



Heal the Bay



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A Statewide Voice for Our Waters

September 1, 2006

Chair Doduc and Board Members
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Comments on the Storm Water Panel Recommendations on the Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities and recommendations to reform the Stormwater Program

Dear Chair Doduc and Board Members:

On behalf of Heal the Bay, the Natural Resources Defense Council, Santa Monica Baykeeper, California Coastkeeper Alliance, and Lawyers for Clean Water we submit the following comments on the Storm Water Panel's report to the State Water Resources Control Board ("State Board") entitled *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* ("Report") dated June 19, 2006. We appreciate the opportunity to provide these comments.

I. INTRODUCTION

Overall, we support the State Board's efforts to solicit recommendations from stormwater experts and use this information to improve the NPDES stormwater program. Stormwater is the biggest water quality problem in the State and should be controlled by an effective regulatory program. As discussed in detail below, the Report provides valuable insights into the failure of the State's current stormwater program and offers useful specific suggestions for program improvements.

In general, the Report is most useful when the Storm Water Panel ("Panel") stays within their technical charge. The Panel was tasked with exploring the *technical* feasibility of numeric effluent limits. Although the Report offers a technical analysis of certain issues, a substantial portion of the document is policy-oriented. For instance, the first few pages of the Report provide a synopsis of stormwater policy and relevant court decisions. None of the Panel members are attorneys. Clearly, the Storm Water Panel stepped beyond their assignment and area of expertise in conducting a legal analysis and in making certain policy recommendations and analyses. Thus, these recommendations are not particularly useful. As a result, the relevant portion of the report is its technical analysis, and the State Board must only focus on those recommendations.

Through this public comment process, the State Board solicited input on how to proceed with the findings of the Storm Water Panel. Congress through the Clean Water Act as well as State and Federal courts have ordered that water quality standards be attained in our State's waterbodies.

Thus in crafting a program to address the largest source of impairment, the State Board must focus on achieving this result. Section II of our comments focuses on the Storm Water Panel's Report, and Section III provides specific suggestions for next steps. In sum, we urge the State Board to take immediate action on several of the Report's main findings:

- The State's current stormwater regulatory approach is seriously flawed and insufficiently effective.
- There is an overall lack of quality stormwater monitoring data.
- Numeric effluent limits are technically feasible for pollutants commonly associated with stormwater discharges from construction sites.
- Numeric effluent limits are technically feasible for some industrial categories.

II. STORM WATER PANEL REPORT

A. General Storm Water Panel Recommendations

1. The State Board should reevaluate many aspects of the NPDES stormwater program.

The Storm Water Panel's Report sends the message loud and clear that the State's NPDES stormwater program is badly broken and needs to be fixed before significant progress can be made towards water quality standards attainment. The Report outlines many of the problems facing the stormwater program. For example, the Panel observes that for the municipal program "[t]he current practice for permitting, designing, and maintaining municipal stormwater treatment facilities on urban landscape does not lend itself to reliable and efficient performance of the BMPs..." and "[t]he principal reasons for the failure of BMP performance is improper BMP selection, design and/or lack of maintenance." Report at 4. In other words, every key aspect of BMP application that is relied upon by the State's stormwater program is faulty. The Panel also observes major problems with the industrial and construction stormwater programs. For instance, the general construction and industrial permits do not focus on all of the pollutants of concern. In essence, the Panel has rejected the current regulatory approach used to control the number one source of water pollution in the nation.

Given the Panel's observations, the State Board cannot continue down the same path for its stormwater program. Over the last 16 years, the State has failed in its mission to protect water quality by using the current regulatory approach. The Report offers some suggestions for program improvement such as "[d]esigning the facility more rigorously with respect to the physical, chemical and biological processes that are active in the BMP would give confidence that the BMP would perform at least as well, if not better than the average performance determined from literature." Report at 7. However in reality, the Report only skims the surface of the changes that are needed. Clearly, the State Board should critically evaluate and revamp the stormwater program, in order to ensure significant progress towards water quality standards attainment.

2. Stormwater monitoring efforts should be significantly enhanced.

Throughout the Report, the Panel notes the inadequacy of current stormwater monitoring efforts. For instance, the experts find that the industrial stormwater program lacks sufficient monitoring data. As stated in the Report, “[t]he Panel recognizes the inadequacy of current monitoring data sets and recommends improved monitoring to collect data useful for establishing Numeric Limits and Action Levels. Required parameters for future monitoring should be consistent with the type of industrial activity instead of the current parameters....” Report at 21. While we agree that there are major deficiencies with current stormwater monitoring programs, insufficient monitoring has the greatest impact on compliance determination and does not preclude the development of numeric effluent limitations, particularly technology-based limits that focus on available BMPs and not ambient water quality conditions. Clearly as the Panel suggests, the State Board should pursue a standardized, comprehensive monitoring program for the State’s stormwater programs to ensure high quality data and comparability of data. However, these efforts do not stand in the way of developing numeric limits.

In recognition of these pervasive issues, the California State Legislature adopted SB72 in 2001. This law requires the standardization of stormwater monitoring programs. SB72 also clarifies what information to consider when determining which constituents should be monitored in municipal runoff. California Water Code Section 13383.5 requires that this be addressed by January 2003, which is over three years ago. To date, the State has failed to comply with SB72 requirements, and there has been no attempt to implement the law. The State Board should meet the requirements of SB72 to develop and implement a strong standardized stormwater monitoring program as soon as possible.

B. Feasibility of Numeric Effluent Limits

1. The State Board must adopt a Construction Permit with numeric effluent limits.

The Panel concludes that numeric limits are technically feasible for pollutants commonly associated with discharges from construction sites. Report at 15. Specifically, they comment that active treatment technologies such as polymer treatment systems can produce a discharge less than 10 NTU. Report at 16. Although the Report focuses on polymeric treatment systems, it is important to note that this is not the only advanced form of construction site runoff treatment. Electrocoagulation, for example, has shown high performance in treating construction stormwater runoff. Also, there are construction management options that can prevent excessive erosion and sediment transport and hence the need for treatment. These include maintaining existing vegetation and performing ground-disturbing work in the dry season. Also, the Report specifies that numeric limits should be set for other pollutants of relevance at construction sites such as pH. We agree with this assessment, as construction activities with concrete can be very caustic. Clearly, numeric effluent limits are technically feasible for construction stormwater, and therefore must be implemented.

In addition, the Report emphasizes larger sites, but there is no technical rationale provided for not developing numeric limits for medium or small sites. Construction impacts are significant, especially for projects adjacent to receiving waters or on areas with a steep slope. In fact, a smaller site with these characteristics can cause more of an impact than a larger site. For example in the Santa Monica Mountains, there are numerous examples of the smothering of riparian habitat due to poor

management practices at small construction sites. Thus, the State Board should employ numeric limits for all sizes of construction sites.

2. The State Board should take appropriate steps to include numeric limits in industrial stormwater permits.

The Panel finds that numeric effluent limits are feasible for some industrial categories. They reason that industries have control over their facilities and there have been reliable treatment systems in place since the 1980's. Report at 19. Further, the Report finds that the biggest obstacle to developing numeric limits is an inadequate industrial database. While the lack of data is a problem for compliance assurance purposes, it does not preclude the development of numeric effluent limits. Plenty of data exist on industrial BMP effectiveness. For example, the EPA-ASCE database is a good source for BMP effluent quality information. While we agree that the State Board should take immediate steps to develop an appropriate industrial database, numeric effluent limits should be pursued at the same time.

3. The State Board should reevaluate the feasibility of numeric effluent limits in municipal stormwater permits.

The Storm Water Panel concludes that “[it] is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.” Report at 8. The Report identifies four key issues as the basis for this conclusion: 1) effluent concentration estimates can be made by using literature values of percent removal and EMC data, in addition to the data found in the BMP database; 2) BMPs will likely perform better than expected if they are designed with physical, chemical and biological processes in mind; 3) if a BMP is designed and constructed based on sound criteria and is properly maintained, it can meet the expected effluent concentrations; and 4) existing development relies on non-structural BMPs, and there is not enough information on the performance of these controls. Report at 7-8. This line of reasoning is flawed.

First, these four “issues” do not support the conclusion that numeric effluent limits are infeasible for municipal stormwater permits. In fact, the first three issues could be used to support numeric limits because they suggest that BMPs can perform as expected. The fourth issue alone does not provide a basis for concluding that numeric effluent limits are infeasible, as the Panel is assuming that non-structural BMPs are the only means for stormwater control at certain sites and that structural BMPs are not widely used. If the Panel reverses the assumption and instead assumes that structural BMPs could be implemented, and in fact are required under current-generation permits and TMDLs, then their conclusion does not “hold water.” Specifically in the case of TMDLs and waste load allocations (“WLAs”), there is an expectation that structural BMPs will be utilized to achieve water quality standards and that, whatever BMPs are selected, they will be sufficiently analyzed to comport with the requirements associated with TMDL implementation. Chief among these requirements: that the selection of BMPs to meet a WLA be supported by quantitative analysis attesting to their ability to fulfill the requisite load reduction. Thus, numeric effluent limits are entirely feasible for municipal stormwater permits.

Also, the Report’s conclusion disregards without analysis or discussion comments made at the September 14, 2005 State Board public workshop on the feasibility of incorporating numeric

effluent limitations in stormwater permits. Two leading scientists in the field of stormwater, Dr. Rich Horner and Rick Rollins, proposed viable methods for developing discharge limits. Specially, Mr. Rollins presented a BAT method for developing effluent limits for municipal stormwater permittees.¹ Clearly, these recommendations demonstrate that numeric effluent limitations are feasible for the municipal stormwater program if the regulator thinks “outside the box.”

Finally, the level of difficulty for a discharger to comply with numeric limits does not dictate the ability of the regulator to derive and impose numeric limits. The Report highlights certain challenges associated with complying with numeric limits by commenting that “[i]t is very difficult to determine specific causative agents...” and “[m]onitoring for enforcement of numeric effluent limits would also be challenging.” Report at 6. However, the Report only provides evidence that numeric limits are undesirable or difficult in the view of the panel, and *not* that numeric limits are impossible to develop. In fact, it is technically feasible to develop numeric limits that if met lead to water quality standards attainment. By reasoning that permittees are not complying so numeric limits can not be developed creates a cycle of non-progress that will never be broken. Again, this becomes a policy question that is not under the Panel’s purview, one that has to be informed by the Regional Board’s legal obligation to develop numeric limits where it is possible to do so. With improvements to the stormwater program such as increased monitoring and design and performance standards, compliance with numeric limits will be less of a challenge. Thus, it is imperative that these programmatic and regulatory modifications occur as soon as possible so effective compliance assurance efforts can take place.

In summary, the Report does not provide sufficient evidence to suggest that numeric limits are infeasible for municipal stormwater permits. Inappropriately, the Report leaves the reader with the impression that numeric limits are extremely complicated, but this is not the case. For instance, sound methods for developing numeric limits have been proposed by leading scientists. While we recognize that full-fledged numeric limits for every priority pollutants in every municipal permit may not be immediately feasible, the State Board should work towards this goal and at a minimum develop an interim enforceable and quantifiable permitting scheme.

C. Miscellaneous

1. Action Levels should only be considered if they will lead to water quality standards attainment.

For all three categories of stormwater discharges, the Report recommends that under certain circumstances the regulator should consider employing action levels in stormwater permits. The Panel identifies that action levels or “upset values” can be useful as an “...interim approach that would allow ‘bad actor’ catchments to receive additional attention.” Report at 8. The Report continues by outlining three suggested methods for developing the action levels: a consensus based approach, a ranked percentile distribution approach and a statistically –based population parameters approach.

¹ Of note, they also proposed methods for developing construction and industrial limits, but these were also not addressed in the Report.

In concept, action levels may be a useful regulatory tool as they serve as a transitional step towards water quality standards attainment. For example, if they provide an “early warning” that discharge quality is close to exceeding water quality standards, they can assist a discharger with its water quality standards compliance obligation. However, the three approaches suggested for developing an appropriate action level are not protective of beneficial uses and will not lead to water quality standards attainment. The recommended approaches assume that the BMPs that are currently being used are adequate. However, experience tells us that more often than not BMPs are incorrectly sized, designed and sited. The State Board should consider other technically-based approaches for developing action levels such as an incremental reduction in pollutant concentrations, a design storm concept, or an acceptable exceedance frequency approach. It is important to note that action levels provide useful information but are not an end in itself. The action levels must be set at a level that creates impetus for action, and they cannot replace the fundamental obligation to meet actual water quality standards.

2. The State Board should distinguish appropriately between the NPDES stormwater program and the TMDL program.

While the Storm Water Panel was tasked with exploring the technical feasibility of establishing numeric effluent limits for inclusion in stormwater permits, the Panel strayed beyond this mandate, confusing the different purposes of TMDLs and stormwater permitting. The Panel made a brief, half-hearted attempt at addressing the link between TMDLs and stormwater permits. For instance, the Report includes guidance for determining what BMPs are required when a waterbody is impaired. Specifically, the Report states that “...where water quality impairment exists but a TMDL has not yet been performed, BAT would be required...” Report at 12. However, BAT or other applicable technology-standards are always applicable, in every waterway scenario. They are not “special” requirements for impaired waters; instead, statutory language plainly provides that waters are listed as impaired when BAT and other technology-standards have been insufficient to attain applicable standards. 33 U.S.C. Section 1313(d). Where impaired waters exist, the law requires state regulators to ensure that such waters attain clean water standards. Indeed, even before a TMDL is adopted, additional discharges to a waterway that lacks assimilative capacity would be inconsistent with federal regulations, chief among them, 40 C.F.R. Part 122.44 . In these cases, actions beyond BAT are certainly likely to be required.

Continuing on, “Condition 3” in the proposed BMP design and permit process poses a situation where a TMDL is already in force. Although the section is unclear, it appears that the Panel’s prescription here is the same as where no TMDL has been adopted under “Condition 2.” Report at 12. This conclusion makes little sense legally, because an established TMDL requires design criteria and a maintenance plan that leads to water quality standards attainment.

The discussion of industrial stormwater suffers from the same confusion. The Report states that “[w]hen there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL.” However, the Report then states “[w]hen there is no TMDL, the Numeric Limits should be based upon sound and established practices for stormwater pollution prevention and treatment...” Report at 19. Here, the Panel seems to assert that if no TMDL exists then water quality standards attainment is not of concern. Again, although a TMDL may not be

currently adopted for a waterbody, the BMPs or other approaches must ultimately lead to water quality standards attainment.

Regardless of the Report's attempts to address TMDLs, the controlling legal structure is clear as to the role of TMDLs. In spite of the Panel's conclusions as to the feasibility of numeric limits, TMDLs are a special case where specific waste load allocations have been adopted to lead to water quality standards attainment. To date, stormwater regulations have failed, as evidenced by the impairments in many of our State's waterbodies. Because TMDLs are the safety net of the Clean Water Act, it is especially important, and legally required, to take actions that genuinely improve water quality. Thus, regardless of the Panel's opinions, the State cannot disregard necessary numeric effluent limits for all adopted TMDLs. The goal of the TMDL program is for these impaired waterbodies to meet water quality standards through the establishment of numeric waste load allocations ("WLAs") and load allocations ("LAs"). Thus, the implementation of TMDLs requires incorporation of WLAs and LAs in appropriate NPDES permits. Regardless of the Panel's recommendations, Federal law clearly commands that the Regional Boards integrate TMDLs into the effluent limitations of appropriate NPDES permits. Specifically, Federal regulations require that:

Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7. (40 CFR § 122.44(d)(4)(vii)(B).)

In sum, recommendations made by a State-convened Storm Water Panel do not and cannot supersede Federal law which commands the incorporation of WLAs and LAs into stormwater permits in the form of numeric effluent limits. The directive to place numeric TMDLs into stormwater permits is not open for discussion. Clearly, the Panel's attempt to address TMDLs is inappropriate, and the State Board should disregard the discussion on this topic.

III. RECOMMENDATIONS

As discussed in the Panel's Report and above, the entire California stormwater program is in dire need of an overhaul. At the July 28, 2006 State Board public workshop, State Board Members requested that the public provide specific recommendations on how to proceed with the findings of the Storm Water Panel. In this Section, we offer recommendations to improve all three stormwater programs that include the use of numeric effluent limits and move away from the focus on the iterative BMP process. First and foremost, any approach adopted by the State Board must result in water quality standards attainment as soon as possible. We believe that our outlined approach will finally move the State towards water quality standards attainment. The proposal is detailed below and in Appendices A - F. A graphical summary is provided in Figures 1-4.

Further, the "refined" BMP-focused compliance approach for storm water permits that has been suggested by some parties will not lead to better water quality results. Since the mid-1990s,

dischargers have repeatedly filed administrative and judicial challenges to BMP programs required by permits.² Some examples of these cases include:

- In the mid-1990s, the City of Long Beach filed suit, objecting to the fact that the Los Angeles Municipal Storm Water Permit contained permit programs not sufficiently tailored to its circumstances.
- On December 20, 2001, the Building Industry Association, representing local cities in the San Diego region, filed suit. BIA challenged a range of BMP programs, including the “SUSMP” standards—the only BMP program currently required that specifies a design standard—as well as the power of the state to specify the means by which local governments comply with permit conditions.
- In January 2003, five lawsuits were filed by over 35 cities in Southern California, raising more than a dozen challenges to BMP programs in the 2001 Los Angeles Municipal Storm Water Permit. These challenges included BMP requirements related to trash, construction, critical sources, inspections, response times, natural hydrological conditions, development plan reviews and general plans, the SUSMP program, and even requirements related to designated environmentally-sensitive areas.
- On March 15, 2003, the City of Mission Viejo filed an administrative petition with the SWRCB. The Petition asserted that “the manner of compliance should be left to the permittees” and, further, that various BMPs relating to construction and industrial sites were unlawful. The petition further challenged other BMPs as too intrusive on municipal powers.

These examples demonstrate that, over the last ten years, dischargers throughout the state have shown that they will not accept specific, BMP-requirements, without litigation. There is no reason to think that this practical impediment to progress would change in the future. On the contrary, should the State Board employ as a fundamental regulatory strategy the further specification and enforcement of BMP-requirements, the dischargers’ past and current litigation efforts foretell even more litigation aimed at paralyzing the regulatory system.

A. Construction Stormwater Permit

As confirmed by the Storm Water Panel, the inclusion of numeric effluent limits in construction stormwater permits is entirely feasible. Developing appropriate numeric effluent limits for construction activities is relatively easy, as “construction” is a single industrial category. Moreover, much scientific research has gone into construction stormwater BMPs and evaluating current performance, BAT, and effluent pollutant concentrations achieved by these BMPs.³ Thus, we recommend the following approach⁴:

² See attached Complaints/Petitions.

³ Appendix D includes references for a variety of construction stormwater-related studies.

⁴ See Figure 2

- 1) As required by the Clean Water Act, the General Permit for Discharges of Storm Water Associated with Construction Activity (“Construction General Permit”) must prohibit discharges that cause or contribute to an exceedance of water quality standards. 40 C.F.R. Part 122.44.
- 2) The “Construction General Permit” must immediately be modified to include numeric effluent limits based on the waste load allocations for all adopted TMDLs.
- 3) The State Board should immediately include numeric effluent limits in the Construction General Permit for pH, turbidity, and TSS. These parameters are indicators of BMP effectiveness at the majority of construction sites. As discussed in the Storm Water Panel Report if the construction BMPs are properly designed and maintained, dischargers should not have a problem meeting these effluent limits. If there are other pollutants of concern identified in the SWPPP, the State Board must apply any existing benchmarks to the discharge to evaluate if the BAT requirement has been complied with. In other words, the benchmark will become the effluent limit. Appendix E outlines suggested numeric effluent limits and a process for applying benchmarks to the discharge.
- 4) In order to significantly improve the State’s Construction Stormwater Program, the State Board should develop a programmatic Storm Water Pollution Prevention Plan (“SWPPP”) to serve as a model for site-specific SWPPPs. Currently, the SWPPP requirement under the Construction General Permit is too vague and leads to the development of “cookie cutter” SWPPPs that do not promote significant water quality improvements. Instead, the development of a programmatic SWPPP would allow dischargers to reference certain more universal aspects of the programmatic SWPPP and to focus on site-specific circumstances. Specifically, the programmatic SWPPP should include elements such as construction site design and management. Also, a key component of any site-specific SWPPP is the identification of potential pollutants. Thus, the programmatic SWPPP should include guidelines for determining potential pollutants at each construction site. A proposed SWPPP content outline, basic principles summary, and potential pollutant categories that are useful for pollutant identification are included in Appendix F.

B. Construction Stormwater Monitoring

There are four major categories of potential pollutants in construction stormwater runoff: sediments, construction materials, materials associated with past land use activities, and materials incidentally present in soils. Discharges of pollutants associated with these categories should be monitored appropriately, in order to ensure that they are not impacting water quality. As outlined below and in Appendix E, we recommend that the State Board include several standard monitoring requirements in the Construction General Permit.

- Discharges of sediment should be monitored for TSS and turbidity in the receiving water. For all monitored discharges, sampling should be performed in accordance with the State Board’s Construction Storm Water Sampling and Analysis Guidance Document.

- Discharge monitoring should be performed if a construction material for which a water quality standard or benchmark exists is released through BMP failure, accident, or spill that is not completely cleaned up before discharge.
- Discharge monitoring should be performed to identify polluted runoff associated with materials from past land use activities. Since erosion is the usual transport mechanism, monitoring should consist of field turbidity measurements and laboratory measurements of potential pollutants.
- For discharges of materials incidentally present in soils to a waterbody designated as impaired for nutrients, monitoring should be conducted for phosphorus and nitrogen if and when water quality standards or benchmarks have been set for those pollutants.
- Discharge monitoring should be performed for any incidentally present pollutants identified for which the prospective construction site contains relatively enriched deposits of the potential pollutant(s), and if a water quality standard or benchmark for the pollutant(s) has been set for the receiving water. Since erosion is the usual transport mechanism, monitoring should consist of field turbidity measurements and laboratory measurements of potential pollutants.
- In accordance with the State Board's Construction Storm Water Sampling and Analysis Guidance Document, sampling should occur in the receiving water upstream and downstream of the discharge and, if possible, the discharge itself. Of note, the Guidance applies where the discharge does not mingle with other flow prior to entering the receiving water and where upstream and downstream receiving water sampling points are accessible.

C. Industrial Stormwater Permit

As the Storm Water Panel's Report suggests, numeric effluent limits are currently feasible for a variety of industrial categories. However in order to give the State Board time to develop appropriate numeric effluent limits, we suggest incorporating numeric effluent limits into industrial stormwater permits through a phased approach. The specific proposal is detailed below⁵:

- 1) As required by the Clean Water Act, the Industrial General Permit must prohibit discharges that cause or contribute to an exceedance of water quality standards. 40 C.F.R. Part 122.44.
- 2) The Industrial General Permit should immediately be modified to include numeric effluent limits based on the waste load allocations for all adopted TMDLs. As stated in the Storm Water Panel Report, "[w]hen there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL." Report at 19.
- 3) The State Board should replace the current SIC code based program with one that considers the relative exposure of pollutants. SIC codes were developed by Congress for other

⁵ See Figure 3

regulatory purposes and do not consider pollutant exposure.⁶ Instead, the State Board should adopt an exposure-based approach. To do this, the SIC categories can be arranged into subcategories by considering relative exposure of pollutants to rainfall and runoff. For instance, manufacturing businesses can be separated into those with outdoor exposure and a high relative exposure of pollutants such as cement plants and those with less outdoor exposure and a lower risk of pollutant runoff such as food products manufacturing. This approach will ensure that industries are properly grouped and prioritized in terms of pollutant exposure. A list of proposed categories with their relative exposure of pollutants are summarized in Appendix A.

- 4) A strategy to develop numeric effluent limits should stem from the exposure-based categories described above. The State Board should develop numeric effluent limits for pollutants associated with industrial sectors with the highest relative pollutant exposure (see Appendix A) and incorporate them into the Industrial General Permit. Recommended parameters for effluent limitations and monitoring purposes are provided in Appendix B. Specifically within *3 years*, numeric effluent limits should be included for the pollutants associated with the following 10 industrial sectors with the highest risk of pollutant exposure⁷: 1)chemicals manufacturing; 2)metal products; 3)petroleum products; 4)ship and boat building and repair yards; 5)airfields and aircraft maintenance; 6)fleet vehicle yards; 7)railroads; 8)gas stations; 9)recyclers and scrap yards; and 10)vehicle maintenance and repair. For the second phase within *five years*, numeric effluent limits should be adopted for the pollutants associated with the remaining nine high priority industrial categories: 1)cement; 2)concrete products; 3)paper and pulp; 4)wood/wood treatment; 5)commercial composting; 6)retail/wholesale nurseries and building materials; 7)marinas and boat clubs; 8)construction businesses; and 9)retail/wholesale chemicals and petroleum.

Further, as a first step the State Board should derive the numeric effluent limits using a Best Available Technology (“BAT”) approach. Specifically, the State Board should calculate numeric effluent limits using the 90th percentile effluent quality specified in the EPA-ASCE BMP database at an appropriate design storm. For example purposes only, we have attached numeric effluent limits based on 50th percentile effluent quality during the 50 year storm in Appendix C, as these values were already calculated. However, the 90th percentile is appropriate for toxics.⁸ For those parameters that are not included in the EPA-ASCE database, numeric effluent limits should be taken from EPA's Multi-Sector General Permit for Storm Water Discharges from Industrial Activities. These numeric limits are also included in Appendix C. There are several parameters that cannot be derived from either of these data sources (i.e. tPAHs, BTEX, ethylene glycol, propylene glycol, ammonia, and

⁶ Of note, the Storm Water Panel also confirms that the SIC categories are not satisfactory. Report at 21.

⁷ For a list of pollutants associated with each industrial category, see Appendix B.

⁸ Of note, EPA calculates limitations based upon percentiles chosen, on one hand, to be high enough to accommodate reasonably anticipated variability within control of the facility and, on the other hand, to be low enough to reflect a level of performance consistent with the Clean Water Act requirement that these effluent limitations be based on the “best” technologies. The daily maximum limitation is an estimate of the 99th percentile of the distribution of the *daily* measurements. The monthly average limitation is an estimate of the 95th percentile of the distribution of the *monthly* averages of the daily measurements. Meat and Poultry Products Technical Support Document 14.6.2.

chlorinated solvents other than VOCs). The State Board should develop numeric effluent limits for these parameters, as they are associated with the priority industrial categories.

- 5) The Storm Water Panel concludes that the current industrial stormwater database is inadequate. Therefore, the State Board should require a comprehensive monitoring program as discussed in further detail below. Once the monitoring program is implemented and sufficient data have been collected, the State Board should develop water quality based effluent limits (“WQBELs”). Specifically, the State Board should include WQBELs during the 2011 renewal of the General Industrial Stormwater Permit.

D. Industrial Stormwater Monitoring

In conjunction with the re-issuance of the Industrial General Permit, the State Board should institute a comprehensive monitoring program with the goal of making the reasonable potential analysis fully quantitative and capable of backing numeric effluent limitations. While dischargers should be required to perform certain functions of this program that are most directly related to their own facilities, the State Board will need to have significant involvement in the oversight and monitoring itself. The monitoring program should be carefully designed and tailored toward obtaining the specific data required to perform the reasonable potential analysis and better inform the development of numeric water quality-based effluent limits, as laid out in the State Board’s Water Quality Permit Writer’s Manual and USEPA’s Technical Support Document for Water Quality-Based Toxics Control. Specifically, the Industrial General Stormwater Permit should contain the following effluent and receiving water monitoring requirements:

Monitoring Frequency

- All industrial sites should be required to obtain effluent samples during the first flush (first hour) of at least 5 rainfall events per year.

Monitoring Parameters

- At a minimum, all effluent samples should be analyzed for total recoverable and dissolved copper, lead, and zinc; total suspended solids; pH; and TPH. In addition, the State Board should assign additional monitoring parameters by sector, and the Regional Boards should add site specific monitoring requirements as needed.
- Receiving water samples should be analyzed for, at a minimum, the parameters set forth in Appendix C.

Monitoring Specifications

- The State Board should provide guidance and assistance to make the effluent samples as representative as possible of rainfall quantities and intensities, antecedent dry periods, and industrial activities. The State Board has a legal obligation under SB72 to develop a

standardized industrial monitoring program for California that includes sampling constituents and analysis.

- Receiving water sampling should be representative of different waterbody types, industrial operations, and seasons. Effectively representing the range of conditions is essential if the receiving water around every industrial site will not be monitored. This component should embrace both water quality (in the discharge vicinity and background) and physical characteristics (e.g., flow rates, water circulation patterns and rates) necessary to perform the assessment.

E. Municipal Stormwater Permit

The Storm Water Panel reasoned that there are various barriers to developing numeric effluent limits for municipal stormwater discharges. However by using a phased approach, steady progress can be made towards water quality standards attainment while the State Board has more time to develop numeric effluent limits for all priority pollutants. Specifically, we recommend the following⁹:

- 1) As required by the Clean Water Act, municipal stormwater permits must prohibit discharges that cause or contribute to an exceedance of water quality standards. 40 CFR Part 122.44.
- 2) The Regional Boards should *immediately* incorporate numeric effluent limits for adopted TMDLs into municipal stormwater permits. The State Board has no choice but to include these limits, as stormwater permits are the primary implementation mechanism for many TMDLs. As such, numeric effluent limits for TMDLs should be placed in municipal stormwater permits as soon as possible after TMDL adoption. In addition, the State Board should include a policy in all stormwater permits that provides that the permit shall be reopened to incorporate WLAs *before* the first TMDL compliance deadline for WLAs. This regulation will ensure compliance with TMDL implementation schedules and progress towards water quality standards attainment.
- 3) In addition, the Regional Boards should immediately include design and performance standards based on effluent quality in the municipal stormwater permits. This element should expand upon the current Standard Urban Storm Water Mitigation Plans (SUSMPs) design standards requirements that were part of the MS4 permits. Specifically, performance standards should be based on the 90th percentile effluent quality value associated with BMPs in the EPA-ASCE database. Reliance on pollutant removal efficiency data as opposed to effluent quality for a performance standard would be less effective because removal efficiencies do not provide a clear connection to water quality and are biased by influent quality. Design standards should be included that ensure treatment of the design storm but do not cause an undue risk of flooding. Preferably, the BMPs should be designed to treat multiple pollutants. Further, once the iterative approach is triggered, all BMPs constructed within the drainage causing or contributing to the water quality standards exceedance should be required to meet these design and performance standards on a retrofit basis. All BMPs

⁹ See Figure 4

and BMP retrofits completed in response to the exceedance shall be completed within one year of the exceedance. All new projects covered by SUSMP requirements shall meet the design and performance standards going forward.

- 4) As the fourth component of our proposal, the State Board should pursue a phased approach for adopting numeric effluent limits for California Toxics Rule Priority Pollutants. The Storm Water Panel suggests that at this time proper BMPs are not in place to make numeric limits feasible. With this in-mind, we suggest a phased approach that begins in five years. After *5 years*, the Regional Boards should include numeric effluent limits for 9 Priority Pollutants that are major concerns and good indicators of other pollutants. Specifically, this initial set of numeric effluent limits should include copper, lead, zinc, total phosphorus, total nitrogen, TSS, total PAH, DDT and PCBs. Further, after *10 years*, the Regional Boards should incorporate numeric effluent limits for *all* Priority Pollutants. This phased approach will give dischargers up to 10 years to anticipate these numeric effluent limitations designed to attain water quality standards in the receiving waters and modify BMPs appropriately. Also, the State Board will have sufficient time to develop appropriate numeric effluent limits. Presumably if a waterbody does not have a TMDL or does not require a TMDL, water quality standards for other Priority Pollutants are already attained. Thus, maintaining the water quality standards should not be problem. Thus, a total of ten years should provide sufficient time for incorporating numerics in the permit.

F. Municipal Stormwater Monitoring

Phase I municipal stormwater discharges should be evaluated under a comprehensive monitoring program prescribed by the State Board and Regional Boards. As discussed above, under SB72 the State Board has a legal obligation to develop a comprehensive and consistent monitoring program. Once this program is developed, the Regional Boards should simply add any necessary situation or site-specific monitoring requirements. There are numerous examples of strong stormwater monitoring programs in place that should serve as the model for statewide monitoring requirements. For instance, Los Angeles County's stormwater monitoring program includes key monitoring requirements for mass pollutant loading, tributary monitoring, and ecological impacts that consists of bioassessment and toxicity testing. In addition, the monitoring program specifies agreed upon monitoring frequencies, constituents, MLs and reporting practices. As outlined below, minimum requirements for this monitoring program should include the following elements:

Monitoring Frequency and Sampling

- A minimum of 3 storms per year
- In order to accurately assess storm loadings, at least 5 discrete samples shall be collected over the course of a storm in conjunction with flow measurements.

Monitoring Locations

- 10% or more of all outlets that are 36 inches or greater in diameter
- Mass pollutant loading monitoring sites should exist in all watersheds greater than 50 square miles in area
- Tributary monitoring should exist within watersheds greater than 50 square miles in area

Monitoring Parameters

All sites:

- Priority Pollutants
- Bacteria
- TSS, TDS, nutrients, pH

For sites within watersheds greater than 50 square miles:

- Bioassessment
- Toxicity
- Sediment contamination

Specifications

- MLs below water quality standards in CTR
- Use of State Certified Laboratories

In sum, the approach proposed above is reasonable and an enormous improvement over the existing ineffective stormwater program. The approach focuses on water quality standard attainment as soon as possible with a phased move towards numeric effluent limits: an essential component for compliance assurance.

If you have any questions or would like to discuss any of these comments and recommendations, please feel free to contact us. Thank you for your consideration.

Sincerely,

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Figure 1

The “Refined” BMP-Approach Will Not Work

“Refined” BMP-focused compliance approach for storm water permits that has been suggested by some parties will not lead to better water quality results.

- Since the mid-1990s, dischargers have repeatedly filed administrative and judicial challenges to BMP programs required by permits. These examples demonstrate that dischargers are not willing to accept specific BMP requirements without litigation.
- Subjective BMP-based effluent limits are less effective in assuring protection of beneficial uses and are harder to enforce when violations occur.
- BMP-based limits are labor intensive for compliance review and enforcement, meaning compliance levels are low, and staff time is badly used attempting to achieve compliance.
- Action Item #6 of the Governor’s “Action Plan for the Environment” states that because “[s]trict law enforcement is vital to assure environmental protection... [m]y Administration will focus on keeping underlying statutes and regulations simple; simple rules are easiest to follow and comply with; unnecessarily complex rules are hard to comply with, hard to enforce, and encourage evasion.”
- The November 2004 Cal/EPA Enforcement Initiative found that “one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable.” The Initiative implements the Governor’s enforcement vision by asking the SWRCB to “lead the effort... on ensuring that our regulations and permits are enforceable by our enforcement staff.”



