES permit, as limited by Water Code section
25 13378.

26 These defects render the MRP inappropriate and invalid and require action —preferably by means
27 of a remand to the Regional Water Board— by the State Water Board pursuant to its authority
28 under Water Code section 13320(c).

I. NAME AND ADDRESS OF PETITIONER:

City of Dublin

100 Civic Plaza

Dublin, CA

Attn: Mark Lander, City Engineer; Joni Pattillo, City Manager

Email: Mark.Lander@ci.dublin.ca.us; Joni.Pattillo@ci.dublin.ca.us

1 **II. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL WATER BOARD**
2 **WHICH THE STATE WATER BOARD IS REQUESTED TO REVIEW**

3 The Petitioner seeks review of the Regional Water Board's issuance of the MRP.

4 **III. THE DATE ON WHICH THE REGIONAL WATER BOARD ACTED OR**
5 **REFUSED TO ACT**

6 The Regional Water Board adopted the MRP on October 14, 2009.

7 **IV. STATEMENT OF REASONS THE REGIONAL WATER BOARD'S ACTION OR**
8 **FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER**

9 **A. Factual and procedural background.**

10 **1. Federal and State Statutory Scheme.**

11 The discharge of pollutants in storm water is governed by Clean Water Act Section 402(p),
12 which governs permits issued pursuant to the National Pollutant Discharge Elimination System
13 ("NPDES"). 33 U.S.C. § 1342(p). With respect to a municipality's discharge of storm water from
14 a municipal separate storm sewer system ("MS4"), Section 402(p)(3)(B) provides:

15 Permits for discharges from municipal storm sewers –

- 16 (i) may be issued on a system or jurisdiction-wide basis;
- 17 (ii) shall include a requirement to effectively prohibit non-storm
18 water discharges into the storm sewers; and
- 19 (iii) shall require controls to reduce the discharge of pollutants to
20 the maximum extent practicable, including management
21 practices, control techniques and system, design and
22 engineering methods, and such other provisions as the
23 Administrator or the State determines appropriate for the
24 control of such pollutants.

25 33 U.S.C. § 1342(p)(3)(B).

26 California is among the states that are authorized to implement the NPDES permit
27 program. 33 U.S.C. § 1342(b). California's implementing provisions are found in the Porter-
28 Cologne Water Quality Control Act ("Porter-Cologne"). See Water Code §§ 13160 and 13370 *et*
29 *seq.* Respondent State Water Board is designated as the state water pollution control agency for
30 all purposes stated in the Clean Water Act. Water Code § 13160.⁴ State and Regional Water

⁴ Water Code Sections 13160 and 13370 *et seq.* reference the Federal Water Pollution Control Act.
(Footnote continues on next page.)

1 Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued
2 for terms not to exceed five years. *Id.* § 13378 (“Such requirements or permits shall be adopted
3 for a fixed term not to exceed five years.”).

4 Thus, when a Regional Water Board issues an NPDES permit, it is implementing both
5 federal and state law. Permits issued by a Regional Water Board must impose conditions that are
6 at least as stringent as those required under the federal act. 33 U.S.C. § 1371; Water Code §
7 13377. But, relying on its state law authority or discretion, a Regional Water Board may also
8 impose permit limits or conditions in excess of those required under the federal statute as
9 “necessary to implement water quality control plans, or for the protection of beneficial uses, or to
10 prevent nuisance.” Water Code § 13377.

11 Porter-Cologne requires the Regional Water Board, when issuing NPDES permits, to
12 implement “any relevant water quality control plans that have been adopted, and shall take into
13 consideration the beneficial uses to be protected, the water quality objectives reasonably required
14 for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of
15 Section 13241.” Water Code § 13263(a). Section 13241 requires the consideration of a number
16 of factors, including technical feasibility and economic considerations. *Id.* § 13241.

17 Courts have read these provisions together to mean that the Regional Water Board cannot
18 rely on the requirement for consideration of economic conditions under section 13241 as
19 justification for imposing conditions that are *less stringent* than those required under the federal
20 Act. *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 626-27 (2005).
21 However, nothing in the federal or state statutory scheme prohibits consideration of economic
22 factors in fashioning permits that *meet* federal standards. *Id.* at 629 (J. Brown, concurring). And
23 as implied by the remand order issued by the court in the *City of Burbank*, sections 13263 and
24 13241 together *require* that economic factors must be considered when imposing conditions that
25 exceed federal requirements. *Id.* at 627 n.8 & 629 (remanding to the trial court “to decide whether

26 (Footnote continued from previous page.)

27 After the Federal Water Pollution Control Act was amended, it commonly became known as the
28 Clean Water Act.

1 any numeric limitations, as described in the permits, are 'more stringent' than required under
2 federal law and thus should have been subject to 'economic considerations' by the Los Angeles
3 Regional Board before inclusion in the permits").

4 Permit conditions that exceed the mandatory requirements of the federal Clean Water Act
5 also trigger review of their environmental impact under the California Environmental Quality Act,
6 Pub. Res. Code § 21000 et seq. ("CEQA").⁵

7 2. Procedural Requirements

8 (a) Public participation.

9 NPDES permits may be issued only "after opportunity for public hearing." 33 U.S.C.
10 § 1342(a)(1). Indeed, public participation is a fundamental —and non-discretionary— component
11 of issuing an NPDES permit:

12 Public participation in the development, revision, and enforcement
13 of any regulation, standard, effluent limitation, plan, or program
14 established by the Administrator or any State under this Act *shall be provided for*, encouraged, and assisted by the Administrator and the States.

15 33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a
16 state permitting agency to provide at least 30 days for public comment on a draft NPDES permit.
17 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP that has taken
18 so long to develop and applies to so many permittees.

19 The federal regulations also require at least 30 days advance notice of a public hearing on
20 adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the
21 Regional Water Board in consideration of an NPDES permit are governed by the Regional Water
22 Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative
23 Procedure Act (commencing with § 11400 of the Government Code), sections 801-805 of the
24

25 ⁵ Issuance of NPDES permits as required to implement the Clean Water Act are exempt from
26 CEQA's requirement of preparation of an environmental impact report for all projects that are
27 expected to have a significant environmental impact. Water Code § 13389. But municipal storm
28 water permits that contain provisions exceeding the "maximum extent practicable" standard set by
the federal Clean Water Act fall outside the exemption established by section 13389.

