November 19, 2014

By email: laurie.walsh@waterboards.ca.gov

Mr. David Gibson
Executive Officer
C/O Laurie Walsh, P.E.
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700

Subject: Comments – Tentative Order No. R9-2015-0001, Place ID: 658018LWalsh

Dear Mr. Gibson:

The City of Lake Forest ("City") submits these comments on the San Diego Regional Water Quality Control Board's Tentative Order No. R9-2015-0001 ("Draft Permit").

As the Regional Board is aware, the City's municipal separate storm sewer system has been subject to regulation by the Santa Ana Regional Water Quality Control Board ("Santa Ana Regional Board") and by the San Diego Regional Water Quality Control Board ("San Diego Regional Board"). Pursuant to Water Code section 13228, the City requested regulation by a single board, the Santa Ana Water Board. The Draft Permit notes that the Santa Ana Water Board and the San Diego Water Board have entered into an agreement allowing the City's stormwater discharges to be subject to the municipal stormwater permit issued by the Santa Ana Board in lieu of regulation under the Draft Permit.

We would like to express our support and appreciation for the efforts of each Regional Board in reaching this agreement. Allowing the City to participate in watershed based programs in the San Diego Region while implementing the Santa Ana Regional Board's permit will reduce costs and administrative burdens currently imposed on the City. The City is grateful for both Boards' efforts in coming to this agreement and supports the proposed change.

In an effort to streamline and clarify regulation of the City by a single water board, the City requests minor revisions to the wording of the Draft Permit. Specifically, the City seeks to conform the Draft Permit language designating the Santa Ana Water Board as the City's regulatory authority with language used in previous permits making a similar designation. This request seeks four changes to the Draft Permit, as follows:

1. Remove "Lake Forest" from Table 1b.

Table 1b. Orange County Copermittees

City of Aliso Viejo	City of Rancho Santa Margarita
City of Dana Point	City of San Clemente
City of Laguna Beach	City of San Juan Capistrano
City of Laguna Hills	City of Laguna Woods
City of Laguna Niguel	County of Orange
~~City of Lake Forest1~~	Orange County Flood Control District
City of Mission Viejo	

2. Remove footnote 1 to Table 1b.

~~1 The MS4 discharges within the jurisdiction of the City of Lake Forest located in the San Diego Region will be regulated by the Santa Ana Water Board Order No. R8-2014-0002 (NPDES No. CAS618030) and any reissuance thereto subject to the terms of the agreement between San Diego Water Board and Santa Ana Water Board.~~

3. Revise footnote 2 to Table B-1 to read as follows:

~~The MS4 discharges within the jurisdiction of~~ The City of Lake Forest ~~located in the San Diego Region will be~~ is wholly regulated by the Santa Ana Water Board under Order No. R8-2014-0002 (NPDES No. CAS618030) ~~and any reissuance thereto.~~ or the most recent iteration thereof, including those portions of the City of Lake Forest within the San Diego Water Board's region. In accordance with the terms of the agreement between San Diego Water Board and Santa Ana Water Board, the City of Lake Forest must ~~also comply with~~ implement the requirements of the Bacteria TMDL in Attachment E of this Order, participate in preparation and implementation of the Water Quality Improvement Plan for the Aliso Creek Watershed Management Area as described in Provision B of this Order and continue implementation of its over-irrigation discharge prohibition in Title 15, Chapter 15, section 14.030, List (b).

4. Revise Finding 29 as follows:

Regional Water Board Designation. The Cities of Laguna Hills, Laguna Woods, and Lake Forest are located partially within the jurisdictions of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the San Diego Water Board and their ~~dischargers~~ discharges are subject to regulation by both Regional Water Boards. Pursuant to CWC section 13228, the Cities of Laguna Hills, Laguna Woods, and Lake Forest submitted written requests that one Regional Water Board be designated to regulate Phase I MS4 discharges for each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement whereby the Cities of Laguna Woods and Laguna Hills are wholly regulated by the San Diego Water Board ~~is designated to regulate Phase I~~

~~MS4 discharges within the jurisdiction~~ under this Order, including those portions of the Cities of Laguna Woods and Laguna Hills ~~and~~ not within the ~~Santa Ana~~ San Diego Water Board's ~~is designated to regulate Phase I MS4 discharges within the jurisdiction's~~ region. Similarly, the City of Lake Forest, including those portions of the City of Lake Forest ~~pursuant to MS4 permits administered by each Regional Water Board~~ within the San Diego Water Board's region, is wholly regulated by the Santa Ana Water Board under Order No. R8-2014-0002 (NPDES No. CAS618030) or the most recent iteration thereof. The agreement provides that the City of Lake Forest will be required to retain, and continue implementation of, its over-irrigation discharge prohibition in Title 15, Chapter 14.030, List (b) of the City Municipal Code for regulating storm water quality throughout its jurisdiction. The City of Lake Forest will also be required to actively participate during development and implementation of the Aliso Creek Watershed Management Area Water Quality Improvement Plan required pursuant to this Order. Each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Laguna Woods, Laguna Hills or Lake Forest as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDL and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL. The San Diego Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate the agreement with Santa Ana Water Board or otherwise modify the agreement subject to the approval of the Santa Ana Water Board.

In addition to the above, the City is aware that the County of Orange is submitting comments on the Tentative Order. The City supports the County's comments and is listed as a concurring entity on the County's comment letter.

Many of the City's concerns with the Regional Permit issued to the San Diego County permittees (San Diego Regional Board Order R9-2013-0001(NPDES No. CAS0109266)) have not been resolved in the Draft Permit. The City therefore resubmits its prior comments and its petition of the Regional Permit as comments on the Draft Permit. If the City's above requested changes are granted, the City will be largely regulated under the Santa Ana Regional Board's permit for Orange County and many of its existing concerns will be rendered moot. Nonetheless, to ensure the City exhausts all administrative remedies, the City submits the attached additional comments.

The City believes that the changes requested in this letter will ease the regulatory burden consistent with Water Code section 13228. The City is committed to the goal of improving

water quality and to working with the San Diego Regional Board in developing and implementing the Aliso Creek Watershed Management Area Water Quality Improvement Plan.

If you should have any questions, please contact Devin Slaven, Environmental Manager at (949) 461-3436 or me at (949) 461-3481.

Sincerely,

CITY OF LAKE FOREST

Thomas Wheeler, P.E.
Director of Public Work/City Engineer

Attachments: Comment Letter on Tentative Order R9-2013-0001, dated January 11, 2013
Petition for Review of Action Issuing Order R9-2013-0001, dated June 7, 2013

cc: Robert Dunek, City Manager
Devin Slaven, Environmental Manager
Scott Smith, City Attorney
J.G. Andre Monette, Special Counsel
Mary Anne Skorpanich, County of Orange, OC Environmental Resources

\\CLF400V\Departments\Public Works\001 - ADMINISTRATION\001 -TOMLTRS\2014\Comments on Tentative Order R9-2015-0001.docx

CITY OF LAKE FOREST

January 11, 2013

Via US Mail and E-mail

Mr. David Gibson
Executive Officer
California Regional Water Quality Control Board,
San Diego Region
C/O Mr. Wayne Chiu, P.E.
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Subject: **Comments – Tentative Order No. R9-2013-0001, Regional MS4 Permit, Place ID: 786088Wchiu.**

Dear Mr. Gibson:

The City of Lake Forest ("City") submits this letter to the California Regional Water Quality Control Board, San Diego Region ("SDRWQCB") to convey the City's formal written comments on Tentative Order No. R9-2013-0001/NPDES Permit No. CAS0109266 ("Draft Permit"). The Draft Permit is intended by the SDRWQCB to serve as the basis for stormwater regulation for the City upon the expiration of current Order R9-2009-0002. The City appreciates the efforts of the SDRWQCB staff in the development of the Draft Permit including the most recent revisions from the former Administrative Draft; however, significant concerns remain.

The City is aware that the County of Orange ("County") is submitting a comment letter documenting comprehensive technical and legal concerns identified during the review of the Draft Permit. The County's submittal also includes proposed revisions to the Draft Permit provided via "red line" format per SDRWQCB staff request. City staff have participated closely in the collaborative development of this comprehensive set of comments and the City has requested to be named as a concurring entity in the County's letter. The City would like to express its full support for the County's comments and proposed revisions. While detailed comments are provided within the County's submittal, the City would like to note and specifically highlight several key issues of concern as follows:

- The Receiving Water Limitations provisions in the Tentative Order could expose the City to Clean Water Act liabilities for discharges that cause or contribute to an exceedance of a water quality standard. A clear linkage between the compliance provisions and prohibitions, receiving water limitations, and effluent limitations must be established.

The provisions dealing with land development, Low Impact Development (LID) and hydromodification control are significantly ratcheted up while existing permit programs are only just being implemented and/or pending approval. The City is particularly concerned with the elimination of all exemptions for the hydromodification control requirements, including for discharges to channels that have been engineered to prevent erosion. Exemptions for hydromodification management should include discharges to certain types of receiving waters and certain types of projects. The City additionally questions the Regional Board's authority to impose *any* flow related limitations in an NPDES permit following the District Court's decision in Virgina Dept. of Transportation v. EPA, No. 1:12-CV-775, slip op. (E.D. Va. Jan. 3, 2013).

- The provisions implementing the Beaches and Creeks Total Maximum Daily Load (TMDL) bacteria requirements are inconsistent with the TMDL as it was developed and pose additional significant liabilities. Federal law does not require NPDES permits for municipal discharges to include TMDLs. (*Defenders of Wildlife v. Browner* 191 F.3d 1159 (9th Cir. 1999); 40 C.F.R. § 122.44(d).) Pursuant to state law, permit provisions must be consistent with the corresponding Basin Plan amendments (Cal Water Code § 13263), and may only be included after consideration of "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (*Id.*)

- The provisions requiring the development and implementation of a Water Quality Improvement Plan need to be aligned with the Jurisdictional Runoff Management Program requirements so that the programs are complimentary and prioritized instead of additive.