Figure 2

Reforming the General Construction Stormwater Permit

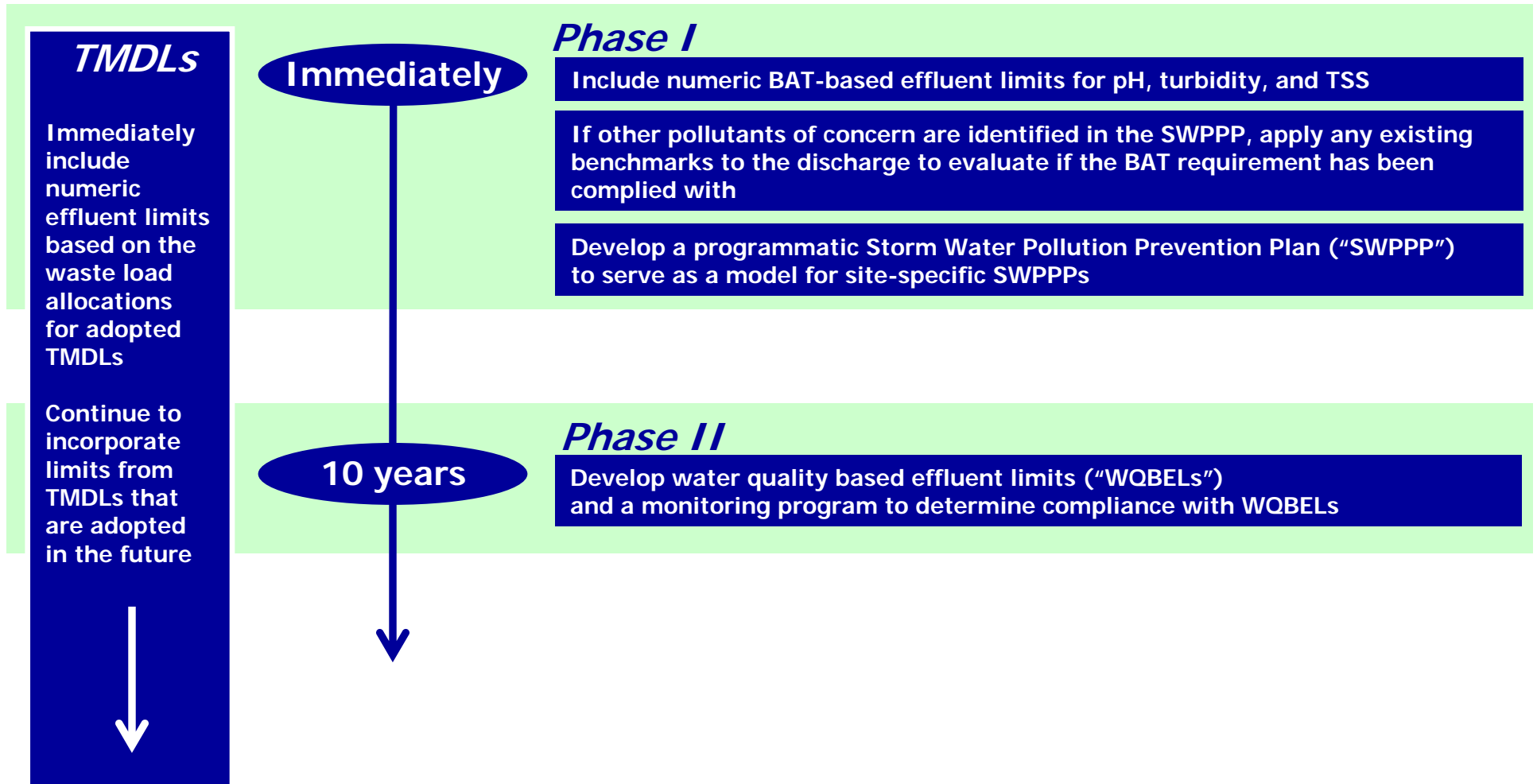


Figure 3

Reforming the General Industrial Stormwater Permit

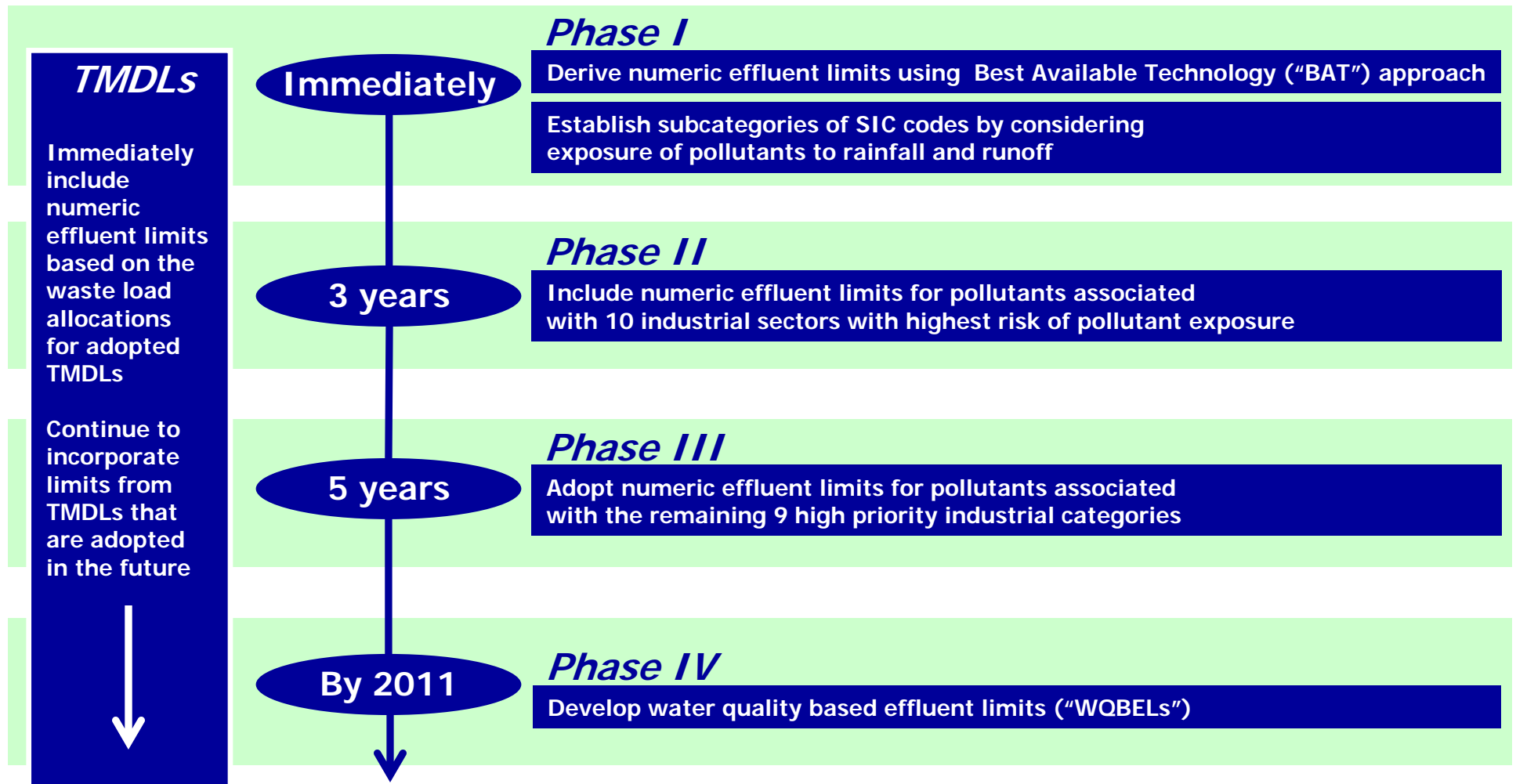
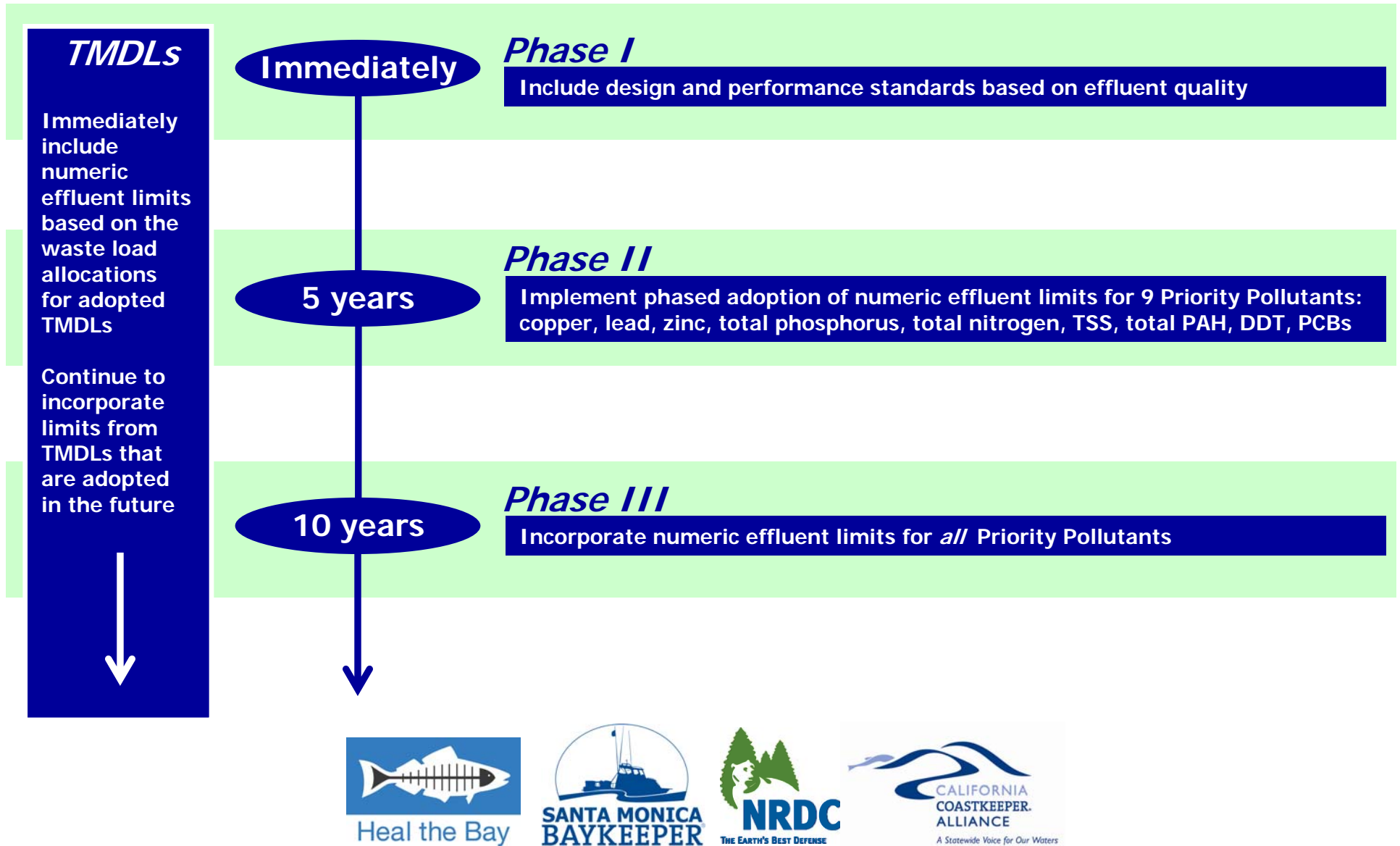


Figure 4

Reforming Municipal Stormwater Permits



APPENDIX A

SIC CATEGORIES ARRANGED IN SUBCATEGORIES CONSIDERING ANTICIPATED RELATIVE EXPOSURE OF POLLUTANTS TO RAINFALL AND RUNOFF

NOTE: Numbers in **(bold)** at the end of subcategory titles represent estimated relative rank in polluting potential (per unit area) among all subcategories, with **(1)** being highest.

Category 1: Manufacturing Businesses

Subcategory 1A: Manufacturing businesses with relatively high outdoor exposure of potentially polluting materials and/or manufacturing processes (1)

- Cement
- Chemicals Manufacturing
- Concrete Products
- Metal Products
- Paper and Pulp
- Petroleum Products
- Ship and Boat Building and Repair Yards
- Wood
- Wood Treatment

Subcategory 1B: Manufacturing businesses with less outdoor exposure of potentially polluting materials and/or manufacturing processes (9)

- Electrical Products
- Food Products
- Glass Products
- Industrial Machinery and Equipment, Trucks and Trailers, Aircraft, Aerospace, and Railroad
- Paper Products
- Printing
- Rubber and Plastic Products
- Other Manufacturing Businesses

Category 2: Transportation and Communication

Subcategory 2A: Transportation and communication facilities with relatively high outdoor exposure of vehicles (2)

- Airfields and Aircraft Maintenance
- Fleet Vehicle Yards
- Railroads

Subcategory 2B: Transportation and communication facilities with less outdoor exposure of vehicles (5)

- Warehouses and Mini-Warehouses
- Other Transportation and Communication

Category 3: Retail and Wholesale Businesses

Subcategory 3A: Retail and wholesale businesses with relatively high outdoor exposure of potentially polluting materials (3)

- Gas Stations
- Recyclers and Scrap Yards
- Commercial Composting
- Retail / Wholesale Nurseries and Building Materials
- Retail / Wholesale Chemicals and Petroleum

Subcategory 3B: Retail and wholesale businesses with relatively high outdoor exposure of vehicles (8)

- Retail / Wholesale Vehicle and Equipment Dealers

Subcategory 3C: Retail and wholesale businesses with a relatively high rate of vehicle cycling (7)

- Restaurants / Fast Food
- Retail / Wholesale Foods and Beverages

Subcategory 3D: Retail and wholesale businesses with a medium rate of vehicle cycling (10)

- Retail / General Merchandise
- Other Retail / Wholesale Business [note: placed here because of vagueness of term]

Category 4: Service Businesses

Subcategory 4A: Service businesses with a relatively high rate of vehicle cycling (6)

- Commercial Car and Truck Washes
- Laundries and Other Cleaning Services

Subcategory 4B: Service businesses with a medium rate of vehicle cycling (11)

- Animal Care Services
- Equipment Repair [note: assuming all work indoors; otherwise in Subcategory 4D]
- Gold and Country Clubs
- Miscellaneous Services
- Professional Services

Subcategory 4C: Service businesses with a relatively low rate of vehicle cycling (12)

- Multi-Family Residences

Note: There seems to be no obvious designation in the official SIC code system for offices with outdoor parking. We propose placing them in this subcategory.

Subcategory 4D: Service businesses with relatively high outdoor exposure of vehicles and potentially polluting materials (4)

- Marinas and Boat Clubs
- Vehicle Maintenance and Repair
- Construction Businesses

APPENDIX B

Industrial Categories and Parameters for First Five Year Permit Cycle

Category 1: Manufacturing Businesses

Subcategory 1A: Manufacturing businesses with relatively high outdoor exposure of potentially polluting materials and/or manufacturing processes

- Cement
 - TSS
 - COD
 - pH
 - lead
 - iron
 - zinc
 - oil and grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)

- Chemicals Manufacturing(Ag Chem)N+N
 - Lead
 - Iron
 - Zinc
 - phosphorus

(Inorg Chem) Alum

 - iron
 - N+N

(Soaps etc) N+N

 - Zinc

(Plastics etc) zinc

- Concrete Products
 - TSS
 - COD
 - pH
 - potassium sulfate
 - oil and grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)

- Metal Products
 - Zn

- Fe
 - Al
 - N+N
 - Cu
 - Pb

- Paper and Pulp
 - COD

- Petroleum Products
 - Oil and grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)

- Ship and Boat Building and Repair Yards
 - Cu
 - Pb
 - Zn
 - TSS
 - Ethylene Glycol
 - Propylene Glycol
 - pH
 - Oil and grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)

- Wood
 - COD
 - TSS
 - Oil and Grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)
 - pH

- Wood Treatment
 - copper
 - Arsenic
 - TSS
 - BOD

Category 2: Transportation and Communication

Subcategory 2A: Transportation and communication facilities with relatively high outdoor exposure of vehicles

- Airfields and Aircraft Maintenance BOD
COD
Ammonia
pH
- Fleet Vehicle Yards oil and grease
Zinc
Lead
Iron
Al
pH
TPH
chl solvents
glycol
- Railroads oil and grease
Zinc
Lead
Iron
Al
pH
TPH
chl solvents
glycol
COD

Category 3: Retail and Wholesale Businesses

Subcategory 3A: Retail and wholesale businesses with relatively high outdoor exposure of potentially polluting materials

- Gas Stations oil and grease
Zinc
Lead
Iron
Al
pH
TPH
chl solvents
Ethylene Glycol
Propylene Glycol
COD
- Recyclers and Scrap Yards TSS
Fe

- Pb
 - Al
 - Cu
 - Zn
 - COD
- Commercial Composting
 - BOD
 - TSS
 - N+N
 - Phosphorus
- Retail / Wholesale Nurseries and Building Materials
 - BOD
 - TSS
 - N+N
 - Phosphorus
- Retail / Wholesale Chemicals and Petroleum (Ag Chem)
 - N+N
 - Lead
 - Iron
 - Zinc
 - phosphorus
- (Inorg Chem) Alum
- iron
- N+N
- (Soaps etc) N+N
- Zinc
- (Plastics etc) zinc
- (Petroleum Products) Oil and grease
- Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)

Category 4: Service Businesses

Subcategory 4A: Service businesses with a relatively high rate of vehicle cycling

- Commercial Car and Truck Washes
 - BOD
 - COD
 - Oil and grease
 - Total petroleum hydrocarbons (gasoline, Diesel, and heavy oil fractions)
 - Phosphorus

- Laundries and Other Cleaning Services

BOD
COD
Phosphorus

APPENDIX C

Numeric Limits

A. Limits Derived From National Database

Item	Parameter	Proposed BAT	Benchmark	CTR	Rationale	Alt. Prop. BAT	Alt. Rationale
1.	T. Phosphorus	0.2 mg/L	2 mg/L	na		0.1 mg/L	
2.	T. Suspended Solids	50 mg/L	100 mg/L	na	Coal Pile Runoff associated with Steam Electric Power Generating Point Source, 40 CFR 423	25 mg/L 30 day average, 45 mg/L 7 day average; 25 mg/L (IBMPDB)	Best Practicable Technology, Colorado Sand and Gravel Discharge Permit Number Cog-500000

(continued)

Item	Parameter	Proposed BAT	Benchmark	CTR	Rationale	Alt. Prop. BAT	Alt. Rationale
3.	Total Nitrogen	2 mg/L	na	na			
4.	Total Copper	15 µg/L	63.6 µg/L	3.1 µg/L salt water continuous		10 µg/L	
5.	Total Lead	15 µg/L	81.6 µg/L	2.5 µg/L fresh water continuous			
6.	Total Zinc	110 µg/L	117 µg/L	81 µg/L salt water continuous		55 µg/L, 60 µg/L	
7.	Oil and Grease	10 mg/L	15 mg/L	na	State Effluent Regulations, Colorado Sand and Gravel Discharge Permit Number Cog-500000		
8.	BOD5	37 mg/L	30 mg/L	na			
9.	COD	40 mg/L	120 mg/L	na			

B. Limits from Multi-sector Permit

N+N	.68 mg/l
pH	6-9
Al	.75mg/l
As	.168 mg/l
Fe	.1.0 mg/l

(Source-Multi-sector Permit Benchmarks, FR Vol 60, No. 189, 50826)

APPENDIX D

Construction Stormwater- Related Studies

http://www.stormh2omanagement.org/sw_0405_raising.html

http://www.ecy.wa.gov/programs/wq/stormwater/newtech/use_designations/wteccud.pdf

<http://www.djc.com/news/en/11135659.html>

<http://www.snohomishcountybusinessjournal.com/archive/may01/watertectonics-may01.htm>

<http://news.thomasnet.com/fullstory/451928/4605>

<http://www.iwaponline.com/ws/00205/ws002050073.htm>

APPENDIX E

CONSTRUCTION STORMWATER PERMIT

DISCHARGE LIMITS

Note: These limits apply to surface discharges to receiving waters.

Potential Pollutants in Category 1 (sediments from areas subject to clearing and grading)

- For discharges waters on the 303(d) list as impaired for sediment, if and when a water quality standard has been established, sample as specified in the State Water Resources Control Board's Construction Storm Water Sampling and Analysis Guidance Document (August 2003), if possible. The Guidance Document specifies sampling the receiving water upstream and downstream of the discharge, and encourages sampling the discharge itself. This guidance applies where the discharge does not mingle with other flow prior to entering the receiving water and where upstream and downstream receiving water sampling points are accessible. Analyze samples as specified in the Guidance Document.

The discharge limit shall be the established water quality standard.

- If a water quality standard has not been established, or if it is impossible to sample as specified for listed waters in the Guidance Document, sample the discharge and analyze it for turbidity in the field and total suspended solids (TSS) in the laboratory. A field measurement gives an instant indication of a possible contribution to a violation of a water quality objective, and a confirmation if there is a standard for turbidity. A laboratory measurement provides a confirmation of whether or not there is a violation of sediment standards other than turbidity.

If the Basin Plan turbidity objectives apply, the discharge limit shall be the objectives (or the turbidity established through an optional baseline, reference, or mixing zone study). If the Basin Plan turbidity objectives do not apply, and measurements exceed the following discharge limits (or the turbidity established through an optional baseline, reference, or mixing zone study), the result shall be considered to be a violation:

Mean of all measurements at discharge point = 25 NTU;

Maximum of all measurements at discharge point = 75 NTU.

The discharger shall immediately begin to make provisions for remediation, as specified below, pending laboratory confirmation of a violation

If there is a TSS standard, the discharge limit shall be the standard (or the concentration established through an optional baseline, reference, or mixing zone study as outlined above). If there is no TSS standard and measurements exceed the following discharge

limits (or the concentration established through an optional baseline, reference, or mixing zone study), the result shall be considered to be a confirmation of a violation requiring remediation:

Mean of all measurements at discharge point = 50 mg/L;

Maximum of all measurements at discharge point = 260 mg/L

Potential Pollutants in Categories 2-4 (construction materials)

Discharge monitoring shall be performed if a material for which a water quality standard or benchmark exists is released through BMP failure, accident, or spill that is not completely cleaned up before discharge.

Potential pollutants subject to analysis pending identification at the construction site shall include, but not be limited to:

Metals—Arsenic, Cadmium, Chromium⁺³, Chromium⁺⁶, Copper, Lead, Mercury, Nickel, Selenium, Silver, Zinc;

Other inorganics—pH, Asbestos;

Pesticides—Diazinon, Chlorpyrifos;

Other organics—Oil and grease; Total petroleum hydrocarbons; Benzene; Ethylbenzene; Toluene; Vinyl chloride; 2-Chlorophenol; 2,4-Dichlorophenol; 2,4-Dimethylphenol; 2-Methyl-4,6-Dinitrophenol; 2,4-Dinitrophenol; 2-Nitrophenol; 4-Nitrophenol; 3-Methyl-4-Chlorophenol; Pentachlorophenol, Acenaphthylene, Naphthalene, Nitrobenzene.

If a potential pollutant release occurs through a failure, accident, spill, etc., the discharger shall immediately begin to make provisions for remediation, as specified below, pending laboratory confirmation of a violation.

The discharge limit shall be the benchmark (or the concentration established through an optional baseline, reference, or mixing zone study).

Potential Pollutants in Categories 5-9 (materials associated with past land use activities)

Monitoring as follows shall be performed if any potential pollutants in these categories are identified, and if a water quality standard or benchmark for the pollutant(s) exists.

Potential pollutants subject to analysis pending identification at the construction site shall include, but not be limited to:

The list for Potential Pollutants in Categories 2-4 above;

Additional organics—2,3,7,8-TCDD (dioxin); Aldrin; Chlordane; 4,4'-DDT; 4,4'-DDE; 4,4'-DDD; Dieldrin; alpha-Endosulfan; beta-Endosulfan; Endosulfan sulfate; Endrin; Endrin aldehyde; Heptachlor; Heptachlor epoxide; Polychlorinated biphenyls (PCBs); Toxaphene.

Pollutants in these categories are generally released in connection with soil erosion, although they can also dissolve in runoff. Since erosion is the usual transport mechanism, monitoring shall consist of field turbidity measurements and laboratory measurements of potential pollutants.

If turbidity measurements exceed the following discharge limits (or the concentration established through an optional baseline, reference, or mixing zone study), the result shall be considered to be an indication of a possible violation:

Mean of all measurements at discharge point = 25 NTU;

Maximum of all measurements at discharge point = 75 NTU.

The discharger shall immediately begin to make provisions for remediation, as specified below, pending laboratory confirmation of a violation.

The discharge limit shall be the benchmark (or the concentration established through an optional baseline, reference, or mixing zone study).

Potential Pollutants in Category 10 (materials incidentally present in soils)

For discharges to waters on the 303(d) list for nutrients, monitoring shall be performed as follows to test for phosphorus and nitrogen if and when water quality standards or benchmarks have been set for those pollutants.

Discharge monitoring shall be performed as follows for any other incidentally present pollutant(s) identified for which the prospective construction site contains relatively enriched deposits of the potential pollutant(s), and if a water quality standard or benchmark for the pollutant(s) has been set for the receiving water.

Potential pollutants subject to analysis pending identification at the construction site shall include, but not be limited to:

Nutrients—Phosphorus, Nitrogen (Note: The form(s) to be analyzed shall be those stated by the prevailing water quality standard or benchmark.)

Metals—Arsenic, Cadmium, Chromium⁺³, Chromium⁺⁶, Copper, Lead, Mercury, Nickel, Selenium, Silver, Zinc

Other inorganics—Asbestos

Pollutants in this category are generally released in connection with soil erosion, although they can also dissolve in runoff. Since erosion is the usual transport mechanism, monitoring shall consist of field turbidity measurements and laboratory measurements of potential pollutants.

If turbidity measurements exceed the following discharge limits (or the concentration established through an optional baseline, reference, or mixing zone study), the result shall be considered to be an indication of a possible violation:

Mean of all measurements at discharge point = 25 NTU;

Maximum of all measurements at discharge point = 75 NTU.

The discharger shall immediately begin to make provisions for remediation, as specified below, pending laboratory confirmation of a violation.

For discharges to impaired waters, the discharge limit shall be the water quality standard (or the concentration established through an optional baseline, reference, or mixing zone study).

For discharges to other receiving waters, the discharge limit shall be the benchmark (or the concentration established through an optional baseline, reference, or mixing zone study).

APPENDIX F

CONSTRUCTION STORMWATER PERMIT

SWPPP

CONTENT OUTLINE

I. SWPPP certifications and approvals

- A. Initial certifications by architect, engineer, contractor, and/or owner, as appropriate
- B. Annual compliance certification

II. SWPPP amendments

- A. SWPPP amendment certifications and approvals
- B. Amendment log

III. Introduction and project descriptions (generalized to current and prospective projects, with examples)

- A. General description
- B. Unique site features and potential problems
- C. Construction site estimates (areas, impervious cover before and after, hydrologic changes)
- D. Construction activities schedule (emphasizing water pollution control aspects)
- E. Responsible party obligations and contact information

IV. Documents incorporated by reference (e.g., regulatory documents, handbooks)

V. Plan details (Note: Voluminous detail material can be placed in attachments)

- A. SWPPP objectives
- B. Vicinity map(s)
- C. Pollutant source identification

1. Existing (pre-construction) conditions
 2. Inventory of potentially polluting activities and materials—see Attachment A for categories to consider
 3. Characteristics of site soils and imported fill
- D. Site analysis (including calculations, plans, maps, and/or diagrams, as appropriate)
1. Soils analysis
 2. Hydrologic analysis
 3. Topographic analysis
 4. Potential erosion analysis
- E. Best management practices (BMPs) selection (including calculations, plans, maps, and/or diagrams, as appropriate)
1. Construction management practices
 2. Erosion control practices
 3. Flow control practices
 4. Sediment control practices
 5. Tracking control practices
 6. Wind erosion control practices
 7. Non-stormwater control practices
 8. Dewatering control practices
 9. Materials, wastes, and equipment control practices
 10. SWPPP map(s) (placement of BMPs)
 11. Water pollution control budget
- F. BMP inspection and maintenance
- G. Post-construction stormwater management practices

1. Source control practices
2. Treatment control practices
3. Operation and maintenance of post-construction practices

H. Training

1. Contractor training
2. Subcontractor training

I. Other permits and plans

VI. Monitoring program and reports

- A. Site inspections
- B. Non-compliance reporting
- C. Record keeping and reports
- D. Sampling and analysis plan for sediment
- E. Sampling and analysis plan for non-visible pollutants
 1. Potential non-visible pollutants and their sources
 2. Sampling schedule
 3. Sampling locations
 4. Monitoring preparation
 5. Sample collection
 6. Sample handling
 7. Sample documentation
 8. Sample analysis
 9. Quality assurance/quality control
 10. Data management, analysis, and interpretation

11. Reporting of monitoring results

F. Modification of monitoring program because of change in conditions

G. Use of monitoring results to specify remedial action—see Attachment B for discharge limits and actions to take if limits exceeded

VII. Attachments (e.g., maps, plans, checklists, calculations, program details, logs, forms)

PROGRAMMATIC SWPPP DEVELOPMENT AND ORGANIZATION

- Develop a user-friendly, comprehensive document incorporating all elements in one place in a way that they are easy to find.
- Organize in some way so that a user consulting the programmatic SWPPP for a particular site can enter at and be directed to points appropriate for the site-specific circumstances.
- Develop in relation to locations, seasons, and construction phases, from initial grading through building occupation.
- Develop in terms of general provisions coupled to actual site examples illustrating the provisions. In examples show actual BMP locations and all underlying information per the Construction General Permit (e.g., calculations).
- Where appropriate, present strategies in hierarchies emphasizing prevention at pollution sources over attempts at control away from sources.

PROGRAMMATIC SWPPP PRINCIPLES

- Recognize situations like: (1) All or significant areas of the site have good vegetation cover at the outset, versus all or much of the site is not well covered; (2) cut and fill operations are substantial versus absent or minor; (3) the site is versus is not subject to substantial off-site runoff.
- At the top of the erosion control hierarchy, emphasize construction management BMPs, such as:
 - Maintaining existing vegetation cover, if it exists, as long as possible;
 - Perform ground-disturbing work in the dry season and work off disturbed ground in the wet season.
 - Limiting ground disturbance to the amount that can be effectively controlled temporarily in the event of rain.

- Using natural depressions and planning excavation to drain runoff internally and isolate areas of potential sediment and other pollutant generation from draining off the site, so long as safe in large storms;
- Scheduling and coordinating rough grading, finish grading, and erosion control application to be completed in the shortest possible time overall and with the shortest possible lag between these work activities.
- Stabilize with cover appropriate to site conditions, season, and future work plans, e.g.:
 - Rapidly stabilize disturbed areas that could drain off the site, and that will not be worked again, with permanent vegetation supplemented with highly effective temporary erosion controls until achievement of at least 90 percent vegetative soil cover.
 - Rapidly stabilize disturbed areas that could drain off the site, and that will not be worked again for more than three days, with highly effective temporary erosion controls.
 - If at least 0.1 inch of rain is predicted with a probability of 40 percent or more, before rain falls stabilize or isolate disturbed areas that could drain off the site, and that are being actively worked or will be within three days, with measures that will prevent or minimize to the greatest extent possible the transport of sediment off the property.
 - As backup for cases where all of the above measures are used to the maximum extent possible but sediments still could be released from the site, consider the need for sediment collection systems including, but not limited to, conventional settling ponds and advanced sediment collection devices such as polymer-assisted sedimentation and advance sand filtration.
- Specify emergency stabilization and/or runoff collection (e.g., using temporary depressions) procedures for areas of active work when rain is forecast.
- If runoff can enter storm drains, use a perimeter control strategy as backup where some soil exposure will still occur, even with the best possible erosion control (above measures) or when there is discharge to a sensitive water body.
- Specify flow control BMPs to prevent or minimize to the extent possible:
 - Flow of relatively clean off-site water over bare soil or potentially contaminated areas;
 - Flow of relatively clean intercepted groundwater over bare soil or potentially contaminated areas;
 - High velocities of flow over relatively steep and/or long slopes, in excess of what erosion control coverings can withstand;

- Erosion of channels by concentrated flows either by using channel lining, velocity control, or both.
- Specify stabilization of construction entrance and exit areas, provision of a nearby tire and chassis wash for dirty vehicles leaving the site with a wash water sediment trap, and a sweeping plan.
- Specify construction road stabilization.
- Specify wind erosion control.
- Prevent contact between rainfall or runoff and potentially polluting construction materials, processes, wastes, and vehicle and equipment fluids by such measures as enclosures, covers, and containments, as well as berming to direct runoff.
- Incorporate all additional relevant General Permit SWPPP elements—
 - Source identification;
 - BMPs for control of construction materials and processes, wastes, vehicles, and equipment, including a spill prevention and clean up plan;
 - Non-stormwater management;
 - Maintenance, inspection, and repair;
 - Training;
 - Monitoring;
- Implement a bidding and contracting system that provides a budget line item for pollution control. An important reason why control work does not get done is that conventional contracting does not provide dedicated funds, which can come only from the contractor's profit margin.

POTENTIAL POLLUTANT CATEGORIES

Potential pollutants shall be identified in the following categories:

1. Sediments from areas subject to clearing and grading;
2. Materials used in construction;
3. Materials stored on the construction site;

4. Materials with the potential to be spilled during construction;
5. * Materials used during past land use activities in a manner presenting the potential for release of pollutants;
6. * Materials stored during past land use activities in a manner presenting the potential for release of pollutants;
7. * Materials spilled during past land use activities and not fully cleaned up;
8. * Materials applied to land during past land use activities or in preparation for or during construction (e.g., pesticides, soil amendments);
9. * Materials released from natural sources during past land use activities and not fully cleaned up (e.g., petroleum, mining debris);
10. * Materials with polluting potential incidentally present in soils that will be disturbed during construction (e.g., nutrients, natural metals deposits).

* These categories apply if construction disturbance could release pollutants remaining from past land use activities or incidentally present as natural soil components. Analysis of past land use activities and soil sampling and analysis shall be required as necessary to prove or disprove the presence of potential pollutants.

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CITY OF SANTA CLARITA, AND CITY OF TORRANCE

8
9 SUPERIOR COURT, STATE OF CALIFORNIA

10 COUNTY OF LOS ANGELES

11 LOS ANGELES COUNTY ECONOMIC
12 DEVELOPMENT CORPORATION, CITY
OF EL SEGUNDO, CITY OF INDUSTRY,
13 CITY OF LAKEWOOD, CITY OF SANTA
CLARITA, AND CITY OF TORRANCE

14 Petitioners/Plaintiffs,

15 vs.

16 CALIFORNIA STATE WATER
17 RESOURCES CONTROL BOARD;
CALIFORNIA REGIONAL WATER
18 QUALITY CONTROL BOARD LOS
ANGELES REGION, and DOES 1 through
19 50, inclusive

20 Respondents/Defendants.

21 LOS ANGELES COUNTY FLOOD
22 CONTROL DISTRICT, COUNTY OF LOS
ANGELES, CITY OF AGOURA HILLS,
23 CITY OF ALHAMBRA, CITY OF
ARCADIA, CITY OF ARTESIA, CITY OF
24 AZUSA, CITY OF BALDWIN PARK, CITY
OF BELL, CITY OF BELLFLOWER, CITY
OF BELL GARDENS, CITY OF BEVERLY
25 HILLS, CITY OF BRADBURY, CITY OF
BURBANK, CITY OF CALABASAS, CITY
26 OF CARSON, CITY OF CERRITOS, CITY
OF CLAREMONT, CITY OF COMMERCE,
27 CITY OF COMPTON, CITY OF CUDAHY,
CITY OF COVINA, CITY OF CULVER
28 CITY OF DIAMOND BAR, CITY OF

Case No.

EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103

**PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
RELIEF PURSUANT TO WATER CODE
SECTION 13330(b), CODE OF CIVIL
PROCEDURE SECTIONS 1085 AND 1094.5,
AND GOVERNMENT CODE SECTIONS
11350 AND 11350.3**

1 DOWNEY, CITY OF DUARTE, CITY OF
2 EL MONTE, CITY OF GARDENA, CITY
3 OF GLENDALE, CITY OF GLENDORA,
4 CITY OF HAWAIIAN GARDENS, CITY
5 OF HAWTHORNE, CITY OF HERMOSA
6 BEACH, CITY OF HIDDEN HILLS, CITY
7 OF HUNTINGTON PARK, CITY OF
8 INGLEWOOD, CITY OF IRWINDALE,,
9 CITY OF LA CANADA FLINTRIDGE,
10 CITY OF LA HABRA HEIGHTS, CITY OF
11 LA MIRADA, CITY OF LA PUENTE, CITY
12 OF LA VERNE, CITY OF LAWNDALE,
13 CITY OF LOMITA, CITY OF LOS
14 ANGELES, CITY OF LYNWOOD, CITY
15 OF MALIBU, CITY OF MANHATTAN
16 BEACH, CITY OF MAYWOOD, CITY OF
17 MONTEBELLO, CITY OF MONTEREY
18 PARK, CITY OF MONROVIA, CITY OF
19 NORWALKCITY OF PALOS VERDES
20 ESTATES, CITY OF PARAMOUNT, CITY
21 OF PASADENA, CITY OF PICO RIVERA,
22 CITY OF POMONA, CITY OF RANCHO
23 PALOS VERDES, CITY OF REDONDO
24 BEACH, CITY OF ROLLING HILLS, CITY
25 OF ROLLING HILLS ESTATES, CITY OF
26 ROSEMEAD, CITY OF SAN DIMAS, CITY
27 OF SANTA FE SPRINGS, CITY OF SAN
28 FERNANDO, CITY OF SAN GABRIEL,
CITY OF SAN MARINO, CITY OF SANTA
MONICA , CITY OF SIERRA MADRE,
CITY OF SIGNAL HILL, CITY OF SOUTH
EL MONTE, CITY OF SOUTH GATE,
CITY OF SOUTH PASADENA, CITY OF
TEMPLE CITY, CITY OF VERNON, CITY
OF WALNUT, CITY OF WEST COVINA,
CITY OF WHITTIER, CITY OF WEST
HOLLYWOOD, CITY OF WESTLAKE
VILLAGE, and DOES 51 through 100,
inclusive

REAL PARTIES IN INTEREST.

Pursuant to California Water Code § 13330(b), Code of Civil Procedure §§ 1085 and 1094.5, and Government Code §§ 11350 and 11350.3, Petitioners Los Angeles County Economic Development Corporation (“LAEDC”), the City of El Segundo, the City of Industry, the City of Lakewood, the City of Santa Clarita and the City of Torrance (“Cities”) petition this Court for declaratory relief and a writ of mandate directed to Respondents California State Water Resources Control Board (“State Board”) and California Regional Water Quality Control Board

1 Los Angeles Region (“Regional Board”). Petitioners bring this action seeking revisions to a
2 Storm Water order that the Regional Board adopted¹ to conform the Order to the provisions of
3 the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”), and California law. To that
4 end, the Petitioners will file forthwith a notice of motion and motion for writ of mandate
5 commanding Respondents to rescind the Order, or in the alternative to revise the Order so it
6 conforms to federal and state law. Petitioners support the CWA’s objectives and many of the
7 State Board and Regional Board’s efforts, but are constrained to assert that portions of the Order
8 are unauthorized, arbitrary, capricious and without legal foundation. Petitioners hereby allege as
9 follows:

10 **PARTIES**

11 1. Petitioner Cities are municipalities formed under California law. Pursuant to
12 Water Code § 13200(d), the Cities are all located within the Los Angeles Region for water
13 quality issues. In addition, all the Cities operate municipal separate storm sewer systems,
14 including streets, gutters and storm drains. The Cities² are beneficially interested in these
15 proceedings because they are charged with implementing the Order. The Cities are aggrieved
16 because the Order imposes unnecessary and illegal requirements on the Cities and may cost over
17 \$50 billion to implement in the region.

18 2. Petitioner LAEDC is the premier business leadership organization in Los Angeles
19 County. The LAEDC’s mission is to attract, retain and grow both business and jobs in the Los
20 Angeles region, and it has vital interest in growth and development in Los Angeles County. The
21 Order will have an adverse impact on the region’s economy and will negatively affect LAEDC’s
22 ability to carry out its mission. LAEDC is therefore aggrieved by the Order and beneficially
23 interested in these proceedings.

24 3. Respondent State Board is an agency of the State of California formed pursuant to
25 California Water Code § 13100. Its duties and responsibilities include approving guidelines and
26

27 ¹ Order No. 01-182, NPDES Permit No. CAS0040001 Waste Discharge Requirements for Municipal Storm Water
28 and Urban Runoff Discharges Within the County of Los Angeles and the Incorporated Cities therein, except the City
of Long Beach (“Order”).

² Petitioner City of Santa Clarita joins in the Fifth, Ninth, Eleventh and Thirteenth Causes of Action only.

1 water quality control plans that the various regional boards adopt. In addition, pursuant to Water
2 Code §§ 13160 and 13777, the State Board is authorized to implement the CWA and the CWA's
3 National Pollutant Discharge Elimination System ("NPDES") program that governs discharge
4 into waters of the United States. The State Board is authorized to review NPDES permits upon
5 petition. Cal. Water Code §§ 13260, 13320.

6 4. Respondent Regional Board is an agency of the State of California formed
7 pursuant to Water Code § 13201. Its duties and responsibilities include obtaining coordinated
8 action in water quality control and formulating water quality control plans for all areas in the Los
9 Angeles Region. Further, the Regional Board is authorized to issue NPDES permits and Waste
10 Discharge Requirements ("WDRs") to regulate discharges into the State's waters. The Regional
11 Board is also authorized to implement the NPDES program at the regional level. Cal. Water
12 Code §§ 13177, 13623. For urban runoff, the Regional Board's practice is to issue a single
13 document that serves as both a federal NPDES permit and state WDR.

14 5. Petitioners do not know the true names or capacities of Respondents/Defendants
15 named herein as DOES 1 through 50, inclusive, and for that reason have sued such
16 Respondents/Defendants by these fictitious names pursuant to Code of Civil Procedure § 474.
17 Petitioners will amend this Petition to show the true names and capacities when they have been
18 ascertained.

19 6. Real Parties In Interest Los Angeles County Flood Control District, County of
20 Los Angeles, City of Agoura Hills, City of Alhambra, City of Arcadia, City of Artesia, City of
21 Azusa, City of Baldwin Park, City of Bell, City of Bellflower, City of Bell Gardens, City of
22 Beverly Hills, City of Bradbury, City of Burbank, City of Calabasas, City of Carson, City of
23 Cerritos, City of Claremont, City of Commerce, City of Compton, City of Cudahy, City of
24 Covina, City of Culver City, City of Diamond Bar, City of Downey, City of Duarte, City of El
25 Monte, City of Gardena, City of Glendale, City of Glendora, City of Hawaiian Gardens, City of
26 Hawthorne, City of Hermosa Beach, City of Hidden Hills, City of Huntington Park, City of
27 Inglewood, City of Irwindale, City of La Canada Flintridge, City of La Habra Heights, City of La
28 Mirada, City of La Puente, City of La Verne, City of Lawndale, City of Lomita, City of Los

1 Angeles, City of Lynwood, City of Malibu, City of Manhattan Beach, City of Maywood, City of
2 Montebello, City of Monterey Park, City of Monrovia, City of Norwalk, City of Palos Verdes
3 Estates, City of Paramount, City of Pasadena, City of Pico Rivera, City of Pomona, City of
4 Rancho Palos Verdes, City of Redondo Beach, City of Rolling Hills, City of Rolling Hills
5 Estates, City of Rosemead, City of San Dimas, City of Santa Fe Springs, City of San Fernando,
6 City of San Gabriel, City of San Marino, City of Santa Monica, City of Sierra Madre, City of
7 Signal Hill, City of South El Monte, City of South Gate, City of South Pasadena, City of Temple
8 City, City of Vernon, City of Walnut, City of West Covina, City of Whittier, City of West
9 Hollywood, and City of Westlake Village, (“Real Parties In Interest”) are all municipal entities
10 located in the Los Angeles Region. All Real Parties must implement the Order within their
11 respective jurisdictions. Petitioners have thus named them as Real Parties in Interest because the
12 Order — and hence these proceedings—impacts them.

13 7. On information and belief, Petitioners allege that DOE Real Parties in Interest are
14 persons or entities, other than those identified above as Petitioners, Respondents or Real Parties
15 in Interest, who have a legally recognizable and beneficial interest in the Order. Petitioners are
16 unable to ascertain the true names, identities or capacities of those sued herein as DOE Real
17 Parties in Interest 51 through 100, inclusive. Petitioners therefore sue those parties by fictitious
18 names. Petitioners will seek leave to amend this Petition to set forth the true names and
19 capacities of the DOE Real Parties in Interest after that information has been ascertained.

20 PROCEDURAL HISTORY

21 8. On December 13, 2001, the Regional Board adopted the Order for the Los
22 Angeles Region. LAEDC and the Cities participated in the administrative process that led up to
23 the Regional Board’s adopting the Order by submitting written comments and participating at a
24 Public Hearing.

25 9. On January 9, 2002, LAEDC and the Cities appealed that Order by filing a
26 Petition for Review (“State Board Petition”) with the State Board. In that Petition, the Cities and
27 LAEDC explained that in adopting the Order, the Regional Board exceeded its authority and

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1 acted arbitrarily, capriciously, and without legal foundation. The State Board accepted the
2 Petition and indicated it would hold a hearing and render a decision.

