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

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June 2, 2015

VIA ELECTRONIC MAIL TO:
COMMENTLETTERS@WATERBOARDS.CA.GOV

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
24th Floor
Sacramento, CA 95814

Re: *Comments to A-2236(a)-(kk)*

Dear Ms. Townsend:

This will provide the joint comments of 20 municipal petitioners (collectively, "Cities" or "Municipal Petitioners")[1] on the State Water Resources Control Board's ("State Board") April 24, 2015 Draft Order ("Draft Order") addressing the 37 petitions challenging the Los Angeles MS4 Permit (Order No. R4-2012-0175, NPDES Permit No. CAS004001) ("MS4 Permit").

[1] The Municipal Petitioners joining this letter and their respective petition numbers are: City of Agoura Hills (A-2236(w)); City of Artesia (A2236(e); City of Beverly Hills (A2236(g)); City of Commerce (A2236(aa); City of Covina (A2236(s)); City of Culver City (A2236(hh)); City of Downey (A-2236(dd)); City of Hidden Hills (A-2236(h)); City of Inglewood (A-2236(ee)); City of La Mirada (A-2236A(q)); City of Manhattan Beach (A-2236(r)); City of Monrovia (A-2236(v)); City of Norwalk (A-2236(d)); City of Rancho Palos Verdes (A-2236(b)); City of Redondo Beach (A-2236(jj)); City of San Marino (A-2236(a)); City of South El Monte (A-2236(c)); City of Torrance (A-2236(f)); City of Vernon (A-2236(t); and City of Westlake Village (A-2236(p)).

The Cities request that the State Board make certain modifications to the changes redlined in the Draft Order, as detailed below, before adopting a Final Order.

The State Board has requested that comments be confined to new additions or deletions as indicated in the Draft Order, and the Cities accordingly have limited their comments to the new portions of the Draft Order. But, as previously stated in their January 21, 2015 joint comment letter to the State Board, the Cities reserve and reassert each and every argument made in their initial petitions (with supporting memorandum) and all other arguments and comments submitted by the Cities as part of the administrative record in this matter.

I. THE STATE BOARD SHOULD MODIFY NEW TEXT IN TWO FOOTNOTES DISCUSSING WHY THE MS4 PERMIT DOES NOT VIOLATE THE ANTI-BACKSLIDING PROHIBITION

The State Board added new language and a new footnote (text at pp. 20-21 and new footnote 64) explaining why the Environmental Petitioners are incorrect in asserting that the MS4 Permit violates the federal Clean Water Act's limitation against backsliding (or the anti-backsliding provision). (Clean Water Act Section 402(o); 40 C.F.R. §122.44(*l*)(1)).

We support the State Board's additional new language and suggest that footnote 64 separately cite the First District Court of Appeal's decision in ***Communities for a Better Environment v. State Water Resources Control Board***, 132 Cal. App. 4th 1313 (2005), *rev. den'd* (2005). This case is an important decision in the area of interpreting the anti-backsliding provision and merits separate citation in new footnote 64. It provides further support for the general proposition that the 2001 and 2012 MS4 Permits are not easily

comparable. Accordingly, the decision provides additional express authority that the 2012 MS4 Permit does not violate the anti-backsliding prohibition.

Thus, we suggest that footnote 64 (*Draft Order, p. 21*) be revised to read as follows (new language in redlined format):

> [64] Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, US EPA stated: "The Commentator implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . In this case, the two provisions are not comparable. EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra* fn. 17). See *Communities for a Better Environment v. State Water Resources Control Bd.* 132 Cal. App. 4th 1313 (2005), *rev. den'd* (discussing the anti-backsliding prohibition in context of industrial discharge permit).
>
> The Cities also suggest additional language be added to footnote 70 (*Draft Order, p. 22*), which contains new language added by the State Board. The additional language is contained in redlined format below:

[70] As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012 (See fn. 20~~19~~). We acknowledge that the letter states at page 3 that a provision in the Prince George's County, Maryland, Phase I MS4 draft permit constituted backsliding. The letter refers in passing to 40 C.F.R. section 122.44(*l*)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4 (See fn. 19). The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES ~~P~~ppermits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be ~~to be~~ determinative on the issue. We further note that the NPDES Permit Writers' Manual is a guidance document and USEPA expressly qualified its applicability by stating: "Recommendations in this guidance are not binding; the permitting authority may consider other approaches consistent with the CWA and EPA regulations." (NPDES Permit Writers' Manual, cover page).

