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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST COURTHOUSE

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| In re LOS ANGELES COUNTY MUNICIPAL STORMWATER PERMIT LITIGATION. | LEAD CASE NO. BS080548<br><br>[Related Cases: BS080753; BS080758; BS080791; BS080792; BS080807]<br><br>[Assigned to the Hon. Victoria Chaney]<br><br>**PETITIONERS' PHASE I TRIAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR WRIT OF MANDATE ON PHASE I TRIAL ISSUES**<br><br>Date: May 19, 2004<br>Time: 8:30 a.m.<br>Place: Dept. 324-Central Civil West |

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This lawsuit challenges the validity of that permit issued by Respondent, the California Regional Water Quality Control Board, Los Angeles Region ("Respondent") on December 13, 2001, entitled Waste Discharge Requirements for Municipal Stormwater and Urban Runoff Discharges within the County of Los Angeles, and the incorporated cities therein, except the City of Long Beach, Order No. 01-182, NPDES No. CAS004001 (hereinafter referred to as the "Permit" or "Order").[1] Petitioners herein are 29 Los Angeles County Cities[2], the Building Industry Legal Defense Foundation ("BILD") and the Construction Industry Coalition on Water Quality (hereafter "CICWQ") (collectively, the "Arcadia Petitioners").

The Subject Permit was purportedly issued under Section 1342(p)(3)(B) of the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA" or "Act"), as well as pursuant to Chapter 5.5, Section 13377 of the Porter-Cologne Act, Water Code §§ 13000 et seq.,[3] but contains numerous terms that are expressly contrary to both bodies of law, as well as other controlling State statutes. As shown herein, and in the coordinated Points and Authorities submitted in support of the issues raised in this Phase I Motion for Writ of Mandate ("Coordinated Brief"), Respondents committed countless errors of law, and have issued an NPDES Permit that is contrary to law and is not supported by the evidence, for the following reasons:

(1) The Permit contains various terms that exceed the maximum extent practicable standard ("MEP") as established under the CWA, 33 U.S.C. § 1342(p)(3)(B)(iii), and that exceed the "reasonableness" standard as provided for under the Porter-Cologne Act, Sections 13263(a), 13241(c), and 13000;

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[1] As stated in these Petitioners' Motion for Summary Adjudication, the Respondent apparently failed to include within the Administrative Record a copy of the very Permit that is the central part of the challenges raised in this Petition for Writ of Mandate. Accordingly, Petitioners have included a copy of the Permit as Exhibit "A" to their Request for Judicial Notice (RJN) and ask that the Administrative Record be supplemented to include a copy of the very Permit that is being challenged.

[2] The Original Arcadia Petition involved 31 Los Angeles County Cities, but the Court has stricken the declaratory relief causes of action from the Complaint, and thereby struck from the pleadings as Plaintiffs, the Cities of Monterey Park and South Gate. The 29 Cities remaining in this action are as follows: Arcadia, Baldwin Park, Bell Gardens, Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Irwindale, Lawndale, Montebello, Paramount, Pico Rivera, Pomona, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Temple City, Vernon, Walnut, West Covina, and Whittier.

[3] All section references are to the California Water Code unless otherwise specified.

(2) The provisions of Part 2 of the Permit that provide for what is referenced as an "iterative" BMP process are contrary to the MEP and reasonableness standard, and are further wholly unintelligible and ambiguous and thus arbitrary and capricious (Permit, p. 17-18);

(3) The Permit contains numerous terms that go beyond the requirements of the Act by improperly regulating discharges "***in***" and "***to***" the municipal separate storm sewer system ("MS4"), as opposed to what is permitted under the Act, i.e., to have the Permittees reduce Pollutants "***from***" their MS4's (see 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. 122.26 (a)(3); 122.26((b)(4)(iii); 122.26(b)(7)(iii);122.26(d); 122.26(d)(1)(v); 122.26(d)(2)(iv)(A)&(A)(1), (A)(2), (A)(3) and (A)(6).);

(4) The Respondent, in approving the Permit, failed to comply with the environmental review requirements of the California Environmental Quality Act ("CEQA") (Excerpts of Record ("ER"), Exh. 3, R7377-78),[4] thereby causing the entire Permit to be invalidated until review, in accordance with the policies established by CEQA, has first been conducted by Respondents (See Water Code § 13389, Pub. Res. Code §§ 21000 and 21001 and 23 CCR § 3733);

(5) Respondent has acted contrary to State land use law governing General Plans and the provisions of CEQA by requiring Permittees to amend their CEQA and General Plans' processes in a manner that is contrary to State laws, and by forcing Cities to impose a different CEQA review process than that set forth by the Legislature (Permit, p. 34-41); and

(6) Respondent has acted contrary to law by attempting to infringe upon the local land use authority of the Permittees and by imposing provisions that violate the California Constitution's Separation of Powers Clause.

The Arcadia Petitioners hereby join in the Consolidated Brief on the above issues, and further offer the following Points and Authorities in Support of their Phase I Motion for Writ of Mandate, and respectfully request that judgment be entered in the Arcadia Petitioners' favor, and that a writ of mandate be issued invalidating the Subject Permit[5] and directing that Respondent

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[4] For the Court's convenience, given that the Administrative Record in this case is approximately 36 boxes of documents, Petitioners have prepared and submitted its Excerpts of Administrative Record ("ER") representing those portions of the record they have referenced in their initial moving papers.

