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**STATE OF CALIFORNIA**  
**STATE WATER RESOURCES CONTROL BOARD**

In the matter of the Petition of:

THE CITIES OF ARCADIA AND  
CLAREMONT

FOR REVIEW OF ACTION BY THE  
CALIFORNIA REGIONAL WATER  
QUALITY CONTROL BOARD, LOS  
ANGELES REGION, IN ISSUING  
ORDER NO. R4-2012-0175 (NPDES NO.  
CAS 004001)

COMMENTS ON STATE WATER  
RESOURCES CONTROL BOARD DRAFT  
ORDER WQ 2015- XXXX (REVISED APRIL  
24, 2015) IN THE MATTER OF REVIEW OF  
ORDER NO. R4-2012-0175, NPDES PERMIT  
NO. CAS0004001

A-2236(i)  
A-2236(j)

[Water Code § 13320(a)]

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**I. INTRODUCTION**

Petitioners, the Cities of Arcadia and Claremont (“Cities” or “Petitioners”) submit these joint comments on State Water Resources Control Board’s (“State Board”) April 24, 2015 revisions to Draft Order WQ 2015-XXXX, In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS0004001 (“Draft Order”). The Cities petitioned the State Board (Petition Nos. A-2236(i) and (j)) for review of California Regional Water Quality Control Board, Los Angeles Region’s (“Regional Board”) Order No. R4-2012-0175 (NPDES No. CAS 004001) (“2012 Permit”).

In addition to their initial petitions and associated memorandum of points and authorities, the Cities filed responses to other petitions, responses to the State Board’s July 15, 2013 request for comments, an opposition to the Natural Resources Defense Council’s Motion to Strike portions of the Cities’ response to the State Board’s July 15, 2013 request for comments, and comments on the initial Draft Order on January 21, 2015. After releasing a revised Draft Order on April 24, 2015, the State Board provided a period of public comment on the Draft Order and limited comments to those modifications proposed in the April 24, 2015 Draft Order.

The Cities would like to express support for a BMP-based approach to Permit compliance and the modifications in the Draft Order that allow for this approach, including the deletion of language from II.B.5.a and addition of language in footnote 127. The Cities support the modifications to Section II.B.1, which confirm that the 2012 Permit’s Wastershed Management Programs (“WMP/EWMP”) do not violate the anti-backsliding provisions of the Clean Water Act or the federal regulations implementing the National Pollutant Discharge Elimination System (“NPDES”). The Cities also support the addition to Section II.B.4.b (page 40), which confirms that the Permittees’ inability to obtain funding for a project may constitute grounds for an extension of deadlines set forth in a WMP/EWMP.

The Cities believe that two revisions to the Draft Order, which were intended to provide clarification, are unnecessary and otherwise confuse the regulatory landscape established by the 2012 Permit. For these reasons, the Cities request deletion of, or in the alternative, further modifications to Sections II.B.5.c, and footnotes 133, 187, and 192.

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## II. COMMENTS

Without waiving any arguments or comments previously submitted, the Cities submit the following comments, supporting, in part, the April 24, 2015 revisions to the Draft Order, and seeking, in part, further modifications to the Draft Order.<sup>1</sup>

### A. THE CITIES SUPPORT THE 2012 PERMIT'S BMP-BASED APPROACH TO COMPLIANCE, ANTI-BACKSLIDING, AND FUNDING CONSIDERATIONS

The Cities are committed to complying with the 2012 Permit. Three revisions in the Draft Order enable the Cities to better focus their efforts and limited resources. Specifically, the BMP-based approach and WMP/EWMP compliance pathway, anti-backsliding structure, and funding considerations in the Draft Order recognize the restrictions the Cities face as they act to protect the environment and also establish a rigorous and proactive structure to ensure continued environmental protection. The Cities express their support for these revisions.

