STEVE FLEISCHLI, Bar No. 175174
NOAH J. GARRISON, Bar No. 252154
NATURAL RESOURCES DEFENSE COUNCIL, INC.
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300

Attorneys for NATURAL
RESOURCES DEFENSE COUNCIL, INC.
AND HEAL THE BAY

LIZ CROSSON, Bar No. 262178
TATIANA GAUR, Bar No. 246227
LOS ANGELES WATERKEEPER
120 Broadway, Suite 105
Santa Monica, CA 90401
(310) 394-6162

Attorneys for LOS ANGELES
WATERKEEPER
AND HEAL THE BAY

DANIEL COOPER, Bar No. 153576
LAWYERS FOR CLEAN WATER, INC.
1004A O'Reilly Avenue
San Francisco, CA 94129
(415) 440-6520

Attorney for LOS ANGELES
WATERKEEPER

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of NRDC, Los Angeles Waterkeeper, and Heal the Bay, for Review of Action by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting the Los Angeles County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2012-0175; NPDES Permit No. CAS004001	OPPOSITION TO PETITIONS FOR REVIEW

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I. INTRODUCTION

The Natural Resources Defense Council, Heal the Bay, and Los Angeles Waterkeeper (collectively, "Environmental Groups") hereby respond to the petitions for review, SWRCB/OCC File No. A2236(a-l, n-kk), filed by thirty-seven municipalities ("Dischargers") regulated under the 2012 Los Angeles County Municipal Separate Storm Sewer System ("MS4") Permit.[1] The 2012 Permit's retreat from rigorous compliance with Receiving Water Limitations ("RWLs") adopted in the 2001 Los Angeles County MS4 permit[2] renders the Permit unlawful and inadequate to protect the region's waters or public health. The 2012 Permit incorporates several illicit "safe harbors" that create broad exemptions to the RWLs, in certain circumstances rendering the limitations inoperative.[3] Environmental Groups filed a petition with the State Water Resources Control Board ("State Board") as well as a response to a request from the State Board for comment on the 2012 Permit's alternative compliance approach to RWLs,[4] both demonstrating the ways in which the 2012 Permit is insufficient to comply with the federal Clean Water Act ("CWA").[5]

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[1] Regional Water Quality Control Board, Los Angeles Region ("Regional Board"), Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach, Order No. R4-2012-0175, NPDES Permit No CAS004001 (Nov. 8, 2012) ("2012 Permit" or "Permit").

[2] Regional Board, Waste Discharge Requirements for Municipal Separate Storm Sewer 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 Permit No. CAS004001 (Dec. 13, 2001) ("2001 Permit").

[3] For a full explanation of how the permit violates the law, see Memorandum of Points and Authorities in Support of Petition of NRDC, Los Angeles Waterkeeper and Heal the Bay for Review of Action by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting the Los Angeles County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2012-0175; NPDES Permit No. CAS004001 (Dec, 10, 2012) ("Environmental Groups' Petition"), SWRCB/OCC File No. A-2236(m).

[4] NRDC, Los Angeles Waterkeeper and Heal the Bay's Response to State Water Resources Control Board Request for Comment on Receiving Water Limitations and Opposition to Petitions for Review on Limited Receiving Water Limitations Issues (Aug. 15, 2013) ("Environmental Groups' RWL Response").

[5] Environmental Groups incorporate both these documents (Environmental Groups' Petition and Environmental Groups' RWL Response) in their entirety here by reference.

Rather than acknowledging these critical legal deficiencies, Dischargers have petitioned the 2012 Permit's adoption to the State Board claiming the Permit is too stringent, though they fail to identify any actionable legal objections to it. Instead, Dischargers raise a series of arguments that have been repeatedly rejected and resolved against them by the State Board and state and federal courts, including in a direct challenge to the 2001 Permit.[6] Dischargers, more than half of whom were parties to this earlier litigation, universally fail to mention, much less acknowledge the implications of, the state court decisions upholding the 2001 Permit.

Because many of the issues raised by Dischargers were litigated and resolved previously with regard to the 2001 Permit, under the doctrine of collateral estoppel Dischargers cannot raise them again here. Regardless, the record in this matter demonstrates that the aspects of the 2012 Permit challenged by Dischargers are well supported by the evidence and the law, are consistent with the efforts of other regulatory entities around the nation, and were endorsed by the United States Environmental Protection Agency ("EPA") at the Permit's adoption hearing on November 8, 2012.[7] For these reasons and the reasons set forth below, Dischargers' Petitions are without merit and should be denied.

II. FACTUAL BACKGROUND

All parties agree that water discharged from municipal storm drains, including from the Los Angeles County MS4 regulated by the 2012 Permit, commonly contains unsafe levels of bacteria, metals, toxics, and other pollutants. The Regional Board acknowledges:

> Discharges of storm water and non-storm water from the . . . Los Angeles County [MS4s] convey pollutants to surface waters throughout the Los Angeles Region. . . . the primary pollutants of concern in these discharges . . . are indicator bacteria, total aluminum, copper, lead, zinc, diazanon, and cyanide. Aquatic toxicity, particularly during wet weather, is also a concern. . . .
>
> Pollutants in storm water and non-storm water have damaging effects on both human health and aquatic ecosystems. Water quality assessments conducted by the

[6] See *In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 (L.A. Super. Ct. Mar. 24, 2005) ("*L.A. County Mun. Stormwater*"), aff'd. sub nom. *County of Los Angeles v. State Water Res. Control Bd*. (2006) 143 Cal.App.4th 985.

[7] See Testimony of Mr. John Kemmerer, EPA, November 8, 2012 Hearing, 100:19-22.

> Regional Water Board have identified impairment of beneficial uses of waterbodies in the Los Angeles Region caused or contributed to by pollutant loading from municipal storm water and non-storm water discharges.

(2012 Permit, at 13, Finding A.) The Regional Board, State Board, and numerous peer-reviewed studies have demonstrated that this pollution causes increased rates of human illness, harm to the environment, and an economic loss of tens to hundreds of millions of dollars every year from public health impacts alone.[8]

III. DISCHARGERS' CLAIMS

Dischargers challenge the adopted Permit on numerous fronts to argue for more lenient regulation of MS4 discharges. Most of these challenges have been raised by Dischargers in litigation previously and are barred from further review by the doctrine of collateral estoppel. On the merits, each of Dischargers' claims must also fail.

Dischargers' principal challenges to the Permit can be grouped into nine categories:[9]

> (1) Challenges to the Permit's RWLs, which in many cases implicate other sections of the Permit. Dischargers allege that: (a) requiring compliance with water quality standards in MS4 permits violates federal law; (b) requiring compliance with water quality standards conflicts with prior state precedent, including requirements to implement an "iterative process"; and (c) requiring compliance with water quality standards forces Dischargers to perform the "impossible" or exceeds the mandates of federal law such that the Regional Board improperly failed to consider economic and other factors in its decision.[10]

> (2) Challenges to the Permit's total maximum daily load ("TMDL") requirements. Dischargers allege that: (a) requiring compliance with numeric limitations for TMDLs violates, or at least exceeds, federal and state mandates; (b) compliance with numeric limitations for TMDLs is infeasible and/or unachievable; and (c) the Regional Board failed to conduct a Reasonable Potential Analysis for limitations associated with TMDLs.

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[8] See Environmental Groups' Petition, at 4–6.

[9] The thirty-six different petitions, filed by thirty-seven individual Dischargers, raise somewhat differing issues and not every Discharger raises each of these claims. However, for the convenience of the State Board we are addressing the major arguments presented by Dischargers in one response brief.

[10] All these arguments are a species of the claim that the Regional Board may not require compliance with numeric water quality standards of the Dischargers. This claim has been repeatedly rejected by California and federal courts and Environmental Groups demonstrated that Dischargers' challenges to the RWLs were barred by collateral estoppel and otherwise legally deficient previously in Environmental Groups' RWL Response.

(3) claims that the Permit violates California Water Code sections 13241 and 13000;

(4) claims that the 2012 Permit or provisions of the Permit constitute an unfunded state mandate;

(5) claims that the 2012 Permit's RWL and TMDL monitoring requirements exceed federal requirements;

(6) claims that prohibitions on non-stormwater discharges (or urban runoff) violate federal and state law;

(7) objections to the Permit's joint responsibility structure;

(8) claims that the 2012 Permit infringes on local land use decision-making authority; and,

(9) claims that the Permit violates the California Environmental Quality Act ("CEQA").

None of Dischargers' arguments has merit—Dischargers misunderstand the facts, the law, or both. For the reasons set forth below, their petitions must be denied.

IV. ARGUMENT

A. Many of Dischargers' Challenges are Barred by Collateral Estoppel

Dischargers' claims objecting to the 2012 Permit's RWL requirements, as well as several other arguments, have been flatly rejected by California State courts in litigation previously *brought by the Dischargers*. Under California law, a party is collaterally estopped from relitigating an issue if: "(1) the issue decided in a prior adjudication is identical with that presented in the action in question; *and* (2) there was a final judgment on the merits; *and* (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. [Citation.]" (*Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1688.) All of these conditions are met with regard to Dischargers' claims discussed below; pursuant to the doctrine of collateral estoppel, the board should reject these challenges here.[11]

[11] Collateral estoppel principles are applicable to administrative adjudicatory proceedings. (See *Berg v. Davi* (2005) 130 Cal.App.4th 223, 231 (trial court properly upheld application of collateral estoppel in an administrative proceeding to bar reconsideration of issues decided in a prior court decision); State Board Water Rights Order 2006-0008 EXEC, In the Matter of the Petition for Reconsideration of the Kings River Water Association Regarding Water Right Fee Determinations

1. Dischargers' Challenges to RWLs in the 2012 Permit are Barred by Collateral Estoppel

Dischargers central complaints about the Permit's RWL provisions—that requiring compliance with water quality standards in MS4 permits violates federal law, that it conflicts with prior state precedent, and that it is "impossible" or exceeds the mandates of federal law have been previously raised by the Dischargers, and rejected, by a California state court in *L.A. County Mun. Stormwater*, and cannot be retried here.[12]

a. A California Superior Court Already Held that Requiring Strict Compliance with Water Quality Standards in the Permit is Consistent with the Clean Water Act

Dischargers argue now—as they did in previous litigation challenging the 2001 Permit—that the MS4 Permit RWL provisions requiring compliance with numeric water quality standards violate federal law.[13] However, in *L.A. County Mun. Stormwater*, the court explicitly rejected Dischargers' contention.

Citing *Defenders of Wildlife v. Browner*, the court concluded that "EPA [or the State] has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." Accordingly, the court upheld the 2001 Permit's RWLs, which prohibited "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." (*L.A. County Mun. Stormwater*, at 5.) The 2012 Permit incorporates virtually identical RWLs,[14] stating that "Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited." (2012 Permit, at Part

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for Fiscal Year 2005-2006, at 5–6 (denying water association's petition for reconsideration of State Board decision under collateral estoppel).)