II. THE STATE BOARD SHOULD REVISE THE NEW LANGUAGE WITH RESPECT TO WATERSHED MANAGEMENT PLANS AND EWMPS

A. *The Additional Language Added to Part VI.C.8.a (new subpart iv.) Should Be Deleted (Draft Order, pp. 42-44)*

The State Board suggests adding to Part VI.C.8.a. ("adaptive management process") a new subpart iv. as initially explained in new text at page 42 and as explicitly stated at pages 43-44 of the Draft Order. The Cities have a concern that the new requirement added in Part VI.C.8.a.iv.(4) may not lead to any useable data for either the Permittees or the Los Angeles Water Board overseeing the implementation of a Watershed Management Plan or an EWMP.

The new language that the State Board proposed to Part VI.C.8.a is as follows:

> "iv. (4) Comparison of the effectiveness of the control measures to the results projected by the RAA;"

The Cities are concerned that this new requirement, to be conducted every two years from the date of program approval (in the case of a number of Watershed Management Plans, likely to occur for the first interval in June 2017), may not yield statistically valid trends. If the frequency of wet weather events in Southern California remains as sparse as such events currently occur, then the likelihood of obtaining a statistically significant trend over two years may be very low. Attachment A to the MS4 Permit defines the term "wet season" to be based on a calendar period of October 1st-April 15th. If a Watershed Management Plan is approved in June 2015, then by the first two-year reporting requirement for that Plan *(i.e.*, June 2017) there will have

been just two "wet seasons" to measure. Attachment E to the MS4 Permit requires monitoring of at least three "wet weather events" during a particular wet season. (*MS4 Permit, Attachment E, page E-15, §C.1.b.iii*). This would equal six events over two wet seasons, and may not yield a sufficient sample size to produce a valid statistical result.

The Cities believe that the Los Angeles Water Board's Monitoring and Reporting Program (Attachment E to the MS4 Permit) contains enough data and reporting requirements to allow the Los Angeles Water Board and the public to gauge the permittees' progress toward achieving receiving water limitations. The new proposed addition of Part VI.C.8.a.iv.(4) is not likely to yield statistically significant additional data, and therefore should be deleted.

B. The Language in New Footnote 127 Highlights a Key Incentive in the LA Permit Which Should Be Maintained (Draft Order p. 49)

In new footnote 127 the State Board notes that Permittees have a major incentive to develop an EWMP (or even a Watershed Management Plan), to wit, the "deemed in compliance" with receiving water limitations during the EWMP development phase.[2] The Cities concur, and urge the State Board to continue the "deemed in compliance" standard during the development of a WMP or EWMP for this MS4 Permit.

C. The Modified Language in Part VI.E.2.e.i. Is Appropriate (Draft Order p. 50)

The State Board revised draft language related to EWMP implementation and the "deemed in compliance" provision of Part VI.E.2.3.i.

[2] MS4 Permit, Part VI.E.2.d.i.(4)(d), p. 144 (applying compliance criteria to both Watershed Management Plans and EWMPs).

as stated at the bottom of page 50 and the top of page 51 of the Draft Order. The Cities urge that the deletion/strikeout contained in the Draft Order be upheld in the Final Order.

D. The New Text and Accompanying Footnote 133 regarding "Non-Storm Water Discharge Prohibition" is Unnecessary (Draft Order p. 52)

The State Board states that the MS4 Permit's existing language is clear with respect to the effective prohibition of non-stormwater discharges. It specifically cites provisions in Part III.A of the MS4 Permit, which requires that permittees "effectively prohibit" stormwater discharges. The Clean Water Act limits non-stormwater discharges into the storm sewers (33 U.S.C. Sec. 1342(p)(3)(B)). EPA has further provided express regulations that discuss the "effectively prohibit" requirement in 40 C.F.R. Sec. 122.26(d)(2)(iv)(B)(1)-(7) (requirements for management plan to include implementation of ordinances or other orders to prevent "illicit discharges" to the MS4).

The Cities disagree that any clarification (as requested by the Environmental Petitioners) is necessary given the existing language in the Permit and EPA regulations on the meaning of the term "effectively prohibit."

IV. THE STATE BOARD'S ANALYSIS OF TMDL REQUIREMENTS AND THE TRANSLATION OF THOSE REQUIREMENTS INTO WATER-QUALITY BASED EFFLUENT LIMITATIONS IS STILL INADEQUATE (*DRAFT ORDER PP. 62- 64)*

In new language added to the discussion of the appropriateness of TMDL Requirements (*Draft Order beginning at p.59)*, the State Board added language concerning EPA guidance regarding the use of numeric pollutant

loads in TMDLs and the "translation" "where feasible" of such limitations into "effective, measurable WQBELS. . ." (*Draft Order, pp. 62-63).* The State Board also added new language in footnote 167 to state that it was "not independently reviewing the calculations and analysis underlying the specific numeric limitations arrived at by the Los Angeles Water Board. . ." (*Draft Order, p. 64, n. 167*).

