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VIA OVERNITE EXPRESS
FOR MONDAY MORNING DELIVERY

Mr. Ivar Ridgeway
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Comments on Proposed Modifications to the County of Los Angeles Municipal Separate Storm Sewer System Permit Regarding the Los Angeles River Trash Total Maximum Daily Loads

Dear Mr. Ridgeway:

These comments and attached documentation are being submitted on behalf of the Cities of Arcadia, Carson, Commerce, Downey, Irwindale, Monterey Park, Signal Hill, South Gate and Vernon, and the ad hoc group of cities known as the Coalition for Practical Regulation[1] (hereafter collectively "Cities"), in connection with an October 8, 2009 Notice from the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") requesting comments, evidence and scheduling a public hearing on proposed action to incorporate provisions of the Los Angeles River Trash Total Maximum Daily Load ("TMDL") into the existing Los Angeles County Municipal Stormwater Discharge Permit ("NPDES No. CAS004001," hereafter "MS4 Permit," "NPDES Permit" or "Permit"). We ask that these comments and attached documentation be included in the administrative record for this matter.

[1] The Coalition for Practical Regulation also known as "CPR" is an ad hoc group of municipalities in Los Angeles County committed to obtaining clean water through cost-effective and reasonable storm water regulations, and consists of the following Cities: Arcadia, Artesia, Baldwin Park, Bell, Bell Gardens, Bellflower, Carson, Cerritos, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Canada Flintridge, La Mirada, Lakewood, Lawndale, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pico Rivera, Pomona, Rancho Palos Verdes, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Vernon, Walnut, West Covina, and Whittier.

Before discussing the substantive concerns with the Proposed Amendment, the Cities must first object to the limited Administrative Record reflected in the Index of Administrative Record sent October 15, 2009, prepared by Regional Board Staff in connection with the upcoming December 10 hearing. Specifically, the Cities previously submitted Comments dated July 27, 2009, along with a series of exhibits to the Regional Board in response to a July 6, 2009 Notice of a Workshop on this matter. Further, certain Cities attended the workshop conducted on July 29, 2009. Yet, the Index of the Administrative Record does not reflect a submission of these July 27 Comments, nor apparently any other comments submitted in connection with the July Workshop. As such, the Cities respectively request that their comments dated July 27, 2009 along with all exhibits included therewith and all other Comments submitted by interested parties, along with the Record of any Comments provided during the Workshop on July 29, 2009, be made a part of the Administrative Record and be available for the Board's consideration prior to amending the NPDES permit in question. The Index to the Administrative Record should similarly be corrected.

Turning to the substance of the proposed modification to the Permit in question, for the reasons set forth below and as asserted in previous comments in connection with the July 29, 2009 Workshop, it is inappropriate to revise the NPDES Permit as proposed, and specifically it is inappropriate to "implement the Trash TMDL with numeric effluent limitations" in a municipal separate storm sewer system ("MS4") permit under the present circumstances, for the following reasons:

(1) Because the Clean Water Act (33 USC § 1251 *et seq.* – "CWA" or "Act") does not require that the subject NPDES Permit include numeric effluent limits, any attempt to include either a numeric effluent limit for purposes of the Trash TMDL, or any other numeric effluent limit for any other TMDL into the NPDES Permit in issue, is an attempt to impose a requirement that clearly goes beyond the requirements of the Clean Water Act. Finding 45 of the Proposed Permit Amendment makes clear that the Proposed Amendment is designed to implement the TMDL through "numeric effluent limitations." Further, Proposed Finding 51 and pages 23-24 of the Fact Sheet, demonstrate the Regional Board's intent to utilize the Permit Amendment to obtain "strict enforcement of the WLAs." As such, the Regional Board is proposing to impose new permit terms that go beyond what is required under the CWA, and therefore all requirements under the California Porter-Cologne Act ("PCA") must be complied with by the Regional Board before such new Permit terms may be imposed.

Under the PCA, the inclusion of any such numeric effluent limits into the NPDES Permit can only lawfully be accomplished by the Regional Board after it has first conducted the analysis and considered the factors required under California Water Code sections 13241 and 13000.[2]

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[2] All section references are to the California Water Code unless otherwise specified.

(*See City of Burbank v. State Board* (2005) 35 Cal.4th 613 ("*Burbank*").) And because the Regional Board appears to have admitted it did not even attempt to conduct such an analysis, at least in accordance with section 13241 (claiming such an analysis was not "necessary to support these effluent limitations"), no action to incorporate the Trash TMDL, as proposed, can lawfully be taken at this time. Moreover, requiring strict compliance with numeric effluent limits for the Trash TMDL, where the WLAs are, in fact, actually unachievable (and where deemed compliant full capture devices show an iterative Best Management Practices ("BMPs") approach is necessary), sets the wrong precedent for the incorporation of other TMDLs that cannot be complied with through iterative MEP-compliant BMPs.

(2) In a Guidance Memorandum dated November 22, 2002, EPA Headquarters established federal policy for incorporating waste load allocations ("WLAs") into stormwater Permits. Under this EPA Policy, "[b]ecause storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in ***rare cases*** will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges.... Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits would be used only in ***rare instances***." (EPA Guidance Memo, p. 4, Exhibit "1" hereto.) EPA went on to conclude that for Municipal NPDES Permits, any water quality based effluent limit for such discharges "should be expressed as best management practices (BMPs), rather than as numeric effluent limits." (*Id.*) The Cities request that this policy issued by US EPA Headquarters in Washington, DC, be followed, and that because no "findings" have been included with the proposed Permit Amendment in question to support a determination that the Trash TMDL is the "rare case," that the Proposed Amendment not be adopted.

(3) Any incorporation of a TMDL into the MS4 Permit in question is premature at this time in light of the Orange County Superior Court's recent decision in *City of Arcadia v. State Board*, OCSC Case No. 06CC02974 (the "*Arcadia* Case"). As recognized by the State Board in Order No. WQ 2001-06, and as quoted in Order No. WQ 2009-0008, "water quality standards provide the ***foundation*** for identifying impaired waters that require a TMDL." (Order No. 2009-0008, p. 2.) In the *Arcadia* Case, the Superior Court issued a Judgment and Writ of Mandate requiring that the State and Regional Boards review the "water quality standards" in the Basin Plan for the Los Angeles Region ("Standards" or "Water Quality Standards") and comply with the requirements of sections 13241 and 13000 with respect to Stormwater discharges (which was defined by the Court and agreed to by the parties as including "urban runoff").[3] The Superior Court also required said Boards to correct the improperly designated "potential" use designations upon which many of the Water Quality Standards in the Basin Plan are based.

[3] As used herein, consistent with the definition of "Stormwater" under the federal regulations, the term "Stormwater" includes urban runoff, *i.e.*, "surface runoff and drainage."

Ironically, while the proposed Permit Amendment discusses prior lawsuits involving the Trash TMDL, it makes no mention of the *Arcadia* Case or of the Superior Court's decision requiring both the State and Regional Boards to revise the Standards to correct the improperly designated "potential use" designation, and to conduct the 13241/13000 analysis of the Standards in relation to Stormwater. (*See, e.g.*, Finding 51 of the Proposed Amendment, which, in part, provides that: "Depending upon the compliance strategy selected by each Permittee, compliance with the effluent limitations set forth in Appendix 7-1 may require a demonstration that the Permittee ***is in strict compliance with water quality standards***.")

Developing Standards in accordance with law before enforcing them is particularly important in connection with the subject Trash TMDL because not only has the Water Code section 13241/13000 analysis never been conducted *vis-a-vis* Stormwater for any of the Standards upon which the Trash TMDL is based, it is also clear from the face of the Trash TMDL Report that the TMDL was developed, in part, to protect improperly designated "potential" beneficial uses. As such, although the Superior Court's Judgment and Writ of Mandate in the *Arcadia* Case are presently on appeal, if upheld, they will require a review and potential modification of all existing Standards in the Basin Plan *vis-a-vis* Stormwater, as well as revisions to all Standards that are based on "potential" uses. Accordingly, the Trash TMDL and all other adopted TMDLs must be reevaluated and readopted ***before*** being incorporated in any fashion into the subject NPDES Permit.