Thank you for your attention to our comments. The City is committed to the goal of water quality improvement and wants to work with the SDRWQCB in developing the most prudent and cost effective permit possible. If you should have any questions, please contact Devin Slaven, Water Quality Administrator, at (949) 461-3436, or dslaven@lakeforestca.gov.

Sincerely,

CITY OF LAKE FOREST

FOR

Thomas Wheeler, P.E.
Director of Public Works/City Engineer

cc: Robert C. Dunek, City Manager
Devin E. Slaven, CPSWQ, QSD/QSP, Water Quality Administrator
Scott Smith, City Attorney, Best Best & Krieger, LLP
Mary Anne Skorpanich, County of Orange, OC Watersheds

\\CLF400V\Departments\Public Works\001 -TOMLTRS\2013\NPDES Order R9-2013-0001 Comments on Draft Regional Permit docx.doc

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of: THE CITY OF LAKE FOREST FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ISSUING ORDER NO. R9-2013-0001 (NPDES NO. CAS0109266)	PETITION FOR REVIEW [Water Code § 13320(a)]

SHAWN HAGERTY
J.G. ANDRE MONETTE
655 West Broadway, 15th Floor
San Diego, CA 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118
Attorneys for Petitioner:
City of Lake Forest, California

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

I.

INTRODUCTION

Petitioner, the City of Lake Forest, California ("City" or "Petitioner") seeks review and reversal of the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") actions in adopting Order No. R9-2013-0001 (NPDES No. CAS0109266) ("Permit"), on May 8, 2013. A copy of the Permit is attached hereto as Exhibit "A" and incorporated herein by reference.

The City is a municipal corporation organized pursuant to California law and the California Constitution. As of 2011, the City had a population of 77,490 people, and is located in Orange County, approximately 40 miles south of the City of Los Angeles. The City owns and operates a large municipal separate storm sewer system ("MS4") within the Regional Board's jurisdiction and as such is subject to regulation under the Permit. Due to the boundary line between the Santa Ana and San Diego Regional Boards, the City is also subject to regulation under the Large MS4 Permit for North Orange County issued by the Santa Ana Regional Board. At all times mentioned herein, the City has acted pursuant to applicable legal requirements, and with great concern for the impacts that discharges from its MS4 may have on surrounding surface waters, and the environment in general.

II.

BACKGROUND

The City fully supports the Permit's goal of attaining water quality improvement throughout south Orange County. In order to ensure that this goal could be attained with minimal negative repercussions for the City, the City participated in the Permit development process. Although the Regional Board removed or modified some requirements at the request of the City and other dischargers, as adopted the Permit retains many requirements that exceed applicable law.

Although the Regional Board pursued an informal Permit development process beginning in March, 2012, the first "official" draft of the Permit was issued in October 2012 with a comment period open until early January 2013. The City participated in the informal Permit

development process. The City also submitted written comments to the Regional Board on the "official" drafts within the time frame permitted. A second draft was issued on March 27, 2013, but the Regional Board did not allow additional time for written comments. The Regional Board held its adoption hearing on the Permit in April, 2013 and continued the hearing to May 8, 2013. At its May 8, 2013 hearing, the Regional Board approved the Permit, but introduced changes prior to the adoption hearing without sufficient time for comment.

As described more fully below, by adopting the Permit in its current form the Regional Board exceeded state and/or federal law. The Cities therefore submits this Petition pursuant to Water Code section 13320 and Title 23 of the California Code of Regulations, and respectfully requests that the State Board correct the Regional Board's actions.

III.

NAMES AND ADDRESSES OF PETITIONERS

The names and contact information for Petitioners is as follows:

ROBERT DUNEK
CITY MANAGER
CITY OF LAKE FOREST
25550 Commercentre Drive, Suite 100
Lake Forest, CA 92630
Telephone: (949) 461-3410

THOMAS WHEELER
DIRECTOR OF PUBLIC WORKS
CITY OF LAKE FOREST
25550 Commercentre Drive, Suite 100
Lake Forest, CA 92630
Telephone: (949) 461-3480

SHAWN HAGERTY
J.G. ANDRE MONETTE
655 West Broadway, 15th Floor
San Diego, CA 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

THE ACTION OR INACTION OF THE REGIONAL WATER BOARD BEING PETITIONED

The Cities seek review and set aside of the Regional Board's actions in adopting Order No. R9-2013-0001 (NPDES No. CAS0109266) on May 8, 2013. A copy of the Permit is attached hereto as Exhibit "A" and incorporated herein by reference.

IV.

DATE THE REGIONAL BOARD ACTED

The Regional Board adopted Order No. R9-2013-0001 (NPDES No. CAS0109266) on May 8, 2013.

V.

STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

The Regional Board exceeded its legal authority, thereby abusing its discretion when issuing the Permit. Among other things, the Regional Board imposed requirements in the Permit that exceed its authority under State and/or Federal law, are not supported by the evidence in the record, and/or exceed the requirements of State and/or Federal law. Specifically, in adopting the Permit in its current form, the Regional Board:

(1) Required strict compliance with Receiving Water Limitations discharge prohibitions without including a BMP-based compliance option in violation of precedential State Board orders;

(2) Imposed infeasible permit conditions on dischargers including the City;

(3) Improperly applied a heightened compliance standard to discharges into and from the MS4;

(4) Imposed post construction, site-design requirements on municipal projects to control the volume of water leaving a completed project site in excess of the Regional Board's (and the City's) authority under State and Federal law including but not limited to the United States Supreme Court's decisions in *Nollan v.*

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

California Coastal Commission (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374;

(5) Required dischargers to expend resources and public funds beyond their jurisdictional boundaries or risk violation of the Permit;

(6) Violated State and Federal law by including the Bacterial Indicators TMDL for Beaches and Inland Streams in the Permit without regard to the limitations of Water Code section 13263, the Ninth Circuit Court of Appeals decision in *Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999), or the terms and conditions of the TMDL itself;

(7) Included stormwater and non-stormwater "Action Levels" in the Permit that are inconsistent with State and Federal law and could be interpreted as numeric effluent limitations and that otherwise lack findings;

(8) Imposed a regional permit on the City without authority under State or Federal law;

(9) Unlawfully classified natural waters as part of the MS4, and classified natural waters as both a MS4 and Receiving Water;

(10) Violated Due Process requirements in the Permit development process;

(11) Failed to conduct an adequate economic analysis in violation of Water Code sections 13263, and 13241; and

(12) Imposed a federal scheme on the City without an option for compliance in violation of the 10th Amendment to the United States Constitution as defined by Supreme Court's decisions in *Printz v. United States*, 521 U.S. 898, 925 (1997), and *New York v. United States*, 505 U.S. 144, 168 (1992)).

The City, other Permittees and interested parties submitted comment letters to the Regional Board during the Permit renewal process raising these concerns. The City additionally made oral comments at the Permit adoption hearings in support of its comment letters, and the comments of the other Permittees to again raise the above listed concerns. The Regional Board nonetheless adopted the Permit over these objections, in violation of state and federal law.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

VI.

HOW PETITIONER IS AGGRIEVED

Petitioner, City of Lake Forest, owns and operates an MS4 within the Regional Board's jurisdiction and as such is subject to regulation under the Permit. The City, along with other Permittees, is required to implement the Permit's programs, and comply with its technical limitations. The City is aggrieved because the challenged Permit requirements exceed the Regional Board's authority. These requirements will require the City to impose severe restrictions on development within City limits, hinder the Cities' ability to exercise their land use authority in a manner that benefits their residents' economic and environmental interests, and require the Cities to invest significant time and resources complying with arbitrarily selected "WQBELs."

VII.

ACTIONS PETITIONER REQUESTS THE STATE WATER BOARD TAKE

The Cities respectfully requests that the State Board remand the Permit to the Regional Board, and direct the Regional Board to amend the Permit to address the deficiencies raised in Section V, above.

VIII.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

The requisite Memorandum of Points and Authorities is attached to this Petition. The City additionally reserve the right to supplement the legal arguments and authorities raised in the attached memorandum of points and authorities if and when such actions is necessary in support of the Petition.

IX.

STATEMENT OF COPIES FURNISHED

In accordance with the requirements of Title 23, Section 2050(a)(8) of the California Code of Regulations, a copy of this Petition has been sent to the California Regional Water Quality Control Board, San Diego Region.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

X.

STATEMENT OF ISSUES RAISED

As illustrated in Exhibit "A" attached hereto and incorporated herein, Petitioner, and/or other interested parties submitted written and oral comments on the Permit outlining the above described issues. Through their written and oral comments, Petitioner requested that the Regional Board revise the Permit to address Petitioner's concerns.

XI.

CONCLUSION

For the reasons set forth in this Petition and in the related documents filed herewith, the City of Lake Forest respectfully requests that the State Water Resources Control Board remand the Permit to the Regional Board with direction to revise it to address the concerns raised herein, and take any other actions that the State Board deems necessary and appropriate to address the City's claims.

Dated: June 7, 2013

BEST BEST & KRIEGER LLP

By: _____

SHAWN HAGERTY
J.G. ANDRE MONETTE
Attorneys for Petitioners
Cities of Lake Forest and Aliso Viejo

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of: THE CITY OF LAKE FOREST FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ISSUING ORDER NO. R9-2013-0001 (NPDES NO. CAS0109266)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW [Water Code § 13320(a)]

SHAWN HAGERTY
J.G. ANDRE MONETTE
655 West Broadway, 15th Floor
San Diego, CA 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118
Attorneys for Petitioner:
City of Lake Forest, California

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner, the City of Lake Forest ("City" or "Petitioner") submits these points and authorities in support of its Petition to the State Water Resources Control Board ("State Board") requesting that the State Board review and set aside all or portions of Order No. R9-2013-0001, NPDES Permit No. CAS0109266 ("Permit"), as adopted by the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on May 8, 2013. The Regional Board's adoption of the Permit was not supported by sufficient evidence and findings, and is arbitrary, capricious and otherwise contrary to law.