[5] Pending the reissuance of a new permit consistent with this Court's determinations and with applicable law, with the invalidation of the subject Permit, Part 6(R) "Rescission," the sections, within the Permit,

issue a new permit, consistent with the determinations of this Court.

## II. SUMMARY OF ARGUMENT.

The Subject Permit eviscerates the flexible and practical approach to the regulation of stormwater runoff enacted by Congress in 1987. Contrary to the federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) ("CWA" or the "Act") § 1342(p)(3)(B), which requires municipalities to reduce the discharge of pollutants ***from*** their municipal separate storm sewer systems ("MS4") to the "maximum extent practicable" ("MEP"), Part 2 of the Permit requires municipal dischargers to strictly comply with water quality objectives and to prevent nuisances, ***without regard to the MEP or reasonableness standards***. The result of this "strict compliance" standard is to set up Petitioners for failure, because the Permit requires Permittees to do the impossible – to prevent all exceedances of water quality objectives from urban runoff. (Permit, p. 17.)

Similarly, under Part 3.C, the Permit enables the Executive Officer to "incorporate program implementation amendments so as to comply with regional, watershed specific requirements, and/or waste load allocations developed and approved pursuant to the process for the designation and implementation of Total Maximum Daily Loads ('TMDLs') for impaired water bodies," again ***without regard to the MEP or reasonableness standards***. (Permit, p. 18-19.)

To compound the problem of complying with an impossible standard, the language under Parts 2.1 – 2.4 and the process thereunder to continue to impose additional best management practices ("BMPs"), are hopelessly "ambiguous." This ambiguity is admitted by the Respondent's Chair's own statements contained in a January 30, 2002 Memorandum, with attached "Answers to Frequently Asked Questions," signed by Respondent's Chair, Francine Diamond. (See RJN, Exh. "B," the "Diamond Memo"). The Diamond Memo expresses the Respondent's intent to find no violation of Part 2, so long as Permittees act in good faith to eliminate exceedances of water quality objectives. (Ex. "B," p. 7.). The Diamond Memo is an admission of a vague Permit.

Third, the Subject Permit improperly attempts to force the Permittees to control discharges "***to***" their municipal storm drain system, and to regulate the mere existence of pollutants "***in***" their

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repealing the 1996 Permit, would be similarly invalidated. Thus, with the invalidation of the subject Permit, the 1996 Permit would automatically be reinstated pending the issuance of a new Permit.

storm drain systems, despite the fact that the CWA only allows Respondent to issue permits to control the discharge of pollutants "***from***" municipal storm drain systems into waters of the United States. (See 33 U.S.C. § 1342(p)(3)(B).) As the Permit is repleat with provisions which impose obligations on municipalities to regulate the mere existence of pollutants "***in***" or "***to***" storm water, the Permit must be found to be contrary to the clear terms of the CWA. For example, the term "Maximum Extent Practicable" is defined in Part 5, p. 57, to mean "the standard for implementation of stormwater management programs to reduce pollutants ***in*** stormwater." This definition and other terms in the Permit are directly contrary to the authority provided in the Act.

Fourth, the Permit in issue must be determined to be invalid, as Respondent admittedly did not comply with CEQA, since it contended it was exempt. (ER, Exh. 3, R7377-78.) Yet, § 13389, by its own terms, is expressly limited to an exemption from Chapter 3 of CEQA (i.e., the requirement to prepare an environmental impact report), as admitted by the State Board in its own regulations (23 CCR § 3733) and by Respondent in the Permit itself. (Permit, p. 15.) Further, by the terms of § 13372, the exemption under § 13389 does not apply to the extent Respondent has taken action beyond those actions "required by" the CWA. (Water Code § 13372.)

In addition, a Writ of Mandamus is required because Respondent has improperly required that the Permittees amend their General Plans and completely revamp their CEQA process to address unidentified and undefined impacts to water quality, and to compel, in all cases, specific mitigation measures for some eight (8) different development categories (Permit, Part 4.D, p. 34-42), regardless of whether such explicit stormwater mitigation measures are appropriate under CEQA. Such requirements are directly contrary to the well-established process compelled by the Legislature, and are a clear infringement on the municipalities' land use authority, and, as well, are violations of the Separation of Powers Clause of the California Constitution.

With this Motion and Phase I trial, Petitioners request adjudication of these issues against the Respondent Los Angeles Regional Water Quality Control Bd., Los Angeles Region ("Respondent") and seek relief under Petitioners First Claim for Relief pursuant to Code of Civil Procedure ("CCP") Section 1094.5 and Water Code Section 13330(d), based on the Court's independent judgment of the evidence and "de novo" review of the law.

## III. THE SUBJECT NPDES PERMIT EXCEEDS THE MEP STANDARD AND THE "REASONABLENESS" STANDARD UNDER THE PORTER-COLOGNE ACT.

### A. The Permit Is Contrary To Law As It Exceeds The MEP Standard

The CWA sets the MEP standard as the substantive upper limit on the requirements that a MS4 permit may contain. (33 U.S.C. § 1342(p)(3)(B)(iii).) This conclusion is evident from the plain language of the statute, applicable case law, and the legislative history to the Act, as well as long accepted maxims of statutory construction.

Section 1342(p)(3)(B) of the Act provides, in pertinent part:

> **(B) Municipal Discharge**
>
> Permits for discharges **from** municipal storm sewers - (i) may be issued on a system- or jurisdiction-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. (Emph. added.)