(4) Incorporation of the Trash TMDL into the subject NPDES Permit is further premature and inappropriate at this time given that all Permittees have already submitted timely applications to renew the existing MS4 NPDES Permit. Thus, contrary to the assertion in the Fact Sheet that "[w]aiting until Permit reissuance would prevent full implementation of the TMDL's regulatory requirements for several years after compliance is required," there should be no delay in reissuing the NPDES Permits outside of the delay created by the Regional Board's own refusal to timely process the Cities' Permit renewal applications. In fact, the NPDES Permit in issue expired nearly three years ago, on December 12, 2006. Accordingly, rather than modify the existing NPDES Permit to incorporate a single TMDL, the Cities respectfully request that their renewal applications be finally processed, and that any incorporation of the subject TMDL be conducted at such time as the existing NPDES Permit is renewed and after the *Arcadia* Case decision has become final.

(5) The implication with the new definition of "Drainage" under the Permit that "urban runoff" is not "stormwater," is contrary to the plain language of the federal regulations to the CWA, as well as prior State Board Orders and representations of State and Regional Boards' counsel in the *Arcadia* Case. Also contrary to the plain language of the CWA is the statement in the Fact Sheet (p.11-12) that the "maximum extent practicable" ["MEP"] standard under the Clean Water Act only applies to discharges of pollutants ***"from storm water."*** Such proposed Permit terms are contrary to law and their adoption would constitute an abuse of discretion.

(6) The proposed incorporation of the TMDL includes additional monitoring and reporting requirements to be adhered to by the Permittees. Yet, Sections 13225 and 13267 require that a cost/benefit analysis be conducted before any monitoring or reporting obligations may be imposed upon the Permittees. The record does not indicate that any such cost/benefit analysis has been conducted, and no Permit modification requiring additional monitoring and reporting requirements may lawfully be adopted at this time until the requirements of Water Code sections 13225 and 13267 have been met.

(7) Because the Proposed Amendment requires the Trash TMDL WLAs to be incorporated into the subject NPDES Permit as strict "numeric effluent limits," *i.e.*, requires incorporation in a manner that is not required by federal law, and because the Proposed Amendment continues to require the Cities to install and maintain trash receptacles at all transit stops within their jurisdictions, such requirements constitute unfunded State mandates which may not be imposed upon the Cities without the State first providing funding in accordance with the requirements of the California Constitution and the implementing Legislation thereunder.

I. BACKGROUND

As in part reflected (although not entirely accurately) in the proposed new Findings to the subject Permit, this Trash TMDL has a storied past. Specifically, the Trash TMDL was initially adopted in January of 2001 (not the September 2001 date suggested in revised Finding 14), with the Regional Board thereafter rescinding this January 2001 TMDL and adopting a new TMDL in September of 2001. No substantive differences appear to exist, however, between the January versus the September 2001 TMDLs. Moreover, for reasons that remain unclear, the January 2001 TMDL appears to have never even been submitted to the State Board. Instead it was superseded in its entirety by the Regional Board's September 2001 TMDL. Yet, both the January 2001 and the September 2001 TMDLs contain the same interim and final waste load allocations, as well as the same implementation schedule. Further, both contain only a single means of being deemed in full compliance with the TMDL, *i.e.*, both only contain what is referred to in the Proposed Amendment as the Vortex Separation System ("VSS") full-capture Units. No other deemed compliance measures were included in these initial January and September 2001 versions of the TMDL. Moreover, of all the deemed-compliant measures presently included in the TMDL in issue, the VSS full-capture Units appear to be the most costly to implement and likely the most environmentally intrusive of all the full-capture systems presently permitted.

The State Board and the Office of Administrative Law ("OAL") both approved the Regional Board's September 2001 TMDL in July of 2002. However, prior to this approval, US EPA adopted its own Trash TMDL for the Los Angeles River in March of 2002. Yet, on August 1, 2002, EPA rescinded its March, 2002 TMDL and simultaneously then approved the State Trash TMDL (the Regional Board's September 2001 Trash TMDL).

In August of 2002, three separate lawsuits were then filed, one by the County of Los Angeles, one by the City of Los Angeles, and a third by the twenty-two cities involved in the *Cities of Arcadia, et al. v. State Board* Trash TMDL case which resulted in a published decision at 135 Cal.App.4th 1392. The lawsuits filed by the County and the City of Los Angeles were settled, with the Regional Board committing to, among other things, reopening the Trash TMDL once fifty percent reductions in trash had been achieved. The *Arcadia v. State Board* lawsuit filed by the twenty-two cities proceeded to trial, and contrary to the implication of Finding 14 of the Proposed Amendments, a majority of the substantive issues raised by the twenty-two cities before the trial court were resolved in favor of such cities. Moreover, on appeal, the Court of Appeal in the *Arcadia v. State Board* case upheld the trial court's determination that the Regional and State Boards had failed to comply with the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, *et seq.*, finding, in part, as follows:

> As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions. [Citation.] The Water Boards' CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR [Environmental Impact Report] or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the environment. The [trial] court correctly invalidated the Trash TMDL on CEQA grounds. (*Cities of Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1426.)

As stated above, the Trash TMDL adopted by the Regional Board in September of 2001 identified only one deemed full compliant measure, *i.e.*, the VSS Units. Yet, the Court of Appeal in *Arcadia v. State Board* recognized that the cost to install such VSS Units, as estimated by the Regional Board, ranged from $332 million to $945 million, with the Court finding that "[n]either the checklist nor the Trash TMDL includes an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures, and in fact the Water Boards' developed no argument as to how they ostensibly complied with the statute. . . . the Trash TMDL sets forth various compliance methods, the general impacts of which are reasonably foreseeable but not discussed." (*Id.* at 1425-26.) The lack of an environmental analysis of the potential environmental impacts created by the September 2001 Trash TMDL was the primary reason the Appellate and trial courts both found that the Water Boards violated CEQA.

The Regional Board thereafter adopted the present Trash TMDL in August of 2007. This 2007 TMDL was then approved by the State Board and the OAL, as well as US EPA, in September of 2008. However, the present Trash TMDL is markedly different from the

September, 2001 Trash TMDL, in that not only does the current TMDL contain a much more thorough analysis of the foreseeable environmental impacts expected from the implementation of the Trash TMDL, but it also identifies a series of effective full-capture devises which are much less costly to install and maintain than the very costly VSS Units. These other deemed-compliant full-capture devises include: trash nets, two gross solid removal devices, catch basin brush inserts and mesh screens, vertical and horizontal trash capture screen inserts and a connector pipe screen device. Such additional full-capture systems are, in fact, the full-capture systems most of the Cities have chosen to rely upon for implementation purposes, and these alternative full-capture devices are universally preferred by the Cities over the VSS Units. Moreover, to date, very few VSS Units have been installed throughout the County, as opposed to the installation or planned installation of tens of thousands of the other alternative full-capture devices identified in the current Trash TMDL.

The Proposed Amendment to the Permit seeks to simply incorporate the Waste Load Allocations ("WLAs") from the most recent Trash TMDL into the NPDES Permit, and to enforce these WLAs as "numeric effluent limitations," asserting that "while there may be other ways to incorporate the compliance points from the TMDL into permit conditions, the Regional Board is ***not aware of*** any other mechanisms that would result in actual compliance with the requirements of the TMDL as it was intended." (Proposed Amendment, Findings 45 and 46.) Finding 51 then describes the compliance strategy under the Proposed Amendment as allowing the Regional Board to "require" demonstration that the Permittee is in "strict compliance with Water Quality Standards," with the Fact Sheet similarly indicating the Regional Board's intent to obtain "strict enforcement of the WLAs." The claim that the Regional Board "***is not aware***" of other mechanisms to achieve compliance with the WLAs is, of course, not a legitimate "finding" that can rightfully be used to support applying "numeric effluent limitations" to Stormwater discharges, and specifically is not an appropriate finding to support the "rare instance" noted by EPA as to when "numeric effluent limits" may appropriately be applied to Municipal Stormwater dischargers. (*See* Exhibit "1," EPA November 2002 Guidance Memorandum, p. 4.)

The historical discussion above not only shows that a good number of "other mechanisms" were developed over time since the January 2001 Trash TMDL was adopted, consistent with the iterative BMP approach referenced by US EPA in its November 2002 Guidance Memorandum, it further shows that "actual compliance" with the final WLA of "zero" in the Trash TMDL is a fiction. The fact that "actual compliance" with the zero WLA is never referenced anywhere in the Permit Amendment as being achievable (with the Permit Amendment instead providing that compliance with the Permit Amendment is "practicable" because of the availability of deemed full-capture BMPs), confirms that "strictly" complying with the "zero" trash limit is unreasonable and not economically achievable, and that "strict compliance" with the WLAs is only possible through an iterative deemed-compliance BMP approach.