3 10. By letter dated December 18, 2002 the State Board dismissed the State Board
4 Petition. The State Board did not hold a hearing or issue an order. The State Board simply
5 stated that "in light of the inability of the SWRCB to effectuate an agreement between interested
6 groups, and the fact that the most of these issues are the subject of prior Board orders and/or
7 current litigation, the SWRCB declines to issue an additional order on these issues."

8 11. LAEDC and the Cities have exhausted all available administrative remedies.

9 **VENUE AND STANDARD OF REVIEW**

10 12. Venue for this action is proper in Los Angeles County Superior Court because
11 Petitioners are located in Los Angeles County and because the regulatory actions and the water
12 discharges at issue occur in Los Angeles County. Venue is therefore appropriate in Los Angeles
13 County pursuant to Government Code § 955.3.

14 13. Before filing this action, Petitioners served written notice of the commencement
15 of this action on Respondents in accordance with Public Resources Code § 21167.5. A true and
16 correct copy of that Notice of Commencement of Action is attached as Exhibit A.

17 14. Petitioners also provided notice of the action and a copy of this Petition to the
18 California Attorney General's Office pursuant to Public Resources Code § 21167.7 and Code of
19 Civil Procedure § 388. A copy of that notice letter is attached as Exhibit B.

20 15. Pursuant to Code of Civil Procedure §§ 1085 and 1094.5, Water Code § 13330(d),
21 and Public Resources Code § 21187.5, this Court has jurisdiction to exercise its independent
22 judgment on the evidence to determine whether Respondents have abused their discretion or
23 otherwise acted contrary to law. Abuse of discretion is established if Respondents have not
24 proceeded in the manner required by law, the Order is not supported by the findings, or the
25 findings are not supported by the evidence. Code of Civil Procedure § 1094.5(b). Where it is
26 claimed that the findings are not supported by the evidence, because this Court is authorized to
27 exercise its independent judgment, abuse of discretion is established if the Court determines that

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1 the findings are not supported by the weight of the evidence. Code of Civil Procedure §
2 1094.5(c).

3 **FACTUAL BACKGROUND**

4 16. Storm water discharges consist of surface runoff generated from various land uses
5 in the hydrologic drainage basins that discharge into the State's water bodies. Various pollutants
6 may be present in storm water and/or urban runoff.

7 17. The Cities discharge or contribute to storm water discharges and urban runoff
8 from municipal separate storm sewer systems ("MS4s"), also known as storm drain systems.
9 The discharges flow to water courses within the Los Angeles County Flood Control District and
10 into receiving waters within the Los Angeles Region. Prior to adoption of the December 13,
11 2001 Order, these discharges were regulated pursuant to the WDR contained in Order No. 96-
12 054, which the Regional Board adopted on July 15, 1996.

13 18. On or about February 1, 2001, the Cities filed with the Regional Board a Report
14 of Waste Discharge ("ROWD") and applied to renew their waste discharge requirements allowed
15 under the existing NPDES permit and state WDR. The ROWD included a proposed Storm
16 Water Quality Management Program ("SQMP") and a monitoring program. The Cities'
17 proposed SQMP contained programs previously approved under Board Order No. 96-054 in the
18 following areas: Public Information and Participation, Development Planning, Development
19 Construction, Public Agency Activities, and Illicit Connection/Illicit Discharge Elimination
20 Program ("Programs").

21 19. The Regional Board took the Cities' ROWD and renewal application under
22 submission. During the ensuing administrative process, LAEDC and the Cities submitted
23 comments to the Regional Board and participated at workshops and a Public Hearing held by the
24 Regional Board.

25 20. On December 13, 2001, the Regional Board adopted the Order, which purports to
26 "develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution
27 control program to reduce the discharge of pollutants in storm water to the Maximum Extent
28 Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the

1 U.S. subject to the Permittees' [i.e., the Cities'] jurisdiction." Order at Part D.4, Page 7. The
2 Order operates as both a federal NPDES permit and a state WDR. The Order also modifies the
3 Programs referenced in Paragraph 18 above by placing additional restrictions and requirements
4 that are not legally authorized.

5 21. The Cities must currently implement the Order within their respective City limits.

6 **THE ORDER**

7 22. The Order, however, is seriously flawed. As the Petitioners demonstrated in their
8 State Board Petition, the Regional Board abused its discretion, exceeded its authority and acted
9 arbitrarily and capriciously in the following ways:

10 a. by failing to consider or address unrebutted Storm Water Permit Cost
11 Studies demonstrating that the cost to implement the Order could exceed \$50 billion;

12 b. by attempting to regulate the manner in which the Cities exercise land use
13 authority (Order at Part 4.D.2.c, at pages 35-36 and Appendix D, Standard Urban Storm Water
14 Mitigation Plan);

15 c. by requiring the Cities to apply Standard Urban Storm Water Mitigation
16 Plans ("SUSMPs"), particularly the SUSMPs' requirement that as a condition for both
17 discretionary and non-discretionary approvals, property owners must agree to "concentrate or
18 cluster development on portions of a site while leaving the remaining land in a natural
19 undisturbed condition" (Order at Appendix D, at 2, 2nd bullet, at page D-5);

20 d. by including "cause or contribute" language in the Receiving Water
21 Limitations (Order at Parts 2.1 and 2.2, at page 17);

22 e. by imposing Peak Flow Control measures (Order at Part 4.D.1, at page 34-
23 35);

24 f. by mandating each City to "amend, revise or update its General Plan"
25 consistent with the Order's requirements (Order at Part 4.D.12, at page 41);

26 g. by assigning responsibility to the Cities to remedy overflows from sanitary
27 sewers that Cities do not own or operate (Order at Part 4.F.1.a, at page 45);

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1 h. by adopting a definition of “redevelopment” that is inconsistent and
2 preempted by the controlling Environmental Protection Agency (“EPA”) definition of
3 redevelopment (Order at Part 5, at page 59);
4 i. by failing to exempt discharges from federal and state facilities,
5 agricultural storm water discharges and irrigation return flows within a City’s boundaries (Order
6 at Part 3.E, at page 19);
7 j. by attempting to extend the Order to reach “Potential Contribution” of
8 pollutants (Order at Part 3.G.2.c, at page 22);
9 k. by adopting an overly broad definition of the term “illicit disposal” (Order
10 at Part 5, at page 56);
11 l. by failing to comply with the California Environmental Quality Act
12 (“CEQA”) with respect to provisions of the Order that are not mandated under the federal CWA
13 (Land Use, Order at Part 4.D.2.c, pages 35-36, and Appendix D; Peak Flow Control measures,
14 Order at Part 4.D.1, pages 34-35; General Plan amendments, Order at Part 4.D.12, at page 41;
15 mandatory response to Sanitary Sewer Overflows, Order at Part 4.F.1.a, page 45; and inspection
16 responsibilities for facilities subject to State General Permits, Order at Parts 4.C, at page 27 and
17 Part 4.E.2.b, at page 43);
18 m. by requiring the Cities to modify their CEQA processes (Order at Part
19 4.D.11, at pages 40-41);
20 n. by imposing unfunded mandates in violation of the California Constitution
21 (Land Use, Order at Part 4.D.2.c, pages 35-36, and Appendix D; Peak Flow Control measures,
22 Order at Part 4.D.1, pages 34-35; General Plan amendments, Order at Part 4.D.12, at page 41;
23 mandatory response to Sanitary Sewer Overflows, Order at Part 4.F.1.a, page 45; and inspection
24 responsibilities for facilities subject to State General Permits, Order at Parts 4.C, at page 27 and
25 Part 4.E.2.b, at page 43);
26 o. by requiring the Cities to assume inspection responsibilities for facilities
27 subject to State General Permits that are the Regional Board’s sole responsibility (Order at Parts
28 4.C, at page 27 and Part 4.E.2), at page 43); and

1 p. by improperly delegating authority to the Regional Board's Executive
2 Director.

3 23. The Order imposes direct, onerous and expensive obligations on the Cities and
4 will hamper both development and redevelopment in the Cities and in Los Angeles County. In
5 addition, the Order requires the Cities to enforce provisions that lack the requisite legal
6 foundation and that therefore could render the Cities vulnerable to potential third-party litigation
7 under CWA's citizen suit provisions.

8 24. In adopting the Order, the Regional Board exceeded its authority and acted
9 arbitrarily, capriciously and without support in the record.

10 25. In denying the State Board Petition and in approving the Order, the State Board
11 exceeded its authority and acted arbitrarily, capriciously and without support in the record.

12 **FIRST CAUSE OF ACTION**

13 **(Writ of Mandate Under Code Of Civil Procedure §§ 1085 and 1094.5 For Arbitrary**
14 **And Capricious Violation Of California Water Code § 13241(c) and (d) and 33 U.S.C. §**
15 **1342(p)(3)(B)(iii))**

16 26. Petitioners reallege and incorporate by reference the allegations contained in
17 Paragraphs 1 through 25 above, as though fully set forth here.

18 27. California Water Code § 13241, subdivisions (c) and (d), requires the Regional
19 Board to balance various factors when prescribing waste discharge requirements, including
20 economic factors and water quality conditions that can reasonably be achieved.

21 28. MS4s Storm Water permits are issued pursuant to the CWA, specifically section
22 402(p)(3)(B)(iii). Like California's Water Code, the CWA does not impose an absolute
23 prohibition on the discharge of pollutants. Instead, it requires that:

24 **Permits for discharges from municipal storm sewers --**

25 **(iii) shall require controls to reduce the discharge of pollutants to the**
26 ***maximum extent practicable*, including management practices, control**
27 **techniques and system, design and engineering methods, and such other**
28 **provisions as the Administrator or the State determines appropriate for the**
control of such pollutants. 33 U.S.C. § 1342(p)(3)(B)(iii) (Emphasis
added).

1 **The EPA recognizes that the maximum extent practicable standard requires consideration**
2 **of, *inter alia*, "...current ability to finance the program...."** See "National Pollutant
3 Discharge Elimination System - Regulations for Revision of the Water Pollution Control
4 Program Addressing Storm Water Discharges; Final Rule" Part II, 64 Fed.Reg. 68722, 68754,
5 Dec. 8, 1999. (Emphasis added).

6 29. In adopting the Order, however, the Regional Board ignored the Storm Water
7 Permit Cost Studies that the LAEDC and Cities submitted. These Studies demonstrated that the
8 cost of implementing the Order in the Los Angeles Region could exceed \$50 billion. In ignoring
9 this evidence and given that there is no evidence in the record that the Cities would be able to
10 fund the potential \$50 billion implementation cost, the Regional Board violated the state and
11 federal statutory requirements to balance and consider economic factors, including the Cities'
12 current ability to finance permit costs, and thereby acted arbitrarily, capriciously and without
13 authorization.

14 30. For the same reasons, the State Board acted arbitrarily, capriciously and without
15 authorization in denying the State Board Petition and in approving the Order.

16 **SECOND CAUSE OF ACTION**

17 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For** 18 **Adopting An Order That Is Not Supported By Substantial Evidence)**

19 31. Petitioners reallege and incorporate by reference the allegations contained in
20 Paragraphs 1 through 30 above, as though fully set forth here.

21 32. Federal NPDES regulations mandate that a state permitting authority, such as the
22 Regional Board or State Board, must provide a detailed fact sheet with reasons and explanations
23 for conditions established in a permit. 40 C.F.R. §§ 124.6, 124.8 and 124.56.

24 33. Further, the Regional Board acted in an adjudicatory fashion in adopting the
25 Order. As such, the findings supporting the Order must be based on a reasonable factual basis
26 and supported by tangible evidence and specific reasons in the record.

27 34. Here, the Regional Board ignored the un rebutted evidence showing that the Order
28 could cost over \$50 billion to implement. Accordingly, the Fact Sheet for the Order does not

1 meet the federal requirements set forth in the regulations cited in Paragraph 32, nor does the
2 record support the Regional Board's finding that the Order is required and "practicable." The
3 Regional Board thus acted without authority, arbitrarily and capriciously.

4 35. For the same reasons, the State Board acted arbitrarily, capriciously and without
5 authorization in denying Petitioner's State Board Petition and in approving the Order.

6 **THIRD CAUSE OF ACTION**

7 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
8 **Arbitrary and Capricious Interference With The Cities' Ability To Exercise Land Use**
9 **Authority In Violation Of The CWA And The California Constitution)**

10 36. Petitioners reallege and incorporate by reference the allegations contained in
11 Paragraphs 1 through 35 above, as though fully set forth here.

12 37. Article XI, Section 7 of the California Constitution and Government Code §
13 65800 confer on local government — not state agencies — broad authority to regulate land use
14 through the Cities' police powers. Further, Article III, Section 3 limits the authority of each of
15 the three branches of government via the separation of powers doctrine.

16 38. Congress and the EPA have made clear that the CWA and NPDES program are
17 not intended to infringe on local land use authority. 33 U.S.C. § 1251(b); 64 F.R. 68761.

18 39. The Regional Board therefore has no authority under either state or federal law to
19 interfere with the Cities' land use authority.

20 40. Despite this, the Order repeatedly infringes on the Cities' land use authority as
21 demonstrated in the following non-exhaustive list:

22 a. Part 4.D.12 (at page 41) provides that each city "shall amend, revise or
23 update its General Plan;"

24 b. Part 4.D.2.c, (at page 36 and Appendix D, page D-5) the section that
25 establishes SUSMPs, incorporates Regional Board Resolution No. R00-02 and thereby imposes a
26 condition on land use approvals that the project "concentrate or cluster development on portions
27 of a site while leaving the remaining land in a natural undisturbed condition;" and

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1 c. According to the Fact Sheet/Staff Report and Technical Report
2 accompanying the Order, the Regional Board contemplates that the SUSMPs—in particular the
3 “concentrate or cluster” requirement—will be applied to both the Cities’ discretionary land use
4 decisions and the Cities’ non-discretionary, ministerial decisions.

5 41. The Regional Board’s efforts through the Order and SUSMPs to infringe on the
6 Cities’ land use authority violates California law, the CWA and the separation of powers
7 doctrine. The Regional Board therefore lacks the authority and acted arbitrarily and capriciously
8 in attempting to impose land use controls through the Order.

9 42. For the same reasons, the State Board acted arbitrarily, capriciously and without
10 authorization in denying the State Board Petition and in approving the Order.

11 **FOURTH CAUSE OF ACTION**

12 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Acting Without**
13 **Authority, Arbitrarily And Capriciously In Imposing Requirements That Could Likely**
14 **Result In A Claimed Violation Of The United States and California Constitutions)**

15 43. Petitioners reallege and incorporate by reference the allegations contained in
16 Paragraphs 1 through 42 above, as though fully set forth here.

17 44. The Fifth Amendment to the United States Constitution, applicable to the States
18 through the Fourteenth Amendment, (*see, Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir.
19 1996) provides “that no person shall . . . be deprived of . . . property without due process; nor
20 shall private property be taken for public use, without just compensation.” *See also*, Cal. Const.
21 Act. I, §§ 7, 19.

22 45. The SUSMP requirement to “concentrate or cluster development on portions of a
23 site while leaving the remaining land in a natural undisturbed condition” purports to require
24 Cities to condition both discretionary and non-discretionary land use approvals on a property
25 owner “clustering” the project and leaving the remainder of their land in a natural undisturbed
26 condition.

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1 Part 2.1 (at page 17) prohibits “[d]ischarges from the MS4 that *cause or contribute* to the
2 violation of Water Quality Standards of water quality objectives.” (Emphasis added)

3 54. The Order’s “cause or contribute” language appears to impose a “zero
4 contribution” standard. But that standard violates both the CWA’s “maximum extent
5 practicable” and the Water Code’s “reasonably achievable” standards.

6 55. The Regional Board’s adoption of an Order that imposes a Receiving Water
7 Limitations standard for discharges in violation of both the state and federal laws lacks authority
8 and is arbitrary and capricious.

9 56. For the same reasons, the State Board acted arbitrarily, capriciously and without
10 authorization in denying the State Board Petition and in approving the Order.

11 **SIXTH CAUSE OF ACTION**

12 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
13 **Arbitrary And Capricious Attempt To Modify CEQA Processes)**

14 57. Petitioners reallege and incorporate by reference the allegations contained in
15 Paragraphs 1 through 56 above, as though fully set forth here.

16 58. The Order’s Part 4.D.11 (at pp. 40-41) imposes requirements on the Cities to
17 incorporate various additional procedures into their CEQA processes targeted at considering
18 potential storm water impacts and providing mitigation for such impacts.

19 59. Under the separation of powers doctrine established in Article III Section 3 of the
20 California Constitution, the powers of the legislative, executive and judicial branches are limited
21 and separate.

22 60. The Legislature, not the Regional and State Boards, has the power to modify
23 CEQA procedures.

24 61. In attempting to require the Cities to modify their CEQA processes through the
25 Order, the Regional Board acted in an unauthorized, arbitrary and capricious fashion.

26 62. For the same reason, the State Board acted arbitrarily, capriciously and without
27 authorization in denying the State Board Petition and approving the Order.

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1 SEVENTH CAUSE OF ACTION

2 (Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,
3 Arbitrary And Capricious Attempts To Control Non-Pollutant Discharges In Violation Of

4 33 U.S.C. §§ 1342(p)(3)(b)(iii) And 1362(6))

5 63. Petitioners reallege and incorporate by reference the allegations contained in
6 Paragraphs 1 through 62 above, as though fully set forth here.

7 64. The CWA provides that MS4 Storm Water permits are to include “controls to
8 reduce the discharge of pollutants . . . and such other provisions . . . appropriate for the control of
9 such pollutants.” 33 U.S.C. § 1342(p)(3)(b)(iii). Further, the CWA defines “pollutant” as
10 “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions,
11 chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded
12 equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged
13 into water.” 33 U.S.C. § 1362(6).

14 65. The Order, however, attempts to control not only pollutants, but also the flow of
15 water itself. Specifically, Part 4.D.1 (at pp. 34-35) provides that “Permittees shall control post-
16 development peak storm water runoff discharge rates, velocities, and duration (peak flow
17 control) In Natural Drainage Systems (i.e., mimic pre-development hydrology) to prevent
18 accelerated stream erosion and to protect stream habitat.”

19 66. In addition, the Order at Part 3.G.2.c (at p. 22) imposes a requirement that the
20 Cities control “potential contribution” of pollutants.

21 67. Because the definition of pollutant does not include the flow of water itself and
22 because the Regional Board only has authority regarding the discharge of pollutants, Part 4.D.1
23 concerning peak flow control and Part 3.G.2.c concerning “potential contribution” of pollutants
24 exceed the Regional Board’s authority. In addition, the term “potential contribution” is
25 ambiguous. The Regional Board thus acted without authority, arbitrarily and capriciously.

26 68. For the same reasons, the State Board acted arbitrarily, capriciously and without
27 authorization in denying the State Board Petition and in approving the Order.

28 ///

1 **EIGHTH CAUSE OF ACTION**

2 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
3 **Arbitrary and Capricious Attempt To Transfer Responsibility For Sanitary Sewer**
4 **Overflows To Cities In Violation Of 33 U.S.C. § 1292(2)(A))**

5 69. Petitioners reallege and incorporate by reference the allegations contained in
6 Paragraphs 1 through 68 above, as though fully set forth here.

7 70. Sanitary sewers are part of publicly owned treatment works (“POTWs”) and the
8 duty to respond to sanitary sewer overflows rests with the POTWs operator, not with the
9 municipality through which the POTWs sewers flow.

10 71. The Order, specifically Part 4.F.1.a (at page 45) requires each City to implement
11 “a response plan for overflows of the sanitary sewer system, . . . including “immediate
12 response to overflows for containment”

13 72. The Regional Board’s attempt to shift the burden to deal with sanitary sewer
14 overflows from the POTWs operators to the Cities is contrary to the CWA. It is thus
15 unauthorized, arbitrary and capricious.

16 73. For the same reasons, the State Board acted arbitrarily, capriciously and without
17 authorization in denying the State Board Petition and in approving the Order.

18 **NINTH CAUSE OF ACTION**

19 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
20 **Arbitrary And Capricious Redefinition Of The Term “Redevelopment” In Violation Of 64**
21 **F.R. 68760 And Overly Broad Definition of “Illicit Disposal”)**

22 74. Petitioners reallege and incorporate by reference the allegations contained in
23 Paragraphs 1 through 73 above, as though fully set forth here.

24 75. The EPA promulgated rules that define the term “redevelopment.” Under those
25 rules, the term “redevelopment” refers to “alterations of a property that change the ‘footprint’ of
26 a site or building in such a way that results in the disturbance of equal to or greater than *1 acre* of
27 land. The term is not intended to include such activities as exterior remodeling” 64 F.R.

28 68760. (Emphasis added)

1 76. The Order, at Part 5 (at pp. 59-60) defines “redevelopment” to mean “land-
2 disturbing activity that results in the creation, or addition or replacement of 5,000 square feet or
3 more of impervious surface area on an already developed site.” (Emphasis added)

4 77. The Order’s definition is ambiguous, inconsistent and more restrictive than the
5 EPA definition, which is controlling and preemptive.

6 78. The Regional Board’s adoption of the Order is therefore unauthorized, arbitrary
7 and capricious.

8 79. The Order in Part 5 (at page 56) defines “illicit disposal” as “any disposal, either
9 intentionally [sic] or unintentionally [sic] of material(s) or waste(s) that *can pollute* storm water.”
10 (Emphasis added)

11 80. The term “can pollute” is undefined and ambiguous.

12 81. The CWA only authorizes the Regional Board to regulate discharges of pollutants
13 into MS4s. But the term “can pollute” could be construed to mean something other than
14 “discharge of a pollutant.”

15 82. To the extent the Regional Board, through the vague and ambiguous definition
16 “illicit disposal,” attempts to regulate anything other than discharges of a pollutant, that action is
17 unauthorized, arbitrary and capricious.

18 83. For the same reasons, the State Board acted arbitrarily, capriciously and without
19 authorization in denying the State Board Petition and in approving the Order.

20 **TENTH CAUSE OF ACTION**

21 **(Writ Of Mandate Under Code Of Civil Procedure §§1085 And 1094.5 For Unauthorized,
22 Arbitrary, And Capricious Failure To Exempt Certain Discharges)**

23 84. Petitioners reallege and incorporate by reference the allegations contained in
24 Paragraphs 1 through 83 above, as though fully set forth here.

25 85. The Order’s part 3.E (at pp. 19-20) states that each City must “comply with the
26 requirements of this Order applicable to discharges within its boundaries”

27 86. The Order does not exempt pollutants that may be present in flows that originate
28 on a federal or state facility within a City’s boundaries but outside the City’s authority.

1 constitutes an unfunded mandate in violation of the California Constitution and is unauthorized,
2 arbitrary and capricious.

3 96. For the same reasons, the State Board acted arbitrarily, capriciously and without
4 authorization in denying the State Board Petition and in approving the Order.

5 **TWELFTH CAUSE OF ACTION**

6 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Failure**
7 **To Comply With CEQA)**

8 97. Petitioners reallege and incorporate by reference the allegations contained in
9 Paragraphs 1 through 96 above, as though fully set forth here.

10 98. Generally, NPDES permits are exempt from CEQA pursuant to Water Code §
11 13389.

12 99. But to the extent that the Order exceeds the CWA's requirements for NPDES
13 permits, Water Code § 13389's CEQA exemption does not apply.

14 100. The Order contains numerous provisions that extend beyond the CWA's MS4
15 NPDES permits requirements, including *inter alia*, numeric design standards, SUSMPs,
16 inspection of facilities subject to state general permits, imposition of land use controls and
17 mandatory response to sanitary sewer overflows.

18 101. These requirements qualify as a "project" within the meaning of CEQA.

19 102. The Regional Board and State Board violated CEQA by failing to comply with
20 the CEQA process with respect to the Order's non-CWA mandated elements.

21 103. For the same reasons, the State Board acted arbitrarily, capriciously and without
22 authorization in denying the Cities' State Board Petition and in approving the Order.

23 **THIRTEENTH CAUSE OF ACTION**

24 **(For Declaratory Relief Under Code Of Civil Procedure § 1060 And Government**
25 **Code § 11350 And 11350.3)**

26 104. Petitioners reallege and incorporate by reference the allegations contained in
27 Paragraphs 1 through 103 above, as though fully set forth here.

28 ///

1 by the Permittees in accordance with the provisions of the NPDES Permit, to comply with
2 applicable federal and state law, as the same is amended from time to time.” Order at 61.

3 111. The SQMP is an enforceable part of the Order. Part 3.A.1 (at page 18)
4 specifically provides, “[e]ach Permittee shall, at a minimum implement the SQMP. *The SQMP*
5 *is an enforceable element of this Order.*” (Emphasis added.)

6 112. Part 3.C of the Permit thus authorizes that the Regional Board’s Executive Officer
7 to order a revision to an enforceable element of the Order, without notice or opportunity to be
8 heard.

9 113. Respondents State and Regional Board have prejudicially abused their discretion,
10 acted without or in excess of their jurisdiction and in violation of law in delegating authority to
11 the Executive Officer to revise the Order, without notice or hearing as follows:

12 (a) Under the CWA, a permit cannot be modified without notice and public
13 comment. 40 C.F.R. §§ 124.5, 124.6 and 124.10. *See also*, 40 C.F.R. § 122.62.

14 (b) Under state law, the Regional Board may delegate any of its powers to its
15 Executive Officer “excepting only the following:

16 . . . (2) *the issuance, modification or revocation of any water quality control plan,*
17 *water quality objectives or waste discharge requirement.* Cal. Water Code §
18 13223(a) (Emphasis added).

19 (c) The Order itself provides, “This Order may only be modified, revoked, or
20 reissued, prior to the expiration date by the *Regional Board, in accordance with*
21 *the procedural requirements of the [California Water Code] and CCR Title 23 for*
22 *the issuance of waste discharge requirements, 40 C.F.R. 122.62, and upon prior*
23 *notice and hearing. . .*” Order at pp. 65-66 (Emphasis added).

24 114. This unlawful delegation of authority to the Executive Officer to revise an
25 enforceable part of the Order is further a prejudicial abuse of discretion and an action without or
26 in excess of jurisdiction and in violation of law because the Executive Officer is given the
27 authority to revise an enforceable element of the Order to reflect the implementation of Total
28 Maximum Daily Loads (“TMDLs”).

1 115. Either the state or the EPA may adopt a TMDL. A TMDL represents the
2 maximum amount of a particular pollutant that can be present in a waterbody without violating
3 “water quality standards.” 33 U.S.C. § 1313(d)(1)(C).

4 116. EPA and the State and Regional Boards have adopted several TMDLs affecting
5 waterbodies in Los Angeles County. Those TMDLs have been adopted without reference to
6 Section 402(p) of the Clean Water Act and without reference to the MEP Standard of that
7 section.

8 117. Respondent Regional Board has stated that it intends to implement TMDLs in Los
9 Angeles County through the Order. Because the TMDLs are being adopted without reference to
10 Section 402(p), the Respondents State and Regional Boards have prejudicially abused their
11 discretion and acted without or in excess of their jurisdiction and in violation of law in that Part
12 3.C allows the Executive Officer to revise the Order to implement a TMDL without regard to
13 whether the revision is consistent with Clean Water Act § 402(p), including its MEP standard.

14 **PRAYER FOR RELIEF**

15 **THEREFORE**, the Cities request that:

16 1. A peremptory writ of mandate issue under this Court’s seal, directing
17 Respondents State Board and Regional Board to rescind the Order, comply with CEQA prior to
18 imposing any requirements that exceed the CWA mandate, and set aside all actions taken to
19 enforce or implement the Order;

20 2. Alternatively, a peremptory writ of mandate issue under this Court’s seal directing
21 Respondents State Board and Regional Board to modify the Order to remedy the flaws in the
22 Order articulated herein;

23 3. That a declaratory judgment be entered declaring the Order invalid and declaring
24 that Respondents’ actions were arbitrary, capricious, unauthorized, and contrary to State and
25 federal laws;

26 4. The Court enter an order awarding Petitioners’ costs and reasonable attorney’s
27 fees incurred in bringing this action; and

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5. The Court award any such further relief as it deems just and proper.

Dated: January 16, 2003

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN, LLP

Leland C. Dolley
Rufus C. Young, Jr.
Renee J. Laurents
Amy E. Morgan
Attorneys for Petitioners,
LOS ANGELES COUNTY ECONOMIC
DEVELOPMENT CORPORATION, CITY OF EL
SEGUNDO, CITY OF INDUSTRY, CITY OF
LAKEWOOD, CITY OF SANTA CLARITA, AND
CITY OF TORRANCE

VERIFICATION

I, RUFUS C. YOUNG, JR. declare:

1. I am a partner at Burke, Williams & Sorensen, LLP counsel for Petitioners in this matter. I am authorized to make this Verification on the Petitioners' behalf.

2. I have read the Petition For Writ Of Mandate And Complaint For Declaratory Relief Pursuant To Water Code Section 13330(b), Code Of Civil Procedure Sections 1085 and 1094.5, and Government Code Sections 11350 and 11350.3. The facts stated in the Petition are either true and correct based on my personal knowledge, or I am informed and believe that such facts are true and correct, and on that basis I allege them to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Verification on this 15th day of January 2003 at San Diego, California.

Rufus C. Young, Jr.

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COPY

1 LELAND C. DOLLEY (SBN 41313)
2 RUFUS C. YOUNG, JR. (SBN 38358)
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9 Attorneys for Petitioner
10 CITY OF ALHAMBRA

CONFIRMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

JAN 17 2003

John A. Clarke, Executive Officer/Clerk
By STEPHANIE SIANEZ Deputy

11 SUPERIOR COURT STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES

13 CITY OF ALHAMBRA

14 Petitioner/Plaintiff,

15 vs.

16 CALIFORNIA STATE WATER
17 RESOURCES CONTROL BOARD;
18 CALIFORNIA REGIONAL WATER
19 QUALITY CONTROL BOARD LOS
20 ANGELES REGION, and DOES 1 through
21 50, inclusive

22 Respondents/Defendants.

Case No. BS080791

EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103

**PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR DECLARATORY
RELIEF PURSUANT TO WATER CODE
SECTION 13330(b), CODE OF CIVIL
PROCEDURE SECTIONS 1085 AND 1094.5,
AND GOVERNMENT CODE SECTIONS
11350 AND 11350.3**

23 LOS ANGELES COUNTY FLOOD
24 CONTROL DISTRICT, COUNTY OF LOS
25 ANGELES, CITY OF AGOURA HILLS,
26 CITY OF ARCADIA, CITY OF ARTESIA,
27 CITY OF AZUSA, CITY OF BALDWIN
28 PARK, CITY OF BELL, CITY OF
BELLFLOWER, CITY OF BELL
GARDENS, CITY OF BEVERLY HILLS,
CITY OF BRADBURY, CITY OF
BURBANK, CITY OF CALABASAS, CITY
OF CARSON, CITY OF CERRITOS, CITY
OF CLAREMONT, CITY OF COMMERCE,
CITY OF COMPTON, CITY OF CUDAHY,
CITY OF COVINA, CITY OF CULVER
CITY OF DIAMOND BAR, CITY OF
DOWNEY, CITY OF DUARTE, CITY OF
EL MONTE, CITY OF EL SEGUNDO,
CITY OF GARDENA, CITY OF
GLENDALE, CITY OF GLENDORA, CITY
OF HAWAIIAN GARDENS, CITY OF
HAWTHORNE, CITY OF HERMOSA
BEACH, CITY OF HIDDEN HILLS, CITY

1 OF HUNTINGTON PARK, CITY OF
2 INDUSTRY, CITY OF INGLEWOOD, CITY
3 OF IRWINDALE,, CITY OF LA CANADA
4 FLINTRIDGE, CITY OF LA HABRA
5 HEIGHTS, CITY OF LA MIRADA, CITY
6 OF LA PUENTE, CITY OF LA VERNE,
7 CITY OF LAKEWOOD, CITY OF
8 LAWDALE, CITY OF LOMITA, CITY OF
9 LOS ANGELES, CITY OF LYNWOOD,
10 CITY OF MALIBU, CITY OF
11 MANHATTAN BEACH, CITY OF
12 MAYWOOD, CITY OF MONTEBELLO,
13 CITY OF MONTEREY PARK, CITY OF
14 MONROVIA, CITY OF NORWALKCITY
15 OF PALOS VERDES ESTATES, CITY OF
16 PARAMOUNT, CITY OF PASADENA,
17 CITY OF PICO RIVERA, CITY OF
18 POMONA, CITY OF RANCHO PALOS
19 VERDES, CITY OF REDONDO BEACH,
20 CITY OF ROLLING HILLS, CITY OF
21 ROLLING HILLS ESTATES, CITY OF
22 ROSEMEAD, CITY OF SAN DIMAS, CITY
23 OF SANTA CLARITA, CITY OF SANTA
24 FE SPRINGS, CITY OF SAN FERNANDO,
25 CITY OF SAN GABRIEL, CITY OF SAN
26 MARINO, CITY OF SANTA MONICA ,
27 CITY OF SIERRA MADRE, CITY OF
28 SIGNAL HILL, CITY OF SOUTH EL
MONTE, CITY OF SOUTH GATE, CITY
OF SOUTH PASADENA, CITY OF
TEMPLE CITY, CITY OF TORRANCE,
CITY OF VERNON, CITY OF WALNUT,
CITY OF WEST COVINA, CITY OF
WHITTIER, CITY OF WEST
HOLLYWOOD, CITY OF WESTLAKE
VILLAGE, and DOES 51 through 100,
inclusive

REAL PARTIES IN INTEREST.

Pursuant to California Water Code § 13330(b), Code of Civil Procedure §§ 1085 and 1094.5, and Government Code §§ 11350 and 11350.3, Petitioner City of Alhambra (“City”) petitions this Court for declaratory relief and a writ of mandate directed to Respondents California State Water Resources Control Board (“State Board”) and California Regional Water Quality Control Board Los Angeles Region (“Regional Board”). Petitioner brings this action seeking revisions to a Storm Water Order that the Regional Board adopted¹ to conform the Order

¹ Order No. 01-182, NPDES Permit No. CAS004001 Waste Discharge Requirements for Municipal Storm
80352 v.1

1 to the provisions of the Federal Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* ("CWA"), and
2 California law. To that end, Petitioners will file forthwith a notice of motion and motion for writ
3 of mandate commanding Respondents to rescind the Order, or in the alternative, to revise the
4 Order so it conforms to federal and state law. Petitioner supports the CWA's objectives and
5 many of the State Board and Regional Board's efforts, but are constrained to assert that portions
6 of the Order are unauthorized, arbitrary, capricious and without legal foundation. Petitioner
7 hereby alleges as follows:

8 **PARTIES**

9 1. Petitioner is a municipality formed under California law. Pursuant to Water Code
10 § 13200(d), the City is located within the Los Angeles Region for water quality issues. In
11 addition, the City operates municipal separate storm sewer systems, including streets, gutters and
12 storm drains. The City is beneficially interested in these proceedings because it is charged with
13 implementing the Order. The City is aggrieved because the Order imposes unnecessary and
14 illegal requirements on it and could cost over \$50 billion to implement in the region.

15 2. Respondent State Board is an agency of the State of California formed pursuant to
16 California Water Code § 13100. Its duties and responsibilities include approving guidelines and
17 water quality control plans that the various regional boards adopt. In addition, pursuant to Water
18 Code §§ 13160 and 13777, the State Board is authorized to implement the federal Clean Water
19 Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and the CWA's National Pollutant Discharge
20 Elimination System ("NPDES") program that governs discharge into United States' waters. The
21 State Board is authorized to review NPDES permits upon petition. Cal. Water Code §§ 13260,
22 13320.

23 3. Respondent Regional Board is an agency of the State of California formed
24 pursuant to Water Code § 13201. Its duties and responsibilities include obtaining coordinated
25 action in water quality control and formulating water quality control plans for all areas in the Los
26 Angeles Region. Further, the Regional Board is authorized to issue NPDES permits and Waste
27

28 _____
Water and Urban Runoff Discharges Within the County of Los Angeles and the Incorporated Cities, therein, except
the City of Long Beach ("Order").

1 Discharge Requirements ("WDRs") to regulate discharges into the State's waters. The Regional
2 Board is also authorized to implement the NPDES program at the regional level. Cal. Water
3 Code §§ 13177, 13623. For urban runoff, the Regional Board's practice is to issue a single
4 document that serves as both a federal NPDES permit and state WDR.

5 4. Petitioner does not know the true names or capacities of Respondents/Defendants
6 named herein as DOES 1 through 50, inclusive, and for that reason has sued such
7 Respondents/Defendants by these fictitious names pursuant to Code of Civil Procedure § 474.
8 Petitioner will amend this Petition to show the true names and capacities when they have been,
9 ascertained.

10 5. Real Parties In Interest Los Angeles County Flood Control District, County of
11 Los Angeles, City of Agoura Hills, City of Arcadia, City of Artesia, City of Azusa, City of
12 Baldwin Park, City of Bell, City of Bellflower, City of Bell Gardens, City of Beverly Hills, City
13 of Bradbury, City of Burbank, City of Calabasas, City of Carson, City of Cerritos, City of
14 Claremont, City of Commerce, City of Compton, City of Cudahy, City of Covina, City of Culver
15 City, City of Diamond Bar, City of Downey, City of Duarte, City of El Monte, City of El
16 Segundo, City of Gardena, City of Glendale, City of Glendora, City of Hawaiian Gardens, City
17 of Hawthorne, City of Hermosa Beach, City of Hidden Hills, City of Huntington Park, City of
18 Inglewood, City of Industry, City of Irwindale, City of La Canada Flintridge, City of La Habra
19 Heights, City of La Mirada, City of La Puente, City of La Verne, City of Lakewood, City of
20 Lawndale, City of Lomita, City of Los Angeles, City of Lynwood, City of Malibu, City of
21 Manhattan Beach, City of Maywood, City of Montebello, City of Monterey Park, City of
22 Monrovia, City of Norwalk, City of Palos Verdes Estates, City of Paramount, City of Pasadena,
23 City of Pico Rivera, City of Pomona, City of Rancho Palos Verdes, City of Redondo Beach, City
24 of Rolling Hills, City of Rolling Hills Estates, City of Rosemead, City of San Dimas, City of
25 Santa Clarita, City of Santa Fe Springs, City of San Fernando, City of San Gabriel, City of San
26 Marino, City of Santa Monica, City of Sierra Madre, City of Signal Hill, City of South El Monte,
27 City of South Gate, City of South Pasadena, City of Temple City, City of Torrance, City of
28 Vernon, City of Walnut, City of West Covina, City of Whittier, City of West Hollywood, and

1 City of Westlake Village, ("Real Parties In Interest") are all municipal entities located in the Los
2 Angeles Region. All Real Parties must implement the Order within their respective jurisdictions.
3 Petitioners has thus named them as Real Parties in Interest because the Order — and hence these
4 proceedings—impacts them.

5 6. On information and belief, Petitioner alleges that DOE Real Parties in Interest are
6 persons or entities, other than those identified above as Petitioner, Respondents or Real Parties in
7 Interest, who have a legally recognizable and beneficial interest in the Order. Petitioner is
8 unable to ascertain the true names, identities or capacities of those sued herein as DOE Real
9 Parties in Interest 51 through 100, inclusive. Petitioner therefore sues those parties by fictitious
10 names. Petitioner will seek leave to amend this Petition to set forth the true names and capacities
11 of the DOE Real Parties in Interest after that information has been ascertained.

12 PROCEDURAL HISTORY

13 7. On December 13, 2001, the Regional Board adopted the Order for the Los
14 Angeles Region. The City participated in the administrative process that led up to the Regional
15 Board's adopting the Order by submitting written comments and participating at a Public
16 Hearing.

17 8. On January 9, 2002, the City appealed that Order by filing a Petition for Review
18 ("State Board Petition") with the State Board. In the State Board Petition, the City explained that
19 in adopting the Order, the Regional Board exceeded its authority and acted arbitrarily,
20 capriciously, and without legal foundation. The State Board accepted the Petition and indicated
21 it would hold a hearing and render a decision.