[12] For a full discussion of how Dischargers' claims regarding the 2012 Permit's RWLs are barred by the doctrine of collateral estoppel, see Environmental Groups' RWL Response, at 26-37. For the State Board's convenience, we present a summary of these arguments here.

[13] See Cities of Duarte and Huntington Park, Petition for Review, SWRCB/OCC File No. A-2236(k), ("Cities of Duarte and Huntington Park Petition"), December 7, 2012, at 16; see also, City of Arcadia, Petition for Review, SWRCB/OCC File No. A-2236(j) ("City of Arcadia Petition"), December 7, 2012, at 5.

[14] See Environmental Groups' RWL Response, at 29–31.

V.A.1.) In relevant part, the RWLs in the 2012 Permit require the same result from Dischargers as did the RWLs of the 2001 Permit—Dischargers must meet water quality standards.[15] This requirement has been litigated and upheld in a California court, and Dischargers may not challenge it again here.

b. The California Superior Court has Held that Requiring Compliance with Water Quality Standards is Consistent with the "Iterative Process" and Prior State Board Precedent

Dischargers also argue that the 2012 Permit's RWLs conflict with state precedent mandating implementation of the "iterative process" in MS4 permits.[16] This claim was previously raised by Dischargers, and rejected, in litigation over the 2001 Permit's RWLs. The iterative process requires that "municipalities must report instances where they cause or contribute to exceedances [of water quality standards], and then must review and improve BMPs so as to protect the receiving waters."[17] Requirements to follow this process were incorporated in the 2001 Permit under Parts 2.3 and 2.4, and are incorporated in the 2012 Permit under Parts V.A.3 and V.A.4.

Dischargers in fact make the same arguments that the iterative process must be construed as providing a "safe harbor" under State Board Order 99-05 (establishing RWL requirements for MS4 Permits in California), State Board Order 2001-15 (finding another regional water board appropriately required compliance with water quality standards), and a letter regarding implementation of the 2001 Permit from then Regional Board Chair Francine Diamond, as they

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[15] Moreover, this requirement is in keeping with the CWA's mandate that all permits issued under the National Pollutant Discharge Elimination System ("NPDES") program, including MS4 permits covering discharges from municipal storm sewers, must ensure that discharges do not cause or contribute to a violation of water quality standards established to protect designated uses for all waters within a state's boundaries. (33 U.S.C. §§ 1311(a); 1313; 1341(a); 1342(p); see also State Board Order No. WQ 99-05, *Own Motion to Review the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03.*)

[16] *See, e.g.*, City of El Monte, Petition for Review, SWRCB/OCC File No. A-2236(u) ("City of El Monte Petition"), December 10, 2012, at 16; Cities of Duarte and Huntington Park Petition, at 14–15, 23–25; City of Carson, Petition for Review, SWRCB/OCC File No. A-2236(y) ("City of Carson Petition"), December 10, 2012, at 14; City of Arcadia Petition, at 6.

[17] State Board Order No. WQ 2001-15, *In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*.

maintained in litigation on the 2001 Permit.[18] Dischargers claim that if a Discharger is in compliance with the iterative process it would be deemed in compliance with the Permit's RWLs, regardless of whether water quality standards are met. These arguments were explicitly rejected by the *L.A. County Mun. Stormwater* court, which ruled that the Regional Board's decision to incorporate RWLs that require compliance with water quality standards was "consistent with State Board orders WQ 2001-15 and WQ 99-05," as well as the letter from Francine Diamond. (*L.A. County Mun. Stormwater*, at 6.) In fact, the court found no conflict between the Permit's strict requirement to meet water quality standards, on the one hand, and the Permit's incorporation of the iterative process as a procedure Dischargers must follow to resolve violations of those standards, on the other. (*Id*.)[19] Dischargers are clearly prohibited by collateral estoppel principles from raising the same claim, on the same grounds, to challenge the 2012 Permit's RWLs.

c. The California Superior Court Found that the Permit's RWL Requirements Neither Exceed Federal Requirements nor Require the Impossible

Again repeating claims raised in *L.A. County Mun. Stormwater*, Dischargers argue that requirements to meet numeric water quality standards are technically infeasible,[20] or are improper because these limitations, which have been in place since 2001, are "impossible" for permittees to meet. They claim that as a result, the RWLs exceed the CWA's requirement that MS4 permits

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[18] See *L.A. County Mun. Stormwater* at 4–6.

[19] Petitioners Cities of Carson, Irwindale, Pico Rivera, and others attempt to frame the argument as new, incorrectly asserting that the Ninth Circuit Court of Appeals recently stated that "there is no 'textual support' for the iterative process in the 2001 [Permit]." (City of Carson Petition, at 15; City of Irwindale, Petition for Reviw, SWRCB/OCC File No. A-2236(gg), December 10, 2012, at 15; City of Pico Rivera, Petition for Review, SWRCB/OCC File No. A-2236(x), December 10, 2012, at 14.) This claim entirely misrepresents the Ninth Circuit's holding. The Court stated that there was no "textual support" for the proposition that compliance with the iterative process "shall forgive non-compliance with the discharge prohibitions." (*Natural Res. Def. Council, Inc. v. Cnty. of Los* Angeles, (9th Cir. 2011) 673 F.3d 880, 897.) The court explained, "As opposed to absolving noncompliance . . . the iterative process ensures that if water quality exceedances 'persist,' despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP." (*Id*.) The Ninth Circuit decision creates no new issue for review by the State Board here.

[20] Many Dischargers claim infeasibility with regard to requirements to implement WQBELs as well as RWLs. (*See, e.g.*, City of Carson Petition, at 9.)

"shall require controls to reduce the discharge of pollutants to the maximum extent practicable" or "MEP," (33 U.S.C. § 1342(p)(3)(B)(iii)), triggering further review under state law.[21] However, reviewing the 2001 Permit's virtually identical RWL requirements, the Los Angeles County Superior Court concluded that the "Regional Board conducted considerable research and review to ensure that the best management practices ('BMPs') were available and reasonable" and that compliance was possible because there were "BMPs available to meet the terms of the Permit," including the permit's RWLs. (*L.A. County Mun. Stormwater*, at 8, 9.) The court explicitly stated that "there was no issue of impossibility" on these nearly identical claims, (*id*. at 9), and that "the terms of the permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged [RWL] provisions." (*Id*. at 7–8.) This issue has been litigated, and resolved against Dischargers.

2. A California Court Already Held that Use of Numeric Limitations in the Permit, such as those in the Permit's Water Quality Based Effluent Limits ("WQBELs") Incorporating TMDLs, is Consistent with Federal Regulations Under the CWA

Dischargers claim alternatively that "strictly complying with the various waste load allocations set forth in the TMDLs . . . is not achievable," or that the "imposition of the various numeric limits as strict [WQBELs] . . . attempt[s] to impose an obligation that goes beyond the requirements of federal law."[22] TMDLs, which are a means of bringing waters that are not currently meeting water quality standards into compliance, are simply another mechanism for ensuring compliance with those standards.[23] As discussed above with regard to RWLs, the court

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[21] See Cities of Duarte and Huntington Park Petition, at 24; City of Arcadia Petition, at 5 ("Holding permittees in violation of standards, which they cannot meet is unfair, and contrary to" the MEP standard."). While these claims lack any merit, the 2012 Permit's RWL provisions would be lawful even if they imposed conditions that exceed federal requirements for MS4 permits. (See section IV.B.1; B.3.c, below.)

[22] Cities of Duarte and Huntington Park Petition, at 31–32; see also, City of Arcadia Petition, at 9–10; City of Sierra Madre, Petition for Review, SWRCB/OCC File No. A-2236(cc) ("City of Sierra Madre Petition"), December 10, 2012, at 6–9.

[23] See 33 U.S.C. § 1313(d)(1)(C) (TMDLs must be "established at a level necessary to implement the applicable water quality standards"); *Anacostia Riverkeeper, Inc. v. Jackson*, (D.C. Dist. 2011) 798 F. Supp. 2d 210, 224 ("[T]he CWA requires a TMDL that sets load limits on a pollutant

in *L.A. County Mun. Stormwater* held that "EPA [or the State] has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." (*L.A. County Mun. Stormwater*, at 5.) To the extent that Dischargers are challenging the use of numeric limits in the permit to meet water quality standards, in whatever form, this claim has already been argued by Dischargers and rejected by California courts.

3. A California Court has Already Held that MS4 Permit Requirements Do Not Infringe Upon Dischargers' Land Use Authority

Dischargers claim that the 2012 Permit intrudes on local land use authority because it "relies on federal authority under the CWA to impose land use regulations and dictate specific methods of compliance."[24] Dischargers raised similar claims previously in both *L.A. County Mun. Stormwater* and on appeal in *County of Los Angeles v. California State Water Res. Control Bd.* (2006) 143 Cal.App.4th 985. The appellate court ruled against Dischargers, holding that "[f]ederal law requires that permits include controls to reduce pollutant discharge in areas of new development and significant redevelopment." (*County of Los Angeles,* 143 Cal.App.4th at 1003.) Moreover, the court specifically noted that Dischargers' argument had "no merit" because there is no intrusion on local authority where "the regional boards' decisions carry out federal and state water quality mandates resulting from express legislative action, as the challenged orders in this case in fact do." (*Id.*) As a result, under principles of collateral estoppel, Discharges are precluded from raising this issue again.

4. A California Court has Already Held that MS4 Permit Requirements do not Violate the California Environmental Quality Act

Dischargers also claim that the 2012 Permit's Planning and Land Development Program requirements, which require use of low impact development ("LID") and establish design criteria for new development and redevelopment projects to reduce runoff volume, "are an attempt to override the requirements set forth under [CEQA], and as such, are provisions that are plainly

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sufficient to reduce contamination to levels necessary to satisfy the narrative and numeric water quality criteria and protect all designated uses applicable to the water body.")

[24] City of Arcadia Petition, at 15–16.

preempted by State law."[25] Dischargers further complain that "the Permit dictates the terms and results of environmental review, without regard for CEQA's provisions, and eliminates a local governmental agency's discretion [under CEQA] to consider and approve feasible alternatives or mitigation measures."[26]

Once again Dischargers seek to revive a claim they have raised and lost before California courts in the past. The same arguments were rejected by the court in *County of Los Angeles*, which held that, the "state and regional boards are vested with the primary responsibility of controlling water quality," and "[f]ederal law requires that permits include controls to reduce pollutant discharge in areas of new development and significant redevelopment—the very area where regional board review occurs." (143 Cal.App.4th at 1003.)

