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Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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P.O. Box 100
Sacramento, CA 95812-0100

Sent via e-mail to: commentletters@waterboards.ca.gov

Re: Comments to A-2236(a)-(kk) – Submitted on behalf of the Cities of Pomona and Pico Rivera in Response to the State Water Resources Control Board's Revised Proposed Order Dated April 24, 2015

Dear Ms. Townsend:

These comments are submitted on behalf of the Cities of Pomona and Pico Rivera (the "Cities") in response to the State Water Resources Control Board's ("State Board") Revised Order dated April 24, 2015 ("Revised Draft Order"), In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001(Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within The Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4, referred to herein as the "Permit" or "Subject Permit") issued by the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board").

As instructed by the State Board's Chief Counsel's letter dated April 24, 2015, notifying the Petitioners of the Revised Draft Order and the Written Public Comment Period, these comments are limited to the revisions indicated by redline/strikeout in the Revised Draft Order. In submitting these comments, the Cities are not narrowing or otherwise waiving comments and objections previously submitted in response to the State Board's Proposed Draft Order dated November 21, 2014, but rather, the Cities maintain the previously submitted comments and incorporate said comments by reference.

The Cities appreciate the opportunity to submit comments prior to the State Board's adoption of the Revised Draft Order. For reasons expressed below the Cities believe that the Revised Draft Order requires additional revisions in order to formulate the Subject Permit's provisions in a manner consistent with Federal and State law.

1. The Revised Draft Order interprets the Subject Permit in a manner that sets impossible standards for Permittees' compliance, by prohibiting all non-exempt, non-storm water discharges from entering a receiving water.

Part III.A of the Permit requires each Permittee to prohibit non-exempt "*non-storm water discharges through the MS4 to receiving waters.*" Part VI.C of the Permit, subsection 1.d, then provides that the "*Watershed Management Programs shall ensure that the discharges from the Permittee's MS4: ... (iii) do not include non-storm water discharges that are effectively prohibited pursuant to Part III.A.*"

The revisions in the Revised Draft Order indicate that a Permittee *will not* be deemed in compliance with the Discharge Prohibition provisions in Part III.A, even where the Permittee is in compliance with an approved WMP/EWMP. According to the revisions on page 52 of the Revised Draft Order:

> Implementation of control measures through the WMP/EWMP may provide a mechanism for compliance with Section III.A, which establishes the prohibition on non-storm water discharges, but such implementation does not constitute compliance with Section III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Section V.A of the Order, the receiving water limitations provisions, and not III.A.

This added language implies that *any* non-exempt prohibited discharge that travels "*through the MS4 to receiving waters,*" would result in a violation whether or not pollutants are present in the discharge at levels exceeding the applicable receiving water limitation or exceed a waste load allocation from a TMDL.

Read with Footnote 187 (added at page 69 of the Revised Draft Order), a Permittee violates the Permit and is subject to enforcement or a third party lawsuit whenever *any volume* of non-exempt non-storm water discharge touches a receiving water, regardless of Permittee's compliance with an approved WMP/EWMP program, or with applicable receiving water limitations or waste load allocations.[1] These non-stormwater provisions of the Permit and the Revised Draft Order are impossible to comply with, and exceed what is required under the Clean Water Act, as well as what is permissible under the Porter-Cologne Act.

As a matter of law, the Clean Water Act does not require Permittees to achieve the impossible. In *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.*, 519 U.S. 993

[1] Footnote 187 at page 69 of the Revised Draft Order states, "We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angles MS4 Order means that any dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act. The effective prohibition directed by the Clean Water Act has been addressed in the Los Angeles MS4 Order through the extensive list of exceptions and conditional exemptions laid out in Part III of the Order."

(1996), the plaintiff sued JMS Development Corporation ("JMS") for failing to obtain a storm water permit that would authorize the discharge of storm water from its construction project. The plaintiff argued JMS had no authority to discharge any quantity or type of storm water from the project, i.e. a "zero discharge standard," until JMS had first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was being discharged from its property and that it had not obtained an NPDES permit, but claimed it was not in violation of the Clean Water Act (even though the Act required the permit) because the Georgia Environmental Protection Division, the agency responsible for issuing the permit, was not yet prepared to issue such permits. As a result, it was impossible for JMS to comply. (*Id.*)

The Eleventh Circuit Court of Appeal held that the CWA does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (*Id.* at 1529.) The Court then found that:

> In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge.

