



CITY OF NEWARK, CALIFORNIA

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December 17, 2015

Sent via Email: waterqualitypetitions@waterboards.ca.gov; Philip.Wyels@waterboards.ca.gov

State Water Resources Control Board
Office of Chief Counsel
Attn: Adrianna M. Crowl
P.O. Box 100
Sacramento, CA 95812-0100

RE: PETITION OF THE CITY OF NEWARK FOR REVIEW OF WASTE DISCHARGE REQUIREMENTS ORDER NO. R2-2015-0049 (NPDES PERMIT CAS612008) FOR DISCHARGES OF MS4s IN THE SAN FRANCISCO BAY REGION - THE SAN FRANCISCO BAY MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP 2.0)

To Whom It May Concern;

The City of Newark hereby submits this Petition for Review to the California State Water Resources Control Board (“State Board”) pursuant to section 13320(a) of the California Water Code (the “Water Code”), requesting that the State Water Board review an action by the California Regional Water Quality Control Board, San Francisco Bay Region (“Regional Board”). Petitioner is not seeking immediate review of this Petition and instead requests that it be held in abeyance pending further notice by Petitioner to the State Board in the event that Petitioner wishes to request that the review process be activated.

MRP 2.0 includes as co-permittees 76 San Francisco Bay area municipalities that collectively serve over 5.5 million people in the Bay Area.

Name, address, telephone number and e-mail address of the petitioner.

Soren Fajeau, P.E., Assistant City Engineer
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The action or inaction of the Regional Board being petitioned, including a copy of the action being challenged, if available.

Petitioner seeks review of the Regional Board’s November 19, 2015 Municipal Regional Stormwater Permit Order No. R2-2015-0049, reissuing NPDES Permit No. CAS612008 (the “MRP 2.0”)¹

An official, clean copy, unified version of MRP 2.0 as adopted is available for download at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/index.shtml

The following additional documents, which modified the revised Tentative Order and were adopted as part of MRP 2.0, and which present issues raised for review herein include: (1) a “Staff Supplemental” first made available to the public at the hearing location just prior to the beginning of the Regional Board’s meeting on November 18, 2015 (See Attachment B) and (2) a “Chair’s Supplemental” which the Chair of Regional Board first revealed and made available to those present at the adoption hearing only after the agenda item in question commenced on November 18, 2015 (See Attachment C).

Collectively, all of the above documents are further referred to herein as “Final MRP 2.0 Order.”

The date the Regional Board acted

The Regional Board adopted Order No. R2-2015-0049 on November 19, 2015.

Statement of the reasons the action or inaction was inappropriate or improper.

- After several iterations and nearly three years of work by Regional Board staff, permittees, and other stakeholders, in the course of the June 10th and July 8th workshop hearings and again at the adoption hearing on November 18/19th, the Regional Board cut short Petitioner’s rights to meaningful public participation in the permitting process and did not comply with basic and required public participation and fair hearing requirements.
- Visual Assessment of Trash Load Reduction Outcomes - There is a lack of documentation in the record that demonstrates that the visual assessment protocol contained in the Trash Load Provision is an accurate and reliable method for determining compliance and is, therefore, inappropriate and improper. See Provision C.10.b.
- Trash Load Reduction receiving water monitoring – There is a lack of documentation in the record that demonstrates that the receiving water monitoring requirements contained in the Trash Load Provision is appropriate and proper to effectively monitor trash load reduction. See Provision C.10.b.v.

¹ As the Order and its attachments are 350 pages, a hardcopy is not being provided concurrently with this Petition but will be provided to the State Water Board upon its further request should that be deemed necessary.

- Achievement of Mercury and PCB Load Reductions – Adequate information is not available and was not presented in the record as to how the permittees will be able to fully achieve Mercury and PCB load reductions. Furthermore, it was inappropriate to designate the Mercury and PCB load reduction requirements as Numeric Effluent Levels – they should instead be characterized as Numeric Action Levels. See Provision C.11.a. and 12.a.

How the petitioner is aggrieved

Petitioner is one of 76 cities, towns, counties and other public entities subject to MRP 2. As such, it is aggrieved by the procedural and substantive legal defects in the MRP 2 described in this petition.

Had inappropriate public participation not occurred and a full fair hearing process been effectively followed, the numeric performance criteria for Mercury and PCBs load reductions would not have been characterized or be legally enforceable as NELs, and Trash Load Reduction visual assessment and receiving water monitoring would have been more reasonable and appropriate. Petitioner and its co-permittees would then have been able to ensure compliance with MRP 2.0 through implementing required initial and follow-up actions on a timely basis, and not be subject to third party lawsuits if Trash Load Reduction, Mercury and PCBs loading reductions fall short of their non-transparently calculated and speculative marks.

The action the petitioner requests the State Board to take

These defects render the MRP 2 inappropriate and invalid and require further action by the State Board pursuant to its authority under Water Code section 13320(c).

The State Board should conduct further public hearings on MRP 2.0 to provide the proper and fair process and absence of bias to which the Petitioners and all members of the public are entitled. As part of this process, and as it did in the construction and industrial general stormwater permits it has adopted, the State Board should convert the numeric performance criteria for Mercury and PCBs set forth in Provisions C.11 and C.12 of MRP 2.0 from NELs into NALs with an accompanying set of appropriate exceedance response action requirements (ERAs) if these benchmarks are not met in the first instance. There is even more reason for the State Board to utilize NALs here. Unlike in this Clean Water Act section 402(p)(3) MS4 permit, NPDES stormwater permits for construction and industrial activities *must* address the less flexible requirements of Clean Water Act section 301(b)(1)(C).

Statement of points and authorities

See Attachment A attached to this letter.²

Statement that copies of the petition have been sent to the Regional Board

Copies of this Petition have been provided to the Regional Water Board.

² Petitioner reserves the right to supplement this Statement of Points and Authorities if this Petition is taken out of abeyance and once the record has been assembled.

Statement that the issues raised in the petition were presented to the Regional Board before the Board acted

All the issues raised in this petition were presented to the Regional Board before this permit was adopted on November 18/19, 2015 as indicated in this petition, the attachments to this petition, and as will be reflected in the record to be assembled.³

IN CONCLUSION the City of Newark wishes to note that the vast majority of MRP 2.0 was not the subject of significant dispute and is a tribute to an otherwise high level of cooperation between it and its fellow municipal stormwater programs in the San Francisco Bay Area and the Regional Board staff. The City of Newark raises the issues in this Petition to ensure an improved, more transparent and publicly legitimate permit will be put in place that avoids the prospect of resource consuming litigation and allows for a high level of cooperation and creative approaches to continue to make meaningful and substantial progress on the highest priority water quality issues in the Bay Area.

Regards,



Soren Fajeau, P.E.
Assistant City Engineer
City of Newark

cc Bruce Wolfe, Regional Board Executive Officer

Attachments A, B, & C

³ Petitioner reserves the right to supplement and expand upon this Petition if it is taken out of abeyance and once the record had been assembled.

ATTACHMENT A

STATEMENT OF POINTS AND AUTHORITIES

PETITION OF THE CITY OF NEWARK FOR REVIEW OF WASTE DISCHARGE REQUIREMENTS ORDER NO. R2-2015-0049 (NPDES PERMIT CAS612008) FOR DISCHARGES OF MS4s IN THE SAN FRANCISCO BAY REGION - THE SAN FRANCISCO BAY MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP 2)

I) General Factual and Procedural Background

A. Federal and State Statutory Scheme

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

Permits for discharges from municipal storm sewers –

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

33 U.S.C. § 1342(p)(3)(B).

California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.* Respondent

State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act. Water Code § 13160.¹ State and Regional Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued for terms not to exceed five years. *Id.* § 13378 (“Such requirements or permits shall be adopted for a fixed term not to exceed five years.”).

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

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

B. Public Participation Procedural Requirements

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

¹ Water Code Sections 13160 and 13370 et seq. reference the Federal Water Pollution Control Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water Act.

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

33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a state permitting agency to provide at least 30 days for public comment on a draft NPDES permit. 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP 2 that has taken so long in its development and applies to so many co-permittees

The federal regulations also require at least 30 days advance notice of a public hearing on adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the Regional Water Board in consideration of an NPDES permit are governed by the Regional Water Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative Procedure Act (commencing with § 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, § 648(b). Government Code § 11513 provides that each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, to impeach any witness, and to rebut the evidence against the party. Government Code § 11513(b). The Regional Water Board's procedural regulations also establish the right of a party in an adjudicative hearing before the Regional Water Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, § 648.5(a).

Thus, full and meaningful public participation in NPDES permit consideration and especially at the hearing and adoption stages is fundamental to the permitting process.

II. Argument

- A. **The Regional Board's adoption of the final MRP 2.0 was procedurally defective in that it did not comply with basic and required public participation and fair hearing legal requirements.**

The MRP 2.0 is the culmination of nearly three years of resource intensive work by the Regional Board, permittees, and stakeholders. The process has been iterative, and the Regional Board has established a pattern of allowing time between work product iterations to facilitate public participation. Considerable discussions and meetings were held with permittees and other stakeholders prior to the circulation of formal written documents. Prior to and after circulation of the written documents, Steering Committee meetings were often held monthly to encourage staff, and permittee dialogue. The administrative draft permit (Provisions C.2-C.15) was first circulated for public discussion on February 2, 2015. This was followed by publication of a Tentative Order on May 1, 2015 that included the Order, Attachments A-G, and a Summary of Changes to the administrative draft. At that time, a Notice of Public Workshop Hearings and of a Public Comment Period was circulated. The noticed Revised Tentative Order Workshop Hearings were scheduled for June 10 and July 8, 2015. At each of these preliminary stages of the permitting process, the Regional Board provided sufficient notice and solicited public comment on revisions from the prior draft in keeping with the public participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

However, at the critical final stages leading to permit adoption following the May 1, 2015 Notice of Public Workshop Hearings and of a Public Comment Period, the Regional Board departed from its prior efforts to provide for meaningful public participation and fair hearing process. The Regional Board as more fully described below, has ignored the State Water Board directives and statutory mandate with regard to the permit fair hearing process. As a result, permittees have been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It

should not be overlooked that these requirements apply to 76 Permittees in the San Francisco Bay Region that in itself provides for very complex and controversial issues.

1. The June 10 workshop hearing was inappropriately conducted as a Subcommittee meeting.

At the June 10 Regional Board workshop hearing that was scheduled to hear comments on all permit provisions except for Provisions C.10 relating to Trash Load Reduction, the Regional Board failed to have a quorum present to consider the evidence and instead proceeded as a Subcommittee of only three Board Members (Transcript of June 10 Hearing (hereinafter “Tr.”) at pp.7-25). The June 10 workshop hearing was not noticed as a Board Subcommittee meeting nor was the possibility of a Subcommittee referenced in the meeting agenda. Only three Board members heard the public testimony on all permit provisions, except for the Provision C.10 Trash Load Reduction requirements and, thus, deprived permittees the opportunity to address all Board members on most of the critical hearing issues.

2. The recusals of two Board members from participation in the MRP 2.0 hearing process was inappropriate and improper.

The failure of the Regional Board to have a quorum at the noticed June 10 workshop hearing was in part due to the two Board members with significant service and experience in municipal government, Board members Muller and Abe Koga, recusing themselves from participation in the MRP 2.0 hearing and adoption process.

On July 8, 2015 the Regional Board held the second workshop hearing to consider public comments on Provision C.10 Trash Load Reduction. At that workshop hearing Board member Abe-Kobe recused herself from participating stating that although she had no financial conflict of interest under the Political Reform Act, she was recusing herself “to avoid an appearance of

bias”². Then at the November 18 permit adoption hearing, Board member Muller announced that he was also recusing himself from participation in “order to avoid any appearance of bias” due to his relationship to one of the permittees in the MRP 2.0 hearing and adoption process).³ Board member Abe-Kobe restated her recusal at that time as well. Consequently, the two Regional Board members with significant municipal government service and experience did not participate in the MRP 2.0 hearing and adoption process, despite having no financial conflicts under the Political Reform Act.

At the November 18 hearing, Mr. Matt Fabry, Chair of BASMAA, expressed disappointment on behalf of all BASMAA agencies with the recusals of two Board members with municipal government experience.⁴ Given their municipal experience, participation in the Board’s deliberations on MRP 2.0 by these two additional Board members could have brought important diverse perspectives and practical insights into the Region Board’s consideration of MRP 2.0’s requirements and influenced the final vote. These two recusals resulted in a less diverse and representative Regional Board.

3. The failure of the Regional Board to disclose the content of emails that were exchanged between Board members was inappropriate and improper.

During the July 8 workshop hearing on Trash Load Reduction permit issues, Chair Young stated that that two of the Subcommittee members had exchanged emails, but the content

² July 8 Tr.p.6&7

³ November 18 Tr.p.6

⁴ November 18 Tr.p.132.

of those emails was not disclosed in the public record.⁵ Thus, permittees were deprived of knowing the content of some of the information considered by Regional Board members.

4. At the July 8 workshop hearing and at the November 18 permit adoption hearing, Regional Board members inappropriately stated their tentative conclusions on Trash Load Reduction requirements prior to receiving public testimony.

At the commencement of the July 8 workshop hearing, the Subcommittee members Young and Lefkowitz, plus Board member McGrath who stated that he had read the June 10th hearing transcript, provided Subcommittee comments on issues from the June 10 Subcommittee workshop hearing⁶. The third member of the Subcommittee, who may have brought a different perspective on the same testimony to the discussion, did not participate in these communications or otherwise have input into the Subcommittee's report and recommendations; nor was she present when the Subcommittee's report and recommendations were presented to the Board at a hearing on July 8.

The Board then moved on to Trash Load Reduction, Provision C.10. The deadline for submission of written comments on all permit issues including trash was July 10th, thus, Regional Board members as of the July 8 workshop hearing had not yet had any opportunity to hear or to see any permittee or other stakeholder written comments or hear hearing testimony relating to trash load reduction. Despite this lack of public input, and after the Regional Board staff had made their presentation in support of the Trash Load Reduction May 11 Tentative

⁵ July 8 Tr., p.18.

⁶ It should be noted that Board member Kissinger who was in attendance at the July 8th workshop hearing, but not the June 10 workshop hearing, did not state that he had read the June 10th workshop hearing transcript. It should also be noted that Board member Ajami, who did not attend the July 8th workshop hearing, has not stated in the record that she has read the transcript of that proceeding.

Order, Chair Young announced that prior to public testimony on Trash Load Reduction provisions, the Regional Board members would state their “tentative thinking” (July 8 Tr., p.41, lines 1-2).⁷ Based on the Board members “many quizzical expressions,” Chair Young first provided her tentative thinking (July 8 Tr., p.41, lines 2-3). Regional Board members then, without the benefit of any public input in the process, provided their lengthy “tentative thinking.” Consequently, after the staff presentation and Board member statements of their tentative thinking on the Trash Load Reduction provisions, the impression was created with many permittees that the Board members had basically made up their minds without hearing from the permittees and other stakeholders.

Then again at the November 18 permit adoption hearing, following the Board staff presentation, the Board stated their tentative opinions on all requirements in the permit, prior to hearing any public testimony from permittees and other stakeholders. This again had a chilling effect on the public testimony that followed.

5. At the November 18/19 permit adoption hearing, the Regional Board inappropriately considered written Staff Supplemental revisions and Chair Young’s Supplemental revisions.