As the trial court in *L.A. County Mun. Stormwater* noted, "the Legislature intended CEQA to be *an* environmental review process, not the *only* one," and that "Petitioners present no authority to demonstrate" a legislative intent "that CEQA occupies the field of environmental review." (*L.A. County Mun. Stormwater*, at 12 (emphasis in original).) Accordingly, the Court explained, "the Regional Board can require additional environmental reviews . . . and it can specify and require actions to ameliorate the impacts of polluted runoff without offending CEQA." (*Id*.) Even if there were a conflict between the two, however, the appellate court correctly noted that "the [CWA] supersedes all conflicting state and local pollution laws." (*County of Los Angeles*, 143 Cal.App.4th at 1003.) Dischargers' recycled CEQA arguments are therefore barred by collateral estoppel and must fail.

5. The Prior Litigation Resulted in a Final Judgment on the Merits and the Parties in this Action are the Same or in Privity with those in *L.A. County Mun. Stormwater* and *County Of Los Angeles*

Litigation of all the above issues resulted in a final judgment on the merits. The trial court decision in *L.A. County Mun. Stormwater* was upheld by the California Court of Appeal in *County*

[25] Cities of Duarte and Huntington Park Petition, at 57.
[26] *Id*., at 58.

of Los Angeles, (143 Cal.App.4th 985), and the California Supreme Court denied certiorari on February 14, 2007, making the judgment final.

The parties to the prior litigation on the 2001 Permit are also the same in this petition or are in privity with them. As discussed in Environmental Groups' RWL response brief, privity "refers 'to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel.' [citation]." (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1521.)

Twenty-three of the thirty-seven cities that filed petitions in this matter litigated the *L.A. County Mun. Stormwater* case. (See *L.A. County Mun. Stormwater*.) Thus there is no dispute that these twenty-three cities are barred from re-litigating the previously decided issues. The fourteen cities that did not litigate the previous case[27] are also "sufficiently close" with the remaining Dischargers so as to justify the application of collateral estoppel. These fourteen remaining cities were named as "real parties in interest" by the litigants in *L.A. County Mun. Stormwater*.[28] As real parties in interest, the remaining Dischargers possessed the right to sue over the 2001 Permit, and stood to take part in any relief from that lawsuit.[29] Naming the remaining Dischargers as real parties in interest satisfied privity because the parties in *L.A. County Mun. Stormwater* served as *actual* representatives for the remaining Dischargers. (See *Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 719 (privity was satisfied where one party represented other party's interest in earlier action such that the former party was a "virtual representative of the latter").)

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[27] These cities include the Cities of: Agoura Hills, Bradbury, Culver City. Duarte, El Monte, Glendora, Hidden Hills, Huntington Park, Inglewood, Lynwood, Manhattan Beach, Redondo Beach, San Marino, and South El Monte.

[28] Cities of Arcadia et al., Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, in *L.A. County Mun. Stormwater*, No. BS 080548 (L.A. Super. Ct. Mar. 24, 2005) (filed Jan. 17, 2003) ("Arcadia Complaint").

[29] A real party in interest is one whose interests have been injured or damaged and is therefore entitled to maintain a cause of action and may seek relief. (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.)

Even if the remaining Dischargers had not been explicitly named as real parties in interest, these cities were in privity with the parties because all the cities are regulated under the same municipal stormwater permit, thus sharing a common interest, financial and otherwise, in litigation concerning the stormwater permit and the questions of law and fact resolved there. (See *Cal. Physicians'*, 163 Cal.App.4th at 1522 ("identity or community of interest with . . . the losing party in the first action" is required by due process).) In light of this, a finding of privity here would undeniably serve "the underlying fundamental principles of the collateral estoppel doctrine," (*Mooney*, 138 Cal.App.4th at 721), by putting an end to Dischargers' repetitive claims, raised yet again in their challenges to the 2012 Permit.

B. Dischargers' Claims Do Not Raise an Actionable Legal Objection to the Permit and Must Fail on their Merits

1. Dischargers' Challenges to the 2012 Permit's RWLs Mischaracterize the Requirements of Federal and State Law

Apart from being barred under collateral estoppel, Dischargers' arguments regarding the Permit's RWLs fail on their merits. First, Dischargers claim that federal law precludes the Regional Board from incorporating requirements to meet numeric water quality standards.[30] This claim is directly contradicted by the court's holding in *Defenders of Wildlife*. (191 F.3d at 1165–67.) The *Defenders* court explicitly acknowledged that the permitting agency "has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." (*Id*. at 1166.) California courts, specifically referencing requirements to meet numeric water quality standards in MS4 Permits, have likewise held that "the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'" (*Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.* (2004) 124 Cal.App.4th 866, 883.) The Regional Board's adoption of requirements to strictly comply with numeric water quality standards is well supported by the law.

[30] *See, e.g.*, Cities of Duarte and Huntington Park Petition, at 42.

Second, Dischargers insist that the 2012 Permit's RWLs conflict with prior State Board or Regional Board precedent. This claim entirely misrepresents the Orders on which Dischargers rely. For example, Dischargers state that "the Permit seeks to 'modify the iterative process,' contrary to the process set forth under State Board Order No. 99-05 . . . particularly with the inclusion of language . . . that would hold Permittees in violation of the Permit, irrespective of their 'good faith efforts' to comply and implement" the iterative process.[31] These claims fail to acknowledge that the basis for issuing Order No. 99-05 was EPA's objection to permit language incorporating a good faith safe harbor into the iterative process. The State Board's response through Order No. 99-05 was to specifically require RWL language *without* a good faith safe harbor for all future MS4 permits.[32] Exclusion of a safe harbor provision under the 2012 Permit is thus consistent with State Board Order 99-05.

Nor do the other documents or precedential orders cited by Dischargers support their claims. Dischargers reliance on State Board Order 2001-15 for the proposition that the State Board "'will generally not require 'strict adherence' with water quality standards through numeric effluent limitations and [will] continue to follow an iterative approach'"[33] is misplaced. Order No. 2001-15 itself points out that "[e]xceptions to this general rule are appropriate" where conditions, such as determined by the Regional Board for Los Angeles, warrant.[34] Moreover, as California

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[31] Cities of Duarte and Huntington Park Petition, at 15–16; see also, City of Arcadia Petition, at 6.

[32] See Order 99-05, at 1; Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 9.

[33] City of Arcadia Petition, at 6 (quoting State Board Order No. 2001-15, at 8).

[34] Order 2001-15, at 8 n. 16. Dischargers also claim that the State Board, in its recently adopted MS4 permit for the California Department of Transportation, "found that '[i]t it not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.'" (City of Arcadia Petition, at 6.) Dischargers' claim, however, incorrectly attributes the referenced quotation to the State Board; the quoted passage is instead taken from a 7-year old "Blue Ribbon Panel" report referenced to by the State Board. The Regional Board has addressed Discharger claims based on this report by pointing out that the Dischargers "have misconstrued the findings of the . . . Blue Ribbon panel. The panel focused on concerns about unpredictability of BMP performance, which might suggest that calculating technology based effluent limitations is not feasible but has no bearing on whether NPDES permits must include provisions that require

courts have explained, there is no inherent conflict between the Regional Board requiring strict compliance with numeric water quality standards, and simultaneously mandating use of the iterative process as "the procedure the Board intends to implement to resolve any violations of those requirements." (*L.A. County Mun. Stormwater*, at 6.) Dischargers' argument is simply not supported by prior State Board precedent or case law.

Finally, Dischargers claim that because the RWLs are either impossible to implement or more generally exceed the requirements of federal law, they therefore trigger requirements (discussed in further detail below) under California Water Code section 13241 to consider economics or other factors in establishing permit conditions. A California court has already found that there are "BMPs available to meet" virtually identical RWL provisions in the 2001 Permit and that the RWLs present "no issue of impossibility" for compliance. (*L.A. County Mun. Stormwater*, at 9.) Moreover, Dischargers offer only vague assertions, but cite no valid authority and present no evidence to support their position that it is impossible to comply with RWLs.[35]

2. Dischargers' Challenges to TMDLs incorporated into the 2012 Permit Mischaracterize the Requirements of Federal and State Law

Dischargers challenge the Permit's provisions incorporating TMDL WLAs on several fronts. First, they claim that requiring compliance with numeric limitations for TMDLs in the form of WQBELs and RWLs is inappropriate and beyond federal and state mandates. Second, they complain that compliance with numeric limitations for TMDLs is infeasible and/or unachievable. Third, they assert that the Regional Board failed to conduct a Reasonable Potential Analysis for limitations associated with TMDLs. These arguments all must fail.

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compliance with water quality standards (expressed as receiving water limitations in a permit)." (Regional Board, Response to Comments, Receiving Water Limitations Matrix, at B-4.)

[35] *See, e.g.*, Cities of Duarte and Huntington Park, at 24 (asserting, "Municipalities do not generate the urban runoff, and cannot close a valve to prevent the rain from falling or runoff from entering the expansive storm drain system. As such, to, in effect, conclude that municipalities must somehow develop BMPs . . . to meet numeric limits, is to require municipalities to develop and implement impracticable BMPs, *i.e.*, BMPs that are not technically and/or economically feasible.")

a. Numeric WQBELs are Permissible and Consistent With State and Federal Requirements and Prior Litigation on this Permit

Dischargers claim that "imposing numeric limits on municipalities" to implement TMDLs "in lieu of allowing for deemed compliance through the iterative BMP process, is a significant change in permit-writing policy in California."[36] Dischargers now use the incorporation of TMDLs into the Permit as a vehicle to recycle already-failed arguments. Dischargers ignore that compliance with numeric water quality standards, with or without TMDLs as the implementing mechanism, has been required since the adoption of the 2001 Permit.[37] Further, this claim disregards that where a TMDL has been established, the Regional Board is required by federal law to incorporate it into the Permit.

Where waters fail to meet water quality standards and are considered impaired, states must establish TMDLs, which set a daily limit on the discharge of each pollutant necessary to achieve the water quality standards. (33 U.S.C. § 1313(d)(1).) Effectively, the CWA relies on TMDLs to restore these water bodies—TMDLs establish a clear and scientifically-driven pathway towards protecting designated beneficial uses for public health and aquatic life through bringing these waters back in compliance with water quality standards. To achieve this goal, a TMDL "assigns a *waste load allocation (WLA)* to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which a NPDES permit is required." (*Communities for a Better Env't v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313, 1321 (emphasis in original).) "Once a TMDL is developed, effluent limitations in NPDES permits [such as the 2012 Permit] must be consistent with the WLA's in the TMDL." (*Id.* at 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B).)[38]

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[36] Cities of Duarte and Huntington Park Petition, at 23; City of Arcadia Petition, at 4–5.

[37] *L.A. County Mun. Stormwater*, at 7. Notably, Dischargers themselves have acknowledged the enforceability of water quality based requirements in the 2001 Permit. (See Petitioners' Coordinated Opening Trial Brief on Certain Phase I Writ of Mandate Issues in *L.A. Mun. Stormwater*, (filed March 22, 2004) at 10–17.)