1 Evidence Code, and section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, §
2 648(b). Government Code § 11513 provides that each party shall have the right to call and
3 examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter
4 relevant to the issues even though the matter was not covered in direct examination, to impeach
5 any witness, and to rebut the evidence against the party. Government Code § 11513(b). The
6 Regional Water Board's procedural regulations also establish the right of a party in an adjudicative
7 hearing before the Regional Water Board to present evidence and cross-examine witnesses. Cal.
8 Code Regs, tit. 23, § 648.5(a).

9 The issuing agency is required to respond to comments received during the comment
10 period by: (1) specifying which, if any, provisions of the draft permit have been changed in the
11 final permit, and the reasons for the change; and (2) briefly describing and responding to all
12 significant comments on the draft permit raised during the public comment period or at any
13 hearing on the permit. 40 C.F.R. § 124.17(a).

14 **(b) Legally sufficient findings.**

15 Because issuing an NPDES permit is an adjudicative action, the Regional Water Board is
16 required to make "legally sufficient findings" in support of its conclusions. *See In re Petition of*
17 *Pacific Water Conditioning Assn., Inc.*, State Water Board Order WQ 77-16, at *7 (citing *City of*
18 *R. P. Verdes v. City Council of R. Hills, etc.*, 59 Cal.App. 3d 869, 129 Cal. Rptr. 173 (1976);
19 *Merced County Board of Supervisors v. California Highway Com'n*, 57 Cal.App. 3d 952, 129
20 Cal.Rptr. 504 (1976); *Myers v. Board of Supervisors of Cty. of Santa Clara*, 58 Cal.App. 3d 413,
21 129 Cal.Rptr. 902 (1976).) Adequate findings assure that the permit is the result of careful
22 consideration of the record before the agency and facilitates review. *Topanga Assn. for a Scenic*
23 *Community v. County of Los Angeles*, 11 Cal. 3d 506, 516-517 (1974).

24 NPDES permits that impose conditions more stringent than those required by federal law
25 must include findings demonstrating that such conditions are necessary to protect specific
26 beneficial uses. *Southern Cal. Edison Co. v. State Water Resources Control Bd.*, 116 Cal. App. 3d
27 751, 758-59 (1981) (rejecting conditions in an NPDES permit based on the State Ocean Plan that
28 were unsupported by findings that such standards were "necessary to protect *specific beneficial*

1 uses . . . The absence of such evidence makes it impossible to determine whether stricter
2 regulations than those found in the Ocean Plans are in fact “necessary.”)

3 **B. Argument**

4 **1. The Regional Water Board’s Adoption of the Final MRP Was
5 Procedurally Defective.**

6 **(a) The Regional Water Board provided insufficient notice of the
7 October 14, 2009 hearing on the Final Tentative Order.**

8 The MRP is the culmination of nearly five years of work by the Regional Water Board,
9 permittees, and stakeholders. The process has been iterative, and the Regional Water Board has
10 established a pattern of allowing time between iterations to facilitate public participation. The first
11 draft permit was published for notice and comment on December 14, 2007. This was followed by
12 a public workshop held by the Regional Water Board in March 2008. Nearly a year later, on
13 February 11, 2009, the Regional Water Board produced a revised draft. On May 13, 2009, the
14 Regional Water Board held a public hearing to discuss revisions to the December 2007 draft. At
15 each preliminary stage of the permitting process, the Regional Water Board provided sufficient
16 notice and solicited public comment on revisions from the prior draft in keeping with the public
17 participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R.
18 § 124.10(b)(2).

19 However, at the final stage, the Regional Water Board abruptly departed from its prior
20 efforts to provide for meaningful public participation. On September 24, 2009, the Regional
21 Water Board published a new “Final Tentative Order” reissuing the MRP, to be proposed for
22 adoption by the full Regional Water Board at its regularly scheduled October 14, 2009 meeting.
23 Not only did this truncated notice period deprive Petitioner and other stakeholders of a full and
24 meaningful opportunity for comment and participation, it failed to provide the 30-day mandatory
25 advance notice required under the federal regulations. 40 C.F.R. § 124.10(b)(2) (“Public notice of
26 a public hearing *shall be given* at least 30 days before the hearing.”) (emphasis added).
27
28

1 (b) The Regional Water Board deprived Petitioner of the
2 opportunity to comment on substantive new requirements in the
3 MRP.

4 There is no dispute that the September 24, 2009 Final Tentative Order contained
5 significant substantive changes from the February 2009 draft that was the subject of the Regional
6 Water Board's May 2009 hearing, or that the changes will result in additional costs and burdens
7 on permittees. (See Appendix B to Final Tentative Order, showing changes from February 2009
8 tentative order.)⁶ The new draft also replaced some more flexible provisions of the draft tentative
9 orders that provided continuity from past permit requirements with more prescriptive and
10 inflexible requirements. For example, for new development and redevelopment projects, the Final
11 Tentative Order included the following new LID-only requirements:

- 12 • A requirement that 100 percent of water quality design storm runoff from
13 regulated projects be treated onsite through a handful of prescribed methods,
14 with alternatives such as biotreatment allowed only where the permittee can
15 demonstrate that the preferred methods are infeasible;
- 16 • A requirement that the municipal permittees produce a report determining
17 feasibility or infeasibility of LID measures within the next 18 months;
- 18 • A requirement that the municipal permittees propose an LID treatment
19 reduction Special Project credit system within one year for projects that have
20 demonstrated environmental benefits to allow a portion of the storm water
21 runoff onsite to be treated by non-LID, or so-called "conventional," treatment
22 measures.⁷

23 (Final Tentative Order, sections C.3.c(i)(2)(b); C.3.c(ii); C.3.e(ii).)

24 The Final Tentative Order also introduced, without more meaningful opportunity for
25 comment or analysis, prescriptive and burdensome new structural requirements for the capture and
26 containment of trash. Regional Water Board staff acknowledged that these new provisions would
27 be costly to permittees; it estimated that the associated capital cost alone will be around \$28
28 million dollars over the permit term, and further admitted that it has identified only \$5 million in
available funds. (Appendix D to Final Tentative Order, at p. 6.)

