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April 3, 2009

**By Email ([MRP2waterboards.ca.gov](mailto:MRP2waterboards.ca.gov)) and Regular Mail**

Mr. Bruce Wolfe  
Executive Officer  
California Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA. 94162

Re: Legal Comments of City of San Jose on Revised Tentative Order dated  
February 11, 2009 Concerning Municipal Regional Stormwater NPDES  
Permit

Dear Mr. Wolfe:

These legal comments are submitted on behalf of the City of San José and the Redevelopment Agency of the City of San José on the Revised Tentative Order dated February 1, 2009, for NPDES Permit No. CAS612008. As you know, the City of San José is one of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP" or "Program") co-permittees that would be covered by the Municipal Regional Permit ("MRP"), and is the largest city among the SCVURPP co-permittees. These legal comments supplement the technical comments on the Revised Tentative Order which are being submitted under separate cover by the City's Environmental Services Department on behalf of the numerous City departments and agencies that would be affected by adoption of the Revised Tentative Order.

In addition to this brief summary of San José's specific legal comments, we support and incorporate by reference herein the legal comments submitted by Robert Falk of Morrison & Foerster for SCVURPPP, and our prior legal comments dated February 29, 2008, which were submitted on a prior draft of the Revised Tentative Order dated December 14, 2007.

San José has several legal objections to the revised Tentative Order that are common to most of the provisions identified in our technical comments. These legal objections and the most significant provisions affected by the objections are addressed below as "General Legal Comments." In addition, we have additional legal objections which affect a fewer number of the provisions; and these are identified below as "Specific Legal Comments."

### **General Legal Comments**

#### ***There is Insufficient Evidence in the Record Demonstrating That the Provisions Are Practicable or Necessary to Protect Water Quality.***

We do not believe that the record demonstrates that many of the provisions identified in the City's technical comments meet either the "nexus" requirement that is required under the Porter-Cologne Act (Cal. Water Code §§13241 and 13263) or the maximum extent practicable ("MEP") standard, which is the applicable statutory standard governing the substance of permits regulating municipal stormwater discharges under the Clean Water Act ("CWA"). Many of the provisions referenced in the City's technical comments are deficient under these standards. Of special concern are provisions that are costly or will increase workload or with no demonstrable water quality benefit, such as Provisions C.4.b.ii.1.g, C.6.e.ii.(4)(d); C.13.a, C.14, C.15.b.i & ii.

#### ***The Provisions Impermissibly Specify The Manner of Performance.***

Porter-Cologne specifically prohibits the Board from specifying the "design, location, type of construction, or particular manner in which compliance may be had . . ." Cal. Water Code §13360. Most of the provisions in the Revised Tentative Order violate this prohibition by prescribing, sometimes in minute detail, how the City should conduct municipal operations or operate local programs. The overly prescriptive nature of the provisions related to exempted and conditionally exempted discharges [Prov. C.15] and provisions which do not sufficiently allow for Adaptive Management [Table 8.1, Provisions C.11.e & f, C.12. b & e, C.13] or preclude use of Alternative Compliance [Provision C.3.e.i]

#### ***The Provisions Constitute an Unfunded Mandate.***

The legal basis for the City's unfunded mandate objection, including an analysis of why many of the provisions included in the City's technical comments go beyond the requirements of the federal CWA, is set forth in Mr. Falk's comment letter.

***The Regional Board Has Failed to Sufficiently Consider the Economic Impacts of the Provisions.***

For the provisions in the Revised Tentative Order that go beyond requirements of the federal CWA, the Board is required to conduct an analysis of economic impacts and burdens pursuant to sections 13241 and 13263 of the Porter-Cologne Act. See *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4<sup>th</sup> 613 (2005). Although the TO Fact sheet purports to contain an economic analysis, the studies cited did not address the requirements of this TO and there is no analysis of the extent to which the programs included in those studies are comparable to the requirements in this TO. As indicated in more detail in the City's technical comments, specific provisions that are of particular economic concern to San José include: [Provisions C.3.b.iii., C.10, C.11 & 12.e & f.]

***Issuance of the Tentative Order Is Subject to CEQA.***

The California Environmental Quality Act (CEQA) applies to permits issued by the Regional Board to the extent the permit contains provisions which are not required under the federal CWA. *City of Arcadia v. State Board*, 135 Cal. App. 4<sup>th</sup> 1392 (2006). As indicated above, many provisions in the Tentative Order are not required by the CWA. The need for a CEQA analysis is particularly relevant for provisions which specify the manner in which the permittees can and cannot construct public improvements and those which require the permittees to implement specific public improvement projects, even if they are only pilot projects.

**Specific Legal Comments**

**Some Provisions Exceed the Board's Statutory Authority and Impermissibly Impinge on Local Land Use Authority.**

As a state agency, the Regional Board only has the regulatory authority delegated to it by statute. The scope of this delegated authority does not include jurisdiction over local land uses decisions under state or federal law. Provision C.3 of the Revised Tentative Order contains numerous instances where the Regional Board is exceeding its statutory authority, with the following provisions being of specific concern as indicated in the City's technical comments: Provisions C.3.b.ii(1) and C.3.c.i.(4)-(6).

**Some Provisions Are Outside the Scope of the Board's Permitting Authority for the City's Storm Sewer.**

The Regional Board is also limited in this proceeding to dealing with municipal storm water discharges. There are several provisions in the Revised Tentative Order which attempt to regulate activities simply on the basis of impact on water quality, even though

there is no demonstrated connection between these activities and the permittees' storm sewer systems, including Provisions C.2.c. d & e and C.10.a.ii.2

**CONCLUSION**

We appreciate the opportunity to submit these legal comments on the February 11, 2009 Tentative Order and look forward to your thoughtful consideration of both the legal and substantive issues that San José has raised in this proceeding to date.

Very truly yours,

RICHARD DOYLE, City Attorney

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