22 9. By letter dated December 18, 2002, Respondent State Board dismissed the State
23 Board Petition. The State Board did not hold a hearing or issue an order. The State Board
24 simply stated that "in light of the inability of the SWRCB to effectuate an agreement between
25 interested groups, and the fact the most of these issues are the subject of prior Board orders
26 and/or current litigation, the SWRCB declines to issue an additional order on these issues."

27 10. The City has exhausted all available administrative remedies.

28 ///

1 VENUE AND STANDARD OF REVIEW

2 11. Venue for this action is proper in Los Angeles County Superior Court because
3 Petitioner is located in Los Angeles County and because the regulatory actions and the water
4 discharges at issue occur in Los Angeles County. Venue is therefore appropriate in Los Angeles
5 County pursuant to Government Code § 955.3.

6 12. Before filing this action, Petitioner served written notice of the commencement of
7 this action on Respondents in accordance with Public Resources Code § 21167.5. A true and
8 correct copy of that Notice of Commencement of Action is attached as Exhibit A.

9 13. Petitioner also provided notice of the action and a copy of this Petition to the
10 California Attorney General's Office pursuant to Public Resources Code § 21167.7 and Code of
11 Civil Procedure § 388. A copy of that notice letter is attached as Exhibit B.

12 14. Pursuant to Code of Civil Procedure §§ 1085 and 1094.5, Water Code § 13330(d),
13 and Public Resources Code § 21187.5, this Court has jurisdiction to exercise its independent
14 judgment on the evidence to determine whether Respondents have abused their discretion or
15 otherwise acted contrary to law. Abuse of discretion is established if Respondents have not
16 proceeded in the manner required by law, the Order is not supported by the findings or the
17 findings are not supported by the evidence. Code of Civil Procedure § 1094.5(b). Where it is
18 claimed that the findings are not supported by evidence, because this Court is authorized to
19 exercise its independent judgment, abuse of discretion is established if the Court determines that
20 the findings are not supported by the weight of the evidence. Code of Civil Procedure §
21 1094.5(c).

22 FACTUAL BACKGROUND

23 15. Storm water discharges consist of surface runoff generated from various land uses
24 in the hydrologic drainage basins that discharge into the State's water bodies. Various pollutants
25 may be present in storm water and/or urban runoff.

26 16. The City discharges or contributes to storm water discharges and urban runoff
27 from municipal separate storm sewer systems ("MS4s"), also known as storm drain systems.
28 The discharges flow to water courses within the Los Angeles County Flood Control District and

1 into receiving water within the Los Angeles Region. Prior to adoption of the December 13, 2001
2 Order, these discharges were regulated pursuant to the WDR contained in Order No. 96-054,
3 which the Regional Board adopted on July 15, 1996.

4 17. On or about February 1, 2001, the City filed with the Regional Board a Report of
5 Waste Discharge ("ROWD") and applied to renew its waste discharge requirements allowed
6 under the existing NPDES permit and state WDR. The ROWD included a proposed Storm
7 Water Quality Management Program ("SQMP") and a monitoring program. The City's
8 proposed SQMP contained programs previously approved under Board Order No. 96-054 in the
9 following areas: Public Information and Participation, Development Planning, Development
10 Construction, Public Agency Activities, and Illicit Connection/Illicit Discharge Elimination
11 Program ("Programs").

12 18. The Regional Board took the City's ROWD and renewal application under
13 submission. During the ensuing administrative process, the City submitted comments to the
14 Regional Board and participated at workshops and a Public Hearing held by the Regional Board.

15 19. On December 13, 2001, the Regional Board adopted the Order, which purports to
16 "develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution
17 control program to reduce the discharge of pollutants in storm water to the Maximum Extent
18 Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the
19 U.S. subject to the Permittees' [i.e., the City's] jurisdiction." Order at Part D.4, p. 7. The Order
20 operates as both a federal NPDES permit and a state WDR. The Order also modifies the
21 Programs referenced in Paragraph 17 above by placing additional restrictions and requirements
22 that are not legally authorized.

23 20. The City must currently implement the Order within its City limits.

24 **THE ORDER**

25 21. The Order, however, is seriously flawed. As the City demonstrated in the State
26 Board Petition, the Regional Board abused its discretion, exceeded its authority and acted
27 arbitrarily and capriciously in the following ways:

28 ///

- 1 a. by failing to consider or address unrebutted Storm Water Permit Cost
- 2 Studies demonstrating that the cost to implement the Order could exceed \$50 billion;
- 3 b. by attempting to regulate the manner in which the City exercises land use
- 4 authority (Order at Part 4.D.2.c, at pages 35-36 and Appendix D, Standard Urban Storm Water
- 5 Mitigation Plan);
- 6 c. by requiring the City to apply Standard Urban Storm Water Mitigation
- 7 Plans ("SUSMPs"), particularly the SUSMPs' requirement that, as a condition for both
- 8 discretionary and non-discretionary approvals, property owners must agree to "concentrate or
- 9 cluster development on portions of a site while leaving the remaining land in a natural
- 10 undisturbed condition" (Order at Appendix D, at 2, 2nd bullet, at page D-5);
- 11 d. by including "cause or contribute" language in the Receiving Water
- 12 Limitations (Order at Parts 2.1 and 2.2, at page 17);
- 13 e. by imposing Peak Flow Control measures (Order at Part 4.D.1, at page 34-
- 14 35);
- 15 f. by mandating each City to "amend, revise or update its General Plan"
- 16 consistent with the Order's requirements (Order at Part 4.D.12, at page 41);
- 17 g. by assigning responsibility to the City to remedy overflows from sanitary
- 18 sewers that the City does not own or operate (Order at Part 4.F.1.a, at page 45);
- 19 h. by adopting a definition of "redevelopment" that is inconsistent and
- 20 preempted by the controlling Environmental Protection Agency ("EPA") definition of
- 21 redevelopment (Order at Part 5, at page 59);
- 22 i. by failing to exempt discharges from federal and state facilities,
- 23 agricultural storm water discharges and irrigation return flows within a City's boundaries (Order
- 24 at Part 3.E, at page 19);
- 25 j. by attempting to extend the Order to reach "Potential Contribution" of
- 26 pollutants (Order at Part 3.G.2.c, at page 22);
- 27 k. by adopting an overly broad definition of the term "illicit disposal" (Order
- 28 at Part 5, at page 56);

1 l. by failing to comply with the California Environmental Quality Act
2 (“CEQA”) with respect to provisions of the Order that are not mandated under the federal CWA
3 (Land Use, Order at Part 4.D.2.c, pages 35-36, and Appendix D; Peak Flow Control measures,
4 Order at Part 4.D.1, pages 34-35; General Plan amendments, Order at Part 4.D.12, at page 41;
5 mandatory response to Sanitary Sewer Overflows, Order at Part 4.F.1.a, page 45; and inspection
6 responsibilities for facilities subject to State General Permits, Order at Parts 4.C, at page 27 and
7 Part 4.E.2.b, at page 43);

8 m. by requiring the City to modify its CEQA processes (Order at Part 4.D.11,
9 at pages 40-41);

10 n. by imposing unfunded mandates in violation of the California Constitution
11 (Land Use, Order at Part 4.D.2.c, pages 35-36, and Appendix D; Peak Flow Control measures,
12 Order at Part 4.D.1, pages 34-35; General Plan amendments, Order at Part 4.D.12, at page 41;
13 mandatory response to Sanitary Sewer Overflows, Order at Part 4.F.1.a, page 45; and inspection
14 responsibilities for facilities subject to State General Permits, Order at Parts 4.C, at page 27 and
15 Part 4.E.2.b, at page 43);

16 o. by requiring the City to assume inspection responsibilities for facilities
17 subject to State General Permits that are the Regional Board’s sole responsibility (Order at Parts
18 4.C, at page 27 and Part 4.E.2.b, at page 43); and

19 p. by improperly delegating authority to the Regional Board’s Executive
20 Director.

21 22. The Order imposes direct, onerous and expensive obligations on the City and will
22 hamper both development and redevelopment in the City. In addition, the Order requires the
23 City to enforce provisions that lack the requisite legal foundation and that therefore could render
24 the City vulnerable to potential third-party litigation under CWA’s citizen suit provisions.

25 23. In adopting the Order, the Regional Board exceeded its authority and acted
26 arbitrarily, capriciously and without support in the record.

27 24. In denying the State Board Petition and in approving the Order, the State Board
28 exceeded its authority and acted arbitrarily, capriciously and without support in the record.

FIRST CAUSE OF ACTION

(Writ of Mandate Under Code Of Civil Procedure §§ 1085 and 1094.5 For Arbitrary
And Capricious Violation Of California Water Code § 13241(c) and (d) and 33 U.S.C. §
1342(p)(3)(B)(iii))

25. Petitioner realleges and incorporates by reference the allegations contained in Paragraphs 1 through 24 above, as though fully set forth here.

26. California Water Code § 13241, subdivisions (c) and (d), requires the Regional Board to balance various factors when prescribing waste discharge requirements, including economic factors and water quality conditions that can reasonably be achieved.

27. MS4s storm water permits are issued pursuant to the CWA, specifically section 402(p)(3)(B)(iii). Like the Water Code, that section does not impose an absolute prohibition on the discharge of pollutants. Instead, it requires that:

Permits for discharges from municipal storm sewers --

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. 33 U.S.C. § 1342(p)(3)(B)(iii) (Emphasis added).

The EPA recognizes that the maximum extent practicable standard requires consideration of, *inter alia*, "...current ability to finance the program...." See "National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule" Part II, 64 Fed.Reg. 68722, 68754, Dec. 8, 1999. (Emphasis added).

28. In adopting the Order, however, the Regional Board ignored the Storm Water Permit Cost Studies that the City submitted. These Studies demonstrated that the cost of implementing the Order in the Los Angeles Region could exceed \$50 billion. In ignoring this evidence and given that there is no evidence in the record that the City would be able to fund its position of the potential \$50 billion implementation cost, the Regional Board violated the state and federal statutory requirements to balance and consider economic factors, including the City's

1 current ability to finance permit costs, and thereby acted arbitrarily, capriciously and without
2 authorization.

3 29. For the same reasons, the State Board acted arbitrarily, capriciously and without
4 authorization in denying the State Board Petition and in approving the Order.

5 **SECOND CAUSE OF ACTION**

6 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Adopting An**
7 **Order That Is Not Supported By Substantial Evidence)**

8 30. Petitioner realleges and incorporates by reference the allegations contained in
9 Paragraphs 1 through 29 above, as though fully set forth here.

10 31. Federal NPDES regulations mandate that a state permitting authority, such as the
11 Regional Board or State Board, must provide a detailed fact sheet with reasons and explanations
12 for conditions established in a permit. 40 C.F.R. §§ 124.6, 124.8 and 124.56.

13 32. Further, the Regional Board acted in an adjudicatory fashion in adopting the
14 Order. As such, the findings supporting the Order must be based on a reasonable factual basis
15 and supported by tangible evidence and specific reasons in the record.

16 33. Here, the Regional Board ignored the un rebutted evidence showing that the Order
17 could cost over \$50 billion to implement. Accordingly, the Fact Sheet for the Order does not
18 meet the federal requirements set forth in the regulations cited in Paragraph 31, nor does the
19 record support the Regional Board's finding that the Order is required and "practicable." The
20 Regional Board thus acted without authority, arbitrarily and capriciously.

21 34. For the same reasons, the State Board acted arbitrarily, capriciously and without
22 authorization in denying Petitioner's State Board Petition and in approving the Order.

23 **THIRD CAUSE OF ACTION**

24 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
25 **Arbitrary and Capricious Interference With The City's Ability To Exercise Land Use**
26 **Authority In Violation Of The CWA And The California Constitution)**

27 35. Petitioner realleges and incorporates by reference the allegations contained in
28 Paragraphs 1 through 34 above, as though fully set forth here.

1 36. Article XI, Section 7 of the California Constitution and Government Code §
2 65800 confer on local government — not state agencies — broad authority to regulate land use
3 through the City’s police powers. Further, Article III, Section 3 limits the authority of each of
4 the three branches of government via the separation of powers doctrine.

5 37. Congress and the EPA have made clear that the CWA and NPDES program are
6 not intended to infringe on local land use authority. 33 U.S.C. § 1251(b); 64 F.R. 68761.

7 38. The Regional Board therefore has no authority under either state or federal law to
8 interfere with the City’s land use authority.

9 39. Despite this, the Order repeatedly infringes on the City’s land use authority as
10 demonstrated in the following non-exhaustive list:

11 a. Part 4.D.12 (at p. 41) provides that each city “shall amend, revise or
12 update its General Plan;”

13 b. Part 4.D.2.c (at p. 36 and Appendix D, p. D-5), the section that establishes
14 SUSMPs, incorporates Regional Board Resolution No. R00-02 and thereby imposes a condition
15 on land use approvals that the project “concentrate or cluster development on portions of a site
16 while leaving the remaining land in a natural undisturbed condition;” and

17 c. According to the Fact Sheet/Staff Report and Technical Report
18 accompanying the Order, the Regional Board contemplates that the SUSMPs—in particular the
19 “concentrate or cluster” requirement—will be applied to both the City’s discretionary land use
20 decisions and the City’s non-discretionary, ministerial decisions.

21 40. The Regional Board’s efforts through the Order and SUSMPs to infringe on the
22 City’s land use authority violates California law, the CWA and the separation of powers
23 doctrine. The Regional Board therefore lacks the authority and acted arbitrarily and capriciously
24 in attempting to impose land use controls through the Order.

25 41. For the same reasons, the State Board acted arbitrarily, capriciously and without
26 authorization in denying the State Board Petition and in approving the Order.

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1 FOURTH CAUSE OF ACTION

2 (Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Acting Without
3 Authority, Arbitrarily And Capriciously In Imposing Requirements That Could Result In
4 A Claimed Violation Of The United States And California Constitutions)

5 42. Petitioner realleges and incorporates by reference the allegations contained in
6 Paragraphs 1 through 41 above, as though fully set forth here.

7 43. The Fifth Amendment to the United States Constitution, applicable to the States
8 through the Fourteenth Amendment (*See Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir.
9 1996), provides “that no person shall . . . be deprived of . . . property without due process; nor
10 shall private property be taken for public use, without just compensation.” *See also*, Cal. Const.
11 Act I, §§ 7, 19.

12 44. The SUSMP requirement to “concentrate or cluster development on portions of a
13 site while leaving the remaining land in a natural undisturbed condition” purports to require the
14 City to condition both discretionary and non-discretionary land use approvals on a property
15 owner “clustering” the project and leaving the remainder of their land in a natural undisturbed
16 condition.

17 45. The Order does not define the terms “concentrate,” “cluster” or “natural
18 undisturbed condition.” It is foreseeable that property owners could challenge such terms as
19 impermissibly vague in violation of due process.

20 46. It is also foreseeable that property owners could challenge the SUSMPs
21 requirement as constituting a regulatory taking of private property for public use without just
22 compensation.

23 47. In adopting an Order that makes it likely the City could be sued for due process
24 and regulatory takings claims, the Regional Board exceeded its authority and acted arbitrarily
25 and capriciously.

26 48. For the same reasons, the State Board acted arbitrarily, capriciously and without
27 authorization in denying the State Board Petition and in approving the Order.

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FIFTH CAUSE OF ACTION

**(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Arbitrary And
Capricious Violation Of California Water Code § 13241(c) and 33 U.S.C.**

§ 1342(p)(3)(B)(iii)

49. Petitioner realleges and incorporates by reference the allegations contained in Paragraphs 1 through 48 above, as though fully set forth here.

50. The CWA, specifically 33 U.S.C. § 1342(p)(3)(B)(iii), provides that permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants to the “*maximum extent practicable.*” (Emphasis added)

51. California’s Water Code § 13241(c) provides that in establishing discharge limits the Regional Board shall consider “water quality conditions that *could reasonably be achieved* through the coordinated control of all factors which affect water quality in the area.” (Emphasis added)

52. Ostensibly acting pursuant to the CWA and the Water Code, the Order’s Part 2 establishes rules for Receiving Water Limitations that regulate discharge limits. Specifically, Part 2.1 (at p. 17) prohibits “[d]ischarges from the MS4 that *cause or contribute* to the violation of Water Quality Standards of water quality objectives.” (Emphasis added)

53. The Order’s “cause or contribute” language appears to impose a “zero contribution” standard. But that standard violates both the CWA’s “maximum extent practicable” and the Water Code’s “reasonably achievable” standards.

54. The Regional Board’s adoption of an Order that imposes a Receiving Water Limitations standard for discharges in violation of both the state and federal laws lacks authority and is arbitrary and capricious.

55. For the same reasons, the State Board acted arbitrarily, capriciously and without authorization in denying the State Board Petition and in approving the Order.

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1 **SIXTH CAUSE OF ACTION**

2 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
3 **Arbitrary And Capricious Attempt To Modify CEQA Processes)**

4 56. Petitioner realleges and incorporates by reference the allegations contained in
5 Paragraphs 1 through 55 above, as though fully set forth here.

6 57. The Order's Part 4.D.11 (at pp. 40-41) imposes requirements on the City to
7 incorporate various additional procedures into its CEQA processes targeted at considering
8 potential storm water impacts and providing mitigation for such impacts.

9 58. Under the separation of powers doctrine established in Article III Section 3 of the
10 California Constitution, the powers of the legislative, executive and judicial branches are limited
11 and separate.

12 59. The Legislature, not the Regional and State Boards, has the power to modify
13 CEQA procedures.

14 60. In attempting to require the City to modify its CEQA processes through the Order,
15 the Regional Board acted in an unauthorized, arbitrary and capricious fashion.

16 61. For the same reason, the State Board acted arbitrarily, capriciously and without
17 authorization in denying the State Board Petition and approving the Order.

18 **SEVENTH CAUSE OF ACTION**

19 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
20 **Arbitrary And Capricious Attempts To Control Non-Pollutant Discharges In Violation Of**
21 **33 U.S.C. §§ 1342(p)(3)(b)(iii) And 1362(6))**

22 62. Petitioner realleges and incorporates by reference the allegations contained in
23 Paragraphs 1 through 61 above, as though fully set forth here.

24 63. The CWA provides that MS4 Storm Water permits are to include "controls to
25 reduce the discharge of pollutants . . . and such other provisions . . . appropriate for the control of
26 such pollutants." 33 U.S.C. § 1342(p)(3)(b)(iii). Further, the CWA defines "pollutant" as
27 "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions,
28 chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded

1 equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged
2 into water.” 33 U.S.C. § 1362(6).

3 64. The Order, however, attempts to control not only pollutants, but also the flow of
4 water itself. Specifically, Part 4.D.1 (at pp. 34-35) provides that “Permittees shall control post-
5 development peak storm water runoff discharge rates, velocity, and duration (peak flow control)
6 In Natural Drainage Systems (i.e., mimic pre-development hydrology) to prevent accelerated
7 stream erosion and to protect stream habitat.”

8 65. In addition, the Order at Part 3.G.2.c (at p. 22) imposes a requirement that the
9 City control “potential contribution” of pollutants.

10 66. Because the definition of pollutant does not include the flow of water itself and
11 because the Regional Board only has authority regarding the discharge of pollutants, Part 4.D.1
12 concerning peak flow control and Part 3.G.2.c concerning “potential contribution” of pollutants
13 exceed the Regional Board’s authority. In addition, the term “potential contribution” is
14 ambiguous. The Regional Board thus acted without authority, arbitrarily and capriciously.

15 67. For the same reasons, the State Board acted arbitrarily, capriciously and without
16 authorization in denying the State Board Petition and in approving the Order.

17 **EIGHTH CAUSE OF ACTION**

18 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
19 **Arbitrary and Capricious Attempt To Transfer Responsibility For Sanitary Sewer**
20 **Overflows To City In Violation Of 33 U.S.C. § 1292(2)(A))**

21 68. Petitioner realleges and incorporates by reference the allegations contained in
22 Paragraphs 1 through 67 above, as though fully set forth here.

23 69. Sanitary sewers are part of publicly owned treatment works (“POTWs”) and the
24 duty to respond to sanitary sewer overflows rests with the POTWs operator, not with the
25 municipality through which the POTWs sewers flow.

26 70. The Order, specifically Part 4.F.1.a (at p. 45) requires each City to implement “a
27 response plan for overflows of the sanitary sewer system, including “immediate response to
28 overflows for containment”

1 71. The Regional Board's attempt to shift the burden to deal with sanitary sewer
2 overflows from the POTWs operators to the City is contrary to the CWA. It is thus
3 unauthorized, arbitrary and capricious.

4 72. For the same reasons, the State Board acted arbitrarily, capriciously and without
5 authorization in denying the State Board Petition and in approving the Order.

6 **NINTH CAUSE OF ACTION**

7 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized,**
8 **Arbitrary And Capricious Redefinition Of The Term "Redevelopment" In Violation Of 64**
9 **F.R. 68760 And Overly Broad Definition of "Illicit Disposal")**

10 73. Petitioner realleges and incorporates by reference the allegations contained in
11 Paragraphs 1 through 72 above, as though fully set forth here.

12 74. The EPA promulgated rules that define the term "redevelopment." Under those
13 rules, the term "redevelopment" refers to "alterations of a property that change the 'footprint' of
14 a site or building in such a way that results in the disturbance of equal to or greater than 1 acre of
15 land. The term is not intended to include such activities as exterior remodeling . . ." 64 F.R.
16 68760. (Emphasis added)

17 75. The Order, at Part 5 (at pp. 59-60) defines "redevelopment" to mean "land-
18 disturbing activity that results in the creation, or addition or replacement of 5,000 square feet or
19 more of impervious surface area on an already developed site." (Emphasis added)

20 76. The Order's definition is ambiguous, inconsistent and more restrictive than the
21 EPA definition, which is controlling and preemptive.

22 77. The Regional Board's adoption of the Order is therefore unauthorized, arbitrary
23 and capricious.

24 78. The Order in Part 5 (at p. 56) defines "illicit disposal" as "any disposal, either
25 intentionally [sic] or unintentionally [sic] of material(s) or waste(s) that can pollute storm water."
26 (Emphasis added)

27 79. The term "can pollute" is undefined and ambiguous.

28 ///

1 80. The CWA only authorizes the Regional Board to regulate discharges of pollutants
2 into MS4s. But the term "can pollute" could be construed to mean something other than
3 "discharge of a pollutant."

4 81. To the extent the Regional Board, through the vague and ambiguous definition of
5 "illicit disposals," attempts to regulate anything other than discharges of a pollutant, that action is
6 unauthorized, arbitrary and capricious.

7 82. For the same reasons, the State Board acted arbitrarily, capriciously and without
8 authorization in denying the State Board Petition and in approving the Order.

9 **TENTH CAUSE OF ACTION**

10 **(Writ Of Mandate Under Code Of Civil Procedure §§1085 And 1094.5 For Unauthorized,**
11 **Arbitrary, And Capricious Failure To Exempt Certain Discharges)**

12 83. Petitioner realleges and incorporates by reference the allegations contained in
13 Paragraphs 1 through 82 above, as though fully set forth here.

14 84. The Order's part 3.E (at pp. 19-20) states that the City must "comply with the
15 requirements of this Order applicable to discharges within its boundaries"

16 85. The Order does not exempt pollutants that may be present in flows that originate
17 on a federal or state facility within the City's boundaries but outside the City's authority.

18 86. The Order does not exclude agricultural storm water discharges or return flows
19 from irrigated agriculture that are exempted under the CWA. 33 U.S.C. § 1362(14).

20 87. The Regional Board's failure to exempt discharges originating from state and
21 federal facilities over which the City has no jurisdiction and from agricultural resources
22 exempted under the CWA constitutes an unauthorized, arbitrary and capricious action.

23 88. For the same reasons, the State Board acted arbitrarily, capriciously, and without
24 authorization in denying the State Board Petition and approving the Order

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ELEVENTH CAUSE OF ACTION

(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Unauthorized, Arbitrary And Capricious Attempts To Impose Unfunded Mandates In Violation Of The California Constitution)

89. Petitioner realleges and incorporates by reference the allegations contained in Paragraphs 1 through 88 above, as though fully set forth here.

90. The California Constitution, Article XIII.B, Section 6 forbids imposition of unfunded mandates on the City.

91. Relevant Storm Water Regional Control Board Orders make it the Regional Board's sole responsibility to: inspect facilities that are subject to the General Industrial Activities Storm Water Permit and the General Construction Activities Storm Water Permit; enforce those permits; and impose Best Management Practices requirements. SWRCB Order No. 97-03-DWQ, ¶ 13; SWRCB Order No. 99-08-DWQ, ¶ 11.

92. In the Order's Part 4.C (at pp. 27-34) and 4.E (at pp. 42-45), the Regional Board attempts to transfer these responsibilities to the City.

93. The Order also imposes numerous requirements that are not required under the CWA. These unauthorized requirements include, *inter alia*, numeric design standards, SUSMPs, inspection of facilities subject to state general permits, imposition of land use controls and mandatory response to sanitary sewer overflows.

94. The Regional Board's attempt to transfer state responsibilities to the City and to impose non-CWA mandated requirements on the City without providing the requisite funding constitutes an unfunded mandate in violation of the California Constitution and is unauthorized, arbitrary and capricious.

95. For the same reasons, the State Board acted arbitrarily, capriciously and without authorization in denying the State Board Petition and in approving the Order.

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1 **TWELFTH CAUSE OF ACTION**

2 **(Writ Of Mandate Under Code Of Civil Procedure §§ 1085 And 1094.5 For Failure**
3 **To Comply With CEQA)**

4 96. Petitioner realleges and incorporates by reference the allegations contained in
5 Paragraphs 1 through 95 above, as though fully set forth here.

6 97. Generally, NPDES permits are exempt from CEQA pursuant to Water Code §
7 13389.

8 98. But to the extent that the Order exceeds the CWA's requirements for NPDES
9 permits, Water Code § 13389's CEQA exemption does not apply.

10 99. The Order contains numerous provisions that extend beyond the CWA's MS4
11 NPDES permits requirements, including *inter alia*, numeric design standards, SUSMPs,
12 inspection of facilities subject to state general permits, imposition of land use controls and
13 mandatory response to sanitary sewer overflows.

14 100. These requirements qualify as a "project" within the meaning of CEQA.

15 101. The Regional Board and State Board violated CEQA by failing to comply with
16 the CEQA process with respect to the Order's non-CWA mandated elements.

17 102. For the same reasons, the State Board acted arbitrarily, capriciously and without
18 authorization in denying the City's State Board Petition and in approving the Order.

19 **THIRTEENTH CAUSE OF ACTION**

20 **(For Declaratory Relief Under Code Of Civil Procedure § 1060 And Government**
21 **Code § 11350 And 11350.3)**

22 103. Petitioner realleges and incorporates by reference the allegations contained in
23 Paragraphs 1 through 102 above, as though fully set forth here.

24 104. An actual controversy has arisen between Petitioner and Respondents relating to
25 their legal rights and duties concerning the Order. Specifically, the Petitioner contends that the
26 Order is invalid, contrary to the CWA, the California Water Code, CEQA, and the California and
27 United States Constitutions.

28 ///

1 105. Respondents, on the other hand, contend that the Order complies with State and
2 federal law.

3 106. No adequate remedy other than that prayed for herein exists to adjudicate the
4 parties' rights given the public interest in promptly resolving this matter and because the Order
5 concerns unique rights. Declaratory relief is thus necessary and appropriate to resolve the
6 pending dispute and to avoid the multiplicity of actions and/or similar actions, and as necessary
7 to provide specific direction to Respondents in taking any future action that may involve the
8 Order.

9 **FOURTEENTH CAUSE OF ACTION**

10 **(For Writ of Mandate Under Code Of Civil Procedure § 1085 and 1044.5 For**
11 **Unauthorized Delegation)**

12 107. Petitioner realleges and incorporates by reference the allegations contained in
13 Paragraphs 1 through 106 above, as though fully set forth here.

14 108. The Order, Part 3.C (at pp. 18-19) provides:

15 The Permittees shall revise the SQMP, at the direction of the Regional
16 Board Executive Officer, to incorporate program implementation
17 amendments so as to comply with regional, watershed specific
18 requirements, and/or waste load allocations developed and approved
19 pursuant to the process for the designation and implementation of Total
20 Maximum Daily Loads (TMDLs) for impaired water bodies.

21 109. The Order defines the SQMP to mean "the Los Angeles Countywide Stormwater
22 Quality Management Program, which includes descriptions of programs, collectively developed
23 by the Permittees in accordance with the provisions of the NPDES Permit, to comply with
24 applicable federal and state law, as the same is amended from time to time." Order at 61.

25 110. The SQMP is an enforceable part of the Order. Part 3.A.1 (at p. 18) specifically
26 provides, "[e]ach Permittee shall, at a minimum implement the SQMP. *The SQMP is an*
27 *enforceable element of this Order.*" (Emphasis added.)

28 ///

1 111. Part 3.C thus authorizes the Regional Board's Executive Officer to order - without
2 notice or opportunity to be heard - a revision to an enforceable element of the Order.

3 112. Respondents State and Regional Boards have prejudicially abused their discretion,
4 acted without or in excess of their jurisdiction and in violation of law in delegating authority to
5 the Executive Officer to revise the Order, without notice or hearing, as follows:

6 (a) Under the CWA, a permit cannot be modified without notice and
7 public comment. 40 C.F.R. §§ 124.5, 124.6 and 124.10. *See also*, 40
8 C.F.R. § 12262.

9 (b) Under state law, the Regional Board may delegate any of its powers to
10 its Executive Officer "excepting only the following: . . . (2) *the issuance,*
11 *modification or revocation of any water quality control plan, water quality*
12 *objectives, or waste discharge requirement.* Cal. Water Code § 13223(a)
13 (Emphasis added.)

14 (d) The Order itself provides, "This Order may only be modified,
15 revoked, or reissued, prior to the expiration date by the *Regional Board, in*
16 *accordance with the procedural requirements of the [California Water*
17 *Code] and C.C.R. title 23 for the issuance of waste discharge*
18 *requirements, 40 C.F.R. 122.62, and upon prior notice and hearing. . . ."*
19 Order pp. 65-66. (Emphasis added.)

20 113. This unlawful delegation of authority to the Executive Officer to revise an
21 enforceable part of the Order is further a prejudicial abuse of discretion and an action without or
22 in excess of jurisdiction and in violation of law because the Executive Officer is given the
23 authority to revise an enforceable element of the Order to reflect the implementation of Total
24 Maximum Daily Loads ("TMDLs").

25 114. Either the State or the EPA may adopt a TMDL. A TMDL represents the
26 maximum amount of a particular pollutant that can be present in a water body without violating
27 "water quality standards." 33 U.S.C. § 1313(d)(1)(C).

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1 115. EPA and Respondents State and Regional Boards have adopted several TMDLs
2 affecting waterbodies in Los Angeles County. Those TMDLs have been adopted without
3 reference to Section 402(p) of the CWA and without reference to the MEP Standard of that
4 section.

5 116. Respondent Regional Board has stated that it intends to implement TMDLs in Los
6 Angeles County through the Order. Because the TMDLs are being adopted without reference to
7 Section 402(p), the State and Regional Boards have prejudicially abused their discretion and
8 acted without or in excess of their jurisdiction and in violation of law in that Part 3.C allows the
9 Executive Officer to revise the Order to implement a TMDL without regard to whether the
10 revision is consistent with CWA's § 402(p), including its MEP Standard.

11 **PRAYER FOR RELIEF**

12 **THEREFORE**, the City requests that:

13 1. A peremptory writ of mandate issue under this Court's seal, directing
14 Respondents State Board and Regional Board to rescind the Order, comply with CEQA prior to
15 imposing any requirements that exceed the CWA mandate, and set aside all actions taken to
16 enforce or implement the Order;

17 2. Alternatively, a peremptory writ of mandate issue under this Court's seal directing
18 Respondents State Board and Regional Board to modify the Order to remedy the flaws in the
19 Order articulated herein;

20 3. That a declaratory judgment be entered declaring the Order invalid and declaring
21 that Respondents' actions were arbitrary, capricious, unauthorized, and contrary to State and
22 federal laws;

23 4. The Court enter an order awarding Petitioner's costs and reasonable attorney's
24 fees incurred in bringing this action; and

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5. The Court award any such further relief as it deems just and proper.

Dated: January 16, 2003

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN, LLP

Rufus C. Young (by am)

Leland C. Dolley
Rufus C. Young, Jr.
Renee J. Laurents
Amy E. Morgan
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CITY OF ALHAMBRA

VERIFICATION

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I, RUFUS C. YOUNG, JR. declare:

1. I am a partner at Burke, Williams & Sorensen, LLP counsel for Petitioner in this matter. I am authorized to make this Verification on the Petitioner's behalf.

2. I have read the Petition for Writ of Mandate And Complaint For Declaratory Relief Pursuant to Water Code Section 13330(b), Code of Civil Procedure Sections 1085 And 1094.5, and Government Code Sections 11350 and 11350.3. The facts stated in the Petition are either true and correct based on my personal knowledge, or I am informed and believe that such facts are true and correct, and on that basis I allege them to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Verification on this 16th day of January 2003 at San Diego, California.



Rufus C. Young, Jr.

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OUR FILE NO:
00006-0875

January 16, 2003

Dennis A. Dickerson
Executive Officer
California Regional Water Quality Control Board Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Notice of Commencement of Action

Dear Mr. Dickerson:

Please take notice that the City of Alhambra intends to commence an action against the California State Water Resources Control Board ("State Board") and the California Regional Water Quality Control Board Los Angeles Region ("Regional Board"). The action will challenge Order No. 01-182, NPDES Permit No. CAS004001 Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles and the Incorporated Cities Therein, except the City of Long Beach ("Order"). The litigation will allege, inter alia, that the Regional Board and State Board acted without legal authorization, arbitrarily, capriciously and in violation of State and federal laws, including California's Environmental Quality Act.

Very truly yours,

BURKE, WILLIAMS & SORENSEN, LLP



Amy E. Morgan

AEM:kfm

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

3 I declare that I am over the age of eighteen (18) and not a party to this action. My
4 business address is 3403 Tenth Street, Suite 300, Riverside, California 92501.

5 On January 16, 2003, I served the following document(s) **NOTICE OF**
6 **COMMENCEMENT OF ACTION** on the interested parties in this action by placing a true and
7 correct copy of such document, enclosed in a sealed envelope, addressed as follows:

8 Dennis A. Dickerson
9 Executive Officer
10 California Regional Water Quality Control Board Los Angeles Region
11 320 West 4th Street, Suite 200
12 Los Angeles, CA 90013

13 **BY MAIL**

14 I am readily familiar with the business' practice for collection and processing of
15 correspondence for mailing with the United States Postal Service. I know that the
16 correspondence was deposited with the United States Postal Service on the same
17 day this declaration was executed in the ordinary course of business. I know that
18 the envelope was sealed and, with postage thereon fully prepaid, placed for
19 collection and mailing on this date in the United States mail at Riverside,
20 California.

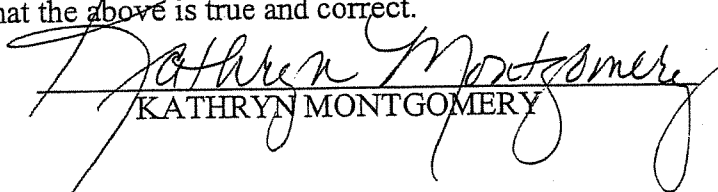
21 **BY OVERNIGHT COURIER**, I caused the above-referenced document(s) to be
22 deposited in a box or other facility regularly maintained by the overnight courier,
23 or I delivered the above-referenced document(s) to an overnight courier service,
24 for delivery to the above addressee(s).

25 **BY PERSONAL SERVICE**, I caused such envelope to be delivered by hand to
26 the above addressee(s).

27 **BY FACSIMILE MACHINE**, I caused the above-referenced document(s) to be
28 transmitted to the above-named person(s) to the following telecopy number
indicated on the attached service list.

Executed on January 16, 2003 at Riverside, California.

(State) I declare under penalty of perjury under the laws of the State of
California that the above is true and correct.


KATHRYN MONTGOMERY

001/196

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2001 DEC 20 11:05

SUPERIOR COURT
SAN DIEGO, CA

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8 Attorneys for Petitioners
9 Building Industry Association of San
10 Diego County, Building Industry Legal
11 Defense Foundation, California Business
12 Properties Association, Construction
13 Industry Coalition for Water Quality, San
14 Diego County Fire Districts Association,
15 City of Santee and City of San Marcos

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO

12 BUILDING INDUSTRY ASSOCIATION OF
13 SAN DIEGO COUNTY, a California
14 nonprofit corporation, BUILDING
15 INDUSTRY LEGAL DEFENSE
16 FOUNDATION, a California nonprofit
17 corporation, CALIFORNIA BUSINESS
18 PROPERTIES ASSOCIATION, a California
19 association, CONSTRUCTION INDUSTRY
20 ASSOCIATION FOR WATER QUALITY, an
21 ad-hoc association, SAN DIEGO COUNTY
22 FIRE DISTRICTS ASSOCIATION, a
23 California nonprofit association, CITY OF
24 SANTEE, a California municipal corporation,
25 and CITY OF SAN MARCOS, a California
26 municipal corporation,

20 Petitioners and Plaintiffs,

21 v.

22 STATE WATER RESOURCES CONTROL
23 BOARD, CALIFORNIA REGIONAL
24 WATER QUALITY CONTROL BOARD,
25 SAN DIEGO REGION, and DOES 1-50,
26 Inclusive,

25 Respondents and Defendants.

26 CITY OF CARLSBAD, CITY OF CHULA
27 VISTA, CITY OF CORONADO, CITY OF
28 DEL MAR, CITY OF EL CAJON, CITY OF
ENCINITAS, CITY OF ESCONDIDO, CITY
OF IMPERIAL BEACH, CITY OF LA
MESA, CITY OF LEMON GROVE, CITY

CASE NO:

GIC

780263

VERIFIED PETITION FOR WRIT OF
MANDATE RE:

- (1) CALIFORNIA ENVIRONMENTAL QUALITY ACT;
- (2) CLEAN WATER ACT;
- (3) CALIFORNIA WATER CODE;
- (4) CALIFORNIA CONSTITUTION;
- (5) CALIFORNIA CODE OF CIVIL PROCEDURE;
- (6) CALIFORNIA ADMINISTRATIVE PROCEDURES ACT
- (7) STATUTORY RECORD REVIEW AND CALIFORNIA CONSTITUTION;

VERIFIED COMPLAINT FOR:

- (8) DECLARATORY RELIEF; AND
- (9) INJUNCTIVE RELIEF

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OF NATIONAL CITY, CITY OF
OCEANSIDE, CITY OF POWAY, CITY OF
SAN DIEGO, CITY OF SOLANA BEACH,
CITY OF VISTA, COUNTY OF SAN
DIEGO, SAN DIEGO UNIFIED PORT
DISTRICT, WESTERN STATES
PETROLEUM ASSOCIATION, and DOES
51-100, Inclusive,

Real Parties in Interest

1 Petitioners and plaintiffs Building Industry Association of San Diego County,
2 Building Industry Legal Defense Foundation, California Business Properties Association,
3 Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association,
4 City of Santee, and City of San Marcos, (collectively, "Petitioners") petition this Court for a writ
5 of mandate under Code of Civil Procedure Section 1085 and/or Section 1094.5 directed to
6 respondents and defendants the State Water Resources Control Board ("SWRCB") and the
7 California Regional Water Quality Control Board, San Diego Region ("Regional Board")
8 (collectively, "Respondents") commanding the SWRCB to vacate those portions of its
9 November 20, 2001 order approving a permit issued by the Regional Board for the public storm
10 drains of San Diego County (the "Permit"), and mandating that the Permit be re-issued by the
11 Regional Board only in compliance with law after consultation with Petitioners. Petitioners
12 further seek declaratory relief determining the extent of Petitioners' rights and additionally bring
13 this action for injunctive relief. Petitioner and Plaintiff City of Santee joins in the Petition and
14 Complaint as to the Second, Eighth and Ninth Causes of Action.