(*Id.* at 1530.) The Court concluded, "*Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities." (*Id.*)

The same rule applies here. The Clean Water Act does not require municipal Permittees to do the impossible and comply with unachievable BMPs and a complete prohibition on all dry weather discharges. Because municipal Permittees are involuntary permittees, that is, because they have no choice but to obtain a municipal storm water permit, the Permit, as a matter of law, cannot impose terms that are unobtainable. (*Id.*) In this case, strictly complying with the non-storm water "discharge prohibition" is not achievable by the Permittees, given the innumerable and variable potential sources of urban runoff. The "technical" and "economic" feasibility to comply with the non-storm water "discharge prohibition" simply do not exist, and imposing such a requirement that goes beyond "the limits of practicability" (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1162) and is nothing more than an attempt to impose an impossible standard on municipalities that cannot withstand legal scrutiny. Accordingly, the imposition of the non-storm water "discharge prohibition" is not only an attempt to impose an obligation that goes beyond the requirements of federal law, but equally important, represents an attempt to impose provisions that go beyond what is "practicable," and in this case, beyond what is "feasible." Because the law does not compel doing the impossible, the non-storm water "discharge prohibition" in the Permit, as interpreted in the Revised Draft Order, must be revised to be consistent with the law.

Unless a Permittee diverts all non-exempt, non-storm water discharges from touching a receiving water, including, apparently those occurring during rain events, the Permittee will be in

violation of the Permit. The result is an impossible position for the Permittees, and the non-storm water "discharge prohibition" provisions of the Permit, as interpreted in the Revised Draft Order, are therefore impossible to comply with. The ultimate outcome of imposing an unachievable discharge prohibition on municipalities will not be to improve water quality, but instead to increase litigation and attorney's fees in fighting enforcement actions and citizen suits (*see, e.g., NRDC v. County of Los Angeles, supra*, 2015 U.S. Dist. LEXIS 40761 [County of Los Angeles and Los Angeles Flood Control District found liable for over 140 violations of the Clean Water Act for effluent limit exceedances, and thus subjecting them to penalties in an amount yet to be determined, where the Court stated: "*Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are liable for Permit violations as a matter of law. . . . As a result, Defendants are liable for the 147 exceedances described in Defendants' monitoring reports, which the Ninth Circuit found were conclusively demonstrated to be Permit violations by Defendants' own pollution monitoring.*"].) Not only does such a requirement subject municipalities to unjustified penalty claims under the Clean Water Act, it would also potentially subject them to mandatory minimum penalties under the Porter-Cologne Act. (Permit, p. 45-46, citing Water Code § 13385.)

For the reasons stated above, the Cities request that that the amended language of the Revised Draft Order at page 52 be further revised to state that "*implementation [of control measures through the WMP/EWMP] shall constitute compliance with Section III.A.*"

2. A "Zero" Discharge Limit for Non-Storm Water is not required under the Clean Water Act and is inconsistent with Water Code §§ 13000, 13241 and 13263.

As explained, the effect of the Revised Draft Order's interpretation of the Discharge Prohibition provisions of the Permit is to impose a "zero" discharge limitation on non-exempt, non-storm water discharges. Such a requirement is clearly not required under the Clean Water Act, and is, on its face, inconsistent with the requirements of the Porter-Cologne Act, namely, Water Code sections 13000, 13241 and 13263.

Section 1342(p)(3)(B) of the CWA 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.)

Federal law thus only require that municipal storm sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable" ("MEP"), and specifically does not require that such dischargers comply with numeric effluent limits, including a "zero" discharge limit for non-exempt, non-storm water discharges. (*See, e.g. Defenders, supra*, 191 F.3d 1159, 1165; *also see Divers' Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, 256.)

Although "non-stormwater" is required to be "effectively prohibited" from entering ***"into"*** the MS4, the CWA does not treat discharges ***"from"*** the MS4 any differently if the "pollutants" in issue arose as a result of a "storm water" versus a "non-stormwater" discharge. (33 U.S.C. § 1342(p)(3)(B)(iii).) Instead, under the CWA, regardless of the nature of the discharge, *i.e.,* be it "storm water" or alleged "non-stormwater," the MEP standard continues to apply. (*Id.*)

The only difference in the requirements to be imposed upon the municipalities between "storm water" and "non-stormwater," involves the need for municipalities to adopt ordinances in order to "effectively prohibit non-stormwater discharges into the" MS4. (See e.g., 40 CFR 122.26(d)(1)(3)(A) ["***use of ordinances***, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system"]; 40 CFR 122.26(d)(2)(i)(B) ["Prohibit ***through ordinance***, order or similar means, illicit discharges to the municipal separate storm sewer"].)