The City respectfully requests that the subject petition be granted, and that the challenged terms of the Permit be voided, as the Permit and the terms have not been adopted in accordance with the requirements of State and/or federal law, and because there is insufficient evidence and findings in the record to support its adoption.[1]

I. THE PERMIT SHOULD BE REVISED TO ALLOW BMP-BASED COMPLIANCE WITH RECEIVING WATER LIMITATIONS.

Permit, section II.A.2. governing "Receiving Water Limitations," provides that "discharges from MS4s must not cause or contribute to the violation of water quality standards and/or receiving waters ..." This blanket prohibition is standard permit language that until 2011, was interpreted as a management practice based compliance target. In 2011, the Ninth Circuit Court of Appeals, in *Natural Resources Defense Counsel v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, *rev'd on other grounds* by 133 S.Ct. 710 (2013), interpreted this standard language as a stand- alone prohibition requiring strict compliance with Water Quality Standards.

By retaining the Receiving Water Limitations prohibition in the Permit as it was considered by the Ninth Circuit, the Regional Board is holding the City responsible for compliance with numeric Water Quality Standards as an end of pipe limit. For the reasons set

[1] In order to comply with 23 C.C.R.§2050 (a), the City submits a copy of Order R9-2013-0001 with its petition; however, since the entire administrative record will be lodged by the Regional Board with the State Water Board, most citations to the record herein will not be accompanied by duplicative exhibits. As of this filing, the complete transcripts of the three hearing dates are not believed to be available for specific citations. The City reserves the right to submit supplemental or amended points and authorities with specific transcript citations when available for review.

forth below, the Permit's Receiving Water Limitations prohibition is inconsistent with State and Federal law and must be revised.

A. *Federal law does not require Numeric Effluent Limits or strict compliance with Water Quality Standards*

The Federal Clean Water Act and its implementing regulations do not require municipal stormwater permits to include numeric effluent limits or to strictly adhere to Water Quality Standards. The Ninth Circuit Court of Appeals addressed both issues in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).

In *Defenders*, the Ninth Circuit held that the United States Environmental Protection Agency ("US EPA") has the authority to impose numeric effluent limits in MS4 Permits, but that the Clean Water Act does not require numeric effluent limits. The Ninth Circuit additionally held that municipal stormwater permits do not need to comply with Water Quality Standards, stating "industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges."

The decision highlights the difference between traditional, industrial discharges and municipal stormwater. The Ninth Circuit focused on the approach Congress took to addressing this difference holding that Congress replaced the requirements applicable to industrial discharges "with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable. . ." and that the statute "unambiguously demonstrates" that Congress did not require municipal storm-sewer discharges to comply strictly with Water Quality Standards. (*Defenders of Wildlife v. Browner*, 191 F.3d at 1165.)

The Ninth Circuit's holding that has been adopted by California courts. In *Divers' Environmental Conservation Organization v. State Water Resources Control Board (Divers' Environmental)* (2006) 145 Cal.App.4th 246, the plaintiff brought suit claiming that an NPDES Permit issued to the United States Navy by the San Diego Regional Board was contrary to law because it did not incorporate waste load allocations ("WLAs") from a TMDL as numeric effluent limits.

After discussing the relevant requirements of the Clean Water Act, as well as governing

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

case authority, the Court of Appeal acknowledged that in regulating stormwater permits EPA "has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations." (*Id.* at 256.) The Court went on to find that "it is now clear that in implementing numeric water quality standards, such as those set forth in CTR, permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL's [Water Quality Based Effluent Limit]." (Id. at 262.)

Likewise, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the Court of Appeal found that Congress intentionally gave the EPA "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."

Federal law simply does not require numeric effluent limits or direct incorporation of Water Quality Standards into municipal stormwater permits. The Clean Water Act instead establishes a unique regulatory structure to address the unique nature of discharges from MS4s. Recognizing that, because of the open nature of the system and wide variability in flow, municipal stormwater discharges are different than other discharges regulated by the Clean Water Act, Congress expressly exempted municipal stormwater discharges from strict compliance with water quality standards. The Permit's infeasible requirement of strict compliance with water quality standards at all times and in all receiving waters is contrary to the Congressional policy reflected in the CWA related to discharges from municipal stormwater systems. To conform to Congressional policy, the Permit should have included a compliance option.

B. ***The Receiving Water Limitations prohibition is inconsistent with precedential State Board Orders.***

Pursuant to Government Code section 11425.60, unless otherwise stated in the decision, all State Board orders are binding precedent on both the State Board itself and the nine Regional Water Quality Control Boards. (State Board Order WR 96-01, fn 11.) Compliance with precedential orders is mandatory. (*See California Assn. of Sanitation Agencies v. State Water*

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

Resources Control Board (2012) 208 Cal. App. 4th 1438, 1465, fn 20; *see also* State Board statement on precedential orders: "The State Water Board and the nine Regional Water Quality Control Boards (Regional Water Boards) ordinarily will follow State Water Board precedents, or provide a reasoned analysis for not doing so." http://www.swrcb.ca.gov/board_decisions/adopted_orders/ [as of June 1, 2013, emphasis added].)

The State Board has held on numerous occasions, in multiple precedential orders, that its standard receiving water limitations language "does not require strict compliance with water quality standards." (State Water Board Order WQ 2001-15.) Rather, compliance with water quality standards is "to be achieved over time, through an iterative approach requiring improved BMPs." (State Water Board Order WQ 2001-15.) Because the Permit's Receiving Water Limitations prohibition is inconsistent with these precedential State Board orders, it must be revised.

The State Board's position that Water Quality Standards are to be achieved over time through the iterative process was most recently reiterated in State Board Order WQ 2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001). The State Board issued Order WQ 2001-15 in response to the building industry's claim that the Ninth Circuit's decision in *Defenders of Wildlife v. Browner* rendered requirements in the 2001 San Diego County MS4 Permit unnecessary and contrary to the MEP standard. While retaining the requirement that the San Diego permit prohibit discharges that cause or contribute to violations of water quality standards, the State Board made clear that compliance with this requirement was to be achieved through the iterative process, and that the Water Quality Standards themselves were not hard compliance targets.

In discussing the propriety of requiring strict compliance with water quality standards, and the applicability of the MEP standard in State Board Order WQ 2001-15, the State Board held:

> 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

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

> 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.
>
> (Order 2001-15, p. 7-8 [emphasis added].)

State Board policy is, and has been, that Water Quality Standards are to be achieved over time through the iterative process. In State Board Order WQ 2001-15, the State Board further explained, in the context of its review of the 2001 San Diego MS4 Permit, that:

> In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that ***our language, similar to U.S. EPA's permit language discussed in the Browner case, does not require strict compliance with water quality standards***. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. ***Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.***
>
> (*Id.*, at 7 [emphasis added].)

The State Board thus established a "middle ground" position where MS4 permits had to require compliance with water quality standards but where compliance was to be achieved over time in recognition of the unique nature of stormwater discharges:

> We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of water quality objectives. ***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.*** The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.
>
> (*Id.*, at 8-9 [emphasis added].)

The State Board's position on the receiving water limitations language has been consistent and clear: Water Quality Standards are to be achieved over time through the iterative process. Because the language in the Permit is modeled after the State Board's language, it must be revised to align the language with the State Board's precedential orders.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

II. THE PERMIT NEEDS TO BE REVISED TO GIVE THE CITY A FEASIBLE PATH TO ATTAINING COMPLIANCE WITH PERMIT REQUIREMENTS.

As a matter of law, the Clean Water Act does not require permittees to achieve the impossible. That is nonetheless what the Regional Board has asked the City to do by including the Receiving Water Limitations prohibition (and other requirements including but not limited to the TMDL requirements in Attachment E), in the Permit. Compliance with numeric effluent limits tied directly to Water Quality Standards or TMDLs is simply not feasible.

The State Board has recognized that municipal stormwater discharges are different. In 2006, the State Board convened a "Blue Ribbon Panel" of experts to determine whether compliance with numeric effluent limits in stormwater permits was feasible. The panel found that "[m]ost all existing development rely on non-structural control measures, making it difficult, if not impossible to set numeric effluent limits for these areas" and that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." (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, 2006, pp. 8, 12.)

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 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

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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. (See also *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1994) ["it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants . . . Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit"].)

The Clean Water Act does not require municipal permittees to do the impossible. Nor does State law. 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, as reflected in the numerous comments submitted during the permit adoption process, complying with numeric limits is simply not achievable by the permittees, given the variability of the potential sources of pollutants and urban runoff, as well as the unpredictability of the climate in Southern California.

In fact, as discussed above in *Divers, supra*, 145 Cal.App.4th 246: "In regulating storm water permits the EPA has repeatedly expressed the preference for doing so by way of BMPs, rather than by way of imposing either technology-based or water quality-based numeric limitations." (*Id.* at 256.) According to the *Divers* Court: "EPA has repeatedly noted, storm water consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact the receiving body on a basis which is only as predictable as the weather." (*Id.* at 258.)

Similarly, in *BIA v. State Board, supra*, 124 Cal.App.4th 866, 889-90, after having

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

recognized the "practical realities of municipal storm sewer regulation," and the "physical differences between municipal storm water runoff and other pollutant discharges," and finding that the maximum extent practical approach was a "workable enforcement mechanism" (*id.* at 873, 884), the Court concluded that the MEP standard was purposefully intended to be highly flexible concept that balances numerous factors including "technical feasibility, costs, public acceptance, regulatory compliance and effectiveness." (*Id.* at 889-90.)

It is technically and economically infeasible to strictly comply with Water Quality Standards as end of pipe numeric limits. Imposing such requirements goes beyond "the limits of practicability" (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1162). Accordingly, the imposition of the Receiving Water Limitations prohibition is not only an attempt to impose an obligation that goes beyond the requirements of State and Federal law, but equally important, represents an attempt to impose provisions that go beyond what is "feasible." These aspects of the Permit must be stricken.