In 1999, the Ninth Circuit considered the application of the stricter "industrial" standard versus the "MEP" standard in connection with a municipal NPDES permit, and found that while: "Congress expressly required ***industrial*** stormwater discharges to comply with the requirements of 33 U.S.C. § 1311. . . . ***Congress chose not to include a similar provision for municipal storm-sewer discharges.***" (*See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 (emph. added).) The Court found that Section 1342(p)(3)(B) was not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311, but, instead, that it ***replaced*** the requirements of § 1311 with the requirement that municipal dischargers reduce the discharge of pollutants to ***the maximum extent practicable***. (*Id.* at 1165.)

For each of the reasons set forth in the Coordinated Brief, Respondent has acted contrary to law by imposing requirements on Permittees, particularly with Parts 2 and 3 of the Permit, that exceed the MEP standard. Through its continual reference to the MEP standard throughout the Permit, Respondent concedes its application as the appropriate standard. Yet, as Parts 2 and Part 3.C of the Permit contain provisions that enable Respondent to impose significant requirements

upon the Permittees, in excess of the MEP standard and in excess of the "reasonableness" standard as set forth under the Porter-Cologne Act, all as discussed in the Coordinated Brief and below, Respondent's adoption of the Permit was action that was contrary to law.

### B. The Permit is Contrary to Law as it Exceeds the "Reasonableness" Standard Required by the Porter-Cologne Act

In addition to the limitations placed upon Respondent in issuing ***NPDES permits*** under the CWA, the Porter-Cologne Act imposes similar limitations through its "reasonableness" requirements as provided for in Water Code §§ 13000, 13263(a), and 13241(c), as discussed in Petitioners' Coordinated Brief. Part 2 of the Permit strictly requires compliance with all water quality objectives, without the inclusion of any "reasonableness" standard and allows for the imposition of "additional BMPs," at the unfettered discretion of Respondent. Part 3.C includes a similar strict compliance standard, thereby subjecting the Permittees to violations of the Permit and thus the Porter-Cologne Act and the CWA. The Permit's terms go beyond the MEP and "reasonableness" standards, and require that the Subject Permit be invalidated.

## IV. PART 2 OF THE PERMIT IS AMBIGUOUS AND CONTRARY TO THE MEP STANDARD AND THE "REASONABLENESS" STANDARD, AND IS THUS INVALID AND UNENFORCEABLE.

As discussed in the Coordinated Brief, Part 2 of the Permit was to have included a "good faith safe harbor" so that, even if an exceedance of a water quality objective or standard occurred, or a condition of nuisance existed, such exceedance or nuisance would ***not*** result in a ***violation*** of the Permit, so long as the Permittees were implementing best management practices or "BMPs" to address the exceedance or nuisance. Yet, the language in Part 2 of the Permit, as confirmed by the Diamond Memo (see RJN, Ex. "B," p. 2), is admittedly ambiguous. Part 2.4, when read in coordination with the remaining provisions of Part 2, and read literally, would mean that when an exceedance or a condition of nuisance exists, that Permittees need not continue to repeat failed BMPs, unless otherwise directed by the Regional Board.

As discussed in the Coordinated Brief, the problems with the Part 2 language are:

(1) The language requiring Permittees not to repeat the same failed procedures for continuing or reoccurring water quality "exceedances," unless otherwise "***directed by the***

***Regional Board to develop additional BMPs***," clearly imposes a standard that exceeds MEP. As discussed above and in the Coordinated Brief, the MEP standard is the controlling standard governing "permits from the municipal storm sewers" (33 USC § 1342(p)(3)(B).) Thus, any provision which gives Respondent complete discretion to require Permittees to "develop additional BMPs," without limitation, is contrary to the CWA.

(2) The language under Part 2 allows the Regional Board to require, at the Regional Board's complete discretion, that the Permittees "develop additional BMPs," without any consideration of the "reasonableness" of such requirements. (See Water Code §§ 13000, 13263(a) and 13241(c).) Without the "reasonableness" limitations as set forth under said sections of the Water Code, Respondent has exercised its authority outside of both the CWA and the Porter-Cologne Act, requiring that Part 2 of the Permit, and the entire Permit, be invalidated.

(3) In addition, Part 2 of the Permit is clearly vague and ambiguous, as admitted by the Regional Board itself in the January 30, 2002 Diamond Memo, which by its own terms was prepared in part because of "uncertainty in how elements of the permit are to be implemented":

> . . . the Regional **Board's** Executive Officer will . . . be meeting with city and county representatives to engage a dialogue to ensure that the provisions of the permit are **clearly understood** and, that **any uncertainty** in how elements of the permit **are to be implemented**, are discussed. (RJN, Ex. "B," p. 2 (emph. added).)

Thereafter, to address the admitted "uncertainty" with the language in Part 2, Ms. Diamond explained the intent of the Regional Board with Part 2, and admitted that:

> The receiving **water** compliance process outlined in the permit. . . is **expressly intended** to serve as the vehicle by which the Regional Board will obtain Permittee compliance. . . . **To that end, the key aspect is that a good faith effort be utilized by Permittees to utilize this process**. (Ex. "B," p. 2 (emph. added).)

In the Diamond memo, Ms. Diamond specifically sought to clarify the ambiguity, stating:

> **As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides that the Permittee is in compliance**. . . . Even if water quality does not improve as a result of the implementation efforts, **there is no violation** of the permit's receiving water provision **as long as a good faith effort is underway** to participate in the iterative process. (Ex. "B," p. 7 (emph. added).)