[38] See Memorandum from James A. Hanlon and Denise Keehner, EPA, to Water Management Division Directors, Regions 1–10, re: Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm

The TMDL requirements are nothing new for the Dischargers or this Permit—Dischargers have been required to meet water quality standards since 2001. Moreover, inclusion of a numeric WQBEL is proper. Addressing Dischargers' claims that numeric limits are out of the norm, the U.S. EPA has stated that, "[w]here the TMDL includes WLAs for stormwater sources that provide numeric pollutant load . . . objectives, the WLA should, where feasible, be translated into numeric WQBELs in the applicable stormwater permits."[39] As the record in this matter demonstrates, the Regional Board's adoption of WQBELs and RWLs to implement TMDLs, while flawed due to the inclusion of unlawful safe harbors,[40] is otherwise well supported by the evidence and the law, and consistent with state and federal regulations and precedent.

b. Numeric WQBELs are Required Because the Dischargers Own Undefined Approach is Insufficient to Ensure Compliance with Water Quality Standards and Establishing Numeric WQBELs is Feasible

Dischargers additionally argue that the use of WQBELs, and numeric WQBELs in particular, is inappropriate and infeasible.[41] As discussed above, EPA has stated that where a TMDL provides a numeric WLA, it should be translated to a numeric WQBEL for incorporation into an applicable permit.[42] Further, because WQBELs must be consistent with established WLAs, it follows that numeric pollutant objectives in WLAs be translated into numeric WQBELs for municipal discharges to ensure the expected water quality outcome. (See 40 C.F.R. § 122.44(d)(1)(vii)(B); 2012 Permit, Fact Sheet, at F-34.)[43] Finally, where certain factors exist, WQBELs expressed as numeric limits are *required*. (40 C.F.R. § 122.44(d)(1); 122.44(k)(3).)

Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 12, 2010), ("EPA Hanlon Memo"), at 3.

[39] See EPA Hanlon Memo, at 3.

[40] See Environmental Groups' Petition, at 15–23; RWL Response, at 17–26.

[41] City of Arcadia Petition, at 6–9; City of Carson Petition, 7–9; City of Sierra Madre Petition, 6–8.

[42] EPA Hanlon Memo, at 3. Use of numeric WQBELs for municipal stormwater is authorized by the CWA under 33 U.S.C. section 1342(p)(3)(B)(iii), because "EPA [or State] has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants." (See *L.A. County Mun. Stormwater,* at 5 (citing *Defenders of Wildlife v. Browner,* 191 F.3d at 1166).)

[43] See also U.S. EPA NPDES Permit Writers' Manual (Sept. 2010) EPA No. EPA-833-K-10-001 ("EPA NPDES Permit Writers' Manual"), Chapter 6; EPA Hanlon Memo, at 2 (EPA also

Confusing the proper standard, Dischargers claim that the Regional Board must justify its use of numeric WQBELs as opposed to allowing use of BMP-based WQBELs.[44] However, the opposite is true. Permit requirements may only rely upon BMP-based limits if: 1) the BMPs are adequate to achieve water quality standards, and 2) numeric effluent limitations are infeasible. (40 C.F.R. §§ 122.44(d)(1), 122.44(k)(3).)[45] The Dischargers have not demonstrated that their own undefined BMP-based approach will achieve water quality standards, nor, as discussed below, have Dischargers shown the WQBELs are infeasible.

Dischargers argue that "strictly complying with the various waste load allocations set forth in the TMDLs . . . is not achievable by the Permittees" and "the imposition of the various numeric limits as strict [WQBELs]. . .is [] an attempt to impose an obligation that goes beyond the requirements of federal law. . . ."[46] Neither of these contentions is correct. Although the Regional Board failed to properly implement the WLAs due to the 2012 Permit's inclusion of safe harbors and illegal compliance mechanisms, its use of numeric WQBELs was otherwise not only legal, but required. The State Board and EPA have repeatedly emphasized that "infeasibility" means "the

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recommends that permit writers include numeric WQBELs to meet water quality standards to clarify permit requirements and "improve accountability and enforceability.")

[44] City of Carson Petition, at 7–8.

[45] See also Memorandum from James A. Hanlon and Robert H. Wayland to Water Division Directors, Regions 1-10, "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (Nov. 22, 2002), at 2 ("When a non-numeric water quality-based effluent limit is imposed, the permit's administrative record, including the fact sheet when one is required, needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL,") (citing 40 C.F.R. §§ 124.8, 124.9, and 124.18.)

[46] Cities of Duarte and Huntington Park Petition at 31–32; see also City of Arcadia Petition at 9–10; City of Sierra Madre Petition, at 8 ("In the face of the recognized extreme variability of effluent levels in storm water discharge, measuring compliance by strict numeric values results in unfair enforcement and imposes liability on permittees for discharges over which they have no control.")

ability or propriety of establishing" numeric limits; it does not refer to the feasibility of compliance.[47]

Over the last decade, 33 TMDLs for the Los Angeles region were developed and WLAs were specifically assigned to MS4 discharges. Through the development of the 2012 Permit, the Regional Board determined it feasible to use these numeric WLAs to derive numeric WQBELs. (2012 Permit, Fact Sheet, at F-34.) The Dischargers' arguments regarding the appropriateness and feasibility of including numeric WQBELs should therefore be rejected.

c. TMDLs and their Associated WLAs Incorporated Into the Permit Properly Include Reasonable Potential Analyses

Dischargers argue that the Regional Board failed to conduct a Reasonable Potential Analysis ("RPA"), to determine that discharges have the reasonable potential to cause or contribute to a water quality excursion, in incorporating TMDL WLA-based effluent limitations into the 2012 Permit.[48] In doing so, Dischargers ignore the express terms of the TMDL-based effluent limitations, which not only establish the Dischargers' contribution to impairment, but disaggregate loads and assign specific WLAs to Dischargers to end that impairment.

Federal Regulations require that effluent limitations established under section 1313 of the CWA must control all pollutants which "are or may be discharged at a level that will cause, or have the reasonable potential to cause, or contribute to an excursion above any State water quality standards. . . ." (40 C.F.R. § 122.44(d)(1)(i).) Conducting an analysis to determine reasonable potential, which can be done quantitatively or non-quantitatively, is a prerequisite to the development of TMDLs and WLAs, and to their incorporation into the Permit.[49] "Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality excursion, EPA recommends that, where feasible, the NPDES

[47] State Water Board, Order No. WQ 2006-0012, *In the Matter of the Petition of Boeing Company*, at 15; see also Testimony of Mr. John Kemmerer, EPA, October 5, 2012 Hearing, at 224:17–225:12.
[48] City of Arcadia Petition, at 6–9.
[49] EPA NPDES Permit Writers' Manual, at 6–23.

permitting authority . . . include numeric effluent limitations as necessary to meet water standards."[50] Further, "[E]PA recommends that WLAs for NPDES-regulated stormwater discharges should be disaggregated into specific categories (e.g., separate WLAs for MS4 and industrial stormwater discharges) to the extent feasible based on available data and/or modeling projections."[51]

Contrary to the Dischargers' assertions, the Regional Board appropriately conducted an "RPA" and disaggregated discharges according to municipal category with respect to WLAs incorporated in the 2012 Permit. Every receiving water within the Dischargers' jurisdictions and regulated by the 2012 Permit is designated as impaired for one or more pollutants and has one or more TMDLs adopted by the Regional Board and/or EPA. (See Permit, Ex K.) In incorporating these TMDLs into the Permit,[52] the Regional Board disaggregated the WLAs, and imposed effluent limitations consistent with each WLA, either to all MS4 Dischargers in a particular watershed as a category, or for the Trash TMDL, Discharger by Discharger. (See Permit, Ex L-R.) Both in developing the TMDLs, and in incorporating them into the Permit, the Regional Board and/or EPA not only determined that regulated discharges have the reasonable potential to cause or contribute to WQS excursions, but that those discharges *in fact* contribute to excursions and impairment. It then set effluent limits to bring Dischargers into compliance. Dischargers' arguments that the 2012 Permit failed to include an RPA when the TMDLs were incorporated are thus flatly incorrect and must be rejected.

[50] EPA Hanlon Memo, at 2.
[51] *Id*. at 5.
[52] Environmental Petitioners again note that the safe harbors and compliance schedules provided in the Permit are inconsistent with the TMDLs and render the 2012 Permit illegal. See Environmental Groups' Petition and Environmental Groups' RWL Response.

d. Dischargers' Attempts to Attack Approved TMDLs Through Challenges to the 2012 Permit are Impermissible

Dischargers may not bootstrap an attack on previously-approved TMDLs by challenging the Permit's WQBEL and RWL provisions incorporating TMDL WLAs. As discussed above, "[o]nce a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLAs in the TMDL." (*Communities for a Better Environment*, 132 Cal.App.4th at 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)); see also *City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392, 1404.) Any modification to these provisions in the TMDLs incorporated into the 2012 Permit would constitute an unlawful attack on the underlying TMDLs themselves and other prior actions by the Regional Board. During the permit process the Regional Board does not have authority to reanalyze the TMDLs, but instead is required to ensure that the Permit is consistent with them and their WLAs.

Moreover, since the Dischargers did not challenge the TMDLs themselves (or lost challenges and are barred by collateral estoppel)[53], any request by the Dischargers to revisit these issues is barred by the three-year statute of limitations applicable to challenges of Basin Plan amendments such as the state-developed TMDLs (see *California Ass'n of Sanitation Agencies v. State Water Res. Control Bd*. (2012) 208 Cal.App.4th 1438, 1454), or the six-year statute of limitations for federally-developed TMDLs. (See *American Canoe Ass'n, Inc. v. U.S. E.P.A.*, 30 F.Supp.2d 908, 925.) [54] Furthermore, Dischargers' attacks on TMDLs should be prohibited by the equitable doctrine of laches.[55]

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[53] See *City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392.

[54] The statute of limitations has passed for at least several of the state-developed TMDLs which were incorporated into the Permit, such as for example the Santa Monica Bay Beaches Bacteria TMDL for summer dry weather which became effective in 2003 and the federally-developed TMDLs, such as Santa Clara River Reach 3 Chloride TMDL, which became effective in 2003.