Accordingly, the litigation history described above and the iterative development of the various full-capture devices to be utilized as "deemed" compliance with the TMDL, reinforces the fact that that TMDL is not the "rare case" where numeric effluent limits must be applied to achieve strict compliance with the WLAs, and that the opposite is the case here, *i.e.*, that compliance is only "reasonably achievable" through the use of iterative BMPs. In sum, it was because of the lengthy litigation process, including the decision of the Court of Appeal in *Arcadia v. State Board, supra*, 135 Cal.App.4th 1392 to require the Water Boards to finally comply with the requirements of CEQA, that viable and more cost-effective deemed-compliant devices were able to be developed to address the problem of trash within the Region, rather than the forced expenditure of $332 million to $945 million to install VSS Units throughout the Region.

Yet, the incorporation of the Trash TMDL into the NPDES Permit must now itself still be conducted in accordance with applicable State and federal law, specifically including, but not limited to, the need to develop "reasonably achievable" and "economically" defensible Permit requirements thereunder, including developing such Permit requirements only after the "foundation" of the current TMDL, *i.e.*, the Standards upon which they are based, have been developed in accordance with applicable law as required by the Superior Court in the *Arcadia* Case.

In addition to the above-referenced lawsuits challenging the Trash TMDL, other litigation had also ensued regarding the requirement in the existing Permit mandating that the Permittees place and maintain trash receptacles at all transit stops within their respective jurisdictions. Because this Permit provision imposes an unfunded State Mandate upon the Permittees, a test claim was filed by the County and various other City Permittees, with the State Commission on Mandates ("Commission"). Initially, the Commission refused to hear the matter, asserting that the constitutional prohibition in the California Constitution was not applicable to NPDES Permits. However, in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, the Appellate Court overturned the Commission's determination in this regard, and found that NPDES permits were not exempt from the constitutional prohibition on imposing unfunded mandates upon municipalities. (*Id.* at 920.) According to the Court of Appeal:

> In contrast, the constitutional infirmity of *Section 17516(c)* is readily apparent from its plain language that the definition of "'[e]xecutive order' does not include *any* order, plan, requirement, rule, or regulation *issued by the State Water ... Board or by any regional water ... board* pursuant to Division 7 (commencing with *Section 13000*) of the Water Code." (*§ 17516(c)*, italics added [by the Court].) This exclusion of any order issued by any Regional Water Board contravenes the clear, unequivocal intent of *article*

> *XIII B, section 6* that subvention of funds is required "[w]henever ... *any state agency* mandates a new program or higher level of service on any local government ... ." (Italics added [by Court].) We therefore conclude that *Section 17516(c)* is unconstitutional to the extent it excludes "any order ... issued by ... any regional water ... board pursuant to Division 7 (commencing with *section 13000)* of the Water Code" from the definition of "'[e]xecutive order.'" (*Art. XIII B § 6.*)

(*Id.* at 920.) Following the Court of Appeals' decision in *County v. Commission on State Mandates,* the plaintiffs in that action pursued a test claim with the Commission to recover the costs incurred to place and maintain trash receptacles at all transit stops within their jurisdictions, as required by the existing NPDES Permit and now by the Permit Amendment. On July 31, 2009, the Commission issued its decision finding that the requirement to install and maintain trash receptacles at all transit stops was an unfunded State mandate requiring funding under the California Constitution. The Commission concluded that, "the following activity in part 4F5c3 of the Permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total maximum daily loads: 'Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles are to be maintained as necessary.'" (Exhibit "2," p. 1-2.)

The Proposed Permit Amendment continues to mandate that the Permittees place and maintain such trash receptacles. Accordingly, this provision, along with the requirement to strictly comply with the Trash TMDL's WLAs, may only be required of the Cities where the State has committed appropriate funding to the Cities to comply with these State mandates.

II. INCORPORATION OF THE TRASH TMDL INTO ANY MUNICIPAL NPDES PERMIT IS PREMATURE.

A. No TMDL Should Be Incorporated Into The NPDES Permit Until The *Arcadia* Case Has Been Resolved And The Review And Necessary Revisions Of The Water Quality Standards Ordered Therein, Completed.

The incorporation of a TMDL into an NPDES Permit is, in effect, the final step in the process of seeking to enforce Water Quality Standards as against storm water ("Stormwater")[4]

[4] As discussed below, the term "storm water" is defined under federal law to include both dry weather and wet weather runoff, *i.e.*, "storm water" plainly includes not only precipitation events but also "urban runoff." (See Exhibit "3" hereto, which collectively includes the Judgment, Writ of Mandate and the Decision in the *Arcadia* case, with the Superior Court in the *Arcadia* Case

dischargers. As recognized by the Court of Appeal in *City of Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404, "[a] TMDL must be 'established' at a level necessary to implement the applicable water quality standards." (*Also see City of Arcadia v. EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1145 ["each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES Permits or establishing nonpoint source controls."].) As further confirmed by the State Board in Order No. 2001-06, and reiterated in State Board Order No. 2009-08, "water quality standards provide the ***foundation*** for identifying impaired waters that require a TMDL."

In the recent *Arcadia* Case, a number of cities successfully challenged the propriety of the Standards in the Basin Plan, and particularly the Water Boards' failure to conduct a Water Code Section 13241/13000 analysis during the course of the 2004 Triennial Review, along with their failure to correct the improperly designated "potential" use designations in the Basin Plan. As discussed below, the trial court in the *Arcadia* Case determined that the State and Regional Boards are now required to conduct this 13241/13000 review and to make appropriate revisions to the Standards, including deleting the "potential" use designation.

Thus, any consideration of the incorporation of the Trash TMDL, or any other TMDL, into a Municipal NPDES Permit for the Los Angeles Region, should be delayed until such time as the propriety of the Standards, *i.e.*, the "foundation" upon which the TMDL is based, has been reviewed and the Standards corrected. For example, the current Trash TMDL is based on various "potential" use designations, designations which the Superior Court found in the *Arcadia* Case found improper. (*See* the *Arcadia* Case documents included with Exhibit "3" hereto.) Thus, any attempt to enforce the Trash TMDL to protect mere "potential" beneficial uses, will likely be a significant waste of scarce public resources.

Judgment, at p. 2, fn. 2, citing 40 C.F.R. § 122.26(b)(13) and finding as follows: "Federal law defines 'storm water' to include urban runoff, *i.e.*, 'surface runoff and drainage'.") In their Opening Appellate Brief filed on June 11, 2009, the Appellant State and Regional Boards conceded that "storm water emanates from diffuse sources, including surface run-off following rain events (hence, 'storm water') and urban run-off." (*See* Exhibit "4," which includes portions of the Appellant Boards Opening Brief in the *Arcadia* Case, p. 9, n. 5, along with portions of the Appellants'/Intervenors' Opening Brief). In the Opening Appellate Brief of the Intervenors/Appellants NRDC, et al. filed on 6/09/09 in the *Arcadia* Case at p. 6, n. 3 (included with Exhibit "4" hereto), said Intervenors/Appellants stated as follows: "For ease of reference, throughout this brief the terms 'urban runoff' and stormwater' are used interchangeably to refer generally to the discharges from the municipal discharger storm sewer systems. A definition of stormwater includes 'stormwater runoff, snow melt runoff, and surface runoff and drainage.' (40 C.F.R. § 122.26(b)(13).)."

Moreover, although the *Arcadia* Case is presently on appeal, at a minimum, in light of the significance of the Superior Court's rulings that the "potential" use designations are improper and are to be replaced with other more appropriate use designation, and that other changes to the Standards may be necessary once the review under Water Code Sections 13241 and 13000 has been completed, any decision to enforce the existing Standards through the incorporation of the Trash TMDL into the subject Permit, should, at a minimum, be delayed until the *Arcadia* Case has been finally decided. To proceed with the incorporation of the Trash TMDL understanding that the Standards supporting the TMDL have been adjudicated as being defective, and thus, that the TMDL itself may need to be revised, is arbitrary and capricious action that will only lead to further litigation.