As the existing language of Part 2 does not contain a reference to a "good faith" safe harbor, or a statement that no violation will be found "so long as the Permittees are engaged in a

good faith effort," Respondent has admittedly included Permit language that is hopelessly ambiguous, and that requires clarification by Respondent.

The Supreme Court in *Cramp v. Board of Public Instruction* (1961) 368 U.S. 278, held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Id.* at 287.) (Also see *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App. 4th, 1311, 1324-1325 ["[T]he County and its Board may reasonably be heard to complain that they would not be able to comply with it because of its alleged vagueness."] So too is Part 2 of the subject Permit vague, ambiguous and unworkable, as admitted by Respondent in issuing the Diamond Memo to address "any uncertainty in how elements of the permit are to be implemented." (RJN, Ex. "B," p. 2.)

(4) Finally, Part 2 of the Permit must invalidated, as Permittees have no viable means of complying with its terms. As discussed in the Coordinated Brief, as a matter of law, the Clean Water Act does not require Permittees to achieve the impossible. (See, *Hughey v. JMS Development Corp.* (11 Cir. 1996) 78 F. 3d 1523, 1527.) To require the Permittees to continue to engage in a process of complying with water quality standards, where there is no realistic means to comply with such a requirement, is "action" requiring the Permittees to achieve the "impossible." The Permittees cannot turn off their discharge or realistically "stop the rain from falling" any more than they can individually or collectively, in the first instance, prevent the discharge of pollutants "***in***" or "***to***" storm water. Permittees cannot, for example, prevent the discharge of petroleum products or various heavy metals from automobiles throughout their communities, any more than they can ban the use and application of herbicides, pesticides or fertilizers.

In short, even if Permittees wanted to, they have neither the authority nor the ability to change all of society's bad practices which cause pollution in our city sidewalks, streets, storm drain systems and beaches. The Permittees cannot stop the rain from falling and have no realistic way of complying with the "impossible" standard in Part 2. By law, they are only required to "reasonably" achieve applicable water quality objectives, and to take action "to the maximum extent practicable" to reduce the discharge of pollutants from their MS4s.

## V. THE SUBJECT PERMIT IS CONTRARY TO LAW AS IT IMPROPERLY ATTEMPTS TO REGULATE DISCHARGES "*IN*" OR "*TO*" THE MUNICIPAL STORM DRAIN SYSTEM.

The language within the Clean Water Act governing municipal storm water discharges, along with the language throughout the federal regulations, plainly limits the authority of the Respondents to regulate that the subject Permittees obtain: "Permits for discharges ***from*** municipal storm sewers . . . ." (33 U.S.C. § 1342(p)(3)(B).) Similar limiting language on allowing Respondent to require discharges "***from***" the MS4, exists throughout the federal regulations. (See 40 CFR (33 U.S.C. § 1342(p)(3)(B)(iii); 40 CFR 122.26 (a)(3); 122.26(b)(4)(iii); 122.26(b)(7)(iii);122.26(d); 122.26(d)(1)(v); 122.26(d)(2)(iv)(A)& (A)(1),(A)(2)(A)(3) and (A)(6).) Even the State Board recognized this limitation when it issued Order No. WQ2001-15:

> We find the permit language is overly broad because it applies the MEP standard not only to discharges "***from***" MS4s, but also to discharges "***into***" MS4s. (RJN, Ex. "F," p. 10 (emph. added).)

As discussed at length in the Coordinated Brief, the authority provided under the CWA and the regulations is express and clear. Permits are not needed or appropriate to regulate storm water discharges, except where expressly provided under the Act, i.e., here, for municipal storm sewer systems serving a population of "250,000 or more" (See, 33 U.S.C. § 1342(p)(1) and (2)(C)(D); 40 CFR 122.26(b)(4) and (7).) In such a setting, a permit will be required, but the permit is only required for "Permits for discharges ***from*** municipal storm sewer systems. . . ." (33 U.S.C. § 1342(p)(3)(B).) Thus, the general rule is that a permit is not authorized, except in certain cases for "discharges ***from***" municipal storm drains." Respondent thus had no authority to order Permittees to regulate the discharges of pollutants "***in***" or "***to***" the Permittees' MS4.

As referenced in the Coordinated Brief, under Parts 3.A.2, 3.A.3, 3.B, 3.G.2(e), Part 4 describing "Maximum Extent Practicable," and Part 5 with the definition of the term "Maximum Extent Practicable (MEP)," as well as Part 4.D entitled "Development Planning Program," Respondent has sought to impose controls on discharges of pollutants throughout the various locations in the city "***in***" or "***to***" the Permittees' municipal storm drain system. Such provisions are contrary to the CWA and Respondent acted contrary to law in imposing them.

## VI. PLAINTIFF FAILED TO COMPLY WITH APPLICABLE PROVISIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

### A. Section 13389 Only Exempts Respondent from Complying with Chapter 3 of CEQA

Water Code § 13389 contains a limited statutory exemption for complying with certain requirements of CEQA. The exemption under § 13389 is limited in two ways: (1) first, by its own terms, it exempts actions of the Regional Board only from complying with Chapter 3 of CEQA commencing with Section 21100, i.e., to prepare a formal Environmental Impact Report, and (2) second, pursuant to Section 13372, Section 13389 exempts only "actions required under" the Clean Water Act from Chapter 3 of CEQA. As Respondent admittedly has failed to comply with CEQA in any respect, the Subject Permit must be invalidated in its entirety.