[55] Laches "consists of a failure on the part of a plaintiff to assert his rights in a timely fashion accompanied by a period of delay with consequent results prejudicial to the defendant." (*Rouse v. Underwood* (1966) 242 Cal.App.2d 316, 323; see also *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359 (laches consists of "unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting

3. The Mandates of Federal and State Law Make Water Code Section 13241 and Other Provisions of State Law Inapplicable

Dischargers incorrectly assert that the Regional Board was required, but failed, to consider economic factors under Water Code sections 13000, 13241 and 13623 when adopting the 2012 Permit.[56] Specifically, Dischargers claim that numerous Permit provisions were subject to economic analysis because they exceed federal mandates, including: the Permit's RWL requirements in Part V; WQBEL requirements in Part IV.A.; TMDL Provisions in Part VI.E which incorporate TMDL WLAs into the Permit as numeric WQBELs; and, Discharge Prohibitions in Part III.A regulating non-stormwater runoff. Dischargers also challenge the Permit's provisions requiring compliance with and monitoring of TMDL WLAs in the receiving water and the Permit's minimum control measures ("MCM") provisions.[57] Because, Dischargers' contend, the Regional Board did not analyze these Permit provisions under Water Code sections 13000, 13241 and 13623, the Permit was adopted in violation of state law and is therefore invalid. As discussed in detail below, these arguments lack merit. Further, even if the Regional Board was required to review the Permit under these sections of the Water Code, the Regional Board actually did perform any necessary analysis.

a. Water Code Section 13000 Does Not Impose Obligations on the Regional Board

Dischargers assert that the Regional Board has violated its obligations under Section 13000 of the Porter-Cologne Act to consider economic impacts.[58] However, the California Court of Appeal has recently explained that this section imposes no such obligation on the Board. Rather, this section expresses a "precatory declaration of intent" and "[a] statute containing 'a general

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from the delay").) The public, as well as the Regional Board, has been prejudiced by expending significant resources—through multiple hearings, expending staff time and utilizing other resources—in reliance on the validity of these TMDLs, some of which were established more than a decade ago.

[56] City of Agoura Hills Petition, at 9; City of Arcadia Petition, at 11–12; Cities of Duarte and Huntington Park Petition at 41–51; City of Carson Petition at 28–29;

[57] *Id.*

[58] Cities of Duarte and Huntington Park Petition, at 41–51; City of Arcadia Petition, at 11.

statement of legislative intent . . . does not impose any affirmative duty that would be enforceable'." (*City of Arcadia v. State Water Res. Control Bd.* (2010) 191 Cal.App.4th 156, 176 (citations omitted).) Consequently, Dischargers' arguments that the Regional Board has failed to comply with its duties under Section 13000 during the adoption of this Permit lack basis and must be rejected.

b. Dischargers Fail to Demonstrate Economic Analysis under Sections 13241 and 13263 of the California Code as Required

Dischargers claim that multiple sections of the Permit exceed federal requirements, as a result triggering further review under Water Code section 13241. However, Dischargers misconstrue the requirements of the CWA and resort to conclusory assertions without establishing that any provision of the Permit in fact exceeds the requirements of federal law.

Section 13241 requires the Regional Board to consider a list of factors in MS4 permitting decisions, including "[e]conomic considerations," and the "need for developing housing within the region." (Cal. Wat. Code § 13241.)[59] Yet, section 13241 applies only when the requirements of federal law are exceeded—a condition that Dischargers fail to establish has occurred. As the California Supreme Court held in *City of Burbank v. State Water Resources Control Board*, Regional Boards are forbidden from considering state law factors, such as those under section 13241, "if so doing would result in the dilution of the requirements set by Congress in the Clean Water Act." ((2005) 35 Cal.4th 613, 626 ("*Burbank*").) This ruling of the California Supreme Court dictates that section 13241 does not apply when the Regional Board is implementing basic CWA requirements, as it is here.

As importantly, the *Burbank* court did not hold that section 13241 applies unless the Regional Board demonstrates that any particular provision is required by federal law. Rather, the Supreme Court remanded the case to the trial court to determine whether the permit in question imposed standards more stringent than federal law requires—a necessary predicate to deciding

[59] Water Code Section 13263 instructs the Regional Board to consider various factors, including those in section 13241, when issuing waste discharge orders.

whether section 13241 applied in the first place. (*Id*. at 627.)[60] Thus, the burden of proof concerning whether requirements exceed the CWA rests on the Dischargers here.

Instead of demonstrating section 13241 factors actually apply, Dischargers presume what must be proven, leaping from cursory assertions that the challenged provisions exceed federal requirements directly to decrying (incorrectly) the Regional Board's failure to properly consider section 13241's factors in establishing the 2012 Permit's requirements.[61] Because Dischargers fail to establish the requisite finding that these provisions in fact impose requirements more stringent than federal law, their claims should be dismissed outright.

i. The Permit Provisions Do Not Exceed the Federal Maximum Extent Practicable Standard or Other Federal Mandates

The fact that Dischargers fail to carry their burden of proof is sufficient reason to reject their claims that the Permit exceeds federal law. However, a close review of the Permit and its applicable requirements reveals that the Permit is in fact consistent with the core requirements of federal law. Section 402(p) of the CWA requires MS4 permits to include "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(B)(iii).) The maximum extent practicable ("MEP") standard does not grant unbridled leeway to Permittees in developing controls to reduce the discharge of pollution. (*See, e.g.,*

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[60] See also Cal. Wat. Code § 13372(a) (This chapter "shall be construed to ensure consistency with the requirements for state programs implementing the [CWA]. . . . The provisions of this chapter shall prevail over other provisions of this division," which includes section 13241, "to the extent of any inconsistency.")

[61] *See, e.g.*, City of Arcadia Petition, at 11 (stating, "Because the Permit requires [sic] exceed the Federal MEP standard for storm water permits in numerous key regards, consideration of economic factors was necessary," without providing further analysis); City of Bradbury, Petition for Review, SWRCB/OCC File No. A-2236(o) ("City of Bradbury Petition"), December 10, 2012, at 23–24 (listing "several requirements that exceed federal storm water regulations" and concluding, without support, that "CWC section 13241 requires a consideration of factors including economic and housing impacts if Order requirements exceed federal law" and "[b]ecause, as demonstrated above, the Permit requires monitoring that exceeds the Federal MEP standard in numerous key aspects, consideration of economic factors is necessary.")

Defenders of Wildlife v. Babbitt (D.D.C. 2001) 130 F. Supp. 2d 121, 131; *Environmental Defense Center, Inc. v. U.S. E.P.A* (9th Cir. 2003) 344 F.3d 832, 853.) The MEP standard "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." (*Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d at 131.)[62]

Contrary to Dischargers' claims, the Permit's RWL provisions prohibiting discharges that cause or contribute to exceedances of water quality standards clearly fall within the requirements of federal law. In fact, and as discussed in Section IV.A., California courts have already upheld the virtually identical RWL provisions of the 2001 Permit, finding that these provisions not only comply with the CWA, but in essence constitute the MEP standard. (*L.A. County Mun. Stormwater*, at 7–8 ("the terms of the permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged [RWL] provisions.").) Consequently, under *Burbank*, the Permit's RWL requirements represent core compliance with the CWA and analysis of economic factors under the California Water Code was not required. (*Burbank*, 35 Cal.4th at 626.)

Similarly, the Board must reject Dischargers' assertions that the Regional Board should not have incorporated TMDLs into the Permit as numeric WQBELs. Contrary to Dischargers' claims, these numeric WQBELs are required by the CWA and thus not subject to the economic analysis mandate of section 13241. Incorporating TMDL WLAs as numeric WQBELs was required by federal law because the CWA requires Permits to incorporate existing TMDL WLAs. Also, because the TMDLs' WLAs are numeric and the Regional Board found that incorporating the WLAs as numeric WQBELs is feasible, federal regulations required the Board to adopt the numeric WQBELs. (See Section IV.B.2 above.) As a result, the Regional Board had no duty to perform analysis of economic considerations under the Water Code.

[62] California courts have additionally "reject[ed] . . . assertion[s] that the MEP standard is the sole standard that applies to municipal storm water discharges and the[] related contention that MEP is a substantive upper limit on requirements that can be imposed to meet water quality standards" (*L.A. County Mun. Stormwater*, at 5.)

Dischargers' contentions that the Permit's MCM provisions exceed CWA requirements and should have been analyzed under section 13241[63] also lack basis and must fail. Rather than exceeding the federal MEP standard, the MCM provisions in Part VI.D. of the Permit are required by federal regulations to ensure Dischargers *meet* the MEP standard. 40 C.F.R. section 122.26(d)(2)(iv) states that MS4 Permits must require a management program, "which shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." The Permits must include programs specifically addressing industrial and commercial facilities, illicit discharges, construction sites, public education and reporting, development and redevelopment to ensure compliance with the MEP standard. (*Id*.) As a result, the Permit's MCM provisions are in fact required elements of the Permit. Environmental Groups provided detailed support and discussion of the cost-effectiveness for the 2012 Permit's Planning and Land Development Program requirements mandating low impact development ("LID") based storm water retention requirements in particular in comments to the Regional Board on the Draft Permit.[64] Because these sections are required components of the Permit under federal law, the Regional Board had no obligation to perform a Section 13241 analysis of the Permit's MCM provisions.

Finally, as discussed in Sections IV.B.5 and IV.B.6 below, neither the Permit's non-stormwater requirements nor its monitoring provisions exceed federal requirements, and as such, section 13241 does not apply.[65]

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[63] See City of Agoura Hills Petition, at 9; City of Bradbury Petition, at 24–25.

[64] Letter from Environmental Groups to the Regional Board re: Draft Los Angeles County MS4 Permit, July 23, 2012, at 21–35. (See Administrative Record, AR 6006, et seq.)

[65] The CWA and federal regulations require the regulator to include monitoring provisions sufficient to determine compliance. 33 U.S.C. §1318(a)(A); 40 C.F.R. § 122.44(i)(l)] In California, the Regional Board, as the permitting authority, must establish these conditions. The 2012 Permit's monitoring program is thus federally mandated and consistent with CWA section 1342(p)(3)(B)(iii). (See Fact Sheet at F-138.)

ii. The Permit's RWL Provisions are Mandated under Federal Anti-backsliding and Antidegradation Requirements and Therefore Not Subject to Economic Analysis under State Law

Federal law prohibits the adoption of permit terms that are weaker than the terms of the previous permit, (see 33 U.S.C. § 1342(o)(1); 40 C.F.R. § 122.44(l)(1)), and therefore Dischargers' push to undo provisions in the 2001 Permit now included in the 2012 Permit must be rejected. Section 402(o)(1) of the CWA requires that, for effluent limitations based on a state standard, "a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," except in circumstances not present here. (33 U.S.C. § 1342(o)(1).) Similarly, federal regulations require that "when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit. . . ." (40 C.F.R. § 122.44(l)(1).)

The RWL provisions of the Permit are virtually identical to the RWL provisions of the previous 2001 Permit. (See Section IV.A.1, above). As the Ninth Circuit Court of Appeals recently stated, "Succinctly put, the Permit incorporates the pollution standards promulgated in other agency documents such as the Basin Plan, and prohibits stormwater discharges that 'cause or contribute to the violation' of those incorporated standards." (*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1199.) The RWL provisions of the 2001 Permit required strict compliance with numeric limits. Under the CWA section 1342(o) anti-backsliding provision (or under 40 C.F.R. § 122.44(l)(1)) the Regional Board was required to adopt in the 2012 Permit an equally protective RWL provision.[66] Because the adoption of an RWL provision requiring compliance with numeric water quality standards was mandated by federal law, the Regional Board had no obligation to conduct economic analysis. (See *Burbank*, 35 Cal.4th at 623).