#### 1. *BMP-based Compliance is consistent with the Clean Water Act, Required by State Board Precedential Orders, and Protective of the Environment*

The addition of footnote 127 and the amendment of Part VI.E.2.e.i(4) of the 2012 Permit provide a clear statement of the manner in which the Cities “will be deemed in compliance with the receiving water limitations during the EWMP development phase[.]” (Draft Order, fn. 127.) The WMP/EWMP provisions in the 2012 Permit establish a rigorous plan for attaining water quality benefits consistent with the goals of the Clean Water Act and the State Board’s precedential orders. (Gov. Code, § 11425.60; State Board Order WQ 2001-15; State Board Order WR 96-1, footnote 11 [“the [State Board] designates all decisions or orders adopted by the [State Board] at a public meeting to be precedent decisions”].)

The Clean Water Act does not require strict compliance with water quality standards. Instead, it requires municipal separate storm sewer dischargers (“MS4”) “to reduce the discharge of pollutants to the maximum extent practicable.” (33 U.S.C. § 1342, subd. (p)(3)(b)(iii);

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<sup>1</sup> The Cities are additionally informed that the Cities of Duarte and Huntington Park, and Cities of Agoura Hills et al have submitted comments on the revised Draft Order. The Cities of Arcadia and Claremont fully support those comments.

1 *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 [“Congress chose not to  
2 include a [strict compliance] provision for municipal storm-sewer discharges.”].) Consistent  
3 with *Defenders of Wildlife v. Browner*, the State Board has determined that water quality  
4 standards in municipal storm water permits are to be obtained using an iterative approach:

5 which focuses on timely improvements of BMPs . . . . ***We will***  
6 ***generally not require “strict compliance” with Water Quality***  
7 ***Standards through numeric effluent limits and we will continue***  
8 ***to follow an iterative approach, which seeks compliance over***  
9 ***time.*** The iterative approach is protective of water quality, but at  
the same time considers the difficulties of achieving full  
compliance through BMPs that must be enforced through large and  
medium municipal storm sewer systems.

10 (State Water Board Order No. 2001-15, pp. 7-8 [emphasis added].)

11 The inclusion of footnote 127 and the deletion of the additional control measures in  
12 Section II.B.5.a provide a clear pathway for the Cities to engage in the iterative process, and in  
13 so doing, to fulfill the requirements of the 2012 Permit. In addition, in light of the potential for  
14 confusion created by the addition of the non-storm water discharge language (Section II.B.5.c  
15 and footnotes 133 and 187 discussed below), a strong statement of what constitutes compliance  
16 with the 2012 Permit is necessary.

17  
18 **2. *The Draft Order’s Anti-backsliding Analysis is consistent with the Clean***  
***Water Act***

19 The additional language in Section II.B.1 and footnote 64 is consistent with case law  
20 interpreting the anti-backsliding provision of the Clean Water Act. (33 U.S.C. § 1342, subd. (o);  
21 40 C.F.R. § 122.44, subd. (l)(1); *Communities for a Better Environment v. State Water*  
22 *Resources Control Board* (2005) 132 Cal.App.4th 1313, 1330-1331.) The Cities provided  
23 briefing on this issue in filings dated January 21, 2015, October 13, 2013, August 15, 2013, and  
24 December 7, 2013 and incorporate those comments by reference. The Cities support the  
25 additional language in Section II.B.1 and footnote 64 as additional confirmation that a BMP-  
26 based compliance approach is not backsliding.

1                   3.     ***Allowing deadline extensions because of funding challenges is***  
2                                     ***consistent with State and Federal law***

3             The revisions to the Draft Order allow the Cities to request an extension of time to  
4 comply with final deadlines in a WMP/EWMP for receiving water limitations not otherwise  
5 addressed in a TMDL based on inability to obtain funding for a project. (Draft Order,  
6 § II.B.5.a.) Without waiving their request for a similar provision for extending deadlines to  
7 comply with TMDL-based water quality based effluent limitations, the Cities support this  
8 revision to the Draft Order.