The State Board has admittedly failed to evaluate the actual numeric calculations employed by the Los Angeles Water Board and implicitly failed to evaluate whether it was "feasible" to impose such numeric limits. In so doing, the State Board has effectively rejected (without any analysis) the Cities' petitions raising the impropriety of strict numeric limits in the MS4 Permit. The State Board's new language also effectively renders nugatory the qualifying language contained in the EPA 2014 Guidance found at: http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf. The EPA Guidance memorandum from 2014 specifically qualifies the imposition of numeric limits in stormwater permits to situations "where feasible." (EPA 2014 Memorandum at p.4). The State Board's failure to analyze the numeric limits imposed by the Los Angeles Water Board means that no one, other than the initial permit drafter, will ever review the critical determination—whether such numeric limits are in fact "feasible."[3]

As previously stated in their comment letter of January 19, 2015, the Cities expressly request that the State Board determine whether substantial

[3] Although EPA in its 2014 memorandum does not expressly define "feasible", that term must be construed in light of the formal EPA regulation governing municipal stormwater permits, requiring implementation of controls on stormwater discharges to the "maximum extent practicable." That standard (discussed *infra* in Part VI) clearly includes cost considerations.

evidence supports the Los Angeles Water Board's position: "that the water-quality based effluent limits were in fact feasible."[4] The Cities reiterate that even under the newly finalized language cited by the State Board in the Draft Order, particularly at pp. 62-63, numeric limits may be imposed only "where feasible." The State Board has not undertaken any such feasibility analysis, and its Draft Order is legally defective in this regard. *See* ***In re: Stinnes-Western Chem. Corp.*** State Board WQ Order No. 86-16 at pp. 11-12 (1986) (State Board reviews Regional Board determination for "substantial evidence" to support findings).

Finally, the newly added language in footnote 167 ignores any consideration of whether the TMDLs were in fact properly stated as "Total Maximum *Daily* Loads." The Clean Water Act clearly requires that the limits be stated in *daily*, not seasonal terms. ***Friends of the Earth v. EPA***, 446 F.3d 140, 144-145 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1121 (2007) (analyzing EPA-issued TMDL for both point sources and non-point sources such as stormwater).

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[4] This request is not unique to this group of municipal petitioners. Numerous other municipal petitioners made a similar observation in their comments of January 2015. See *The Cities of Pico Rivera's and Pomona's Written Comments in Response to State Board Draft Order No. [11/21/14]* at pp. 6-7 (specifying certain standards that are unobtainable); *[Cities of Arcadia, Claremont & Covina] Comments on State Water Resources Control Board Draft Order WQ 2015-XXXX in the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS 0004001* at p. 11 (noting that compliance with certain Receiving Water Limits is "not feasible at this time."); *Comments to A2236(a)-(kk) & the City of Signal Hill's Petition for Review* at p. 6 (same); *Comments to A2236(as)-(kk)—Submitted on behalf of the Cities of Duarte and Huntington Park in Response to State Board Draft Order Dated 11/21/14* at p. 2 of memorandum.

Despite the clear mandate of the Clean Water Act, the Los Angeles Water Board uses TMDLs expressed as "waste load allocations" for non-point sources in terms of time periods other than daily time loads. To take but one example, the revised waste load allocation for non-point sources in the Ballona Creek watershed area for metals is expressed in terms of "kg/year." (*Los Angeles Water Board, 2013 Amendment to Basin Plan Amendment for Ballona Creek Metals TMDL, available at:* http://63.199.216.6/bpa/docs/Ballona%20Toxics/R13-010T_RB_BPA.pdf. This TMDL, and all other TMDLs which are expressed in seasonal terms other than daily terms, violate the Clean Water Act and therefore exceed the authority of the Los Angeles Water Board.

V. NEW FOOTNOTE 169 IS MISPLACED AND SHOULD BE STRICKEN (*DRAFT ORDER P. 65, N. 169*)

The Draft Order at page 65 contains a new footnote 169 which rejects an argument by some Permittee Petitioners concerning the EPA 2014 Memorandum containing guidance with respect to disaggregation of waste loads in a TMDL. The discussion in footnote 169 concedes that those Permittee Petitioners correctly quoted from the EPA 2014 Memorandum at page 8 of that document, but then leaps to a conclusion that: "In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger." (*Draft Order, p. 65, fn. 169*).