⁶ Provision C.3.c. regarding LID was nearly completely rewritten and Provision C.10 regarding
Trash Load Reduction was replaced in its entirety.

⁷ This could relate to Brownfield Sites, low-income housing, senior citizen housing, transit
oriented development projects and other infill or redevelopment projects.

1 Despite the extensive and substantive nature of the changes from the February 2009
2 tentative order, the Regional Water Board accepted no further written public comments or
3 evidence. Instead, participation by the permittees who would be subject to these burdensome new
4 requirements was limited to five-minute oral testimony at the Regional Water Board's October 14,
5 2009, hearing on the MRP. (Transcript of October 14, 2009 Hearing (hereinafter "Tr."). The
6 Regional Water Board's statement that these revisions were the "outgrowth of comments"
7 submitted by permittees and other interested persons is not accurate, is an oversimplification of the
8 changes, and does not justify the refusal to allow written comments on these revisions.

9 During the hearing, members of the Regional Water Board and the witnesses who testified
10 agreed that the new provisions were significantly different from the draft discussed at the May
11 2009 hearing. (*See, e.g.*, Tr. at p. 31 (comments of Mr. Moore: "particularly between the pilot
12 project work you just discussed, and the low impact development requirements. Because I think
13 they both progressed very – on a pretty significant pace since May.") A witness for a group
14 favoring the new trash provisions testified that the changes were not just significant but "historic."
15 (Tr. at p. 78 (comments of David Lewis: "This is a big improvement from May. *And we call*
16 *these historic changes . . .*".))

17 Yet despite the nature, scope, and burdens of these new and controversial provisions and
18 the failure of the Regional Water Board to allow written comments, each interested entity was
19 allowed only five minutes to speak, and was encouraged by the chair to limit remarks to less than
20 three minutes. (Tr. at p. 51) Permittees who wished to present more than one witness were
21 required to split their five-minute allotment among those witnesses. (*Id.*) The only exception was
22 granted to a witness appearing on behalf of one group that favored the new provisions. This
23 witness was allotted ten minutes. (*Id.* at p. 92.) While the Regional Water Board staff was
24 allowed to respond to all comments with no time limit, and was questioned by the members of the
25 Regional Water Board, no additional time was allotted for permittees to question staff directly or
26 to submit additional evidence. (*See, e.g.*, Tr. at p. 82 (refusing to allow a witness to provide the
27 Regional Water Board with a copy of written comments).)

28 Witnesses who appeared on behalf of permittees objected to the imposition of these costly,

1 burdensome and inflexible new provisions being added so late in the process and without the
2 opportunity to provide more detailed comments, and testified to the lack of available public
3 resources to fund them. (*See, e.g.*, Tr. at p. 102 (comments of Melody Tovar: “We do look at the
4 new draft, though, and note some new changes in the permit, and that the revised draft was not
5 circulated for public review and comment, and we think it should have been. For us, that means
6 that my testimony here today does not benefit from the direction and feedback from our City
7 Council, and that is something we have thoughtfully done for every draft of this permit.”); *see*
8 *also*, Tr. at pp. 58, 83, 85, 111-113, 121-22, 129.)

9 Under similar circumstances, the State Water Board has expressed concern that such
10 proceedings were insufficient to assure that all participants were allowed adequate opportunity to
11 be heard:

12 But we are concerned that at the . . . hearing, interested persons and
13 permittees *were not given adequate time to review late revisions or*
14 *to comment on them.* Given the intense interest in this issue, *the*
15 *Regional Water Board should have diverged from its strict rule*
limiting individual speakers to three minutes and conducted a more
formal process. Such a process should provide adequate time for
comment, including continuances where appropriate.

16 *In re The Cities of Bellflower et al.*, State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000)
17 (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water
18 Boards to employ the procedures for hearings set forth in section 648 of the Regional Water
19 Board’s regulations. *Id.* at *24 n.25 (“For future adjudicative proceedings that are highly
20 controversial or involve complex factual or legal issues, we encourage regional water boards to
21 follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et
22 seq.”) Those regulations require the Regional Water Board to allow interested parties the
23 opportunity to cross-examine witnesses and present contrary evidence. Cal. Code Regs, tit. 23, §
24 648.5(a). The Regional Water Board here ignored the State Water Board’s admonition. As a
25 result, Petitioner has thus far been denied the right to full and fair participation in the permitting
26 process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-
27 11. It should not be overlooked that these requirements apply to 76 permittees in the San
28 Francisco Bay Region - that in itself provides for very complex and controversial issues.

1 (c) The Regional Water Board Failed to Adequately Respond to
2 Comments on its Prior Draft Tentative Orders.

3 Federal permitting regulations require that states issuing NPDES permits seek, consider,
4 and respond to public comments on draft permits. 40 C.F.R. § 124.17(a). The Regional Water
5 Board failed to provide timely responses to comments submitted on its draft tentative orders, and
6 ignored or, at most, gave lip service to many comments suggesting pragmatic modifications that
7 would, among other things, help avoid wasting resources and/or mitigate the economic impacts of
8 the MRP on fiscally stressed municipalities.⁸ The Final Order indeed includes hundreds of pages
9 of charts containing purported responses to written comments received on earlier iterations of the
10 MRP. (See Appendices E and F of Final Order.)⁹ However, a closer examination of the responses
11 reveals that they are insufficient. Each comment is summarized in a few sentences, and the
12 responses are often limited to two or three words. (*Id.*) Few, if any, meaningful changes were
13 made in response to comments submitted. In other words, despite providing a voluminous and
14 nice-looking chart, the responses were substantively too little and too late to be meaningful as is
15 required by law.

16 To better illustrate these deficiencies, a few illustrative examples of substantive and
17 important issues that were not adequately addressed in the Regional Water Board's responses to
18 comments are discussed below.

