(6/16/15) Board Meeting
Comments to A-2236(a)-(kk)
Deadline: 6/2/15 by 12:00 noon

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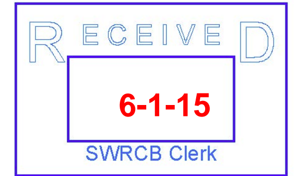

June 1, 2015

VIA E-MAIL

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

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Re: Comments to A-2236(a)-(kk) & the City of Signal Hill's Petition for Review

Dear Chair Marcus and Members of the Board:

These comments are submitted on behalf of the City of Signal Hill ("City") and its Petition for Review, A-2236(ii), regarding the State Board's 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.

As provided in the letter from State Board's Chief Counsel, dated April 24, 2015, "[c]omments must be limited to revisions made since the November 21, 2014, proposed order, as indicated by redline/strikeout." In limiting comments to the revisions, as instructed, the City is not waiving or abandoning its objections/comments raised in its previously submitted Comments in Response to the State Board Order Dated 11/21/14 and Petition for Review.

I. SUMMARY OF ARGUMENTS.

The City supports many of the revisions developed and incorporated into the Revised Draft Order. However, the City does present the following Comments in an effort to make the final Order and Permit feasible for Permittees.

First, the Revised Draft Order fails to address the City's request to be granted an individual permit, and the Regional Board's decision to deny this request remains unsupported, and arbitrary and capricious. The primary basis provided by the Revised Draft Permit for the City of Long Beach being issued an individual permit is its "proven track record in implementing an individual permit and a robust monitoring program." As demonstrated in the City's previous

comments, the City also has a proven track record, if not a better track record than the City of Long Beach, illustrating that this basis is inadequate for denying the City an individual permit.

Second, the Revised Draft Order reinforces the fact that the Permit requires Permittees to do the impossible, *i.e.*, prevent all non-stormwater discharges from reaching a receiving water. (*See* Revised Draft Order, pp. 52, 69, fn. 187.) In effect, it appears that under the Revised Draft Order, the Los Angeles 2012 MS4 Permittees ("Permittees") would be in violation of the Permit for virtually every instance where a dry weather discharge reaches a receiving water. In effect, the newly added language would effectively eviscerate all dry-weather TMDL interim and final waste load allocations as, under the Permit with this language, no non-stormwater can be allowed to reach a receiving water, even if the interim or final dry weather waste load allocation ("WLA") is being met. ***In short, the new Permit language would override all dry weather WLAs, and convert them into "zero" WLAs***.

This apparent interpretation of the Permit, including its interpretive effect on dry weather WLAs in the TMDLs, is then compounded by the fact that most of the final wet weather WLAs being imposed on Permittees cannot possibly be met (other than possibly through a deemed compliance EWMP for certain limited locations where EWMP's are feasible), thereby making it impossible for a Permittee to comply with most any aspect of a TMDL (understanding that the Permit is imposing a strict "zero" discharge limit for non-exempt, non-stormwater discharges).

The ultimate outcome of imposing an unachievable non-stormwater discharge prohibition will not be to improve water quality, but instead to increase litigation fees and costs in fighting enforcement actions and citizen suits, with the Permittees then being subject to excessive penalties under the Clean Water Act. (*See*, *e.g.*, *NRDC v. County of Los Angeles* (C.D. Cal. Mar. 30, 2015) 2015 U.S. Dist. LEXIS 40761 ["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."].) Because the law precludes the Permit from requiring the impossible, the "discharge prohibition" provisions cannot withstand legal scrutiny.

As a small city of 11,585 population, Signal Hill cannot afford the litigation and regional board fines that are sure to come from the new dry-weather prohibition language. Signal Hill is currently working to implement the State's drought restrictions, which will require substantial investments in water conservation by the City, our homeowners and businesses. A portion of these restrictions will be designed to substantially reduce dry-weather flows from outdoor irrigation. In many cases this will require new landscaping and irrigation on hundreds of properties in this small community alone. These changes will need time and resources to be implemented. The City is committed to these programs; however, it is impractical for the permit to require that all dry-weather flows be immediately and permanently eliminated, since the dry-weather time period covers almost 11 months of the year.