[66] As explained in our RWL response brief, the Regional Board failed to comply with the CWA anti-backsliding requirement by adopting safe harbors.

Additionally, the Regional Board may not adopt a permit provision that violates federal antidegradation requirements. (40 C.F.R. § 131.12.) Antidegradation requirements apply to NPDES permit renewals or modifications and mandate that existing water quality in navigable waters be maintained, unless degradation is justified based on specific findings.[67] In no case may water quality be lowered to a level that would interfere with existing or designated uses. The Regional Board has not provided any data, analysis, or findings, which must be accomplished on a pollutant-by-pollutant and beneficial-use-by beneficial use basis, to support that degradation is allowed. (See *Associacion de Gente Unida for El Agua v. Central Valley Regional Board* (2012) 210 Cal.App.4th 1255, 1268-69, 1271-72 (citing St. Water Res. Control Bd., Guidance Memorandum (Feb. 16, 1995); 40 CFR 131.12(a)(1).)[68] Therefore, the Regional Board was required by federal antidegradation principles to include RWL (and TMDL) provisions that mandate compliance with numeric limits, to ensure quality of Los Angeles area waters does not fall below levels that will protect existing or designated uses.[69]

c. Even if the Permit Exceeds the MEP Standard and Other Federal Mandates, the Regional Board Did Consider Factors under Section 13241

Dischargers' claims that the Regional Board failed to properly consider section 13241 would still be without merit even if the challenged Permit provisions were more stringent than federally required. Specifically, the Permit contains a finding that, despite the fact that consideration of the factors under section 13241 is not required, "the Regional Water Board has

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[67] See SWRCB Order No. WQ 86-17; EPA, Region IX, *Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. § 131.12*, at 2-4 (June 3, 1987) ("EPA Antidegradation Guidance").

[68] The 2012 Permit's reference to antidegradation is limited to a cursory summary of the legal requirements, and a conclusion that "[t]he permitted discharge is consistent with the anti-degradation provision of [40 CFR] section 131.12 and State Water Board Resolution No. 68-16." (2012 Permit, at p. 25, Finding M.) Simply claiming that no degradation will occur does not satisfy the requirements of the CWA. (*Associacion de Gente Unida*, 210 Cal.App.4th at 1260–61; see also, *American Funeral Concepts-American Cremation Soc'y v. Board of Funeral Directors and Embalmers* (1982) 136 Cal.App.3d 303, 309.)

[69] As discussed in Environmental Groups' RWL response brief, the Regional Board failed to comply with this federal CWA requirement by adopting safe harbors.

developed an economic analysis of the permit's requirements, consistent with California Water Code section 13241." (2012 Permit, Finding S, at 26.) Although Dischargers claim that "[t]he alleged facts in the economic consideration section of the Fact Sheet misrepresent the permittees' data and fail to consider the economic impact of new, costly aspects of the Permit"[70] and the Permit does not "include a sincere . . . legitimate discussion" of economic factors.[71] Dischargers have ignored an avalanche of evidence to the contrary.

Dischargers attack, in particular, the Regional Board's reliance on monitoring data collected pursuant to the 2001 MS4 Permit and the Board's alleged lack of consideration of the newly incorporated TMDLs, the new MCMs, and monitoring requirements of the Permit.[72] Contrary to Dischargers' assertions, however, the Regional Board analyzed section 13241's economic factors as they related to the Permit requirements, including the challenged provisions. Further, the Board considered the Dischargers' own water quality data and reporting on funding sources and evaluated numerous studies of the costs and benefits of storm water pollution control, including, a recent USC/UCLA study titled "Alternative Approaches to Stormwater Control," an NPDES Stormwater Cost Survey conducted by California State University, Sacramento and a UC Irvine study of health costs associated with polluted beaches. (2012 Permit, Factsheet, at F137-155.) Moreover, at the Permit adoption hearing the Board heard a lengthy presentation on the economic costs associated with Permit compliance and Board members had the opportunity to ask numerous questions specifically related to economic costs.[73]

The Board should reject Dischargers Duarte and Huntington Park's complaint that "cost estimates from the 2001 Permit . . . do not reflect compliance with the numeric receiving water limits sought to be imposed under the new Permit terms. . . ."[74] Indeed, Dischargers themselves cite multiple studies from the same timeframe and, as discussed in Section IV.A.1 above, the 2001

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[70] City of Agoura Hills Petition, at 9; City of Bradbury Petition, at 24.
[71] Cities of Duarte and Huntington Park Petition, at 45–46.
[72] City of Agoura Hills Petition, at 9, Bradbury Petition, at 24–25.
[73] Testimony of Dr. Gerald Horner, State Board Economist, November 8, 2012 Hearing, at 31-46.
[74] *Id*. at 48–49.

Permit did in fact require compliance with numeric receiving water limits, making these earlier analyses appropriate for this proceeding. Furthermore, the Board should reject these same Dischargers' reliance on three studies prepared for CalTrans in 1998 regarding costs of stormwater treatment because one of the studies "has been disavowed by Cal-Trans, the agency that requested the report"[75] and the costs in the studies "assume a worst-case scenario and assume advanced treatment for all storm water discharges."[76] (*Id*.) As for the 2005 Report titled "NPDES Stormwater Costs Survey" by California State University, Sacramento, this report was considered by the Regional Board and was part of the Administrative Record for the Permit adoption hearing.

Analyses under Section 13241 are generally committed to the Board's sound discretion. As California courts have held, Section 13241 "does not define 'economic considerations' or specify a particular manner of compliance, and thus . . . the matter is within a regional board's discretion." (*City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392, 1415.) Notably, the court in *Arcadia* found "no authority for the proposition that a consideration of economic factors under Water Code section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees." (*Id.* at 1417.) Given this standard, the analysis contained in the Permit's factsheet, and the Board members' engaged discussion of economic concerns presented by Dischargers at the Permit adoption hearing, the Board has considered economic factors and has thus complied with the requirement of sections 13241 and 13623.

4. The Permit Does Not Constitute a State Unfunded Mandate

Dischargers claims that the Permit's MCM program and the imposition of numeric standards render it an unfunded mandate lack merit and should be rejected.[77] Article XIII.B,

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[75] See Regional Board, Responsiveness Summary – Triennial Review, February 18, 2005, at 24-36 – 24-37. (Attachment 1.) Evidence Code section 452(c) allows the Board to take official notice of "[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States." Courts have found that "Official acts" under Evidence Code section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.)

[76] *Id.*

[77] City of Agoura Hills Petition, at 14–15; City of Bradbury Petition, at 29–30.

section 6 of the California Constitution and Government Code section17514, provide for the reimbursement of local government's costs of carrying out new programs or higher levels of service that are mandated by the State. However, under Article XIII.B, section 9, subdivision (b), this reimbursement requirement does not apply to any "appropriations required for purposes of complying with mandates of the. . .federal government." (*City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 79; see also, *San Diego Unified School Dist.* v. *Commission on State Mandates* (2004) 33 Cal. 4th 859, 880.) Moreover, "costs [are not] mandated by the state" if the state "statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation." (Cal. Govt. Code § 17556 (c).)

A program is mandated by federal law and therefore not a state mandate when the state has "no real choice in deciding whether to comply with the federal act" and the program does not exceed the requirements of federal law. (*Hayes v. Commission on State Mandates,* (1992) 11 Cal.App.4th 1594, 1594; Cal. Gov. Code, § 17556.) "The test for determining whether there is a federal mandate is whether compliance with federal standards 'is a matter of true choice,' that is, whether participation in the federal program 'is truly voluntary.'" (*City of Sacramento,* 50 Cal.3d at 76.) The test is flexible and depends on a number of factors such as "the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." *(Id.)*

Here, neither the Regional Board, nor the Permittees have a true choice in the Permit or the requirement to reduce pollutants to the maximum extent practicable. (See *City of Sacramento,* 50 Cal.3d at 76.) Rather, the federal municipal storm water program requires a permitting authority—in this case the Regional Board—to issue an NPDES permit that reduces pollutants to the maximum extent practicable, prohibits discharges that cause or contribute to exceedances of water quality standards, mandates the incorporation of TMDL WLAs and the implementation of the

Permit's MCM provisions to comply with the MEP standard under 40 C.F.R. section 122.26(d)(iv). (Cf. *Hayes,* 11 Cal.App.4th at 1593.) Thus, this Permit simply satisfies the minimum requirements of federal law.

Furthermore, renewal permits—like the 2012 Permit, at issue—may not contain weaker standards than those contained in the previous permit, except under limited circumstances. (33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l).) Because the 2001 LA MS4 Permit contained virtually identical Receiving Water Limitations, requiring compliance with numeric water quality standards, the Regional Board had no choice under the federal CWA but to adopt a 2012 Permit which required compliance with these numeric limits.[78] Thus, Dischargers' claims that the Permit's requirements mandating compliance with numeric water quality standards (through RWLs and WQBELs) are an unfunded state mandate must fail.

Dischargers' contentions that the Permit's MCM program requirements are unfunded mandates are similarly without legal basis. As the Court in *State of California Department of Finance, et al. v. Commission of State Mandates* (Case No. BS 130710, LA County Superior Court (Aug. 15, 2011)) explained, "[t]he 'maximum extent practicable standard' is designed to provide administrative bodies the 'tools to meet the fundamental goals of the Clean Water Act in the context of storm water pollution.'" (At 8 (citations omitted).) The standard allows "permit writers to use a combination of pollution controls that may be different in different permits" so that the regulating agency can "tailor permits to the 'site-specific nature of MS4.'" (*Id.* (citations omitted).) In fact, Permit requirements that "will help prevent the introduction of . . . known contaminants into the water" are "clearly within the maximum extent practicable standard." (*Id.* at 9–10.) For this reason, such requirements are not a state mandate.

In this case, the Dischargers challenge the requirement to control, inspect, and regulate non-municipal permittees and potential permittees; the public information and participation program; the industrial and commercial facilities program; the public agency activities program

[78] As discussed in Environmental Groups' Petition and RWL Response, however, the Regional Board failed to comply with this mandate by allowing "safe harbors."

and the illicit connection and illicit discharge elimination program. However, each of these requirements "will help prevent the introduction of known contaminants" (see 2012 Permit, Fact Sheet, at F47-83) in receiving waters and are the type of measures "clearly anticipated under the Clean Water Act" within the flexible maximum extent practicable standard. (*Commission on State Mandates*, Case No. BS 130730, at 11.)