9             Water Code section 13241 (via Water Code section 13263) requires the State Board and  
10 the Regional Boards to consider the economic implications of the Waste Discharge  
11 Requirements they issue. While some courts have narrowed this requirement (*see City of*  
12 *Arcadia v. State Water Resources Control Bd.*, 191 Cal.App.4th 156 (2010)), failing to allow a  
13 city to make changes to its WMP or EWMP based on the availability of funding would outright  
14 ignore this obligation. Moreover, apart from the State and Regional Boards’ obligations under  
15 Water Code sections 13263 and 13241, neither agency has the authority to impose unreasonable  
16 or unattainable requirements on the cities. (*California Assn. of Sanitation Agencies v. State*  
17 *Water Resources Control Board*, 208 Cal.App.4th 1438 (2012) [“where the regional board has  
18 evidence that a designated use does not exist and likely cannot be feasibly attained, it is  
19 unreasonable to require a discharger to incur control costs to protect that use”].)

20             State law places limitations on how and when a city can impose fees and taxes or issue  
21 bonds to provide funding for the infrastructure necessary to implement stormwater control  
22 projects. (*See Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th  
23 1351.) Articles XIII A, XIII C, and XIII D of the California Constitution severely limit the  
24 Cities’ power to impose fees. In most cases, fees could only be imposed by some form of  
25 special tax or property related fee that would require approval by either a 2/3 vote of the  
26 electorate subject to the tax; or a majority vote of the property owners subject to the property  
27 related fee.

28             Where the State Board or the Regional Board receives evidence that a city cannot

1 implement a particular aspect of its WMP or EWMP because of a lack of funding or some other  
2 legal impediment, the Board cannot refuse to extend the deadline. Imposing impossible or  
3 infeasible requirements is an abuse of discretion and contrary to law. (*California Association of*  
4 *Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438;  
5 *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996); *Atl. States Legal Found., Inc. v.*  
6 *Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1994).)

7 **B. THE CITIES SEEK FURTHER MODIFICATION TO THE DRAFT ORDER TO REMOVE**  
8 **THE “CLARIFICATION” ON NON-STORMWATER DISCHARGES AND ALLOW FOR**  
9 **FUNDING-BASED EXTENSIONS IN ALL INSTANCES**

10 Two revisions in the Draft Order are unnecessary and otherwise confuse the regulatory  
11 landscape established by the 2012 Permit. Specifically, the addition of Section II.B.5.c, when  
12 read in light of footnotes 133 and 187 create uncertainty regarding the significance of the Cities’  
13 participation in and compliance with the WMP/EWMP provisions. Similarly, the addition of  
14 footnote 192 confuses the regulatory environment by concluding that the Clean Water Act  
15 preempts state law that requires consideration of cost and feasibility on the grounds that such  
16 considerations stand as an obstacle to accomplishing the purpose and objective of the Clean  
17 Water Act. The Cities request deletion of these provisions, or, in the alternative, further  
18 modifications.

19 **1. Remove the “Clarification” on Non-Stormwater Discharges**

20 The revisions to the Draft Order add Section II.B.5.c (Draft Order page 52) and footnotes  
21 133 and 187. The Cities are concerned that, when read together, Section II.B.5.c, footnotes 133  
22 and 187 and the non-storm water discharge prohibition in the 2012 Permit could be construed to  
23 mean that any discharge from the MS4 during dry weather is a violation of the 2012 Permit  
24 and/or Clean Water Act until proven otherwise by the Cities. Footnote 187 attempts to further  
25 clarify that the this is not the case stating “[w]e disagree that the phrasing of the non-storm water  
26 discharge prohibition in the Los Angeles MS4 Order means that any dry weather discharges  
27 from the MS4 could be construed as a violation of the Clean Water Act.” Nonetheless, this  
28 statement is qualified by reference to the list of exempt discharges into the MS4 system.

The Cities fundamentally disagree with and object to the Draft Order’s treatment of

1 “non-stormwater” discharges *from* the MS4. The Cities provided briefing on this issue in filings  
2 dated January 21, 2015, October 13, 2013, August 15, 2013, and December 7, 2013 and hereby  
3 incorporate those comments by reference.