This comment in footnote 169 is not supported by the record, which demonstrates that the Los Angeles Water Board has set up wasteload allocations by watershed, and some watersheds (such as the Malibu Creek or Ballona Creek watersheds) have a very limited number of municipal or

County Flood Control District dischargers. *See* Los Angeles Water Board MS4 Order, Attachment F-Fact Sheet at pp. F-17-F-18 (determining that one system-wide permit was appropriate, but noting that some requirements could be disaggregated to watershed-based standards and that "[i]ndividually tailored permittee requirements are provided in this Order, where appropriate.").

The Cities recommend that footnote 169 be deleted in its entirety as contrary to the record.

VI. THE STATE BOARD'S FINDING THAT SECTIONS OF THE CALIFORNIA WATER CODE ARE UNCONSTITUTIONAL VIOLATIONS OF FEDERAL LAW IS INAPPROPRIATE AND LEGALLY INCORRECT *(DRAFT ORDER P. 71)*

The State Board is charged with enforcing and defending all provisions of the California Water Code. Yet, in an extraordinary new footnote 192, the State Board now states that Water Code Sections 13225 and 13267 [5] are

[5] Water Code section 13225 provides in part that a regional water board can require reports from "local agencies" if the burden, including costs of such reports, bears a "reasonable relationship" to the benefits of such reports (Water Code Sec. 13225(c)). Water Code section 13267(b) contains a similar requirement with respect to reports relating to water quality within a specific region. Section 13267 also requires that the burden (including costs) of reports required by a regional water board must bear a "reasonable relationship" to the benefits sought to be obtained through such reports. Although not specifically referenced by the State Board, Water Code section 13165 contains similar language requiring that a report on "technical factors involved in water quality control" also bear a "reasonable relationship to the

unconstitutional. The Supremacy Clause of the U.S. Constitution requires that federal law prevail over any contrary state law, and thus, a determination that state law is pre-empted is effectively a conclusion that such a law is unconstitutional. *See* N. Dupont, "Federal Pre-Emption of State and Local Environmental Laws", Ch. 7 in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (J. May, ed. 2011). It is inappropriate for the State Board to state that provisions of the California Water Code are unconstitutional. Yet, this is effectively what it is now stating in new footnote 192.

A. The Claim that Water Code Sections Stand as an "Obstacle" to the Federal Clean Water Act is Legally Unsupportable

The assertion in footnote 192 that Water Code sections 13225 and 13267 are pre-empted by the federal Clean Water Act is legally incorrect. The argument is made that: "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" then the state law is pre-empted. This form of pre-emption, sometimes known as "obstacle" pre-emption is the weakest form of pre-emption, since it is not based upon the express words of a federal statute, but rather, judicial

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need for the reports and the benefits to be obtained therefrom." The Cities note that they, and other Petitioner Permittees, cited two other provisions of the Water Code, Sections 13263 and 13241, which require consideration of economic factors. For example, Water Code Section 13263 requires a Regional Water Board to consider a variety of factors, including those set forth in Section 13241, which in turn sets forth a list of factors, including "economic considerations" for a Regional Water Board to evaluate in setting water quality standards. New footnote 192 does not discuss these other provisions of the Water Code, so we presume that there is no intent to suggest that these other provisions are similarly "pre-empted" by the Clean Water Act.

inference of what constitutes the "full purposes and objectives of Congress." *See* ***Wyeth v. Levine***, 555 U.S. 555, 583, 594-602 (2009) (Thomas, J., concurring in result) (reviewing Court's "inherently flawed" pre-emption based upon vague "purposes and objectives" of Congress).

Moreover, in this case, the implicit argument in footnote 192 is that the cited Water Code provisions "stand as an obstacle" to implementation of the Clean Water Act because they require the Regional Board to consider costs. But, the State Board's review of a much earlier version of the MS4 Permit makes it clear that federal law applicable to such permits allows room for consideration of costs. As the State Board has previously stated: "[T]he maximum extent practicable standard should be applied in a site-specific, flexible manner, *taking into account cost considerations as well as water quality effects*." (quoting the preamble to the Phase II storm water regulations (64 Fed. Reg. 68722, 68732 (Dec. 8, 1999)). *State Board, Order WQ 2000-11* at p. 19 (emphasis added).[6]

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[6] EPA in 40 C.F.R. Section 122.26(d) sets forth in two parts the "application requirements for large and medium municipal separate storm sewer discharges." In subpart 122.26(d)(1), it sets out the requirements of Part 1 of a permit application, including in subpart 122.26(d)(1)(vi) that a municipality should describe: "financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs." 40 C.F.R. Section 122.26(d)(1)(vi). EPA thus implicitly concedes that costs and a public entity's financial resources are relevant to permits issued for large MS4 systems.