15 By this Verified Petition and Complaint, Petitioners allege as follows:

16 **I.**

17 **INTRODUCTION**

18 1. This case involves an attempt by the Regional Board to force fundamental change
19 in local land use. The Regional Board, an agency without land use power, attempts to achieve its
20 stated purpose through an 89-page document, identified by the Regional Board as a permit issued
21 under the federal Clean Water Act and the State Porter Cologne Water Quality Control Act (the
22 "Porter-Cologne Act").

23 2. While ostensibly a permit issued under the Clean Water Act's National Pollution
24 Discharge Elimination System ("NPDES") and provisions of the Porter-Cologne Act governing
25 waste discharge requirements, the permit is actually a master land use planning document for the
26 County of San Diego, touching upon almost every aspect of everyday life within the County,
27 from home gardening and residential car washing, to firefighting.

28

1 1987, BILD is dedicated to eliminating barriers to the American dream of home ownership. As
2 an organization wholly owned by the Building Industry Association of Southern California, Inc.
3 (“BIA/SC”), BILD represents more than 1,750 BIA/SC member companies in eight chapters in
4 Southern California, including landowners, developers, home builders, and building industry.
5 BILD is beneficially interested in the Permit as BILD’s members will be responsible for
6 implementing certain terms of the Permit, and the Permit directly impacts the housing
7 construction industry in San Diego County. The policies and practices of the Respondents have
8 adversely affected and will continue to adversely affect BILD and its members’ performance of
9 their functions not only in San Diego County but also throughout the State of California. BILD
10 participated in the administrative process related to the Permit by, among other things,
11 submitting written and oral comments to the SWRCB prior to its decision regarding the Permit.

12 7. Petitioner California Business Properties Association (“CBPA”) is a trade
13 association organized under the laws of the State of California of business properties owners
14 throughout the State of California, including San Diego County, with its principal place of
15 business located at 1121 L Street, Sacramento, California. CBPA is beneficially interested in the
16 Permit as CBPA’s members will be responsible for implementing certain terms of the Permit.
17 The policies and practices of Respondents have adversely affected and will continue to adversely
18 affect CBPA and its members’ performance of their functions not only in San Diego County but
19 also throughout the State of California.

20 8. Petitioner Construction Industry Coalition on Water Quality (“CICWQ”) is an ad
21 hoc association of more than 3,300 member companies drawn from four major construction and
22 building trade associations, including the Associated General Contractors of California, the
23 Building Industry Association of California, the Engineering Contractors Association, and the
24 Southern California Contractors Association. CICWQ is currently in the process of formally
25 organizing as a nonprofit association under the laws of the State of California. CICWQ
26 represents the interests of construction contractors, labor unions, landowners, developers, and
27 homebuilders throughout the County and region. CICWQ is beneficially interested in the Permit
28 as all CICWQ members are impacted by the Permit, including construction employees who rely

1 SWRCB has accepted the delegation of authority from U.S. EPA to implement the Clean Water
2 Act's NPDES permit program. The SWRCB is "an inferior tribunal, corporation, board, or
3 person" as that term is used in Code of Civil Procedure Section 1085.

4 13. On information and belief Petitioners allege Respondent Regional Board is a sub-
5 entity of the SWRCB with jurisdiction over water quality issues in San Diego County and part of
6 southern Orange County. The Regional Board is responsible for adopting and enforcing NPDES
7 permits, such as the Permit in question. The Regional Board is "an inferior tribunal, corporation,
8 board, or person" as that term is used in Code of Civil Procedure Section 1085.

9 14. On information and belief Petitioners allege Doe Defendants 1-50, inclusive, are
10 Respondents and are responsible in some way for the issuance of the Permit at issue in this case.
11 Petitioners are unable to ascertain the true names, identities or capacities of those parties sued
12 herein as Doe Defendants 1 through 50, inclusive. Petitioners therefore sue such parties by such
13 fictitious names. Petitioners will seek leave to amend this petition and complaint to set forth the
14 true names and capacities of these Doe Defendants once they have been ascertained.

15 15. On information and belief Petitioners allege Real Parties in Interest City of
16 Carlsbad, City of Chula Vista, City of Coronado, City of Del Mar, City of El Cajon, City of
17 Encinitas, City of Escondido, City of Imperial Beach, City of La Mesa, City of Lemon Grove,
18 City of National City, City of Oceanside, City of Poway, City of San Diego, City of Solana
19 Beach, and City of Vista (collectively, the "Municipalities") are municipalities located in the
20 County of San Diego, organized under the laws of the State of California. The Municipalities are
21 copermittees.

22 16. On information and belief Petitioners allege Real Party in Interest County of San
23 Diego is the overall governing body for San Diego County and a copermittee.

24 17. On information and belief Petitioners allege Real Party in Interest San Diego
25 Unified Port District ("Port District") is an entity created by the California State Legislature for
26 the purpose of owning, operating and maintaining the San Diego Harbor, located in the County
27 of San Diego. The Port District is a copermittee.

28

1 **C. Petitioners Have Exhausted Their Administrative Remedies**

2 23. Petitioners have exhausted all of the administrative remedies available to them
3 prior to filing this action. Petitioners participated in workshops and hearings and provided
4 written comments to the Regional Board prior to its adoption of the Permit on February 20, 2001.
5 On March 22, 2001, BIA filed a petition for review with the SWRCB within 30 days of the
6 Regional Board's action. BIA subsequently filed objections with the SWRCB regarding the
7 Regional Board's submission of an inadequate administrative record, and requested the SWRCB
8 not proceed on this matter until it received a complete administrative record. BIA also submitted
9 written points and authorities to the SWRCB prior to the public hearing of November 15, 2001
10 regarding the Permit. Petitioners BIA, CICWQ, BILD, and City of Santee, among others,
11 appeared in opposition to the Permit at the SWRCB's workshop on October 31, 2001 and BIA,
12 CICWQ and City of Santee, among others, also appeared at the SWRCB's public hearing on
13 November 15, 2001. The SWRCB issued a final order regarding the Permit on November 20,
14 2001, after which Petitioners had no available administrative remedy to redress its grievances
15 against the SWRCB and the Regional Board other than through this petition.

16 **D. Petitioners Have No Adequate Remedy At Law**

17 24. Petitioners do not have a plain, speedy, and adequate remedy in the ordinary
18 course of law.

19 **E. Standard of Review**

20 25. Pursuant to California Public Resources Code ("CEQA"), Respondents'
21 application of an erroneous legal standard is subject to an independent determination by the
22 Court.

23 26. Pursuant to California Water Code section 13330(d), "the court shall exercise its
24 independent judgment on the evidence in any case involving judicial review of a decision or
25 order of the state board issued under [Water Code] Section 13320"

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1 U.S.C. § 1342(p); Clean Water Act § 402(p). The Clean Water Act authorizes states to
2 implement the Clean Water Act program, which includes issuance and enforcement of NPDES
3 permits, such as the San Diego Permit in question. 33 U.S.C. § 1342(b); Clean Water Act
4 § 402(b). The SWRCB has accepted this delegation from U.S. EPA, and in turn has attempted to
5 delegate its power to issue NPDES permits to the Regional Board. The Regional Board and
6 SWRCB also are authorized under California law to adopt waste discharge requirements
7 (WDRs). *See*, Cal. Water Code, § 13236 *et seq.*

8 31. The Regional Board is the state agency that issues and enforces NPDES permits
9 and WDRs within its geographical jurisdiction, which includes San Diego County. The SWRCB
10 is the agency responsible for reviewing Regional Board actions.

11 32. On October 11, 2000, the Regional Board issued a draft NPDES permit and
12 WDRs regulating discharges of urban runoff from public storm drains in San Diego County (“the
13 Draft Permit”). The Regional Board held workshops regarding the Draft Permit on October 19,
14 2000, November 2, 2000 and November 30, 2000.

15 33. Petitioners or their representatives attended these workshops, and Petitioners also
16 provided written comments to the Regional Board. A public hearing was held on December 13,
17 2000, at which time Petitioners expressed concerns regarding the Permit.

18 34. The Regional Board approved the Permit on February 21, 2001 as Regional Board
19 Order No. 2001-01. Despite substantial revisions made to the Draft Permit by the Regional
20 Board subsequent to the last public meeting, the Regional Board refused to accept any further
21 public comment on the Permit at its February 21, 2001 hearing.

22 35. On March 22, 2001, BIA filed a petition with the SWRCB seeking review of the
23 Regional Board’s adoption of the Permit and requesting the SWRCB to conduct a full
24 adjudicatory hearing on the matter. Various parties filed letters with the SWRCB joining in
25 BIA’s petition. Real Party in Interest WSPA also filed a timely petition with the SWRCB.
26 Numerous other parties sent letters to the SWRCB urging it to not adopt the Permit as drafted.

27 36. On October 19, 2001, the SWRCB issued its Draft Order regarding the Permit,
28 upholding parts of the Permit and revising other parts. The SWRCB provided a narrow window

1 Pub. Res. Code § 21080(a). CEQA applies generally to the “the issuance of permits.” *Id.*
2 § 21006. The issuance of the Permit was a “project” as that term is defined for purposes of
3 CEQA, obligating the Regional Board to, without limitation, prepare an initial study and either a
4 negative declaration or Environmental Impact Report, none of which were done here.

5 43. The Permit is an action by the Regional Board and SWRCB that is subject to
6 CEQA review, as the Permit will have a significant impact on the environment. Substantial
7 evidence exists which shows that the Permit will have a significant impact on the environment.
8 Among other things, the Permit requires structural Best Management Practices for numerous
9 categories of new development and significant redevelopment; the development and
10 implementation of Best Management Practices for existing built-out properties, including
11 residences; changed construction practices; and a myriad of other on-the-ground changes which
12 will likely have a significant impact on the environment. The Permit will have serious socio-
13 economic impacts on the community that have not been addressed, such as the potential for
14 reduced new housing starts for low-income homes. The effects of the Permit on human health
15 and safety, such as in the form of restrictions on firefighting, have not been addressed. Nor have
16 the effects of the Permit, or the provision of municipal services, and the exercise of local
17 governments land use authority been analyzed. Petitioners (collectively, residents, citizens,
18 property owners, taxpayers, and public entities) will be adversely affected by the changes to
19 environment caused by the Permit in that Petitioners and their members engage in homebuilding,
20 construction, development, the provision of municipal services including firefighting, and the
21 exercise of municipal land use authority.

22 44. The Regional Board and the SWRCB erroneously interpreted Section 13389 of
23 the California Water Code to excuse the Permit, and the massive land use planning exercise it
24 entails, from CEQA. Section 13389, however, only exempts from CEQA permit provisions
25 required to meet the non-discretionary requirements of the federal Clean Water Act. Cal. Water
26 Code § 13374. The California Legislature did not give the Regional Board a CEQA “pass” for
27 anything other than federal Clean Water Act mandates.

28

1 50. In violation of Section 402(p), the Permit vests the Regional Board with the
2 authority to order copermittees to implement ever more onerous BMPs, regardless of whether
3 those additional BMPs exceed the Maximum Extent Practicable standard. In violation of Section
4 402(p), the Permit may be enforced against copermittees even if they are actively and in good
5 faith implementing BMPs consistent with the Maximum Extent Practicable standard.

6 51. In addition, numerous other provisions of the Permit exceed the MEP standard,
7 including, without limitation, inspection provisions with no corresponding water quality benefit;
8 required structural controls not expected to improve water quality (if at all) for decades;
9 infeasible construction standards regarding sediment retention and grading; infeasible
10 requirements to mimic natural hydrology, prevent erosion and control runoff volumes; and BMP
11 requirements for a sweeping array of land uses including home gardening.

12 **B. The Permit violates Clean Water Act § 101(b).**

13 52. The Clean Water Act requires the traditional planning power of local authorities
14 over land use issues to be preserved and protected. 33 U.S.C. § 1251(b); Clean Water Act §
15 101(b). The United States Supreme Court recently limited the exercise of agency authority
16 under the Clean Water Act in part on the basis that the agency was interfering with local land use
17 authority. *See Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531
18 U.S. 159, 174 (2001) (“*SWANCC*”). The Permit unlawfully interferes with the valid exercise by
19 local government of land use authority.

20 53. The Permit explicitly calls for fundamental change in land use planning (Finding
21 21) and indicates the Regional Board’s intent to direct local land use decisions. *See, e.g.*, Permit,
22 Finding 21, § F. The Permit seeks to require new building techniques and engineering methods
23 that will somehow allow land use without changing the hydrologic cycle. These goals and
24 objectives are *ultra vires* in that they exceed the agency’s lawful jurisdiction; they also
25 unlawfully infringe on local governmental authority.

26 54. The Permit requires, among other things, that the copermittees amend their
27 General Plan – the core document which guides a city’s land use decisions – to include Regional
28 Board priorities (Permit § F.1.a) and development project approval processes (Permit § F.1.2).

1 58. The Permit regulates discharges *into* things other than navigable waters, including
2 without limitation street gutters, curbs, and municipal streets. Discharges to areas such as
3 these—which clearly are not waters of the United States—are beyond the reach of a NPDES
4 permit. By defining “water of the United States” to include such things as street gutters, curbs
5 and municipal streets, the Permit violates the federal Clean Water Act.

6 **E. The Permit violates Clean Water Act §§ 502, 508.**

7 59. The Clean Water Act’s NPDES program prohibits only *point source* discharges of
8 pollutants into navigable waters. 33 U.S.C. §§ 1342(a), 1362(12); Clean Water Act §§ 402(a),
9 502(12). The Clean Water Act excludes agricultural storm water discharges and irrigated return
10 flows from NPDES permits by excluding these discharges from the definition of a “point
11 source.” 33 U.S.C. § 1362(14), Clean Water Act § 502(14) (“This term [point source] does not
12 include agricultural storm water discharges and return flows from irrigated agriculture”). In
13 addition, overland street flow, regardless of source, is not a point source.

14 60. The Permit regulates urban runoff regardless of the source and how it enters the
15 public storm drain. Thus, whether water running off from a copermitee’s jurisdiction came from
16 a farm, ranch, or other excluded source, or entered navigable waters as overland flow, the Permit
17 unlawfully imposes responsibility for these flows on the copermitees.

18 61. In that the Permit encompasses urban runoff that is not from a point source, the
19 Permit violates Clean Water Act §§ 502 and 508.

20 **F. The Permit’s Definition of “Redevelopment” in the Order is**
21 **Unsupported by Substantial Evidence.**

22 62. The Permit, defines “significant redevelopment” to mean “the creation or addition
23 of at least 5,000 square feet of impervious surfaces area on an already developed site.” Permit
24 § F.1.b.2.a. The definition further provides that “significant redevelopment” includes exterior
25 remodeling.

26 63. These aspects of the definition of “redevelopment” conflict with U.S. EPA’s
27 definition of the term. *See, e.g.*, 64 Fed.Reg. 678722 (December 8, 1999). There is no
28 substantial evidence in the administrative record to support the Regional Board’s departure from

1 considered some of the statutory factors during that earlier proceeding, but did not provide the
2 SWRCB with the record from that proceeding.

3 69. When BIA proffered the documents from the earlier proceeding to the SWRCB,
4 its proffer was denied by the SWRCB. *See* SWRCB Order, at 4, fn. 11. The SWRCB
5 inexplicably decided that the Regional Board complied with the requirement to consider various
6 statutory factors, not by identifying any evidence in the record showing the Regional Board had
7 considered them, but instead by arguing that no evidence was in the record showing it *did not*
8 comply with these requirements. *Id.* at 11.

9 70. In fact, neither the records provided by the Regional Board to the SWRCB, nor
10 the Regional Board records that BIA provided to the SWRCB, contain substantial evidence that
11 the Regional Board considered the various mandatory factors specified by the Legislature in
12 Water Code Sections 13263 and 13241.

13 71. Additionally, the California Water Code prohibits the SWRCB or Regional Board
14 from mandating the manner of compliance a permittee must utilize in order to achieve
15 compliance with regional board discharge requirements. Cal. Water Code § 13360(a). In
16 contravention of the Section 13360(a) mandate, the Permit consists of numerous specific
17 directions on how the copermitees must implement the Permit including without limitation
18 numeric design criteria in accordance with which structural storm water controls must be
19 constructed (*see, e.g.*, Permit § F.1.b.2.c); a vastly over-inclusive inspection program, applicable
20 to new construction (Permit § F.2.g.), existing development (Permit § F.3.a.7.), industrial
21 properties (Permit § F.3.b.6.) and commercial properties (Permit § F.3.c.4.); revisions of the
22 project approval practices and policies of local government (Permit § F.1.b.); specifications as to
23 where structural Best Management Practices must be located and how much impervious surface
24 will be allowed; and hydrologic and engineering controls and directives that would have the
25 effect of re-shaping construction and development in San Diego County. The Permit's specific
26 directions do not step over the line, they jump over the line, by requiring very specific actions
27 that copermitees must take in order to comply with the Permit.

28

1 78. The Permit violates the separation of powers, as an arm of the Executive branch
2 (the Regional Board and SWRCB) has, in effect, amended a statute enacted by the Legislature.
3 The Permit imposes new CEQA requirements on local governments. *See, e.g.*, Permit § F.1.c.
4 The Permit requires copermittees, among other things, to “revise their environmental review
5 processes to include requirements for evaluation of water quality effects and identification of
6 appropriate mitigation measures.” *Id.*

7 79. The Legislature, by enacting CEQA, has placed certain requirements on the
8 copermittees and others when undertaking approval of a discretionary project. The Permit
9 results in a *de facto* amendment of the CEQA requirements by requiring the copermittees to,
10 among other things, modify their “development project approval processes” (i.e., CEQA
11 processes). Permit § F.1.b. It is the province of the Legislature to require the copermittees to
12 implement specific requirements prior to a project’s approval (through CEQA amendment or
13 other statutory action). It is beyond the authority of the Regional Board and the SWRCB to
14 require a copermittee to amend its General Plan and impose new CEQA restrictions.

15 80. The Permit also violates California’s separation of powers clause as the Regional
16 Board, as an arm of the executive branch, does not have the authority to proscribe requirements
17 that exceed the statutory mandates handed down by the Legislature. Under the Porter Cologne
18 Act, the Regional Board has the authority to “prescribe requirements as to the nature of any
19 proposed discharge . . .” Water Code § 13263(a). The Porter Cologne Act does not give the
20 Regional Board land use authority.

21 81. The Permit contains numerous provisions that exceed the Regional Board’s
22 statutory authority to regulate discharges. Many of the Permit’s provisions regulate the general
23 use of land, the hydrology of the landscape, on site and down stream erosion, as well as other
24 areas that are clearly *ultra vires* to the Regional Board’s statutory authority. *See, e.g.*, Permit §
25 F. In general, the Permit places illegal restrictions on when, where and how development can
26 take place. *Id.*

27 82. The Permit also results in the federalization of CEQA. As the Permit may be
28 enforced in federal court pursuant to the Clean Water Act, the Permit’s CEQA terms can also be

1 87. This statement ignores the other sources of pollutants such as farming,
2 silviculture, and natural sources of bacteria and sediment that also play a large role in water
3 quality. The Regional Board provides no evidence to substantiate this overstatement, nor would
4 such a statement be reasonable in light of the variety and complexity of factors that affect water
5 quality in the area.

6 **B. Permit Findings 16 and 17: implying that municipalities intentionally**
7 **exploit the area waters for profit.**

8 88. Finding 16 states in part: “Utilizing their land use authority, Copermittees
9 authorize and realize benefits from the urban development which generates the pollutants and
10 runoff that impair receiving waters.” Finding 17 states that because the copermittees “authorize,
11 permit, and profit,” from urban development, they have “commensurate responsibilities to
12 protect water quality during each phase” of development.

13 89. Municipalities are not for-profit entities as implied by the findings. The findings
14 reflect the Regional Board’s misunderstanding of the local planning processes and self-
15 governance, as local governments authorize new development in connection with their land use
16 authorities and collect revenue in order to finance the public services they provide to their
17 citizens. The Regional Board did not base these statements upon any factual evidence in the
18 record, and its reliance upon these statements as a basis for the Permit requirements is an abuse
19 of discretion.

20 **C. Permit Finding 38: requiring compliance with non-existent total**
21 **maximum daily loads.**

22 90. Finding 38 states in relevant part: “Once . . . TMDLs [total maximum daily loads]
23 are approved by the SDRWQCB and USEPA, Copermittees’ discharge of urban runoff into an
24 impaired waterbody will be subject to load allocations established by the TMDLs.” TMDLs are
25 pollutant load-based standards established for water bodies deemed “impaired” by the regulatory
26 agencies; TMDLs set a limit on discharge of particular constituents into the impaired waterbody
27 and specify the particular dischargers or types of dischargers to which the load-based standards
28 apply. There are no TMDLs yet established in the San Diego area.

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A. The Permit violates the California Administrative Procedure Act.

96. The California Administrative Procedure Act (“APA”) prohibits the Regional Board or SWRCB from adopting a regulation of general applicability without compliance with the APA. The Regional Board and SWRCB did not even attempt to comply with these requirements.

97. The Permit is “generally applicable” because many of its provisions apply to all persons conducting business or residing within the permittees’ jurisdiction. *See, e.g.*, Permit § F. For example, the Permit requires all significant new development and redevelopment projects to comply with numerous source control BMPs, implement specific landscaping techniques, comply with minimum grading standards, implement various erosion prevention techniques, and utilize structural treatment BMPs with specific numerical design standards. *Id.* at § F.1-8. These Permit provisions are not limited to the copermitees, but are effectively applicable to the general public. *Id.* The Permit also contains provisions that set forth mandatory inspection and enforcement procedures relating to these generally applicable requirements. *Id.* These provisions of the Permit attempt to make specific the legal requirements of the Clean Water Act and the Porter-Cologne Act, as interpreted by the Regional Board. Permit Finding 37. Because the Permit consists of generally applicable requirements that attempt to make specific the laws administered by the Regional and State Board, the Permit constitutes a regulation under the APA. Because neither the Regional nor State Board complied with the APA when issuing the Permit’s generally applicable provisions, these provisions are invalid.

98. In taking the above actions, the Respondents abused their discretion, acted contrary to law, and their decisions were not supported by substantial evidence.

1 evidence as to the economic impact of the Permit, and the Permit's impact on homebuilding,
2 homeownership, and the provision of municipal services.

3 103. In failing to conduct record review, and the Regional Board's failure to furnish
4 the record, the SWRCB and the Regional Board each abused their discretion, acted contrary to
5 law, and their decisions were not supported by substantial evidence. The resulting SWRCB
6 decision was not supported by substantial evidence, and must therefore be reversed and
7 remanded by writ of mandate, which writ also should direct the Regional Board to furnish the
8 entire record and the SWRCB to conduct additional proceedings based upon that record.

9 **EIGHTH CAUSE OF ACTION**

10 **(BY PETITIONERS BIA, BILD, CBPA, CICWQ, FIRE DISTRICTS and SAN MARCOS**
11 **and PETITIONER SANTEE AS TO PARAGRAPHS 105-106, 107(c)**

12 **AGAINST ALL RESPONDENTS)**

13 **(DECLARATORY RELIEF)**

14 104. Petitioners incorporate herein paragraphs 1 through 103 inclusive as though fully
15 set forth herein.

16 105. An actual controversy exists between Petitioners and the Respondents involving
17 substantial questions pertaining to Petitioners' rights as affected by the Permit. Petitioners
18 maintain that the Respondents' approval (in part) of the Permit violates the California
19 constitution, and state and federal law as described *supra*. Respondents maintain the Permit, as
20 modified by its Order No. 2001-15, complies with all laws. Accordingly, declaratory relief is
21 appropriate and necessary to determine the extent of Petitioners' rights and the Respondents'
22 authority to approve the Permit.

23 106. The Respondents' departure from the requirements of law as described above
24 manifests a policy of violating and ignoring these constitutional and statutory limitations on its
25 authority, which constitutes a fundamental misunderstanding of its legal duties. The
26 Respondents' error threatens the legal rights of Petitioners, independent of the invalidity of the
27 Permit.

28

1 j. California Public Resources Code § 21000 *et seq.* (“CEQA”), as Permit
2 provision in excess of federal mandates were adopted by the Regional Board and approved by
3 the SWRCB without conducting any environmental analysis pursuant to CEQA;

4 k. California Code of Civil Procedure § 1094.5(c), as the Permit contains
5 findings that are not supported by substantial evidence;

6 l. The California Administrative Procedures Act, as the Permit was
7 unlawfully adopted as an underground regulation;

8 m. The vested rights of any person or entity to the extent the Permit requires a
9 copermitttee revisit a prior discretionary decision and, after rights have vested, places new
10 restrictions on a person or entity; and

11 n. California Water Code § 13320 and California Constitution due process
12 protections, as the Regional Board failed to provide the SWRCB the complete administrative
13 record, the SWRCB did not base its decision on the complete administrative record, and failed to
14 conduct its proceedings in accordance with the time-honored and statutory principle of record
15 review.

16 108. Such a declaration is a necessary and proper exercise of the Court’s power at this
17 time under the circumstances, in order to prevent further actions by the SWRCB in violation of
18 law.

19 **NINTH CAUSE OF ACTION**

20 **(BY PETITIONERS BIA, BILD, CBPA, CICWQ, FIRE DISTRICTS and SAN MARCOS**

21 **and PETITIONER SANTEE AS TO PARAGRAPHS 110-111, 112 (d), (e), 113 (b), (c)**

22 **AGAINST ALL RESPONDENTS)**

23 **(INJUNCTIVE RELIEF)**

24 109. Petitioners incorporate herein paragraphs 1 through 108 inclusive as though fully
25 set forth herein.

26 110. As evidenced by the SWRCB’s November 15, 2001 approval (in part) of the
27 Permit, its November 20, 2001 Order, and its interpretations of the legal requirements that
28 govern its conduct, the SWRCB will continue to proceed in a manner that will force Petitioners

1 f. meet with Petitioners two times per month while the Regional Board is
2 revising the Permit so that Petitioners' concerns are addressed in the Permit.

3 113. Petitioners are also entitled to a preliminary and a permanent injunction
4 commanding the Regional Board to:

5 a. only issue NPDES permits that comply with the law as set forth above;

6 b. refrain specifically from issuing NPDES permits which allow for
7 enforcement action by a regional board even if a permittee is engaged in a good faith effort to
8 improve BMPs; and

9 c. refrain from issuing NPDES permits which allow for third-party
10 enforcement against a permittee even if the permittee if engaged in a good faith effort to improve
11 BMPs.

12 d. meet with Petitioners two times per month while the Regional Board is
13 revising the Permit so that Petitioners' concerns are addressed in the Permit.

14 **PRAYER FOR RELIEF**

15 **WHEREFORE**, Petitioners pray for judgment on its Petition and Complaint as
16 follows:

- 17 1. For a writ of mandate directing SWRCB to set aside its approval (in part)
18 of the Permit,
- 19 2. For a writ of mandate compelling the SWRCB and Regional Board to
20 conform any future revisions of the Permit with the California
21 Constitution, state and federal law, and mandating these agencies take all
22 actions to comply with these legal requirements as alleged by each
23 individual Petitioner;
- 24 3. For a writ of mandate compelling the SWRCB and Regional Board to
25 conduct any future proceedings regarding re-issuance of the Permit only
26 pursuant to the complete administrative record;
- 27 4. For a judicial determination and declaration that the Permit violates the
28 California Constitution, the Clean Water Act, the California Water Code

VERIFICATION

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6/19/02
851-9997*

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I, Jerry Livingston, am staff counsel for the Building Industry Association of San Diego County, a petitioner to the above-entitled action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I have read the foregoing Petition For Writ Of Mandate and Complaint and know the contents thereof, and the same is true of my own knowledge.

As staff counsel for Building Industry Association of San Diego County, I hereby attest, under penalty of perjury, that the contents of this Petition are truthful and accurate.

Executed on December __, 2002 at San Diego, California.

Jerry Livingston, Esq.

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**EXEMPT FROM FILING FEES
GOVERNMENT CODE § 6103**

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10 Attorneys for Petitioners COUNTY OF LOS ANGELES
and LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF LOS ANGELES

13 COUNTY OF LOS ANGELES and LOS
14 ANGELES COUNTY FLOOD CONTROL
DISTRICT,

15 Petitioners,

17 v.

18 CALIFORNIA REGIONAL WATER
19 QUALITY CONTROL BOARD FOR THE
20 LOS ANGELES REGION; STATE WATER
RESOURCES CONTROL BOARD; and DOES
1 through 50, inclusive,

21 Respondents.

22
23 THE CITIES OF AGOURA HILLS,
24 ALHAMBRA, ARCADIA, ARTESIA,
25 AZUSA, BALDWIN PARK, BELL, BELL
GARDENS, BELLFLOWER, BEVERLY
26 HILLS, BRADBURY, BURBANK,
CALABASAS, CARSON, CERRITOS,
27 CLAREMONT, COMMERCE, COMPTON,
COVINA, CUDAHY, CULVER CITY,

) CASE NO.
) PETITION FOR WRIT OF MANDATE
) [Code of Civil Procedure §§1085, 1094.5;
) Water Code §13330]

1 DIAMOND BAR, DOWNEY, DUARTE, EL)
MONTE, EL SEGUNDO, GARDENA,)
2 GLENDALE, GLENDORA, HAWAIIAN)
GARDENS, HAWTHORNE, HERMOSA)
3 BEACH, HIDDEN HILLS, HUNTINGTON)
PARK, INDUSTRY, INGLEWOOD,)
4 IRWINDALE, LA HABRA HEIGHTS, LA)
MIRADA, LA PUENTE, LA VERNE,)
5 LAKEWOOD, LAWNSDALE, LOMITA,)
6 LONG BEACH, LOS ANGELES,)
LYNWOOD, MALIBU, MANHATTAN)
7 BEACH, MAYWOOD, MONROVIA,)
8 MONTEBELLO, MONTEREY PARK,)
NORWALK, PALOS VERDES ESTATES,)
9 PARAMOUNT, PASADENA, PICO RIVERA,)
POMONA, RANCHO PALOS VERDES,)
10 ROLLING HILLS ESTATES, ROSEMEAD,)
SAN GABRIEL, SAN DIMAS, SAN)
11 FERNANDO, SAN MARINO, SANTA)
12 CLARITA, SANTA FE SPRINGS, SANTA)
MONICA, SIERRA MADRE, SIGNAL HILL,)
13 SOUTH EL MONTE, SOUTH GATE, SOUTH)
PASADENA, TEMPLE CITY, TORRANCE,)
14 VERNON, WALNUT, WEST COVINA,)
15 WEST HOLLYWOOD, WESTLAKE)
VILLAGE and WHITTIER,)

16 Real Parties In Interest.)
17

18
19 Petitioners County of Los Angeles and Los Angeles County Flood Control District
20 (collectively "Petitioners") hereby petition this Court for a writ of mandate, pursuant to Code of
21 Civil Procedure § 1094.5 and Water Code § 13330, ordering Respondents California Regional Water
22 Quality Control Board for the Los Angeles Region ("Regional Board") and State Water Resources
23 Control Board ("State Board") to modify Los Angeles Regional Water Quality Control Board Order
24 No. 01-182, adopting NPDES Permit No. CAS004001, Waste Discharge Requirements for
25 Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles and the
26 Incorporated Cities therein, except the City of Long Beach (the "Permit"). Petitioners further seek an
27 order declaring certain portions of the Permit void, remanding the matter to the Regional Board for
28

1 adoption in accordance with the governing statutes and regulations, and enjoining any use or
2 enforcement of the Permit to the extent it was adopted in violation of law. In the alternative,
3 Petitioners seek a writ of mandate pursuant to Code of Civil Procedure § 1085 granting this relief.
4 In support of this petition, Petitioners allege as follows:

5 **INTRODUCTION**

6 1. This is an action for an order setting aside portions of the Permit, which purports to
7 govern municipal storm water and urban runoff within the County of Los Angeles and incorporated
8 cities therein.

9 2. Petitioners seek review of only a small portion of the entire Permit. Petitioners seek
10 review of only those portions of the Permit that violate the federal Clean Water Act and/or
11 California's Porter-Cologne Water Quality Act (the "Porter-Cologne Act"), unlawfully impose on
12 Petitioners and other local municipalities obligations of the State Board or the Regional Board,
13 represent unfunded mandates in violation of the California Constitution, are not supported by
14 evidence in the record, or are arbitrary and capricious.

15 3. Petitioners are not challenging the other portions of the Permit. Petitioners are and
16 continue to be committed to improving water quality and protecting the environmental resources of
17 Los Angeles County. To that end, Petitioners presently spend millions of dollars each year
18 implementing provisions of this Permit and its predecessors.

19 4. In particular, Petitioners seek review of the following portions of the Permit:

20 (a) *Part 3.C (Permit, pp. 18-19)*. This section allows the Executive
21 Officer of the Regional Board to, among other actions, reopen and modify
22 an enforceable element of the Permit without notice or hearing. This
23 section violates the Clean Water Act, the Porter-Cologne Act, and the
24 terms of the Permit itself, all of which require that the Permit can be
25 modified only after the notice and hearing, and only by the Regional
26 Board itself, as opposed to its Executive Officer.

1 (b) *Part 4.C.2.b (Permit, p. 31)*. This section requires Petitioners to
2 inspect "Phase I facilities," i.e., industrial facilities possessing or
3 requiring to possess an individual NPDES storm water permit or a state-
4 issued General Industrial Activities Storm Water Permit. This section
5 shifts the cost and burden of enforcing these permits from Respondents to
6 Petitioners and other local municipalities in violation of the Clean Water
7 Act, the Porter-Cologne Act (including the State Board order issuing
8 those permits), and the California constitutional prohibition against
9 unfunded mandates.

10 (c) *Parts 4.E.2.b and 4.E.3 (Permit, pp. 43-44)*. These sections
11 require Petitioners to inspect construction sites required to possess a state-
12 issued General Construction Activities Storm Water Permit. Like Part
13 4.C.2.b, these sections also shift the cost and burden of enforcing these
14 permits from Respondents to Petitioners and other local municipalities, in
15 violation of the Clean Water Act, the Porter-Cologne Act (including the
16 State Board order issuing those permits), and the California constitutional
17 prohibition against unfunded mandates.

18 (d) *Part 4.D.1 and Section II.I of the Monitoring and Reporting*
19 *Program. (Permit, pp. 34-35, and Monitoring and Report Program, p. T-*
20 *18)*. These sections require Petitioners to develop controls for post-
21 development peak storm water run-off discharge rates, velocities and
22 duration (collectively, "peak flow"). These sections have the effect of
23 requiring Petitioners to control peak flow from development before there
24 is evidence that peak flow should be controlled, as opposed to other, more
25 appropriate, parameters. These sections are thus arbitrary and capricious
26 and not supported by evidence in the record.

1 (e) *Part 4.C.3.d(3) (Permit, pp. 33-34)*. This section requires
2 Petitioners to initiate, “within one business day,” the investigation of
3 complaints regarding facilities within their jurisdiction. This section, and
4 its “one business day” requirement, does not distinguish between high and
5 low priority complaints, and therefore will cause Petitioners to devote
6 resources to non-emergency investigations in lieu of higher priority
7 matters without benefit to the storm water program. This requirement is
8 arbitrary, capricious, and not supported by evidence in the record.

9 (f) *Part 2 (Permit, pp. 17-18)*. Petitioners seek a declaration that
10 compliance with the “iterative process,” described in Part 2.3 of the
11 Permit, constitutes compliance with the Permit, as has been publicly
12 stated by Regional Board representatives and the decisions of the State
13 Board. If Respondents dispute the interpretation that compliance with the
14 “iterative process” described in Part 2.3 constitutes compliance with the
15 Permit, then Petitioners seek an order setting aside Part 2 of the Permit on
16 the grounds that it violates the Clean Water Act, the Porter-Cologne Act,
17 and is arbitrary and capricious. Petitioners further seek an order that Part
18 2 of the Permit must be consistent with the “maximum extent practicable”
19 standard set forth in Clean Water Act Section 402(p)(3)(B).

20 **PARTIES**

21 5. Petitioner County of Los Angeles is a political subdivision of the State of California,
22 duly formed and authorized to conduct business within the State of California and entitled to
23 commence and maintain suit in its own name.

24 6. Petitioner Los Angeles County Flood Control District is a public entity within the
25 meaning of Government Code § 811.2, duly formed and authorized to conduct business within the
26 State of California and entitled to commence and maintain suit in its own name.

1 7. Respondent Regional Board is a public agency of the State of California, created by
2 the legislature through Water Code §§ 13200 *et seq.* The Regional Board is one of nine Regional
3 Water Quality Control Boards that, pursuant to the California Water Code, operate under the
4 purview of the State Board. The Regional Board was responsible in the first instance for issuing the
5 Permit. Water Code § 13377.

6 8. Respondent State Board is a public agency of the State of California created by the
7 legislature through Water Code §§ 174 *et seq.* The State Board is charged with formulating and
8 adopting state policy for water quality control, and is designated as the State Water Pollution Control
9 Agency for all purposes stated in the federal Clean Water Act. Water Code §§ 13140 and 13160.

10 9. Petitioners do not know the true names or capacities of Respondents named herein as
11 Does 1 through 50, inclusive, and for that reason have sued such Respondents by these fictitious
12 names pursuant to Code of Civil Procedure § 474. Petitioners will amend this petition to show their
13 true names and capacities when the same have been ascertained.

14 10. Real Parties In Interest Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa,
15 Baldwin Park, Bell, Bell Gardens, Bellflower, Beverly Hills, Bradbury, Burbank, Calabasas, Carson,
16 Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey,
17 Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne,
18 Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Habra Heights,
19 La Mirada, La Puente, La Verne, Lakewood, Lawndale, Lomita, Long Beach, Los Angeles,
20 Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk,
21 Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Rolling
22 Hills Estates, Rosemead, San Gabriel, San Dimas, San Fernando, San Marino, Santa Clarita, Santa
23 Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena,
24 Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village and
25 Whittier are municipal corporations located in the County of Los Angeles and organized under the
26 laws of the State of California. Real Parties In Interest are co-permittees with Petitioners under the
27 Permit.

1 **JURISDICTION AND VENUE**

2 11. This Court has jurisdiction pursuant to Code of Civil Procedure §§ 1085 and 1094.5
3 and Water Code § 13330. Venue is proper pursuant to Government Code § 955.3 and Water Code §
4 13361.

5 **STANDARD OF REVIEW**

6 12. The inquiry in this case shall extend to the questions of whether Respondents have
7 proceeded without or in excess of jurisdiction and whether there was any prejudicial abuse of
8 discretion. Code of Civil Procedure § 1094.5(b); Water Code § 13330(d).

9 13. Abuse of discretion is established if Respondents have not proceeded in the manner
10 required by law, the order or decision is not supported by the findings, or the findings are not
11 supported by the evidence. Code of Civil Procedure § 1094.5(b).

12 14. Water Code § 13330(d) specifies that this Court is authorized to exercise its
13 independent judgment on the evidence in this case.

14 15. Where it is claimed that the findings are not supported by the evidence, because this
15 Court is authorized to exercise its independent judgment, abuse of discretion is established if the
16 Court determines that the findings are not supported by the weight of the evidence. Code of Civil
17 Procedure § 1094.5(c).

18 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

19 16. Petitioners have exhausted their administrative remedies. Petitioners participated in
20 workshops and hearings and submitted written and oral comments to the Regional Board prior to its
21 adoption of the Permit. Petitioners filed a petition for review of the Permit with the State Board. By
22 letter dated December 18, 2002, the State Board dismissed this petition, as well as other petitions
23 consolidated with it, as of that date.

24 **THE CLEAN WATER ACT**

25 17. The federal Clean Water Act regulates the discharge of pollutants to waters of the
26 United States, and prohibits the discharge of pollutants to such waters except in compliance with the
27 Act. 33 U.S.C. § 1311. The discharge of pollutants is authorized if done pursuant to permit,
28

1 including permits issued pursuant to the National Pollutant Discharge Elimination System
2 (“NPDES”). These permits are commonly known as “NPDES” permits. 33 U.S.C. § 1342.