On November 10, the Regional Water Board published a new “Revised Tentative Order” for reissuance of the MRP 2.0, to be proposed for adoption by the full Regional Water Board at its regularly scheduled November 18/19 meeting. This also included a List of Errata Corrections and Clarifications as well as revised Appendices A-G which included the Fact Sheet. Permittees had only eight days to consider these late revisions.

⁷ July 8 Tr.pp.14-56.

At the November 18/19 permit adoption hearing, the Regional Board commenced their final consideration of MRP 2.0. The Regional Board's October 19 Notice of Public Hearing to Consider Adoption of MRP 2.0 clearly stated that participants were "encouraged" to limit testimony to revisions to the Revised Tentative Order, and that the Board "will not accept any additional written comments." Permittees followed this directive regarding additional written comments. Despite this directive, on the morning of the November 18 hearing, the Regional Board staff passed out yet another new written Staff Supplement document that significantly increased the frequency of visual trash assessments in the Trash Load Reduction provision of the permit. See Attachment B

Furthermore, during the course of hearing testimony on November 18, Chair Young also introduced a new written two page Supplemental containing significant revisions to the Trash Load Reduction receiving water monitoring requirements.⁸ See Attachment C. Both of these late written revision submissions introduced by Board staff and Chair Young of burdensome significant revisions not only were contrary to the Hearing Notice directive of no additional written comments, but most importantly did not provide the opportunity for permittees to adequately consider these significant changes and provide appropriate comments to the Board.

Objections were made by several commenters to Board consideration of these two supplemental revisions. See the comments of Gary Grimm, legal counsel for the Alameda Countywide Clean Water Program.⁹

There is no dispute that the Staff Supplemental and the Supplemental revisions introduced by Chair Young contained substantive changes from the Revised Tentative Order that

⁸ November 18 Tr.p.54

⁹ November 18 Tr.p.253-4

was the subject of the Regional Board's November 18/19 hearing, or that the changes will result in additional costs and burdens on permittees. The Regional Water Board's statement that these revisions were the "outgrowth of comments" submitted by Permittees and other interested persons is not accurate, is an oversimplification of the changes, and does not justify the lack of opportunity to allow written comments on these revisions. Witnesses who appeared on behalf of Permittees objected to the imposition of these costly, burdensome and inflexible new provisions being added so late in the process and without the opportunity to provide more detailed comments, and testified to the lack of available public resources to fund them.

Moreover, even if these Supplementals really only contained clarifications, at the very minimum, the public should have received notice of them at least 10 days prior to the hearing in order to have a real and meaningful opportunity to review and prepare testimony on their implications. While the Regional Board staff was allowed to reply to all hearing comments with no time limit at the hearing at the November 19th hearing once public testimony was concluded, and was questioned by the members of the Regional Board, no additional time was allotted for Permittees to question staff directly or to submit additional evidence in response to staff conclusions on the supplemental material.

6. The Board did not provide requisite notice to the public that "numeric performance criteria" for mercury and PCBs loading reduction contained in MRP 2.0 were intended as Numeric Effluent Limits ("NELs") rather than Numeric Action Levers ("NALs") until they released their Response to Comments document on October 19 in conjunction with the permit adoption hearing.

The ambiguous nature of the term "numeric performance criteria" in the permit and its fact sheet resulted in extensive testimony at the June 10, 2015 hearing on the nontrash related

requirements of the draft permit and generated an associated formal request for clarification in terms of the NEL vs. NAL distinction in written comments which followed on July 9, 2015.

Hence, as a practical matter, the Response to Comments document's *first time* insistence that the numeric performance criteria were NELs and not something else effected a material change in the nature of the permit's requirements and the associated potential third party liability consequences to permittees in the event they are unable to fully comply with them. As such, it should have resulted in a re-opening of the written public comment period.

7. Following the public testimony at the permit adoption hearing on November 19, the Regional Board inappropriately conducted lengthy deliberations in closed session.

Final deliberations of the Regional Board members at the adoption hearing on November 19 concerning their resolution of key contested issues (including issues concerning the imposition of NELs rather than NALs for mercury and PCBs) occurred in a lengthy, 1 hour and 45 minute closed session that was also insufficiently noticed and which was otherwise unauthorized even in the context of an adjudicative proceeding of this nature.¹⁰ This precluded

¹⁰ The Board meeting agenda does not provide notice of a closed session in conjunction with its specified item on MRP 2.0 (Item 7). Instead, Agenda Item 11 just contains a boilerplate reference to a closed session for "Deliberation," the authority referenced for which is Government Code section 11126(c)(3). There is also a further explanatory note contained in a boilerplate attachment to the Agenda that explains that the Board may adjourn to a closed session at any time during the regular session to, among other things, deliberate, based on the authority provided by "Government Code section 11126(a), (d) and (q)." Putting aside for a moment the question of whether any of these statutory references provide authorization for a closed session in these circumstances, what they clearly do not do is override Government Code section 11125(b)'s independent requirement to provide clear advanced notice to the public of "an item" to be discussed in closed session.

Moreover, in terms of providing authorization for a closed session on the MRP 2.0 adoption item, these references are either inapposite or non-existent. Even Government Code 11126(c)(3) extends only to deliberations on proceedings conducted pursuant to Government Code section 11500 or similar provisions of law. But Section 11500 *et seq.* concerns only proceedings conducted by administrative law judges and, to the extent Government Code section 11400 *et seq.* is considered similar, its general rule is that even an adjudicative hearing "shall be open to public observation" and may only be closed for certain limited purposes, none of which presented themselves here. *See* Cal. Gov. Code §§ 11425.10(a)(3) and 11425.20(a)(1)-(3). Government Code section 11126(e), which was *not* referenced on the Agenda, also does not apply here since there is no significant exposure to litigation against Region 2 and, in any event, Region 2's counsel did not timely prepare and submit the requisite memorandum detailing the

direct observation by, and full accountability to, members of the public, as both the spirit and the letter of the Bagley-Keene Act demand.

With regard to the above seven cumulative arguments relating to lack of fair hearing and lack of adequate opportunity for public participation, under circumstances similar in some ways to those described above, the State Board has expressed concern that such proceedings were insufficient to assure that all participants were allowed adequate opportunity to be heard:

But we are concerned that at the . . . hearing, interested persons and permittees *were not given adequate time to review late revisions or to comment on them*. Given the intense interest in this issue, *the 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.

In re The Cities of Bellflower et al., State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board's regulations. *Id.* at *24 n.25 ("For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et

specific reasons and legal authority for closing the session on this basis. See Cal. Gov. Code 11126(e)(1), (e)(2), and (e)(2)(B) and (C)(ii).

Finally, even if the above were not the case, the transcript of the open hearing reveals that the closed session's purpose was not deliberating evidence but rather, ultimately without apparent success, for the Board members to try and craft new permit language to resolve the NEL v. NAL issue in a manner addressing the co-permittees concerns. RT-Nov19 at 160:7-161:2. (As has been observed relative to general permits issued in California, the line between adjudicative and quasi-legislative action and associated procedural rules governing the board members blurs in a proceeding to develop a single set of requirements governing a large number of co-permittees, like the 76 present here such that erring on the side of transparency concerning the Region 2 Board members' decision-making is in order relative to this closed session issue.)

seq.”) Those regulations require the Regional Water Board to allow interested parties the opportunity to present contrary evidence. Cal. Code Regs, tit. 23, § 648.5(a).

B. Visual Assessment Requirements of Trash Load Reduction Outcomes are Unreasonable, Inappropriate, and Legally Defective.

There is a lack of documentation in the record that demonstrates that the visual assessment protocol contained in the Trash Load Reduction Control Provision C.10 is an accurate and reliable method for determining compliance with the permit’s trash load reduction requirements. See Provision C.10.b.ii.b. To the contrary, the prescribed methodology that was proposed in the Revised Tentative Order and that was included in the final permit adds burdensome permittee expense to conduct an unreliable methodology. Lesley Estes of the City of Oakland provided specific examples in her testimony of their experience of why visual assessments is a very expensive way to achieve non-meaningful results and doesn’t effectively address trash cleanup.¹¹

In addition to the inappropriateness of the Revised Tentative Order visual assessment methodology, as has been previously mentioned the Board staff at the beginning of the hearing, and contrary to the rules of the hearing as set forth in the Notice of Hearing, introduced a written Supplemental sheet that among other things further significantly revised the requirements and purports to clarify information in the Fact Sheet on frequency of visual assessments in Provision C.10.b.ii.b.(i-iv). These revisions will result in a significant increase of the frequency of required visual assessment for some areas. Permittees were not able to adequately consider and respond to these late revisions, however, Board staff was allowed to fully explain and comment on the public testimony for these revisions.

¹¹ Nov 18 Tr.p.216

Despite the time limitations to consider these revisions, Mr. Phil Bobel of the City of Palo Alto testified that his quick estimate of the trash visual assessment revisions proposed in the staff Supplement would triple their visual assessments, and that this revision caught them off-guard.¹² Ms. Melody Tovar of the City of Sunnyvale commented that she agreed with Mr. Bobel's comments that the increased visual trash assessment Supplemental revisions simply add more cost without benefit.¹³ Finally, Ms. Leah Goldberg, Senior Deputy City Attorney for the City of San Jose, testified that they had only briefly considered the Supplemental revision and urged the Board not to adopt the revisions.¹⁴

Staff member Mumley added further uncertainty to this discussion by stating that the revisions to the Fact Sheet on visual assessments is not directly enforceable, is intended as guidance only, that it's not a substantial change, and that the numbers are a guide and not mandatory.¹⁵ This statement is questionable to the permittees and gives permittees little comfort given the risk of third party liability and that Finding 1 of the Revised Tentative Order incorporates the Fact Sheet by reference.

C. The Provision C.10 Trash Reduction Outcomes Receiving Water Monitoring Provisions, the Development and Testing Plan, and Reporting Requirement Revisions Introduced by Chair Young at the November 18 Hearing are Inappropriate and Improper.

As previously referenced, two pages of significant written revisions to Trash Reduction Outcomes requirements were introduced during the course of the November 18 hearing by Chair

¹² Nov 18 Tr.p.156

¹³ Nov 18 Tr.p.175-6

¹⁴ Nov 18 Tr.p.226

¹⁵ Nov 19 Tr.pp118-120.

Young. This was contrary to the rules for written comments provided in the Hearing Notice and did not afford permittees and other members of the public sufficient opportunity to review and comment on the revisions.

As a consequence of this procedural error, the hearing record contains relatively little information on the issues presented by the Provision C.10.b.v. and C.10.f. revisions that required a specific receiving water monitoring proposed program to be approved by the Executive Officer, rather than developing water monitoring tools and protocols. There was simply not sufficient time for permittees to review, discuss, and comment on these revisions. Provisions C.10.b.v.a. and C.10.f are inappropriate revisions in that they requires permittees to submit a plan to develop and test a receiving water monitoring program containing new criteria not previously considered, rather than a plan to develop tools and protocols; and similar changes to Provisions C.10.b.v.b and C.10.f Reporting. This is a substantial receiving water monitoring change.

D. The inclusion of NELs as opposed to NALs for Mercury and PCB Load Reduction Requirements Contained in Provision C.11&12 are Inappropriate and should not have been designated as Numeric Effluent Limitations

After having confirmed that the requirements in MRP 2.0 were best management practices (BMP) and other required actions-based measures, consistent with their TMDL implementation plans, and that good faith compliance with them would create a safe harbor for the co-permittees, staff and counsel then left the Board members in a state of confusion by saying that the mercury and PCBs requirements in the permit were not-fully action-based and by

ultimately acknowledging that failing to meet the numeric criteria would render the co permittees subject to enforcement and third party lawsuits even if they implemented all required actions.¹⁶

Then, contrary to the State Board's own conclusions and use of them, just before the improper closed session at the hearing, Board staff and counsel also told the Board members that NALs would not be effective regulatory mechanisms and suggested that the State Board would see anything other than NELs as insufficiently rigorous.¹⁷

Instead, Board staff and counsel should have presented the Board members with a more objective delineation of the State Board's position on the issue of NALs v. NELs; informed them that the State Board has not precluded the use of NALs as an "ambitious, rigorous, and transparent" alternative to NELs; and left the decision on whether to use NELs or NALs in the Board members' hands in a more objective manner considering: (1) the State Board's own use of them,¹⁸ (2) the State Board's Expert Panel's recommendations concerning the use of NALs in municipal stormwater permits in particular,¹⁹ and (3) the guidance the State Board recently provided specifically on this issue in WQO-2015-0075.

In the latter, although the State Board acknowledged that the Los Angeles Regional Board's use of NELs to implement 33 TMDLs in its area was not error given the number and

¹⁶ Cf. RT-Nov19 at 14:7-19:1 and 156:23-157:7 with 147:1-148:19, 152:19-25, 158:25-160:5.

¹⁷ RT-Nov19 at 167:5-168:10, 170:8-171:1, and 174:8-25.

¹⁸ Storm Water General Permit Order No. 2009-0009-DWQ and Storm Water General Permit Order No. 2014-0057-DWQ.

¹⁹ State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006) at p. 8 ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. . . . For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit basically is not possible.) After the conclusion of the public testimony portion of the adoption hearing, Region 2 staff asserted that SCVURPPP's characterization of the Expert Panel's conclusions were amounted to gross misrepresentation. RT-Nov19 at 131:12-20. Although there is no evidence to support it in the record or elsewhere, they then went on to assert that the Expert Panel's report was outdated and that these experts "were not *thinking* in the context of Effluent Limits . . . which are an enforceable numeric . . . performance measure that will be enforced." RT-Nov19 at 133:1-9 (emphasis supplied.)

nature of TMDLs involved, it then went on to specifically state: “We emphasize, however, that we are not taking the position that [NELs] are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. We also decline to urge the regional water boards to use [NELs] in all MS4 permits.”²⁰

With regard to the Regional Board staff’s repeated assurances to its Board that the permittees concerns with NELs could be sidelined and dealt with later through the exercise of their enforcement discretion, they and counsel should have informed their Board members that the State Board had expressed a different policy preference earlier this year when it stated in WQO-2015-0075: “from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . interim and final TMDLs through provisions built directly into their permit rather than through enforcement orders” – i.e., enforcement orders that could arise from noncompliance with NELs per se.²¹

Beyond these significant process issues, the substantive justification offered by Board staff for treating the numeric performance criteria for PCBs and mercury load reductions as NELs also falls short. First, while they are undoubtedly designed to further implement the region’s mercury and PCBs TMDLs and represent an increment towards getting to the waste load allocations assigned to stormwater therein, there is nothing concrete in the record revealing how the numeric values of the NELs were actually calculated.²² Instead, Board staff state why

²⁰ WQO-2015-0075 at p. 58-59.

²¹ Id. at 31.