Thus, there is no valid legal support for the notion that the Clean Water Act *prohibits* any consideration of a municipality's financial resources. Indeed, the State Board has stated the exact contrary conclusion based upon EPA rulemaking dating from 1999. There can be no valid claim that Water Code sections 13225 and 13267 "stand as an obstacle" to federal law.

B. The Legal Citations in Footnote 192 Do Not Support a Conclusion that the Water Code Sections are Pre-empted.

Footnote 192 quotes expressly from a trial court decision, but any trial court decision is *not* binding precedent in California.[7] Trial court decisions

[7] Although it is not "new" language in the current Draft Order, the citation in footnote 191 to various federal Clean Water Act provisions (and related regulations) related to monitoring does not provide any supportable legal basis for the pre-emption argument raised now in footnote 192. Footnote 191 cites to two provisions of the Clean Water Act, Sections 1318 and 1342(a)(2). Section 1318 contains an express provision allowing for state law monitoring requirements to govern "point sources." Section 1318(c) allows for the application of state law for "inspection, monitoring, and access [rights]" if the EPA Administrator finds that such state law provisions are "applicable at least [to] the same extent as those required by this Section. . ." Section 1342(a)(2) is a general provision that allows EPA to issue NPDES discharge permits and allows the Administrator to prescribe conditions including those related to data and information collection "as he deems appropriate." Even assuming *arguendo* that section 1342(a)(2) constitutes a *different* federal requirement than that in section 1318, the conditions to be imposed under section 1342(a)(2) are those deemed "appropriate" by the Administrator (or a state delegated authority to issue permits). EPA's use of the term "appropriate" gives regulators (including the Regional Board) sufficient basis

are simply not authority binding on other trial courts or a Court of Appeal. *See* ***Santa Ana Hosp. Medical Center v. Belshe***, 56 Cal. App. 4th 819, 831 (4th Dist. 1997) ("a written trial court ruling has no precedential value."). Yet, footnote 192 cites only a trial court decision as authority for its pre-emption position.

The only other authority cited in footnote 192 is the trial court's internal citation to a federal Supreme Court case, ***Silkwood v. Kerr-McGee Corp.,*** 464 U.S. 238 (1984). But, that Supreme Court case cannot support anything close to the proposition it was cited for, i.e., that the federal Clean Water Act pre-empts certain provisions of the California Water Code.

In ***Silkwood***, the U.S. Supreme Court held that the Atomic Energy Act did *not* pre-empt Oklahoma common law tort provisions awarding punitive damages against a nuclear facility operator who allowed amounts of plutonium to leave the facility and end up in Ms. Silkwood's apartment, causing her death. The facility operator, defendant Kerr-McGee, argued that the punitive damages award was pre-empted either because the federal government intended to regulate the entire "field" of nuclear energy through the Atomic Energy Act or because the goals of that act—the promotion of safe nuclear energy—would conflict with the Oklahoma punitive damages law. The Supreme Court rejected both arguments. 464 U.S. at 248-257.

The Supreme Court reached a similar conclusion with respect to whether the Clean Water Act preempted the application of state tort law remedies to the largest point source release in the history of the western

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to consider costs as part of determining what is appropriate in an NPDES permit.

United States, the *Exxon-Valdez* oil tanker discharge. In ***Exxon Shipping Co. v. Baker,*** 554 U.S. 471 (2008), the Court held that the Clean Water Act did *not* pre-empt the imposition of common law punitive damages in that case. In so doing, the Court stated: "[W]e see no clear indication of congressional intent [in the Clean Water Act] to occupy the entire field of pollution liabilities [citation omitted]; nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme. . ." 554 U.S. at 489.

In other parts of the Clean Water Act, both the U.S. Supreme Court and the California Supreme Court have recently held that EPA is free to evaluate costs versus benefits considerations in regulating effluent from cooling towers under the Clean Water Act. *See* ***Entergy Corp. v. Riverkeeper, Inc.***, 556 U.S. 208 (2009) (EPA's consideration of cost versus benefit in imposing regulation in Phase II rules for cooling water intake structures was permissible under the Clean Water Act section requiring consideration of "best technology available for minimizing adverse environmental impact"); ***Voice of the Wetlands v. State Water Resources Control Bd.***, 52 Cal. 4th 499, 535-538 (2011) (affirming Regional Board's discretion to consider costs for power plant cooling towers based upon Supreme Court's 2009 construction of Clean Water Act).[8]

[8] The Clean Water Act provisions for regulating cooling towers are different than the Act's sections dealing with permits for municipal stormwater discharge. With respect to municipal stormwater permits, EPA (or a delegated state agency) is required to issue permits to reduce discharges to the "maximum extent practicable." 33 U.S.C. §1342(p)(3)(B)(iii). As the State Board has previously concluded, that standard clearly allows for consideration of costs in evaluating an NPDES permit.