Third, imposing a "zero" discharge limitation on non-exempt, non-stormwater discharges is clearly not required under the Clean Water Act ("CWA"), and therefore can only be imposed under the California Porter-Cologne Act when the factors set forth in California Water Code ("CWC") sections 13241, 13263 and 13000 have first been fully considered, and the Permit findings and terms have been developed consistent with these factors. The Revised Draft Order has the potential impact of making the Permit legally deficient, in light of the lack of findings and determinations showing that the "zero" discharge limitation was developed in accordance with the factors and considerations required by State law.

Fourth, the Revised Draft Order improperly suggests that, because CWC sections 13267, 13225 and 13165, somehow "stand[] as an obstacle to the accomplishment of the full purposes and objectives of [Federal law]," they cannot apply to the Permit's monitoring and reporting program. (Revised Draft Order, p. 71, fn. 192.) However, the Revised Draft Order points to no federal law or regulatory requirement imposing the particular monitoring requirements upon the Permittees, nor does it point to any federal law prohibiting the conducting of an economic analysis, as required by CWC sections 13267, 13225 and 13165. Thus, the requirements in CWC sections 13267, 13225 and 13165 do not "stand as an obstacle" to federal law and must be complied with prior to imposing the monitoring obligations on Permittees.

Moreover, the fact that the U.S. EPA has already developed a scheme for evaluating financial impacts and conducting a cost-benefit analysis further demonstrates that such an analysis is not an obstacle to federal law. However, the Revised Draft Order fails to include the U.S. EPA's Financial Capability Analysis, which should be utilized by all Regional Boards when imposing water quality permit terms.

Last, 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 suggesting 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.) However, when defendants are "jointly responsible," it is generally understood that a plaintiff may recover the entire damages from any one of them regardless of the proportion of their responsibility or contributions to the violation. If the Revised Draft Order is intended to mean that a Permittee is only to be considered "liable" for its portion of an exceedance in a co-mingled discharge, this interpretation effectively means a Permittee is only to be "severally" liable for exceedances it contributes to. In effect, the State Board appears to be striving to state that a Permittee shall only have "several responsibility" rather than "joint responsibility."

Several responsibility suggests that any obligations are divided amongst Permittees in proportion to their responsibility or contributions to the violation. Moreover, as written, the Permit conflicts with the various cases confirming that the Regional Board has the burden of

proving liability against an individual Permittee, regardless of whether or not there is a comingled exceedance, and is contrary to the clear terms of the Clean Water Act and the Porter-Cologne Act. Furthermore, it violates fundamental principles of due process of law.

As explained herein, the City respectfully requests that the Revised Draft Order be further revised to address the other legal issues set forth in these Comments.

II. FAILURE TO GRANT THE CITY AN INDIVIDUAL PERMIT.

The City raised several concerns in its previous comment letter on the Draft Order that remain unaddressed. The City explained that the Regional Board's refusal to grant the City's individual permit request is in violation of Federal law and contradicts the U.S. EPA's and the Regional Board's previous positions on this issue. The City also explained that the Regional Board failed to provide an adequate explanation for its decision to deny the City an individual permit, making its decision arbitrary and capricious.

The Revised Draft Order fails to respond or address these arguments and many others. Instead, the Revised Draft Order merely makes the following changes (shown in red):

> We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:
>
> The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time~~. The Regional Water Board will continue to issue an individual permit to the City of Long Beach~~ because the City of Long Beach ~~has been permitted under an individual permit for over a decade and~~ has a proven track record in ~~implementation of~~implementing an individual permit ~~requirements~~ and ~~development~~ developing~~of~~ a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** ~~I~~individually tailored permittee requirements are provided in this Order, where appropriate.

(*See* Revised Draft Order at p. 82.)

These revisions are not substantive and do nothing to address the City's concerns and claims. As stated in the City's Petition, the City respectfully requests the State Board modify the Permit by removing the City from the Permit and direct the Regional Board to issue the City an individual permit.

III. BECAUSE THE REVISED DRAFT ORDER INTERPRETS THE PERMIT AS PROHIBITING ALL NON-EXEMPT, NON-STORMWATER DISCHARGES FROM ENTERING A RECEIVING WATER, IT IS IMPOSSIBLE TO COMPLY WITH AND CANNOT BE REQUIRED.