19 Comments submitted by the Santa Clara Valley Urban Runoff Pollution Prevention
20 Program, for example, requested that the Regional Water Board's requirement for an initial
21 desktop feasibility analysis of the provisions set forth in sections C.11 and C.12 of the February
22 2009 draft be used as a screening mechanism to determine whether and to what extent the pilot

23 ⁸ Despite prior specific direction from Regional Water Board members to the staff to expedite
24 getting responses to previously submitted written comments issued following the May 2009
25 hearing on the February 2009 revised tentative order, the *only* responses to written comments
26 submitted over the five-year course of the MRP's development (totaling well over 1,000 pages)
were issued less than 10 days prior to the Regional Water Board's October 14, 2009 adoption
hearing further depriving Petitioner and others of a meaningful public participation opportunity.

27 ⁹ The Final Order and all associated documents are available at
28 http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/stormwater/mrp.shtml.

1 diversions should be required. (Appendix F, at p. 438-39.) This suggestion – which would have
2 saved public resources by providing an equivalent amount of information with less paperwork –
3 was ignored: all five pilot diversion studies are mandated in the Final Order, *regardless of the*
4 *outcome of the initial feasibility analysis. (Id.)* In light of the overwhelming evidence of financial
5 distress suffered by municipal permittees in this economic environment, opportunities for added
6 efficiencies are of critical importance to the permittees, taxpayers, and the Regional Water Board
7 as a public entity. The Regional Water Board’s failure to meaningfully respond to this suggestion
8 is an example of its procedural failures in considering and responding to public comments.¹⁰

9 In addition, with respect to new development and redevelopment requirements, several
10 permittees provided evidence that vault-based systems for on-site treatment of storm water are
11 effective in removing pollutants and that there are situations in which these types of controls
12 represent the maximum practicable level of treatment. (*See, e.g.,* Comments of Santa Clara Valley
13 Urban Runoff Pollution Prevention Program (“SCVURPPP”), at pp. 4-5; Comments of the
14 Alameda Countywide Clean Water Program, and Comments of the City of Dublin, at p. 7.) The
15 Regional Water Board staff responded by asserting – without providing an evidentiary basis or
16 citation to EPA regulations or permitting guidance (since none exists) – that LID measures, rather
17 than the vault-based systems, represent the “maximum extent practicable” because they address a
18 broader range of pollutants and provide other benefits. (Response to Comments on February 2009
19 Draft.) This response is inadequate because it assumes, rather than finds with adequate support,
20 that LID measures are “practicable.” Indeed, as discussed in more detail below, the Regional
21 Water Board has effectively admitted that it has no factual basis for such a conclusion by requiring
22 the permittees to study the very *feasibility* of LID measures imposed in the MRP.

23 _____
24 ¹⁰ Likewise, the Santa Clara Program submitted comments on Provision C.15 of the MRP noting
25 that it had previously developed and obtained approval of a comprehensive non-stormwater
26 discharge management program. It asked the Regional Water Board staff to explain why that
27 program was no longer adequate or could not simply be grandfathered, thereby saving significant
28 public resources while continuing to protect water quality; it also asked the staff to explain where
the existing program had failed to protect water quality. The response fails to provide any data or
analysis, merely paying lip service to these important points while attempting to put the ball back
in the municipalities’ court. *Id.* at 502-503

1 A number of commenters also requested more time for implementation of new
2 requirements in the February 2009 draft MRP based on the impacts that the new provisions for
3 development and redevelopment projects in that version of the permit would have on existing
4 Hydromodification Management (“HM”) programs that are already being implemented by
5 permittees. In the response to comments, the Regional Water Board indicated that it had
6 accommodated this request by moving all immediate deadlines back. (Appendix E to Final
7 Tentative Order, at pp. 2-3.) However, because the Final Tentative Order fails to acknowledge
8 that the new MRP will have an immediate effect on changing the requirements in some existing
9 HM programs, no such revision was made to the deadlines for their implementation. (Final
10 Tentative Order C.3.g.ii(5); C.3.a.ii.) While the response therefore facially responds to the
11 comment in question, its identification of changes made in response is inaccurate and misleading,
12 and it is therefore inadequate and legally insufficient.

13 Each of these examples raises a significant point of importance to permittees, and, more
14 important, only exemplifies the widespread and pervasive set of deficiencies in the Regional
15 Water Board’s response to comments and compliance with mandatory public participation
16 requirements. The Regional Water Board staff’s responses to many of the comments submitted
17 were either dismissive, non-existent, based on a mischaracterization of evidence before the
18 Regional Water Board, inaccurate and misleading, or non-responsive to the issue presented. None
19 satisfies the requirement for a reasonable response. 40 C.F.R. § 124.17.

20 2. The Final MRP is Legally Defective.

21 The Final MRP fails to satisfy the requirements of federal and state law governing the
22 issuance of an NPDES permit. Two of the new provisions included in the final MRP – the LID
23 and trash provisions – are highlighted below. While the defects discussed here may also affect
24 other permit provisions, these two were the focus of much of the testimony presented at the
25 October 14, 2009 hearing, and are used here as illustrations.¹¹

26
27 ¹¹ Comments in the record submitted by and on behalf of Bay Area municipalities raise the issues
28 to which this section of the Petition is addressed with respect to many other requirements of the
MRP, including, but not limited to: Provisions C.3 (e.g., C.3.g, C.3.i), C.8 (e.g., C.8.d.iii, C.8.f),
(Footnote continues on next page.)

1 (a) **The Regional Water Board's imposition of LID and trash**
2 **control measures are not supported by legally sufficient findings**
3 **and cannot be supported on the record before it.**

4 The federal Clean Water Act requires storm water discharges to be controlled to the
5 "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). This term is not defined in the
6 federal statute or its implementing regulation, but has been interpreted by the U.S. Environmental
7 Protection Agency and courts to require imposition of best management practices, or "BMPs."
8 *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999).

9 Neither the Final Tentative Order, nor the Final Order as approved by the Regional Water
10 Board, contains any additional findings supporting its conclusion that the new LID measures
11 required under the Final MRP represent the "maximum extent practicable." Indeed, the evidence
12 before the Regional Water Board was to the contrary. As the Regional Water Board staff
13 admitted, the permittees uniformly testified that the new requirements would be difficult and
14 expensive to implement, and may well be out of reach. (*See e.g.*, Tr. at pp. 53-54, 58, 83, 121-
15 122, 125.) As one Regional Water Board member summarized succinctly: "Well, the state of the
16 economy, or the state of the cities is such that, really, going backward, they cannot have it, they
17 cannot afford it." (Tr. at p. 159.)