In the *Arcadia* Case, with respect to the propriety of the Standards in the existing Basin Plan as they are to be applied to Stormwater, in a Notice of Ruling/Decision dated March 13, 2008 (hereafter "Decision" included within Exhibit "3" hereto), the Superior Court, the Honorable Thierry P. Colaw presiding, held, among other things, as follows:

> The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objective. . . . They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975." [Citation.] This was confirmed by the State Board in a 1991 Order when it stated: **"The Basin Plan specified requirements and controls for 'traditional' point sources, but storm water discharges were not covered . . .** The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. **Clearly, the effluent limitations listed for other point sources are not meant to apply."** [Citation.] There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water. (*See* Decision p. 5-6; bolding in original.)

Similarly the Superior Court found that the Water Boards' development of Standards based on mere "potential" uses, was inappropriate, holding:

> **Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probable future beneficial uses of water." Water C. § 13241(a).**
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> **The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirements in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. Of California* (2003) 31 Cal.App.4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.** (Decision, p. 5.)

In light of the fact that the Trash TMDLs has been based on a set of Standards that, as of this point in time, has been determined to be defective because of the improper inclusion of "potential" use designations, as well as the possible defects created by the Boards' failure to comply with Water Code Sections 13241/13000 as they relate to Stormwater, at a minimum, the Cities respectfully request that the Trash TMDLs not be incorporated into the subject NPDES Permit, until such time as a final decision has been rendered in the *Arcadia* Case, and if the Superior Court's decision is upheld, until such time as the Judgment and Writ of Mandate set forth in that case have been fully complied with. (*See* the Judgment and Writ of Mandate entered in the *Arcadia* Case by the Superior Court included with Exhibit "3.")

B. The Term Of The Existing NPDES Permit Expired On December 12, 2006, And The Incorporation Of This Or Any Other TMDL Should Be Addressed In Accordance With The Pending Permit Renewal Process.

The Fact Sheet to the proposed Amendment asserts that "[w]aiting until permit reissuance would prevent full implementation of the TMDL's regulatory requirements for several years

after compliance is required. Therefore, the Regional Board is reopening the existing Permit during its administrative extension, instead of reissuing the permit at this time." (Fact Sheet for Proposed Amendment, p. 24.) This statement ignores the fact that the existing NPDES Permit was issued on December 13, 2001, and by its own terms, expired on December 12, 2006 (albeit under the federal regulations, its terms are to remain in effect until a replacement permit is adopted).

The Proposed Amendment and Fact Sheet also ignore the fact that in June of 2006, and in accordance with the requirements of the applicable federal regulations governing the renewal of MS4 Permits, the Cities of Downey, Signal Hill and several other small cities within Los Angeles County, along with the County of Los Angeles, filed Reports of Waste Discharge ("ROWDs") to renew the subject MS4 Permit. The City of Long Beach has, as well, an application pending for renewal of its MS4 Permit. Yet, the Regional Board, without explanation, has delayed its processing of the various ROWD Applications for approximately three and a half years, and longer for Long Beach, and there is thus no basis to conclude that "permit reissuance" would delay implementation of the TMDL "for several years."

The only delay in permit reissuance process is the Regional Board's failure to process the ROWD Applications. And at this time it is unclear when the Regional Board will even commence the renewal process. It is clear, however, that the renewal process is long overdue, as the term of the existing Municipal NPDES Permit expired nearly three years ago, but without the Regional Board having provided any justification for its delay in re-issuing new Permits.

In light of the fact that the renewal process is long overdue, and given the complexities created by incorporating a TMDL into the subject Permit, the proposed incorporation should be conducted as part of the Permit renewal process. To do otherwise at this time is to proceed in a manner that is arbitrary and capricious, and no supportable justification was provided in the Permit Amendment or in the Fact Sheet, to ***not*** process the ROWD Applications at this time.

III. ANY PERMIT TERM INCORPORATING A TMDL MUST BE IN COMPLIANCE WITH APPLICABLE STATE AND FEDERAL LAW AND POLICIES.

A. Federal And State Policies Provide For The Use Of Best Management Practices ("BMPs") In Lieu Of Numeric Water Quality-Based Effluent Limitations, in Stormwater Permits When Enforcing a TMDL Or Otherwise.

As recognized in the Proposed Amendment and Fact Sheet, existing federal law does ***not*** require that Stormwater dischargers strictly comply with the WLAs set forth in the subject TMDL. Instead they only require compliance with WLAs in accordance with the maximum extent practicable ("MEP") standard, and importantly, through the use of best management

practices ("BMPs"). In fact, time and again the Courts, US EPA and the State Board have all recognized that Stormwater discharges are different from traditional point source discharges, and that Stormwater must be analyzed and treated as such in accordance with the requirements of the Clean Water Act.

Both the Proposed Amendment (Proposed Finding 44) and the Fact Sheet (p. 12), reference the Ninth Circuit Court of Appeals' decision in *Defenders of Wildlife v. Browner* ("Defenders") 191 F.3d 1159 (9th Cir. 1999), where there, the Court found that under the CWA municipalities were not required to "strictly" comply with water quality standards. As noted in the Fact Sheet, the *Defenders'* Court specifically granted the permitting agency in that case "discretion either to require 'strict compliance' with water quality standards through the imposition of numeric effluent limitations, ***or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs***." (Proposed Fact Sheet, p. 24, emphasis added.)

The *Defenders'* Court specifically recognized the different approach taken by Congress when addressing Stormwater discharges versus industrial discharges, finding that "industrial discharges must comply strictly with state water-quality standards," with Congress choosing "not to include a similar provision for municipal storm-sewer discharges." (*Id* at 1165.) As the *Defenders* Court held, instead, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' . . . ." (*Id.*) The Ninth Circuit went on to find, after reviewing the relevant portions of the Clean Water Act, that "because 33 U.S.C. § 1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. § 1311," but instead Section 1342(p)(3)(B)(iii) "*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable . . . . In such circumstances, the statue unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)." (*Id* at 1165, emphasis in original.)

In *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the Appellate Court held that "in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'" (*Id*, emphasis in original, citing 33 USC § 1342 (p)(3)(B)(iii) & *Defenders, supra,* 191 F.3d 1159, 1163.)

With respect to TMDLs specifically, the fact that WLAs within a TMDL are not required under the CWA to be strictly complied within a Stormwater Permit, was confirmed by U.S. EPA itself in a November 22, 2002 EPA Guidance Memorandum on "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs." (Exhibit "1" hereto.) In this EPA Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges should be "***in the form of BMPs and that numeric limits will be used only in rare instances.***" (Exhibit "1," p. 6, emphasis added.) EPA recommended that "***for NPDES-regulated municipal . . . dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits.***" (*Id* at p. 4.)

EPA went on to expressly recognize the difficulties in regulating Stormwater discharges, explaining its policy as follows:

> **EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.** (EPA Guidance Memo, p. 4.)

As such, because EPA has found, particularly when it comes to the incorporation of a TMDL into a municipal NPDES Permit, "that numeric limits will be used only in rare instances," and because in this case, there is no evidence that this is a "rare instance" that would justify the inclusion of a numeric limit, any incorporation of the Trash TMDL into the subject Municipal NPDES Permit should be limited to the inclusion of MEP-complaint BMPs, and not terms requiring "strict compliance" with numeric effluent limits.

The Cities are aware of recent EPA Region IX comments which appear to seek to undermine EPA's Guidance Memorandum, with Region IX, in part, asserting that EPA Headquarters' Guidance Memorandum is nearly seven years old and that permitting agencies typically do not have the necessary supporting documentation to show that BMPs are expected to be sufficient to implement the WLAs within a TMDL. First, EPA's Official policy, as reflected in its November 22, 2002 Guidance Memorandum, is of greater weight and is taken precedence

over any informal communications that has been or may be issued by a staff member within a particular Region of EPA. Further, the fact that EPA's Guidance Memorandum was issued seven years ago does not in any way undermine its application to this TMDL, or to any other TMDL incorporation, particularly given that no other official EPA policy has been issued since then, and because neither EPA Region IX, nor any other party has provided any evidence to show that the assumptions and bases for EPA's Guidance Memorandum are no longer valid.

Also, Region IX's assertion that permitting agency often do not have the necessary supporting documentation in the administrative record to show that BMPs will be sufficient to implement the WLA, is not applicable to this Trash TMDL, and beyond that, is a troubling assertion to say the least. For this Trash TMDL, as described above, a series of BMPs have in fact been developed over the years, and the record is replete with evidence showing that these BMPs are believed to be effective. Thus the reason for the Regional Board's determination that such BMPs are deemed compliant full-capture devices. As such, evidence of these deemed compliant BMPs, and others as may be approved in the future, is evidence, in and of itself, within the administrative record, which specifically refutes any attempted assertion by Region IX that the record does not contain sufficient evidence of BMPs that would meet the WLAs.