4 The Cities believe that reasonable minds may disagree on the significance of the  
5 additional language. To avoid implications that the existence of non-storm water discharges  
6 may be deemed noncompliance with the 2012 Permit, the Cities request the deletion of Section  
7 II.B.4.c and footnote 133, and deletion of the second sentence in footnote 187. In the alternative,  
8 the Cities seek additional clarity regarding the significance of non-stormwater discharges, and  
9 without waiving any arguments or comments previously submitted, request that the following  
10 modifications be made to Section II.B.5.c of the Draft Order:

11 Draft Order, Section II.B.5.c

12 The Environmental Petitioners suggest that the Los Angeles MS4  
13 Order is unclear as to whether compliance with the WMP/EWMP  
14 may also constitute compliance with the non-storm water  
15 discharge prohibition of the Order. We disagree that the Los  
16 Angeles Ms4 Order is unclear on this issue. Implementation of  
17 control measures through the WMP/EWMP may provide a  
18 mechanism for compliance with Section III.A, which establishes  
19 the prohibition on non-storm water discharges, but such  
20 implementation does not *constitute* compliance with Section III.A.  
21 Section III.A establishes an extensive list of exceptions and  
22 conditional exemptions to the non-storm water discharge  
23 prohibition. As a result, the existence of non-storm water  
24 discharges to and from the MS4 is not deemed noncompliance  
25 with Section III.A. The several provisions stating that Permittees  
26 will be deemed in compliance with the receiving water limitations  
27 of the Los Angeles MS4 Order for implementing the WMP/EWMP  
28 specifically reference Section V.A of the Order, the receiving  
water limitations provisions, and not III.A.<sup>133</sup> Although we  
accordingly see no need to direct revisions to the Order we provide  
this clarification here to respond to the Environmental Petitioners’  
concern and address any confusion that may exist.

2. ***Remove Footnotes 110 and 192 and allow cost-based extensions in all instances***

Footnotes 110 and 192 provide that TMDL-based deadlines cannot be extended without a  
Time Schedule Order in instances where funding is unavailable. The State Board has the  
discretion to make changes in the Cities’ NPDES permit to allow for extensions, but is choosing  
not to. This is an abuse of discretion. As described above, imposing impossible or infeasible



1 requirements is an abuse of discretion and contrary to law. (*California Association of Sanitation*  
2 *Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438; *Hughey v. JMS*  
3 *Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*,  
4 12 F.3d 353, 357 (2d Cir. 1994).) Where the State Board or the Regional Board receives  
5 evidence that a city cannot implement a particular aspect of its WMP or EWMP because of a  
6 lack of funding or some other legal impediment, the Board cannot refuse to extend the deadline,  
7 regardless of whether the deadline is based on a prior adopted TMDL.

8 Moreover, footnote 192 misstates the cooperative federalist structure inherent in the  
9 Clean Water Act and should be deleted. Footnote 192 asserts that allowing deadline extensions  
10 for EPA issued TMDLs due to cost considerations would stand as an obstacle to accomplishing  
11 the full purposes and objectives of the Clean Water Act and is, for this reason, preempted by the  
12 Clean Water Act. (Draft Order, § I.E., fn. 192, citing *Silkwood v. Kerr-McGee Corp.* (1984) 464  
13 U.S. 238.) The Clean Water Act, however, establishes a cooperative federalist structure that  
14 permits consideration of costs under the Porter-Cologne Water Quality Control Act (“Porter  
15 Cologne”).