²² Region 2 counsel’s last minute effort to try and create a record for their being an adequate substantive basis for the NELs through a wholly conclusory statement by a staff member without the “adequate information” she refers to having been delineated in the record and subject to prior public review and comment, is meaningless. *See* RT-Nov19 at 176:10-19.

they think the load reduction numbers they have identified as NELs for PCBs are feasible to achieve based on the Bay Area's recent performance in terms of new and redevelopment and building demolition and construction.²³ But the staff's economic forecast (which sometimes proves wrong even when done by actual economists) requires no deference given their expertise and has no real basis in the record. Moreover, a plethora of testimony at the adoption hearing demonstrated that even if the staff's prediction concerning the pace of development and construction ends up being on target, there is still likely to be a significant shortfall in all or at least many co-permittees meeting the NELs.²⁴

At one point, staff testified at the adoption hearing that the PCB numbers were "based on an updated assessment of controls to reduce PCBs to the maximum extent practicable and then indicate that their calculation "started with a numerical formula."²⁵ But, importantly, this formula and these calculations are nowhere to be found in the record, and later in their testimony, the same staff member even indicates that they abandoned the formula-based calculation effort.²⁶ Their testimony then goes on to explain that they turned to "a number of sources of information" to come up with the 3 kilogram PCBs load reduction requirement, but once again, these sources were not delineated in the permit's Fact Sheet or elsewhere in the record.²⁷

The Board staff member's further testimony on the issue indicates that the PCBs load reduction numbers in controversy are no more than speculative "guesstimate estimates" that

²³ RT-Nov18 at 26:6-9.

²⁴ *See e.g.*, RT-Nov18 at 138:8-142:18.

²⁵ RT-Nov19 at 135:1-11.

²⁶ *Id.* at 137:11-13.

²⁷ *Id.* at 138:3-5.

represent the idea of “[h]ere is the number, we think it’s attainable.”²⁸ Ultimately, the staff even expressly conceded that “we know that there’s uncertainty with the basis of our numbers,” while trying to reassure the Board members that they could deal with the uncertainty through their future exercise of enforcement discretion.²⁹ (Board counsel then further conceded to one of the Board members that the numbers were uncertain and that the co-permittees would be in non-compliance if they did not meet them despite their good faith efforts to implement all required actions.)³⁰

Finally, in the course of the adoption hearing, Board staff revealed that, when all was said and done, their position on NELs was really based on their preference to avoid having to specify additional required actions and then expending the additional effort necessary to oversee and enforce on them if bad actors emerge among the permittees and refused to meet their implementation obligations.³¹ Instead, they ultimately admitted that their insistence on NELs reflects their frustrations and preference to employ a psychology of “coercion.”³² Not only is this an inappropriate basis for calculating the numbers used for NELs, while they voted to include them based on the mistaken understanding that they were necessary as an alternative to NALs in order to avoid the State Board disapproving the permit, the need for undertaking a coercive

²⁸ Id. at 139:7-8 and 146:19-20. Relative to some communities that are not likely sources of PCBs, the staff’s testimony even went further to characterize the requirements as they might default down to them as “unrealistic.” RT-Nov19 at 153:16-20. *See also* Id. at 168:18-169:7.

²⁹ Id. at 149:17-150:9.

³⁰ Id. at 152:7-25.

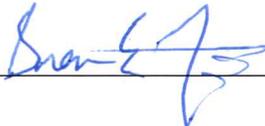
³¹ *See* RT-Nov19 at 137:1-6 and 146:13-20.

³² RT-Nov 19 at 171:17-174:3.

approach vis-à-vis the permittees is clearly not a view that was shared by the members of the Regional Board.³³

Thank you for your consideration.

Dated: December 17, 2015

By:  _____
Soren Fajeau, P.E.
Assistant City Engineer
City of Newark

³³ RT-Nov19 at 160:7-161:15, 166:20-167:5, 168:11-169:19, 181:13-183:17, 187:7-188:20, 193:15-194:2 and 196:3-25.

ATTACHMENT A

STATEMENT OF POINTS AND AUTHORITIES

PETITION OF THE CITY OF NEWARK FOR REVIEW OF WASTE DISCHARGE REQUIREMENTS ORDER NO. R2-2015-0049 (NPDES PERMIT CAS612008) FOR DISCHARGES OF MS4s IN THE SAN FRANCISCO BAY REGION - THE SAN FRANCISCO BAY MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP 2)

I) General Factual and Procedural Background

A. Federal and State Statutory Scheme

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

Permits for discharges from municipal storm sewers –

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

33 U.S.C. § 1342(p)(3)(B).

California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.* Respondent

State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act. Water Code § 13160.¹ State and Regional Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued for terms not to exceed five years. *Id.* § 13378 (“Such requirements or permits shall be adopted for a fixed term not to exceed five years.”).

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

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

B. Public Participation Procedural Requirements

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

¹ Water Code Sections 13160 and 13370 et seq. reference the Federal Water Pollution Control Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water Act.

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

33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a state permitting agency to provide at least 30 days for public comment on a draft NPDES permit. 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP 2 that has taken so long in its development and applies to so many co-permittees

The federal regulations also require at least 30 days advance notice of a public hearing on adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the Regional Water Board in consideration of an NPDES permit are governed by the Regional Water Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative Procedure Act (commencing with § 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, § 648(b). Government Code § 11513 provides that each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, to impeach any witness, and to rebut the evidence against the party. Government Code § 11513(b). The Regional Water Board's procedural regulations also establish the right of a party in an adjudicative hearing before the Regional Water Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, § 648.5(a).

Thus, full and meaningful public participation in NPDES permit consideration and especially at the hearing and adoption stages is fundamental to the permitting process.

II. Argument

- A. **The Regional Board's adoption of the final MRP 2.0 was procedurally defective in that it did not comply with basic and required public participation and fair hearing legal requirements.**

The MRP 2.0 is the culmination of nearly three years of resource intensive work by the Regional Board, permittees, and stakeholders. The process has been iterative, and the Regional Board has established a pattern of allowing time between work product iterations to facilitate public participation. Considerable discussions and meetings were held with permittees and other stakeholders prior to the circulation of formal written documents. Prior to and after circulation of the written documents, Steering Committee meetings were often held monthly to encourage staff, and permittee dialogue. The administrative draft permit (Provisions C.2-C.15) was first circulated for public discussion on February 2, 2015. This was followed by publication of a Tentative Order on May 1, 2015 that included the Order, Attachments A-G, and a Summary of Changes to the administrative draft. At that time, a Notice of Public Workshop Hearings and of a Public Comment Period was circulated. The noticed Revised Tentative Order Workshop Hearings were scheduled for June 10 and July 8, 2015. At each of these preliminary stages of the permitting process, the Regional Board provided sufficient notice and solicited public comment on revisions from the prior draft in keeping with the public participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

However, at the critical final stages leading to permit adoption following the May 1, 2015 Notice of Public Workshop Hearings and of a Public Comment Period, the Regional Board departed from its prior efforts to provide for meaningful public participation and fair hearing process. The Regional Board as more fully described below, has ignored the State Water Board directives and statutory mandate with regard to the permit fair hearing process. As a result, permittees have been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It

should not be overlooked that these requirements apply to 76 Permittees in the San Francisco Bay Region that in itself provides for very complex and controversial issues.

1. The June 10 workshop hearing was inappropriately conducted as a Subcommittee meeting.

At the June 10 Regional Board workshop hearing that was scheduled to hear comments on all permit provisions except for Provisions C.10 relating to Trash Load Reduction, the Regional Board failed to have a quorum present to consider the evidence and instead proceeded as a Subcommittee of only three Board Members (Transcript of June 10 Hearing (hereinafter “Tr.”) at pp.7-25). The June 10 workshop hearing was not noticed as a Board Subcommittee meeting nor was the possibility of a Subcommittee referenced in the meeting agenda. Only three Board members heard the public testimony on all permit provisions, except for the Provision C.10 Trash Load Reduction requirements and, thus, deprived permittees the opportunity to address all Board members on most of the critical hearing issues.

2. The recusals of two Board members from participation in the MRP 2.0 hearing process was inappropriate and improper.

The failure of the Regional Board to have a quorum at the noticed June 10 workshop hearing was in part due to the two Board members with significant service and experience in municipal government, Board members Muller and Abe Koga, recusing themselves from participation in the MRP 2.0 hearing and adoption process.

On July 8, 2015 the Regional Board held the second workshop hearing to consider public comments on Provision C.10 Trash Load Reduction. At that workshop hearing Board member Abe-Kobe recused herself from participating stating that although she had no financial conflict of interest under the Political Reform Act, she was recusing herself “to avoid an appearance of

bias”². Then at the November 18 permit adoption hearing, Board member Muller announced that he was also recusing himself from participation in “order to avoid any appearance of bias” due to his relationship to one of the permittees in the MRP 2.0 hearing and adoption process).³ Board member Abe-Kobe restated her recusal at that time as well. Consequently, the two Regional Board members with significant municipal government service and experience did not participate in the MRP 2.0 hearing and adoption process, despite having no financial conflicts under the Political Reform Act.

At the November 18 hearing, Mr. Matt Fabry, Chair of BASMAA, expressed disappointment on behalf of all BASMAA agencies with the recusals of two Board members with municipal government experience.⁴ Given their municipal experience, participation in the Board’s deliberations on MRP 2.0 by these two additional Board members could have brought important diverse perspectives and practical insights into the Region Board’s consideration of MRP 2.0’s requirements and influenced the final vote. These two recusals resulted in a less diverse and representative Regional Board.

3. The failure of the Regional Board to disclose the content of emails that were exchanged between Board members was inappropriate and improper.

During the July 8 workshop hearing on Trash Load Reduction permit issues, Chair Young stated that that two of the Subcommittee members had exchanged emails, but the content

² July 8 Tr.p.6&7

³ November 18 Tr.p.6

⁴ November 18 Tr.p.132.

of those emails was not disclosed in the public record.⁵ Thus, permittees were deprived of knowing the content of some of the information considered by Regional Board members.

4. At the July 8 workshop hearing and at the November 18 permit adoption hearing, Regional Board members inappropriately stated their tentative conclusions on Trash Load Reduction requirements prior to receiving public testimony.

At the commencement of the July 8 workshop hearing, the Subcommittee members Young and Lefkowitz, plus Board member McGrath who stated that he had read the June 10th hearing transcript, provided Subcommittee comments on issues from the June 10 Subcommittee workshop hearing⁶. The third member of the Subcommittee, who may have brought a different perspective on the same testimony to the discussion, did not participate in these communications or otherwise have input into the Subcommittee's report and recommendations; nor was she present when the Subcommittee's report and recommendations were presented to the Board at a hearing on July 8.

The Board then moved on to Trash Load Reduction, Provision C.10. The deadline for submission of written comments on all permit issues including trash was July 10th, thus, Regional Board members as of the July 8 workshop hearing had not yet had any opportunity to hear or to see any permittee or other stakeholder written comments or hear hearing testimony relating to trash load reduction. Despite this lack of public input, and after the Regional Board staff had made their presentation in support of the Trash Load Reduction May 11 Tentative

⁵ July 8 Tr., p.18.

⁶ It should be noted that Board member Kissinger who was in attendance at the July 8th workshop hearing, but not the June 10 workshop hearing, did not state that he had read the June 10th workshop hearing transcript. It should also be noted that Board member Ajami, who did not attend the July 8th workshop hearing, has not stated in the record that she has read the transcript of that proceeding.

Order, Chair Young announced that prior to public testimony on Trash Load Reduction provisions, the Regional Board members would state their “tentative thinking” (July 8 Tr., p.41, lines 1-2).⁷ Based on the Board members “many quizzical expressions,” Chair Young first provided her tentative thinking (July 8 Tr., p.41, lines 2-3). Regional Board members then, without the benefit of any public input in the process, provided their lengthy “tentative thinking.” Consequently, after the staff presentation and Board member statements of their tentative thinking on the Trash Load Reduction provisions, the impression was created with many permittees that the Board members had basically made up their minds without hearing from the permittees and other stakeholders.

Then again at the November 18 permit adoption hearing, following the Board staff presentation, the Board stated their tentative opinions on all requirements in the permit, prior to hearing any public testimony from permittees and other stakeholders. This again had a chilling effect on the public testimony that followed.

5. At the November 18/19 permit adoption hearing, the Regional Board inappropriately considered written Staff Supplemental revisions and Chair Young’s Supplemental revisions.

On November 10, the Regional Water Board published a new “Revised Tentative Order” for reissuance of the MRP 2.0, to be proposed for adoption by the full Regional Water Board at its regularly scheduled November 18/19 meeting. This also included a List of Errata Corrections and Clarifications as well as revised Appendices A-G which included the Fact Sheet. Permittees had only eight days to consider these late revisions.

⁷ July 8 Tr.pp.14-56.

At the November 18/19 permit adoption hearing, the Regional Board commenced their final consideration of MRP 2.0. The Regional Board’s October 19 Notice of Public Hearing to Consider Adoption of MRP 2.0 clearly stated that participants were “encouraged” to limit testimony to revisions to the Revised Tentative Order, and that the Board “will not accept any additional written comments.” Permittees followed this directive regarding additional written comments. Despite this directive, on the morning of the November 18 hearing, the Regional Board staff passed out yet another new written Staff Supplement document that significantly increased the frequency of visual trash assessments in the Trash Load Reduction provision of the permit. See Attachment B

Furthermore, during the course of hearing testimony on November 18, Chair Young also introduced a new written two page Supplemental containing significant revisions to the Trash Load Reduction receiving water monitoring requirements.⁸ See Attachment C. Both of these late written revision submissions introduced by Board staff and Chair Young of burdensome significant revisions not only were contrary to the Hearing Notice directive of no additional written comments, but most importantly did not provide the opportunity for permittees to adequately consider these significant changes and provide appropriate comments to the Board.

Objections were made by several commenters to Board consideration of these two supplemental revisions. See the comments of Gary Grimm, legal counsel for the Alameda Countywide Clean Water Program.⁹

There is no dispute that the Staff Supplemental and the Supplemental revisions introduced by Chair Young contained substantive changes from the Revised Tentative Order that

⁸ November 18 Tr.p.54

⁹ November 18 Tr.p.253-4

was the subject of the Regional Board’s November 18/19 hearing, or that the changes will result in additional costs and burdens on permittees. The Regional Water Board’s statement that these revisions were the “outgrowth of comments” submitted by Permittees and other interested persons is not accurate, is an oversimplification of the changes, and does not justify the lack of opportunity to allow written comments on these revisions. Witnesses who appeared on behalf of Permittees objected to the imposition of these costly, burdensome and inflexible new provisions being added so late in the process and without the opportunity to provide more detailed comments, and testified to the lack of available public resources to fund them.

Moreover, even if these Supplementals really only contained clarifications, at the very minimum, the public should have received notice of them at least 10 days prior to the hearing in order to have a real and meaningful opportunity to review and prepare testimony on their implications. While the Regional Board staff was allowed to reply to all hearing comments with no time limit at the hearing at the November 19th hearing once public testimony was concluded, and was questioned by the members of the Regional Board, no additional time was allotted for Permittees to question staff directly or to submit additional evidence in response to staff conclusions on the supplemental material.

6. The Board did not provide requisite notice to the public that “numeric performance criteria” for mercury and PCBs loading reduction contained in MRP 2.0 were intended as Numeric Effluent Limits (“NELs”) rather than Numeric Action Levers (“NALs”) until they released their Response to Comments document on October 19 in conjunction with the permit adoption hearing.

The ambiguous nature of the term “numeric performance criteria” in the permit and its fact sheet resulted in extensive testimony at the June 10, 2015 hearing on the nontrash related

requirements of the draft permit and generated an associated formal request for clarification in terms of the NEL vs. NAL distinction in written comments which followed on July 9, 2015.

Hence, as a practical matter, the Response to Comments document's *first time* insistence that the numeric performance criteria were NELs and not something else effected a material change in the nature of the permit's requirements and the associated potential third party liability consequences to permittees in the event they are unable to fully comply with them. As such, it should have resulted in a re-opening of the written public comment period.