In addition, Region IX's comment that numeric limits set forth within a TMDL are required to be strictly complied with in an MS4 Permit, where there is no sufficient evidence of BMPs that can achieve the WLAs, is contradictory, and is nothing more than an argument that numeric limits must be strictly complied with because there are ***no*** BMPs that can be utilized to achieve compliance, *i.e.*, broken down to its essence, Region IX is arguing that strict compliance is required with numeric limits because Cities have no practical means of complying with such numeric limits. The argument contradicts the core of the Maximum Extent Practicable ("MEP") standard set forth under the Clean Water Act, and beyond that, is entirely unsupportable given the requirements of California Law requiring a consideration of the section 13241/13000 factors particularly including whether any such permit terms are "reasonably achievable," as well as being "economically" achievable, and in light of the environmental characteristics of the water body issue.

Moreover, as reflected in a letter dated August 22, 2003 from EPA Headquarters to the Honorable Bart Doyle, EPA Headquarters was very clear that it will "continue to work with the Regional Board to make sure that they consider different implementation methods for TMDLs," and that with respect to EPA's November 22, 2002 Guidance Memorandum, that EPA has ***"worked closely with all ten Regions on this memo and expects that it will be followed by the states."*** (Exhibit "13," hereto, p. 2.)

Furthermore, as reflected in Exhibit "14" hereto, the State Board's Water Quality Control Policy for addressing Impaired Waters, dated June 16, 2005, although NPDES Permit terms must be consistent with the assumptions and requirements of a TMDL, State policy provides that

WLAs in a TMDL are not required to be incorporated verbatim into an MS4 Permit. Instead, State Policy provides that a TMDL "may" be adopted and included in a permit, but may also "be adopted with and reflected in a resolution or order that certifies that" a regulatory program has been adopted and is being implemented by another state, regional, local or federal agency, and that the program will correct the impairment of the water body, or through a resolution or order certifying a non-regulatory program is being implemented by another entity which will correct the impairment.

As such, rather than requiring that the WLAs be strictly enforced as numeric effluent limits in the MS4 Permit, instead, a Memorandum of Agreement or Understanding setting forth a performance-based approach to complying with the WLAs, consistent with the implementation plan and schedule set forth in the TMDL, is a more appropriate means of addressing the WLAs, rather than the Proposed Amendment. A Memorandum of Understanding/Agreement would be preferable because it would provide greater flexibility to the Cities to remove the impairment, rather than being subject to strict numeric limits which, at the end of the day, in fact are not actually achievable, but can only be met through deemed full compliant BMPs. As such, rather than the Proposed Amendment, the Cities' request that the Regional Board consider an alternative, namely entering into a Memorandum of Understanding/Agreement, with the Cities being permitted to develop an iterative BMP approach that allows for further technologies to be developed to address the WLAs.

The Proposed Amendment relies upon language in Order No. 2009-0008 to assert that "in some instances when implementing TMDLs, numeric effluent limitations may be an appropriate means of controlling pollutants in storm water, provided the Regional Board's determination is adequately supported in the permit findings." (Proposed Finding 45.) The problem with this assertion is that there is no indication and no findings to support the claim that the subject TMDL is the "rare instance" referenced by EPA in its Guidance Memo.

Instead, the Proposed Amendment attempts to justify requiring strict compliance with the numeric WLAs based on a disjointed argument that the annual trash discharge amounts meet the definition of an "effluent limitation" under Section 13385.1(c), and that as such the WLAs magically must be strictly complied with when incorporated into an NPDES Permit. Yet, no reasoned or logical reason or "Finding" is provided for requiring strict compliance with the WLAs, and no Findings are contained anywhere in the Proposed Amendment to support the contention that a Trash TMDL is the "rare case" justifying strict compliance with numerics.

In fact, to the contrary, and as EPA recognized in its Guidance Memorandum, because Stormwater discharges are due to storm events that are "highly variable in frequency and duration and are not easily characterized," with trash being primarily mobilized through major storm events, discharges of trash through the MS4 are largely carried by such storm events, and the subject TMDL is anything but the "rare case" where it would be feasible or appropriate to

establish a numeric limit to include in the subject NPDES Permit. No Findings or other evidence are contained or referenced anywhere in the Proposed Amendment or the Administrative Record to support the contention that this Trash TMDL is the "rare case," and the evidence is to the contrary.

Moreover, the contention in Finding 46 of the Proposed Amendment that because the "Regional Board is not aware of any other mechanisms that would result in actual compliance with the requirements of the TMDL as it was intended," somehow justifies incorporation of the WLAs as strict numeric limits, is frivolous. To begin with, the Regional Board's lack of knowledge is anything but a "Finding" to support the inclusion of strict numeric limits in an NPDES Permit. Second, none of the mechanisms referenced in the Trash TMDL, be it the VSS Units or any of the other deemed full-capture devices, will achieve "actual compliance" with the zero WLA. And that is in fact the point. There is no way to "actually" comply with the WLAs within the TMDL, outside of the use of deemed complaint full-capture BMPs. Thus, the Regional Board's lack of knowledge of any means of achieving "actual compliance" with the TMDL, only goes to prove the inappropriateness of requiring strict compliance with the "zero" WLA. Mandating compliance with a numeric limit that cannot actually be achieved, not only exposes the Cities to inappropriate enforcement actions by the Regional Board, it similarly exposes the Cities to unjustified third-party citizen suits.

In addition, it has long since been the policy of the State of California not to require the use of strict numeric limits to Stormwater dischargers, but rather to apply the MEP standard through an iterative BMP process. (*See, e.g.*, State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14] [Exhibit "5"]; State Board Order No. 96-13, p. 6 [***"federal laws does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."] [Exhibit "6"]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."] [Exhibit "7"]; State Board Order No. 2001-11, p. 3 ***["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."]*** [Exhibit "8"]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."] [Exhibit "9"]; State Board Order No. 2006-12, p. 17 [***"Federal regulations do not require numeric effluent limitations for discharges of storm water***"] [Exhibit "10"]; *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [***"It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."] [Exhibit "11"]; and an April 18, 2008 letter from the State Board's Chief Counsel

to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"] [Exhibit "12"].)

Furthermore, in the League of California Cities Final Draft Water Policy Guidelines dated October 14, 2009, with respect to MS4 Permits, the League specifically encouraged "the water boards to issue permits ***that are reasonably achievable,*** based on the unique conditions of a city or region." The League went on to generally oppose ***"legislation that requires the use of numeric limits in waste discharge permits, especially in storm water permits, because of the difficulties in meeting them, the problems with exceeding them, and the cost and potential enforcement impacts."*** (League of California Cities Final Draft Water Policy Guidelines, Exhibit "15," pp. 8-9.)

In short, neither State or federal law, nor State or federal policy, provide for the incorporation of WLAs as strict numeric limits into an MS4 Permit. In fact, they provide for the contrary, and recognize that numeric limits should only be incorporated into an MS4 Permit in "rare instances," with the State Board's Numeric Effluent Limits Panel concluding that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."

B. Any Attempt To Impose Strict Compliance With WLAs In A Stormwater Permit, Or To Impose Other Requirements That Go Beyond Federal Law Or That Do Not Exist In Federal Law, Require Compliance With Water Code Sections 13241 And 13000.

As explained by the Court of Appeal in *BIA San Diego County v. State Board, supra,* 124 Cal.App.4th 866, 874, in the Clean Water Act, Congress distinguished between industrial and storm water discharges and clarified that with respect to municipal storm water discharges, "the EPA has the authority to fashion NPDES Permit requirements to meet storm water quality standards without specific numeric effluent limits . . . ." Accordingly, the attempt to impose a permit term that requires strict compliance with the WLAs, *i.e.*, numeric effluent limits, is a requirement that clearly goes beyond what is mandated under federal law. As such, all aspects of State law must be adhered to before any such permit term can be adopted.