With the exception of exempt and conditionally exempt non-stormwater discharges, Part III.A of the Permit requires each Permittee to "*prohibit non-storm water discharges through the MS4 to receiving waters*." (Permit, p. 27.) 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 to the Draft Order on page 52: "*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.*" (Revised Draft Order, p. 52.)

Accordingly, the implication of this added language to the Revised Draft Order is that ***any*** non-exempt prohibited discharge that travels "*through the MS4 to receiving waters,*" regardless of whether there are "pollutants" in the discharge that exceed a receiving water limitation or exceed a waste load allocation from a TMDL, would result in a violation of the Permit.

This interpretation appears to be further confirmed by new footnote 187 to the Revised Draft Order, which provides as follows:

> 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. (Revised Draft Order, p. 69.)

Reading the revisions on pages 52 and 69 of the Revised Draft Order together would mean that any non-exempt, non-stormwater discharge that touches a receiving water would be a violation of the Permit, irrespective of the existence of the Permittee's Illicit Discharge program, irrespective of the Permittee's compliance of an approved WMP/EWMP, and irrespective of the Permittee's compliance with applicable receiving water limitations or waste load allocations. In short, a single "drop" of non-exempt, non-stormwater to a receiving water through the MS4 would seemingly subject the Permittee to an enforcement action or extensive liability to a third party under the citizen suit provisions of the Clean Water Act. These non-stormwater provisions of the Permit and the Revised Draft Order are impossible to comply with, go beyond what is required under the Clean Water Act, and exceed what is permissible under the Porter-Cologne Act.

Furthermore, the reference in footnote 187 on page 69 of the Revised Draft Order to the discharge prohibition exceptions in Part III of the Permit are not, by any means, "extensive" as claimed by the State Board in footnote 187. To the contrary, they are limited to the following *narrow* categories: (1) discharges separately regulated by an NPDES permit, (2) discharges authorized by U.S. EPA, (3) discharges from "emergency" firefighting activities, and (4) natural water flows. Moreover, while the list of conditional exemptions includes a broader range of discharges, including residential car washing and landscape irrigation, these exemptions are also somewhat limited (Permit, pp. 36-37), and it is clear that unless a Permittee can find a way to divert all non-exempt, non-stormwater 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-stormwater "discharge prohibition" provisions of the Permit, as interpreted in the Revised Draft Order, are therefore impossible to comply with.

In fact, the Permit's incorporation of the various dry-weather WLAs from the TMDLs (and the development of the dry weather WLAs themselves) is an acknowledgement that complying with a "zero" dry weather discharge limit is either necessary or possible. (*See e.g.* Permit, Attachment O.) Such dry weather TMDL WLAs would be unnecessary and entirely meaningless *if* dry weather discharges in general would need to be prohibited. Indeed, the dry-weather TMDLs only make sense if the implementation of control measures though the WMP/EWMP programs constituted compliance with the "discharge prohibition" in Section III.A. Yet, as discussed above, the Revised Draft Order makes the opposite point, i.e., that Permittees' "*implementation [of control measures through the WMP/EWMP] does not constitute compliance with Section III.A.*" (Revised Draft Order, p. 52.)

The City hereby requests that this language be revised to state the opposite, i.e., that "*effective implementation [of control measures through the WMP/EWMP] shall constitute compliance with Section III.A*."

By adopting such dry weather TMDLs and WQBELs and failing to provide any feasible means by which Permittees can comply with the dry weather discharge prohibition provisions, or to otherwise comply with the general discharge prohibition requirement in Part III.A, through the implementation of a WMP/EWMP or otherwise, the Permit places the Permittees between Scylla and Charybdis by implicitly acknowledging that the dry weather discharge prohibition is impossible to comply with – necessitating the need for dry weather TMDLs – yet providing no mechanism for Permittees to comply with such discharge prohibition requirements.

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. (*See* Permit, pp. 45-46, citing CWC § 13385.)

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 (1996), the plaintiff sued JMS Development Corporation ("JMS") for failing to obtain a storm water permit that would authorize the discharge of stormwater 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 stormwater 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. (*Ibid*.)

The Eleventh Circuit Court of Appeals 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." (*Ibid.*)

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. (*Ibid*.)