18 To find the basis for the Regional Water Board's implementation of these requirements,
19 one must instead "grobe through the record to determine whether some combination of credible
20 evidentiary items which supported some line of factual and legal conclusions supported the
21 ultimate order or decision of the agency," in contravention to the requirement for clear and explicit
22 findings. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 516-
23 517 (1974).

24 A search for such findings would also, in this instance, prove fruitless. Instead of
25 evidence-based findings, the Regional Water Board staff simply asserts in a separate document

26 (Footnote continued from previous page.)

27 C.9e, C.11 (e.g., C.11.e, C.11.f, C.11.h, C.11.i, C.11.j), C.12 (e.g., C.12.e, C.12.f, C.12.h, C.12.i),
28 C.13 (e.g., C.13.e), and C.14. Should this Petition be removed from abeyance, Petitioner reserves
the right to elaborate on these and the illustrations above.

1 that "LID is rapidly being established as the maximum extent practicable (MEP) standard for new
2 and redevelopment stormwater treatment." (Staff Report, at p. 2.)¹² In fact, even this somewhat
3 equivocal and unsupported statement is belied by the very conditions of the final MRP, which
4 1) requires permittees to conduct studies of whether the LID measures required under section C.3
5 of the MRP are feasible (Final MRP at C.3.c.i(2)(b)(iv)-(v).), and 2) requires a proposal from
6 permittees to support LID treatment reduction credits for Special Projects. (Final MRP at
7 C.3.c.ii.(1)&(2)). The fact that the Regional Water Board deems such studies necessary confirms
8 that it is not in possession of sufficient evidence to conclude that these measures are "practicable."
9 Thus, inclusion of these studies in the MRP is a tacit admission that the Regional Water Board
10 cannot make legally sufficient findings to support its conclusion that LID represents MEP. In
11 corollary, to make such findings would be an admission that the required studies were excessive
12 and unnecessary. Indeed, the Regional Water Board's insertion of these requirements into the
13 MRP before it has the supporting data is based on speculation, not evidence.

14 Like the LID requirements, the trash reduction requirements in the MRP also exceed the
15 federal "maximum extent practicable" standard. There are no findings, and no evidence, that
16 indicate the Long-Term Trash Reduction level of 100% is even attainable, much less practicable.
17 Indeed, all evidence is to the contrary. Given this lack of evidence and findings, at minimum the
18 MRP should have committed to re-assess the trash reduction percentages for achievability and
19 practicability in the future. See *City of Arcadia v. State Water Resources Control Board*, 135
20 Cal.App.4th 1392, 1413 (2006) (because of Water Board's commitment "to reconsider the zero
21 trash target after a 50 percent reduction compliance with a zero target may never actually be
22 mandated."). The 100% Long-Term Trash Reduction level cannot be, and has not been, justified
23 at this time, and it should not have been included in the MRP without an express commitment to
24 reconsider achievability and practicability.

25
26 ¹² Even if this rationale were sufficient and supported by evidence, a statement in the Staff Report
27 or other supporting document cannot substitute for findings in the permit. *In re City and County*
28 *of San Francisco et al.*, State Board Order WQ 95-4, at pp. *28-29 (Sept. 12, 1995).

1 (b) The requirements to reduce trash loads by 40% by 2014, 70%
2 by 2017 and 100% by 2022 are not BMP-based.

3 The provisions in Section C.10 of the MRP requiring the permittees to reduce trash loads
4 from their MS4 by 40% by 2014, 70% by 2017 and 100% by 2022, are not based on BMPs, as
5 required for regulation of municipal stormwater. BMPs are methods, measures or practices to
6 reduce or eliminate the introduction of pollutants into receiving waters. 40 C.F.R. § 130.2(m).
7 The trash load reductions specified as percentages of the baseline load are not methods or
8 measures to reduce the introduction of trash into receiving waters. The MRP acknowledges that
9 these trash reductions are not based on BMPs by repeating that permittees must “describe control
10 measures *and* best management practices” that will be used to meet the reductions. (Final MRP at
11 C.10.a.i, C.10.c, C.10.d.i-ii.)

12 The inclusion of the percentage trash reduction requirements in the MRP violates EPA
13 regulations, guidance and the State Water Board’s expert recommendations. Section 122.44(k) of
14 Title 40 of the Federal Code of Regulations requires that an NPDES permit include BMPs to
15 control or abate the discharge of pollutants when numerical effluent limitations are infeasible. 40
16 C.F.R. § 122.44(k)(3). The Blue Ribbon Panel convened by the State Water Board in 2006 found
17 that “[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs
18 and in particular urban discharges.” (Blue Ribbon Panel, *The Feasibility of Numeric Effluent*
19 *Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and*
20 *Construction Activities*, June 19, 2006, p. 8). Accordingly, the Regional Water Board was
21 required under Section 122.44(k) to set BMPs for trash reduction in lieu of numerical effluent
22 limitations.

23 In addition, the inclusion of numerical effluent limitations is contrary to EPA’s expressed
24 preference for regulating storm water discharges by way of BMP’s. *Divers’ Environmental*
25 *Conservation Organization v. State Water Resources Control Board, et al.* (2006) 145 Cal.App.4th
26 246, 256 (“In regulating storm water permits, EPA has repeatedly expressed a preference for
27 doing so by way of BMP’s, rather than by way of imposing either technology-based or water
28 quality-based numeric effluent limitations.”)

1 Furthermore, while Petitioner understands and expects that the Regional Water Board did
2 not intend to impose numerical effluent limitations in the MRP, the MRP should explicitly state
3 that the specified percentages for trash reduction are *not* numerical effluent limitations to reinforce
4 this intention.