Under the California Supreme Court's holding in *Burbank v. State Board, supra,* 35 Cal.4th 613, a regional board must consider the factors set forth in Water Code sections 13000 and 13241 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.* at 627.) According to the Supreme Court in *Burbank,* ***"Section 13263 directs Regional Boards, when issuing waste discharge requirements, to take into account various factors including those set forth in Section 13241."*** (*Id.* at 625, emphasis added.) In *Burbank,* the California Supreme Court held

that to the extent the NPDES Permit provisions in that case were not compelled by federal law, the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the ***"dischargers cost of compliance."*** (*Id.* at 618.) The Court specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that case. (*Id.* at 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the costs of compliance when setting effluent limitations in a waste water discharge permit."].) And according to the California Supreme Court, the goal of the Porter-Cologne Act is to "attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (*Id.* at 618, citing Water Code § 13000.)

As such, under the *Burbank* decision, Section 13263 requires a consideration of the factors set forth under Section 13241. Section 13241 then compels the Boards to consider the following factors when developing NPDES Permit terms.

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing in the region.

(f) The need to develop and use recycled water.

(§ 13241.) In *U.S. v. State Board* (1986) 182 Cal.App.3d 82, the State Board issued revised water quality standards for salinity control because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento–San Joaquin Delta ("Delta"). (*Id* at 115.) In invalidating the revised standards, the Court recognized the importance of complying with the policies and factors set forth under Water Code sections 13000 and 13241, and emphasized section 13241's requirement of an analysis of "economics." The Court also stressed the importance of establishing water quality objectives which are "reasonable," and the need for adopting "reasonable standards consistent with overall State-wide interests":

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible.**" **(§ 13000.)** In fulfilling its statutory imperative, the Board **is required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." **(§ 13241)**, a conceptual classification far-reaching in scope. (*Id* at 109-110, emphasis added.)
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> The Board's obligation is to attain the highest reasonable water quality "considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, *economic* and social, tangible and intangible." (§13000, italics added.) (*Id* at 116.)
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> * * *
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> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also all competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). (*Id* at 118, emph. added.)

Justice Brown in her concurring opinion in *Burbank,* made several significant comments regarding the importance of considering "economics" in particular, and the Water Code section 13241 factors in general, when considering including numeric effluent limitations in an NPDES Permit:

> **Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) – the body responsible to enforce the statutory framework –failed to comply with its statutory mandate.**

> **For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.** (*Id* at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

> **Accordingly, the Board has failed its duty to allow public discussion – including economic considerations – at the required intervals when making its determination of proper water quality standards.**
>
> **What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.** (*Id* at 632-33.)

The above-referenced statutory, regulatory and case authority all confirm, not only that municipal dischargers are to be treated differently than other industrial dischargers, but also that numeric limits should not be applied to any municipal discharger at this time. "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, Exhibit "9," p. 8.) Accordingly, strict compliance with WLAs in the Trash TMDL or any other TMDL, should not be required at this time, and to the extent a WLA is attempted to be incorporated into a municipal NPDES Permit, and enforced as such and through a means other than through the use of the MEP-complaint BMPs, all applicable requirements of State law, including the analysis required under Water Code Sections 13241/13000, must be met.

With the language in the Proposed Amendment, the Regional Board seems to contends that no section 13241 (and presumably section 13000) analysis is necessary to support the

inclusion of numeric effluent limits in the subject Permit, because according to the Regional Board, "practicable" options exist to achieve compliance with the effluent limitations. Yet, as referenced above, there are no "practicable" options that have been identified that will achieve "actual compliance" with the numeric effluent limits. To the contrary, all of the "practicable" options are "deemed" compliant full-capture devices, and no "Finding" or evidence exists to support any Finding that "actual compliance" could ever reasonably be achieved.

Moreover, the CWA plainly does not require the inclusion of "numeric effluent limits" in a Stormwater NPDES Permit, and clearly does not require "strict compliance" with any such limits or with any "water quality standards." Accordingly, a Permit term that requires strict compliance with numeric effluent limits is a Permit term that, on its face, goes beyond the requirements of the Clean Water Act. As such, whether the deemed-compliant measures to meet these strict numeric limits are "practicable" is not the relevant issue. Instead, the issue, given that numeric limits clearly are not required under federal law, is whether the Regional Board has complied with the requirements of the Porter-Cologne Act before adopting the Proposed Amendment, *i.e.*, conducted the analysis required under sections 13263, 13241 and 13000. Yet, as reflected in the Proposed Amendment itself, no such section 13241/13000 analysis has been conducted, with the Regional Board wrongly concluding that no such analysis is "necessary to support these effluent limitations." (Proposed Amendment, Finding 52.)

With the adoption of sections 13263 and 13241, the California Legislature clearly required the Regional Board to conduct an analysis of whether the Proposed Permit terms in issue are "reasonably achievable," as well as an analysis of their "economic" impacts, and to consider the "environmental characteristics" of the water body in issue before imposing any such Permit terms. In this case, the draft findings in the Proposed Permit confirm that the Regional Board has not conducted this legally required analysis. Nor is there any evidence in the record that such an analysis has ever been conducted to date, and it would be contrary to law for the Boards to rely upon any prior analysis conducted with respect to the Trash TMDL, particularly in light of the fact that when the Trash TMDL was adopted, the Boards did not indicate with any certainty that "strict compliance" with the WLAs in the TMDL would be required, as it is now attempting to require.

Moreover, the initial Trash TMDL was adopted in 2001, with the Regional Board at that time providing the Cities with a twelve year implementation period, *i.e.*, two years of monitoring and investigation, followed by ten, ten percent (10%) annual reductions in the amount of trash allowed to be discharged to the Los Angeles River. Now, however, with the attempted incorporation of the WLAs into the MS4 Permit in 2009, some eight years later, the starting point for reductions in trash are 50%, rather than 10% after three years, as was the case in 2001, meaning that a much more significant effort, with accelerated capital and implementation costs, must be undertaken to install the various full-capture devices in issue.

Yet, no analysis has been performed on whether such an expedited implementation schedule "could reasonably be achieved" in the necessary time frame, nor has any analysis been performed on the costs of installing and maintaining these deemed-compliant structural BMPs on an expedited basis. For example, in utilizing a recent State Grant provided to the Gateway Cities for purposes of complying with the TMDL, in order to meet the 60% WLA as of September 30, 2010, it is estimated that thousands of catch basin inserts will need to be installed, *i.e.*, several thousand catch basin inserts will need to be installed over the course of the next 10 months for the Gateway Cities alone. Whether the market can even manufacture a sufficient number of catch basins in time, let alone the significant capital cost that must be undertaken to install these catch basins, as well as the cost to purchase or install catch basin inserts throughout other parts of the Region to comply with the 60% requirement by the end of next September, has not been shown, and nor is there any evidence in the record to indicate that such is in fact "reasonably achievable". Beyond this, the experience to date by the Cites has shown that for those catch basin inserts that have been installed, the actual cost to maintain such devices is excessive, as is the repair cost, and there has been no analysis by the Regional Board of the overall cost to continue to maintain, repair and subsequently replace such devices, consistent with the requirements of sections 13241/13000.

The Regional Board has failed to comply with the clear requirements of Water Code sections 13263, 13241 and 13000, even though it is admittedly requiring strict compliance with numeric limits, *i.e.*, the WLAs in the Trash TMDL.

C. With The Proposed Permit Terms, The Regional Board is Arbitrarily Attempting To Redefine "Stormwater" To Exclude "Urban Runoff"

Part 5 of the Proposed Amendment arbitrarily includes a new definition for the term "Drainage," where it defines such term as meaning "all drainage into the MS4, including urban runoff (non-stormwater) and stormwater." In addition, page 11 of the Fact Sheet misrepresents the application of the MEP standard to Municipal Stormwater Permits, by asserting that the language of the CWA requires Municipal Stormwater Permits to include "controls to reduce the discharge of pollutants from ***storm water*** to the maximum extent practicable," citing to section 402(p)(3)(B) of the CWA. As discussed below, these terms of the Proposed Amendment and such contentions in the Fact Sheet, are in error, in light of the fact that the definition of "storm water" under the federal regulations specifically includes "storm water runoff, snow melt runoff, and surface runoff and drainage" (40 CFR § 122.26(b)(13)), and given that the actual language of the CWA provides for the application of the MEP standard to all "pollutants" from the MS4, not just to pollutants "from storm water" from the MS4.