16 The Federal and State governments are subject to the basic rule that each is required to  
17 exercise its powers so as not to interfere with the free and full exercise of the powers of the  
18 other. (U.S. Const., art. VI, cl. 2; U.S. Const., 10th Amend.; *Pacific Co. v. Johnson* (1932) 285  
19 U.S. 480, 493.) Despite the basic rule of noninterference, there are a variety of arrangements by  
20 which states can voluntarily cooperate with the federal government in the exercise of their  
21 regulatory authority. (See *New York v. O’Neill* (1959) 359 U.S. 1, 6.) The Clean Water Act’s  
22 scheme of cooperative federalism is one such arrangement. (*Aminoil U.S.A., Inc. v. Cal. State*  
23 *Water Resources Control Board* (9th Cir. 1982) 674 F.2d 1227, 1228 (superseded by statute on  
24 other grounds as noted in *Beeman v. Olson* (9th Cir. 1987) 828 F.2d 620, 621.) Under  
25 cooperative federalism, Congress gives states the “choice of regulating [an] activity according to  
26 federal standards or having state law pre-empted by federal regulation.” (*New York, supra*, 505  
27 U.S. at p. 167; see also *Hodel, supra*, 456 U.S. at pp. 287-289.) Cooperative federalism thus,  
28 “allows the States, within limits established by the federal minimum standards, to enact and

1 administer their own regulatory programs, structured to meet their own particular needs.”  
2 (*Virginia v. Browner* (4th Cir. 1996) 80 F.3d 869, 882-883.) As long as a state law is consistent  
3 with a federal law that has a cooperative federalism scheme, the state law is not preempted.

4 Cost considerations cannot relax permit conditions to a point where they are *less*  
5 stringent than the Clean Water Act; however, consideration of costs when imposing permit  
6 conditions that *meet* or *exceed* federal standards is entirely consistent with the Clean Water Act’s  
7 purposes and objectives. (See, e.g., 33 U.S.C. § 1311, subd. (m) [allowing a permit issued under  
8 Clean Water Act section 402 to modify certain effluent limitations in a permit where the cost of  
9 meeting requirements exceeds the benefits to be obtained by an unreasonable amount]; see also  
10 *Entergy Corp. v. Riverkeeper, Inc.* (2009) 556 U.S. 208, 222 [the Clean Water Act’s silence  
11 regarding factors to consider when implementing the Act “is meant to convey nothing more than  
12 a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to  
13 what degree.”]; *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613,  
14 627 [prohibiting consideration of “economic factors to justify imposing pollutant restrictions that  
15 are *less stringent* than the applicable federal standards require.” (Emphasis in original).) In  
16 certain circumstances, the Act expressly permits cost consideration in furtherance of its purposes  
17 and objectives. (See e.g., 33 U.S.C. § 1311.) The Clean Water Act does not expressly prohibit  
18 consideration of cost when establishing monitoring and reporting requirements; it is merely  
19 silent on the role cost should play. (See *Entergy Corp., supra*, 566 U.S. at p. 222.) Such silence  
20 cannot be interpreted as prohibiting cost considerations. (*Ibid.*) Porter-Cologne’s requirement to  
21 consider costs when imposing certain permit conditions is entirely consistent with federal law’s  
22 silence on the issue, as long as cost considerations (or any factors, for that matter) are not used to  
23 justify imposition of conditions less stringent than federal law. (*City of Burbank, supra*, 35  
24 Cal.4th at p. 618.)

25 Because cost considerations do not directly contradict the Clean Water Act, do not  
26 contradict the Clean Water Act’s purposes or objectives, and are consistent with the Act’s  
27 silence on the issue, the Cities request deletion of footnote 192 from the revised Draft Order.  
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**C. THE CITIES FUNDAMENTALLY DISAGREE WITH THE STATE BOARD'S ANALYSIS  
IN FOOTNOTE 51**

Footnote 51 of the Draft Order claims that the Receiving Waters Limitations requirements in the Draft Order and the 2012 Permit are required by Federal law, and that as a result, the State and Regional Boards have no obligation to comply with State law limitations on waste discharge requirements. The Cities fundamentally disagree with this analysis and object to its inclusion in the Draft Order. The Cities provided briefing on this issue in filings dated January 21, 2015, October 13, 2013, August 15, 2013, and December 7, 2013 and hereby incorporate those comments by reference. Footnote 51 should be removed from the Draft Order.

**III. CONCLUSION**

The Cities respectfully request that the State Board modify both the Draft Order and the 2012 Permit as requested herein.

Dated: June 2, 2015

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