Section 13389 contains the following limited exemption from CEQA:

> Neither the State Board nor the Regional Boards shall be required to comply with **the provisions of Chapter 3** (commencing with Section 21100) of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act or acts amendatory thereof or supplementary thereto.

The clear language of Section 13389 exempts compliance only with Chapter 3 of CEQA, and does not exempt Respondent from complying with any other provision of CEQA. Likewise, by specifically asserting its exemption from Chapter 3, the Permit itself implicitly recognizes that Respondent is not exempt from other parts of CEQA. (See Permit, p. 15, Finding G(6) ["The action to adopt an NPDES permit is exempt from the provisions of Chapter 3 of CEQA (Cal. Pub. Resources Code § 21100 et seq.) in accordance with CWC § 13389."]) Evidence of the need for Respondent to have complied with the other requirements of CEQA is, moreover, set forth in the State Board's own regulations. Specifically, under Section 3733 of Title 23 of the Regulations, the State Board determined that Section 13389 "***does not apply to the policy provisions of Chapter 1 of CEQA***." (23 CCR § 3733 (emph. added).) Thus, in addition to the plain language of § 13389 itself, which clearly limits the application of the exemption to Chapter 3 alone (involving the preparation of an environmental impact report), the State Board's own regulations recognize the limited nature of the exemption under 13389, and prove that the "policy" provisions of CEQA

in fact apply. Yet, there is no evidence Respondent made any attempt to comply with any respect of CEQA whatsoever. In fact, Respondent asserts the opposite, that it did not need to comply with CEQA. (ER, Ex. "9," R68813, Response to Comments 32 & 34.)

The policy provisions under CEQA provide that:

> (g) It is the intent of the Legislature that **all agencies of the State government** which regulate activities of private individuals, corporations and public agencies which are found to affect the quality of the environment, shall regulate such activities **so that major consideration is given to preventing environmental damage,** while providing a decent home and satisfying living environment for every Californian. (Pub. Res. Code 21000(g) (emph. added).)

Further, under Section 21001 of CEQA, the Legislature provided as follows:

> The Legislature further finds and declares that it is the policy of the state to:
>
> (g) **Require governmental agencies at all levels** to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment. (Emph. added.)

As the primary purpose of CEQA is to afford the fullest possible protection to the environment within the reasonable scope of the statutory language (*see No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83), the Legislature established a "substantive mandate" requiring that all public agencies consider the environmental consequences of a proposed project, including permitting actions, and to explore feasible alternatives and mitigation measures prior to the approval of any such project. (PRC 21002; *also see Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 134.)

In *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, the California Supreme Court determined that the proponent of a project, although exempt from Chapters 3 and 4 of CEQA, still had a substantive obligation to identify the significant impacts of the proposed project, and, moreover, to mitigate those adverse affects by requiring feasible mitigation measures or feasible alternatives, all prior to project approval. (*Id.* at 1233.) In addition, in *Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, the court held that the cumulative environmental impacts for a timber harvest plan had to be evaluated despite a partial exemption from Chapters 3 and 4 of CEQA. (*Id.* at 624-25.)

Further, other State Board determinations support the fact that Section 13389 is a limited exemption. For example, in *In the Matter of the Petition of Robert and Federick Kirtlan*, State Board Order No. WQ75-8, 1975 Cal. Env. LEXIS 45, a copy of which is enclosed herewith and marked as Exhibit "D" to the RJN, the State Board determined that the Regional Board was subject to the policy provisions of CEQA in spite of Section 13389, and specifically, that the it was required to have complied with Chapters 1 and 2.6 of CEQA. The State Board determined:

> The statute and the regulations leave the Regional Board and the State Board subject to the policy provisions of CEQA which are set forth in Public Resources Code Sections 21000 and 21001. These policy provisions clearly indicate that all state agencies which regulate activities which may significantly affect the quality of the environment shall give major consideration to protection of the environment. (RJN, Ex. "D," p. 3.)

Similarly, in *In the Matter of the Petition of the Sierra Club, San Diego Chapter*, State Board Order No. WQ84-7, 1984 Cal. Env. LEXIS 13, *23 (July 19, 1984), the State Board again concluded that. "***Section 13389 does not exempt Regional Boards from the policy provisions of CEQA (PRC § 21000 – 21100)***." (RJN, Ex. "E," p.6)

In claiming that it "does not need to comply with the documentary requirements of CEQA for the issuance of the permit," Respondent itself implicitly acknowledges that Section 13389 exempts it ***only*** from the requirements of Chapter 3, and not the public policy provisions of CEQA. (See ER, Exh. 3, pp. R7377-7378). Further, in response to the comment by a permittee that "Setting a numerical mitigation measure is a discretionary action" requiring Respondent to "[p]rovide cost estimates of impacts and benefits and [to] release documentation for public comment and review under CEQA," Respondent responded with the unqualified assertion that "[t]he requirements under an NPDES permit are exempt from review under CEQA." (ER, Ex. "9," R68813.) Respondent's admitted failure to comply with the policy requirements of CEQA requires that the Subject Permit be invalidated.

### B. Section 13389 Exempts Respondents' Actions Only to the Extent They are Required by the Clear Water Act

Similarly, Section 13389 is limited in its application, as pursuant to Section 13372, a provision of Chapter 5.5 of the Porter-Cologne Act, of which 13389 is a part, "only applies to

actions ***required under*** the Federal Water Pollution Control Act. . . ." (Water Code § 13372(a).) As Section 13389 is contained with Chapter 5.5 of the Porter-Cologne Act, and as 13372(a) expressly limits the application of all provisions within Chapter 5.5 "***to actions required***" under the CWA, the exemption provided in § 13389 does not apply to actions outside of the Act.