3 18. The discharge of pollutants in storm water is governed by Clean Water Act Section
4 402(p), 33 U.S.C. § 1342(p). With respect to a municipality’s discharge of storm water from a
5 municipal separate storm sewer system (“MS4”), Section 402(p)(3)(B) provides:

6 Permits for discharges from municipal storm sewers –

7 (i) may be issued on a system or jurisdiction-wide
8 basis;

9 (ii) shall include a requirement to effectively prohibit
10 non-storm water discharges into the storm sewers; and

11 (iii) shall require controls to reduce the discharge of
12 pollutants to the maximum extent practicable, including
13 management practices, control techniques and system,
14 design and engineering methods, and such other provisions
15 as the Administrator or the State determines appropriate for
16 the control of such pollutants.

17 33 U.S.C. § 1342(p)(3)(B). (Clean Water Act Section 402(p)(3)(B)(iii) shall be referred to hereafter
18 as the “maximum extent practicable” or “MEP” standard.)

19 19. The Clean Water Act authorizes states to implement the NPDES permit program. 33
20 U.S.C. § 1342(b).

21 20. California is one of the states authorized to implement the NPDES program.
22 California’s implementing provisions are found in the Porter-Cologne Act. *See* Water Code §§
23 13160 and 13370 *et seq.* Respondent State Board is designated as the state water pollution control
24 agency for all purposes stated in the Clean Water Act. Water Code § 13160¹. Respondents State

25 _____
26 ¹ Water Code Sections 13160 and 13370 *et seq.* reference the Federal Water Pollution Control
27 Act. After the Federal Water Pollution Control Act was amended, it commonly became known as
28 the Clean Water Act.

1 and Regional Boards are authorized to issue NPDES permits. Water Code § 13377. To the extent
2 that the California Water Code is inconsistent with applicable provisions of the federal Clean Water
3 Act, the applicable provisions of the federal Clean Water Act apply. Water Code § 13372.

4 **THE PERMIT**

5 21. On December 13, 2001, Respondent Regional Board issued Order No. 01-182.

6 22. Order No. 01-182 adopted the Permit as the NPDES municipal storm water permit
7 applicable to Petitioners and the incorporated cities within the County of Los Angeles, except for the
8 City of Long Beach.

9 23. On January 11, 2002, Petitioners filed a petition for review of the Permit with
10 Respondent State Board. The State Board accepted the petition and assigned it a file number,
11 SWRCB/OCC File No. A-1448. The State Board indicated that it would hold a hearing and render a
12 decision.

13 24. By letter dated December 18, 2002, Respondent State Board dismissed Petitioners'
14 petition to the State Board, as well as other petitions consolidated with it. Notwithstanding its
15 acceptance of the petitions, the State Board did not hold a hearing or issue an order. The State Board
16 simply stated that "in light of the inability of the SWRCB to effectuate an agreement between
17 interested groups, and the fact that most of these issues are the subject of prior Board orders and/or
18 current litigation, the SWRCB declines to issue an additional order on these issues."

19 25. Petitioners now seek a Writ of Mandate ordering Respondents State and Regional
20 Boards to set aside the portions of the Permit set forth in paragraph 4 above. Petitioners have no
21 plain, speedy, and adequate remedy in the ordinary course of law.

22 **FIRST CAUSE OF ACTION**

23 **(Permit - Part 3.C)**

24 26. Petitioners reallege paragraphs 1 through 25 above and incorporate them by reference.

25 27. The Permit, Part 3.C, provides:

26 The Permittees shall revise the SQMP [Storm Water Quality Management
27 Program], at the direction of the Regional Board Executive Officer, to

1 incorporate program implementation amendments so as to comply with
2 regional, watershed specific requirements, and/or wasteload allocations
3 developed and approved pursuant to the process for the designation and
4 implementation of Total Maximum Daily Loads (TMDLs) for impaired
5 water bodies.

6 (Permit, pp. 18-19).

7 28. The Permit defines the Storm Water Quality Management Program (“SQMP”) to
8 mean “the Los Angeles Countywide Stormwater Quality Management Program, which includes
9 descriptions of programs, collectively developed by the Permittees in accordance with the provisions
10 of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from
11 time to time.” Permit, p. 61.

12 29. The SQMP is an enforceable part of the Permit. Part 3.A.1 specifically provides,
13 “[e]ach Permittee shall, at a minimum implement the SQMP. *The SQMP is an enforceable element*
14 *of this Order.*” Permit, p. 18 (emphasis added.)

15 30. Part 3.C of the Permit thus provides that the Regional Board’s Executive Officer can
16 order a revision to an enforceable element of the Permit, a revision that can be ordered without
17 notice or an opportunity to be heard.

18 31. Respondents State and Regional Boards have, in the following manner, abused their
19 discretion to Petitioners’ prejudice, and acted without or in excess of their jurisdiction and in
20 violation of law, in that the Permit’s delegation to the Executive Officer of authority to revise the
21 Permit, without notice or hearing, is a violation of the Clean Water Act, the Porter-Cologne Act, and
22 the terms of the Permit itself:

23 (a) Under the Clean Water Act, a permit cannot be modified without
24 notice and public comment. 40 C.F.R. §§ 124.5, 124.6 and 124.10. *See*
25 *also* 40 C.F.R. § 122.62.

26 (b) Under the Porter-Cologne Act, the Regional Board may delegate
27 any of its powers to its Executive Officer “excepting only the following: .
28

1 . . . (2) *the issuance, modification or revocation of any water quality*
2 *control plan, water quality objectives, or waste discharge requirement.*
3 *Water Code § 13223(a) (emphasis added).*

4 (c) The Permit itself provides, "This Order may only be modified,
5 revoked, or reissued, prior to the expiration date by the *Regional Board,*
6 *in accordance with the procedural requirements of the [California Water*
7 *Code] and CCR Title 23 for the issuance of waste discharge*
8 *requirements, 40 C.F.R. 122.62, and upon prior notice and hearing. . ."*

9 Permit, p. 65-66 (emphasis added.)

10 32. This unlawful delegation of authority to the Executive Officer to revise an enforceable
11 part of the Permit is further a prejudicial abuse of discretion and an action without or in excess of
12 jurisdiction and in violation of law because the Executive Officer is given the authority to revise an
13 enforceable element of the Permit to reflect the implementation of Total Maximum Daily Loads
14 ("TMDLs").

15 33. A TMDL may be adopted by EPA or the state. It represents the maximum amount of
16 a particular pollutant that can be present in a waterbody without violating "water quality standards."
17 33 U.S.C. § 1313(d)(1)(C).

18 34. EPA and Respondents State and Regional Boards have adopted several TMDLs
19 affecting waterbodies in Los Angeles County. Those TMDLs have been adopted without reference
20 to Section 402(p) of the Clean Water Act and without reference to the MEP standard of that section.

21 35. Respondent Regional Board has stated that it intends to implement TMDLs in Los
22 Angeles County through the Permit. Respondents State and Regional Boards have prejudicially
23 abused their discretion and acted without or in excess of their jurisdiction and in violation of law in
24 that Part 3.C allows the Executive Officer to revise the Permit to implement a TMDL without regard
25 to whether the revision is consistent with Clean Water Act Section 402(p), including its MEP
26 standard.

1 36. For the reasons stated above, a peremptory writ of mandate should issue ordering
2 Respondents State and Regional Boards to delete Part 3.C of the Permit.

3 37. Petitioners are entitled to a stay of this portion of the Permit pending the judgment of
4 this court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

5 **SECOND CAUSE OF ACTION**

6 **(Permit - Part 4.C.2.b)**

7 38. Petitioners reallege paragraphs 1 through 37 above and incorporate them by reference.

8 39. The Permit, Part 4.C.2.b, requires Petitioners to inspect "Phase I facilities." Permit, p.
9 31. This inspection includes nine steps, including a determination of "compliance." Permit, pp. 56-
10 57.

11 40. "Phase I facilities" are defined to be "facilities in specified industrial categories that
12 are required to obtain an NPDES Permit for storm water discharges, as required by 40 C.F.R.
13 122.26(c)." Permit, p. 62.

14 41. A Phase I facility must obtain its NPDES storm water permit either by applying for an
15 individual permit from Respondent Regional Board or by seeking to be covered under a general
16 storm water permit issued by Respondent State Board.

17 42. Respondents State and Regional Boards have, in the following manner, abused their
18 discretion to Petitioners' prejudice, and acted without or in excess of their jurisdiction and in
19 violation of law, by requiring Petitioners to inspect Phase I facilities:

20 (a) The imposition of the obligation to inspect state-permitted facilities
21 violates the Clean Water Act, including but not limited to the requirement
22 that NPDES authority can only be shared by state agencies, those agencies
23 must have "[s]tatewide jurisdiction over a class of activities or
24 discharges," 40 C.F.R. § 123.1(g), and there is no authority to impose this
25 inspection obligation on municipal permittees.

26 (b) The imposition of the obligation to inspect state-permitted facilities
27 violates the Porter-Cologne Act, including but not limited to Water
28

1 Quality Order No. 97-03 DWQ. That order, which promulgated the
2 current General Industrial Activities Storm Water Permit, provides that
3 “[f]ollowing adoption of this General Permit, *the Regional Water Boards*
4 shall enforce its provisions” (Order No. 97-03, Finding 13 (emphasis
5 added)), and “*Regional Water Boards* shall . . . [i]mplement the provisions
6 of this General Permit, including . . . *conducting compliance inspections . .*
7 *.” (Id., Part F.1.a (emphasis added).)*

8 (c) The imposition of the obligation to inspect state-permitted facilities
9 violates the California Constitution’s prohibition against unfunded
10 mandates, Article XIII B, Section 6, in that Respondents State and
11 Regional Boards have shifted the cost and burden of enforcing the General
12 Industrial Activities Storm Water Permit to Petitioners without the
13 subvention of funds required by Article XIII B.

14 43. For the reasons stated above, a peremptory writ of mandate should issue ordering
15 Respondents State and Regional Boards to delete Part 4.C.2.b of the Permit.

16 44. Petitioners are entitled to a stay of this portion of the Permit pending the judgment of
17 this court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

18 **THIRD CAUSE OF ACTION**

19 **(Permit - Parts 4.E.2.b and 4.E.3)**

20 45. Petitioners reallege paragraphs 1 through 44 above and incorporate them by reference.

21 46. The Permit, Parts 4.E.2.b and 4.E.3, requires Petitioners to inspect construction sites
22 required to possess a state-issued General Construction Activities Storm Water Permit. Permit, pp.
23 43-44.

24 47. Respondents State and Regional Boards have abused their discretion to Petitioners’
25 prejudice, and acted without or in excess of their jurisdiction and in violation of law, by requiring
26 Petitioners to inspect construction sites:

1 (a) The imposition of the obligation to inspect state-permitted facilities
2 violates the Clean Water Act, including but not limited to the requirement
3 that NPDES authority can only be shared by state agencies, those agencies
4 must have “[s]tatewide jurisdiction over a class of activities or
5 discharges,” 40 C.F.R. § 123.1(g), and there is no authority to impose this
6 inspection obligation on municipal permittees.

7 (b) The imposition of the obligation to inspect state-permitted facilities
8 violates the Porter-Cologne Act, including but not limited to Water
9 Quality Order No. 99-08 DWQ. That order, which promulgated the
10 current General Construction Activities Storm Water Permit, provides
11 that “[f]ollowing adoption of this General Permit, the *RWQCBs* shall
12 enforce the provisions herein . . .” (Order No. 99-08, Finding 11
13 (emphasis added)), and “*RWQCBs* shall . . . [i]mplement the provisions of
14 this General Permit” including “*conducting compliance inspections.*” (*Id.*,
15 Part D.1. (emphasis added).)

16 (c) The imposition of the obligation to inspect state-permitted facilities
17 violates the California Constitution’s prohibition against unfunded
18 mandates, Article XIII B, Section 6, in that Respondents State and
19 Regional Board have shifted the cost and burden of enforcing the General
20 Construction Activities Stormwater Permit to Petitioners without the
21 subvention of funds required by Article XIII B.

22 48. For the reasons stated above, a preemptory writ of mandate should issue ordering
23 Respondents State and Regional Boards to delete Parts 4.E.2.b and 4.E.3 of the Permit.

24 49. Petitioners are entitled to a stay of this portion of the Permit pending the judgment of
25 this court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

1 FOURTH CAUSE OF ACTION

2 **(Permit - Parts 4.D.1 and Section II.I of the Monitoring and Reporting Program)**

3 50. Petitioners reallege paragraphs 1 through 49 above and incorporate them by reference.

4 51. The Permit, as an NPDES municipal storm water permit, is applicable only to
5 discharges from MS4s. The Permit does not apply to discharges from non-point sources. The
6 Permit also does not apply to natural stream drainage systems and streams that are not subject to
7 discharges from an MS4.

8 52. The Permit designates Petitioner Los Angeles County Flood Control District as the
9 Principal Permittee. Permit, p. 19.

10 53. The Permit defines "Natural Drainage Systems" to be "unlined or unimproved (not
11 engineered) creeks, streams, rivers or similar waterways." Permit, p. 57.

12 54. The Permit, Part 4.D.1, provides:

13 The Permittees shall control post-development peak storm water run-off
14 discharge rates, velocities, and duration (peak flow control) in Natural
15 Drainage Systems (i.e., mimic pre-development hydrology) to prevent
16 accelerated stream erosion and to protect stream habitat. . . .

17 The Principal Permittee in consultation with Permittees shall develop
18 numerical criteria for peak flow control, based on the results of the Peak
19 Discharge Impact Study (See Monitoring Program Section II.I).

20 Permit pp. 34-35.

21 55. Section II.I of the Monitoring and Reporting Program provides in pertinent part:

22 The Principal Permittee shall conduct a study to evaluate peak flow control
23 and to determine numeric criteria to prevent or minimize erosion of natural
24 streams, channels and banks caused by urbanization.

25 Monitoring and Reporting Program, p. T-18.

1 56. Petitioners support controls to prevent or minimize erosion of natural stream channels
2 and banks caused by urbanization. To that end, Petitioners are currently funding and participating in
3 the study required by Section II.I of the Monitoring and Reporting Program.

4 57. Nevertheless, Respondents State and Regional Boards have abused their discretion to
5 Petitioners' prejudice, and acted without or in excess of their jurisdiction and in violation of law, in
6 requiring control of peak flow before the study is completed, and before there is evidence that peak
7 flow should be controlled:

8 (a) Part 4.D.1 and Section II.I of the Monitoring and Reporting
9 Program are not supported by the findings in that there is no finding that
10 peak flow, as opposed to some other, more appropriate, parameter is the
11 primary and predominate cause of the erosion.

12 (b) In the alternative, if there is such a finding, the finding is not
13 supported by the weight of the evidence, in that there is no evidence of the
14 impact of peak flow in the unique environment of Southern California
15 watersheds and no evidence that control of peak flow will be of benefit to
16 the Los Angeles County storm water program.

17 58. Respondents State and Regional Boards have further prejudicially abused their
18 discretion, and acted without or in excess of their jurisdiction and in violation of law, in requiring
19 studies to be conducted of and control measures to be applied to discharges other than discharges
20 from MS4s.

21 59. For the reasons stated above, a preemptory writ of mandate should issue ordering
22 Respondents State and Regional Boards to delete Part 4.D.1 and Section II.I of the Monitoring and
23 Reporting Program, or in the alternative, (a) to provide that the Principal Permittee need not develop
24 peak flow criteria until the study presently being performed pursuant to Section II.I of the
25 Monitoring and Reporting Program is completed, and, (b) if that study concludes that post-
26 development storm water run-off has a significant impact on stream bed erosion and stream habitat,

1 then develop numerical criteria for flow control based on the results of that study, or conduct further
2 study if necessary.

3 60. Petitioners are entitled to a stay of these portions of the Permit pending the judgment
4 of this Court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

5 **FIFTH CAUSE OF ACTION**

6 **(Permit - Part 4.C.3.d(3))**

7 61. Petitioners reallege paragraphs 1 through 60 above and incorporate them by reference.

8 62. The Permit, Part 4.C.3.d(3), provides in pertinent part:

9 Investigation of Complaints Regarding Facilities – Transmitted By The
10 Regional Board Staff: Each Permittee shall initiate, within one business
11 day, investigation of complaints (other than non-storm water discharges)
12 regarding facilities within its jurisdiction.

13 Permit, pp. 33-34.

14 63. Respondents State and Regional Boards have abused their discretion to Petitioners'
15 prejudice, and acted without or in excess of their jurisdiction and in violation of law, in that the
16 requirement that each permittee shall initiate, within one business day, an investigation of
17 complaints (other than non-storm water discharges) regarding facilities within its jurisdiction
18 transmitted by the Regional Board staff:

19 (a) is not required by the Clean Water Act;

20 (b) is arbitrary and capricious in that it does not distinguish between
21 high and low priority complaints, and requires a permittee to initiate an
22 investigation within one business day without regard to the number of
23 days the complaint was pending before Regional Board staff before it was
24 referred to the permittee;

25 (c) is not supported by any finding; and

26 (d) if there is such a finding, the finding is not supported by the
27 weight of the evidence, in that there is no evidence that immediate
28

1 investigation of these complaints, without regard to their nature, will be of
2 benefit to the storm water program.

3 64. For the reasons stated above, a peremptory writ of mandate should issue ordering
4 Respondents State and Regional Boards to delete the one-business day requirement of Part
5 4.C.3.d(3) of the Permit.

6 65. Petitioners are entitled to a stay of this portion of the Permit pending the judgment of
7 this Court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

8 **SIXTH CAUSE OF ACTION**

9 **(Permit - Part 2)**

10 66. Petitioners reallege paragraphs 1 through 65 above and incorporate them by reference.

11 67. Part 2 of the Permit purports to establish limits on discharges from the MS4 into
12 "receiving waters." "Receiving waters" are defined in the Permit to mean "all surface water bodies
13 in the Los Angeles Region that are identified in the Basin Plan." Permit, p. 59. Such waters include,
14 for example, the Pacific Ocean.

15 68. The limitations on discharges into receiving waters are set forth in four paragraphs of
16 the Permit:

17 Part 2.1 states: "Discharges from the MS4 that cause or contribute to the violation of
18 Water Quality Standards or water quality objectives are prohibited."

19 Part 2.2. states: "Discharges from the MS4 of storm water, or non-storm water, for
20 which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."

21 Part 2.3 establishes an "iterative process" for compliance with Parts 2.1 and 2.2.

22 Part 2.4 states: "So long as the Permittee has complied with the procedure set forth
23 above, and is implementing the revised SQMP and its components, the Permittee does not have to
24 repeat the same procedure for continuing or recurring exceedences of the same receiving water
25 limitations unless directed by the Regional Board to develop additional BMPs."

26 69. In conjunction with Respondent Regional Board's adoption of the Permit, questions
27 arose as to what would constitute compliance with Parts 2.1 and 2.2 of the Permit.

1 70. In response to those questions, representatives of the Regional Board publicly stated
2 that compliance with the iterative process set forth in Part 2.3 would constitute compliance with the
3 Permit.

4 71. Thereafter, in a letter signed by the Chairperson of Respondent Regional Board, dated
5 January 30, 2002, it was stated:

6 A violation of the permit would occur when a municipality fails to engage
7 in a good faith effort to implement the iterative process to correct the
8 harm. As long as the Permittee is engaged in a good faith effort, the
9 specific language of the permit provides that the Permittee is in
10 compliance. As discussed at the Regional Board's July 2001 workshop
11 and the December 2001 board meeting, the presence of the iterative
12 process language makes clear the Permittee's mechanism for compliance
13 with receiving water language. *Even if water quality does not improve as*
14 *a result of the implementation efforts, there is no violation of the permit's*
15 *receiving water provision as long as a good faith effort is underway to*
16 *participate in the iterative process.*

17 Letter dated January 30, 2002, Question and Answer Enclosure at p. 7 (emphasis added). This letter,
18 and the Question and Answer Enclosure, also was posted on the Regional Board's website.

19 72. The Permit's receiving water limitation language is based on language set forth in
20 orders of Respondent State Board. Respondent State Board, in addressing similar receiving water
21 limitation language in an appeal from the Storm Water Permit for the County of San Diego, stated as
22 follows:

23 [O]ur language. . . does not require strict compliance with water quality
24 standards. Our language requires that storm water management plans be
25 designed to achieve compliance with water quality standards. Compliance
26 is to be achieved over time, through an iterative approach requiring
27 improved BMPs.

1 *In the matter of Petitions of Building Industry Association of San Diego County and Western*
2 *Petroleum Association, State Water Resources Control Board Order WQ 2001-15 (November 15,*
3 *2001), at p.7.*

4 73. An actual controversy now exists relating to whether compliance with the iterative
5 process constitutes compliance with the Permit. Petitioners seek a declaration that compliance with
6 the iterative process described in Part 2.3 of the Permit constitutes compliance with the Permit, as
7 publicly stated by Regional Board representatives and the decisions of the State Board.

8 74. If Respondents State and Regional Boards dispute that compliance with the “iterative
9 process” described in Part 2.3 constitutes compliance with the Permit, then Respondents have abused
10 their discretion to Petitioners’ prejudice, and acted without or in excess of their jurisdiction and in
11 violation of law, in the following manner:

12 (a) the Permit does not clearly set forth a mechanism by which
13 Permittees can comply with the Permit; and

14 (b) Part 2, as written, appears to render compliance impossible.

15 75. Additionally, to the extent that Part 2 requires controls to reduce the discharge of
16 pollutants beyond the MEP standard, Respondents State and Regional Boards have further
17 prejudicially abused their discretion, and acted without or in excess of their jurisdiction and in
18 violation of law, in that Part 2 does not comply with Clean Water Act Section 402(p).

19 76. For the reasons stated above, should Respondents dispute the interpretation that
20 compliance with the “iterative process” described in Part 2.3 constitutes compliance with Permit,
21 then a peremptory writ of mandate should issue ordering Respondents to revise Part 2 to state that
22 compliance with Part 2.3 does constitute compliance with the Permit. If Respondents further
23 contend that Part 2 of the permit allows Respondents to order the imposition of controls beyond the
24 MEP standard, then a preemptory writ of mandate should issue ordering Respondents to set aside
25 Part 2 of the Permit.

26 77. Petitioners are entitled to a stay of this portion of the Permit pending the judgment of
27 this Court. Code of Civil Procedure § 1094.5(g) and Water Code § 13361.

1 8. For a stay of those portions of the Permit challenged herein pending the judgment of
2 this Court.

3 9. For preliminary and permanent injunctive relief, enjoining Respondents State and
4 Regional Board from using or enforcing any portion of the Permit which was adopted without or in
5 excess of Respondents' jurisdiction or in violation of law.

6 10. For an order requiring Respondents to pay Petitioners' costs of suit and attorneys'
7 fees.

8 11. For such further and other relief as the Court deems just and proper.

9 Dated: January __, 2003

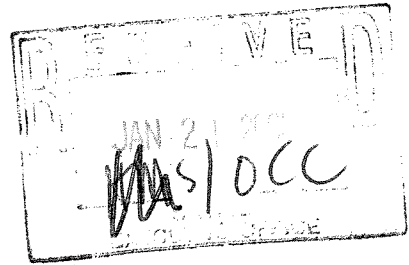
Respectfully submitted,

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12 PETER J. GUTIERREZ
13 Senior Deputy County Counsel
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6 Attorneys for Petitioners and Plaintiffs,
7 The Cities of Monrovia, Norwalk,
Rancho Palos Verdes, Artesia, Beverly Hills,
8 Carson, La Mirada and Westlake Village
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**

RW RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION
NSG

12 CITY OF MONROVIA, a municipal
corporation; CITY OF NORWALK,
13 a municipal corporation; CITY OF RANCHO
PALOS VERDES, a municipal corporation;
14 CITY OF ARTESIA, a municipal corporation;
15 CITY OF BEVERLY HILLS, a municipal
corporation; CITY OF CARSON, a municipal
16 corporation; CITY OF LA MIRADA, a
municipal corporation and CITY OF
17 WESTLAKE VILLAGE, a municipal
corporation,
18

Petitioners and Plaintiffs,

19 v.

20 REGIONAL WATER QUALITY
CONTROL BOARD - LOS ANGELES
21 REGION, a California State Agency;
22 STATE WATER RESOURCES CONTROL
BOARD, a California State Agency; and
23 DOES 1 through 50, inclusive,
24

Respondents and Defendants,

25 COUNTY OF LOS ANGELES, a political
subdivision of the State of California, and
26 the LOS ANGELES COUNTY FLOOD
CONTROL DISTRICT, a special district,
27 THE CITIES OF AGOURA HILLS,
28 ALHAMBRA, ARCADIA, AZUSA,

Case No.

NOTICE OF COMMENCEMENT OF ACTION

[Code Civ. Proc. §§ 1085, 1094.5; Pub. Res. Code § 30801; 42 U.S.C. §1983]

[Exempt from Filing Fees Pursuant to Govt. Code § 6103]

1 BALDWIN PARK, BELLFLOWER, BELL
2 GARDENS, BRADBURY, BURBANK,
3 CALABASAS, CERRITOS,
4 CLAREMONT, COMMERCE,
5 COMPTON, COVINA, CUDAHY,
6 CULVER CITY, DIAMOND BAR,
7 DOWNEY, DUARTE, EL MONTE, EL
8 SEGUNDO, GARDENA, GLENDALE,
9 GLENDORA, HAWAIIAN GARDENS,
10 HAWTHORNE, HERMOSA BEACH,
11 HIDDEN HILLS, HUNTINGTON PARK,
12 INDUSTRY, INGLEWOOD,
13 IRWINDALE, LA CANADA
14 FLINTRIDGE, LA HABRA HEIGHTS,
15 LAKEWOOD, LA PUENTE, LA VERNE,
16 LAWNDALE, LOMITA, LOS ANGELES,
17 LYNWOOD, MALIBU, MANHATTAN
18 BEACH, MAYWOOD, MONTEBELLO,
19 MONTEREY PARK, PALOS VERDES
20 ESTATES, PARAMOUNT, PASADENA,
21 PICO RIVERA, POMONA, REDONDO
22 BEACH, ROLLING HILLS, ROLLING
23 HILLS ESTATES, ROSEMEAD, SAN
24 DIMAS, SAN FERNANDO, SAN
25 GABRIEL, SAN MARINO, SANTA
26 CLARITA, SANTA FE SPRINGS, SANTA
27 MONICA, SIERRA MADRE, SIGNAL
28 HILL, SOUTH EL MONTE, SOUTH
GATE, SOUTH PASADENA, TEMPLE
CITY, TORRANCE, VERNON,
WALNUT, WEST COVINA, WEST
HOLLYWOOD AND WHITTIER and
ROES 1 THROUGH 150,

Real Parties In Interest.

TO THE REGIONAL WATER QUALITY CONTROL BOARD- LOS ANGELES
REGION, the STATE WATER RESOURCES CONTROL BOARD, AND DOES 1-50
(collectively, "Respondents"), INCLUSIVE:

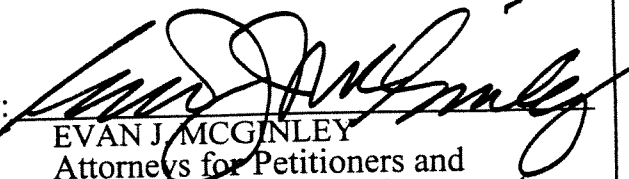
NOTICE IS HEREBY GIVEN that the Petitioners and Plaintiffs, the Cities
of Monrovia, Norwalk, Artesia, Beverly Hills, Carson, La Mirada, Rancho Palos Verdes
and Westlake Village (collectively, the "Petitioners"), intend to file a petition for writ of
mandate, pursuant to Code of Civil Procedure §§ 1085 and 1094.5, Water Code §13330,
and Government Code § 800, among other statutes, against Respondents challenging
portions of the issuance of the "Waste Discharge Requirements for Municipal Storm

1 Water and Urban Runoff Discharges Within the County of Los Angeles and the
2 Incorporated Cities Therein Except for the City of Long Beach " [NPDES Permit No.
3 CAS004001] (the "NPDES Permit"), by the Regional Water Quality Control Board - Los
4 Angeles Region (the "Regional Board") as well as the denial of the Petitioners' request for
5 a stay of the NPDES Permit on the grounds that the Respondents' issuance of the NPDES
6 Permit neither comported with, nor is mandated by, the Clean Water Act and/or the
7 Porter-Cologne Water Quality Act, violates Article XIII(B) of the California Constitution,
8 as well as other provisions of both Federal and California statutory law, and was
9 unsupported by the evidence in the record before the Regional Board and was in excess of
10 Respondents' jurisdiction.

11 A copy of Petitioners' Writ of Mandate is attached hereto as Exhibit "A."

12 DATED: January 16, 2003

RICHARDS, WATSON & GERSHON
A Professional Corporation
JOHN J. HARRIS
EVAN J. MCGINLEY

By: 
EVAN J. MCGINLEY
Attorneys for Petitioners and
Plaintiffs, The Cities of, Monrovia,
Norwalk, Rancho Palos Verdes,
Artesia, Beverly Hills, Carson, La
Mirada and Westlake Village

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EXHIBIT A

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10 Attorneys for Petitioners and Plaintiffs,
11 The Cities of Monrovia, Norwalk,
12 Rancho Palos Verdes, Artesia, Beverly Hills,
13 Carson, La Mirada and Westlake Village

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

CITY OF MONROVIA; a municipal corporation; CITY OF NORWALK, a municipal corporation; CITY OF RANCHO PALOS VERDES; a municipal corporation, CITY OF ARTESIA; a municipal corporation, CITY OF BEVERLY HILLS; a municipal corporation; CITY OF CARSON, a municipal corporation, CITY OF LA MIRADA, a municipal corporation and CITY OF WESTLAKE VILLAGE, a municipal corporation,

Petitioners and Plaintiffs,

v.

REGIONAL WATER QUALITY CONTROL BOARD- LOS ANGELES REGION, a California State Agency; STATE WATER RESOURCES CONTROL BOARD, a California State Agency; and DOES 1 through 50, inclusive,

Respondents and Defendants,

COUNTY OF LOS ANGELES, a political subdivision of the State of California, and the LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, a special district, and THE CITIES OF AGOURA HILLS, ALHAMBRA, ARCADIA, AZUSA,

Case No.

**PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR:
(1) DECLARATORY RELIEF; AND
(2) INJUNCTIVE RELIEF**

[Code Civ. Proc. §§ 1085, 1094.5; Pub. Res. Code § 30801; 42 U.S.C. §1983]

[Exempt from Filing Fees Pursuant to Govt. Code § 6103]

1 BALDWIN PARK, BELLFLOWER, BELL
2 GARDENS, BRADBURY, BURBANK,
3 CALABASAS, CERRITOS,
4 CLAREMONT, COMMERCE,
5 COMPTON, COVINA, CUDAHY,
6 CULVER CITY, DIAMOND BAR,
7 DOWNEY, DUARTE, EL MONTE, EL
8 SEGUNDO, GARDENA, GLENDALE,
9 GLENDORA, HAWAIIAN GARDENS,
10 HAWTHORNE, HERMOSA BEACH,
11 HIDDEN HILLS, HUNTINGTON PARK,
12 INDUSTRY, INGLEWOOD,
13 IRWINDALE, LA CANADA
14 FLINTRIDGE, LA HABRA HEIGHTS,
15 LAKEWOOD, LA PUENTE, LA VERNE,
16 LAWDALE, LOMITA, LOS ANGELES,
17 LYNWOOD, MALIBU, MANHATTAN
18 BEACH, MAYWOOD, MONTEBELLO,
19 MONTEREY PARK, PALOS VERDES
20 ESTATES, PARAMOUNT, PASADENA,
21 PICO RIVERA, POMONA, REDONDO
22 BEACH, ROLLING HILLS, ROLLING
23 HILLS ESTATES, ROSEMEAD, SAN
24 DIMAS, SAN FERNANDO, SAN
25 GABRIEL, SAN MARINO, SANTA
26 CLARITA, SANTA FE SPRINGS, SANTA
27 MONICA, SIERRA MADRE, SIGNAL
28 HILL, SOUTH EL MONTE, SOUTH
GATE, SOUTH PASADENA, TEMPLE
CITY, TORRANCE, VERNON,
WALNUT, WEST COVINA, WEST
HOLLYWOOD AND WHITTIER, and
ROES 1 THROUGH 150,

Real Parties In Interest.

Petitioners and Plaintiffs, the Cities of Monrovia, Norwalk, Rancho Palos Verdes, Artesia, Beverly Hills, Carson, La Mirada and Westlake Village (collectively, the "Petitioners"), respectfully petition this Court for a Writ of Mandate, pursuant to California Code of Civil Procedure §§ 1085 and 1094.5 against Respondents and Defendants, the REGIONAL WATER QUALITY CONTROL BOARD- LOS ANGELES REGION, a California state agency, and the STATE WATER RESOURCES CONTROL BOARD, a California state agency; and DOES 1 through 50, and complain for declaratory and injunctive relief against all Defendants and Respondents, and each of them, and allege, as follows:

I.

THE PARTIES

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1. The CITY OF MONROVIA is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

2. The CITY OF NORWALK is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

3. The CITY OF RANCHO PALOS VERDES is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

4. The CITY OF ARTESIA is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

5. The CITY OF BEVERLY HILLS is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

6. The CITY OF CARSON is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

7. The CITY OF LA MIRADA is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

8. The CITY OF WESTLAKE VILLAGE is a municipal corporation, duly created and existing pursuant to the Constitution and laws of the State of California and is located in the County of Los Angeles.

9. The Petitioners, along with the County of Los Angeles, the Los Angeles County Flood Control District and other incorporated cities in the Los Angeles County,

1 are permittees (collectively, "Permittees") under Order No. 01-182 of the Regional Water
2 Quality Control Board- Los Angeles Region, issued on and effective December 13, 2001,
3 and entitled "Waste Discharge Requirements for Municipal Storm Water and Urban
4 Runoff Discharges Within the County of Los Angeles and the Incorporated Cities Therein
5 Except the City of Long Beach"[NPDES Permit No. CAS004001] (the "NPDES Permit"),
6 which purports to regulate the discharge of storm water and urban runoff from the
7 Municipal Separate Storm Sewer System ("MS4") within the Los Angeles Basin. The
8 NPDES Permit requires each Petitioner to directly implement its terms within its
9 jurisdictional boundaries and with respect to those portions of the MS4 within each
10 Petitioner's jurisdiction. Each Petitioner is, therefore, beneficially interested in the
11 requirements imposed by the NPDES Permit. Accordingly, each of the Petitioners is an
12 aggrieved party and is challenging certain actions taken by Respondents, and certain
13 failures of Respondents to act lawfully in establishing and adopting the subject NPDES
14 Permit in accordance with State and federal law, as more particularly alleged herein.

15 10. Respondent and Defendant, the REGIONAL WATER QUALITY
16 CONTROL BOARD- LOS ANGELES REGION (the "Regional Board"), is a state
17 agency and a regional agency, created pursuant to the provisions of Water Code §13200,
18 et seq. Petitioners are informed and believe and thereon allege that the Regional Board is
19 a sub-entity of the State Water Resources Control Board and is responsible for adopting
20 and enforcing NPDES permits, such as the NPDES Permit in question. The Regional
21 Board is "an inferior tribunal, corporation, board, or person", as that term is used in Code
22 of Civil Procedure § 1085.

23 11. Respondent and Defendant, the STATE WATER RESOURCES
24 CONTROL BOARD ("State Board"), is a state agency created pursuant to the California
25 Water Code §§ 174, et seq. and 13200, et seq. and is charged with formulating and
26 adopting state policy for water quality control within the State of California. The State
27 Board is "an inferior tribunal, corporation, board, or person" as that term is used in Code
28 of Civil Procedure § 1085. The State Board also oversees all of California's Regional

1 Water Quality Control Boards, including the Respondent Regional Board, and is
2 responsible for ensuring that the Regional Board complies with applicable federal and
3 state laws.

4 12. Petitioners are ignorant of the true names and capacities of the Respondents
5 and Defendants sued herein as Does 1 through 50, inclusive, and therefore sues such
6 Respondents and Defendants by their fictitious names. Petitioners will amend this
7 Petition and Complaint to specifically identify such persons when they are ascertained.
8 Petitioners are informed and believes, and thereon alleges, that each of the fictitiously
9 named Respondents and Defendants are in some manner responsible for the acts, injuries
10 and damages alleged herein.

11 13. Real Party in Interest, the County of Los Angeles (the "County") is a
12 political subdivision of the State of California and the Principal permittee under the
13 NPDES Permit.

14 14. Real Party in Interest, the Los Angeles County Flood Control District
15 ("LACFCD") is special district and a local government agency, created by the California
16 Legislature for the purpose of owning, operating and maintaining portions of the MS4 in
17 the County of Los Angeles. LACFCD is a permittee under the NPDES Permit.

18 15. Petitioners are informed and believe and thereon allege that Real Parties in
19 Interest, the Cities of Agoura Hills, Alhambra, Arcadia, Azusa, Baldwin Park, Bellflower,
20 Bell Gardens, Bradbury, Burbank, Calabasas, Cerritos, Claremont, Commerce, Compton,
21 Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo,
22 Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden
23 Hills, Huntington Park, Industry, Inglewood, Irwindale, La Canada Flintridge, La Habra
24 Heights, Lakewood, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood,
25 Malibu, Manhattan Beach, Maywood, Montebello, Monterey Park, Palos Verdes Estates,
26 Paramount, Pasadena, Pico Rivera, Pomona, Redondo Beach, Rolling Hills, Rolling Hills
27 Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita,
28 Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate,

1 South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood,
2 Westlake Village, and Whittier (collectively, the "Other Municipal Permittees") are
3 municipal corporations, located in the County of Los Angeles, organized under the laws
4 of the State of California. The Other Municipal Permittees are co-permittees with
5 Petitioners under the NPDES Permit, and solely for that reason, Petitioners are naming
6 such Other Municipal Permittees as nominal Real Parties In Interest in this action.
7 However, Petitioners are not seeking any affirmative relief with respect to any of the
8 Other Municipal Permittees.

9 16. Petitioners are informed and believe and thereon allege that Roes 1 through
10 100 are also Real Parties in Interest and are persons or entities, other than those identified
11 above as Petitioners/Plaintiffs, Respondent/Defendants, or Real Parties in Interest, who
12 have a legally cognizable beneficial interest in the NPDES Permit. Petitioners are unable
13 to ascertain the true names, identities or capacities of those parties sued herein as Roe
14 Real Parties in Interest 1 through 100, inclusive. Petitioners therefore sue such parties by
15 such fictitious names. Petitioners will seek leave to amend this petition to set forth the
16 true names and capacities of these Roe Real Parties in Interest after they have been
17 ascertained.

18
19 **II.**

20 **PROCEDURAL BACKGROUND**

21 **A. Jurisdiction and Venue**

22 17. This Court has jurisdiction over this matter, pursuant to Water Code
23 §13330.

24 18. This Court has jurisdiction to issue writs of mandate pursuant to Code of
25 Civil Procedure §§ 1085 and 1094.5, to render judicial determinations and to issue
26 declarations under Code of Civil Procedure § 1060, and to order injunctive relief under
27 Code of Civil Procedure § 525 (Cal. Const., art. VI, Section 10).

28 ///

1 19. This Court also has jurisdiction over this matter, pursuant to Code of Civil
2 Procedure §§ 1085 and 1094.5, in that Petitioners allege that the respondents have
3 proceeded and continue to proceed in excess of their jurisdiction in that they issued the
4 NPDES Permit despite the Permit's conflict with applicable federal and state law, as well
5 as the California Constitution.

6 20. This Petition has been brought within the appropriate time period to
7 challenge Respondents' actions and inactions alleged herein, as required by Public
8 Resources Code §§ 21080.5(g) and 21167(a) and Title 14, section 15112 of the California
9 Code of Regulations, and pursuant to Water Code § 13330.

10 21. Venue in this Court is proper pursuant to Code of Civil Procedure § 401 and
11 Government Code § 955.3, in that Respondents and Defendants, the State Board and the
12 Regional Board, are agencies and boards of the State of California, and the Attorney
13 General of the State of California has an office located in the City and County of Los
14 Angeles.

15 B. Petitioners Have Exhausted Their Administrative Remedies

16 22. Petitioners have exhausted all of the administrative remedies available to
17 them prior to filing this action. As further alleged herein, Petitioners participated in
18 workshops and hearings and provided written comments to the Regional Board prior to its
19 adoption of the NPDES Permit on December 13, 2001.