III. THE PERMIT IMPROPERLY APPLIES A HEIGHTENED COMPLIANCE STANDARD TO DISCHARGES INTO AND FROM THE MS4.

Permit, section II.A.1. entitled "Discharge Prohibitions," requires the Permittees to not only "effectively prohibit" non-storm water discharges, but also, through subsection II.E.2 (entitled "Illicit Discharge Retention and Elimination"), to take action to prevent "non-stormwater" from entering the MS4. In effect, all "non-storm water discharges," unless they are otherwise conditionally permitted to be discharged under subsection E.2. of the Permit, are prohibited. The Permit further treats dry weather discharges *from* the MS4 as industrial discharges and applies an end of pipe standard that violates Section 402(p) of the Clean Water Act. Because both Permit requirements violate State and Federal law, they must be revised.

A. *All discharges from the MS4 are subject to the MEP standard.*

The Regional Board has attempted to create a new standard under the Clean Water Act – ***non-stormwater*** discharges ***from*** the MS4. Permit Finding 15 states:

> Non-Storm Water and Storm Water Discharges. Non-storm water discharges from the MS4s are not considered storm water discharges and therefore are not subject to the MEP standard of

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

> CWA section 402(p)(3)(B)(iii), which is explicitly for "Municipal ...Stormwater Discharges (emphasis added)"from the MS4s. Pursuant to CWA 402(p)(3)(B)(ii), non-storm water discharges into the MS4s must be effectively prohibited.

Because all discharges from the MS4 are subject to the Maximum Extent Practicable ("MEP") standard, all Permit requirements based on the false standard referenced in Finding 15 must be removed from the Permit.

Section 402(p)(3)(B) of the Clean Water 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]*.)

Thus, the plain language of the CWA requires MS4 Permits to "require controls to reduce the discharge of pollutants to the maximum extent practicable." (*Id.*) The CWA applies the MEP standard to the "discharge of pollutants" from the MS4. There is no distinction between the discharge of "stormwater" or "non-stormwater" or dry weather flows and wet weather flows. As such, the Regional Board's attempt to "prohibit non-stormwater discharges through the MS4 to receiving waters" exceeds Federal law.

B. ***The Permit prohibits discharges into the MS4 in a manner that is inconsistent with the Federal Clean Water Act and precedential State Board Orders.***

Permit, section II.A.1. entitled "Discharge Prohibitions," requires the Permittees to not only "effectively prohibit," non-storm water discharges, but also, through subsection II.E.2 (entitled "Illicit Discharge Retention and Elimination"), to take action to prevent "non-stormwater" from entering the MS4. In effect, all "non-storm water discharges," unless they are

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

otherwise conditionally permitted to be discharged under subsection E.2. of the Permit, are prohibited.

The Clean Water Act requires only a permit condition that says the Co-Permittee shall effectively prohibit discharges of non-stormwater into the MS4. Section 402(p)(3)(B)(ii) provides that permit for discharges from municipal storm sewers "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer . . . ." (33 USC § 1342(p)(3)(B)(ii).) (*Id.*) The proposed regional permit uses Section 402(p)(3)(B)(ii) expansively.

"Effectively prohibit" is not the same as prohibit or eliminate. The draft permit appears to strictly prohibit discharges of non-stormwater and holds the Co-Permittees liable for preventing or eliminating such discharges. This exceeds what is required by the CWA.

Federal regulations make clear this only requires the Co-Permittees to prohibit such discharges in their ordinances. (40 C.F.R. § 122.26(d)(2)(i).) Moreover, the State Board addressed this issue in Order WQ-2001-15, expressly stating that discharges into an MS4 are subject to a more flexible standard, holding:

> 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***. . . the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.
>
> (*Id.*, at 7 [emphasis added].)

A strict prevention or prohibition of all non-stormwater discharges into the MS4 is not feasible. This requirement therefore exceeds the requirements of Federal Law as well as the State Board's direction on how to manage discharges into the MS4 as set forth in precedential order WQ-2001-015.

IV. THE PERMIT'S NEW DEVELOPMENT AND REDEVELOPMENT REQUIREMENTS ARE UNNECESSARY AND, AS INCORPORATED INTO THE PERMIT, VIOLATE STATE AND FEDERAL LAW.

The Permit imposes site design requirements new development and significant redevelopment projects. The overarching requirement is that the completed project site retain the

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

runoff from the 85th percentile storm event. If the project site is unable to retain the runoff because of soil conditions or other site restrictions, the Permit will require some projects to provide additional mitigation. Moreover, in the case of redevelopment projects, the Permit will require a return to pre-project hydrologic conditions.

These Permit requirements are regulating the discharge of stormwater as a pollutant, rather than the pollutants in the stormwater, and are void under the Clean Water Act. They additionally exceed both the City's the Regional Board's authority under the United States Supreme Court's decisions in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374, and must be removed from the Permit.

A. *The Permit imposes post construction, site-design requirements on municipal projects to control the volume of water leaving a completed project site in excess of the Regional Board's authority under both the Clean Water Act and Porter Cologne.*

Permit section E.3.c imposes BMP requirements for all priority projects as defined in the Permit. Priority projects include areas of new development and redevelopment. Section E.3.c.(1)(a) requires the following:

> Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapotranspire) onsite the pollutants contained in the volume of storm water runoff produced from a 24-hour 85th percentile storm event (design capture volume)

Section E.3.c.(2) imposes requirements based solely on the volume of stormwater leaving a completed project site:

> Each Copermittee must require each Priority Development Project to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project

Because these Permit requirements regulate the discharge of stormwater alone, rather than pollutants or waste in stormwater, they exceed the Regional Board's authority under both the Clean Water Act and Porter Cologne.

Regulation of stormwater discharges on a volumetric basis was recently rejected in *Virginia Department of Transportation v. EPA* (2013) U.S. Dist. Lexis 981, 43 ELR. 20002 (E.D. Va.), In that case, US EPA established a TMDL for Accotink Creek to limit the flow of stormwater into the creek. The purpose of the TMDL was to regulate the amount of sediment

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

into Accotink, based on EPA's belief that the sediment was the primary cause of its impairment. The parties to the case agreed that sediment is a "pollutant" under the CWA, and that stormwater is not. EPA, however, claimed that the storm water flow rate was a "surrogate" for sediment thereby justifying the stormwater flow TMDL.

The Court found that EPA had no authority to regulate the flow of storm water into the creek, holding finding the Clean Water Act did not authorize it to do so. According to the District Court:

> The language of § 1313(d)(1)(C) is clear. EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulatable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its limited statutory authority.
>
> (Id. at 14-15.)

Accordingly, the Regional Board in this case has no authority under the Clean Water Act to regulate discharges from completed project sites without specifically identifying a particular pollutant of concern. Similar restrictions exist in State law. Porter Cologne prohibits the discharge of "Waste" without a permit. (Cal Water Code §§ 13260; 12363; 13264.) Waste is defined as:

> sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.
>
> (Cal Water Code § 13050(d).)

Stormwater itself is not Waste, though it may contain Waste. The Water Code only authorizes the Regional Board to regulate the discharge of Waste. Permit terms that seek to regulate stormwater flows without identifying specific pollutants in such flows are beyond the authority of the Regional Board and must be removed from the Permit.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

B. *The Permit requires the City to impose exactions on projects within their jurisdictions in excess of the City's authority.*

As applied to areas of redevelopment, and offsite mitigation where retention of the 85th percentile storm is not feasible, the Permit's hydromodification requirements exceed the scope of both the City's and the Regional Board's authority under State and Federal law. Permit section E.3.c.(2)(a) states:

> Post-project runoff conditions (flow rates and durations) must not exceed pre-development runoff conditions by more than 10 percent (for the range of flows that result in increased potential for erosion, or degraded instream habitat downstream of Priority Development Projects).

Section E.3.c.(1)(a) requires the following:

> Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapotranspire) onsite the pollutants contained in the volume of storm water runoff produced from a 24-hour 85th percentile storm event (design capture volume)

In areas of redevelopment, compliance with Section E.3.c.(2)(a) will require a project proponent to return the project site to a condition that predates construction of the original project. The Permit will thus require the City to impose mitigation and/or exactions for impacts that are not a result of the redevelopment project itself.

When imposing a condition on a development permit, a local government is required under the federal and state constitutions to establish that the condition bears a reasonable relationship to the impacts of the project. This rule applies to legislatively enacted requirements and impact fees or exactions. *Building Indus. Ass'n v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009). Moreover, fees imposed on a discretionary ad hoc basis are subject to heightened scrutiny under a two-part test. First, local governments must show that there is a substantial relationship between the burden created by the impact of development and any fee or exaction. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Second, a project's impacts must bear a "rough proportionality" to any development fee or exaction. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Under California law, the *Nollan/Dolan* heightened scrutiny test also applies to in-lieu

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

fees. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996). The Legislature has memorialized these requirements in the Mitigation Fee Act which establishes procedures that local governments must follow to impose impact fees. Cal. Gov't Code §§ 66000-66025.

By requiring redevelopment projects to mimic pre-development conditions, the City would be requiring a project developer to make changes to the project site that are not related to the project's impacts. Imposing such requirements would exceed the City's (and the State's) authority under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374.

Permit conditions requiring mitigation where onsite retention of the 85th percentile storm is not feasible because of local soil or other pre-project conditions also violate the *Nollan/Dolan* limitations. Imposing offsite mitigation requirements when the original project site is incapable of retaining the 85th percentile storm exceeds the impacts of the proposed project. For that reason, as applied to redevelopment projects, and offsite mitigation where retention of the 85th percentile storm is not feasible, Permit section E.3.c. must be revised to reflect the limitations of the City's authority.

C. *The Regional Board failed to make adequate findings on the Permit's new development and redevelopment requirements.*

The Permit requires hydromodification controls in every development and redevelopment project with little to no ability to exempt projects where an HMP is infeasible. These requirements are a one size fits all approach across three large counties with varying climates, soil conditions and topography.

The Regional Board had no evidence before it that an across the board requirement to implement hydromodification controls and LID requirements in every development and redevelopment project improves water quality. In fact, the Regional Board has based its entire Permit requirements on one study produced out of the Pacific Northwest, an area that has more pristine steam and site conditions and whose soils better allow for infiltration that do the clay conditions of south Orange County that do not allow infiltration and the capture of on-site pollutants. To that extent, the HMP and LID requirements lack substantial evidence and are

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

arbitrary and capricious under the California Administrative Procedure Act and violate the Clean Water Act in that the requirements do not on their face demonstrate water quality benefits.