Finally, the consideration of the large magnitude of costs in this MS4 Permit is directly supported by specific portions of the administrative record. At the December 16, 2014 workshop consultant John L. Hunter (part of a panel presentation on behalf of most of the Cities) answered a question from Board Member Moore concerning potential costs for Watershed Management Plans by indicating that such costs could be in the hundreds of millions of dollars. In the same panel, City of Monrovia Mayor Mary Ann Lutz presented information from the U.S. Conference of Mayors concerning the impacts of increased stormwater costs upon cities, particularly cities which are located in economically disadvantaged areas. Petitioners note (by way of example) that the Los Angeles River Upper Reach 2 (LAR UR2) watershed includes the cities of Bell, Bell Gardens, Commerce, Cudahy, Huntington Park, Maywood, Vernon, and the Los Angeles County Flood Control District. Most of the cities in this watershed qualify as economically disadvantaged communities. *Cal EPA*, "Designation of Disadvantaged Communities Pursuant to Senate Bill 535 (De Leon)" (Oct. 2014) (discussing criteria for establishing disadvantaged communities for purposes of specific legislation).

The Cities submit that footnote 192 is inappropriate and not supported by any appropriate legal authority. It should be stricken in its entirety.

VI. THE REVISED LANGUAGE IN SECTION II.F CONCERNING JOINT RESPONSIBILITY SHOULD BE CLARIFIED (*DRAFT ORDER, PP. 72-76)*

The Cities previously urged the State Board to modify language relating to "joint and several liability" and instead utilize the "joint responsibility" language as suggested by the Los Angeles Water Board. In the Draft Order the State Board has effectively adopted this prior suggestion, and the Cities support this modified language.

The Cities request, however, that the State Board issue a clarification of the "joint responsibility" discussion contained at pages 72-76 of the Draft Order. Specifically, the Cities request that the State Board modify footnote 196 at p. 72 of the Draft Order as follows[9]:

> [196] "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II, K.1, p. 23 (defining 'joint responsibility.') The term "joint responsibility", however, should not be construed to impose liability upon an MS4 Permittee beyond the limits of 40 C.F.R. Section 122.26(a)(3)(vi)("Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators."). Courts have held

[9] The Cities also support the comment made by the California Stormwater Quality Association ("CASQA") as to the revised new language contained on page 76 with respect to demonstration of compliance for commingled discharges. The Cities understand that CASQA's comment on new language as to Part VI. B.2.b.iv.(3) is: "With respect to the proposed revision to 2.b.iv.(3), CASQA notes that the additional language appears to actually undermine the intent of this provision, and adds an additional burden for a permittee to demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limit. Specifically, under option 3, a permittee would now need to demonstrate that the cause of exceedance was from an alternative source *and* that the pollutant was not in the permittee's discharge. Rather than requiring a demonstration that the pollutant was not in the discharge all altogether, CASQA requests the following wording to reflect that the appropriate demonstration should be "and that the pollutant was not discharged from the Permittee's MS4 at a level that would cause or contribute to an exceedance in the receiving water."

that a party is responsible only for its own discharges or those over which it has control. ***Jones v. E.R. Snell Contractor, Inc.***, 333 F.Supp.2d 1344, 1348 (N.D. Ga. 2004) (county not responsible for alleged discharges from state-controlled highway); ***United States v. Sargent County Water Dist***., 876 F.Supp. 1081, 1088 (D.N.D. 1992).

VII. CONCLUSION

The Cities reiterate their willingness to work in a cooperative fashion with the Los Angeles Water Board, the State Board, and EPA Region 9 to achieve a common goal of clean water uncontaminated by substances that could impair reasonable beneficial uses. They recognize that one of the primary challenges in today's fiscally challenging times will be to coordinate with all federal and state agencies to find appropriate funding sources, including funding available through the State Board's administration of certain Proposition 1 monies.

We look forward to the ultimate adoption of the Draft Order (as finalized by the State Board). Once the State Board issues that decision it will effectively shift the focus from administrative petitions to the critical implementation of the MS4 Permit, as modified by the Final Order, in a fiscally responsible manner.