20 23. On January 12, 2002, Petitioners filed a petition for review with the State
21 Board within 30 days of the Regional Board's December 13, 2001 action. Petitioners also
22 submitted written points and authorities to the State Board.

23 24. By letter dated January 9, 2002, Petitioners requested that the Regional
24 Board prepare the administrative record of the NPDES Permit, including the
25 December 13, 2001 hearing, and prior hearings and workshops including transcripts of
26 such hearings, workshops, and audiotapes.

27 25. Petitioners sought a stay of the NPDES Permit from the State Board, which
28 was denied by the State Board.

1 26. The State Board issued its final order regarding the NPDES Permit on
2 December 18, 2002, after which Petitioners had no further available administrative
3 remedy to redress their grievances against the Respondents, other than through this
4 petition.

5 27. On January 17, 2003, before filing this action, Petitioners served written
6 notice of the commencement of this action on Respondents in accordance with
7 requirements of Public Resources Code § 21167.5.

8 28. Petitioners have also furnished the California Attorney General's Office
9 with a copy of this Petition, pursuant to Public Resources Code § 21167.7 and Code of
10 Civil Procedure § 388.

11 D. Petitioners Have No Adequate Remedy At Law

12 29. As further alleged herein, Petitioners do not have a plain, speedy, and
13 adequate remedy in the ordinary course of law.

14 30. Unless the requested writs herein are issued and the other relief requested
15 herein is granted, Respondents will proceed with the enforcement of the subject NPDES
16 Permit, in violation of, and in excess of, Respondents' authority and jurisdiction under,
17 the Clean Water Act , the Porter-Cologne Act, the California Environmental Quality Act,
18 the California Administrative Procedure Act, California Government Code § 17561, and
19 other State and federal laws and the United States and California Constitutions.

20 E. Standard of Review

21 31. California Water Code § 13330(d) provides in pertinent part that “the court
22 shall exercise its independent judgment on the evidence in any case involving judicial
23 review of a decision or order of the state board issued under Section 13320. . . .”

24 32. Abuse of discretion is established if Respondents have not proceeded in the
25 manner required by law, the order or decision is not supported by the findings, and/or the
26 findings are not supported by the evidence. Code Civ. Pro. §1094.5(b). When it is alleged
27 that the findings are not supported by the evidence and the Court is authorized to exercise
28 its independent judgment, abuse of discretion is also established if the Court determines

1 that the findings are not supported by the weight of the evidence. For all other cases,
2 abuse of discretion is established if the Court determines that the findings are not
3 supported by substantial evidence in light of the entire record. Code Civ. Pro. §1094.5(c).

4 33. Pursuant to Government Code §§ 11350 and 11350.3, this Court also has
5 jurisdiction to determine whether there is substantial evidence that Respondents have
6 acted in compliance with the process set forth in California's Administrative Procedures
7 Act for adopting administrative regulations.

8 34. Pursuant to California Environmental Quality Act ("CEQA"), Respondents'
9 application of an erroneous legal standard is subject to an independent determination by
10 the Court.

11
12 **III.**

13 **FACTUAL BACKGROUND**

14 35. The federal Water Pollution Control Act (the "Clean Water Act" or
15 "CWA") 33 U.S.C. §§1251 et seq., established the National Pollutant Discharge
16 Elimination System ("NPDES") as a permit program to regulate the discharge of
17 pollutants from point sources to waters of the United States.

18 36. In 1987, Congress amended the Clean Water Act to establish a framework
19 for regulating storm water and urban runoff by adding Section 402(p) which requires the
20 USEPA to establish regulations setting forth NPDES requirements for storm water
21 discharges. Section 402(p) of the CWA [33 U.S.C. §1342(p)] requires permits for
22 discharges from the MS4s to "require controls to reduce the discharge of pollutants to the
23 *maximum extent practicable* to the waters of the United States". Dischargers who are
24 issued permits and who operate within the terms of such permits are thereby in
25 compliance with the requirements of the Clean Water Act.

26 37. The Clean Water Act authorizes states to implement the NPDES program,
27 which includes issuance and enforcement of NPDES permits, such as the NPDES Permit
28 in question. 33 U.S.C. § 1342(b). The State Board has accepted the delegation of

1 authority from U.S. Environmental Protection Agency ("USEPA") to implement the
2 Clean Water Act's NPDES permit program. The State Board administers the NPDES
3 program in California under a September 22, 1989 Memorandum of Understanding with
4 USEPA and pursuant to provisions of the Porter-Cologne Act, and specifically, Water
5 Code § 13160.

6 38. The Regional Board and State Board also are authorized under California
7 law to adopt waste discharge requirements ("WDRs"). See, Water Code § 13236, et seq.
8 The Regional Board is the state agency that issues and enforces NPDES permits and
9 WDRs within its geographical jurisdiction, which includes Los Angeles County. The
10 State Board is the agency responsible for reviewing Regional Board actions.

11 39. Under State law, in formulating and revising state policy for water quality
12 control, the State Board and the Regional Board are required to consult with and carefully
13 evaluate the recommendations of concerned federal, state and local agencies on water
14 quality policy issues. (Water Code § 13144.)

15 40. On June 18, 1990, the Regional Board adopted Order No. 90-079 as NPDES
16 Permit (the "1990 Permit") which required the County of Los Angeles and the certain
17 cities to implement pollution control measures to reduce the discharge of pollutants from
18 the MS4s to waters of the United States.

19 41. On July 15, 1996, the Regional Board adopted Order No. 96-054 which
20 superseded Order No. 90-076 and the NPDES permit was in effect from 1996 through
21 2001 (the "1996 Permit").

22 42. In February 2001, the Los Angeles County Department of Public Works
23 filed a Report of Waste Discharge ("ROWD") and applied on behalf of the Permittees for
24 renewal of their waste discharge requirements that serve as an NPDES permit under the
25 CWA.

26 43. The NPDES Permit application submitted by the Permittees was ultimately
27 found by the Regional Board to be complete and in compliance with the Clean Water Act
28 and state law.

1 44. On April 13, 2001, the Regional Board issued a first draft of the NPDES
2 Permit. Petitioners filed written comments to the first draft of the NPDES Permit.

3 45. On June 29, 2001, the Regional Board issued its second draft of the NPDES
4 Permit. Petitioners participated in the Regional Board's "workshop" on the Permit and
5 submitted written comments to the second draft of the NPDES Permit.

6 46. On October 11, 2001, the Regional Board issued its third draft of the
7 NPDES Permit. Petitioners submitted written comments to the third draft of the NPDES
8 Permit.

9 47. Petitioners or their representatives attended workshops regarding the drafts
10 of the NPDES Permit, and Petitioners also provided written comments to the Regional
11 Board. Petitioners raised the issues set forth herein at public hearings conducted by the
12 Regional Board.

13 48. The Regional Board approved and adopted the NPDES Permit on
14 December 13, 2001 as Regional Board Order No. 01-182. Petitioners seek review of that
15 Order, and the certain provisions of the underlying NPDES Permit.

16 49. On January 12, 2002, Petitioners filed a petition with the State Board
17 seeking review of the Regional Board's adoption of the NPDES Permit and requesting the
18 State Board to conduct a full adjudicatory hearing on the matter. Numerous other parties,
19 including the County and the LACFCD, also filed petitions. As alleged herein, the State
20 Board dismissed the petitions on December 18, 2002.

21
22 **IV.**

23 **REASONS WHY THE ACTIONS OF RESPONDENTS WERE IMPROPER**

24 50. This is an action for an order setting aside certain portions of the NPDES
25 Permit; Petitioners seek review of certain portions of the Permit which violate the federal
26 Clean Water Act and/or California's Porter-Cologne Water Quality Act (Water Code §§
27 13000, et seq.) [the "Porter-Cologne Act"], as further alleged herein and unlawfully
28 impose on Petitioners and other Permittees obligations of the State Board or the Regional

1 Board, represent unfunded mandates in violation of the California Constitution, are not
2 supported by evidence in the record, or are arbitrary and capricious, or in excess of
3 Respondents' jurisdiction. Petitioners seek a Writ of Mandate and declaratory and
4 injunctive relief ordering Respondents to set aside and not to enforce certain portions of
5 the Permit.

6 51. The actions taken by the Respondents, among other things, place obligations
7 on Petitioners that are not mandated by, or violate, the Clean Water Act and/or the Porter-
8 Cologne Water Quality Act; violate Article XIII(B) of the California Constitution by
9 shifting state obligations to Petitioners without adequate funding; unlawfully transfer to
10 Petitioners of obligations expressly reserved to the Regional Board by State Board order;
11 violate the prohibitions found in Water Code § 13360(a); violate CEQA and are not
12 supported by evidence in the record before the Regional Board. The actions taken by
13 Respondents, and their failures to act, were improper, inappropriate, arbitrary and
14 capricious, and in violation of State and federal law and in excess of Respondents'
15 jurisdiction. The NPDES Permit, therefore, does not comply with the requirements of the
16 Clean Water Act or the Porter-Cologne Act or the regulations promulgated thereunder.

17 52. The NPDES permitting scheme of the Clean Water Act, authorizes the
18 issuance of permits for: discharges of pollutants into waters of the United States from
19 point sources. 33 U.S.C. §§ 1342(a); 1362(6), (12), (14). NPDES permits are limited to
20 discharges to navigable waters. 33 U.S.C. §§ 1342(a); 1362(12). A "navigable water"
21 refers to waters "that were or had been navigable in fact or which reasonably could be
22 made so." See 40 C.F.R. § 122.2. An NPDES permit which regulates discharges to things
23 not waters of the United States is void and unenforceable.

24 53. The Clean Water Act's NPDES program prohibits only point source
25 discharges of pollutants *into* navigable waters. 33 U.S.C. §§ 1342(a), 1362(12). Overland
26 street flow, regardless of source, is not a point source.

27 54. Accordingly, the NPDES Permit is applicable only to discharges from
28 MS4s, which do not include natural streams or other non-point sources. Nevertheless, the

1 Permit defines "Natural Drainage Systems" to be "unlined or unimproved (not
2 engineered) creeks, streams, rivers or similar waterways." Permit, p. 57.

3

4 A. The Regional Board Should Have Included A "Safe Harbor"
5 Provision In The NPDES Permit

6 55. In accordance with CWA section 402(p), municipal permittees, such as
7 Petitioners, and MS4s are not required to strictly comply with water quality standards.
8 Instead, they are regulated by NPDES permits that reduce the discharge of pollutants in
9 the storm water to the "Maximum Extent Practicable" ("MEP"). See 33 U.S.C.
10 §1342(p)(3)(B)(iii). The MEP standard is a maximum standard, and is the only standard
11 to be applied to Permittees under either State or federal law. To comply with the MEP
12 standard, the Clean Water Act envisions an iterative process whereby successive rounds
13 of Best Management Practices ("BMPs") are implemented to the MEP. See 40 C.F.R.
14 §122.44(k).

15 56. Both the 1990 Permit and the 1996 NPDES Permit, contained provisions
16 which explicitly assured Petitioners that, once they implemented the storm water
17 management programs set forth in the Permit in a timely and complete manner, they
18 would be deemed to be in compliance with the Discharge Prohibitions and Receiving
19 Water Limitations provisions of the NPDES Permit. These "Safe Harbor" provisions
20 provided the Permittees with important protections from third-party liability once they
21 have implemented the storm water management programs prescribed in the Permit.

22 57. By failing to include a Safe Harbor provision in the Discharge Prohibitions
23 section in Part 1 and the Receiving Water Limitations section in Part 2 of the NPDES
24 Permit, the Respondents potentially expose Petitioners and the other Permittees to
25 unwarranted third party suits, even though they may be in full compliance with the ir
26 obligations under the NPDES Permit.

27 ///

28 ///

1 58. By not including a Safe Harbor provision, Respondents violated section
2 402(p) of the CWA and California Water Code § 13372 (requiring that NPDES permits
3 be "consistent" with the CWA).

4
5 B. The Regional Board's Re-Characterization of the "Maximum Extent
6 Practicable Standard" Is Contrary to Section 402 of the CWA (33
7 U.S.C. §§ 1342).

8 59. Many provisions of the NPDES Permit exceed the MEP standard under each
9 of the major parts of the Permit, including Part I, entitled "Discharge Prohibitions," Part 2
10 entitled "Receiving Water Limitations," Part 3 entitled "Storm Water Quality
11 Management Program ('SQMP') Implementation" Part 4, entitled "Special Provisions,"
12 and Part 5 entitled "Definitions."

13 60. Under Part 2 of the NPDES Permit entitled "Receiving Water Limitations,"
14 the MEP standard has been exceeded as the Permit, as written, imposes more stringent
15 standards and requirements beyond those set forth either in the Clean Water Act or Water
16 Code section 13263, and imposes standards that are stricter than the standards set forth
17 under any applicable State or federal law. In particular, irrespective of the MEP standard,
18 Part 2 of the Permit provides that any discharge from the municipal storm drain system
19 that causes or contributes to a violation of a water quality standard or water quality
20 objective, or that causes or contributes to a condition of nuisance, is prohibited and
21 requires that in the event of any such violation of a water quality standard or contribution
22 to a condition of nuisance (hereinafter collectively "exceedance"), that Permittees are to
23 develop additional best management practices that will be "implemented to prevent or
24 reduce any pollutants that are causing or contributing to the exceedance . . ." Under the
25 language of Part 2 of the Permit, the Best Management Practices to be implemented to
26 address exceedances are not limited to those BMPs that are consistent with the maximum
27 extent practicable standard, but rather include all BMPs as necessary to prevent or reduce
28 exceedances. Accordingly, Part 2 of the Permit effectively imposes a "strict liability"

1 standard on municipalities by not requiring the implementation of those BMPs that are
2 consistent with the maximum extent practicable standard.

3 61. Part 3 of the Permit, subsection (c) allows the Executive Officer of the
4 Regional Board to incorporate and require the implementation of Total Maximum Daily
5 Loads ("TMDL") into the "Storm Water Quality Management Program" ("SQMP"),
6 which is thus, an indirect incorporation of any such TMDL requirement into the Permit
7 itself. Yet, the incorporation of TMDLs under the Permit is not restricted only to those
8 Best Management Practices ("BMP's") that are consistent with the MEP standard. Rather,
9 under the NPDES Permit, the Executive Officer has the discretion to incorporate TMDLs
10 into the NPDES Permit without regard to whether the BMPs to be implemented to comply
11 with the TMDLs are "practicable." Accordingly, this portion of the NPDES Permit was
12 issued contrary to the MEP standard, as it allows for the incorporation of TMDLs without
13 regard to whether the BMP's to be implemented thereunder, are consistent with the MEP
14 standard.

15 62. With respect to Part 4, the MEP Standard is ignored in various sections,
16 including but not limited to: (a) in the general requirements under Section A of Part 4
17 dealing with MEP; (b) in various portions of the Public Information and Public
18 Participation Program under Section B of Part 4; (c) throughout the provisions under
19 Section C of Part 4 entitled "Industrial/Commercial Facilities Program;" (d) throughout
20 Section D of Part 4 entitled "Development Planning Program," including the entire
21 SUSMP provisions; (e) throughout Section E of Part 4 entitled "Development
22 Construction Program;" (f) throughout Section F of Part 4, "Public Agency Activities
23 Program;" and (g) in Section G of Part 4, "Illicit Connections and Illicit Discharges
24 Elimination Program."

25 63. In addition, the MEP standard and its limited application to discharges
26 "from" MS4s, has been exceeded by Respondent in Part 5 of the Permit, the various
27 definitions in the Permit, specifically including the definitions of the terms
28 "Environmentally Sensitive Areas," "Inspection," "Maximum Extent Practicable,"

1 "Planning Priority Projects," "Redevelopment," "Significant Ecological Areas," and
2 "Waters of the United States or Waters of the U.S."

3 C. The Regional Board Has Infringed Upon the Local Land Use
4 Authority of the Petitioners

5 64. The Clean Water Act requires the traditional planning power of local
6 authorities over land use issues to be preserved and protected. 33 U.S.C. § 1251(b).
7 Congress, under the Clean Water Act, specifically chose to "recognize, preserve and
8 protect the primary responsibility and rights of states . . . to plan the development and
9 use . . . of land and water resources . . ." (33 U.S.C. § 1251(b).) The regulations to the
10 Clean Water Act further recognize the concerns with "possible federal interference with
11 local land use planning," and EPA has expressly determined not to infringe on local land
12 use authority.

13 65. Pursuant to Government Code § 65300.9, the Legislature has already
14 expressed its intent that it is "for each city and county to coordinate its local budget
15 planning and local planning for federal and state program activities . . . with the local land
16 use planning process, recognizing that each city and county is required to establish its
17 own appropriate balance in the context of the local situation when allocating resources to
18 meet the purposes." (Gov. Code § 65300.9.)

19 66. Certain Development Planning requirements in the NPDES Permit violate
20 the policies and purpose of the Porter-Cologne Act, CWA and CEQA, and applicable
21 state and federal laws which grant the Petitioners, not Respondent, the authority to review
22 "discretionary" projects for purposes of considering whether such projects will have a
23 significant adverse impact on the environment, and for purposes, if necessary, of adopting
24 appropriate "mitigation measures" such as SUSMPs, to address such potentially
25 significant adverse impacts. The provision of the Permit purporting to require Petitioners
26 to apply its requirements to non-discretionary or ministerial permits violates state and
27 federal law and exceeds Respondents' jurisdiction.

28 ///

1 67. In addition, the provisions of the NPDES Permit which require
2 modifications to the Petitioners' CEQA process violate State law. The Regional Board
3 does not have the authority to impose such requirements.

4 68. Government Code §§ 65300 and 65307 require Petitioners to prepare
5 Comprehensive General Plans. General Plan requirements allow for the "conservation
6 element" to include, among other issues, the prevention and control of pollution in
7 streams and other waters, as well as the prevention, control and correction of the erosion
8 of soils, beaches and shores, and the protection of watersheds.

9 69. The NPDES Permit explicitly calls for fundamental change in land use
10 planning and indicates the Regional Board's intent to direct local land use decisions.
11 These goals and objectives are ultra vires in that they exceed the agency's lawful
12 jurisdiction; they also unlawfully infringe on local governmental authority.

13 70. The NPDES Permit requires, among other things, that the Petitioners amend
14 their General Plan to include Regional Board priorities and development project approval
15 processes. The Permit directs Petitioners to undertake an unprecedented inspection
16 program, develop and require the implementation of Best Management Practices for
17 various land use categories, and specifies numeric design standards and the precise
18 location where certain BMPs are to be located (e.g., as close to the place where the rain
19 first hits the ground). These Permit conditions infringe on the Petitioners' right to
20 regulate land use, and unlawfully direct the Petitioners to regulate land use as the
21 Regional Board and State Board see fit.

22 71. The provisions of the NPDES Permit that require the Permittees to amend
23 their General Plans violate State law, as the Regional Board is without authority to adopt
24 legislation or to impose regulations, and any attempted change to California law by
25 Respondent concerning General Plans is preempted.

26 72. The findings in the NPDES Permit reflect the Regional Board's
27 misunderstanding of the local planning processes and self-governance, as local
28 governments authorize new development in connection with their land use authorities and

1 collect revenue in order to finance the public services they provide to their citizens. The
2 Regional Board did not base these statements upon any factual evidence in the record, and
3 its reliance upon these statements as a basis for the Permit requirements is an abuse of
4 discretion.

5 73. Accordingly, the Permit seeks to improperly infringe upon and interfere
6 with the local land use planning and regulatory authority of the Permittees.

7 D. The Regional Board Exceeded its Authority by Mandating the
8 Manner of Compliance in Violation of the California Water Code
9 Section 13360.

10 74. Water Code § 13360 prohibits a Regional Board or the State Board from
11 imposing a specific “design, location, type of construction, or particular manner in which
12 compliance may be had” with an order or permit.

13 75. Numerous provisions within the Permit violate this prohibition under
14 Section 13360, including but not limited to the SUSMP requirements and the Industrial
15 Commercial Facilities Inspection Program (including the requirement that the Petitioners
16 inspect specific industrial and commercial facilities in a particular manner for specific
17 BMPs), as well as the Illicit Connection and Illicit Discharge Program, and other
18 requirements imposed upon Petitioners throughout the Permit, including the requirements
19 to clean catch basins at specific times, or to install trash receptacles at each bus stop.

20 E. The Regional Board Abused its Discretion by Requiring Permittees
21 to Inspect Industrial/Commercial Sites Which Already Are Covered
22 by State-Issued Permits And To Investigate Complaints.

23 76. Site inspection responsibilities for commercial and industrial facilities
24 covered by state or federally issued permits, including NPDES general permits, clearly
25 belong to and should remain with the State Board and Regional Water Quality Control
26 Boards. Water Code §13163, §13267(c). The Water Code does not provide for delegation
27 of these duties to Permittees. The delegation of inspection authority for NPDES permitted
28 sites and facilities is unauthorized by statute.

1 77. The imposition of the obligation to inspect state-permitted facilities violates
2 the Clean Water Act, including but not limited to the fact that NPDES administration
3 obligations can only be shared by state agencies that have "[s]tate wide jurisdiction over a
4 class of activities or discharges," 40 C.F.R. § 123.1(g), and there is no authority to
5 impose such an obligation on municipal permittees.

6 78. The provisions of the NPDES Permit require the Permittees to have
7 "Adequate Legal Authority" to control pollutants "including potential contribution," and
8 further to inspect, sample, and review and copy records and require regular reports from
9 industrial facilities "with the potential to discharge polluted storm water runoff into [the
10 Permittees] MS4." Such requirements are not supported anywhere under State or federal
11 law and are requirements that far exceed any limited inspection obligation that may be
12 placed upon municipalities in connection with certain industrial facilities.

13 79. In addition under the U.S. and California Constitutions, a Permittee has
14 limited authority to enter upon, sample, inspect, review and copy records of an already
15 permitted facility without a warrant or probable cause or the consent of the property
16 owner. Requiring such an inspection not only exceeds the authority provided to the
17 Regional Board under State or federal law, but similarly would potentially place
18 Permittees in a position where they are being asked to either violate the apparent terms of
19 the NPDES Permit, or alternatively, to violate the constitutional rights of private parties.

20 80. Part 4.C.3.(d)(3) of the NPDES Permit requires Permittees to initiate,
21 within one business day, investigation of complaints (other than non-storm water
22 discharges) regarding facilities within its jurisdiction without distinguishing between high
23 and low priority complaints and without regard to the number of days the complaint was
24 pending with Regional Board staff before it was referred to the Permittee.

25 81. Section 4.F.1 of the NPDES Permit also requires Permittees to respond to
26 and investigate sanitary sewer overflows, and to take actions to prevent such overflows
27 even though they do not own, operate or have jurisdiction over such sewers which are
28 separately and fully regulated by Respondents.

1 82. These provisions are not required by the Clean Water Act; are arbitrary and
2 capricious in that they are not supported by any finding; and if there are any such
3 findings, they are not supported by the evidence.

4 83. The imposition of these obligations in the NPDES Permit also violates the
5 California Constitution's prohibition against unfunded mandates, Article XIII B, Section 6,
6 in that Respondents State and Regional Boards have shifted the cost and burden of
7 enforcing the General Industrial Activities Storm Water Permit to Petitioners without the
8 subvention of funds required by Article XIII B.

9 F. The NPDES Permit Unlawfully Delegates Authority To the Regional
10 Board's Executive Officer.

11 84. Part 3.C of the NPDES Permit allows the Executive Officer of the Regional
12 Board to, among other actions, reopen and modify an enforceable element of the Permit
13 without notice or hearing. This section violates the Clean Water Act, the Porter-Cologne
14 Act, and the terms of the Permit itself, all of which require that the Permit can be
15 modified only after the notice and hearing, and only by the Regional Board itself, as
16 opposed to its Executive Officer. Respondents State and Regional Boards have
17 prejudicially abused their discretion and acted without or in excess of their jurisdiction
18 and in violation of law in that the Permit's delegation to the Executive Officer of authority
19 to revise the Permit, without notice or hearing, is a violation of the Clean Water Act, the
20 Porter-Cologne Act, and the terms of the Permit itself. Furthermore, under Water Code §
21 13223(a), the Regional Board may not delegate to its Executive Officer "(2) the issuance,
22 modification or revocation of any water quality control plan, water quality objectives, or
23 waste discharge requirement.

24 85. Respondent Regional Board has stated that it intends to implement TMDLs
25 in Los Angeles County through the NPDES Permit. Because the TMDLs are being
26 adopted without reference to Section 402(p), the Respondents have prejudicially abused
27 their discretion and acted without or in excess of their jurisdiction and in violation of law
28 in that Part 3.C allows the Executive Officer to revise the Permit to implement a TMDL

1 without regard to whether the revision is consistent with Clean Water Act § 402(p),
2 including its MEP Standard.

3 G. The Permit's Peak Flow Provisions Violate Applicable Law.

4 86. Part 4.D.1 of the NPDES Permit requires the Permittees to control
5 post-development peak storm water run-off discharge rates, velocities, and duration (peak
6 flow control) in Natural Drainage Systems (i.e., mimic pre-development hydrology) to
7 prevent accelerated stream erosion and to protect stream habitat. Parts 4.D.1 and Section
8 II.1 of the Monitoring and Reporting Program are not supported by the findings in that
9 there is no finding that peak flow, as opposed to some other, more appropriate, parameter
10 is the primary and predominate cause of the erosion. Alternatively, any such finding is not
11 supported by weight of the evidence in that there is no evidence of the impact of peak
12 flow in the environment of Southern California watersheds.

13 H. No Cost Benefit Analysis Or Peer Review Were Conducted.

14 87. In adopting the NPDES Permit, Respondents failed to properly consider
15 "economic" considerations and did not develop the Permit based on a cost/benefit
16 analysis. Numerous provisions in State and federal law require the conducting of a
17 cost/benefit analysis (which Respondent has failed to perform), and further require that
18 economic considerations be addressed in adopting such permits. (See 33 U.S.C. §§ 1288,
19 1313, 1315(b), and 64 Fed. Reg. 68722, 68732; Water Code §§ 13000, 13165, 13241,
20 13225 and 13267.)

21 88. Furthermore, no scientific peer review was conducted or obtained by
22 Respondents, as required by Health & Safety Code § 57004.

23 I. In Adopting the Permit The Regional Board Failed to Comply with
24 the California and Federal Administrative Law.

25 89. The NPDES Permit, and the process which generated it, did not comply
26 with applicable principles of California and federal administrative law.

27 90. While the issuance of individual waste discharge requirements may not be
28 subject to the provisions of the California Administrative Procedure Act ("APA"), the

1 standards, objectives and guidelines which dictate the content of those requirements have
2 to be formally adopted in accordance with the APA. (Government Code §11352(b).)

3 91. California law does not allow either the State Board or any of the Regional
4 Water Quality Boards to develop and impose requirements of general application in such
5 a manner; like any other state agency, the Regional Board is required to first formally
6 establish its objectives, guidelines and requirements through formal rulemaking in
7 compliance with the APA. (Government Code §11340.5(a).) The principle underlying
8 the APA's requirements is that state agencies are not allowed to adopt or enforce
9 unwritten laws, regulations or policies. The APA prohibits state agencies from issuing,
10 utilizing enforcing or attempting to enforce any guideline, criterion, bulletin, manual,
11 instruction, order, standard of general application, or other rule which is a "regulation", as
12 defined in Government Code §11342(g), unless the rule has been adopted as a formal
13 regulation.

14 92. Both the Regional Board as well as the State Board expressly acknowledged
15 that they are attempting to achieve statewide consistency with respect to municipal
16 stormwater permits. In order to achieve that consistency, the Regional Board is
17 effectively engaging in informal rulemaking. However, no notice of rulemaking was ever
18 issued, nor was any regulatory package ever submitted to the OAL for approval.

19 93. The APA prohibits the Respondents from adopting a regulation of general
20 applicability without compliance with the APA. The Regional Board and State Board did
21 not even attempt to comply with these requirements. While the issuance of individual
22 waste discharge requirements may not be subject to the provisions of the APA (See,
23 Government Code §11352(b)), the standards, objectives and guidelines which dictate the
24 content of those requirements have to be formally adopted in accordance with the APA.
25 (Government Code §11352(b).)

26 94. The NPDES Permit also contains numerous new information collection
27 requirements which were not submitted for approval to the Office of Management and
28 Budget ("OMB") under the provisions of the federal Paperwork Reduction Act (44

1 U.S.C. §§3501, et seq.) ("PRA"), nor did they meet the requirements of Government
2 Code § 11346.3(a) . The Regional Board failed to comply with the PRA and Government
3 Code § 11346.3 in imposing new reporting obligations on the Permittees.

4 95. Furthermore, although the NPDES Permit imposes substantial compliance
5 costs on Petitioners, other Permittees and small business entities, Respondents failed to
6 comply with the federal Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601, et seq,
7 which required Respondents to prepare a regulatory flexibility analysis and an assessment
8 of the economic impact of a proposed rule on small business entities, 5 U.S.C. § 604,
9 unless the agency certifies that the proposed rule will not have a "significant economic
10 impact on a substantial number of small entities" and provides a factual basis for that
11 certification.

12 96. A draft of the NPDES Permit, dated October 11, 2001, was originally
13 scheduled for adoption on November 29, 2001. In mid-November 2001, the hearing on
14 the adoption of the Permit was continued until December 13, 2001. On December 4,
15 2001, a change sheet for the October 11, 2001 Permit was circulated. On December 10,
16 2001, an additional change sheet was issued by the Regional Board, along with another
17 draft of the Permit. However, the December 10, 2001 Change Sheet was never publicly
18 circulated. Thereafter, on December 13, 2001, on the morning of the hearing on the
19 Permit, an additional change sheet dated December 13, 2001 and entitled "Additions to
20 Supplemental Change Sheet" was distributed with yet further changes to the Permit, along
21 with the December 10, 2001 draft of the Permit. In the course of the December 13
22 hearing, additional changes were proposed and made by the Regional Board to the
23 NPDES Permit.

24 97. The changes put forth in the various change sheets to the Permit, along with
25 those at the hearing, were collectively significant in number and in scope. Yet, no
26 additional time for public comment was provided by Respondent for review and comment
27 of all such changes by the public and interested stakeholders. An additional public
28 comment period of at least 30 days should have been provided in accordance with the

1 requirements of the regulations to the Clean Water Act. Specifically, the regulations
2 require a 30-day notice and publication period for hearings on NPDES Permits, but such
3 requirements was violated as substantial revisions were made to the Permit less than ten
4 (10) days and four (4) days prior to the hearing, with even more changes and revisions
5 having been made both in writing and orally on the day of the hearing itself.

6 98. Additional evidence could have and would have been presented by the
7 Petitioners on the proposed modifications, report references and the numerous changes to
8 the Permit, had Petitioners been given sufficient time and opportunity to review the
9 changes and proposed references, and had Respondent Regional Board complied with the
10 regulations to the Clean Water Act and provided the requisite 30-day notice. Respondent
11 Regional Board improperly denied Petitioners and other interested parties a fair hearing in
12 its consideration of the Permit, as the last minute changes to the proposed Permit were
13 significant in both number and scope. The Permit was required to have been re-circulated
14 for additional public review and comment, and the Respondent Regional Board's failure
15 to re-circulate the Permit is a violation of the hearing requirements under the regulations
16 to the Act, and a violation of due process of law.

17 J. The Regional Board Failed to Comply with CEQA When Adopting
18 the Permit.

19 99. In adopting the Permit, the Regional Board failed to comply with CEQA.
20 Although the Permit discusses an exemption from CEQA's Chapter 3 requirements for
21 Environmental Impact Reporting ("EIR") under Water Code § 13389, this exemption is
22 only a partial exemption. The remaining non-exempted parts of CEQA require all
23 Regional Boards to consider the environmental consequences of their permitting actions,
24 and to explore feasible alternatives and mitigation measures prior to the adoption of waste
25 discharge requirements. See e.g., Pub. Res. Code § 21002; 23 C.C.R. §3733 (which
26 states that the exemption in Section 13389 "does not apply to the policy provisions of
27 Chapter 1 of CEQA").

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1 100. The Permit also imposes new CEQA requirements on Petitioners, including
2 requiring them to revise their environmental review processes to include requirements for
3 evaluation of water quality effects and identification of appropriate mitigation measures.

4 101. The Legislature, by enacting CEQA, has placed certain requirements on the
5 petitioners and others when undertaking approval of a discretionary project. The Permit
6 results in a de facto amendment of the CEQA requirements by requiring the petitioners to,
7 among other things, modify their “development project approval processes” It is beyond
8 the authority of the Regional Board and the State Board to require Petitioners to amend
9 their General Plan and impose new CEQA requirements.

10 102. The Permit was issued by the Regional Board without conducting
11 appropriate analysis as to whether the Permit will have a significant impact on the
12 environment. CEQA requires that such an analysis be performed prior to the issuance of
13 the Permit by the Regional Board, and approval of the Permit by the State Board. CEQA
14 applies to “discretionary projects proposed to be carried out or approved by public
15 agencies. . . .” Cal. Pub. Res. Code § 21080(a). CEQA applies generally to the “the
16 issuance of permits.” Id. § 21006. The issuance of the Permit was a “project” as that term
17 is defined for purposes of CEQA, obligating the Regional Board to, without limitation,
18 prepare an initial study and either a Negative Declaration or an Environmental Impact
19 Report, none of which were done here.

20 103. The Permit also results in the federalization of CEQA. As the Permit may
21 be enforced in federal court pursuant to the Clean Water Act, the Permit’s CEQA terms
22 can also be enforced in the federal court, where a standard of review other than the one
23 contained in CEQA may be applied. The State Board and Regional Board are without
24 power to effect such a sweeping revision of land use processes of local government.

25 K. Other Grounds.

26 104. In addition to the foregoing, the coercive requirements in the NPDES Permit
27 that Petitioners adopt specific ordinances and regulate the activities of third parties violate
28 California and federal law, as well as the California and United States Constitutions.

1 105. The NPDES Permit also violates the constitutional prohibition of imposing
2 unfunded mandates on Petitioners, as set forth under Article XIII B, Section 6 of the
3 California Constitution, and the corresponding statutory prohibition on mandating the
4 construction of major waste water treatment facilities, such as will result from the
5 adoption of the NPDES Permit. (See, Gov. Code § 17516(c).)

6 106. The California Constitution limits the domain of each of the branches of our
7 government. (California Constitution, Article III, Section 3) The NPDES Permit violates
8 the separation of powers, as an arm of the Executive branch (the Regional Board and
9 State Board) has, in effect, amended a statute enacted by the Legislature. The Permit
10 therefore, violates California's separation of powers clause as the Respondents, do not
11 have the authority to prescribe requirements that exceed the statutory mandates
12 established by the Legislature.

13 107. The NPDES Permit contains numerous provisions that exceed the
14 Respondents' statutory authority to regulate discharges. Many of the Permit's provisions
15 regulate the general use of land, the hydrology of the landscape, on site and down stream
16 erosion, as well as other areas that are clearly ultra vires to the Respondents' statutory
17 authority. In general, the Permit places illegal restrictions on when, where and how
18 development can take place.

19 108. The NPDES Permit exceeds the standard for the issuance of waste discharge
20 requirements as set forth under Water Code §§13263 and 13241, as there are no findings
21 and no evidence that the requisite factors set forth in section 13241 were properly
22 considered, as required under section 13263 of the Water Code, and as there is no
23 indication that the water quality objectives that have been attempted to be met have been
24 "reasonably required" as set forth under section 13263.

25 109. The language under Part 2 of the Permit also inappropriately exposes
26 Permittees to unjustified enforcement actions and spurious third party lawsuits, as it
27 potentially holds Permittees responsible for the discharges of others "to" the MS4, and as
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1 it inappropriately holds the Permittees to a "strict liability" standard that is not supported
2 anywhere under State or federal law.

3 110. In addition to the foregoing, the Respondents failed to take into account
4 reasonably achievable water quality conditions, economic considerations and the need for
5 new housing as required, among other things, by Water Code §§ 13241 and 13263.

6 111. The Respondents also failed to provide for compliance in the NPDES
7 permit through the iterative BMP process, as required by the Clean Water Act and the
8 State Board's own orders.

9 112. Provisions of the NPDES Permit also violate the Clean Water Act and the
10 Porter-Cologne Water Quality Act (Water Code §§ 13000, et seq.) [the "Porter-Cologne
11 Act"] in that they are unlawfully prescriptive and fail to provide the flexibility required by
12 such statutes and the regulations promulgated thereunder.

13 113. Provisions of the NPDES Permit further violate the Clean Water Act and the
14 Porter-Cologne Act in that they impermissibly require Petitioners to duplicate and expand
15 state and federal programs for regulating discharges from industrial, commercial and
16 construction facilities.

17 114. Respondents have a clear and present duty to proceed in the manner
18 required by law and to obtain authority and jurisdiction under the Clean Water Act and
19 the Porter-Cologne Act through further regulatory direction from the State Board, to issue
20 NPDES permits, and to thereafter act in accordance with the regulations and other federal
21 and State law, and the United States and California Constitutions.

22 115. In taking the above actions, the Respondents abused their discretion, acted
23 contrary to law and in excess of their jurisdiction, and their decisions were not supported
24 by substantial evidence.

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V.
**FIRST CAUSE OF ACTION
AGAINST ALL RESPONDENTS
(WRIT OF MANDATE - CALIFORNIA WATER CODE)**

116. Petitioners re-allege and incorporate by reference each and every allegation contained in Paragraphs 115 and 126 through 174 of this Petition and Complaint.

117. Petitioners are subject to the terms and requirements of the NPDES Permit, and, thus, are parties who are beneficially interested in the subject of this Petition for Writ of Mandate.

118. The Porter-Cologne Act authorizes the Regional Board to adopt waste discharge requirements that reflect certain statutory factors, including, without limitation the beneficial uses to be protected, the water quality objectives reasonably required to protect such uses, reasonably achievable water quality, local factors affecting water quality, the need for housing, and economics. Water Code §§ 13263(a), 13241. The Regional Board failed to consider these all of the applicable statutory factors in the adoption of the NPDES Permit, and failed to include substantial evidence in the administrative record of any such consideration.

119. The NPDES Permit regulates urban runoff entering storm drains and water bodies throughout the County, during both wet and dry periods, and for all seasons of the year. There is no substantial evidence in the record that the Regional Board considered the beneficial uses of all the water bodies for which it set discharge requirements, or what water quality objectives were reasonably required to protect such uses, or all the factors affecting water quality in the region, or what water quality could be reasonably achieved in light of these factors, or the need to develop housing in the County, or the economic impacts of the vast majority of the Permit's provisions.

120. Additionally, the California Water Code prohibits the State Board or Regional Board from mandating the manner of compliance a permittee must utilize in order to achieve compliance with regional board discharge requirements. Cal. Water

1 Code § 13360(a). In contravention of the Section 13360(a) mandate, the Permit consists
2 of numerous specific directions on how the petitioners must implement the Permit. The
3 Permit's specific directions require very specific actions that petitioners must take in
4 order to comply with the Permit.

5 121. As alleged herein, Respondents have prejudicially abused their discretion
6 and contrary to applicable law and have failed to proceed in a manner required by law
7 and in excess of their jurisdiction, in that, among other things:

8 (a) Respondents acted contrary to law and, specifically, the requirements of the
9 Clean Water Act, the Porter-Cologne Act and the regulations thereunder;

10 (b) Respondents' findings in the NPDES Permit were not supported by
11 substantial evidence, and the requirements and conditions set forth in the NPDES Permit
12 are not supported by the findings;

13 (c) Respondents failed to comply with the requirements of Porter-Cologne Act,
14 and acted contrary to law, as alleged herein;

15 (d) Respondents acted contrary to the requirements of CEQA by failing to
16 comply with the requirements of CEQA and by adopting permit terms that are
17 inconsistent with and contrary to the process set forth by the California Legislature in its
18 adoption of CEQA, and in the regulations promulgated thereunder;

19 (e) Respondents' actions in adopting the NPDES Permit, and in modifying the
20 same, without providing Petitioners sufficient opportunity to review and comment on all
21 substantive changes prior to the adoption of the NPDES Permit, as required by law,
22 resulted in Petitioners being denied a full opportunity to review and comment on all such
23 changes;

24 (f) Respondents failed to comply with the requirements of the California
25 Administrative Procedure Act, and acted contrary to federal and state law, as described
26 herein; and

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1 (g) Respondents failed to comply with the requirements of the California
2 Constitution, Article XIII B, Section 6, and acted contrary to law as described herein by
3 violating Government Code § 17516(c).