7. Following the public testimony at the permit adoption hearing on November 19, the Regional Board inappropriately conducted lengthy deliberations in closed session.

Final deliberations of the Regional Board members at the adoption hearing on November 19 concerning their resolution of key contested issues (including issues concerning the imposition of NELs rather than NALs for mercury and PCBs) occurred in a lengthy, 1 hour and 45 minute closed session that was also insufficiently noticed and which was otherwise unauthorized even in the context of an adjudicative proceeding of this nature.¹⁰ This precluded

¹⁰ The Board meeting agenda does not provide notice of a closed session in conjunction with its specified item on MRP 2.0 (Item 7). Instead, Agenda Item 11 just contains a boilerplate reference to a closed session for "Deliberation," the authority referenced for which is Government Code section 11126(c)(3). There is also a further explanatory note contained in a boilerplate attachment to the Agenda that explains that the Board may adjourn to a closed session at any time during the regular session to, among other things, deliberate, based on the authority provided by "Government Code section 11126(a), (d) and (q)." Putting aside for a moment the question of whether any of these statutory references provide authorization for a closed session in these circumstances, what they clearly do not do is override Government Code section 11125(b)'s independent requirement to provide clear advanced notice to the public of "an item" to be discussed in closed session.

Moreover, in terms of providing authorization for a closed session on the MRP 2.0 adoption item, these references are either inapposite or non-existent. Even Government Code 11126(c)(3) extends only to deliberations on proceedings conducted pursuant to Government Code section 11500 or similar provisions of law. But Section 11500 *et seq.* concerns only proceedings conducted by administrative law judges and, to the extent Government Code section 11400 *et seq.* is considered similar, its general rule is that even an adjudicative hearing "shall be open to public observation" and may only be closed for certain limited purposes, none of which presented themselves here. *See* Cal. Gov. Code §§ 11425.10(a)(3) and 11425.20(a)(1)-(3). Government Code section 11126(e), which was *not* referenced on the Agenda, also does not apply here since there is no significant exposure to litigation against Region 2 and, in any event, Region 2's counsel did not timely prepare and submit the requisite memorandum detailing the

direct observation by, and full accountability to, members of the public, as both the spirit and the letter of the Bagley-Keene Act demand.

With regard to the above seven cumulative arguments relating to lack of fair hearing and lack of adequate opportunity for public participation, under circumstances similar in some ways to those described above, the State Board has expressed concern that such proceedings were insufficient to assure that all participants were allowed adequate opportunity to be heard:

But we are concerned that at the . . . hearing, interested persons and permittees *were not given adequate time to review late revisions or to comment on them*. Given the intense interest in this issue, *the 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.

In re The Cities of Bellflower et al., State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board's regulations. *Id.* at *24 n.25 ("For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et

specific reasons and legal authority for closing the session on this basis. See Cal. Gov. Code 11126(e)(1), (e)(2), and (e)(2)(B) and (C)(ii).

Finally, even if the above were not the case, the transcript of the open hearing reveals that the closed session's purpose was not deliberating evidence but rather, ultimately without apparent success, for the Board members to try and craft new permit language to resolve the NEL v. NAL issue in a manner addressing the co-permittees concerns. RT-Nov19 at 160:7-161:2. (As has been observed relative to general permits issued in California, the line between adjudicative and quasi-legislative action and associated procedural rules governing the board members blurs in a proceeding to develop a single set of requirements governing a large number of co-permittees, like the 76 present here such that erring on the side of transparency concerning the Region 2 Board members' decision-making is in order relative to this closed session issue.)

seq.”) Those regulations require the Regional Water Board to allow interested parties the opportunity to present contrary evidence. Cal. Code Regs, tit. 23, § 648.5(a).

B. Visual Assessment Requirements of Trash Load Reduction Outcomes are Unreasonable, Inappropriate, and Legally Defective.

There is a lack of documentation in the record that demonstrates that the visual assessment protocol contained in the Trash Load Reduction Control Provision C.10 is an accurate and reliable method for determining compliance with the permit’s trash load reduction requirements. See Provision C.10.b.ii.b. To the contrary, the prescribed methodology that was proposed in the Revised Tentative Order and that was included in the final permit adds burdensome permittee expense to conduct an unreliable methodology. Lesley Estes of the City of Oakland provided specific examples in her testimony of their experience of why visual assessments is a very expensive way to achieve non-meaningful results and doesn’t effectively address trash cleanup.¹¹

In addition to the inappropriateness of the Revised Tentative Order visual assessment methodology, as has been previously mentioned the Board staff at the beginning of the hearing, and contrary to the rules of the hearing as set forth in the Notice of Hearing, introduced a written Supplemental sheet that among other things further significantly revised the requirements and purports to clarify information in the Fact Sheet on frequency of visual assessments in Provision C.10.b.ii.b.(i-iv). These revisions will result in a significant increase of the frequency of required visual assessment for some areas. Permittees were not able to adequately consider and respond to these late revisions, however, Board staff was allowed to fully explain and comment on the public testimony for these revisions.

¹¹ Nov 18 Tr.p.216

Despite the time limitations to consider these revisions, Mr. Phil Bobel of the City of Palo Alto testified that his quick estimate of the trash visual assessment revisions proposed in the staff Supplement would triple their visual assessments, and that this revision caught them off-guard.¹² Ms. Melody Tovar of the City of Sunnyvale commented that she agreed with Mr. Bobel's comments that the increased visual trash assessment Supplemental revisions simply add more cost without benefit.¹³ Finally, Ms. Leah Goldberg, Senior Deputy City Attorney for the City of San Jose, testified that they had only briefly considered the Supplemental revision and urged the Board not to adopt the revisions.¹⁴

Staff member Mumley added further uncertainty to this discussion by stating that the revisions to the Fact Sheet on visual assessments is not directly enforceable, is intended as guidance only, that it's not a substantial change, and that the numbers are a guide and not mandatory.¹⁵ This statement is questionable to the permittees and gives permittees little comfort given the risk of third party liability and that Finding 1 of the Revised Tentative Order incorporates the Fact Sheet by reference.

C. The Provision C.10 Trash Reduction Outcomes Receiving Water Monitoring Provisions, the Development and Testing Plan, and Reporting Requirement Revisions Introduced by Chair Young at the November 18 Hearing are Inappropriate and Improper.

As previously referenced, two pages of significant written revisions to Trash Reduction Outcomes requirements were introduced during the course of the November 18 hearing by Chair

¹² Nov 18 Tr.p.156

¹³ Nov 18 Tr.p.175-6

¹⁴ Nov 18 Tr.p.226

¹⁵ Nov 19 Tr.pp118-120.

Young. This was contrary to the rules for written comments provided in the Hearing Notice and did not afford permittees and other members of the public sufficient opportunity to review and comment on the revisions.

As a consequence of this procedural error, the hearing record contains relatively little information on the issues presented by the Provision C.10.b.v. and C.10.f. revisions that required a specific receiving water monitoring proposed program to be approved by the Executive Officer, rather than developing water monitoring tools and protocols. There was simply not sufficient time for permittees to review, discuss, and comment on these revisions. Provisions C.10.b.v.a. and C.10.f are inappropriate revisions in that they requires permittees to submit a plan to develop and test a receiving water monitoring program containing new criteria not previously considered, rather than a plan to develop tools and protocols; and similar changes to Provisions C.10.b.v.b and C.10.f Reporting. This is a substantial receiving water monitoring change.

D. The inclusion of NELs as opposed to NALs for Mercury and PCB Load Reduction Requirements Contained in Provision C.11&12 are Inappropriate and should not have been designated as Numeric Effluent Limitations

After having confirmed that the requirements in MRP 2.0 were best management practices (BMP) and other required actions-based measures, consistent with their TMDL implementation plans, and that good faith compliance with them would create a safe harbor for the co-permittees, staff and counsel then left the Board members in a state of confusion by saying that the mercury and PCBs requirements in the permit were not-fully action-based and by

ultimately acknowledging that failing to meet the numeric criteria would render the co permittees subject to enforcement and third party lawsuits even if they implemented all required actions.¹⁶

Then, contrary to the State Board's own conclusions and use of them, just before the improper closed session at the hearing, Board staff and counsel also told the Board members that NALs would not be effective regulatory mechanisms and suggested that the State Board would see anything other than NELs as insufficiently rigorous.¹⁷

Instead, Board staff and counsel should have presented the Board members with a more objective delineation of the State Board's position on the issue of NALs v. NELs; informed them that the State Board has not precluded the use of NALs as an "ambitious, rigorous, and transparent" alternative to NELs; and left the decision on whether to use NELs or NALs in the Board members' hands in a more objective manner considering: (1) the State Board's own use of them,¹⁸ (2) the State Board's Expert Panel's recommendations concerning the use of NALs in municipal stormwater permits in particular,¹⁹ and (3) the guidance the State Board recently provided specifically on this issue in WQO-2015-0075.

In the latter, although the State Board acknowledged that the Los Angeles Regional Board's use of NELs to implement 33 TMDLs in its area was not error given the number and

¹⁶ Cf. RT-Nov19 at 14:7-19:1 and 156:23-157:7 with 147:1-148:19, 152:19-25, 158:25-160:5.

¹⁷ RT-Nov19 at 167:5-168:10, 170:8-171:1, and 174:8-25.

¹⁸ Storm Water General Permit Order No. 2009-0009-DWQ and Storm Water General Permit Order No. 2014-0057-DWQ.

¹⁹ State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006) at p. 8 ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. . . . For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit basically is not possible.) After the conclusion of the public testimony portion of the adoption hearing, Region 2 staff asserted that SCVURPPP's characterization of the Expert Panel's conclusions were amounted to gross misrepresentation. RT-Nov19 at 131:12-20. Although there is no evidence to support it in the record or elsewhere, they then went on to assert that the Expert Panel's report was outdated and that these experts "were not *thinking* in the context of Effluent Limits . . . which are an enforceable numeric . . . performance measure that will be enforced." RT-Nov19 at 133:1-9 (emphasis supplied.)

nature of TMDLs involved, it then went on to specifically state: “We emphasize, however, that we are not taking the position that [NELs] are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. We also decline to urge the regional water boards to use [NELs] in all MS4 permits.”²⁰

With regard to the Regional Board staff’s repeated assurances to its Board that the permittees concerns with NELs could be sidelined and dealt with later through the exercise of their enforcement discretion, they and counsel should have informed their Board members that the State Board had expressed a different policy preference earlier this year when it stated in WQO-2015-0075: “from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . interim and final TMDLs through provisions built directly into their permit rather than through enforcement orders” – i.e., enforcement orders that could arise from noncompliance with NELs per se.²¹

Beyond these significant process issues, the substantive justification offered by Board staff for treating the numeric performance criteria for PCBs and mercury load reductions as NELs also falls short. First, while they are undoubtedly designed to further implement the region’s mercury and PCBs TMDLs and represent an increment towards getting to the waste load allocations assigned to stormwater therein, there is nothing concrete in the record revealing how the numeric values of the NELs were actually calculated.²² Instead, Board staff state why

²⁰ WQO-2015-0075 at p. 58-59.

²¹ Id. at 31.

²² Region 2 counsel’s last minute effort to try and create a record for their being an adequate substantive basis for the NELs through a wholly conclusory statement by a staff member without the “adequate information” she refers to having been delineated in the record and subject to prior public review and comment, is meaningless. *See* RT-Nov19 at 176:10-19.

they think the load reduction numbers they have identified as NELs for PCBs are feasible to achieve based on the Bay Area's recent performance in terms of new and redevelopment and building demolition and construction.²³ But the staff's economic forecast (which sometimes proves wrong even when done by actual economists) requires no deference given their expertise and has no real basis in the record. Moreover, a plethora of testimony at the adoption hearing demonstrated that even if the staff's prediction concerning the pace of development and construction ends up being on target, there is still likely to be a significant shortfall in all or at least many co-permittees meeting the NELs.²⁴

At one point, staff testified at the adoption hearing that the PCB numbers were "based on an updated assessment of controls to reduce PCBs to the maximum extent practicable and then indicate that their calculation "started with a numerical formula."²⁵ But, importantly, this formula and these calculations are nowhere to be found in the record, and later in their testimony, the same staff member even indicates that they abandoned the formula-based calculation effort.²⁶ Their testimony then goes on to explain that they turned to "a number of sources of information" to come up with the 3 kilogram PCBs load reduction requirement, but once again, these sources were not delineated in the permit's Fact Sheet or elsewhere in the record.²⁷

The Board staff member's further testimony on the issue indicates that the PCBs load reduction numbers in controversy are no more than speculative "guesstimate estimates" that

²³ RT-Nov18 at 26:6-9.

²⁴ *See e.g.*, RT-Nov18 at 138:8-142:18.

²⁵ RT-Nov19 at 135:1-11.

²⁶ *Id.* at 137:11-13.

²⁷ *Id.* at 138:3-5.

represent the idea of “[h]ere is the number, we think it’s attainable.”²⁸ Ultimately, the staff even expressly conceded that “we know that there’s uncertainty with the basis of our numbers,” while trying to reassure the Board members that they could deal with the uncertainty through their future exercise of enforcement discretion.²⁹ (Board counsel then further conceded to one of the Board members that the numbers were uncertain and that the co-permittees would be in non-compliance if they did not meet them despite their good faith efforts to implement all required actions.)³⁰

Finally, in the course of the adoption hearing, Board staff revealed that, when all was said and done, their position on NELs was really based on their preference to avoid having to specify additional required actions and then expending the additional effort necessary to oversee and enforce on them if bad actors emerge among the permittees and refused to meet their implementation obligations.³¹ Instead, they ultimately admitted that their insistence on NELs reflects their frustrations and preference to employ a psychology of “coercion.”³² Not only is this an inappropriate basis for calculating the numbers used for NELs, while they voted to include them based on the mistaken understanding that they were necessary as an alternative to NALs in order to avoid the State Board disapproving the permit, the need for undertaking a coercive

²⁸ Id. at 139:7-8 and 146:19-20. Relative to some communities that are not likely sources of PCBs, the staff’s testimony even went further to characterize the requirements as they might default down to them as “unrealistic.” RT-Nov19 at 153:16-20. *See also* Id. at 168:18-169:7.

²⁹ Id. at 149:17-150:9.

³⁰ Id. at 152:7-25.

³¹ *See* RT-Nov19 at 137:1-6 and 146:13-20.

³² RT-Nov 19 at 171:17-174:3.

approach vis-à-vis the permittees is clearly not a view that was shared by the members of the Regional Board.³³

Thank you for your consideration.

Dated: December 17, 2015

By:  _____
Soren Fajeau, P.E.
Assistant City Engineer
City of Newark

³³ RT-Nov19 at 160:7-161:15, 166:20-167:5, 168:11-169:19, 181:13-183:17, 187:7-188:20, 193:15-194:2 and 196:3-25.

ATTACHMENT A

STATEMENT OF POINTS AND AUTHORITIES

PETITION OF THE CITY OF NEWARK FOR REVIEW OF WASTE DISCHARGE REQUIREMENTS ORDER NO. R2-2015-0049 (NPDES PERMIT CAS612008) FOR DISCHARGES OF MS4s IN THE SAN FRANCISCO BAY REGION - THE SAN FRANCISCO BAY MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP 2)

I) General Factual and Procedural Background

A. Federal and State Statutory Scheme

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

Permits for discharges from municipal storm sewers –

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

33 U.S.C. § 1342(p)(3)(B).

California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.* Respondent

State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act. Water Code § 13160.¹ State and Regional Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued for terms not to exceed five years. *Id.* § 13378 (“Such requirements or permits shall be adopted for a fixed term not to exceed five years.”).