In this case, strictly complying with the non-stormwater "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-stormwater "discharge prohibition" simply do not exist, and imposing such a requirement 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-stormwater "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-stormwater "discharge prohibition" in the Permit, as interpreted in the Revised Draft Order, must be revised to be consistent with the law.

IV. A "ZERO" DISCHARGE LIMIT FOR NON-STORMWATER IS NOT REQUIRED UNDER THE CWA AND IS INCONSISTENT WITH CWC §§ 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-stormwater 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, CWC 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 requires 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; *see also Divers' Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, 256.)

Although "non-stormwater" flows are 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. (*Ibid.*)

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.

CWC sections 13241, 13242, 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***" (CWC § 13000), the "***water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area***" (CWC § 13241), and the need to "take into consideration the beneficial uses to be protected" and the "***water quality objectives reasonably required for that purpose***" (CWC § 13263(a).)

Under the California Supreme Court's holding in *Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 ("*Burbank*"), a regional board must consider the factors set forth in sections 13263, 13241, 13242 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-stormwater 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.

V. THE REVISED DRAFT ORDER FAILS TO ESTABLISH HOW COMPLIANCE WITH CWC §§ 13267, 13225 AND 13165 "STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF [THE FEDERAL LAW]."

Under California law, before any monitoring, reporting, investigation and study requirements may be imposed upon a permittee, an economic 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* CWC § 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 CWC 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 CWC 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 budget, 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 Members 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 (incorrectly) 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 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 CWC 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" (CWC §§ 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.

Ken Farfsing, Signal Hill City Manager, presented at the Workshop on the Draft Order held on December 16, 2014. He provided those comments in advance to the Board and they are attached hereto as **Exhibit "A"** to ensure they are included in the record. Mr. Farfsing's comments focused in part on the need for a financial planning review and the critical role the State Board plays in assisting local government in funding WMPs/EWMPs.

A key part of Mr. Farfsing's comments were regarding the U.S. EPA's Financial Capability Analysis and the failure of the State Board and Regional Boards to engage in this analysis when water quality permits are developed. U.S. EPA's Financial Capability Analysis ("FCA") provides a clear method for Regional Boards to review economic feasibility of permit terms.

As the State Board is aware, there are significant numbers of disadvantaged communities and households in Los Angeles County. A number of the watershed groups designated in the permit are dominated by disadvantaged communities. These communities include the cities of Bell, Bell Gardens, Compton, Cudahy, Huntington Park, Lynwood, Maywood, Paramount, South

Gate, Vernon and major areas of the unincorporated territory of Los Angeles County. There are significant neighborhoods in other communities that include disadvantaged households, including Bellflower, Commerce and Long Beach. Signal Hill is a member of two watershed groups, which include disadvantaged communities. These and many of our communities would benefit from the inclusion of the FCA as part of the WMP/EWMP process. The FCA process does not relieve permittees of their obligations, but assists in establishing a frame work with the Regional Board, the permittees and other stakeholders in setting priorities, examining funding options, reviewing compliance deadlines and other key implementation factors.

Despite Mr. Farfsing's comments on this issue, the Revised Draft Order fails to mention U.S. EPA's Financial Capability Analysis. Since this Order will be precedential in many respects, it provides the perfect opportunity for the State Board to direct the Regional Boards to include this Analysis when developing permit terms and issuing permits.

In fact, we are informed and believe that many State and Regional Board staff are unaware of this Analysis and the fact that a process already exists for review of economic feasibility in permits. Requiring the completion of the FCA process as part of the adoption of the WMP/EWMPs will ensure that the implementation of the watershed programs consider the social-economic factors of not only the disadvantage communities, but the difficulties that all communities face as they implement the permit requirements.

Because a cost/benefit analysis as required by CWC 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 Revised Draft Order's determinations in this regard are in error.

VI. A PERMITTEE CAN ONLY LAWFULLY BE FOUND TO BE "SEVERALLY" RESPONSIBLE FOR CONTRIBUTING TO A COMINGLED EXCEEDANCE, AND THE BURDEN MUST BE ON THE REGIONAL BOARD TO PROVE 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.)[1]

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-Cologne 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 proving 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 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.)

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[1] 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].)

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, supra,* 162 Cal.App.3d at 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 Permittee's responsibility for exceedances found in a co-mingled plume, to "several" liability only.