Very truly yours,

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Candice K. Lee

Nicholas R. Ghirelli

cc: Exhibit A--Petitioners and Their Counsel of Record [via email only]
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82001-0012\1841698v1.doc

Exhibit 1
SWRCB/OCC FILE NOS. A-2236(a) through (kk)
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MS4 Dischargers – Contact List

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c/o Steve Forster Public Works Director
13700 La Mirada Boulevard
La Mirada, CA 90638-0828
gsanui@cityoflamirada.org
sforster@cityoflamirada.org

[via email only]
City of La Puente
c/o John DiMario
Director of Development Services
15900 East Marin Street
La Puente, CA 91744-4788
jdimario@lapuente.org

[via email only]
City of La Verne
do Daniel Keesey
Director of Public Works
3660 "D" Street
La Verne, CA 91750-3599
dkeesey@ci.la-verne.ca.us

[via email only]
City of Lakewood
c/o Konya Vivanti
P.O. Box 158
Lakewood, CA 90714-0158
kvivanti@lakewoodcity.org

[via U.S. Mail only]
City of Lawndale
c/o Marlene Miyoshi
Senior Administrative Analyst
14717 Burin Avenue Lawndale, CA 90260

[via email only]
City of Lomita
c/o Tom A. Odom, City Administrator
P.O. Box 339
Lomita, CA 90717-0098
d.tomita@lomitacity.com

[via U.S. Mail only]
City of Los Angeles
c/o Shahram Kharanghani Program Manager
1149 S. Broadway, 10th Floor
Los Angeles, CA 90015

[via U.S. Mail only]
City of Lynwood
c/o Josef Kekula
11330 Bullis Road
Lynwood, CA 90262-3693

[via email only]
City of Malibu
c/o Jennifer Brown
Environmental Program Analyst
23825 Stuart Ranch Road
Malibu, CA 90265-4861
jbrown@malibucity.org

[via U.S. Mail only]
City of Manhattan Beach
c/o Brian Wright, Water Supervisor
1400 Highland Avenue
Manhattan Beach, CA 90266-4795
bwright@citymb.info

Exhibit 2
MS4 Dischargers – Contact List

[via U.S. Mail only]
City of Maywood
c/o Andre Dupret, Project Manager
4319 East Slauson Avenue
Maywood, CA 90270-2897

[via email only]
City of Monrovia
c/o Heather Maloney
415 South Ivy Avenue
Monrovia, CA 91016-2888
hmaloney@ci.monrovia.ca.gov
hmaloney@ci.monrovia.ca.us

[via email only]
City of Montebello
c/o Cory Roberts
1600 West Beverly Boulevard
Montebello, CA 90640-3970
croberts@aaeinc.com

[via email only]
City of Monterey Park
c/o Amy Ho or John Hunter, Consultant
320 West Newmark Avenue
Monterey Park, CA 91754-2896
amho@montereypark.ca.gov
jhunter@jlha.net

[via email only]
City of Norwalk
c/o Daniel R. Garcia, City Engineer
P.O. Box 1030
Norwalk, CA 90651-1030
dgarcia@norwalkca.gov

[via email only]
City of Palos Verdes Estates
c/o Allan Rigg, Director of Public Works
340 Palos Verdes Drive
West Palos Verdes Estates, CA 90274
arigg@pvestates.org

[via email only]
City of Paramount c/o Christopher S. Cash
Director of Public Works
16400 Colorado Avenue
Paramount, CA 90723-5091
ccash@paramontcity.com

[via email only]
City of Pasadena
c/o Stephen Walker
P.O. Box 7115
Pasadena, CA 91109-7215
swalker@cityofpasadena.net

[via email only]
City of Pico Rivera c/o Art Cervantes
Director of Public Works
P.O. Box 1016
Pico Rivera, CA 90660-1016
acervantes@pico-rivera.org

[via email only]
City of Pomona c/o Julie Carver
Environmental Programs Coordinator
P.O. Box 660
Pomona, CA 91769-0660
Julie_carver@ci.pomona.ca.us

[via email only]
City of Rancho Palos Verdes
c/o Ray Holland
Interim Public Works Director
30940 Hawthorne Boulevard
Rancho Palos Verdes, CA 90275
clehr@rpv.com

[via email only]
City of Redondo Beach
c/o Mike Witzansky, Public Works Director
c/o Mike Shay, Principal Civil Engineer
415 Diamond Street
P.O. Box 270
Redondo Beach, CA 90277
Mike.Witzansky@redondo.org
mshay@redondo.org