There is also no evidence of water quality benefit to support a pre-development run-off reference requirement. A pre-development standard is entirely subjective. While a project proponent would need to review on-site or nearby soil conditions for this reference, evidence was presented at the adoption hearing that this could not be done as easily as using an Internet website, which was the contention of Regional Board staff in advocating for the new standard. Also, in highly developed concrete areas, it would be difficult to find nearby conditions that could be used as this reference, and is thus, arbitrary and must be removed from the Permit.

V. THE PERMIT WILL REQUIRE THE CITY TO EXPEND RESOURCES AND PUBLIC FUNDS BEYOND ITS JURISDICTIONAL BOUNDARIES AND POTENTIALLY HOLDS THE CITY JOINTLY AND SEVERALLY LIABLE FOR COMPLIANCE.

The Permit's Water Quality Improvement Plan ("WQIP") program includes multiple requirements for joint efforts by the City and other dischargers in a watershed management area, irrespective of the City' jurisdictional boundaries. For example, Permit section B.2.b. states:

> The Copermittees must consider the following, at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s . . .
>
> (3) Locations of each Copermittee's MS4 outfalls that discharge to receiving waters;
>
> (4) Locations of MS4 outfalls that are known to persistently discharge non-storm water to receiving waters likely causing or contributing to impacts on receiving water beneficial uses;
>
> (5) Locations of MS4 outfalls that are known to discharge pollutants in storm water causing or contributing to impacts on receiving water beneficial uses; and
>
> (6) The potential improvements in the quality of discharges from the MS4 that can be achieved.

Permit section B.2.c. requires the City to use the information gathered to "develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

waters." The Permit then requires the City to develop goals to address the pollutant sources on the priority list. (Permit section B.2.d.) There are no limitations on jurisdictional boundaries or relative contribution to pollutant loading from individual sources.

Requiring the City to expend resources outside its jurisdiction exceeds the authority granted to the Regional Board under Clean Water Act section 402(p) and the California Water Code. Both statutes hold dischargers responsible for only those pollutants that discharge from their point sources. (33 U.S.C. §§ 1311, 1319, 1342(p)(3)(B) and 1362(12); Water Code §§ 13350(a), 13263(f) and 13376.)[2] For example, although stormwater permits may be issued on a system – or jurisdiction – wide basis, Co-Permittees need only comply with permit conditions relating to discharges from the municipal separate sewers for which they are operating. (33 U.S.C. § 1342(p)(3)(B)(i) and 40 CFR § 122.26(a)(3)(vi).). In addition, EPA has defined the term "Co-Permittee" to mean a permittee who "is only responsible for permit conditions relating to the discharge for which it is operator." (40 CFR § 122.26(b)(1).)

Thus, Co-Permittees are only responsible for pollutants discharged from its MS4, and need only comply with permit conditions related to such discharges. (*So. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (2004) 541. U.S. 95, 105; *Jones v. E.R. Shell Contractor, Inc.* (N.D. Ga. 2004) 333 F.Supp.2d 1344; In re *City of Irving, Texas*, Mun. Separate Storm Sewer Sys., 10 E.A.D. 111 (EPA July 16, 2001); 40 CFR §§ 122.26(a)(3)(vi).) Mandatory watershed requirements not linked directly to pollutants discharged from a Co-Permittees MS4 are thus, pursuant to the plaint meaning of the CWA, beyond the responsibility of that Co-Permittee.

Similarly, Porter Cologne focuses on individual discharges (*see, e.g.*, Water Code §§ 13263 and 13350(a)) and makes watershed planning an option that NPDES Co-Permittees may

---

[2] The Authority acknowledges that EPA and others believe that the watershed approach would result in better water quality results. (*See, e.g.*, EPA's Watershed-Based NPDES Permitting Policy Statement dated January 7, 2003 and the conclusions of the National Research Council's 2009 Report on Urban Stormwater Management in the United States (concluding that the "course of action most likely to check and reverse degradation of the nation's aquatic resources would be to base all stormwater and other wastewater discharge permits on watershed boundaries instead of political boundaries.").) However, it is also acknowledged that structural changes in the CWA and the laws of authorized states would be required to implement such a watershed permitting approach. (*See, e.g.*, National Research Council Report, p 524 (noting that the "national watershed-based approach to stormwater is likely to require legislative amendments . . . .").) In the absence of such structural changes, the CWA must be applied as currently written, and as currently written its focus is on jurisdictional boundaries.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

pursue, not a mandatory requirement with which Co-Permittees must comply.. (Water Code § 16101(a).) The purpose of such voluntary watershed planning is to allow permittees to implement existing and future water quality requirements and regulations on a watershed rather than a jurisdictional level. (*Id.*) If the Regional Board incorporates the watershed plan into the waste discharge requirements issued to a permittee, the implementation of the plan by the permittee may represent compliance with waste discharge requirements. (Water Code § 16102(d) and (c).) Thus, the voluntary watershed approach of Water Code §§ 16100 *et seq.* allows permittees to *elect* the pursue a watershed approach and *offers* the permittee a compliance option as an incentive to move from a jurisdictional approach to a watershed approach.

Moreover, the Clean Water Act is not a contribution statute; dischargers are not jointly and severally liable for water quality conditions in a watershed. Nonetheless, under Attachment E of the Permit, the City could potentially be found out of compliance with an interim or final TMDL target based solely on discharges from other dischargers. Joint liability is imposed by each section of the Permit that sets forth how the dischargers are to establish compliance with the six TMDLs incorporated into the Permit.[3] The following provision is an example of unlawful joint liability imposed by the Permit:

> (3) Interim TMDL Compliance Determination
>
> Compliance with the interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:
>
> . . . .
>
> (d) The pollutant load reductions for discharges from the Responsible *Copermittees'* MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR
>
> (e) The Responsible *Copermittees* can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the *Copermittees'* MS4s are not causing or contributing to the exceedances; OR
>
> (f) There are no exceedances of the interim receiving water

[3] The Permit sections that impose joint liability are: Attachment E, Sections 1.b(3)(d); 2.b(3)(d)(iv-v); 3.b(3)(d); 3.b(3)(e)(iv-v); 3.c(2)(d); 3.c(2)(e); 4.b(3)(d); 4.c(2)(e); 5.b(3)(d-g); 5.c(1)(b)(iv-viii); 6.b(3)(d-f); 6.c(3)(d-h).

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

> limitations under Specific Provision 6.c.(2)(a) in the receiving water at, or downstream of the Responsible *Copermittees'* MS4 outfalls; OR
>
> (g) The pollutant load reductions for discharges from the Responsible *Copermittees'* MS4 outfalls are greater than or equal to the interim effluent limitations under Specific Provision 6.c.(2)(b); OR
>
> (h) The Responsible *Copermittees* have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.
>
> Permit at E-46 to E-47 § 6(c)(3) (emphasis added).

Under this provision, which applies to interim compliance determinations for the bacteria TMDL covering twenty beaches and creeks in the San Diego Region, the City would be unable to establish compliance based on its pollutant load reductions, receiving water conditions, or Water Quality Improvement Plan activities unless it can show that all other dischargers are also in full compliance. The Regional Board apparently recognized this problem because it changed "Copermittees" to "Copermittee" in other parts of Attachment E in response to comments from the dischargers, but the Regional Board neglected to make the change consistently.[4]

As a matter of law, the Regional Board cannot impose joint liability on the City. Under Clean Water Act section 402, and California Water Code section 13260, the Regional Board's authority is limited to imposing conditions on a discharge that are reasonably related to the discharge. The Permit's WQIP program provide an additional example of how the Permit could be interpreted as imposing joint liability. The Permit's WQIP requirements will force the City to develop goals and strategies to address sources of pollution in the City' watershed regardless of whether they are in the City' jurisdiction. If they are outside the City' jurisdiction, and the permittee who is responsible refuses to act, the City would not be able to comply with the Permit's WQIP requirements. In that instance, the City could be held liable for failure to develop a WQIP as specified in the Permit.

[4] The Permit sections that the Regional Board changed from "Copermittees" (in the March 27, 2013 Tentative Order) to "Copermittee" (in the Permit) are: Attachment E, Sections 1.b(3)(a)-(c); 4.b(3)(a)-(c); 4.c(2)(a)-(d); 5.b(3)(a)-(c); 5.c(1)(b)(i)-(iii); 6.b(3)(a)-(c); 6.c(3)(a)-(c).

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

The Regional Board has no authority to impose such liability on the City. (*City of Modesto Redevelopment Agency v. Superior Court*, (2004) 119 Cal.App.4th 28; *In re Alvin Bacharach and Barbara Borsuk* (Order No. WQ 91-07, SWRCB 1991 ["The Water Code provides for the issuance of cleanup and abatement orders to "'dischargers'"].) Any permit conditions that impose responsibility for discharges that do not originate from point sources owned, operated or controlled by the City exceed the Regional Board's authority and must be stricken from the permit.

VI. THE PERMIT'S INCORPORATION OF THE BACTERIAL INDICATORS TMDL FOR BEACHES AND INLAND STREAMS VIOLATES STATE LAW.

A. *Federal Law does not require the TMDL to be incorporated into the Permit.*

As with Water Quality Standards, there is no question that the Federal Clean Water Act and its implementing regulations do not require municipal stormwater permits to include TMDLs. In *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), the Ninth Circuit held that municipal stormwater do not need to comply with Water Quality Standards, holding "industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges."

TMDLs are an expression of Water Quality Standards. (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1129 [TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans]; *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1415 [TMDL does not establish water quality objectives, but merely implements, under Water Code section 13242, the existing narrative water quality objectives].) The Ninth Circuit's holding that the Clean Water Act and its implementing regulations do not require municipal stormwater permits to include Water Quality Standards therefore applies to TMDLs.