5. The 2012 Permit's Monitoring Program Does Not Exceed the Requirements of State or Federal Law

Dischargers incorrectly claim that the permit's monitoring provisions exceed federal requirements and that compliance with permit limits can only be measured at an "outfall."[79] Despite statutory and regulatory provisions mandating and describing NPDES monitoring requirements and the Regional Board's application of these mandates in the Permit,[80] Dischargers' arguments, attempt to evade critical monitoring obligations by repeatedly mischaracterizing the underlying legal authority.

Every NPDES permit must require the dischargers to conduct monitoring sufficient to assure compliance with permit limits.[81] This monitoring must be "representative" of the discharges being regulated: "All permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity." (40 C.F.R. §§ 122.48(b), 122.41(j)(1)). Further, the CWA provides that permittees shall sample "in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator [or state] shall prescribe." (33 U.S.C. § 1318(a)(A)(iv).)

Despite this clear language giving broad authority to the regulating agency to select appropriate compliance monitoring, the City of Carson incorrectly suggests that 40 C.F.R.

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[79] See City of Carson at 21–23; City of Arcadia at 12–13;City of Culver City at 8–9.
[80] See City of Carson at 21–23; see also City of El Monte Petition at 24–26.
[81] 33 U.S.C. §1318(a)(A); 40 C.F.R. § 122.44(i)(l) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"); see also 33 U.S.C. § 1342(a)(2) ("The Administrator [or state] shall prescribe conditions for such permits to assure compliance with the requirements" of the statute").

§122.44(i) only allows outfall monitoring.[82] To the contrary, this federal provision requires "every permit" to include monitoring "to assure compliance with permit limitations," without limiting the location of required monitoring.[83] Further, EPA explains that "[t]he NPDES regulations do not prescribe exact monitoring locations; rather, the permit writer is responsible for determining the most appropriate monitoring location(s) and indicating the locations(s) in the permit."[84]

Dischargers incorrectly refer to required receiving water monitoring as "extra-MS4 monitoring"[85] ignoring the fact that receiving water monitoring was also required by the 2001 MS4 permit and, in the 2012 Permit, "is linked to outfall based monitoring in order to gauge the effect of MS4 discharges on receiving water." (2012 Permit, Fact Sheet, at F-114.) Importantly, the receiving water monitoring in the 2001 Permit was previously challenged by Dischargers, along with other Permit provisions, and was upheld as lawful.[86] Moreover, receiving water monitoring

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[82] See City of Carson Petition, at 22. Further, the City of Carson claims that 40 C.F.R. §122.41(j), titled "Monitoring and records," is inapplicable because it only refers to inspections, (City of Carson Petition, at 22), when instead the regulation provides that "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." (40 C.F.R. §122.41(j).) Similarly, the City of Carson ignores the authority granted to the agency in 40 C.F.R. §122.41(h) to request information necessary "to determine compliance" with the permit when it argues that the agency cannot require the permittee to perform "any monitoring requirement that the [agency] wishes." (City of Carson Petition, at 21.) Dischargers further incorrectly argue that it is improper to require end-of-pipe monitoring of non-stormwater discharges. *See, e.g.*, City of Carson Petition, at 21 ("Although non-stormwater discharger monitoring is required under federal regulations, it is limited to intra-MS4 field screening for the purpose of identifying and detecting illicit discharges and connections.")

[83] See also *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1207 ("First and foremost, the Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit.")

[84] EPA NPDES Permit Writers' Manual 8-12; see also Brief of United States as Amicus Curiae to the U.S. Supreme Court, *Los Angeles Flood Control District v. Natural Res. Def. Council*, (U.S. 2012), at 9 ("[S]ubject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two.")

[85] City of Carson Petition, at 21.

[86] *L.A. County Mun. Stormwater*, at 2-4.

at in-stream locations was recently unequivocally upheld by the Ninth Circuit Court of Appeals as appropriate for determining compliance in the LA MS4.[87]

The 2012 Permit's monitoring program is also consistent with the requirement that NPDES permits must include monitoring that is "representative" of the discharges regulated under the MS4. (40 C.F.R. §§ 122.26(d)(2)(iii)(D), 122.41(j)(1), 122.48(b).) Compliance monitoring must be conducted at representative locations, which may include particular discharge points or instream locations, or both. (40 C.F.R. § 122.26(d)(2)(iii)(D) (requiring permit applicants to propose representative monitoring programs which may include outfall or instream monitoring).) The fact that the 2012 Permit includes both outfall and instream monitoring is neither burdensome nor illegal.

Finally, as explained in Section IV.B.3, above, Dischargers arguments that the Permit's monitoring requirements exceed federal requirements and should therefore be subjected to Section 13241 review of economic factor also lack merit. And to the extent that some Dischargers have argued that the cost/benefit analysis was required under Water Code sections 13165, 13225, and 13267, these assertions are similarly unsupported and must be rejected.[88] As the Regional Board clearly explained in its Response to Comments, Water Code section 13383 governs the permitting process and, along with the federal provisions cited above, grants the Regional Board the authority to require compliance monitoring in an NPDES Permit without a cost/benefit analysis.[89] Further, these arguments have already failed in prior litigation.[90]

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[87] *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d at 1206 ("the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit… the monitoring data conclusively demonstrate that the [permittees] are not "in compliance" with the Permit conditions.")

[88] See Cities of Duarte and Huntington Park Petition, at 51–54; see also City of Culver City Petition, at 8–9; City of Arcadia Petition, at 12.

[89] See Response to Comments at C-2.

[90] See *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Superior Ct., March 24, 2005), Case No. BS 080548, Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at 19–20. Dischargers are collaterally estopped from raising these same issues again here.

The inclusion of a monitoring program that adequately assures compliance with one's permit is central to the effective implementation and enforcement of the CWA. The Regional Board's inclusion of both receiving water monitoring and outfall based monitoring for determining compliance with water quality standards and TMDLs is appropriate and provides clarity and accountability for regulators and dischargers.

6. The 2012 Permit Properly Incorporates Discharge Prohibitions for Non-Stormwater Runoff

Multiple Dischargers claim that the Permit "improperly defines non-stormwater to expansively include all dry-weather runoff,"[91] and that the Permit's Discharge Prohibitions governing non-stormwater discharges are void for imposing "a more stringent standard on Permittees for such dischargers [sic], other than the MEP standard."[92] Yet, the 2012 Permit properly defines dry-weather runoff as "non-stormwater," which federal law in turn requires Dischargers to "effectively prohibit."

Under federal regulations, stormwater is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26.) Contrary to Dischargers' assertions, the clause, "and surface runoff and drainage," does not as a result incorporate "'dry weather' runoff" into the precipitation-based definition of stormwater.[93] In fact, when it promulgated part 122.26, EPA expressly declined to expand the definition of "'storm water' broadly to include a number of classes of discharges which are not in any way related to precipitation events," or put another way, to expand the definition to include dry-weather runoff. (55 Fed.Reg. 47990, 47995.) As EPA explained, Congress "did [not] intend for section 402(p) [of the CWA] to be used to provide a moratorium from permitting other non-storm water discharges." (*Id*. at 47995-96.) There is no support for the claim that dry weather runoff is not a non-stormwater discharge.

[91] *See, e.g.*, City of Arcadia Petition, at 17.
[92] Cities of Duarte and Huntington Park Petition, at 36.
[93] Cities of Duarte and Huntington Park Petition, at 40.

7. The 2012 Permit Properly Assigns Joint Responsibility for Discharges of Pollution

Dischargers claim the 2012 Permit improperly imposes joint responsibility for commingled MS4 discharges rather than holding each Discharger liable only for its own individual MS4 discharges.[94] Dischargers further complain that the Permit improperly places the burden of proof on them to demonstrate they are not responsible for a particular discharge that causes or contributes to RWL or WQBEL exceedances.[95] As discussed below, however, the 2012 Permit's imposition of joint responsibility and the allocation of burden of proof on individual Dischargers to show they are not responsible for violations of RWLs and WQBELs is both fair and lawful.

a. The 2012 Permit's Imposition of Joint Responsibility on Commingled MS4 Dischargers is Consistent with CWA

Dischargers incorrectly assert that the Permit imposes joint and several liability for commingled MS4 discharges that cause or contribute to exceedances of RWLs and WQBELs.[96] While the Permit imposes joint responsibility for commingled discharges it confines each Discharger's responsibility to "discharges … from the MS4 for which it is an owner or operator." (2012 Permit, at 38, Section V.A.2, fn.20.) "Joint responsibility" under the Permit "means that the Permittees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges." (*Id*. at 23.)[97]

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[94] See Cities of Duarte and Huntington Park Petition, at 9; City of Sierra Madre Petition, at 9; City of Arcadia Petition, at 13–14.

[95] Cities of Duarte and Huntington Park Petition, at 12; City of Arcadia Petition, at 14.

[96] City of Arcadia Petition, at 14; City of Sierra Madre Petition, at 9.

[97] While we use the term "joint responsibility" as defined in the Permit here, we note that the permit's definition of 'joint responsibility' is narrower than the traditional tort notion of the term, and does not in any way suggest that a Discharger could be required to remedy some other party's discharge.

Unlike joint and several liability, where an individual party is responsible for remedying full damages, regardless of its proportionate share of the harm,[98] the Permit does not require any Discharger to remedy another Discharger's contribution of pollutants; each Discharger is required to take steps only within its own jurisdiction and to clean up only its share. (*Id.* at 22, 23 ("co-permittees are only responsible for their contributions to the commingled discharge").) In fact, any doubt that the Permit imposes joint and several liability, as the Discharger's incorrectly claim, is cleared by the Permit's unequivocal language: "This Order does not require a Permittee to individually ensure a commingled MS4 discharge meets the applicable water quality-based effluent limitations included in this Order, unless such Permittee is shown to be solely responsible for an exceedance." (*Id.* at 23.)[99] More importantly, each permittee's responsibility to comply fully with Permit terms was recently upheld in the joint MS4 Permit context by the Ninth Circuit. (*Natural Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d at 1206 ("If the LA MS4 is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges. Thus, a finding of *liability* against the [one permittee] would not … hold [this permittee] responsible for discharges for which they are not "the operator.").)

Next, Dischargers' contention that the Permit unlawfully holds them responsible for the discharges of others[100] completely ignores the Permit's mechanism allowing a Discharger to demonstrate that its discharge did not cause or contribute to an exceedance,[101] thereby completely

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[98] *Commonwealth v. Boston Edison Co*., 828 N.E.2d 16, 20 n.4 (Mass. 2005); see also Restatement (Second) of Torts § 433A(1)(b) & cmt. b (1965).

[99] See also, Regional Board, Response to Comments, (Total Maximum Daily Loads (General) Matrix, at F-64 ("The Board agrees, however, that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are operators. So, for example, one co-permittee is not required to implement or correct best management practices employed by another co-permittee.")