With the Subject Permit, as described above, the Respondent has adopted a regulatory program that goes far beyond what has been envisioned under the Act or the Waste Discharge Requirements under State law. For example, the Permit terms regulating discharges "***in***" or "***to***" the MS4, imposing restrictive Receiving Water standards on Permittees irrespective of the MEP or reasonableness standard, regulating land use and development projects, and requiring modifications to CEQA Guidelines, all show that the exemption in Section 13389 is inapplicable to the instant case, as the "action" taken by the Regional Board is action that was not "***required under***" the CWA." (*See* Water Code § 13389.)

In *Committee for a Progressive Gilroy v. The State Water Resources Control Board* (1987) 192 Cal.App.3d 847, plaintiff brought suit arguing respondents had failed to comply with CEQA in establishing WDRs for the operation of a municipal sewage treatment facility. The Court sustained the trial court's denial of the writ of mandate on the grounds that CEQA had been complied with. However, in response to the City's argument that § 13389 exempted the project from CEQA compliance, the Court rejected the argument and held:

> The flaw in this argument, as plaintiff correctly notes, is that both the cities and the Pacific Water court ignore the limitation placed upon this exemption by Water Code *section 13372*. **This section provides that the "provisions of this chapter [which includes section 13389] shall apply only to actions required under the Federal Water Pollution Control Act, as amended."** The challenged orders here were issued under the exclusive authority of the Porter-Cologne Act and were not required by the Federal Water Pollution Control Act. The cities do not contend otherwise. By terms of the statutes read as a whole, *the exemption under Water Code section 13389 simply does not apply in this case, a point conceded by the boards.* (*Id.* at 862 (emph. in original and added).)

Accordingly, the Court in *Gilroy* expressly recognized that Section 13389 applies only to the extent that the actions taken by respondents therein in establishing WDRs were actions taken pursuant to the CWA. Yet, on its face, the Permit plainly goes beyond the requirements of the CWA, as discussed above, and goes beyond what was envisioned with the adoption of WDRs

under Porter-Cologne. In light of the fact that the Permit includes requirements that exceed the CWA, and go beyond Respondent's authority in issuing WDRs, CEQA should have been adhered to, and the exemption under § 13389 had no application. (See Water Code §§ 13372 and 13389.)

## VII. THE PERMIT IS INVALID BECAUSE IT IS AN ATTEMPT TO AMEND CEQA AND ITS IMPLEMENTING REGULATIONS, AND REQUIRES CITIES TO AMEND THEIR CEQA PROCESS AND THEIR GENERAL PLANS.

### A. Respondent Lacks Authority To Require Permittees To Revise Their CEQA Process And Implement Specific Mitigation Measures

Under Part 4.D(11) of the NPDES Permit, entitled "California Environment Quality Act (CEQA) document update," Respondent requires the following:

> Each Permittee **shall incorporate into its CEQA process, with immediate effect**, procedures for considering potential stormwater quality impacts and providing for appropriate mitigation **when preparing and requiring CEQA documents**." (Permit, p. 40 (emph. added).)

Respondent seeks to force the Permittees to amend their CEQA process to incorporate the various mitigation measures imposed by the Subject Permit, which are specifically designed to hoist a whole new development review process on the municipalities and project applicants. For example, Part 4.D of the Permit further requires that:

> **Each Permittee shall** require that post-construction Treatment Control BMPs incorporate at a minimum, either a volumetric or flow-based treatment control design standard, or both, as identified below to **mitigate** (infiltrate, filter or treat) **storm water run off**: . . .. (Permit, p. 36 (emph. added).)
>
> **The Permittees shall require the following categories of Planning Priority Projects to design and implement post-construction treatment control to mitigate storm water pollution**: . . .. (Permit, p. 37 (emph. added).)
>
> **Each Permittee shall,** no later than September 2, 2002, require the implementation of a **site-specific plan to mitigate post-development stormwater for new development and redevelopment** not requiring a SUSMP but which **may potentially have adverse impacts on post-development stormwater quality,** where one or more of the following project characteristics exist: . . .. (Permit, p. 38 (emph. added).)
>
> **The Permittee shall** apply the SUSMP, or site-specific requirements including post-construction storm water mitigation **to all Planning Priority Projects that undergo significant Redevelopment** in their respective categories. (Permit, p. 38 (emph. added).)

Respondent has openly and boldly changed the entire face of the CEQA review process

(i.e., changed the statutory process mandated by the California Legislature in 1970) by requiring actions that augment land use control contrary to CEQA.

CEQA was adopted for the very purpose of mitigating adverse environmental impacts from development "projects," through the imposition of "feasible" mitigation measures by a public agency, to mitigate potentially significant adverse impacts created by such projects. (Pub. Res. Code § 21000 *et seq.*) In Public Resources Code ("PRC") §§ 21000 and 21001, the Legislature expressed its clear intent with the adoption of CEQA:

> (f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality **and to control environmental pollution.**
>
> (g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities **so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.** (PRC § 21000 (emph. added).)

The Legislature further finds and declares that it is the policy of the State to:

> (d) **Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian**, shall be the guiding criterion in public decisions.
>
> (g) **Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment**. (PRC § 21001 (emph. added).)