Any inclusion of TMDLs in the Permit is purely a function of State law, and at the discretion of the Regional Board. However, as explained more fully below, the manner in which the Regional Board included the Bacterial Indicators TMDL for Beaches and Inland Streams into the Permit represents an abuse of discretion, and the Permit must be revised.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

B. *To the extent that the TMDL is incorporated as a WQBEL, the Regional Board was required to follow Federal Regulations.*

Although Federal law does not require the inclusion of TMDLs in municipal stormwater permits, when issuing NPDES permits, the Regional Board was required to follow Federal Regulations. (23 Cal Code Regs § 2235.2 ["Waste discharge requirements for discharge from point sources to nagivable waters shall be issued and administered in accordance with the currently applicable federal regulations for the National Pollutant Discharge Elimination System (NPDES) program"].) Thus although inclusion of the TMDL is not required by Federal law, if the Regional Board is going to include it in a permit, it must be in accordance with Federal Regulations. In this case, that meant appropriate development of water quality based effluent limits ("WQBELs") that incorporate the TMDL.

Federal Regulations at 40 C.F.R. § 122.44(d) require the Regional Board to incorporate WQBELs into industrial NPDES permits when it finds there is a "reasonable potential" that the discharge of the pollutant to be regulated "has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard." (40 C.F.R. § 122.44(d)(1)(iii).)[5] To determine whether a permitted discharge has the reasonable potential to "cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard" Federal Regulations require the Regional Board to:

> use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.
>
> (40 C.F.R. § 122.44(d)(1)(ii).)

The Regional Board must use this information to develop an appropriate WQBEL for the

[5] Pursuant to the *Defenders of Wildlife* decision, 40 CFR § 122.44(d) does not apply to municipal stormwater permits. Section 122.44(d) requires implementation of WQBELs to attain water quality standards. Under the *Defenders* opinion, water quality standards are not required to be incorporated into this MS4 permit; therefore WQBELs necessary to meet water quality standards are not required in this Permit.

regulated discharge. Before a WQBEL can be developed, a need for it must be established. As the Writers' Manual points out:

> The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where required by federal and state regulations. A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.
>
> (NPDES Permit Writers' Manual, September 2010, page 6-23.)

Basically, if a TMDL has been developed for the pollutant to be regulated, the WQBEL must be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA." (40 C.F.R. § 122.44(d)(1)(vii)(B).)

There are two generally accepted approaches to conducting reasonable potential analysis. According to US EPA guidance, "A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques, or using a non-quantitative approach." (NPDES Permit Writers' Manual, September 2010, page 6-23.) The first approach would have required end of pipe monitoring data to be evaluated against in-stream generated ambient (dry weather) data. There is no evidence in the Permit or the Fact Sheet that the Regional Board based the Permit's WQBELs on any such data. (Fact Sheet F-126, F-127.)

As for the second, non-quantitative approach, the Regional Board also failed to provide information in the Permit, or the Fact Sheet stating that it had performed a non-quantitative analysis based on recommended criteria described in US EPA guidance. Neither the administrative record nor the Fact Sheet contains any evidence of the Regional Board having performed a reasonable potential analysis in accordance with either of the two foregoing approaches. (Fact Sheet F-126, F-127.)

Instead both the Permit's Findings, and its Fact Sheet merely recite the requirement that WBELs must be "consistent with the assumptions and requirements of any available wasteload allocation" with no analysis as to how the Permit requirements are consistent or how the WQBELs chosen were based on the required reasonable potential analysis. (Fact Sheet, F-126, F-

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

127.) Not only is this a violation of Federal Regulations, but it is also renders the Permit infirm under the California Supreme Court's decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, which requires appropriate findings to "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." (*Id.*, at 514.)

C. *The Permit's TMDL requirements violate State law.*

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 in the *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.) Specifically, the Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, the Regional Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that such a requirement means that the Water Boards must analyze the "discharger's cost of compliance." (Id. at 618.)

As described above, there is no question that Federal Law does not require TMDLs to be included in municipal stormwater permits. (*Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); 40 C.F.R. § 122.44(d).) Consequently, the Regional Board was required to consider the factors listed in Water Code sections 13000, 13263 and 13241 before including the TMDL in the Permit. (*Burbank v. State Board* (2005) 35 Cal.4th 613.)

Water Code sections 13000, 13263, and 13241 require much more than an economic analysis.[6] First and foremost, they require an analysis of whether the proposed Permit terms are "reasonable, considering all demands being made and to be made on [receiving] waters." (Cal

[6] The Regional Board additionally failed to conduct a sufficient economic analysis of the Permit's requirements. A discussion of the reasons the Regional Board's efforts were deficient is presented in Section XI., below.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

Water Code § 13000.) They further require an analysis of whether specific Permit requirements are necessary given "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges." (Cal Water Code § 13263(a).)

The Regional Board has failed on both fronts. Permit terms that are infeasible to achieve are by definition, not reasonable. As described in Section II., above, compliance with numeric effluent limits tied directly to Water Quality Standards is simply not feasible. While the Regional Board attempted to "soften the blow" by requiring percentage reductions in bacteria levels instead of strict compliance with the TMDL's WLA, the effect is the same. Stormwater is a diffuse source subject to many areas of input. With regard to bacteria, many of those sources are natural. 100% control is not feasible. If a discharger fails to attain the reductions set forth in the TMDL on a numeric basis, they will be in violation of the Permit.

This kind of strict compliance approach fails to consider "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges" as required by Water Code section 13263(a). Many of the inland streams to which the TMDL (and the Permit conditions implementing the TMDL) apply are either channelized, fenced, or so shallow as to prevent full body contact recreation. Requiring the City to meet a bacteria standard based on an assumption of full body contact recreation in these areas is an unreasonable abuse of discretion that blatantly fails to consider the true beneficial uses of the waters at issue, and the many naturally occurring sources of bacteria discharges to surface waters in the region.[7] Neither the Permit or the Fact Sheet contain any analysis to the contrary.

More importantly for the purposes of this challenge, the Regional Board's decision to include the TMDL in the Permit violates sections 13263, 13241 and 13000, as well as the California Supreme Court's decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. For that reason, the TMDL requirements must be removed from the Permit.

[7] Additionally, to the extent the underlying TMDL is flawed, the Regional Board had an obligation to correct the TMDL before imposing it on the City. (*See California Assn. of Sanitation Agencies v. State Water Resources Control Bd.* 208 Cal. App. 4th 1438, 1461 (2012).)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

VII. THE PERMIT'S ACTION LEVEL REQUIREMENTS ARE INCONSISTENT WITH STATE AND FEDERAL LAW.

Permit, section II.C, entitled "Action Levels," imposes a series of Non-stormwater Action Levels ("NALs") and Stormwater Action Levels ("SALs"), as numeric "goals" to be achieved. To the extent an NAL or SAL is based on an interim or final effluent limitation from a TMDL, then such a NAL or SAL becomes an "enforceable effluent limitations" which must be strictly complied with.

A. *The Permit's Action Levels could be interpreted as numeric effluent limitations.*

The Regional Permit, in Provision II.C, sets forth requirements for the incorporation of Non-Storm Water Action Levels ("NALs") and Storm Water Action Levels ("SALs") into Water Quality Implementation Plans ("WQIPs). The preamble to Provision II.C states that the "goal of the action levels is to guide Water Quality Improvement Plan implementation efforts and measure progress towards the protection of water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges." This language establishes that the NALs and SALs are not intended to be enforceable themselves if not attained by the copermittees.

Unfortunately, the language of the Regional Permit is not entirely clear on this point. Footnotes 7 and 9 of the Regional Permit state that NALs and SALs incorporated into a WQIP "*are not considered* by the San Diego Water Board to be enforceable effluent limitations" (unless based on a water quality based effluent limitation ("WQBEL") expressed as an interim or final effluent limitation for a TMDL and the compliance date for that WQBEL has passed). (emphasis supplied).

Given that the Regional Board has an obligation to make ensure that the provisions of the Regional Permit are clear and unambiguous, the City requests that the State Board either amend the footnotes or text of the Regional Permit to make clear that the NALs and SALs are *not* enforceable effluent limitations or direct the Regional Board to take that action.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

B. ***The Permit lacks adequate findings that the Action Levels are necessary, or compliant with Water Code sections 13263 or 13241.***

The Permit's Action Level requirements (both NAL and SAL) include several predetermined Action Levels for, among other things, dissolved oxygen, turbidity, pH, copper, zinc, and lead. (Permit section C.1.a.) These pre-set levels were selected by the Regional Board as necessary to achieve the Maximum Extent Practicable standard required by the Clean Water Act. As an initial matter, neither SALs or NALs are required by the Clean Water Act or the MEP standard for the same reasons that TMDLs and numeric effluent limitations are not required by the Clean Water Act or the MEP standard.

More importantly, the Permit contains no findings explaining why the specific levels were chosen, or how their inclusion in the permit is necessary to achieve the MEP standard. It likewise lacks any findings as to how the chosen standards are compliant with factors set forth in Water Code sections 13263 and 13241.

The Fact Sheet includes a discussion of where the initial Action Level numbers came from but includes no analysis of whether they are reasonable or attainable. (See Fact Sheet pp. F-57, F-58.) The Fact Sheet additionally fails to explain why the each pollutant level chosen is necessary for inclusion in the Permit. (*Id.*) Instead, the Fact Sheet refers back to the 2009 and 2010 municipal permits issued for South Orange County and Riverside County and states that the Permit's Action Levels were developed for those permits.[8] The Fact Sheet additionally cites an EPA study but does not discuss the propriety of each preset limit. This level of analysis is required to provide the City with the opportunity to review the numeric limits chosen and provide evidence refuting the rationale under which they were chosen. It was further required to ensure that the Regional Board did not "randomly leap from evidence to conclusions." (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.)

[8] The Fact Sheet fails to note that the dischargers objected to the 2009 South Orange County Permit's Action Levels on the grounds that they were arbitrarily chosen. The Fact Sheet further fails to note that the 2009 South Orange County Permit's Action Levels were appealed via petition to the State Board by several of the permittees. Those petitions are currently in abeyance.