5 **(c) The Regional Water Board has failed to demonstrate that LID**
6 **measures and trash control requirements are necessary or**
7 **appropriate under State law.**

8 Because the new LID and trash control requirements exceed the federal MEP standard, the
9 Regional Water Board was required to make findings demonstrating that such requirements are
10 necessary to protect specific beneficial uses. *Southern Cal. Edison Co. v. State Water Resources*
11 *Control Bd.*, 116 Cal. App. 3d 751, 758-59 (1981). However, the Regional Water Board failed to
12 make any specific findings supporting the conclusion that the new LID requirements are necessary
13 to maintain any specific beneficial use tied to local receiving waters. Instead, the Regional Water
14 Board simply points in a staff report to storm water permits adopted in *other regions* that have
15 implemented “extensive requirements for LID measures.” (Staff Report, at p. 6.) It also failed to
16 consider how the more extensive new development and redevelopment controls and
17 hydromodification requirements implemented in the permittees’ jurisdictions as a result of their
18 prior permit compliance may already be adequate to achieve protection of beneficial uses (as their
19 prior permits’ findings determined they would).

20 The Regional Water Board also failed to make any specific findings demonstrating that the
21 40%, 70% or 100% trash load reduction requirements are necessary to protect specific beneficial
22 uses. Rather, the Fact Sheet to the MRP makes general statements about beneficial uses without
23 explaining which specific beneficial uses the 40%, 70% and 100% trash load reduction
24 requirements are designed to protect and why such requirements are necessary to protect those
25 uses. For Example, Paragraph C.10-2 of the Fact Sheet states that “[d]ata collected by Water
26 Board staff using the SWAMP Rapid Trash Assessment (RTA) Protocol, over the 2003-2005
27 period, suggest that the current approach to managing trash in waterbodies is not reducing the
28 adverse impact on beneficial uses.” MRP, at p. App I-72. Similarly, Paragraph C.10-6 provides,

1 “[t]rash adversely affects numerous beneficial uses of waters, particularly recreation and aquatic
2 habitat.” MRP, at p. App I-73. These general statements about the impact of trash on beneficial
3 uses are not sufficient to justify permit conditions in excess of those required under federal law.
4 *Southern Cal. Edison Co. v. State Water Resources Control Bd.*, 116 Cal. App. 3d 751, 758-59
5 (1981).

6 Further, these general statements fail to justify the specific percentage of trash reduction
7 required (100%) in relation to the beneficial uses the trash controls are presumably intended to
8 protect. Under Water Code section 13377, water quality based effluent limitations can only be
9 justified if they are necessary “for the protection of beneficial uses.” There are no findings in the
10 MRP, and no evidence in the record, indicating that a 100% trash reduction is needed to protect
11 beneficial uses. This lack of findings also violates the Regional Water Board’s obligation to
12 “bridge the analytical gap between the raw evidence and ultimate decision or order.” *Topanga*
13 *Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974).

14 **(d) The Regional Water Board failed to consider the factors in**
15 **Water Code section 13241**

16 The imposition of LID and trash control requirements in the MRP that are more stringent
17 than those required under federal law required the Regional Water Board to undertake a careful
18 analysis of the technical feasibility and economic reasonableness of its proposed requirements.
19 *City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 626-27, 629 (2005); Water
20 Code §§ 13241(d), 13263(a). It did not do so. In fact, at least one member of the Regional Water
21 Board expressed the strong belief that the LID provisions as written were too inflexible to be
22 feasible, especially in the urban infill context that many of the permittees will have to address.
23 (Tr. at pp. 36-37.)

24 Numerous witnesses also provided testimony about the economic unreasonableness of the
25 MRP’s requirements given the tenuous financial conditions facing municipal permittees.
26 Addressing the permit’s extensive monitoring requirements, one witness in particular testified in
27 detail about the dire short-term and long-term economic realities facing elected officials and the
28 taxpayers who must fund the studies and other mandatory provisions in the new MRP, rebutting

1 the Regional Water Board's belief that deferring the most expensive provisions to the end of the
2 permitting period would alleviate such concerns:

3
4 This is great, we have a five year permit, we can look forward to the
5 future, the bar has been raised; but I caution all of you, as an elected
6 official, and you all know in your own communities, the budgetary
7 considerations are not just ending at the end of this year, they are
8 going to be next year, the year after. Concord alone will have \$9.7
9 million more we will have to cut. We just lost close to 78
10 employees, 20 percent of our workforce. We will be cutting again
11 more staff. So these monitoring requirements [are] still of concern,
12 a very large concern, because the amount of money it is going to
13 take to [conduct] these studies, even though they are spread over a
14 period of time, you are still talking anywhere from \$6 to \$43 million
15 in capital costs throughout the permit over that five years to address
16 some of the issues identified in those studies, possibly, and you are
17 talking about \$12, 15, 18 million of studies, of getting data. . . . I
18 think, in reality, I want to go on record that you may hear from us in
19 another year or two, saying, "You know what? There is not enough
20 money to do all the studies that you ask for in the time frame that
21 you put out in this permit."

22 (Tr. at 111-113.)

23 Against this same fiscal backdrop, the Regional Water Board staff itself also estimated that
24 the new trash capture requirements will carry a capital cost price tag of \$28 million, and admitted
25 that they had identified only \$5 million dollars in public resources available to fund
26 implementation. (Staff Report, at p. 6.)

27 While the record is replete with such acknowledgements by the Regional Water Board that
28 the new requirements (LID, trash capture, monitoring, and others) are costly and burdensome, it
does not contain any actual analysis by staff of costs against the environmental benefit to be
gained by their imposition.¹³ For this reason, and on this record, the LID and trash control
requirements are unsustainable under State law.

**(e) The Regional Water Board has not analyzed the broader
environmental impacts of the new requirements.**

More than one witness testified at the October 14, 2009, hearing that the imposition of
rigid new LID requirements could actually have an *adverse* environmental impact, by

¹³ Municipalities submitted many such analyses; but these were dismissed or ignored.

1 discouraging environmentally responsible infill projects. (*See, e.g.*, Tr. at 121-23: “We have
2 strong concerns that fully implementing this requirement on certain types of projects will be very
3 difficult. In fact, complying with the LID requirement as it is written may not be possible for
4 some projects and may deter responsible redevelopment.”) Witness testimony also supported
5 revisions to the Final Tentative Order suggested by Regional Water Board members to allow
6 greater flexibility in choosing from among environmentally sound treatment methods by
7 eliminating language in the permit that discourages the use of biotreatment. (*See, e.g.*, Tr. at pp.
8 105, 120, 124, 130.) These revisions were not included.