The Legislature has also determined that public agencies are not to approve "projects" if there are feasible alternatives or feasible mitigation measures which would substantially lessen the significant environmental effects of the project. The term "feasible" is defined to mean "capable of being accomplished in a successful manner within a reasonable period of time, ***taking into account economic, environmental, social, and technological factors***." (PRC § 21061.1(emph. added).)

The California Legislature has thus established a procedure to be followed to "***control environmental pollution***" and to establish "***feasible***" mitigation measures, which process requires the long term protection of the environment, as well as the consideration of "***alternatives to***

***proposed actions***" affecting the environment. (PRC § 21001.) This procedure expressly allows a local agency to consider these and other factors, including factors that may override the potential adverse impacts on the environment. (See Chapter 4 "Local Agency," PRC § 21150 et seq. and Pub. Res. Code § 21081(b)) [Agency may approve projects, even where significant effects from the project will go unmitigated, where the Agency "finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."].) The Legislature has dictated the procedure local agencies are to follow in reviewing development "projects" and in imposing mitigation measures on such "projects."

In addition, the Legislature has identified, through statute and regulation, various statutory and categorical exemptions to CEQA, which further preempt the attempts by the Respondent to regulate "development projects." For example, CEQA applies only to "***discretionary***" projects. "***Ministerial***" projects are expressly ***exempt*** from CEQA's application, *i.e.*, public agencies have no authority to review ministerial projects for purposes of imposing additional mitigation measures beyond those already included in the codified standard. (See Pub. Res. Code § 21080(b)(1).) The exemption of all "***ministerial***" projects from the application of CEQA (and thus from review for purposes of imposing additional mitigation measures under CEQA) is significant in connection with the Permit, as the Permit seeks to impose ***mitigation measures*** on ***all*** "***projects***," whether "discretionary" or "ministerial."[6] As CEQA expressly exempts "ministerial projects" from its terms, there is no authority for the Regional Board to require municipalities to, in effect, impose ***mitigation measures*** on such ministerial projects.[7]

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[6] In the Permit, Finding F(1) on page 13, Respondent recognizes that CEQA requires public agencies to consider the environmental impacts of projects that they approve for development, and that CEQA exempts "***ministerial projects***" from its application. Yet, Respondent continues and makes the following legal finding: "A ministerial project may be made discretionary by adopting local ordinance provisions or imposing conditions to create decision-making discretion in approving the project. In the alternative, Permittees may establish standards and objective criteria administratively for stormwater mitigation for ministerial projects." (Permit, p. 13.) Clearly, Respondent is attempting to change the face of CEQA and in so doing, ignores vested rights.

[7] The State CEQA Guidelines identify further exemptions from the environmental review process, many of which appear to be "projects" in which the Regional Board has attempted to regulate with the subject Permit. Specifically, Class 2, Class 3, Class 4, Class 11 and Class 15 "categorical exemptions" under CEQA will be expressly and/or implicitly overridden by the review process compelled by the Subject Permit. These categorical exemptions include: the replacement or the reconstruction of the existing structures or facilities when a new structure is located on the same site as the original facility and will serve

With CEQA, the State Legislature has "occupied the field" on the process to follow in imposing environmental mitigation measures on development projects. Thus any action by a regional board to adopt provisions that are contrary to CEQA, is contrary to law. (*See* e.g., *Leslie v. Superior Court*, *supra*, (1999) 73 Cal.App.4th 1042, 1052 [finding a conflict existed between a city ordinance and State law, where the ordinance ***duplicated, contradicted or entered an area which is fully occupied by general law, either expressly or by legislative implication***: "By enacting the Uniform Statewide Building law and mandating that local government adopt the UBC and the CBSC, the Legislature has shown its intent to preempt local government from legislating on the subject, except as narrowly permitted under Health and Safety Code Section 17958.5."].

Respondent has adopted a permit that expressly requires each Permittee to change, with "***immediate effect***," its CEQA process and to incorporate automatic mitigation measures within it as a condition to development projects, irrespective whether those development projects will in fact create a potential significant adverse environmental impact, and irrespective of what that potential significant adverse impact may be. (See PRC § 21100(a): "All lead agencies shall prepare, or cause to be prepared . . . an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment.") Moreover, Respondent's action would require the imposition of these mitigation measures irrespective of whether or not CEQA exempts such projects from its review. For example, the Subject Permit would require the implementation of these mitigation measures even for "ministerial" projects that are not governed by CEQA. Finally, the Subject Permit would compel the implementation of such mitigation measures even where overriding considerations may exist and specifically even if there are overriding "economic, legal, social, technological, or other benefits of the project [which] outweigh the significant effects on the environment." (PRC § 21081(b).)

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the same purpose and capacity of the original structure (14 CCR 15302); the construction of small new facilities, new equipment and facilities and small structures, and the construction of three or fewer single family homes in urban areas (14 CCR 15303); minor alterations to land such as grading, gardening and landscaping that do not affect sensitive resources (14 CCR 15304); the construction or replacement of minor structures to existing facilities (*e.g.*, signs, small parking lots, portable structures) (14 CCR 15311); and the subdivision of four or fewer parcels in urban areas (14 CCR 15315).

The Development Planning requirements under Part 4.D of the Permit are contrary to CEQA, and as such, the Subject Permit must be overturned.