Lastly, both the Permit and the Fact Sheet fail to assess whether the Action Levels meet the requirements of Water Code sections 13263, and 13241. Because the Action Levels are not required by Federal law, the Regional Board must comply with state law in imposing these requirements. This includes considering the water quality conditions that could be reasonably achieved and economic considerations. A substantial body of evidence exists that suggests the proposed NALs and SALs may not be reasonably achievable. If Permittees are required to respond to and address all exceedances without reasonable prioritization, the cost will be significant. Because some exceedances will not be indicative of impacts to water quality, the cost to implement the SALs and NALs may have little if any commensurate environmental benefit. There is nothing in the record that suggests that the Regional Board has considered these water quality and economic factors. (*See Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) For that reason they must be removed from the Permit until such time as the Regional Board demonstrates that they are feasible, cost effective, and necessary.

VIII. THE REGIONAL BOARD HAS UNLAWFULLY ADOPTED A REGIONAL PERMIT IN VIOLATION OF THE WATER CODE AND FEDERAL REGULATIONS.

The Permit covers permittees in three large metropolitan counties – Orange, Riverside and San Diego. In May 2012, Orange and Riverside Counties ("Counties") sent letters to Staff Counsel for the Regional Board requesting the legal authority to issue a region-wide permit to the Counties.[9] The Counties contended that in accordance with federal regulations there was no system-wide, jurisdiction-wide or watershed basis to issue a regional permit. The Counties also asserted that they did not apply for the Permit and that there was no administrative basis or other evidence that allowed the Regional Board to adopt a Permit with provisions expressly regulating the Counties without considering a Report of Waste Discharge.

On September 7, 2012, Staff Counsel responded to the Counties stating that there was a jurisdiction-wide and watershed basis to impose a regional permit on the Counties, but offered no

[9] Letter from Ryan M. F. Baron, Office of County Counsel, County of Orange, to Catherine Hagan, Office of Chief Counsel, State Water Resources Control Board, San Diego Region (May 10, 2012); Letter from David H. K. Huff, Office of County Counsel, County of Riverside, to Catherine Hagan, Office of Chief Counsel, State Water Resources Control Board, San Diego Region (May 21, 2012).

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

evidence for these bases. Staff Counsel cited examples in the Bay Area and an Alaskan borough where regional permits had been issued.[10] Despite the Regional Board's contentions to the contrary, no law or regulation gives the Regional Board the authority to issue a regional permit.

A. *There Is No System-wide, Jurisdiction-Wide, Watershed or Other Basis by Which to Legally Impose a Region-wide Permit on the Petitioners.*

Finding 2 in the Permit states that the legal and regulatory authority for implementing a region-wide MS4 Permit stems from Section 402(p)(3)(B) of the Clean Water Act ("CWA") and 40 C.F.R. § 122.26(a)(1)(v). The Permit also cites EPA's Final Rule regarding stormwater discharge permit application procedures that there is flexibility to establish system-wide or region-wide permits. (55 Fed. Reg. 47990, 48039-48042.) In the summer of 2012, the Regional Board staff circulated a draft Permit and conducted Focused Meeting Workshops seeking input on the draft Permit. At workshops held on June 27, 2012 and July 11, 2012, Regional Board staff stated that the only reason for a region-wide Permit was to consolidate the three county permits to lessen the amount of permit writing time and reduce Regional Board costs. Upon adoption of the Permit on May 8, 2013, Finding 2 had been amended to state that the "regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall costs savings for the Copermittees and San Diego Water Board." (Permit section I.2.) There was no evidence presented at the adoption hearing of savings by the Copermittees or Regional Board or that the region-wide permit would ensure consistency of regulation. In any case, neither justification is valid under federal or state law. No other basis was given and no evidence was presented demonstrating why three large, geographically different counties would be covered under one Permit.

In 1987, Congress adopted amendments to the CWA requiring EPA to develop a permitting system for large and medium MS4s. As part of a rulemaking proceeding to adopt regulations implementing the CWA amendments, EPA examined how to define an MS4

[10] Letter from Jessica Jahr, California Regional Water Quality Control Board, San Diego Region, to Ryan M. F. Baron, Office of County Counsel, County of Orange, and David H. K. Huff, Office of County Counsel, County of Riverside (Sept. 7, 2012).

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

"system." Under the CWA and EPA rules, a "system," *one system*, would be issued a permit by the EPA or State authority allowing the discharge of stormwater into waters of the U.S. EPA's rulemaking proceeding only examined individual MS4s (*i.e.*, city and county unincorporated area) and MS4s within the same geographic area – defined as the same watershed or the political boundary *of the discharger* (*i.e.*, state owned roads, countywide or regional stormwater management authority).

Multiple smaller systems could be defined as a "system" and issued one permit if there were common physical factors and a unified stormwater management plan. The only instance where a larger geographic area would be covered under one permit is where there was an application by a regional stormwater management authority (*e.g.*, joint powers authority) that was legally empowered to perform all the program functions of smaller MS4s and could apply for such a permit. The EPA did not consider defining a "system" based on cost savings or consistency of regulation, and its final rules do not allow for this interpretation.

In adopting a region-wide Permit, the Regional Board has no basis to define the three counties as "one system" and issue one Permit to 39 different jurisdictions without their application or consent. There are no common physical factors to consider and no unified stormwater management plan between the three counties and 39 permittees. The Petitioners do not operate and are not a member of a regional stormwater management authority. Rather, the Regional Board only considered its internal cost savings and issued the Permit based on the geographic boundary of the Regional Board, and not the dischargers (whereas the Regional Board's political boundary spans across several large distinct and separate MS4 systems).

Federal Regulations look to interconnection and similarities between jurisdictions as the basis by which to issue one permit. (33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v)).) Federal regulations do not authorize and the EPA Final Rule does not contemplate regional permit issuance based on overall reduced cost savings. (55 Fed. Reg. 47990-01.) Here, overall cost savings have not been demonstrated by the Regional Board, and although it may be administratively convenient to impose a one-size fits all Permit, the EPA Final Rule contemplates such consistency within a watershed and not throughout a geographical area the size of the three

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

counties.

There is no factual or technical basis in the Permit that meets this criteria or establishes other bases to regulate Orange County under one unified permit. There is also no statistical basis by which to issue a region-wide Permit, as Orange County is comprised of over three million people and is the sixth largest county by population in the U.S. The U.S. Bureau of Census designates Orange County in a different Metropolitan Statistic Area than San Diego County, designating it in a Combined Statistical Area with Los Angeles, Ventura and San Bernardino Counties.

Lastly, the Regional Board cited examples in the Bay Area and in Alaska where region-wide permits were alleged to have been issued. In the Bay Area MS4 permit, various City and counties under that permit [cite] interconnect with one another and drain into the San Francisco Bay. The Bay Area MS4s agreed to end their existing permits early and applied for and consented to a region-wide permit. The Bay Area is also represented by a joint powers organization or regional watershed management program comprised of 8 municipal stormwater programs that performs common watershed functions for its 94 members. In the case of the Alaska example, a "region-wide" permit was issued to the Fairbanks North Star Borough, City of Fairbanks, City of the North Pole, the Alaska Department of Transportation and the University of Alaska Fairbanks. Further review of that permit and the stormwater program maps demonstrate, however, that the region regulated is a borough, the Alaskan equivalent of a county. All of the regulated Alaska permittees are physically interconnected through a storm drain system and roadways and drain into one watershed. In short, neither the Bay Area nor the Fairbanks Borough permits provide sufficient examples of a region-wide permit comparable to the one being issued to the Petitioners.

B. ***There Is No Technical Basis to Regulate the Petitioners Due to the Lack of a Report of Waste Discharge Application.***

In order for an MS4 system to be issued a permit, the operator of the system must apply for it. (40 C.F.R. § 122.21.) The Report of Waste Discharge ("ROWD") is the mechanism by which an MS4 applies to discharge stormwater. Every MS4 permit contains a requirement that a

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

ROWD be filed within 180 days of the expiration of the permit so that a new permit can be considered and adopted. A ROWD is a several hundred page application that contains information used to determine provisions of a new permit, including, but not limited to, monitoring, program strengths and other tools that are assessed in the new permit. A ROWD contains quantitative data and other evidence by which to make findings, conclusions of law, establish programs, and approve a permit to a system. In short, a ROWD contains the evidence that a Regional Board uses to regulate the permittee.

The Regional Board has adopted a Permit that expressly covers Orange County water bodies and regulates the actions of the Petitioners, but is not based on any ROWD or other application filed by the City. Thus, there is no technical basis for the Permit or substantial evidence in the record by which to regulate the City under a region-wide Permit, or any permit other than the Petitioners existing permit, (Cal Water Code § 13260; *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506) and the terms and conditions of the Permit are arbitrary and capricious.

IX. THE PERMIT CANNOT CLASSIFY NATURAL WATERS AS PART OF THE MS4, AND THE MS4 CANNOT BE CLASSIFIED AS BOTH A MS4 AND RECEIVING WATER.

The Permit states that development often makes use of natural drainage patterns and features as conveyances for runoff. Finding 11 goes on to state that rivers, streams and creeks in developed areas are part of the Petitioners' MS4 whether the river, stream or creek is natural, anthropogenic or partially modified. It further states that these natural water bodies are both an MS4 and a receiving water.

Finding 11 is expressly contradicted by Federal Regulations defining what qualifies as an MS4. Federal Regulations define a municipal separate storm sewer as:

> a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains:
>
> i. Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to state law) ... including special districts under state law such as a sewer district sewer district, flood control district or drainage district, or similar entity, or an

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States;

ii. Designed or used for collecting or conveying stormwater;

iii. Which is not a combined sewer; and

iv. Which is not part of a publicly owned treatment works (POTW) as defined at 40 CFR 122.2.

This definition only includes man-made channels and systems and does not encompass natural water bodies simply because an outfall discharges to a receiving water. Improvements to natural rivers, streams and creeks do not make them an MS4, or part of an MS4. They are simply an improved water of the U.S.