[100] City of Arcadia Petition, at 13; Cities of Duarte and Huntington Park Petition, at 10; City of Sierra Madre Petition, at 9.

[101] A Permittee can make this demonstration by showing that 1) there was no discharge from its MS4 during the time period at issue, 2) the discharge was controlled to a level below the limitation, or 3) for bacteria receiving water limitations or water quality-based effluent limitations,

avoiding any responsibility for exceedances caused or contributed to by dischargers of "non-compliant co-permittees." (*Id.* at 23-24.) By providing this mechanism to Permittees, the Permit ensures that only the discharger responsible for the Permit violation will ultimately be held liable.[102]

Nonetheless, the Permit would have been legal and proper even if it did impose joint and several liability, as Dischargers argue it does. Courts have found that joint responsibility is appropriate in the CWA context where multiple actors contribute to an indivisible harm regardless of the lack of a provision in the Act explicitly allowing for joint responsibility. (See *United States v. Stringfellow* (C.D. Cal. Apr. 5, 1984) CV-83-2501-MML, 1984 WL 3206 ("Although section 311 of the Clean Water Act . . . does not refer explicitly to joint and several liability, courts have imposed joint and several liability by invoking common law principles in interpreting section 311.") (citations omitted); *United States v. Krilich* (N.D. Ill. 1996) 948 F. Supp. 719, 728 (imposing joint and several liability for a CWA violation).) As the Court in *City of Hoboken* reasoned, this tort law principle of liability is appropriately applied in the CWA context because the Act imposes tort-like duties on dischargers. (See *United States v. City of Hoboken* (D.N.J. 1987) 675 F. Supp. 189, 198 ("The Act imposes duties unilaterally, as in the law of torts, and without regard for parties' intention. Specifically, the Act creates a scheme of strict liability for

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that sources in the Permittee's jurisdiction have not caused or contributed to the exceedance. (2012 Permit, at p. 142.)

[102] The City of Arcadia also mistakenly relies on *Jones v. E.R. Shell Contractor, Inc.*, (N.D. Ga. 2004) 333 F. Supp. 2d 1344. Arcadia Petition at 13. The plaintiff in *Jones* sued a county for discharges from a state highway, and the court concluded the county was not liable because "it does not own, maintain or control [the highway]." (*Jones*, 333 F. Supp. 2d at 1349.) The court concluded that the plaintiff's complaint was with the owner or operator of the discharges. (*Id.*) Unlike in *Jones*, here, no one disputes that co-permittees own and/or operate an MS4 and "need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators." 40 C.F.R. § 122.26(a)(3)(vi). Certainly, if a municipality does not own or operate the MS4, it will not be covered by the Permit and will therefore have no liability for Permit violations. This is not the case here, however, because each Discharger owns and/or operates the MS4 and sought and obtained a Permit regulating its MS4 discharges. For these reasons, the Permit is consistent with the 40 C.F.R. § 122.26(a)(3)(vi), and does not ultimately hold Dischargers liable for anything other than their own discharges.

exceeding effluent limitations."); see also, *United States v. Valentine* (D. Wyo. 1994) 856 F. Supp. 627, 633 (noting that courts have relied on the common law of nuisance to apply joint and several liability in environmental cases).)[103]

b. The 2012 Permit Provides for the Proper Allocation of the Burden of Proof

Dischargers' arguments that the Permit's joint liability provisions improperly shift the burden of proof of liability must be similarly rejected. In the context of multiple potentially-liable parties, where a plaintiff demonstrates that at least one of the parties is liable, the defendant has the burden to prove it is not liable. (*Summers,* 33 Cal.2d at 85.) This burden of proof shifting is particularly appropriate in the multiple polluter context. (*See, e.g.*, Restatement 2d Torts, § 433B, Comment on Subsection (2) (discussing a case with multiple dischargers to a stream as "a typical case" where shifting of burden of proof from plaintiff to defendant is proper).) Otherwise, all defendants could evade liability—leaving an injured plaintiff with no redress—simply because there are multiple contributors to an injury. (*Id*. at 86.)

The Permit's liability provisions operate in the following manner: first, all Dischargers are responsible once monitoring data reveals an exceedance of RWLs or WQBELs (see *Natural Res. Def. Council v. Cnty. of Los Angeles,* 725 F.3d at 1207 ("monitoring data conclusively demonstrate[s] that the [Dischargers] are not 'in compliance' with the Permit conditions")); and second, once this is determined, then the burden shifts to the individual discharger to demonstrate it is not liable.[104] (2012 Permit, at 142.)

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[103] The City of Arcadia also disputes joint liability on the ground that it is proper only where joint tortfeasors act "in concert," relying on *Kesmodel v. Rand* (2004) 119 Cal. App. 4th 1128. City of Arcadia Petition, at 14. However, *Kesmodel* is inapposite. It concerned a statute's express limitation on joint and several liability, and the court concluded that despite this limitation, where tortfeasors act in concert, joint and several liability principles apply. (*Kesmodel,* 119 Cal. App. 4th at 1142.) The CWA imposes strict liability and thus determining whether an act is "in concert" would be futile. (See *City of Hoboken*, 675 F. Supp. at 198.)

[104] One Discharger argued that joint responsibility is problematic because a discharger cannot demonstrate that a private party was the source of pollution. City of Sierra Madre Petition, at 10. The Permit, however, does not impose the heavy burden of proving other parties' responsibility for

Dischargers' reliance on *Rapanos v. United States* (2006) 547 U.S. 715 and *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 to support their assertion that the Permit is inconsistent with ordinary rules of evidence[105] is misplaced. Neither *Rapanos* nor *Sackett* addressed the context of commingled discharges, or the level of proof necessary to establish a violation. Instead, these cases simply noted that enforcers generally must prove elements of a CWA violation. (*Rapanos,* 547 U.S. at 745; *Sackett,* 622 F.3d at 1145–47.)

Requiring dischargers to prove they are not in violation, instead of increasing the burden on enforcers, makes sense given the commingled nature of these discharges. (See *Natural Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d at 1208 (noting the "inherent complexity" of determining MS4 compliance because the Permit covers "thousands of different point sources and outfalls.").) The Dischargers, not enforcers, are in the best position to account for their own discharges because it is the permittee's duty to ensure that its system is compliant. (*See, e.g.*, 40 C.F.R. § 122.26(d)(2)(iv)(B)(3) (applicants for permits must describe portions of their system that have "reasonable potential of containing illicit discharges.").)[106]

Finally, the 2012 Permit's burden of proof is consistent with Congressional intent to make enforcement for permit violations "swift and simple." (44 Fed. Reg. at 32, 863; see also, *City of Hoboken, supra,* 675 F. Supp. at 198 ("Congress meant to shift to polluters, and away from the public as a whole, the burden of failing to achieve [compliance].").) The 2012 Permit thus validly provides that Dischargers are jointly responsibly, and fairly affords them an opportunity to avoid liability if they do not contribute to an exceedance.

Permit violations. Rather, a Discharger can avoid liability so long as it can account for its own discharges and can demonstrate they are not the source of the violation.

[105] Cities of Duarte and Huntington Park Petition, at 10–11; City of Arcadia Petition, at 14.

[106] In fact, it may be impossible for citizens to meet the burden that the Dischargers espouse because obtaining access to collect samples is often dangerous and public access may be restricted. (See, Cal. Reg'l Water Quality Control Bd., *L.A. Region Water Quality Control Plan* 2-7 note m, 2-14 note m (1995) (access prohibited by L.A. County in "concrete channelized areas" of the rivers).)

8. The 2012 Permit Does Not Infringe on Local Land Use Decision-Making Authority

Dischargers claim that, "The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers. . . ."[107] As a result, Dischargers claim that the permit improperly imposes land use requirements, including the requirement that Dischargers adopt low impact development ("LID") ordinances to implement the Permit's Planning and Land Use Development section. This contention ignores that these LID and other provisions derive from the CWA's mandates for MS4 permits and thus are federal requirements, under 33 U.S.C. § 1342(p)(3)(B)(iii), and not land use controls.

Further, environmental regulations simply are not land use regulations. As the Supreme Court has stated, "Congress has indicated its understanding of land use planning and environmental regulation as distinct activities." (*Cal. Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, 573.) "Land use planning in essence chooses particular uses for land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits," regardless of the land use. (*Granite Rock Co*., 480 U.S. at 587.) The 2012 Permit requires that when the Dischargers organize development within their bounds, they ensure that such development happens in a way to reduce the impacts of storm water runoff. It does not mandate that Dischargers zone or otherwise control the use of particular parcels of land, and therefore, does not infringe on their land use or planning authority—these activities occupy separate spheres of regulatory power.

9. Dischargers' CEQA Arguments Must Fail

Dischargers argue that the Permit's Planning and Land Development Program, including it's LID requirements for New Development and Redevelopment projects, violates CEQA.[108] Contrary to Dischargers' assertions, CEQA explicitly allows the Regional Board (or for that matter, any state environmental agency) to carry out its substantive mandate: "No provision of

[107] See City of Arcadia Petition, at 15 (citing *Berman v. Parker* (1954) 348 U.S. 26, 32–33.)
[108] Cities of Duarte and Huntington Park Petition, at 56-59.

[CEQA] is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer." (Pub. Res. Code § 21174.) Hence, Dischargers argument that CEQA somehow limits the authority of state agencies to implement substantive pollution control statutes does not merit review. Moreover, the Regional Board's action in no way limits *additional* environmental protection under project-specific CEQA review should further environmental protections be necessary to reduce the impacts of development. Quite simply, the LID provisions do nothing to relieve Dischargers of their "independent obligation under CEQA to protect the physical environment from the effects of their project[s]." (*City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 362 (rejecting legal infeasibility on all counts).)

These Permit requirements are mandated by Clean Water Act regulations. (See 40 C.F.R. § 122.26(d)(2)(iv) (permits must include structural and non-source control measures to reduce pollutants).) This federal requirement is a mandatory condition before permittees discharge effluent from their storm sewer systems, (40 C.F.R. § 122.4(a)), and state law imposes a specific duty on the Regional Board to implement these provisions in NPDES permits (Cal. Wat. Code §§ 13377; 13370(c).) Dischargers misconstrue the requirements of both state and federal law, and their challenge must be rejected.

V. CONCLUSION

For all the foregoing reasons, the instant Petitions for Review should be DENIED.

Respectfully submitted,

Dated: October 15, 2013

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Noah Garrison
Steve Fleischli
Attorneys for NATURAL RESOURCES DEFENSE COUNCIL, INC. & HEAL THE BAY

Dated: October 15, 2013

LOS ANGELES WATERKEEPER

Elizabeth Crosson
Tatiana Gaur
Attorneys for LOS ANGELES WATERKEEPER & HEAL THE BAY