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

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

B. Public Participation Procedural Requirements

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

¹ Water Code Sections 13160 and 13370 et seq. reference the Federal Water Pollution Control Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water Act.

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

33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a state permitting agency to provide at least 30 days for public comment on a draft NPDES permit. 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP 2 that has taken so long in its development and applies to so many co-permittees

The federal regulations also require at least 30 days advance notice of a public hearing on adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the Regional Water Board in consideration of an NPDES permit are governed by the Regional Water Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative Procedure Act (commencing with § 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, § 648(b). Government Code § 11513 provides that each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, to impeach any witness, and to rebut the evidence against the party. Government Code § 11513(b). The Regional Water Board's procedural regulations also establish the right of a party in an adjudicative hearing before the Regional Water Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, § 648.5(a).

Thus, full and meaningful public participation in NPDES permit consideration and especially at the hearing and adoption stages is fundamental to the permitting process.

II. Argument

- A. **The Regional Board's adoption of the final MRP 2.0 was procedurally defective in that it did not comply with basic and required public participation and fair hearing legal requirements.**

The MRP 2.0 is the culmination of nearly three years of resource intensive work by the Regional Board, permittees, and stakeholders. The process has been iterative, and the Regional Board has established a pattern of allowing time between work product iterations to facilitate public participation. Considerable discussions and meetings were held with permittees and other stakeholders prior to the circulation of formal written documents. Prior to and after circulation of the written documents, Steering Committee meetings were often held monthly to encourage staff, and permittee dialogue. The administrative draft permit (Provisions C.2-C.15) was first circulated for public discussion on February 2, 2015. This was followed by publication of a Tentative Order on May 1, 2015 that included the Order, Attachments A-G, and a Summary of Changes to the administrative draft. At that time, a Notice of Public Workshop Hearings and of a Public Comment Period was circulated. The noticed Revised Tentative Order Workshop Hearings were scheduled for June 10 and July 8, 2015. At each of these preliminary stages of the permitting process, the Regional Board provided sufficient notice and solicited public comment on revisions from the prior draft in keeping with the public participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

However, at the critical final stages leading to permit adoption following the May 1, 2015 Notice of Public Workshop Hearings and of a Public Comment Period, the Regional Board departed from its prior efforts to provide for meaningful public participation and fair hearing process. The Regional Board as more fully described below, has ignored the State Water Board directives and statutory mandate with regard to the permit fair hearing process. As a result, permittees have been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It

should not be overlooked that these requirements apply to 76 Permittees in the San Francisco Bay Region that in itself provides for very complex and controversial issues.

1. The June 10 workshop hearing was inappropriately conducted as a Subcommittee meeting.

At the June 10 Regional Board workshop hearing that was scheduled to hear comments on all permit provisions except for Provisions C.10 relating to Trash Load Reduction, the Regional Board failed to have a quorum present to consider the evidence and instead proceeded as a Subcommittee of only three Board Members (Transcript of June 10 Hearing (hereinafter “Tr.”) at pp.7-25). The June 10 workshop hearing was not noticed as a Board Subcommittee meeting nor was the possibility of a Subcommittee referenced in the meeting agenda. Only three Board members heard the public testimony on all permit provisions, except for the Provision C.10 Trash Load Reduction requirements and, thus, deprived permittees the opportunity to address all Board members on most of the critical hearing issues.

2. The recusals of two Board members from participation in the MRP 2.0 hearing process was inappropriate and improper.

The failure of the Regional Board to have a quorum at the noticed June 10 workshop hearing was in part due to the two Board members with significant service and experience in municipal government, Board members Muller and Abe Koga, recusing themselves from participation in the MRP 2.0 hearing and adoption process.

On July 8, 2015 the Regional Board held the second workshop hearing to consider public comments on Provision C.10 Trash Load Reduction. At that workshop hearing Board member Abe-Kobe recused herself from participating stating that although she had no financial conflict of interest under the Political Reform Act, she was recusing herself “to avoid an appearance of

bias”². Then at the November 18 permit adoption hearing, Board member Muller announced that he was also recusing himself from participation in “order to avoid any appearance of bias” due to his relationship to one of the permittees in the MRP 2.0 hearing and adoption process).³ Board member Abe-Kobe restated her recusal at that time as well. Consequently, the two Regional Board members with significant municipal government service and experience did not participate in the MRP 2.0 hearing and adoption process, despite having no financial conflicts under the Political Reform Act.

At the November 18 hearing, Mr. Matt Fabry, Chair of BASMAA, expressed disappointment on behalf of all BASMAA agencies with the recusals of two Board members with municipal government experience.⁴ Given their municipal experience, participation in the Board’s deliberations on MRP 2.0 by these two additional Board members could have brought important diverse perspectives and practical insights into the Region Board’s consideration of MRP 2.0’s requirements and influenced the final vote. These two recusals resulted in a less diverse and representative Regional Board.

3. The failure of the Regional Board to disclose the content of emails that were exchanged between Board members was inappropriate and improper.

During the July 8 workshop hearing on Trash Load Reduction permit issues, Chair Young stated that that two of the Subcommittee members had exchanged emails, but the content

² July 8 Tr.p.6&7

³ November 18 Tr.p.6

⁴ November 18 Tr.p.132.

of those emails was not disclosed in the public record.⁵ Thus, permittees were deprived of knowing the content of some of the information considered by Regional Board members.

4. At the July 8 workshop hearing and at the November 18 permit adoption hearing, Regional Board members inappropriately stated their tentative conclusions on Trash Load Reduction requirements prior to receiving public testimony.

At the commencement of the July 8 workshop hearing, the Subcommittee members Young and Lefkowitz, plus Board member McGrath who stated that he had read the June 10th hearing transcript, provided Subcommittee comments on issues from the June 10 Subcommittee workshop hearing⁶. The third member of the Subcommittee, who may have brought a different perspective on the same testimony to the discussion, did not participate in these communications or otherwise have input into the Subcommittee's report and recommendations; nor was she present when the Subcommittee's report and recommendations were presented to the Board at a hearing on July 8.

The Board then moved on to Trash Load Reduction, Provision C.10. The deadline for submission of written comments on all permit issues including trash was July 10th, thus, Regional Board members as of the July 8 workshop hearing had not yet had any opportunity to hear or to see any permittee or other stakeholder written comments or hear hearing testimony relating to trash load reduction. Despite this lack of public input, and after the Regional Board staff had made their presentation in support of the Trash Load Reduction May 11 Tentative

⁵ July 8 Tr., p.18.

⁶ It should be noted that Board member Kissinger who was in attendance at the July 8th workshop hearing, but not the June 10 workshop hearing, did not state that he had read the June 10th workshop hearing transcript. It should also be noted that Board member Ajami, who did not attend the July 8th workshop hearing, has not stated in the record that she has read the transcript of that proceeding.

Order, Chair Young announced that prior to public testimony on Trash Load Reduction provisions, the Regional Board members would state their “tentative thinking” (July 8 Tr., p.41, lines 1-2).⁷ Based on the Board members “many quizzical expressions,” Chair Young first provided her tentative thinking (July 8 Tr., p.41, lines 2-3). Regional Board members then, without the benefit of any public input in the process, provided their lengthy “tentative thinking.” Consequently, after the staff presentation and Board member statements of their tentative thinking on the Trash Load Reduction provisions, the impression was created with many permittees that the Board members had basically made up their minds without hearing from the permittees and other stakeholders.

Then again at the November 18 permit adoption hearing, following the Board staff presentation, the Board stated their tentative opinions on all requirements in the permit, prior to hearing any public testimony from permittees and other stakeholders. This again had a chilling effect on the public testimony that followed.

5. At the November 18/19 permit adoption hearing, the Regional Board inappropriately considered written Staff Supplemental revisions and Chair Young’s Supplemental revisions.

On November 10, the Regional Water Board published a new “Revised Tentative Order” for reissuance of the MRP 2.0, to be proposed for adoption by the full Regional Water Board at its regularly scheduled November 18/19 meeting. This also included a List of Errata Corrections and Clarifications as well as revised Appendices A-G which included the Fact Sheet. Permittees had only eight days to consider these late revisions.

⁷ July 8 Tr.pp.14-56.

At the November 18/19 permit adoption hearing, the Regional Board commenced their final consideration of MRP 2.0. The Regional Board's October 19 Notice of Public Hearing to Consider Adoption of MRP 2.0 clearly stated that participants were "encouraged" to limit testimony to revisions to the Revised Tentative Order, and that the Board "will not accept any additional written comments." Permittees followed this directive regarding additional written comments. Despite this directive, on the morning of the November 18 hearing, the Regional Board staff passed out yet another new written Staff Supplement document that significantly increased the frequency of visual trash assessments in the Trash Load Reduction provision of the permit. See Attachment B

Furthermore, during the course of hearing testimony on November 18, Chair Young also introduced a new written two page Supplemental containing significant revisions to the Trash Load Reduction receiving water monitoring requirements.⁸ See Attachment C. Both of these late written revision submissions introduced by Board staff and Chair Young of burdensome significant revisions not only were contrary to the Hearing Notice directive of no additional written comments, but most importantly did not provide the opportunity for permittees to adequately consider these significant changes and provide appropriate comments to the Board.

Objections were made by several commenters to Board consideration of these two supplemental revisions. See the comments of Gary Grimm, legal counsel for the Alameda Countywide Clean Water Program.⁹

There is no dispute that the Staff Supplemental and the Supplemental revisions introduced by Chair Young contained substantive changes from the Revised Tentative Order that

⁸ November 18 Tr.p.54

⁹ November 18 Tr.p.253-4

was the subject of the Regional Board’s November 18/19 hearing, or that the changes will result in additional costs and burdens on permittees. The Regional Water Board’s statement that these revisions were the “outgrowth of comments” submitted by Permittees and other interested persons is not accurate, is an oversimplification of the changes, and does not justify the lack of opportunity to allow written comments on these revisions. Witnesses who appeared on behalf of Permittees objected to the imposition of these costly, burdensome and inflexible new provisions being added so late in the process and without the opportunity to provide more detailed comments, and testified to the lack of available public resources to fund them.

Moreover, even if these Supplementals really only contained clarifications, at the very minimum, the public should have received notice of them at least 10 days prior to the hearing in order to have a real and meaningful opportunity to review and prepare testimony on their implications. While the Regional Board staff was allowed to reply to all hearing comments with no time limit at the hearing at the November 19th hearing once public testimony was concluded, and was questioned by the members of the Regional Board, no additional time was allotted for Permittees to question staff directly or to submit additional evidence in response to staff conclusions on the supplemental material.

6. The Board did not provide requisite notice to the public that “numeric performance criteria” for mercury and PCBs loading reduction contained in MRP 2.0 were intended as Numeric Effluent Limits (“NELs”) rather than Numeric Action Levers (“NALs”) until they released their Response to Comments document on October 19 in conjunction with the permit adoption hearing.

The ambiguous nature of the term “numeric performance criteria” in the permit and its fact sheet resulted in extensive testimony at the June 10, 2015 hearing on the nontrash related

requirements of the draft permit and generated an associated formal request for clarification in terms of the NEL vs. NAL distinction in written comments which followed on July 9, 2015.

Hence, as a practical matter, the Response to Comments document's *first time* insistence that the numeric performance criteria were NELs and not something else effected a material change in the nature of the permit's requirements and the associated potential third party liability consequences to permittees in the event they are unable to fully comply with them. As such, it should have resulted in a re-opening of the written public comment period.

7. **Following the public testimony at the permit adoption hearing on November 19, the Regional Board inappropriately conducted lengthy deliberations in closed session.**

Final deliberations of the Regional Board members at the adoption hearing on November 19 concerning their resolution of key contested issues (including issues concerning the imposition of NELs rather than NALs for mercury and PCBs) occurred in a lengthy, 1 hour and 45 minute closed session that was also insufficiently noticed and which was otherwise unauthorized even in the context of an adjudicative proceeding of this nature.¹⁰ This precluded

¹⁰ The Board meeting agenda does not provide notice of a closed session in conjunction with its specified item on MRP 2.0 (Item 7). Instead, Agenda Item 11 just contains a boilerplate reference to a closed session for "Deliberation," the authority referenced for which is Government Code section 11126(c)(3). There is also a further explanatory note contained in a boilerplate attachment to the Agenda that explains that the Board may adjourn to a closed session at any time during the regular session to, among other things, deliberate, based on the authority provided by "Government Code section 11126(a), (d) and (q)." Putting aside for a moment the question of whether any of these statutory references provide authorization for a closed session in these circumstances, what they clearly do not do is override Government Code section 11125(b)'s independent requirement to provide clear advanced notice to the public of "an item" to be discussed in closed session.

Moreover, in terms of providing authorization for a closed session on the MRP 2.0 adoption item, these references are either inapposite or non-existent. Even Government Code 11126(c)(3) extends only to deliberations on proceedings conducted pursuant to Government Code section 11500 or similar provisions of law. But Section 11500 *et seq.* concerns only proceedings conducted by administrative law judges and, to the extent Government Code section 11400 *et seq.* is considered similar, its general rule is that even an adjudicative hearing "shall be open to public observation" and may only be closed for certain limited purposes, none of which presented themselves here. *See* Cal. Gov. Code §§ 11425.10(a)(3) and 11425.20(a)(1)-(3). Government Code section 11126(e), which was *not* referenced on the Agenda, also does not apply here since there is no significant exposure to litigation against Region 2 and, in any event, Region 2's counsel did not timely prepare and submit the requisite memorandum detailing the

direct observation by, and full accountability to, members of the public, as both the spirit and the letter of the Bagley-Keene Act demand.

With regard to the above seven cumulative arguments relating to lack of fair hearing and lack of adequate opportunity for public participation, under circumstances similar in some ways to those described above, the State Board has expressed concern that such proceedings were insufficient to assure that all participants were allowed adequate opportunity to be heard:

But we are concerned that at the . . . hearing, interested persons and permittees *were not given adequate time to review late revisions or to comment on them.* Given the intense interest in this issue, *the 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.

In re The Cities of Bellflower et al., State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board's regulations. *Id.* at *24 n.25 ("For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et

specific reasons and legal authority for closing the session on this basis. See Cal. Gov. Code 11126(e)(1), (e)(2), and (e)(2)(B) and (C)(ii).

Finally, even if the above were not the case, the transcript of the open hearing reveals that the closed session's purpose was not deliberating evidence but rather, ultimately without apparent success, for the Board members to try and craft new permit language to resolve the NEL v. NAL issue in a manner addressing the co-permittees concerns. RT-Nov19 at 160:7-161:2. (As has been observed relative to general permits issued in California, the line between adjudicative and quasi-legislative action and associated procedural rules governing the board members blurs in a proceeding to develop a single set of requirements governing a large number of co-permittees, like the 76 present here such that erring on the side of transparency concerning the Region 2 Board members' decision-making is in order relative to this closed session issue.)

seq.”) Those regulations require the Regional Water Board to allow interested parties the opportunity to present contrary evidence. Cal. Code Regs, tit. 23, § 648.5(a).