Lastly, municipalities do not own, control or operate natural rivers, streams and creeks. Such water bodies are often administrated by the State of California in the public trust for the right of the people to use such waters for certain purposes or are privately owned. The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the trust and may often be the final arbiter of permissible uses of trust lands. Such waters are not therefore, part of the City's MS4.

X. THE REGIONAL BOARD VIOLATED DUE PROCESS REQUIREMENTS IN THE PERMIT DEVELOPMENT PROCESS.

The period provided to review and comment on the Permit was unreasonably short given the breadth of the Permit. By denying the Co-Permittees a meaningful opportunity to review and comment on a Permit that so drastically affects their rights and finances, the Regional Board has denied the Co-Permittees due process rights under state and federal law. The United States Constitution, the California Constitution and the California Administrative Procedures Act, as applicable to the Regional Board, all require basic procedural due process. (*See Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731; Gov. Code § 11425.10.) The essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333; *Spring Valley Water*

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

Works v. San Francisco (1890) 82 Cal. 286 (1890) (reasonable notice and opportunity to be heard are essential elements of "due process of law," whatever the nature of the power exercised.); *Arkansas Wildlife Fed'n v. ICI Ams.* (8th Cir. 1994) 29 F.3d 376, 381 ("the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA."))

Two examples illustrate the lack of compliance by the Regional Board with this "essence" of due process. First, the Regional Board released the Draft Tentative Order at the close of business on March 27, 2013, just before Easter weekend and a state holiday on April 1, 2013. (See Draft Tentative Order R9-2013-0001 (March 27, 2013).) This release date provided just a few business days to review the Draft Tentative Order before the adoption hearings that were scheduled for April 11 and 12, 2013. As the Authority and other Co-Permittees informed the Regional Board in writing before and orally at the April 11 and 12 hearings, this short time period was insufficient to allow the Authority to properly prepare for the hearings. The Authority was thus deprived the "essence" of due process prior to the April hearings.

The same holds true regarding the Regional Board's May 8, 2013 hearing process. The Regional Board released two errata sheets shortly before the final adoption hearing on May 8, 2013. These errata sheets proposed major changes to the March 27, 2013 Tentative Order, most notable the proposed deletion of the compliance option in one version of the errata. Again, this short notice provided insufficient time for the Authority to prepare for and comment on the Permit. The Authority was thus deprived of fair notice and a meaningful opportunity to be heard on this important issue.

XI. THE REGIONAL BOARD FAILED TO ADEQUATELY CONSIDER ECONOMIC IMPACTS PURSUANT TO WATER CODE SECTION 13241

Under the California Supreme Court's holding in *Burbank v. State Board* (2005) 35 Cal.4th 613, 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 in the *Burbank*, "Section 13263 directs Regional Boards, when issuing waste

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

discharge requirements, to take into account various factors including those set forth in Section 13241." (*Id.* at 625, emphasis added.) Specifically, the Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, the Regional Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that such a requirement means that the Water Boards must analyze the "discharger's cost of compliance." (Id. at 618.)

There has not been a full consideration of the section 13241 factors, which would include an analysis of the economic impacts that would result from compliance with the existing stormwater permit compared to the costs of complying with the proposed stormwater permit (thereby the costs of complying with the new requirements). Instead, the Permit's analysis begins by stating, and without any quantification, that it would more expensive to not fully implement programs. Section 13241 is not satisfied by this inverse analysis.

The Permit states that the Petitioners have a significant amount of flexibility to choose how to implement BMPs and that "least expensive measures" can be chosen. (Fact Sheet, F-17.) This statement, however, conflicts with the Permit's definition of MEP at Permit section C-6 which expressly acknowledges Chief Counsel's 1993 MEP memo that only the Regional and State Boards determine whether BMPs meet MEP, and that selection of the least expensive BMPs will likely not result in meeting the MEP standard. The Fact Sheet also fails to cite any recent cost benefit numbers but relies on inapplicable cost data such as a 1999 EPA study on household costs and a California State University, Sacramento ("CSUS") Cost Survey assessed program costs for Phase I City.

Nothing in the Fact Sheet links any of the actual conditions of the Phase I permits of the Phase I City studied by CSUS with any of the requirements of the Permit. Therefore, the study tells the public nothing about the costs to implement the Permit. The data included in the Fact Sheet is also more than a decade old. In short, the Fact Sheet uses old data from Phase I programs that have no linkage to any conditions of the Permit. The full costs of implementing the entire program required by the Permit in 2013 dollars must be assessed.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

In addition to relying on outdated and inapplicable data, the Regional Board's cost analysis is fundamentally flawed because it tells the public nothing at all about the relationship between the cost of any particular BMP and the pollution control benefits to be achieved by implementing that BMP. Under this "generalized" approach, extremely costly requirements that bear little or even no relationship (or even a negative relationship) to the pollution control benefits to be achieved could be "justified" as long as the "overall" program costs are within what the Regional Board deems to be an acceptable range.

This is not a proper way to determine whether a control reduces the discharge of pollutants from the MS4 to the MEP. A more individualized assessment of cost is required. Otherwise, dischargers may be required to implement very costly controls that have no relationship to pollution control benefits, a result inconsistent with MEP. This analytical flaw in the Fact Sheet is compounded by the approach taken to assess the benefits of the Permit. Here again, the assessment approach misses the mark because it tells the public nothing about the pollution control benefits to be achieved by implementation of the controls in the Permit. All the Fact Sheet indicates, in essence, is that people like clean water and in theory may be willing to pay for it, that urban storm water may contribute to beach closures, and that such beach closures have an economic impact. This analysis sheds no light on the relationship between a BMP's costs and the pollution control benefits to be achieved by implementing that BMP.

Finally, stormwater agencies cannot readily establish or raise fees to help pay for the BMPs necessary to comply with either the California Toxics Rule criteria or proposed Site Specific Objectives due to the requirements of Proposition 218, Proposition 26 and the Mitigation Fee Act. For instance, Proposition 218 requires that property-related fees be put to a vote, so City cannot assess fees without the consent of two-thirds of the property owners. Therefore, the costs associated with the implementation and maintenance of the BMPs will almost always be expended using local agency General Funds.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

XII. The Permit unlawfully imposes a Federal scheme on the City with no option for compliance

The Permit violates the Tenth Amendment to the United States Constitution because it compels the City and other copermittees to administer a federal regulatory scheme. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The U.S. Supreme Court has held that under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). The protection afforded by the Tenth Amendment extends to local governments such as the City. *Id.* at 931 n.15; *Envtl. Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003).

A state or local government may be persuaded to implement a federal regulatory program but "the residents of the State or municipality must retain 'the ultimate decision' as to whether or not the State or municipality will comply with the federal regulatory program." *Envtl. Defense Ctr.*, 344 F.3d at 847 (citing *New York v. United States*, 505 U.S. 144, 168 (1992)). Permissible methods of "persuasion" include federal funding that is contingent on participation in a federal program. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 205-08 (1987)). Offering an alternative to implementing a federal regulatory program may also be constitutionally permissible, so long as the alternative does not "unduly infringe on the sovereignty of the State or local government." *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003) (citing *New York*, 505 U.S. at 176).

An example of an alternative that crosses the line into compulsion is the "take title" provision of the Low-Level Radioactive Waste Policy, which gave states the choice of either regulating radioactive waste according to federal standards, or taking possession of that waste. *New York*, 505 U.S. at 174-77. The Supreme Court determined this provision violates the Tenth Amendment because, "[e]ither way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). "A choice between two unconstitutionally coercive regulatory techniques is no

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

choice at all." *Id.*

In the storm water context, a Phase I MS4 permit did not violate the Tenth Amendment even though it required the cities to implement storm water management programs regulating new development, construction sites, sanitary sewers, landfills, hazardous waste treatment facilities, and industrial facilities. *City of Abilene*, 325 F.3d at 660, 662. The court reasoned that the cities had a constitutional alternative to implementing this federal program: accept a permit with effluent limitations instead of storm water management requirements. *Id.* at 662. Likewise, the Ninth Circuit Court of Appeals held that the storm water management requirements in EPA's Phase II MS4 permit rule did not run afoul of the Tenth Amendment because cities had the option to enroll in a Phase I MS4 permit instead, and that permit had already been found constitutional in *City of Abilene. Envtl. Defense Ctr.*, 344 F.3d at 848.

Unlike the MS4 permit requirements challenged in *City of Abilene* and *Environmental Defense Center*, the Permit violates the Tenth Amendment because the City and other copermittees have no choice but to implement a federal regulatory program.[11] The Regional Board has taken the management permit and effluent permit alternatives discussed in *City of Abilene* and made them both compulsory in the Permit. The Permit requires the City to implement the storm water management programs such as the Water Quality Improvement Plans in Provision II.B and the Jurisdictional Runoff Management Programs in Provision II.D, *and* to comply with the de facto effluent limitations in Provision II.A. There is no choice here.

The City respectfully requests that the State Board remand the Permit back to the Regional Board with direction to restore the compliance linkage between the Water Quality Improvement Plans in Provision II.B and the receiving water limitations in Provision II.A. This linkage would cure the legal issues addressed here by giving the City and other copermittees a chance to comply with the Permit and providing a constitutional choice instead of compelling

[11] The Regional Board has found that each and every requirement in the Permit is federally mandated under the Clean Water Act. Permit at F-29 to F-30. The City disagrees with this finding, but notes that the Regional Board cannot have it both ways. If the Permit includes only federal requirements, then the Tenth Amendment must be respected. If the Permit includes state law requirements above and beyond what is required under the Clean Water Act, then those requirements are unfunded state mandates.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

both implementation of federal storm water management programs and compliance with effluent limitations.

CONCLUSION

For the reasons expressed in the Petition, and this Memorandum of Points and Authorities the City's Petition should be granted.

Dated: June 7, 2013

BEST BEST & KRIEGER LLP

By: _____

Attorneys for Defendant

LAW OFFICES OF
BEST BEST & KRIEGER LLP
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101