**B. Respondent Lacks Authority To Require Cities To Revise Their General Plans or CEQA Process, and To Infringe on the Permittees' Land Use Authority**

The Permit Part 4.D.12, entitled "General Plan Update," requires that the Cities amend, revise or update certain elements of their General Plans. (Permit, p. 41.) This requirement is plainly contrary to existing State law governing General Plans, and Respondent has no authority to require changes to Permittees' "General Plans" or, as discussed above, to change the Permittees CEQA review process. Rather, land use planning is to be left in the hands of local government. (*See Yost v. Thomas* (1984) 36 Cal.3d 561, 565.)

Further, the California Constitution mandates a separation of powers in Article 3, § 3:

> "the powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

In turn, Article 4, § 1 of the Constitution vests all legislative power of the State in the California Legislature, except to the extent the "people reserve to themselves the powers of initiative and referendum." (Cal. Const. Art. 4, § 1.)

Thus, under the separation of powers doctrine, the Legislature "declare[s] a policy and fix[es] the primary standard." (*Knudsen Creamery Company of California v. Brock* (1951) 37 Cal. 2d 485, 492.) The Legislature may appoint an "authorized administrative or ministerial officer [to] 'fill up the details' by prescribing administrative rules and regulations," but that officer "may not 'vary or enlarge the terms or conditions of the legislative enactment'" or "'compel that to be done which lies without the scope of the statute.'" (*Id.* at 493.) Determining what is to be included in General Plans and in the CEQA processes, and what need not be included, is a legislative function.

The Legislature, moreover, clearly has carried out that function with respect to both General Plans and CEQA processes. As for the former, Gov. Code § 65300 requires each city's and each county's legislative body to adopt a "comprehensive, long-term general plan." Section 65302 requires cities and counties to include in their General Plans 7 mandated elements,

including land use, circulation, housing, conservation, open-space, noise and safety.

A General Plan must include the conservation element "for the conservation, development and utilization of natural resources ***including water*** and its hydraulic force, soils, rivers and ***other waters, harbors, fisheries, wildlife, minerals and other natural resources***." (Gov. Code § 65302(d) (emph. added).) The "conservation element" may include, among other items: **Prevention and control of the pollution of streams and other waters**. (*Id.*) Further, under Gov. Code § 65300.9, the Legislature expressed its intent that General Plan requirements are to:

> . . . provide an opportunity for **each city and county** to coordinate its local budget planning and local planning for federal and State program activities, such as community development, with the local land use planning process, **recognizing that each city and county is required to establish its own appropriate balance in the context of the local situation when allocating resources to meet the purposes.** (Gov. Code § 65300.9 (emph. added).)

State law thus specifically allows ***each*** city and county to establish ***its own appropriate balance*** when allocating resources and when planning for any federal and State program activities.

Respondent's imposition of additional CEQA and General Plan requirements on cities is directly contrary to legislative policies, and is a clear infringement on the cities' sovereignty over their regulatory land use authority. (*See Yost,* 36 Cal. 3d at 565 [". . . the front line role in land use planning and zoning is in the hands of the local government."])

Under § 65300, the Legislature both sets the policy requiring comprehensive, long-term planning and establishes the General Plan as the primary device for achieving that policy goal. Sections 65302 and 65352 set the parameters for that primary device and policy goal. Despite this, the Regional Board has attempted to establish further parameters. In so doing, however, Respondent has gone beyond simply "filling in the details" and instead has impermissibly attempted to amend state law governing General Plans, i.e., Respondent has attempted to legislate General Plan element requirements, in violation of the separation of powers doctrine.

Similarly, in enacting CEQA, as discussed above, the Legislature has developed a state policy to develop and maintain a high-quality environment (*see, e.g.,* Pub. Res. Code § 21000 and 21001) and established a procedural framework for evaluating the environmental effect of "projects" to determine the projects' significant effects on the environment. (See discussion,

*infra*.) The Legislature, moreover, has directed the Office of Planning and Research to develop guidelines to implement CEQA. PRC § 21083 requires those guidelines to include criteria for public agencies to use in determining both whether a project may have a significant effect on the environment and when a proposed project must be evaluated through an environmental impact report, as opposed to a lesser degree of environmental scrutiny. Once again, however, Respondent, in Part 4.D of the Permit, has attempted to insert additional requirements into the Legislatively-mandated CEQA review processes, and in so doing, has violated the separation of powers clause.

Respondent's usurpation of legislative power is even more dangerous because it, in effect, "federalizes" CEQA, a state process which the Legislature contemplated would be enforced in the Superior Courts of this state. (PRC § 21167.) But Respondent, by including CEQA provisions in Part 4.D of this Permit, has rendered them subject to enforcement through citizens' suits under the CWA. (33 U.S.C. § 1365.) Thus, a Permittee's compliance with the Permit's CEQA requirements could be litigated in a federal forum, using the CWA's statute of limitations, and not the State's. The Legislature did not grant Respondent the authority to enforce CEQA's terms.

The Subject Permit imposes processes contrary to State law concerning CEQA and General Plans, improperly infringes on the municipalities' land use authority, and represents a violation of the Separation of Powers clause under the California Constitution.

## VIII. CONCLUSION.

Petitioners respectfully request that the issues raised in this Phase I portion of the bifurcated Writ of Mandate Trial all be determined in the Petitioner's favor, in accordance with applicable law, and that at the conclusion of the second phase of the Writ of Mandate Trial, that a judgment and writ of mandate be issued invaliding the Subject Permit on each of the grounds raised herein and in the Coordinated Brief.

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Respectfully submitted

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By: _____
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