B. Visual Assessment Requirements of Trash Load Reduction Outcomes are Unreasonable, Inappropriate, and Legally Defective.

There is a lack of documentation in the record that demonstrates that the visual assessment protocol contained in the Trash Load Reduction Control Provision C.10 is an accurate and reliable method for determining compliance with the permit’s trash load reduction requirements. See Provision C.10.b.ii.b. To the contrary, the prescribed methodology that was proposed in the Revised Tentative Order and that was included in the final permit adds burdensome permittee expense to conduct an unreliable methodology. Lesley Estes of the City of Oakland provided specific examples in her testimony of their experience of why visual assessments is a very expensive way to achieve non-meaningful results and doesn’t effectively address trash cleanup.¹¹

In addition to the inappropriateness of the Revised Tentative Order visual assessment methodology, as has been previously mentioned the Board staff at the beginning of the hearing, and contrary to the rules of the hearing as set forth in the Notice of Hearing, introduced a written Supplemental sheet that among other things further significantly revised the requirements and purports to clarify information in the Fact Sheet on frequency of visual assessments in Provision C.10.b.ii.b.(i-iv). These revisions will result in a significant increase of the frequency of required visual assessment for some areas. Permittees were not able to adequately consider and respond to these late revisions, however, Board staff was allowed to fully explain and comment on the public testimony for these revisions.

¹¹ Nov 18 Tr.p.216

Despite the time limitations to consider these revisions, Mr. Phil Bobel of the City of Palo Alto testified that his quick estimate of the trash visual assessment revisions proposed in the staff Supplement would triple their visual assessments, and that this revision caught them off-guard.¹² Ms. Melody Tovar of the City of Sunnyvale commented that she agreed with Mr. Bobel's comments that the increased visual trash assessment Supplemental revisions simply add more cost without benefit.¹³ Finally, Ms. Leah Goldberg, Senior Deputy City Attorney for the City of San Jose, testified that they had only briefly considered the Supplemental revision and urged the Board not to adopt the revisions.¹⁴

Staff member Mumley added further uncertainty to this discussion by stating that the revisions to the Fact Sheet on visual assessments is not directly enforceable, is intended as guidance only, that it's not a substantial change, and that the numbers are a guide and not mandatory.¹⁵ This statement is questionable to the permittees and gives permittees little comfort given the risk of third party liability and that Finding 1 of the Revised Tentative Order incorporates the Fact Sheet by reference.

C. The Provision C.10 Trash Reduction Outcomes Receiving Water Monitoring Provisions, the Development and Testing Plan, and Reporting Requirement Revisions Introduced by Chair Young at the November 18 Hearing are Inappropriate and Improper.

As previously referenced, two pages of significant written revisions to Trash Reduction Outcomes requirements were introduced during the course of the November 18 hearing by Chair

¹² Nov 18 Tr.p.156

¹³ Nov 18 Tr.p.175-6

¹⁴ Nov 18 Tr.p.226

¹⁵ Nov 19 Tr.pp118-120.

Young. This was contrary to the rules for written comments provided in the Hearing Notice and did not afford permittees and other members of the public sufficient opportunity to review and comment on the revisions.

As a consequence of this procedural error, the hearing record contains relatively little information on the issues presented by the Provision C.10.b.v. and C.10.f. revisions that required a specific receiving water monitoring proposed program to be approved by the Executive Officer, rather than developing water monitoring tools and protocols. There was simply not sufficient time for permittees to review, discuss, and comment on these revisions. Provisions C.10.b.v.a. and C.10.f are inappropriate revisions in that they requires permittees to submit a plan to develop and test a receiving water monitoring program containing new criteria not previously considered, rather than a plan to develop tools and protocols; and similar changes to Provisions C.10.b.v.b and C.10.f Reporting. This is a substantial receiving water monitoring change.

D. The inclusion of NELs as opposed to NALs for Mercury and PCB Load Reduction Requirements Contained in Provision C.11&12 are Inappropriate and should not have been designated as Numeric Effluent Limitations

After having confirmed that the requirements in MRP 2.0 were best management practices (BMP) and other required actions-based measures, consistent with their TMDL implementation plans, and that good faith compliance with them would create a safe harbor for the co-permittees, staff and counsel then left the Board members in a state of confusion by saying that the mercury and PCBs requirements in the permit were not-fully action-based and by

ultimately acknowledging that failing to meet the numeric criteria would render the co permittees subject to enforcement and third party lawsuits even if they implemented all required actions.¹⁶

Then, contrary to the State Board's own conclusions and use of them, just before the improper closed session at the hearing, Board staff and counsel also told the Board members that NALs would not be effective regulatory mechanisms and suggested that the State Board would see anything other than NELs as insufficiently rigorous.¹⁷

Instead, Board staff and counsel should have presented the Board members with a more objective delineation of the State Board's position on the issue of NALs v. NELs; informed them that the State Board has not precluded the use of NALs as an "ambitious, rigorous, and transparent" alternative to NELs; and left the decision on whether to use NELs or NALs in the Board members' hands in a more objective manner considering: (1) the State Board's own use of them,¹⁸ (2) the State Board's Expert Panel's recommendations concerning the use of NALs in municipal stormwater permits in particular,¹⁹ and (3) the guidance the State Board recently provided specifically on this issue in WQO-2015-0075.

In the latter, although the State Board acknowledged that the Los Angeles Regional Board's use of NELs to implement 33 TMDLs in its area was not error given the number and

¹⁶ Cf. RT-Nov19 at 14:7-19:1 and 156:23-157:7 with 147:1-148:19, 152:19-25, 158:25-160:5.

¹⁷ RT-Nov19 at 167:5-168:10, 170:8-171:1, and 174:8-25.

¹⁸ Storm Water General Permit Order No. 2009-0009-DWQ and Storm Water General Permit Order No. 2014-0057-DWQ.

¹⁹ State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006) at p. 8 ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. . . . For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit basically is not possible.) After the conclusion of the public testimony portion of the adoption hearing, Region 2 staff asserted that SCVURPPP's characterization of the Expert Panel's conclusions were amounted to gross misrepresentation. RT-Nov19 at 131:12-20. Although there is no evidence to support it in the record or elsewhere, they then went on to assert that the Expert Panel's report was outdated and that these experts "were not *thinking* in the context of Effluent Limits . . . which are an enforceable numeric . . . performance measure that will be enforced." RT-Nov19 at 133:1-9 (emphasis supplied.)

nature of TMDLs involved, it then went on to specifically state: “We emphasize, however, that we are not taking the position that [NELs] are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. We also decline to urge the regional water boards to use [NELs] in all MS4 permits.”²⁰

With regard to the Regional Board staff’s repeated assurances to its Board that the permittees concerns with NELs could be sidelined and dealt with later through the exercise of their enforcement discretion, they and counsel should have informed their Board members that the State Board had expressed a different policy preference earlier this year when it stated in WQO-2015-0075: “from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . interim and final TMDLs through provisions built directly into their permit rather than through enforcement orders” – i.e., enforcement orders that could arise from noncompliance with NELs per se.²¹

Beyond these significant process issues, the substantive justification offered by Board staff for treating the numeric performance criteria for PCBs and mercury load reductions as NELs also falls short. First, while they are undoubtedly designed to further implement the region’s mercury and PCBs TMDLs and represent an increment towards getting to the waste load allocations assigned to stormwater therein, there is nothing concrete in the record revealing how the numeric values of the NELs were actually calculated.²² Instead, Board staff state why

²⁰ WQO-2015-0075 at p. 58-59.

²¹ Id. at 31.

²² Region 2 counsel’s last minute effort to try and create a record for their being an adequate substantive basis for the NELs through a wholly conclusory statement by a staff member without the “adequate information” she refers to having been delineated in the record and subject to prior public review and comment, is meaningless. *See* RT-Nov19 at 176:10-19.

they think the load reduction numbers they have identified as NELs for PCBs are feasible to achieve based on the Bay Area's recent performance in terms of new and redevelopment and building demolition and construction.²³ But the staff's economic forecast (which sometimes proves wrong even when done by actual economists) requires no deference given their expertise and has no real basis in the record. Moreover, a plethora of testimony at the adoption hearing demonstrated that even if the staff's prediction concerning the pace of development and construction ends up being on target, there is still likely to be a significant shortfall in all or at least many co-permittees meeting the NELs.²⁴

At one point, staff testified at the adoption hearing that the PCB numbers were "based on an updated assessment of controls to reduce PCBs to the maximum extent practicable and then indicate that their calculation "started with a numerical formula."²⁵ But, importantly, this formula and these calculations are nowhere to be found in the record, and later in their testimony, the same staff member even indicates that they abandoned the formula-based calculation effort.²⁶ Their testimony then goes on to explain that they turned to "a number of sources of information" to come up with the 3 kilogram PCBs load reduction requirement, but once again, these sources were not delineated in the permit's Fact Sheet or elsewhere in the record.²⁷

The Board staff member's further testimony on the issue indicates that the PCBs load reduction numbers in controversy are no more than speculative "guesstimate estimates" that

²³ RT-Nov18 at 26:6-9.

²⁴ *See e.g.*, RT-Nov18 at 138:8-142:18.

²⁵ RT-Nov19 at 135:1-11.

²⁶ *Id.* at 137:11-13.

²⁷ *Id.* at 138:3-5.

represent the idea of “[h]ere is the number, we think it’s attainable.”²⁸ Ultimately, the staff even expressly conceded that “we know that there’s uncertainty with the basis of our numbers,” while trying to reassure the Board members that they could deal with the uncertainty through their future exercise of enforcement discretion.²⁹ (Board counsel then further conceded to one of the Board members that the numbers were uncertain and that the co-permittees would be in non-compliance if they did not meet them despite their good faith efforts to implement all required actions.)³⁰

Finally, in the course of the adoption hearing, Board staff revealed that, when all was said and done, their position on NELs was really based on their preference to avoid having to specify additional required actions and then expending the additional effort necessary to oversee and enforce on them if bad actors emerge among the permittees and refused to meet their implementation obligations.³¹ Instead, they ultimately admitted that their insistence on NELs reflects their frustrations and preference to employ a psychology of “coercion.”³² Not only is this an inappropriate basis for calculating the numbers used for NELs, while they voted to include them based on the mistaken understanding that they were necessary as an alternative to NALs in order to avoid the State Board disapproving the permit, the need for undertaking a coercive

²⁸ Id. at 139:7-8 and 146:19-20. Relative to some communities that are not likely sources of PCBs, the staff’s testimony even went further to characterize the requirements as they might default down to them as “unrealistic.” RT-Nov19 at 153:16-20. *See also* Id. at 168:18-169:7.

²⁹ Id. at 149:17-150:9.

³⁰ Id. at 152:7-25.

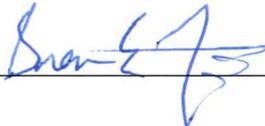
³¹ *See* RT-Nov19 at 137:1-6 and 146:13-20.

³² RT-Nov 19 at 171:17-174:3.

approach vis-à-vis the permittees is clearly not a view that was shared by the members of the Regional Board.³³

Thank you for your consideration.

Dated: December 17, 2015

By: 

Soren Fajeau, P.E.
Assistant City Engineer
City of Newark

³³ RT-Nov19 at 160:7-161:15, 166:20-167:5, 168:11-169:19, 181:13-183:17, 187:7-188:20, 193:15-194:2 and 196:3-25.

ATTACHMENT A

STATEMENT OF POINTS AND AUTHORITIES

PETITION OF THE CITY OF NEWARK FOR REVIEW OF WASTE DISCHARGE REQUIREMENTS ORDER NO. R2-2015-0049 (NPDES PERMIT CAS612008) FOR DISCHARGES OF MS4s IN THE SAN FRANCISCO BAY REGION - THE SAN FRANCISCO BAY MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP 2)

I) General Factual and Procedural Background

A. Federal and State Statutory Scheme

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

Permits for discharges from municipal storm sewers –

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

33 U.S.C. § 1342(p)(3)(B).

California is among the states that are authorized to implement the NPDES permit program. 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.* Respondent

State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act. Water Code § 13160.¹ State and Regional Water Boards are authorized to issue NPDES permits. Water Code § 13377. NPDES permits are issued for terms not to exceed five years. *Id.* § 13378 (“Such requirements or permits shall be adopted for a fixed term not to exceed five years.”).

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

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

B. Public Participation Procedural Requirements

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

¹ Water Code Sections 13160 and 13370 et seq. reference the Federal Water Pollution Control Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the Clean Water Act.

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

33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a state permitting agency to provide at least 30 days for public comment on a draft NPDES permit. 40 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP 2 that has taken so long in its development and applies to so many co-permittees

The federal regulations also require at least 30 days advance notice of a public hearing on adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the Regional Water Board in consideration of an NPDES permit are governed by the Regional Water Board's own regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative Procedure Act (commencing with § 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, § 648(b). Government Code § 11513 provides that each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, to impeach any witness, and to rebut the evidence against the party. Government Code § 11513(b). The Regional Water Board's procedural regulations also establish the right of a party in an adjudicative hearing before the Regional Water Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, § 648.5(a).

Thus, full and meaningful public participation in NPDES permit consideration and especially at the hearing and adoption stages is fundamental to the permitting process.

II. Argument

- A. **The Regional Board's adoption of the final MRP 2.0 was procedurally defective in that it did not comply with basic and required public participation and fair hearing legal requirements.**

The MRP 2.0 is the culmination of nearly three years of resource intensive work by the Regional Board, permittees, and stakeholders. The process has been iterative, and the Regional Board has established a pattern of allowing time between work product iterations to facilitate public participation. Considerable discussions and meetings were held with permittees and other stakeholders prior to the circulation of formal written documents. Prior to and after circulation of the written documents, Steering Committee meetings were often held monthly to encourage staff, and permittee dialogue. The administrative draft permit (Provisions C.2-C.15) was first circulated for public discussion on February 2, 2015. This was followed by publication of a Tentative Order on May 1, 2015 that included the Order, Attachments A-G, and a Summary of Changes to the administrative draft. At that time, a Notice of Public Workshop Hearings and of a Public Comment Period was circulated. The noticed Revised Tentative Order Workshop Hearings were scheduled for June 10 and July 8, 2015. At each of these preliminary stages of the permitting process, the Regional Board provided sufficient notice and solicited public comment on revisions from the prior draft in keeping with the public participation requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R § 124.10(b)(2).

However, at the critical final stages leading to permit adoption following the May 1, 2015 Notice of Public Workshop Hearings and of a Public Comment Period, the Regional Board departed from its prior efforts to provide for meaningful public participation and fair hearing process. The Regional Board as more fully described below, has ignored the State Water Board directives and statutory mandate with regard to the permit fair hearing process. As a result, permittees have been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It

should not be overlooked that these requirements apply to 76 Permittees in the San Francisco Bay Region that in itself provides for very complex and controversial issues.

1. The June 10 workshop hearing was inappropriately conducted as a Subcommittee meeting.

At the June 10 Regional Board workshop hearing that was scheduled to hear comments on all permit provisions except for Provisions C.10 relating to Trash Load Reduction, the Regional Board failed to have a quorum present to consider the evidence and instead proceeded as a Subcommittee of only three Board Members (Transcript of June 10 Hearing (hereinafter “Tr.”) at pp.7-25). The June 10 workshop hearing was not noticed as a Board Subcommittee meeting nor was the possibility of a Subcommittee referenced in the meeting agenda. Only three Board members heard the public testimony on all permit provisions, except for the Provision C.10 Trash Load Reduction requirements and, thus, deprived permittees the opportunity to address all Board members on most of the critical hearing issues.