The Regional Board's attempt, with the Proposed Amendment, to redefine Stormwater to exclude "urban runoff," plainly has it backwards, as the federal regulations expressly define "storm water" as including not only storm water runoff and snow melt runoff but also "surface

runoff and drainage." (40 CFR § 122.26(b)(13).) Thus, the definition of the term "Drainage" in the Proposed Amendment is directly contrary to the express definition of "storm water" in the federal regulations, and in fact inverts the definition of the term "storm water," apparently with the goal of recasting the language of the CWA to avoid applying the MEP standard to ***all*** discharges from the MS4. The proposed definition of "Drainage" is arbitrary and contrary to law.

Redefining the term "storm water" to exclude "urban runoff" is an apparent attempt to read the terms "surface runoff" and "drainage" out of the federal regulation in 40 CFR § 122.26(b)(13). Such an interpretation is contrary to the plain language of the regulation and applicable law. (*See e.g., Astoria Federal Savings and Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 112 ["[W]e construe statutes, where possible, ***so as to avoid rendering superfluous any parts thereof.***"]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 ["We ordinarily reject interpretations that render particular terms of a statute as mere surplusage, ***instead giving every word some significance.***"]; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 92 ["In construing the words of a statute . . . an interpretation ***which would render terms surplusage should be avoided***, and every word should be given some significance, ***leaving no part useless or devoid of meaning.***"]; *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1022 [***"We are required to avoid an interpretation which renders any language of the regulation mere surplusage."***; and *Hart v. McLucas* (9th Cir. 1979) 535 F.2d 516, 519 [***"[I]n the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided."***].)

Second, beyond the plain language of the federal regulation, prior orders of the State Board confirm that the term "urban runoff" is included within the definition of "storm water." For example, in State Board Order No. 2001-15, the State Board regularly interchanges the terms "urban runoff" with "storm water," and discusses the "controls" to be imposed under the Clean Water Act as applying equally to both. In discussing the propriety of requiring strict compliance with water quality standards, and the applicability of the MEP standard in Order No. 2001-15, the State Board asserted as follows:

> **Urban runoff** is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on **urban runoff**. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where **urban runoff** is causing or contributing to exceedances of water quality standards,

> it is appropriate to require improvements to BMPs that address those exceedances.
>
> While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. **We will generally not require "strict compliance" with water quality standards through numeric effluent limits and we will continue to follow a iterative approach, which seeks compliance over time.** The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems. (*See* Order 2001-15, p. 7-8; emphasis added.)

Moreover, at the urging of the petitioner in Order No. 2001-15, the State Board went so far as to modify the "Discharge Prohibition A.2" language, which was challenged by the Building Industry Association of San Diego County ("BIA"), because such Discharge Prohibition was not subject to the iterative process. The State Board found that: "The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. . . . Language clarifying that the iterative approach applies to that prohibition is also necessary." (State Board Order No. 2001-15, p. 9.)

The State Board further required that the Municipal NPDES permit challenged in that case be modified because the permit language was overly broad, as it sought to apply the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s, with the BIA claiming that it was inappropriate to require the treatment and control of discharges "prior to entry ***into*** the MS4," and with the State Board agreeing that such a regulation of discharges ***"into"*** the MS4 was inappropriate. [*Id* at 9 ["We find that the permit language is overly broad because it applies the MEP standard not only to discharges 'from' MS4s, but also to discharges "into' MS4s."].)

In State Board Order No. 91-04 discussed above, the State Board specifically relied upon EPA's Stormwater Regulations, to find that: "Storm water discharges, by ultimately flowing through a point source to receiving waters, are by nature more akin to non-point sources as they flow from diffuse sources over land surfaces." (State Board Order No. 91-04, p. 13-14.) The State Board then relied upon EPA's Preamble to said Stormwater Regulations, and quoted the following from the Regulation:

> For the purpose of [national assessments of water quality], **urban runoff** was considered to be a diffuse source for non-point source pollution. From a legal standpoint, however, most **urban runoff** is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the [Clean Water Act]. 55 Fed.Reg. 47991. (State Board Order No. 91-04, p. 14; emphasis added.)

The State Board went on to conclude that the lack of any numeric objectives or numeric effluent limits in the challenged permit: "will not in any way diminish the permit's enforceability or its ability to reduce ***pollutants in storm water discharges*** substantially. . . . In addition, the [Basin] Plan endorses the application of 'best management practices' rather than numeric limitations as a means of reducing the level of ***pollutants in storm water discharges***." (*Id* at 14, emphasis added.) (*Also see* Storm Water Quality Panel Recommendations to the California State Water Resources Control Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, June 19, 2008, p. 1 ["MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP)"], and p. 8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs ***and in particular urban dischargers***."]; State Board Order No. 98-01, p. 12 [***"Storm water permits*** must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limits."]; and State Board Order No. 2001-11, p. 3 ["In prior Orders this Board has explained the need for the ***municipal stormwater programs*** and the emphasis on BMPs in lieu of numeric effluent limitations."].)

Third, in the *Arcadia* Case, in its Decision, Judgment and Writ of Mandate, the Superior Court found that the term "stormwater" was defined in the federal regulations to include not only "stormwater" but also "urban runoff." (*See*, Decision, Exhibit "3," p. 1 [" . . . the Standards apply to storm water [*i.e.*, storm water and urban runoff]."]; *also see* the Judgment in the *Arcadia* Case, p. 2, fn 2 [citing to 40 C.F.R. § 122.26(b)(13), where the Superior Court found that: "Federal law defines 'storm water' to include urban runoff, *i.e.*, 'surface runoff and drainage'".]; and the Writ of Mandate in the *Arcadia* Case, p. 2, n. 2, where the Superior Court similarly again concluded that: "Federal law defines 'storm water' to include urban runoff, *i.e.*, 'surface runoff and drainage.'".)

It is further important to note that this interpretation of the term "stormwater" as including "urban runoff," by the Superior Court in the *Arcadia* Case, has ***not*** been challenged on appeal by the State or Los Angeles Regional Boards, and in fact, has been agreed to by both of these Boards, as well as by the Intervenor environmental organizations. Specifically, in the State and Regional Boards' Opening Appellate Brief in the *Arcadia* Case, they agreed that the term "Stormwater" is to include "urban runoff," where they stated as follows:

> **"Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but stormwater emanates from diffuse sources, including surface run-off following rain events (hence "storm water") and urban run-off.** (*See* Exhibit "4" hereto, Appellant Boards' Opening Brief, p. 9, n. 5.)

Thus, both the State and the Los Angeles Regional Boards have acknowledged that the term "stormwater" includes not only "stormwater" runoff from "rain events," but also other discharges from a storm sewer conveyance system, specifically including "urban runoff." (*Id.*) This definition of the term "Stormwater" as including "urban runoff," has also been accepted by the NRDC, the Santa Monica Baykeeper, and Heal the Bay (collectively, "Intervenors"). In the Intervenor's Opening Brief in the *Arcadia* Case, said Intervenors admit as follows:

> **For ease of reference, throughout this brief, the terms "urban runoff" and "stormwater" are used interchangeably to refer generally to the discharges from the municipal Dischargers' storm sewer systems. The definition of "stormwater" includes "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).)** (*See* Exhibit "4," Intervenors' Opening Appellate Brief, p. 6, n. 3.)

In sum, in light of the plain language of the federal regulation defining the term "storm water" to include "urban runoff," *i.e.,* "surface runoff" and "drainage" in addition to "storm water" and "snow melt," and given the findings of the Superior Court in the *Arcadia* Case, as well as the admissions by the State and Regional Boards and the Intervenors in that case, it is clear that the term "storm water" as defined in the federal regulations, includes "urban runoff."

In addition, a review of the language of the Clean Water Act clearly shows that municipalities are only required to "reduce the discharge of ***pollutants*** to the maximum extent practicable." (33 USC § 1342(p)(3)(B)(iii).) The CWA requires that the MEP standard be applied to the "discharge of pollutants" from the MS4, and not to the "discharge of pollutants from ***storm water***" from the MS4, as suggested in the Fact Sheet to the Proposed Amendment. Accordingly, the Regional Boards attempted limitation of the application of the MEP standard only to pollutants in "storm water," and the apparent desire to then apply a heightened standard beyond the "MEP" Standard for non-precipitation events, is simply unsupported by the plain language of the CWA.

Section 1342(p)(3)(B) of the Act entitled "Municipal Discharge" provides, in its entirety, as follows:

Permits for discharges **from** municipal storm sewers –

(i) may be issued on a system– or jurisdictional– wide basis;

(ii) shall include a requirement to effectively prohibit **non-stormwater** 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), emphasis added.)