Accordingly, the attempt to impose a "zero" effluent limit of non-exempt, non-storm water to "receiving waters," rather than only requiring the Permittees to adopt ordinances and take other appropriate enforcement measures to "effectively prohibit" non-storm water from entering its MS4 (33 USC § 1342(p)(3)(B)(ii)), exceeds federal law and is not authorized under State law. As such, the Permit, as written and interpreted by the State Board in the Revised Draft Order, imposes requirements on the Permittees that are not requirements under the Clean Water Act. Similarly, such requirements were not developed in accordance with the Porter-Cologne Act.

Water Code sections 13241, 13263 and 13000 all directly or indirectly require a consideration of "economics," as well as whether the terms in question are "reasonable achievable," including a balancing of the benefit of the requirement, e.g., "***the total values involved, beneficial and detrimental, economic and social, tangible and intangible***" (Water Code § 13000), the "***water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area***" (Water Code § 13241), and the need to "take into consideration the beneficial uses to be protected" and the "***water quality objectives reasonably required for that purpose***" (Water Code § 13263(a).)

Under the California Supreme Court's holding in *Burbank v. State Board* (2005) 35 Cal.4th 613 ("*Burbank*"), a regional board must consider the factors set forth in sections 13263,

13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.* at 627.) As stated by the *Burbank* Court, ***"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.) Specifically, the *Burbank* 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 such requirement means that the Water Boards must analyze the ***"discharger's cost of compliance."*** (*Id.* at 618.) The Court in *Burbank* thus interpreted the need to consider "economics" as requiring a 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.***"].)

With the language in the Permit, as now interpreted by the State Board in the Revised Draft Order, to impose a "zero" effluent limit for non-exempt, non-storm water discharges to a "receiving water," the requirements in the Porter-Cologne Act must be met. Because there is nothing in the administrative record, nor could there be, to show that such a "zero" limit on the Permittees is reasonably and economically achievable, the discharge prohibition requirement is plainly contrary to law.

3. Compliance with Water Code §§ 13267, 13225 & 13165 is not "an obstacle to the accomplishment of the full purposes and objectives of" the Clean Water Act.

Under California law, before any monitoring, reporting, investigation and study requirements may be imposed upon a permittee, a cost/benefit analysis must be conducted and no such requirements can be imposed unless the Regional Board has first shown that the burden, including the costs of these requirements, "bear a reasonable relationship" to their need. (See Water Code § 13267.) Section 13225(c) mandates that the Regional Board similarly conduct a cost/benefit analysis if it requires ***a local agency*** to investigate and report on technical factors involved with water quality. Section 13225(c) of the Water Code requires that each regional board, with respect to its region, shall:

> (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control 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) [emphasis added]; *see also* § 13165 [imposing this same requirement on the State Board where it requires a "local agency" to "investigate and report on any technical factors involved in water quality control; ***provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom***"].)

Despite this, with regard to the monitoring and reporting program requirements in Parts VI.B and VI.E.5 of the Permit, New Footnote 192 of the Revised Draft Order (p. 71) improperly suggests that Water Code sections 13267, 13225 and 13165 do not apply to the Permit's monitoring and reporting program:

> Permittee Petitioners argue that the cost considerations of Water Code section 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, § 13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . .").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code section 13225 and 13267 would stand, in other words of *Silkwood* as: 'an obstacle to the accomplishments of the full purposes and objectives of [the federal law].' (*Ibid.*) (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp. 19-20). (Revised Draft Order, p. 71, fn 192.)

Yet, the Revised Draft Order fails to provide any basis for its assertion that California law "stands as an obstacle to the accomplishment of the full purposes and objectives of [the federal law]." (Revised Draft Order, p. 71, fn. 192.) Rather, it cites, in footnote 191, a litany of federal regulations and statutes under which the monitoring provisions of the Permit were allegedly established. (See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.41(h), 12241(j), 122.41(l), 122.42(c), 122.44(i), 122.48.) However, these regulations and statutes say nothing about relieving the Regional Board of its obligation to otherwise comply with State law. Indeed, there is nothing in the referenced federal regulations that conflicts with State law or that require the specific monitoring requirements provided for in the Subject Permit, nor do the federal regulations provide that further requirements imposed upon administering agencies under State law are ***not*** to be complied with.