2. The recusals of two Board members from participation in the MRP 2.0 hearing process was inappropriate and improper.

The failure of the Regional Board to have a quorum at the noticed June 10 workshop hearing was in part due to the two Board members with significant service and experience in municipal government, Board members Muller and Abe Koga, recusing themselves from participation in the MRP 2.0 hearing and adoption process.

On July 8, 2015 the Regional Board held the second workshop hearing to consider public comments on Provision C.10 Trash Load Reduction. At that workshop hearing Board member Abe-Kobe recused herself from participating stating that although she had no financial conflict of interest under the Political Reform Act, she was recusing herself “to avoid an appearance of

bias”². Then at the November 18 permit adoption hearing, Board member Muller announced that he was also recusing himself from participation in “order to avoid any appearance of bias” due to his relationship to one of the permittees in the MRP 2.0 hearing and adoption process).³ Board member Abe-Kobe restated her recusal at that time as well. Consequently, the two Regional Board members with significant municipal government service and experience did not participate in the MRP 2.0 hearing and adoption process, despite having no financial conflicts under the Political Reform Act.

At the November 18 hearing, Mr. Matt Fabry, Chair of BASMAA, expressed disappointment on behalf of all BASMAA agencies with the recusals of two Board members with municipal government experience.⁴ Given their municipal experience, participation in the Board’s deliberations on MRP 2.0 by these two additional Board members could have brought important diverse perspectives and practical insights into the Region Board’s consideration of MRP 2.0’s requirements and influenced the final vote. These two recusals resulted in a less diverse and representative Regional Board.

3. The failure of the Regional Board to disclose the content of emails that were exchanged between Board members was inappropriate and improper.

During the July 8 workshop hearing on Trash Load Reduction permit issues, Chair Young stated that that two of the Subcommittee members had exchanged emails, but the content

² July 8 Tr.p.6&7

³ November 18 Tr.p.6

⁴ November 18 Tr.p.132.

of those emails was not disclosed in the public record.⁵ Thus, permittees were deprived of knowing the content of some of the information considered by Regional Board members.

4. At the July 8 workshop hearing and at the November 18 permit adoption hearing, Regional Board members inappropriately stated their tentative conclusions on Trash Load Reduction requirements prior to receiving public testimony.

At the commencement of the July 8 workshop hearing, the Subcommittee members Young and Lefkowitz, plus Board member McGrath who stated that he had read the June 10th hearing transcript, provided Subcommittee comments on issues from the June 10 Subcommittee workshop hearing⁶. The third member of the Subcommittee, who may have brought a different perspective on the same testimony to the discussion, did not participate in these communications or otherwise have input into the Subcommittee's report and recommendations; nor was she present when the Subcommittee's report and recommendations were presented to the Board at a hearing on July 8.

The Board then moved on to Trash Load Reduction, Provision C.10. The deadline for submission of written comments on all permit issues including trash was July 10th, thus, Regional Board members as of the July 8 workshop hearing had not yet had any opportunity to hear or to see any permittee or other stakeholder written comments or hear hearing testimony relating to trash load reduction. Despite this lack of public input, and after the Regional Board staff had made their presentation in support of the Trash Load Reduction May 11 Tentative

⁵ July 8 Tr., p.18.

⁶ It should be noted that Board member Kissinger who was in attendance at the July 8th workshop hearing, but not the June 10 workshop hearing, did not state that he had read the June 10th workshop hearing transcript. It should also be noted that Board member Ajami, who did not attend the July 8th workshop hearing, has not stated in the record that she has read the transcript of that proceeding.

Order, Chair Young announced that prior to public testimony on Trash Load Reduction provisions, the Regional Board members would state their “tentative thinking” (July 8 Tr., p.41, lines 1-2).⁷ Based on the Board members “many quizzical expressions,” Chair Young first provided her tentative thinking (July 8 Tr., p.41, lines 2-3). Regional Board members then, without the benefit of any public input in the process, provided their lengthy “tentative thinking.” Consequently, after the staff presentation and Board member statements of their tentative thinking on the Trash Load Reduction provisions, the impression was created with many permittees that the Board members had basically made up their minds without hearing from the permittees and other stakeholders.

Then again at the November 18 permit adoption hearing, following the Board staff presentation, the Board stated their tentative opinions on all requirements in the permit, prior to hearing any public testimony from permittees and other stakeholders. This again had a chilling effect on the public testimony that followed.

5. At the November 18/19 permit adoption hearing, the Regional Board inappropriately considered written Staff Supplemental revisions and Chair Young’s Supplemental revisions.

On November 10, the Regional Water Board published a new “Revised Tentative Order” for reissuance of the MRP 2.0, to be proposed for adoption by the full Regional Water Board at its regularly scheduled November 18/19 meeting. This also included a List of Errata Corrections and Clarifications as well as revised Appendices A-G which included the Fact Sheet. Permittees had only eight days to consider these late revisions.

⁷ July 8 Tr.pp.14-56.

At the November 18/19 permit adoption hearing, the Regional Board commenced their final consideration of MRP 2.0. The Regional Board's October 19 Notice of Public Hearing to Consider Adoption of MRP 2.0 clearly stated that participants were "encouraged" to limit testimony to revisions to the Revised Tentative Order, and that the Board "will not accept any additional written comments." Permittees followed this directive regarding additional written comments. Despite this directive, on the morning of the November 18 hearing, the Regional Board staff passed out yet another new written Staff Supplement document that significantly increased the frequency of visual trash assessments in the Trash Load Reduction provision of the permit. See Attachment B

Furthermore, during the course of hearing testimony on November 18, Chair Young also introduced a new written two page Supplemental containing significant revisions to the Trash Load Reduction receiving water monitoring requirements.⁸ See Attachment C. Both of these late written revision submissions introduced by Board staff and Chair Young of burdensome significant revisions not only were contrary to the Hearing Notice directive of no additional written comments, but most importantly did not provide the opportunity for permittees to adequately consider these significant changes and provide appropriate comments to the Board.

Objections were made by several commenters to Board consideration of these two supplemental revisions. See the comments of Gary Grimm, legal counsel for the Alameda Countywide Clean Water Program.⁹

There is no dispute that the Staff Supplemental and the Supplemental revisions introduced by Chair Young contained substantive changes from the Revised Tentative Order that

⁸ November 18 Tr.p.54

⁹ November 18 Tr.p.253-4

was the subject of the Regional Board’s November 18/19 hearing, or that the changes will result in additional costs and burdens on permittees. The Regional Water Board’s statement that these revisions were the “outgrowth of comments” submitted by Permittees and other interested persons is not accurate, is an oversimplification of the changes, and does not justify the lack of opportunity to allow written comments on these revisions. Witnesses who appeared on behalf of Permittees objected to the imposition of these costly, burdensome and inflexible new provisions being added so late in the process and without the opportunity to provide more detailed comments, and testified to the lack of available public resources to fund them.

Moreover, even if these Supplementals really only contained clarifications, at the very minimum, the public should have received notice of them at least 10 days prior to the hearing in order to have a real and meaningful opportunity to review and prepare testimony on their implications. While the Regional Board staff was allowed to reply to all hearing comments with no time limit at the hearing at the November 19th hearing once public testimony was concluded, and was questioned by the members of the Regional Board, no additional time was allotted for Permittees to question staff directly or to submit additional evidence in response to staff conclusions on the supplemental material.

6. The Board did not provide requisite notice to the public that “numeric performance criteria” for mercury and PCBs loading reduction contained in MRP 2.0 were intended as Numeric Effluent Limits (“NELs”) rather than Numeric Action Levers (“NALs”) until they released their Response to Comments document on October 19 in conjunction with the permit adoption hearing.

The ambiguous nature of the term “numeric performance criteria” in the permit and its fact sheet resulted in extensive testimony at the June 10, 2015 hearing on the nontrash related

requirements of the draft permit and generated an associated formal request for clarification in terms of the NEL vs. NAL distinction in written comments which followed on July 9, 2015.

Hence, as a practical matter, the Response to Comments document's *first time* insistence that the numeric performance criteria were NELs and not something else effected a material change in the nature of the permit's requirements and the associated potential third party liability consequences to permittees in the event they are unable to fully comply with them. As such, it should have resulted in a re-opening of the written public comment period.

7. Following the public testimony at the permit adoption hearing on November 19, the Regional Board inappropriately conducted lengthy deliberations in closed session.

Final deliberations of the Regional Board members at the adoption hearing on November 19 concerning their resolution of key contested issues (including issues concerning the imposition of NELs rather than NALs for mercury and PCBs) occurred in a lengthy, 1 hour and 45 minute closed session that was also insufficiently noticed and which was otherwise unauthorized even in the context of an adjudicative proceeding of this nature.¹⁰ This precluded

¹⁰ The Board meeting agenda does not provide notice of a closed session in conjunction with its specified item on MRP 2.0 (Item 7). Instead, Agenda Item 11 just contains a boilerplate reference to a closed session for "Deliberation," the authority referenced for which is Government Code section 11126(c)(3). There is also a further explanatory note contained in a boilerplate attachment to the Agenda that explains that the Board may adjourn to a closed session at any time during the regular session to, among other things, deliberate, based on the authority provided by "Government Code section 11126(a), (d) and (q)." Putting aside for a moment the question of whether any of these statutory references provide authorization for a closed session in these circumstances, what they clearly do not do is override Government Code section 11125(b)'s independent requirement to provide clear advanced notice to the public of "an item" to be discussed in closed session.

Moreover, in terms of providing authorization for a closed session on the MRP 2.0 adoption item, these references are either inapposite or non-existent. Even Government Code 11126(c)(3) extends only to deliberations on proceedings conducted pursuant to Government Code section 11500 or similar provisions of law. But Section 11500 *et seq.* concerns only proceedings conducted by administrative law judges and, to the extent Government Code section 11400 *et seq.* is considered similar, its general rule is that even an adjudicative hearing "shall be open to public observation" and may only be closed for certain limited purposes, none of which presented themselves here. *See* Cal. Gov. Code §§ 11425.10(a)(3) and 11425.20(a)(1)-(3). Government Code section 11126(e), which was *not* referenced on the Agenda, also does not apply here since there is no significant exposure to litigation against Region 2 and, in any event, Region 2's counsel did not timely prepare and submit the requisite memorandum detailing the

direct observation by, and full accountability to, members of the public, as both the spirit and the letter of the Bagley-Keene Act demand.

With regard to the above seven cumulative arguments relating to lack of fair hearing and lack of adequate opportunity for public participation, under circumstances similar in some ways to those described above, the State Board has expressed concern that such proceedings were insufficient to assure that all participants were allowed adequate opportunity to be heard:

But we are concerned that at the . . . hearing, interested persons and permittees *were not given adequate time to review late revisions or to comment on them*. Given the intense interest in this issue, *the 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.

In re The Cities of Bellflower et al., State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board's regulations. *Id.* at *24 n.25 (“For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et

specific reasons and legal authority for closing the session on this basis. See Cal. Gov. Code 11126(e)(1), (e)(2), and (e)(2)(B) and (C)(ii).

Finally, even if the above were not the case, the transcript of the open hearing reveals that the closed session's purpose was not deliberating evidence but rather, ultimately without apparent success, for the Board members to try and craft new permit language to resolve the NEL v. NAL issue in a manner addressing the co-permittees concerns. RT-Nov19 at 160:7-161:2. (As has been observed relative to general permits issued in California, the line between adjudicative and quasi-legislative action and associated procedural rules governing the board members blurs in a proceeding to develop a single set of requirements governing a large number of co-permittees, like the 76 present here such that erring on the side of transparency concerning the Region 2 Board members' decision-making is in order relative to this closed session issue.)

seq.”) Those regulations require the Regional Water Board to allow interested parties the opportunity to present contrary evidence. Cal. Code Regs, tit. 23, § 648.5(a).

B. Visual Assessment Requirements of Trash Load Reduction Outcomes are Unreasonable, Inappropriate, and Legally Defective.

There is a lack of documentation in the record that demonstrates that the visual assessment protocol contained in the Trash Load Reduction Control Provision C.10 is an accurate and reliable method for determining compliance with the permit’s trash load reduction requirements. See Provision C.10.b.ii.b. To the contrary, the prescribed methodology that was proposed in the Revised Tentative Order and that was included in the final permit adds burdensome permittee expense to conduct an unreliable methodology. Lesley Estes of the City of Oakland provided specific examples in her testimony of their experience of why visual assessments is a very expensive way to achieve non-meaningful results and doesn’t effectively address trash cleanup.¹¹

In addition to the inappropriateness of the Revised Tentative Order visual assessment methodology, as has been previously mentioned the Board staff at the beginning of the hearing, and contrary to the rules of the hearing as set forth in the Notice of Hearing, introduced a written Supplemental sheet that among other things further significantly revised the requirements and purports to clarify information in the Fact Sheet on frequency of visual assessments in Provision C.10.b.ii.b.(i-iv). These revisions will result in a significant increase of the frequency of required visual assessment for some areas. Permittees were not able to adequately consider and respond to these late revisions, however, Board staff was allowed to fully explain and comment on the public testimony for these revisions.

¹¹ Nov 18 Tr.p.216

Despite the time limitations to consider these revisions, Mr. Phil Bobel of the City of Palo Alto testified that his quick estimate of the trash visual assessment revisions proposed in the staff Supplement would triple their visual assessments, and that this revision caught them off-guard.¹² Ms. Melody Tovar of the City of Sunnyvale commented that she agreed with Mr. Bobel's comments that the increased visual trash assessment Supplemental revisions simply add more cost without benefit.¹³ Finally, Ms. Leah Goldberg, Senior Deputy City Attorney for the City of San Jose, testified that they had only briefly considered the Supplemental revision and urged the Board not to adopt the revisions.¹⁴

Staff member Mumley added further uncertainty to this discussion by stating that the revisions to the Fact Sheet on visual assessments is not directly enforceable, is intended as guidance only, that it's not a substantial change, and that the numbers are a guide and not mandatory.¹⁵ This statement is questionable to the permittees and gives permittees little comfort given the risk of third party liability and that Finding 1 of the Revised Tentative Order incorporates the Fact Sheet by reference.

C. The Provision C.10 Trash Reduction Outcomes Receiving Water Monitoring Provisions, the Development and Testing Plan, and Reporting Requirement Revisions Introduced by Chair Young at the November 18 Hearing are Inappropriate and Improper.

As previously referenced, two pages of significant written revisions to Trash Reduction Outcomes requirements were introduced during the course of the November 18 hearing by Chair

¹² Nov 18 Tr.p.156

¹³ Nov 18 Tr.p.175-6

¹⁴ Nov 18 Tr.p.226

¹⁵ Nov 19 Tr.pp118-120.

Young. This was contrary to the rules for written comments provided in the Hearing Notice and did not afford permittees and other members of the public sufficient opportunity to review and comment on the revisions.