9 Because these provisions relating to LID and trash removal exceed MEP, they are not
10 exempt from the requirements of CEQA pursuant to section 13389 of the Water Code. Thus,
11 these and other potential environmental impacts of these provisions must be analyzed before they
12 may be applied solely pursuant to the authority provided under state law.

13 **(f) The new LID requirements impermissibly specify the means of**
14 **compliance.**

15 Porter-Cologne expressly prohibits the Regional Water Board from imposing permit terms
16 that specify the means of compliance. Water Code § 13360 (“No waste discharge requirement or
17 other order of a regional board or the state board or decree of a court issued under this division
18 shall specify the design, location, type of construction, or particular manner in which compliance
19 may be had with that requirement, order, or decree, and the person so ordered shall be permitted to
20 comply with the order in any lawful manner.”). The LID requirements in the MRP violate this
21 prohibition. For example, the requirement in section C.3.c.i(2)(b) of the MRP requiring all
22 covered development projects to treat 100% of storm water on site clearly specifies the “location”
23 of treatment in contravention of section 13360. In addition, the provision in section C.3.c.i(2)(b)
24 limiting the use of underground vaults or biotreatment to situations in which none of the
25 prescribed treatment methods are feasible, impermissibly specifies the type of stormwater
26 treatment system. Indeed, one Regional Water Board Member expressed concern at the October
27 14, 2009 adoption hearing that the replacement in the final MRP of more flexible approaches to
28 responsible development that were previously endorsed by the State Water Board with more rigid,

1 proscriptive LID requirements that severely limit options available to permittees in planning new
2 development and redevelopment projects violated the prohibition in section 13360 . Tr. at p.171
3 (“[The Regional Water Board is] treading in dangerous territory here, from my perspective, in
4 specifying the method and means of compliance.” (Tr. at p. 171.)

5 **(g) The MRP contains provisions extending beyond the permit**
6 **term.**

7 Finally, the Final MRP identifies several items extending its reach well beyond the MRP’s
8 five-year term. For example:

9 The Permittees shall demonstrate compliance with Discharge
10 Prohibition A.2 and trash-related Receiving Water Limitations
11 through the timely implementation of control measures and other
12 actions to reduce trash loads from municipal separate storm sewer
13 systems (MS4s) by 40% *by 2014*, 70% *by 2017*, and 100% *by 2022*
14 as further specified below.

15 (Final MRP, at section C.10 (emphasis added).) The MRP is effective December 1, 2009. By
16 law, an NPDES permit term cannot exceed five years. Water Code § 13378. For this reason, only
17 the 2014 date referenced above is legally valid and those extending beyond it should be stricken
18 from the final MRP. When the MRP or another successor NPDES permit is reissued, the Regional
19 Water Board can reassess the necessity, feasibility, and cost of additional reduction goals and
20 impose any incremental increase as supported by the evidence before it at that time.

21 **V. MANNER IN WHICH PETITIONER IS AGGRIEVED**

22 The Petitioner is aggrieved as a permit holder subject to the conditions and limitations in
23 the MRP which may be more stringent or onerous than required or provided for under current law.
24 These inappropriate, improper and unlawful conditions and limitations will require the Petitioner
25 to expend more money and resources to comply with the MRP than would have been required if
26 the MRP was comprised of appropriate, proper and lawful conditions. Because of the severe
27 economic circumstances confronting the Petitioner and the rest of the state and country, the
28 unnecessary expenditure of money and resources is particularly harmful.

29 **VI. THE SPECIFIC ACTION BY THE STATE OR REGIONAL WATER BOARD**
30 **REQUESTED BY PETITIONER**

31 The Petitioner requests that the State Water Board issue an Order:

- 1 • Remanding the MRP to the Regional Water Board;
- 2 • Requiring the Regional Water Board to comply with notice and hearing requirements;
- 3 • Requiring the Regional Water Board to reconsider and readopt the LID requirements in Section C.3.c, and the trash reduction requirements in Section C.10;
- 4
- 5 • Requiring the Regional Water Board to adopt findings demonstrating that the LID requirements in Section C.3.c and the trash reduction requirements in Section C.10 comply with the federal MEP standard or are necessary to protect specific beneficial uses;
- 6
- 7 • Requiring the Regional Water Board to analyze the environmental impact of the LID requirements and the trash reduction requirements in accordance with CEQA;
- 8
- 9 • Requiring the Regional Water Board to analyze the cost of compliance and technical feasibility of the LID and trash control requirements in accordance with Water Code section 13241;
- 10
- 11 • Requiring the Regional Water Board to revise the LID and trash control requirements to permit the permittees to comply by any lawful means;
- 12
- 13 • Requiring the Regional Water Board to revise the trash reduction provisions in the MRP to be based on BMPs and to clarify that the reductions are not numerical effluent limitations;
- 14
- 15 • Requiring the Regional Water Board to include a provision requiring the Regional Water Board to reconsider the trash load reduction requirements on or before the adoption of the next NPDES permit; and
- 16
- 17 • Providing for such other and further relief as is just and proper and as may be requested by the Petitioner and other permittees.

18 **VII. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
 19 **ISSUES RAISED IN THIS PETITION**

20 The Petitioner's preliminary statement of points and authorities is set forth in Section 4
 21 above. The Petitioner reserves the right to supplement this statement upon receipt and review of
 22 the administrative record.

23 **VIII. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE**
 24 **APPROPRIATE REGIONAL WATER BOARD**

25 A true and correct copy of this Petition was hand delivered on November 12, 2009, to the
 26 Regional Water Board at the following address:

27 Bruce Wolfe, Executive Officer

28 California Regional Water Quality Control Board, San Francisco Region

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1515 Clay Street, Suite 1400
Oakland, California 94612

A true and correct copy of this Petition was also sent to all other permittees.

IX. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL WATER BOARD

The substantive issues and objections in this Petition were raised before the Regional Water Board.