This language in the CWA has consistently been interpreted as requiring an application of the MEP standard to all municipal discharges, rather than an application of a standard requiring strict compliance with numeric limits. Specifically, federal law only requires strict compliance with numeric effluent limits by industrial dischargers, but not by municipal dischargers. As the Ninth Circuit in *Defenders, supra,* 191 F.3d 1159, found, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' finding that the Clean Water Act was "***not merely silent***" regarding requiring "municipal" dischargers to strictly comply with numeric limits, but in fact found that the requirement for traditional industrial waste dischargers to strictly comply with the limits was "replaced" with an alternative requirement, *i.e.*, "that ***municipal*** storm-sewer dischargers 'reduce the discharge ***of pollutants*** to the maximum extent practicable . . . ***in such circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).*** (*Id.* at 1165; emphasis added.)

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* ("*BIA*") (2004) 124 Cal.App.4th 866, there as well the Appellate Court, relying upon the Ninth Circuit's holding in *Defenders*, agreed that "with respect to ***municipal*** stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharger ***of pollutants*** to the maximum extent practicable.'" (*Id.* at 874, emphasis added.) The Court of Appeal in the *BIA* Case explained the reasoning for Congress' different treatment of Stormwater dischargers versus industrial waste dischargers when it stated that:

> Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act and making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators pointed out, although

> Congress was reacting to the **physical differences between municipal storm water runoff and other pollutant discharges** that made the 1972 legislation's blanket effluent limitations approach **impractical and administratively burdensome**, the primary points of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (*Id.* at 884, emphasis added.)

In State Board Order No. 91-04, the State Board addressed the propriety of the 1990 Municipal NPDES Permit for Los Angeles County, and particularly whether such permit, in order to be consistent with applicable State and federal law, was required to have included "numeric effluent limitations." In addition to the State Board's interchangeable use of the terms "storm water" and "urban runoff" when discussing the applicable standard to be applied under the CWA (*see* discussion below), the State Board confirmed that the MEP standard applies to the ***"discharge of pollutants"*** from the MS4, and made no mention of the need to apply a different standard if the ***"discharge of pollutants"*** arose from alleged "non-stormwater" rather than "storm water." To the contrary, the State Board recognized the MEP standard applied to "pollutants in runoff," irrespective of the source of the pollutants, finding as follows:

> We find here also that the approach of the Regional Board, requiring the dischargers to implement **a program of best management practices** which will reduce **pollutants in runoff**, prohibiting non-stormwater discharges, is appropriate and proper. **We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expense such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program.** (State Board Order No. 91-04, p. 16-17, emph. added.)

This State Board Order, and others as discussed below, all show that although there are two requirements imposed upon municipalities under the CWA, one requiring that municipalities effectively prohibit "non-stormwater" "into" the MS4, and a second requiring municipalities to "reduce the discharge of pollutants to the maximum extent practicable," that the MEP standard applies to ***"pollutants in runoff"*** coming out of the MS4 system, regardless of whether such discharges are stormwater or non-stormwater. The only difference in the requirements to be imposed upon the municipalities between stormwater and non-stormwater, involves the need for municipalities to "effectively prohibit non-stormwater discharges into the" MS4.

In sum, the Regional Boards attempt to back in a definition of the term "storm water" to exclude "urban runoff," through a new definition of the term "Drainage," is directly contradicted by the plain language of the CWA. In addition, this attempted redefinition of the term "storm water" to exclude "urban runoff," combined with the misrepresentation of the language in the CWA that the MEP standard is limited to the discharge of pollutants from "storm water," appears to be an attempt to justify imposing a strict numeric effluent limitation as the means of incorporating WLAs from the subject TMDL and future TMDLs into the Permit. Such action is contrary to law and constitutes an abuse of discretion.

D. Any Additional Monitoring Or Required Investigation Into Water Quality Would Trigger The Need For A Cost-Benefit Analysis Pursuant To Water Code Sections 13225 And 13267.

The Proposed Amendment also includes a series of "monitoring and reporting requirements" as a part of the incorporation of the subject Trash TMDL, which if not complied with, would subject the Permittees to various penalties and enforcement action under the PCA. Yet, before incorporating any of the "monitoring and reporting requirements" set forth in the Proposed Amendment, the Regional Board must first conduct a cost-benefit analysis, in accordance with Water Code sections 13225(c) and 13267. That is, to the extent the Regional Board seeks to require a city to investigate and report on technical factors involved in water quality control, or to require a city to implement additional monitoring requirements, a cost-benefit analysis must be performed beforehand to justify the inclusion of any such additional reporting and monitoring requirement.

Under these Water Code sections, where any investigation, monitoring or reporting requirements are imposed upon a city, the Regional Board is required to consider the burdens of conducting the analysis, and preparing the monitoring reports, and may only require such reporting and monitoring, where "the burden, including costs, of such reports" bears "a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (§§ 13267 & 13225(c).) Moreover, under section 13267 specifically, where such an investigation or reports are required, "the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." (§ 13267.)

Likewise, under Water Code section 13225(c), a regional board only has the authority to "require as necessary any state or local agency to investigate and report on any technical factors involved in water quality or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom." (§ 13225(c); *also see* § 13165 placing an identical obligation on the State Board.)

Accordingly, the "Monitoring and Reporting Requirements" in the Proposed Amendment to the Permit, may only lawfully be imposed upon the Cities after a cost-benefit analysis, showing that the costs do not exceed the benefits of such requirements, has been conducted. There are no findings and no evidence to support any such findings, that the required cost benefit analysis compelled by sections 13267 and 13225, has been conducted. Until the requisite cost benefit analysis and the other requirements of section 13267 have been met, the Proposed Amendment cannot lawfully be adopted.

E. Any Added Mandates On The Cities With New Permit Terms That Are Not Mandated By Federal Law, Must Be Funded In Accordance With The California Constitution.

The admitted attempt, with the Proposed Amendment, to require "strict" compliance with the WLAs in the current Trash TMDL, is a requirement that admittedly goes beyond what is required under federal law. Similarly, nothing under federal law requires that the municipalities install and maintain trash receptacles at all transit stops within their respective jurisdictions, and the continued requirement in the Proposed Amendment on the Cities to do so is a second aspect of the Proposed Amendment that goes beyond what is required by the Clean Water Act. Accordingly, forcing Cities to strictly comply with numeric limits, or to carry out other requirements such as installing and maintaining trash receptacles at transit stops, are non-federally mandated requirements that may only be imposed where funds have first been provided as required by the California Constitution.

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides in relevant part as follows:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service. . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it "***was intended to preclude the state from shifting financial responsibility to local entities that were ill equipped to handle the task***." (*Id.*) The incorporation of new permit requirements that are not mandated by federal law, and that go unfunded by the State, would violate Article XIII B, Section 6 of the California Constitution. (*See County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 914 ["We are not convinced that the obligations imposed

by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."].)

In this case, as discussed above, the requirement to install and maintain trash receptacles at all transit stops within the respective jurisdictions of the Cities has already been found by the Commission on State mandates to be a mandate that is not compelled by the Clean Water Act, and to be a mandate that must be funded by the State of California. (*See* Exhibit "2" p. 1-2.) Particularly now, continuing to impose such a requirement, while at the same time maintaining the other requirements on the Cities to strictly comply with the WLAs in the Trash TMDL, appears to be an attempt to impose an unnecessary mandate, but nonetheless, is an expense that the State of California will be required to assume responsibility for, along with the cost to comply with the additional non-federal mandate of strictly complying with the numeric WLAs.

IV. CONCLUSION.

For the foregoing reasons, the Cities respectfully request that the Proposed Amendment not be adopted at this time, and that instead the Regional Board revise the NPDES Permit in issue as a part of the Permit renewal process in response to the ROWDs submitted to the Regional Board some 3½ years ago, and then only after the *Arcadia* Case has been finally concluded. In addition, at the appropriate time that the Trash TMDL is to be incorporated into the renewed NPDES Permits, the incorporation must be accomplished consistent not only with the "assumptions and requirements of any available waste load allocation," but also consistent with the assumptions and requirements of applicable State law. The Cities hope that yet further litigation over the Trash TMDL can be avoided, and that the Regional Board will act responsibly and in accordance with law before amending the existing NPDES Permit to incorporate its terms.

Sincerely,

RUTAN & TUCKER, LLP

Richard Montevideo

Enclosures
RM:jlk