Moreover, in accordance with Water Code section 13372(a), only those requirements "required under" the Clean Water Act and which are "inconsistent" with the other requirements of the Porter-Cologne Act outside of Chapter 5.5, may be avoided by the Regional Board in issuing an NPDES Permit. The Revised Draft Order points to no federal law or regulatory requirement imposing the particular monitoring requirements imposed upon the Permittees, nor does federal law prohibit the conducting of a "cost/benefit" analysis under the present

circumstances. Thus the requirements of sections 13225 and 13267 must be complied with prior to imposing the monitoring obligations in issue.

Rather than conflicting with State law, the federal regulatory requirements under the Clean Water Act are consistent with the "cost/benefit" analysis required by Sections 13225 and 13267 by providing that municipalities should describe in its permit application its "budget for existing storm water programs, including an overview of the municipality's financial resources and budge, including overall indebtedness and assets, and sources of funds for storm water programs." (40 C.F.R. § 122.26(d)(1)(vi)(A).) Yet, the Regional Board failed to comply with the cost/benefit requirements under said Sections, and thus acted in excess of its authority and contrary to law. The Revised Draft Order is in error in its analysis of this deficiency with the Permit.

Moreover, with this Permit, at least four Regional Board Member raised concerns with the "cost" of the Permit at the Hearing. (*See e.g.*, Regional Board Hearing Transcript, pp. 218:6-7 ["I'm concerned about the cost"], 240:4-9 ["What if the costs are completely blown out of the park, and it's a really serious problem for the cities and they just can't, you know, for budgetary reasons, they just can't do the things that the permit requires them to do?"], 251:11-15 ["And I know that some of my colleagues already touched upon it, but I think we need to take it very seriously because the truth of the matter is . . . that cities – many smaller cities specifically are really facing borderline bankruptcies"], 257:14-17 ["So I would really appreciate, as we move forward, you know, to do a much better job with looking at the cost – the true cost and benefits in the economics of water quality."].)

In part to address these concerns, a Board/Staff attorney proceeded to advise the Board (wrongly) that the Board should not be conducting, and was not required to conduct, a cost/benefit analysis. (Transcript, p. 259, ["But just to summarize it, there's no cost benefit analysis, so I just wanted to let you know."].) In short, the Board was wrongly advised by its Staff's attorney that there was no obligation on the part of the Board to conduct any form of cost-benefit analysis, presumably including a cost benefit analysis as required under Water Code sections 13225, 13165 or 13267.

Of course the requirement for the Regional Board to have considered "the burden, including costs" of the reporting and monitoring obligations under the Permit, and whether those costs "bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom" (Water Code § 13225(a), 13165 and 13267), cannot rightfully be characterized as anything other than as a cost-benefit analysis. As such, the Regional Board was wrongly advised that they did not need to conduct any form of cost-benefit analysis, and its failure to do so was error.

Because a cost/benefit analysis as required by Water Code sections 13225, 13267 and 13165 was not conducted, *i.e.,* because the evidence does not support a determination that the burden, including the costs of all of the monitoring, investigations, studying and reporting obligations in the Permit, bore a "reasonable relationship" to the need for this information, the Permit was not adopted in accordance with law, and the Revised Draft Order's determinations in

this regard are in error.

4. A Permittee can only lawfully be found to be "severally" responsible for contributing to a comingled exceedance, and the Regional Board bears the burden of proving the contribution.

By changing various references from "~~liability~~" to "responsibility" (see Revised Draft Order, pp. 72-75), the Revised Draft Order further fuels confusion by indicating that "joint responsibility" is presumed in the Permit, yet suggests that the Permit "does not impose such a joint responsibility regime" that "would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permitted contributed to the violation." (Revised Draft Order, p. 74.) This confusion appears to be the result of the Revised Draft Order's misunderstanding of the meaning of "joint and several liability," "joint liability," and "several liability."

If defendants are "jointly and severally liable," the plaintiff may collect his or her entire damages from any one of them, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586–590.) In contrast, if defendants are "severally liable" only, an obligation is divided amongst them in proportion to their liability; the plaintiff is entitled to collect from each only the part that corresponds to the liability of each. (*See* Civ. Code § 1431.2(a); *Douglas v. Bergere* (1949) 94 Cal. App. 2d 267, 270.)[2]

By using the term "joint" instead of "several" in reference to a Permittee's "responsibility," the Revised Draft Order undermines its own assertion that the Permit "does not require each permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation." If the Revised Draft Order means what it says, i.e., that it does not "require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permitted contributed to the violation," it should substitute its use of the term "joint responsibility" with "several responsibility" and revise the Permit to make it clear that several responsibility (as opposed to joint responsibility) applies to the Permittees.