VII. CONCLUSION.

For the foregoing reasons, the City respectfully contends that the Revised Draft Order has added a number of new legal assertions and interpretations of the subject Permit that are inconsistent with law. The City requests that the provisions of the Permit challenged in the City's Petition for Review and supporting points and authorities be revised in accordance with law, and that the procedural deficiencies in the Permit adoption process be corrected.

The City appreciates the State Board's consideration of these comments and strongly urges the State Board to revise its Final Order accordingly.

Sincerely,

ALESHIRE & WYNDER, LLP

David J. Aleshire
Miles P. Hogan
Attorneys for the City of Signal Hill

Encl.

cc: Mayor Forester and Members of the City Council
Kenneth C. Farfsing, City Manager
Charlie Honeycutt, Deputy City Manager

Exhibit "A"

CITY OF SIGNAL HILL

2175 Cherry Avenue • Signal Hill, California 90755-3799

Testimony Before the State Water Board
Order No. R4-2012-0175
Los Angeles Municipal Separate Sewer System Permit

By
Ken Farfsing
Signal Hill City Manager

December 16, 2014

California's cities deserve a rigorous planning process addressing the complex and difficult issues of water quality. I want to focus on how the State Board can improve the WMPs/EWMPs based on practical, real world experiences. My comments will discuss the complicated work of watershed planning, the importance of adaptive management and the need for a "deemed compliant" pathway based on the environmentally successful and practical approach found in the Los Angeles River Trash TMDL. I will also discuss the need for a financial planning review and the critical role the State Board plays in assisting local government in funding the WMPs/EWMPs.

The Uncertainty of the BMP Performance

When I discuss the WMPs/EWMPs with city engineers they are concerned about three issues. The first issue is the **uncertainty** that comes from a new and uncharted path. After designing and building to the best of their ability, what happens if the storm water devise does not work as planned? In the case of the bacteria TMDLs, what happens if there is no practical solution? Imposing numeric limits on municipal storm water discharges presents a series of issues - the difficulties in meeting them, problems with exceeding them and the costs and potential enforcement impacts.

The Uncertainty of Implementation Funding

The second concern is one that is echoed by many local elected officials, city managers and finance professionals – the **uncertainty** of how communities will afford the hundreds of millions of dollars of projects required under their WMPs/EWMPs. This is a particularly difficult question for the Gateway Cities, since we are the epicenter of California's disadvantaged communities.

One has to ask how California's disadvantaged communities will afford these new requirements, when they struggle on a daily basis to provide basic services. The lack of economic protocols in the WMP/EWMP process presents a series of issues – what are reasonably achievable, environmentally sound and cost-effective projects based on sound science and addressing local water conditions. These are important considerations.

<u>The Uncertainty of Watershed Partnerships</u>

The third concern revolves around the **<u>uncertainty</u>** stemming from watershed planning in our complex urban environment. Will the public accept sending local tax money to fund a project in another community? How will the costs be divided on regional projects? What happens if the disadvantage communities in a watershed can't afford the project?

What happens if a city can only afford the construction of the regional BMP and that city reports water quality violations from its own outfalls? Will litigation ensue between cities over failure to implement the WMP? Will litigation ensue between the County and the cities? Can we prioritize watershed projects that result in environmentally sound and cost-effective projects? The lack of answers to these questions in the Tentative Order presents practical implementation problems.

<u>Can we apply the lessons of California's Affordable Housing Policy to the WMPs/EWMPs?</u>

California's affordable housing policy is a good example of how the WMPs/EWMPs can fail if the **<u>uncertainties</u>** are not resolved. The similarities between housing policies and the WMPs/EWMPs are striking. The State faces a difficult and complex problem in providing affordable housing. The State's economic well being rests in part on creating decent, safe and affordable housing for millions of Californians. California's affordable housing laws require numeric limits and time schedules.

Many of the factors impacting California's housing affordability crisis are out of the control of the cities. California's regulators and the Legislature have resorted to punitive actions to "encourage" housing production. The State has removed almost all financial support to local government to assist in providing affordable housing.

Cities are caught in an endless loop of housing element revisions, with no clear direction given. Housing element comments from the regulators routinely change and are viewed as conflicting and arbitrary. Litigation by housing advocates is now common. Public support for affordable housing erodes, when housing decision are forced on communities. This is a critical time for the State Board, local government and the

environmental community to address similar structural **uncertainties** in the WMP/EWMP.