As a consequence of this procedural error, the hearing record contains relatively little information on the issues presented by the Provision C.10.b.v. and C.10.f. revisions that required a specific receiving water monitoring proposed program to be approved by the Executive Officer, rather than developing water monitoring tools and protocols. There was simply not sufficient time for permittees to review, discuss, and comment on these revisions. Provisions C.10.b.v.a. and C.10.f are inappropriate revisions in that they requires permittees to submit a plan to develop and test a receiving water monitoring program containing new criteria not previously considered, rather than a plan to develop tools and protocols; and similar changes to Provisions C.10.b.v.b and C.10.f Reporting. This is a substantial receiving water monitoring change.

D. The inclusion of NELs as opposed to NALs for Mercury and PCB Load Reduction Requirements Contained in Provision C.11&12 are Inappropriate and should not have been designated as Numeric Effluent Limitations

After having confirmed that the requirements in MRP 2.0 were best management practices (BMP) and other required actions-based measures, consistent with their TMDL implementation plans, and that good faith compliance with them would create a safe harbor for the co-permittees, staff and counsel then left the Board members in a state of confusion by saying that the mercury and PCBs requirements in the permit were not-fully action-based and by

ultimately acknowledging that failing to meet the numeric criteria would render the co permittees subject to enforcement and third party lawsuits even if they implemented all required actions.¹⁶

Then, contrary to the State Board's own conclusions and use of them, just before the improper closed session at the hearing, Board staff and counsel also told the Board members that NALs would not be effective regulatory mechanisms and suggested that the State Board would see anything other than NELs as insufficiently rigorous.¹⁷

Instead, Board staff and counsel should have presented the Board members with a more objective delineation of the State Board's position on the issue of NALs v. NELs; informed them that the State Board has not precluded the use of NALs as an "ambitious, rigorous, and transparent" alternative to NELs; and left the decision on whether to use NELs or NALs in the Board members' hands in a more objective manner considering: (1) the State Board's own use of them,¹⁸ (2) the State Board's Expert Panel's recommendations concerning the use of NALs in municipal stormwater permits in particular,¹⁹ and (3) the guidance the State Board recently provided specifically on this issue in WQO-2015-0075.

In the latter, although the State Board acknowledged that the Los Angeles Regional Board's use of NELs to implement 33 TMDLs in its area was not error given the number and

¹⁶ Cf. RT-Nov19 at 14:7-19:1 and 156:23-157:7 with 147:1-148:19, 152:19-25, 158:25-160:5.

¹⁷ RT-Nov19 at 167:5-168:10, 170:8-171:1, and 174:8-25.

¹⁸ Storm Water General Permit Order No. 2009-0009-DWQ and Storm Water General Permit Order No. 2014-0057-DWQ.

¹⁹ State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006) at p. 8 ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. . . . For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit basically is not possible.) After the conclusion of the public testimony portion of the adoption hearing, Region 2 staff asserted that SCVURPPP's characterization of the Expert Panel's conclusions were amounted to gross misrepresentation. RT-Nov19 at 131:12-20. Although there is no evidence to support it in the record or elsewhere, they then went on to assert that the Expert Panel's report was outdated and that these experts "were not *thinking* in the context of Effluent Limits . . . which are an enforceable numeric . . . performance measure that will be enforced." RT-Nov19 at 133:1-9 (emphasis supplied.)

nature of TMDLs involved, it then went on to specifically state: “We emphasize, however, that we are not taking the position that [NELs] are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. We also decline to urge the regional water boards to use [NELs] in all MS4 permits.”²⁰

With regard to the Regional Board staff’s repeated assurances to its Board that the permittees concerns with NELs could be sidelined and dealt with later through the exercise of their enforcement discretion, they and counsel should have informed their Board members that the State Board had expressed a different policy preference earlier this year when it stated in WQO-2015-0075: “from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . interim and final TMDLs through provisions built directly into their permit rather than through enforcement orders” – i.e., enforcement orders that could arise from noncompliance with NELs per se.²¹

Beyond these significant process issues, the substantive justification offered by Board staff for treating the numeric performance criteria for PCBs and mercury load reductions as NELs also falls short. First, while they are undoubtedly designed to further implement the region’s mercury and PCBs TMDLs and represent an increment towards getting to the waste load allocations assigned to stormwater therein, there is nothing concrete in the record revealing how the numeric values of the NELs were actually calculated.²² Instead, Board staff state why

²⁰ WQO-2015-0075 at p. 58-59.

²¹ Id. at 31.

²² Region 2 counsel’s last minute effort to try and create a record for their being an adequate substantive basis for the NELs through a wholly conclusory statement by a staff member without the “adequate information” she refers to having been delineated in the record and subject to prior public review and comment, is meaningless. *See* RT-Nov19 at 176:10-19.

they think the load reduction numbers they have identified as NELs for PCBs are feasible to achieve based on the Bay Area's recent performance in terms of new and redevelopment and building demolition and construction.²³ But the staff's economic forecast (which sometimes proves wrong even when done by actual economists) requires no deference given their expertise and has no real basis in the record. Moreover, a plethora of testimony at the adoption hearing demonstrated that even if the staff's prediction concerning the pace of development and construction ends up being on target, there is still likely to be a significant shortfall in all or at least many co-permittees meeting the NELs.²⁴

At one point, staff testified at the adoption hearing that the PCB numbers were "based on an updated assessment of controls to reduce PCBs to the maximum extent practicable and then indicate that their calculation "started with a numerical formula."²⁵ But, importantly, this formula and these calculations are nowhere to be found in the record, and later in their testimony, the same staff member even indicates that they abandoned the formula-based calculation effort.²⁶ Their testimony then goes on to explain that they turned to "a number of sources of information" to come up with the 3 kilogram PCBs load reduction requirement, but once again, these sources were not delineated in the permit's Fact Sheet or elsewhere in the record.²⁷

The Board staff member's further testimony on the issue indicates that the PCBs load reduction numbers in controversy are no more than speculative "guesstimate estimates" that

²³ RT-Nov18 at 26:6-9.

²⁴ *See e.g.*, RT-Nov18 at 138:8-142:18.

²⁵ RT-Nov19 at 135:1-11.

²⁶ *Id.* at 137:11-13.

²⁷ *Id.* at 138:3-5.

represent the idea of “[h]ere is the number, we think it’s attainable.”²⁸ Ultimately, the staff even expressly conceded that “we know that there’s uncertainty with the basis of our numbers,” while trying to reassure the Board members that they could deal with the uncertainty through their future exercise of enforcement discretion.²⁹ (Board counsel then further conceded to one of the Board members that the numbers were uncertain and that the co-permittees would be in non-compliance if they did not meet them despite their good faith efforts to implement all required actions.)³⁰

Finally, in the course of the adoption hearing, Board staff revealed that, when all was said and done, their position on NELs was really based on their preference to avoid having to specify additional required actions and then expending the additional effort necessary to oversee and enforce on them if bad actors emerge among the permittees and refused to meet their implementation obligations.³¹ Instead, they ultimately admitted that their insistence on NELs reflects their frustrations and preference to employ a psychology of “coercion.”³² Not only is this an inappropriate basis for calculating the numbers used for NELs, while they voted to include them based on the mistaken understanding that they were necessary as an alternative to NALs in order to avoid the State Board disapproving the permit, the need for undertaking a coercive

²⁸ Id. at 139:7-8 and 146:19-20. Relative to some communities that are not likely sources of PCBs, the staff’s testimony even went further to characterize the requirements as they might default down to them as “unrealistic.” RT-Nov19 at 153:16-20. *See also* Id. at 168:18-169:7.

²⁹ Id. at 149:17-150:9.

³⁰ Id. at 152:7-25.

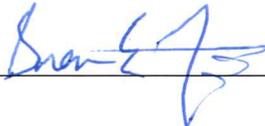
³¹ *See* RT-Nov19 at 137:1-6 and 146:13-20.

³² RT-Nov 19 at 171:17-174:3.

approach vis-à-vis the permittees is clearly not a view that was shared by the members of the Regional Board.³³

Thank you for your consideration.

Dated: December 17, 2015

By:  _____
Soren Fajeau, P.E.
Assistant City Engineer
City of Newark

³³ RT-Nov19 at 160:7-161:15, 166:20-167:5, 168:11-169:19, 181:13-183:17, 187:7-188:20, 193:15-194:2 and 196:3-25.

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

MEETING DATE: November 18, 2015

ITEM: 7 – SUPPLEMENTAL

**SUBJECT: REVISED TENTATIVE ORDER FOR REISSUANCE – MUNICIPAL
REGIONAL STORMWATER NPDES PERMIT**

The following are proposed revisions to the November 10, 2015, version of the Revised Tentative Order that provide clarification as described.

1. Provision C.10.b - Demonstration of Trash Reduction Outcomes

Provide clarification on frequency of visual assessments required by Provision C.10.b.ii.b.(iii) – Visual Assessment of Outcomes of Other Trash Management Actions on page C.10-4 (Tentative Order Page 107)

Fact Sheet for Provision C.10.b.ii.b.(i)-(iv) - Visual Assessment of Outcomes of Other Trash Management Actions on page A-99

Add the following after the second sentence, ending with “implemented in the area.”:

The frequency of required visual assessments depends on the rate of trash generation, the sources and types of trash, trash management actions deployed, and time of year. During the wet season, October through April, visual assessments in a trash management area must be conducted at a frequency that determines whether there may be trash discharges to the storm drain system from sources or areas of trash accumulations before a trash management action or combination of actions is implemented or between recurring trash management actions. The degree of trash reduction that a Permittee claims also affects the frequency of visual assessment necessary to make the claim. Higher reduction claims typically require higher frequency of assessments.

During the wet season, for claims that a trash generation area has been reduced to a low trash generation area, this should be at least once per month in what was a very high trash generation area, at least twice per quarter in what was a high trash generation area, and once per quarter in what was a moderate trash generation area. Permittees, with justification, may conduct less frequent visual assessments for claims that a trash generation area has been reduced from what was a very high trash generation area to a high or moderate trash generation area or from what was a high trash generation area to a moderate trash generation area. Frequency of visual assessments during the dry season, May through September, should be at least once per quarter, including, and preferably, within the month (September) before the wet season begins. Higher frequencies of visual

assessments than those illustrated above may be required to demonstrate effectiveness of trash control actions and claimed trash reduction. Lower frequencies than those illustrated above may also be acceptable with justification.

2. Provision C.10.b.v - Receiving Water Monitoring

Break up one long sentence and clarify dates in another.

Fact Sheet for Provision C.10.b.v - Receiving Water Monitoring on page A-102

Break up sentence after question number 4 into two sentences as follows:

The monitoring tools and protocols may include direct measurements and/or observation of trash in receiving waters, ~~or in~~ In scenarios where direct measurements or observations are not feasible, surrogates for trash in receiving waters, such as measurement or observation of trash on shorelines or creek banks may provide a practicable means of monitoring trash.

Fact Sheet for Provision C.10.b.v - Receiving Water Monitoring on page A-102

Provide date clarifications in second sentence of last paragraph as follows:

, Permittees must submit a preliminary report on the proposed monitoring program by July 1, 2019, a year in advance of the final proposed monitoring program due July 1, 2020, six months before the Permit expires.

3. Provision C.10.f - Reporting (Trash Load Reduction)

Provide clarification on what must be included in a report of non-compliance with a mandatory trash reduction deadline.

Provision C.10.f.v. on page C.10-9 (Tentative Order Page 112)

Replace last sentence of reporting requirement C.10.f.v.b, with the following:

The report shall include a plan and schedule for implementation of full trash capture systems sufficient to attain the required reduction. A Permittee may submit a plan and schedule for implementation of other trash management actions to attain the required reduction in an area where implementation of a full trash capture system is not feasible. In such cases, the report shall include identification of the area and documentation of the basis of the Permittee's determination that implementation of a full trash capture system is not feasible.

C. 10. Trash Load Reduction

C.10.b. Demonstration of Trash Reduction Outcomes

v. **Receiving Water Observations Monitoring** - Permittees shall conduct receiving water monitoring receiving water observations downstream from trash generation areas that have been converted from Very High, High, or Moderate to Low trash generation rates, or at other locations for which receiving water monitoring over time will produce useful trash management information, and develop receiving water monitoring tools and protocols and a monitoring program designed, to the extent possible, to answer the following questions:

- Have a Permittee's trash control actions effectively prevented trash within a Permittee's jurisdiction from discharging into receiving water(s)?
- Is trash present in receiving water(s), including transport from one receiving water to another, e.g., from a creek to a San Francisco Bay segment, at levels that may cause adverse water quality impacts?
- Are trash discharges from a Permittee's jurisdiction causing or contributing to adverse trash impacts in receiving water(s)?
- Are there sources outside of a Permittee's jurisdiction that are causing or contributing to adverse trash impacts in receiving water(s)?

The monitoring tools and protocols shall include direct measurements and/or observations of trash in receiving water(s), or in scenarios where direct measurements or observations are not feasible, surrogates for trash in receiving waters, such as measurement or observations of trash on stream banks or shorelines.

a. **Development and Testing Plan** - The observations shall be sufficient to determine whether a Permittee's trash control actions have effectively prevented trash from discharging into receiving waters, whether additional actions may be necessary associated with sources within a Permittee's jurisdiction, or whether there are ongoing sources outside of the Permittee's jurisdiction that are causing or contributing to adverse trash impacts in the receiving water(s). Permittees shall submit a plan acceptable to the Executive Officer by July 1, 2017, to develop and test a proposed receiving water monitoring program tools and protocols that includes the following:

- (i) Description of the tools and protocols to be developed and tested;
- (ii) Description of discharge and receiving water scenarios, which will be considered, that accounts for the various receiving waters and watershed, community, and drainage characteristics within Permittees' jurisdictions that affect the discharge of trash and its fate and effect in receiving water(s);
- (iii) Description of factors, in addition to those in C.10.b.v.a.(ii), that will be considered and evaluated to determine scenarios and spatial and temporal representativeness of the tools and protocols;

- (iv) Identification of sites, representative of all the Permittees and discharge and receiving water scenarios, that will be monitored during this permit term;
- (v) Development of a system to manage and access monitoring results;
- (vi) Opportunity for input and participation by interested parties;
- (vii) Scientific peer review of the tools and protocols and testing results; and
- (viii) Schedule for development and testing of the tools and protocols, with monitoring at representative sites starting no later than October 2017; and
- ~~(ix) Development of a proposed receiving monitoring program.~~

If the Permittees conduct this work through an independent third party, approved by the Executive Officer, the Plan may be submitted by July 2018, with monitoring to begin no later than October 2018.

- b. **Report and Proposed Monitoring Program** - The observations shall be conducted a minimum of twice per year until the no trash in receiving water determination has been observed and then confirmed with a subsequent observation, after which the frequency may be reduced to once per year. Permittees shall report progress in the 2018 Annual Report, and submit a preliminary report by July 1, 2019 and a final report by July 1, 2020 on the development and testing of receiving water monitoring tools and protocols and a proposed trash receiving water monitoring program. The progress preliminary report is not required if the Permittees conduct this work through an independent third party, approved by the Executive Officer, that provides input and participation by interested parties and scientific peer review of the tools and protocols and testing results and proposed receiving monitoring program.
- e. Trash Hot Spot cleanup site downstream of a trash management area may serve as a receiving water observation site.

C.10.f. Reporting

- vi. In the 2018 Annual Report, status of progress on development and testing of the receiving water monitoring tools and protocols and monitoring program development, C.10.b.v. receiving water observations, including the locations and times of observations and associated determinations. Pending EO acceptance of a monitoring proposal, reference can be made to the existing Trash Hot Spot Cleanup data.