Exhibit 2
MS4 Dischargers – Contact List

[via email only]
City of Rolling Hills
c/o Greg Grammer, Assistant City Manager
2 Portuguese Bend Road
Rolling Hills, CA 90274-5199
ggrammer@rollinghillsestatesca.gov
GregG@co.Rolling-Hills-Estates.ca.us

[via U.S. Mail only]
City of Rolling Hills Estates
c/o Greg Grammer
Assistant City Manager
4045 Palos Verdes Drive North
Rolling Hills Estates, CA 90274
ggrammer@rollinghillsestatesca.gov
GregG@ci.Rolling-Hills-Estates.ca.us

[via U.S. Mail only]
City of Rosemead
c/o Chris Marcarello
Director of Public Works
8838 East Valley Boulevard
Rosemead, CA 91770-1787

[via email only]
City of San Dimas
c/o Latoya Cyrus
Environmental Services Coordinator
245 East Bonita Avenue
San Dimas, CA 91773-3002
lcyrus@ci.san-dimas.ca.us

[via email only]
City of San Fernando
c/o Ron Ruiz
Director of Public Works
117 Macneil Street
San Fernando, CA 91340
rruiz@sfcity.org

[via U.S. Mail only]
City of San Gabriel
c/o Daren T. Grilley, City Engineer
425 South Mission Drive
San Gabriel, CA 91775

[via email only]
City of San Marino
c/o Chuck Richey
Director of Parks and Public Works
2200 Huntington Drive
San Marino, CA 91108-2691
crichie@cityofsanmarino.org
pubwks@cityofsanmarino.org

[via U.S. Mail only]
City of Santa Clarita
c/o Travis Lange
Environmental Services Manager
23920 West Valencia Boulevard, Suite 300
Santa Clarita, CA 91355

[via email only]
City of Santa Fe Springs
c/o Sarina Morales-Choate
Civil Engineer Assistant
P.O. Box 2120
Santa Fe Springs, CA 90670-2120
Smorales-choate@santafesprings.org

[via email only]
City of Santa Monica
c/o Neal Shapiro
Urban Runoff Coordinator
1685 Main Street
Santa Monica, CA 90401-3295
Nshapiro@smgov.net
Neal.shapiro@smgov.net

[via U.S. Mail only]
City of Sierra Madre
c/o James Carlson, Management Analyst
232 West Sierra Madre Boulevard
Sierra Madre, CA 91024-2312

Exhibit 2
MS4 Dischargers – Contact List

[via email only]
City of Signal Hill
c/o John Hunter
2175 Cherry Avenue
Signal Hill, CA 90755
jhunter@jlha.net

[via U.S. Mail only]
City of South El Monte
c/o Anthony Ybarra, City Manager
1415 North Santa Anita Avenue
South El Monte, CA 91733-3389

[via email only]
City of South Gate
c/o John Hunter
8650 California Avenue
South Gate, CA 90280
jhunter@jlha.net

[via email only]
City of South Pasadena
c/o John Hunter
1414 Mission Street
South Pasadena, CA 91030-3298
jhunter@jlha.net

[via email only]
City of Temple City
c/o Joe Lambert or John Hunter
9701 Las Tunas Drive
Temple City, CA 91780-2249
junter@jlha.net

[via U.S. Mail only]
City of Torrance
c/o Leslie Cortez
Senior Administrative Assistant
3031 Torrance Boulevard
Torrance, CA 90503-5059

[via U.S. Mail only]
City of Vernon
c/o Claudia Arellano
4305 Santa Fe Avenue
Vernon, CA 90058-1786

[via U.S. Mail only]
City of Walnut c/o Jack Yoshino
Senior Management Assistant
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Walnut, CA 91788

[via email only]
City of West Covina
c/o Samuel Gutierrez
Engineering Technician
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[via email only]
City of West Hollywood
c/o Sharon Perlstein, City Engineer
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[via email only]
City of Westlake Village
c/o Joe Bellomo
Stormwater Program Manager
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[via email only]
City of Whittier
c/o David Mochizuki
Director of Public Works
13230 Penn Street
Whittier, CA 90602-1772
dmochizuki@cityofwhittier.org

[via email only]
County of Los Angeles
c/o Gary Hildebrand, Assistant Deputy Director, Division Engineer
900 South Fremont Avenue
Alhambra, CA 91803
ghildeb@dpw.lacounty.gov

Exhibit 2
MS4 Dischargers – Contact List

[via email only]
Los Angeles County Flood Control District
c/o Gary Hildebrand, Assistant Deputy
Director, Division Engineer
900 South Fremont Avenue
Alhambra, CA 91803
ghildeb@dpw.lacounty.gov