Resolving Compliance Uncertainty – The Deemed Compliant BMP Pathway

The Order states that "addressing the water quality impacts of municipal stormwater is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources." The Tentative Order calls for a "rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of stormwater is a promising long-term approach to addressing the complex issues involved." (Page 75)

Designing, funding and constructing multi-benefit, green infrastructure projects is complicated. The urban environment is complex. Geologic conditions, slope gradients and unstable slopes limit infiltration opportunities in Signal Hill and other hillside communities. High ground water in cities such as Artesia (named after the artesian wells) prevents infiltration. Small cities have limited staff, no scientist or engineers.

The Success of the Los Angeles River Trash TMDL

The Tentative Order discusses a "paradigm shift" in moving away from viewing stormwater as a liability, to viewing stormwater as a regional asset. In order to truly view stormwater as an asset and to provide local government with the certainties necessary to make the large public investments in capture and reuse, the Order should be modified to extend a "deemed compliant BMP pathway" to local governments engaged in implementing their WMPs/EWMPs.

The practical value of a "deemed compliant BMP pathway" and adaptive management, instead imposing strict numeric limits on municipal stormwater discharges, can be seen in the success of the Los Angeles River Trash TMDL. The Trash TMDL included an early planning process where the County and cities submitted designs for BMP trash controls.

These BMP controls were tested and several "deemed compliant" devices were approved by the Los Angeles Regional Board. Installation of the devices then became an "equivalent" standard as opposed to compliance with strict numeric limits. The State Board supported the installation of over 11,000 catch basin screens/inserts in the Gateway Water Management area by approving a $10 million ERRA grant, which has resulted in substantial environmental benefits to the water quality in the Los Angeles River and to the beaches in Long Beach.

This "deemed compliant" pathway has been a benefit to the cities by increasing compliance certainty. It has been a benefit to the Los Angeles Regional Board by easing their compliance workload. During the whole ten year period of implementation time there was no litigation over the implementation of the TMDL. The WMP/EWMPs should fully embrace the adaptive management process to evaluate, redesign and modify BMPs. The deemed compliant BMP pathway would provide certainty to local government.

Resolving the Financial Uncertainties

The difficulty of funding stormwater programs has been underscored with the decision of the Los Angeles County Board of Supervisors to **not schedule** the Clean Water, Clean Beaches Tax Measure for an election in 2012. While, the Community Clean Water Initiative in Contra Costa County failed at the ballot in 2012.

The Los Angeles Division of the League of California Cities and the California Contract Cities Association commissioned a study of the Clean Water, Clean Beaches measure after the Board tabled the tax measure. The report entitled "*Stormwater Funding Options, Providing Sustainable Water Quality Funding in Los Angeles County* (October 14, 2014) outlines the difficulties that local governments face in the securing new taxes and fees. It also outlines the opportunities.

Providing a sustainable source of funding is complicated by State Constitutional and case law restrictions. Not all of the cities can rely on the newly passed AB 2403. Finding sustainable funding will take time. It will require federal, state and local partnerships. Watershed groups may need to apply for multiple rounds of grants. Until more permanent sources of funds are found, in most cases cities will have to rely on general fund revenues, which are hard pressed to provide for existing municipal services.

The WMP/EWMP process needs to recognize the complexities involved in funding watershed projects. We suggest that a standardized and independent Financial Planning Review process be required. The process would be based on existing California Water Code Sections (13000, 13263 and 13241) examine the existing costs to the watershed's households of funding water related utilities, examining the future costs and the financial capability of the watershed's communities to provide local funding options, with a special emphasis on the impacts to the disadvantaged communities in the watershed.

Resolving Watershed Planning Uncertainties

Relying on the adaptive management and the "deemed compliant BMP" pathway will answer the questions posed by local governments participating in watershed planning. The cities will be able to plan, construct and test regional BMPs without the specter of the consequences of good intentions that fail. Relying on the financial capability analysis will assist in prioritizing improvements, with an eye towards implementing the most environmentally beneficial and the least costly projects to the watershed's taxpayers.

Thank you for your time and consideration of my suggestions.