Moreover, the theory of a presumed violation of law for a comingled exceedance is plainly a theory that is contrary to the clear terms of the Clean Water Act and the Porter-Colon Act; and worse, violates fundamental principles of due process of law. Indeed, as written, the Permit conflicts with the various cases confirming that the Regional Board has the burden of proofing liability against an individual Permittee, regardless of whether or not there is a comingled exceedance. Furthermore, the Revised Draft Order fails to address the fact that there is no such thing as "presumed" liability, nor joint and several liability, under either the Clean

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[2] Joint liability only (as opposed to joint and several liability) is a concept that has little or no application under current law and must be read as referring to joint and several liability. (25 California Forms of Pleading and Practice (Matthew Bender 2010) § 300.14; 5 California Torts (Matthew Bender 2009) § 74.04[1].)

Water Act or the Porter-Cologne Act. (See e.g., *Rapanos v. United States* (2006) 547 U.S. 715, 745 ["[T]he agency must prove that the contaminant-laden waters ultimately reach covered waters"]; *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139, 1145-47 ["We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only after the EPA proves, in district court, and according to traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the manner alleged in the compliance order"] [reversed on other grounds, *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367]; *U.S. v. Range Prod. Co.* (N.D. Tx. 2011) 793 F. Supp 2d 814, 823 [court expressed doubt that civil penalties can be obtained without EPA ever proving defendant actually caused contamination]; *In the Matter of Vos*, 2009 EPA ALJ LEXIS 8.)

Moreover, California Evidence Code section 500 provides that, *"[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."* The Revised Draft Order fails to identify anything in the Porter-Cologne Act that would otherwise provide for the burden to be shifted to a Permittee. California Courts interpreting the Porter-Cologne Act have confirmed that a plaintiff bears the burden of proving a violation. (*See, State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 530 ["once plaintiff had proved that there had been a discharge in violation of the Water Code it became defendant's burden to establish, by a preponderance of the evidence, that the amount of penalty imposed should be less than the maximum"].) *City and County of San Francisco* clearly shows that even if a burden is shifted, it is shifted only ***after*** the actual violation is first proven ***by plaintiff.***

The cases all clearly show that liability under either the CWA or the Porter-Cologne Act triggers constitutional protections, and that the burden is on a plaintiff to prove a violation of one of these statutes, not the other way around. The regulations, furthermore, show quite conclusively that a particular alleged violation is only responsible for its own discharges and not discharges of others. (40 C.F.R. § 122.26(a)(3)(vi).)

It should also be recognized that an action to impose penalties under the CWA is quasi-criminal. (See e.g., *U.S. v. Bay-Houston Towing Co.* (2002) 197 F. Supp. 2d 788 ["civil penalties may be considered '**quasi criminal**' in nature"]; see also *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1001 ["A civil contempt proceeding is criminal in nature because of the penalties that may be imposed"].) In quasi-criminal actions, where penalties are imposed, the accused is entitled to the presumption of innocence until proven guilty. (See e.g., *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1002; *Bennett* v. *Superior Court* (1946) 73 Cal.App.2d 203.) "The presumption of innocence ... [is] fundamental to the Anglo-American system of law." (5 Witkin Cal. Crim. Law Crim. Trial § 624.)

It is clear that the concept of "presumed guilt" is not an accepted principle of justice within the American System of Jurisprudence in the assessment of penalties under the CWA or otherwise. Presuming a Permittee is "jointly responsible" for a violation of the Permit and subject to penalties, whenever there is a co-mingled exceedance, thus violates basic tenants of due process of law, plain statutory requirements and well-established precedent. As such, all such terms are contrary to law and the Revised Draft Order should be modified to limit a

Permittees responsibility for exceedances found in a co-mingled plume, to "several" liability only.

For the foregoing reasons, the Cities respectfully contend that the Revised Draft Order adds legal assertions and interpretations of the Subject Permit that are inconsistent with law, and as such, continue to request that the provisions of the Permit challenged in the Cities' Petition for Review be revised in accordance with law. The Cities appreciate the State Board's consideration of these comments, and strongly urges the State Board to revise its Final Order accordingly.

Sincerely,

ALVAREZ-GLASMAN & COLVIN

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