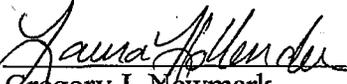
X. REQUEST TO HOLD PETITION IN ABEYANCE

The Petitioner requests that the State Water Board hold this Petition in abeyance pursuant to Title 23, California Code of Regulations, section 2050.5, subdivision (d).

DATED: November 12, 2009

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 
Gregory J. Newmark
Attorneys for Petitioner,
CITY OF DUBLIN

1320445.2

1 **PROOF OF SERVICE**

2 I, the undersigned, declare as follows: At the time of service, I was over 18 years of age
3 and not a party to this action. I am employed in the County of Alameda, State of California. My
4 business address is 555 12th Street, Suite 1500, Oakland, California 94607.

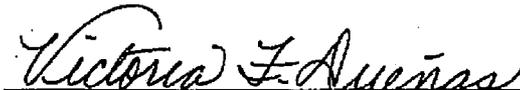
5 On November 12, 2009, I served true copies of the following document(s) described as
6 **CITY OF DUBLIN'S PETITION FOR REVIEW; PRELIMINARY POINTS AND**
7 **AUTHORITIES IN SUPPORT OF PETITION (Wat. Code § 13320)** on the interested parties
8 in this action as follows:

9 jims@acpwa.org melody.tovar@sanjoseca
10 jcamp@ci.san-leandro.ca.us govrmauck@ci.santa-clara.ca.us
11 amasjedl@ci.pleasanton.ca.us cherid@cupertino.org
12 Alex.Ameri@ci.hayward.ca.us larry.lind@ci.los-altos.ca.us
13 dakagi@ci.berkeley.ca.us joe.teresi@CityofPaloAlto.org
14 dggreenwood@ci.livermore.ca.us Eric.anderson@ci.mtnview.ca.us
15 gjgrimm@mindspring.com kphalen@ci.milpitas.ca.gov
16 HenryL@ci.union-city.ca.us kcarroll@wwcwp.org
17 HOLLY.GUIER@newark.org FMaltski@valleywater.org
18 JBarse@ci.alameda.ca.us lgervin@ci.sunnyvale.ca.us
19 kcote@ci.fremont.ca.us jchau@losaltoshills.ca.gov
20 lcestes@oaklandnet.com clara.spaulding@pln.scccgov.org
21 msandhir@ci.piedmont.ca.us awo@eoainc.com
22 mark.lander@ci.dublin.ca.us rfalk@mofo.com
23 molmsted@zone7water.com muneer.ahmed@colma.ca.gov
24 mllm@zone7water.com astillman@co.sanmateo.ca.us
25 nalmaguer@albanyca.org cassie.prudhel@ssf.net
26 pschultze-allen@ci.emeryville.ca.us horrisbergerc@ci.pacifica.ca.us
27 phoffmeister@ci.antioch.ca.us croyer@dalycity.org
28 jdhalilwal@ci.brentwood.ca.us djcasey@co.sanmateo.ca.us
lhoffmeister@ci.clayton.ca.us mfabry@ci.brisbane.ca.us
jeffr@ci.concord.ca.us getchebehere@woodsidadetown.org
rller@pw.cccounty.us hyoung@portolavalley.net
gconn@pw.cccounty.us JChen@HILLSBOROUGH.net
cmccann@ci.danville.ca.us jshannon@sanbruno.ca.gov
19 mmintz@ci.el-cerrito.ca.us bormann@belmont.gov
erwinb@ci.hercules.ca.us klim@ci.millbrae.ca.us
20 dfeehan@ci.lafayette.ca.us laekers@menlopark.org
astroup@cityofmartinez.org claycombe@ci.pacifica.ca.us
21 jmercurio@moraga.ca.us lchen@cityofepa.org
fjk@fjkennedy.com mharang@redwoodcity.org
22 cterentieff@cityoforinda.org nkyser@ci.half-moon-bay.ca.us
nvoisey@ci.pinole.ca.us ndorais@fostercity.org
23 jlongway@ci.pittsburg.ca.us rmapier@co.sanmateo.ca.us
rwul@ci.pleasant-hill.ca.us rwell@cityofsancarlos.org
24 lynne_scarpa@ci.richmond.ca.us styler@ci.atherton.ca.us
karinehs@ci.san-pablo.ca.us vbessey@cityofsanmateo.org
25 spedowfski@sanramon.ca.gov vvoong@burlingame.org
perkins@walnut-creek.org lbarnett@vsfcd.com
26 dkasperson@suisun.com gleach@ci.vallejo.ca.us
ghicks@ci.fairfield.ca.us sharon@acpwa.org
27 kcullen@fssd.com

1 **BY EMAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be
2 sent from e-mail address vduenas@meyersnave.com to the persons at the e-mail addresses listed
3 above. I did not receive, within a reasonable time after the transmission, any electronic message
4 or other indication that the transmission was unsuccessful.

5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct.

7 Executed on November 12, 2009, at Oakland, California.

8 
9 Victoria F. Duenas

10 1322768.1

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I, the undersigned, declare that:

3 At the time of service, I was over 18 years of age and not a party to this action. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, California 94607.

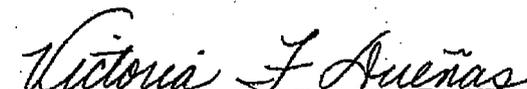
5 On November 12, 2009, I served true copies of the following document(s) described as
6 **CITY OF DUBLIN'S PETITION FOR REVIEW; PRELIMINARY POINTS AND**
7 **AUTHORITIES IN SUPPORT OF PETITION (Wat. Code § 13320)** on the interested parties
in this action as follows:

8 Bruce Wolfe, Executive Officer
9 California Regional Water Quality Control
Board, San Francisco Region
10 1515 Clay Street, Suite 1400
Oakland, California 94612

11 **(BY PERSONAL SERVICE)** I caused each such envelope to be delivered by hand to the offices
12 of each addressee.

13 I declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct.

15 Executed on November 12, 2009, at Oakland, California.

16 
17 Victoria F. Duenas
Victoria F. Duenas

18 1322992.1
19
20
21
22
23
24
25
26
27
28