4 122. In taking the above actions, the Respondents abused their discretion, acted
5 contrary to law and in excess of their jurisdiction, and their decisions were not supported
6 by substantial evidence.

7 123. For reasons set forth in this Petition, issuance of a writ of mandate will
8 result in the enforcement of an important right affecting the public interest and will confer
9 a significant benefit on the general public.

10 124. Petitioners herein have exhausted all administrative remedies available to
11 them and have no adequate legal remedy in the ordinary course of law other than the
12 issuance by this Court of a writ of mandate.

13 125. Petitioners herein further seek a stay of the implementation and enforcement
14 of the offending portions of the NPDES Permit, as well as preliminary and permanent
15 injunctions, pursuant to Water Code § 13361, as permanent damage and irreparable harm
16 may result from the implementation and enforcement of such provisions of the NPDES
17 Permit, and as significant costs and resources will be expended towards compliance with
18 such invalid provisions, and as Petitioners herein may be subject to unwarranted and
19 inappropriate citizen suits and enforcement actions under the Clean Water Act, and other
20 potential and unwarranted litigation, if such relief is not granted.

21
22 **VI.**

23 **SECOND CAUSE OF ACTION**

24 **FOR WRIT OF MANDATE PURSUANT TO CCP § 1094.5(b)**

25 126. Petitioners reallege and incorporate by reference each and every allegation
26 contained in Paragraphs 1 through 125 and 129 through 174 of this Petition and
27 Complaint.

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127. The December 13, 2001 decision and order of Respondent Regional Board is invalid under California Code of Civil Procedure § 1094.5(b). Specifically, the Respondents (i) proceeded in excess of their jurisdiction, (ii) denied Petitioners a fair hearing, (iii) and prejudicially abused their discretion in that the Regional Board failed to proceed in the manner required by law, its decision is not supported by legally adequate findings, and the findings adopted are not supported by substantial evidence.

128. Accordingly, Petitioners are entitled to an alternative and peremptory writ of mandate directing the Respondents to vacate and set aside the offending portions of its decision on Order No. 01-182, and to set a new hearing date for consideration of a revised NPDES Permit.

IX.
THIRD CAUSE OF ACTION

FOR WRIT OF MANDATE PURSUANT TO CCP § 1094.5(c)

129. Petitioners reallege and incorporate by reference each and every allegation contained in Paragraphs 1 through 128 of this Petition and Complaint and 134 through 174.

130. The California Code of Civil Procedure allows for review of the Regional Board's findings made in the NPDES Permit on the basis that they are not supported by "substantial evidence in light of the whole record." Cal. Code Civ. Proc. § 1094.5(c).

131. Because the issuance of the Permit is an adjudicatory function performed by the Regional Board, the Regional Board is required to adopt findings in its permits which are grounded upon a reasonable factual basis and are supported by precise and specific reasons founded on tangible record evidence.

132. The State Board's adoption of its findings in the NPDES Permit are without substantial support in the record, was contrary to law, an abuse of discretion, arbitrary and capricious and supported by the record.

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1 133. In taking the above actions, the Regional Board issued these findings, and
2 the State Board adopted these findings, without any evidence in the record support
3 thereof. Respondents abused their discretion, acted contrary to law, and their decisions
4 were not supported by substantial evidence.

5
6 **VII.**

7 **FOURTH CAUSE OF ACTION**

8 **FOR WRIT OF MANDATE PURSUANT TO CCP § 1085**

9 134. Petitioners reallege and incorporate by reference each and every allegation
10 contained in Paragraphs 1 through 133 and 143 through 174 of this Petition and
11 Complaint.

12 135. Respondents have not proceeded in the manner required by law in that, and
13 have acted in excess of their jurisdiction in that, among other things:

14 (a) Respondents failed to comply with the requirements of the Clean Water Act
15 and regulations hereunder, and acted contrary to law as described herein in developing,
16 processing and adopting the NPDES Permit;

17 (b) Respondents' findings in the NPDES Permit are not supported by
18 substantial evidence, and the requirements and conditions set forth in the NPDES Permit
19 are not supported by the findings;

20 (d) Respondents failed to comply with the requirements of Porter-Cologne Act,
21 and acted contrary to law, as described herein;

22 (e) Respondents acted contrary to the requirements of CEQA by failing to
23 comply with the requirements of CEQA and by adopting Permit terms that are
24 inconsistent with and contrary to the process set forth by the California Legislature in its
25 adoption of CEQA, and in the promulgation of regulations thereunder;

26 (f) Respondents' actions in adopting the NPDES Permit, and in modifying the
27 same, without providing Petitioners sufficient opportunity to review and comment on all
28 substantive changes prior to the adoption of the NPDES Permit, as required by law,

1 resulted in Petitioners being denied a full opportunity to review and comment on all such
2 changes, and being denied due process of law, in violation of the United States and
3 California Constitutions;

4 (g) Respondents failed to comply with the requirements of the APA, and acted
5 contrary to law as alleged herein; and

6 (h) Respondents failed to comply with the requirements of the California
7 Constitution, Article XIII B, Section 6, and acted contrary to law as described herein,
8 including violating Government Code § 17516(c).

9 136. Respondents had a clear and present duty to provide a fair hearing, to
10 comply with the Clean Water Act, the Porter-Cologne Act, CEQA, the APA, Government
11 Code §§11340, et seq., and other state and federal laws and regulations, as well as to act
12 in accordance with the United States and California Constitutions, and should set aside
13 the offending portions of the NPDES Permit which were issued in excess of their
14 authority and jurisdiction and in violation of the procedures and processes required by
15 law.

16 137. Respondents' actions, as described herein, were arbitrary, capricious,
17 contrary to law, and in excess of Respondents' jurisdiction and lacked evidentiary support.

18 138. Petitioners are entitled to an alternative and peremptory writ of mandate
19 directing the Regional Board (a) to vacate and set aside those portions of its decision on
20 Order No. 01-182 in violation of California and federal law .

21 139. For the reasons set forth herein, the issuance of a writ of mandate will result
22 in the enforcement of an important right affecting the public interest and will confer a
23 significant benefit under the general public. Respondents have the present ability to set
24 aside those provisions of the NPDES Permit which violate applicable law.

25 140. Petitioners herein have exhausted all administrative remedies available,
26 have no further administrative remedy, and have no adequate legal remedy in the ordinary
27 course of law other than the issuance by this Court of a writ of mandate.

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1 146. The effects of the NPDES Permit, or the provision of municipal services,
2 and the exercise of local governments land use authority have not been analyzed by
3 Respondents.

4 147. Petitioners and their, residents, citizens, property owners, and taxpayers will
5 be adversely affected by the changes to environment caused by the Permit.

6 148. The NPDES Permit far exceeds the requirements of the Clean Water Act
7 and the Porter-Cologne Act and includes numerous provisions that are not federal
8 mandates. The limited exception the Regional Board and the State Board relied on to
9 disregard CEQA is inapplicable to the full extent the NPDES Permit regulates water
10 quality in excess of federal Clean Water Act mandate.

11 149. The Regional Board and the State Board erroneously interpreted Section
12 13389 of the California Water Code to excuse the NPDES Permit, and the massive land
13 use planning exercise it entails, from CEQA. Section 13389, however, only exempts
14 from CEQA permit provisions required to meet the non-discretionary requirements of the
15 federal Clean Water Act. Water Code § 13374.

16 150. In taking the above actions, the Respondents abused their discretion, acted
17 contrary to law and in excess of their jurisdiction, and their decisions were not supported
18 by substantial evidence.

19 151. Accordingly, Petitioners are entitled to an alternative and preemptory writ of
20 mandate directing the Regional Board (a) to vacate and set aside its decision on Order No.
21 01-182, and (b) to set a hearing and act on the application, and (c) complete the
22 processing.

23 152. The Petitioners have no adequate remedy at law because only a preemptory
24 writ of mandate commanding the Regional Board to set aside its approval of the Permit
25 and prohibiting the Regional Board from re-approving the Permit unless it first prepares
26 and considers an adequate EIR in full compliance with CEQA and adopts all feasible
27 mitigation measures for the impacts identified by that EIR, and unless the Regional Board
28 first ensures the enforcement of those measures through an adequate mitigation

1 monitoring program and conditions of approval, will ensure full disclosure of the adverse
2 impacts of the Permit before it is approved and ensure adequate mitigation of its adverse,
3 environmental impacts.

4 153. The Petitioners have incurred attorneys' fees in bringing this action, and
5 will continue to incur fees in prosecuting it, in an amount not yet known. This action will
6 benefit all those who work, live and recreate in the region of the County that will be
7 affected by the impacts of the NPDES Permit and all of the cities in that region.

8
9 **X.**

10 **SIXTH CAUSE OF ACTION**

11 **(WRIT OF MANDATE - CLEAN WATER ACT)**

12 154. Petitioners reallege and incorporate by reference each and every allegation
13 contained in Paragraphs 1 through 153 and 163 through 174 of this Petition and
14 Complaint.

15 155. The NPDES Permit purports to regulate discharges into things other than
16 navigable waters, including without limitation street gutters, curbs, and municipal streets.
17 Discharges to areas clearly are not "waters of the United States" and are beyond the reach
18 of a NPDES permit. The NPDES Permit regulates urban runoff regardless of the source
19 and how it enters the public storm drain. Whether water running off from a Permittee's
20 jurisdiction came from a state or federal facility, farm, ranch or other excluded source, or
21 entered navigable waters as overland flow, the Permit unlawfully imposes responsibility
22 for these flows on the Petitioners.

23 156. By defining "water of the United States" to include such things as street
24 gutters, curbs and municipal streets, the Permit violates the federal Clean Water Act. In
25 that the NPDES Permit encompasses urban runoff that is not from a point source, the
26 Permit violates Clean Water Act §§ 502 and 508.

27 157. In violation of Section 402(p), the NPDES Permit also purports to vest the
28 Regional Board with the authority to order Petitioners to implement ever more onerous

1 BMPs, regardless of whether those additional BMPs exceed the Maximum Extent
2 Practicable standard.

3 158. In violation of Section 402(p), the NPDES Permit may be enforced against
4 Petitioners even if they are actively and in good faith implementing BMPs consistent with
5 the Maximum Extent Practicable standard.

6 159. In addition, numerous other provisions of the NPDES Permit exceed the
7 MEP standard, including, without limitation, inspection provisions with no corresponding
8 water quality benefit; required structural controls not expected to improve water quality
9 (if at all) for decades; infeasible construction standards regarding sediment retention and
10 grading; infeasible requirements to mimic natural hydrology, prevent erosion and control
11 runoff volumes; and BMP requirements for a sweeping array of land uses including home
12 gardening.

13 160. The NPDES Permit also unlawfully regulates various matters that are not
14 properly the subject of a NPDES permit. The NPDES Permit regulates the potential for
15 water to cause downstream scour and erosion, after the water enters a water body and
16 regardless of what pollutants may be in the water. The NPDES Permit regulates the
17 hydrologic cycle, runoff volumes, and the shape of the natural hydrograph (i.e., how land
18 responds to rainfall).

19 161. In taking the above actions, the Respondents abused their discretion, acted
20 contrary to law and in excess of their jurisdiction, and their decisions were not supported
21 by substantial evidence.

22
23 **XI.**

24 **SEVENTH CAUSE OF ACTION**

25 **DECLARATORY RELIEF**

26 162. Petitioners re-allege and incorporate by reference each and every allegation
27 contained in Paragraphs 1 through 161 and 170 through 174 of this Petition and
28 Complaint.

1 163. There is an actual, present and existing controversy between Petitioners, on
2 the one hand, and the Respondents, on the other hand.

3 164. Among other things, an actual controversy has arisen relating to whether
4 compliance with the iterative process constitutes compliance with the Permit. Petitioners
5 seek a declaration that compliance with the iterative process described in Part 2.3 of the
6 Permit constitutes compliance with the Permit, as publicly stated by Regional Board
7 representatives and the decisions of the State Board. If Respondents dispute that
8 compliance with the "iterative process" described in Part 2.3 constitutes compliance with
9 the Permit, then Respondents have prejudicially abused their discretion and acted without
10 or in excess of their jurisdiction and in violation of law, in the following manner:

11 (a) the Permit does not clearly set forth a mechanism by which Permittees can
12 comply with the Permit; and

13 (b) Part 2, as written, appears to render compliance impossible.

14 165. Furthermore, Petitioners contend, among other things, that:

15 (a) The Respondents failed to comply with the APA and related
16 provisions in adopting the NPDES Permit and the policies and regulations underlying the
17 NPDES Permit;

18 (b) The Regional Board's adoption of Discharge Prohibitions in Part 1
19 of the NPDES Permit and Receiving Water Limitations in Part 2 of the Permit, which fail
20 to include the "Safe Harbor" provision and protections, as permitted by federal and state
21 law, and as specifically provided in the 1990 and 1996 Permits, and approved by the State
22 Board, violated the Clean Water Act;

23 (c) The Regional Board failed to comply with CEQA and 23
24 C.C.R. §3733) when adopting the NPDES Permit;

25 (d) The Respondents re-characterized the "Maximum Extent
26 Practicable" standard ("MEP") in the NPDES Permit in a manner which is contrary to
27 Section 402 of the CWA (33 U.S.C. §§ 1342);

28 ///

1 (e) The Regional Board exceeded its authority by mandating the manner
2 of compliance by Permittees in the Permit contrary to Section 13360 of the Water Code;

3 (f) The Regional Board could not require the Permittees to inspect
4 industrial/commercial sites, many of which are covered by state-issued permits, as
5 prescribed in Part 4.C.2.b., 4.E.2.b., and 4.E.3 of the NPDES Permit; and

6 (g) The Regional Board had no jurisdiction to attempt in the NPDES
7 Permit to dictate and control the Permittees' local land use powers and authority;

8 (h) The Regional Board failed to comply with the federal Paperwork
9 Reduction Act (44 U.S.C. § 3501, et seq.) and Government Code § 11346.3 in imposing
10 new reporting obligations;

11 (i) Respondents' approval of the NPDES Permit violated the U.S. and
12 California Constitutions, and state and federal law as alleged herein;

13 (j) The Regional Board had no authority to delegate its investigation
14 and enforcement obligations in Part 4.C. of the Permit; and

15 (k) The Respondents failed to obtain peer review of their scientific
16 findings in accordance with Health & Safety Code § 57004.

17 166. The Respondents' departure from the requirements of law, as alleged herein,
18 manifests a policy of violating and ignoring these constitutional and statutory limitations
19 on their authority, which constitutes a fundamental misunderstanding of their legal duties.
20 The Respondents' error threatens the legal rights of Petitioners, independent of the
21 invalidity of the NPDES Permit.

22 167. Petitioners are informed and believe, and thereon allege, that the
23 Respondents deny each of the above contentions. An actual controversy exists between
24 Petitioners and the Respondents involving substantial questions pertaining to Petitioners'
25 rights and obligations, as affected by the NPDES Permit. Accordingly, declaratory relief
26 is appropriate and necessary to determine the extent of Petitioners' rights and obligations
27 with respect to the NPDES Permit and for the Court to issue a declaration determining
28 these issues.

1 168. To remedy the Respondents' continuing policy of violating or ignoring the
2 provisions of law as described above, Petitioners request a declaration of their rights and
3 the duties of the Respondents, including, among other things, a declaration that the Permit
4 violates:

5 a. California Constitution article III § 3, since the Permit imposes
6 unlawful restrictions on cities that may be imposed only through legislation, an act
7 exclusively within the province of the Legislature;

8 b. Clean Water Act § 101(b), as the Permit unlawfully directs the
9 exercise of local land use authority and unlawfully imposes land use regulations;

10 c. Clean Water Act § 402(p), as the Permit unlawfully requires
11 Petitioners to control storm water in excess of what is the Maximum Extent Practicable;

12 d. Clean Water Act §§ 402 and 502, as the Permit unlawfully regulates
13 the scour and erosive effects of water, which is in excess of the Clean Water Act's
14 NPDES permitting scheme;

15 e. Clean Water Act §§ 402 and 502, as the Permit unlawfully prohibits
16 the discharge of storm water into things not a water of the United States and unlawfully
17 defines jurisdictional waters to include such things as curbs and gutters;

18 f. Clean Water Act §§ 502, 508, as the Permit does not distinguish
19 urban runoff, on the one hand, from agricultural storm water, irrigation return flows, and
20 overland sheet flow, on the other;

21 g. Applicable USEPA Guidances regarding the appropriate scope of the
22 term "redevelopment";

23 h. California Water Code §§ 13241 and 13263(a), as the Permit was
24 unlawfully adopted and approved without substantial evidence to support legally adequate
25 consideration of various statutory factors relating to beneficial uses, water quality
26 objectives, reasonably achievable water quality, all factors affecting water quality
27 (including wet weather), housing and economics;

28 ///

1 i. California Water Code § 13360, as the Permit unlawfully mandates
2 the Petitioners' manner of compliance with the Permit;

3 j. California Public Resources Code § 21000 et seq. ("CEQA"), as
4 Permit provision in excess of federal mandates were adopted by the Regional Board and
5 approved by the State Board without conducting any environmental analysis pursuant to
6 CEQA;

7 k. California Code of Civil Procedure § 1094.5(c), as the Permit
8 contains findings that are not supported by substantial evidence;

9 l. The California Administrative Procedure Act, as the Permit was
10 unlawfully adopted as an underground regulation;

11 m. The vested rights of any person or entity to the extent the Permit
12 requires a copermitttee revisit a prior discretionary decision and, after rights have vested,
13 places new restrictions on a person or entity; and

14 n. Other provisions of state and federal law, as alleged herein.

15 169. Such a declaration is a necessary and proper exercise of the Court's power
16 at this time under the circumstances, in order to prevent further actions by the State Board
17 in violation of Law.

18
19 **XI.**

20 **EIGHTH CAUSE OF ACTION**

21 **FOR INJUNCTIVE RELIEF**

22 170. Petitioners reallege and incorporate by reference each and every allegation
23 contained in Paragraphs 1 through 173 of this Petition and Complaint.

24 171. California Code of Civil Procedure § 1094.5 authorizes this Court to issue a
25 stay of the operation of an administrative order or decision pending judgment of the
26 Court, if the Court determines that the stay is in the interest of the public, as it is in this
27 case. Further, California Code of Civil Procedure §§ 526 and 527 and California Water

28 ///

1 Code § 13361, authorize this Court to issue a temporary restraining order, preliminary
2 injunction and/or a permanent injunction under the present circumstances

3 172. Respondents will continue to proceed in a manner that will force Petitioners
4 to suffer great and irreparable harm. Without modification of the NPDES Permit,
5 Petitioners will be required to choose between (i) complying with an unlawful Permit at
6 tremendous economic, social and political cost, and (ii) not complying with the unlawful
7 provisions of the Permit and risk enforcement action by the Regional Board and citizen-
8 suit litigation by third parties. The requirements and prohibitions will result in a
9 significant loss of municipal services and economic activity, and disrupt homebuilding
10 and construction in Los Angeles County. In addition, the Regional Board's subjective
11 interpretations of the law will force Petitioners to accept the burden of complying with
12 standards that are exceedingly onerous because they are vague and unpredictable in their
13 specific application to any given issue.

14 173. Petitioners cannot be fully compensated in damages for these harms, and
15 have no adequate remedy at law. If the Regional Board does not modify the NPDES
16 Permit, Petitioners will be permanently required to comply with the illegal terms of the
17 NPDES Permit and will suffer the other harm set forth above.

18 174. Petitioners are entitled to a preliminary injunction and a permanent
19 injunction commanding the Regional Board to:

20 a. Suspend all activities related to implementation or enforcement of
21 the offending portions of the NPDES Permit, as further alleged herein, until the
22 Respondents have taken all actions necessary to bring any amended Permit in compliance
23 with the applicable law;

24 b. Refrain from approving future NPDES permits which do not comply
25 with the law, as set forth above;

26 c. Refrain specifically from approving future NPDES permits which
27 allow for enforcement action by a regional board even if a permittee is engaged in an
28 good faith effort to improve BMPs; and

1 d. Refrain from approving future NPDES permits which allow for third
2 party enforcement against a permittee even if the permittee if engaged in a good faith
3 effort to improve BMPs.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Petitioners and Plaintiffs, pray for judgment, as follows:

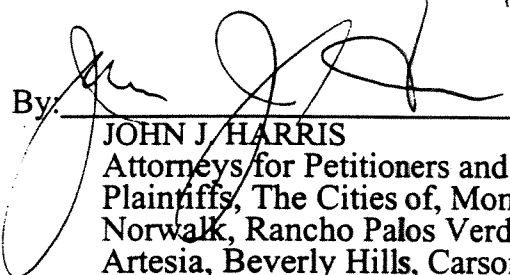
- 6 1. For a writ of mandate:
 - 7 a. Directing State Board to set aside its approval (in part) of the Permit,
 - 8 b. Compelling the State Board and Regional Board to conform any
9 future revisions of the Permit with the California Constitution, state
10 and federal law, and mandating these agencies take all actions to
11 comply with these legal requirements as alleged by each individual
12 Petitioner;
 - 13 c. Compelling the State Board and Regional Board to conduct any
14 future proceedings regarding re-issuance of the Permit only pursuant
15 to the complete administrative record;
- 16 2. For the judicial determination and declaration, requested herein;
- 17 3. For a temporary restraining order, and preliminary and permanent
18 injunctions prohibiting the State Board from approving or enforcing a
19 NPDES permit that violates the law, and requiring the State Board and
20 Regional Board meet with Petitioners prior to the re-issuance of the Permit;
- 21 4. For this Court to maintain continuing jurisdiction over the State Board's and
22 the Regional Board's proceedings related to modification or re-issuance of
23 the NPDES permit;
- 24 5. For costs and fees incidental to procuring the relief sought in this
25 Complaint, including but not limited to attorney's fees under Code of Civil
26 Procedure § 1021.5;
- 27 6. Government Code Section 800, Code of Civil Procedure § 1036, and
28 42 U.S.C. Section 1988; and

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7. For such other and further relief as the Court may deem just and proper.

DATED: January 17, 2003

RICHARDS, WATSON & GERSHON
A Professional Corporation
JOHN J. HARRIS
EVAN J. MCGINLEY

By: 

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PROOF OF SERVICE

I, Lillian Dominguez declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071. On January 17, 2003, I served the within documents:

NOTICE OF COMMENCEMENT OF ACTION

- by causing facsimile transmission of the document(s) listed above from (213) 626-0078 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice for collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in this affidavit.
- by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a n agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by causing personal delivery by First Legal Support Services, 1511 West Beverly Boulevard, Los Angeles, California 90026 of the document(s) listed above to the person(s) at the address(es) set forth below.

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 17, 2003.


Lillian Dominguez

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10 **BEFORE THE STATE WATER RESOURCES**
 11 **CONTROL BOARD**

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13 IN THE MATTER OF THE PETITION OF
 14 THE CITY OF MISSION VIEJO FOR
 REVIEW OF THE FEBRUARY 13, 2002
 15 ACTION BY THE CALIFORNIA
 REGIONAL WATER QUALITY CONTROL
 16 BOARD, SAN DIEGO REGION, IN
 ADOPTING ORDER NO. R9-2002-0001,
 17 NPDES PERMIT NO CAS0108740, WASTE
 DISCHARGE REQUIREMENTS FOR
 18 DISCHARGES OF URBAN RUNOFF FROM
 THE MUNICIPAL SEPARATE STORM
 19 SEWER SYSTEMS (MS4s) DRAINING THE
 WATERSHED OF THE COUNTY OF
 20 ORANGE, THE INCORPORATED CITIES
 OF ORANGE COUNTY, AND THE
 21 ORANGE COUNTY FLOOD CONTROL
 DISTRICT WITHIN THE SAN DIEGO
 22 REGION

Case No.

PETITIONER THE CITY OF MISSION
 VIEJO'S PRELIMINARY MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT OF PETITION FOR REVIEW

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I.

INTRODUCTION

With the new Municipal NPDES Permit for the cities of Orange County within the San Diego Region, the Regional Quality Control Board (the "RWQCB") has crossed the line from its role as the regional agency responsible for protecting the waters of the State in partnership with local agencies like the Petitioner, and has now arrogated to itself the role of a quasi-super regional planning agency which, without any oversight, review or limitation, and seeks to specifically dictate the manner in which property in Orange County will be developed and re-developed, what laws Orange County cities must adopt, how the Cities and their citizens will devote their financial resources, and to unilaterally deputize the Cities to carry out the RWQCB's own law enforcement functions. Neither the Clean Water Act nor the Porter-Cologne Act, nor any other provision of state or federal law authorize such a broad-reaching role for the RWQCB. Petitioner, the City of Mission Viejo ("Petitioner"), along with Orange County and the other cities which are co-permittees under the new Municipal NPDES Permit, are fully committed to the goal of clean beaches, rivers and streams and understand their role and that of the Municipal NPDES in promptly achieving that goal. That goal will not be accomplished by the unilateral actions of a single State agency, acting without regard to the limited regulatory capabilities and financial resources of local agencies, such as Petitioner, nor will our common objectives be achieved by unilateral imposition of costly and intrusive programs which have not undergone any realistic scientific review. For these reasons, the City of Mission Viejo finds itself in the regrettable position of being compelled to file this petition seeking to modify the Municipal NPDES Permit for the cities of South Orange County adopted by the San Diego RWQCB on February 15, 2002.

As the record before the Regional Board reflected, cost estimates for the storm water programs within the watershed of South Orange County will be substantial. The days are gone when governments could simply throw money at a problem and hope that it would go away. At a time of fiscal limitations at the federal, state and local level, it is critical to ensure that these limited funds are spent in a meaningful and cost-effective manner. Resolving storm water

1 pollution in the watershed of South Orange County will require a true partnership on the state,
 2 federal and local levels. Traditional governmental "command and control" approaches to this
 3 problem are unlikely to achieve the consensus necessary to actually make them work.

4 During the prior permit terms, the Petitioner, along with the County of Orange and
 5 other permittees, developed the Drainage Area Management Plan ("DAMP"), an evolving,
 6 iterative storm water compliance program comprised of proven and cost-effective BMPs that are
 7 applicable to all areas countywide. The DAMP was approved by the Regional Board and since
 8 then, has guided the storm water management program for south Orange County.

9 The discussions regarding the San Diego Region's Order R9-2002-0001, NPDES
 10 Permit No. CAS0108740, entitled "Waste Discharge Requirement for Discharges of Urban
 11 Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of
 12 the County of Orange, the Incorporated Cities of Orange County and the Orange County Flood
 13 control District Within the San Diego Region" (the "Permit"), dated February 13, 2002, did not
 14 achieve a consensus between the regulators and the regulated community, nor was a genuine
 15 partnership created to resolve the storm water pollution. The storm water management program
 16 set forth in the Permit takes a fundamentally different approach to storm water management.
 17 Unlike the DAMP, the Permit is (1) prescriptive in nature; (2) focuses on addressing all urban
 18 land uses that may potentially affect receiving waters; (3) does not prioritize waterbodies for
 19 corrective action, but instead requires simultaneous action even for waterbodies without listed
 20 impairments; and is (4) focused on land use controls, rather than a watershed-level approach with
 21 regional BMPs. This default command and control strategy of the Permit has compelled the
 22 Petitioner to file this petition to address several of the Permit's flaws and seek the State Board's
 23 modification of the Permit.

24 The City of Mission Viejo, along with the County of Orange, the Orange County
 25 Flood Control District and the other cities that have filed petitions, are not trying to shirk their
 26 role in resolving regional pollution issues resulting from storm water. Instead, these local
 27 government entities seek modifications of the Permit so that these efforts genuinely represent a
 28 partnership, with the Regional Board and the State Board participating in the effort, rather than

1 merely ordering results without full regard of how these common objectives can be achieved, or a
2 full scientific analysis of the efficacy of the programs.

3 While directing the Permittees to undertake a whole wide range of new storm
4 water responsibilities, the Regional Board has been consciously ambiguous in the Permit about
5 ensuring that the Permittees have the same protections provided under the Clean Water Act that
6 any other NPDES permittee has, that is, the "Safe Harbor" of any NPDES permit, providing that,
7 as long as the permittee complies with the permit and is implementing the programs required by
8 the permit, the permittee cannot be sued just because those programs do not immediately achieve
9 the clean, uncontaminated water conditions to which everyone aspires.

10 In this Permit, the San Diego Board, despite the clear restrictions of the Clean
11 Water Act and the Porter-Cologne Act, attempts to dictate the land use and development
12 planning for the entire South Orange County region without any statutory basis for doing so.

13 The Regional Board has also involuntarily deputized cities as enforcement agents
14 on responsibilities expressly delegated to the State Board and the Regional Board.

15 The process by which the Regional Board developed the Permit, was legally
16 flawed. Neither the Clean Water Act nor the Porter-Cologne Act give either the Regional Board
17 or the State Board unfettered discretion to develop policy and implement those policies through
18 NPDES permits and waste discharge requirements. Under California law and federal law, the
19 appropriate procedural rulemaking steps must first be taken including compliance with the
20 Administrative Procedure Act. The San Diego Regional Board, as well as other regional boards,
21 have developed virtually identical municipal NPDES permits. The State Board and the Regional
22 Board are unabashedly establishing statewide policy. Neither have complied with the rulemaking
23 provisions of the California Administrative Procedure Act. Neither the State Board nor the
24 Regional Board have the capability of developing and implementing policy through the
25 regulatory process without complying with the appropriate requirements of the Administrative
26 Procedure Act.

27 Neither the Porter-Cologne Act nor the Clean Water Act give a Regional Board
28 the authority to specifically direct the means of compliance with an NPDES permit. The Permit

1 here is replete to very specific dictates as to how the Permittees will have to try to achieve the
2 objectives of the Permit.

3 While, on one hand, the Regional Board has created a whole range of new
4 responsibilities for the Permittee cities, it is, at the same time, attempting to unload its own
5 non-delegable responsibilities to inspect and ensure compliance by other dischargers which it
6 directly regulates through NPDES permits. Neither the Clean Water Act nor the Porter-Cologne
7 Act, nor any memorandum of understanding with the United States Environmental Protection
8 Agency, allow the State Board or the Regional Board to delegate their enforcement and
9 compliance responsibilities to local entities.

10 Solving the region's storm water problems will necessarily require a true
11 partnership between the federal government, the State and Regional Boards, the permittees, as
12 well as the stakeholders in the process including environmental groups and the regulated
13 community such as developers of large and small businesses, and the districts and governmental
14 entities that operate sanitary sewers and other NPDES permitted dischargers. With this Permit,
15 the Regional Board has attempted to transfer the entire responsibility on local governments. That
16 approach to resolving the region's storm water problems will not work. For that reason, the
17 Petitioner is asking the State Board to modify the provisions of the Permit.

18 Accordingly, the Petitioner asks that the State Board review the following actions
19 by the Regional Board in adopting the Permit:

20 (a) The Regional Board's failure to comply with the California Administrative
21 Procedure Act ("APA") (Cal. Gov't Code §§ 11340) and related provisions, in adopting the
22 Permit and policies and regulations underlying the Permit;

23 (b) The Regional Board's adoption of Discharge Prohibitions in Part 1 of the
24 Permit and Receiving Water Limitations in Part 2 of the Permit which fail to include the "Safe
25 Harbor" provision and protections, as permitted by federal and state law, and approved by the
26 State Board;

27 ///

1 ✓(c) The Regional Board's failure to comply with the California Environmental
2 Quality Act ("CEQA") (Cal. Pub. Res. Code §§ 2100 et seq. and 23 C.C.R. §3733) when
3 adopting the Permit;

4 ✓(d) The Regional Board's re-characterization in the Permit of the "Maximum
5 Extent Practicable" standard ("MEP") in a manner which is contrary to Section 402 of the CWA
6 (33 U.S.C. §§ 1342);

7 ✓(e) The Regional Board exceeding its authority by mandating the manner of
8 compliance by Permittees in the Permit contrary to Section 13360 of the Water Code;

9 ✓(f) The Regional Board's requirement that the Permittees inspect
10 industrial/commercial sites, many of which are covered by state-issued permits, in Part F.2.g,
11 F.3.b.(4), F.3.b.(5) and F.3.b.(6), and 4.E.3 of the Permit;

12 ✓(g) The Regional Board's attempt in the Permit to dictate and control the
13 Permittees' local land use powers and authority;

14 ✓(h) The Regional Board's unauthorized delegation of its investigation and
15 enforcement obligations in Part F.3.b.(7) of the Permit;

16 ✓(i) The Regional Board's failure to comply with the federal Paperwork
17 Reduction Act (44 U.S.C. § 3501, et seq.) and Government Code § 11346.3 in imposing new
18 reporting obligations;

19 ✓(j) The Regional Board's failure to obtain peer review of its scientific findings
20 in accordance with Health & Safety Code § 57004; and

21 ✓(k) The Regional Board has exceeded its authority in other areas of the Permit.

22 II. PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

23 ✓ The Permit was adopted by the Regional Board at its meeting on February 13,
24 2002, both as an NPDES permit under authority of Section 402 of the Clean Water Act (42
25 U.S.C. § 1342), and as Waste Discharge Requirements ("WDR") under Water Code § 13263.

26 ✓ In reviewing a Regional Board action, the State Board is not necessarily subject to
27 the same standard of review as the courts. (See, In the Matter of the Petition of Exxon Company,
28 U.S.A., et al., Order No. WO 85-7, where the State Board identified that in reviewing an action

1 of an administrative agency, there are two standards of review generally used by the courts; the
 2 substantial evidence test or the independent judgment rule.) Under Water Code § 13320(b), "the
 3 State Board shall consider both the Regional Board record and any other relevant evidence which
 4 it wishes in reviewing the order." If the State Board decides the Regional Board action is
 5 "inappropriate or improper" the State Board may remand or reverse the Regional Board, or take
 6 the appropriate action itself. However, any findings made by an administrative agency in support
 7 of an action must be based on substantial evidence in the record. (See, Topanga Association for a
 8 Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506)

9 Although Petitioner agrees with and incorporate the arguments made by other
 10 petitioners by reference, we have not duplicated all of those arguments here.

11 Petitioner believes that, upon thorough review of the administrative record, the
 12 State Board will determine that the Regional Board's action was not supported by substantial
 13 evidence in the record and should be remanded to the Regional Board.

14 **III. THE PERMIT WAS ENACTED WITHOUT COMPLIANCE WITH THE**
 15 **ADMINISTRATIVE PROCEDURES ACT**

16 In adopting the Permit, the Regional Board failed to comply with the California
 17 Administrative Procedure Act (California Government Code §§ 11340 et seq.) ("APA").

18 One of the most problematic issues confronted by the Petitioner during the Permit process was
 19 the lack of any established, well-defined written policies, guidelines or regulations by the State
 20 Board setting forth the specific elements that must be included in a municipal storm water permit
 21 issued by the Regional Board. Although the State Board has adopted very general regulations for
 22 the issuance of waste discharge requirements in 23 C.C.R. §§ 2200, et seq., those regulations do
 23 not directly address the specific components of a municipal stormwater NPDES permit.

24 Furthermore, while USEPA's regulations contained in 40 CFR § 122.26 address the requirements
 25 for a permit application, those regulations do not set forth very specific requirements for the
 26 contents of a municipal stormwater NPDES permit. (See, for example, 40 CFR § 122.41)
 27 Therefore, the Permit has been developed without compliance with the APA.
 28

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1 ✓ An administrative agency cannot engage in rulemaking, including interpreting and
2 implementing a statute, through informal procedures. City of San Marcos v. California Highway
3 Com. (1976) 60 Cal. App. 3d 383, 403-410.

4 ✓ The standards, objectives and guidelines which dictate the content of waste
5 discharge requirements have to be formally adopted in accordance with the APA. (Government
6 Code §11352(b).) California law does not permit either the State Board or any of the Regional
7 Water Quality Control Boards to develop and impose requirements of general application
8 unilaterally. Like any other state agency, the Regional Board is required to first formally
9 establish its objectives, guidelines and requirements through formal rulemaking in compliance
10 with the APA. (Government Code §11340.5(a).)

11 ✓ The principle underlying the APA's requirements is that state agencies are not
12 allowed to adopt or enforce unwritten laws, regulations or policies. The APA prohibits state
13 agencies from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion,
14 bulletin, manual, instruction, order, standard of general application, or other rule which is a
15 "regulation", as defined in Government Code §11342.600, unless the rule has been adopted as a
16 formal regulation. Government Code §11340.5. Rulemaking is required whenever an
17 administrative agency creates a new rule for future application, as opposed to applying an
18 existing rule to existing facts.

19 ✓ A "regulation" is defined as "every rule, regulation, order, or standard of general
20 application ... adopted by a state agency to implement, interpret, or make specific the law
21 enforced or administered by it, or to govern its procedure, except one which relates only to the
22 internal management of the state agency." Government Code §11342.600.

23 ✓ A regulation subject to the APA thus has two principal identifying characteristics.
24 First, the agency must intend its rule to apply generally, rather than in a specific case. The rule
25 need not, however, apply universally; a rule applies generally so long as it declares how a certain
26 class of cases will be decided. Second, the rule must 'implement, interpret, or make specific the
27 law enforced or administered by [the agency], or . . . govern [the agency's] procedure. Tidewater
28 Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571. "House rules" of an agency,

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1 promulgated without public notice or an opportunity to be heard, or filing with the Secretary of
2 State, and publication in the California Code of Regulations, are prohibited.

3 Government Code §11353(b)(1) specifically provides that "any policy, plan, or
4 guidelines, or any revisions thereof, the State Water Resources Control Board has adopted or that
5 a court determines is subject to this part, after June 1, 1992, shall be submitted to the office [the
6 Office of Administrative Law]." Our courts have held, and the State Board has agreed, that
7 water quality control programs are subject to the APA. See, State Water Resources Control
8 Board v. Office of Administrative Law, 12 Cal.App.4th 697 (1993). In that case, the court
9 concluded that the regulatory matters contained in water quality control plans were actually
10 regulations. Those regulations are neither expressly nor impliedly exempt from the provisions of
11 the APA. On that basis, the Court invalidated a water quality control plan. (12 Cal.App.4th at
12 706) In doing so, the court held that "... if it looks like a regulation, reads like a regulation, and
13 acts like a regulation, it will be treated as a regulation whether or not the agency in question so
14 labeled it." (12 Cal.App.4th at 703) The various procedural steps followed for issuing waste
15 discharge requirements contained in 23 C.C.R. §2200, et seq. are not a substitute for this process.

16 Both the Regional Board as well as the State Board expressly acknowledged that
17 they are attempting to achieve statewide consistency with respect to municipal stormwater
18 permits. For example, other Regional Water Quality Control Boards have drafted NPDES
19 permits based on "model" permit language and requirements crafted by other regions. An
20 example of an attempt by the State Board to achieve statewide consistency and thus trigger the
21 rulemaking process is found in the November 9, 2001 Memorandum from the State Board's
22 Office of Chief Counsel to Executive Officer Dickerson (the "Memorandum"). On page 12 of
23 the Memorandum, Staff Counsel states, in regard to the Receiving Water Limitation language,
24 that the State Board has determined in WQ 99-05 "the suitable language for compliance with the
25 applicable MS4 permit requirements."

26 In order to achieve this across the board consistency among MS4 permits, the
27 Regional and State Boards are effectively engaging in rulemaking. However, no notice of
28 rulemaking was ever issued, nor was any regulatory package submitted to the OAL for approval.

1 Furthermore, the State Board did not institute rulemaking process with respect to the Receiving
2 Water Limitations included in the Permit.

3 The procedural requirements of the APA serve a very important function of
4 ensuring that the policy, cost and scientific issues raised by a regulatory initiative, such as this,
5 are fully considered. Before adopting a regulation, an agency is required by Government Code
6 § 11346.2 to consider and provide a full statement of the reasons for the regulation, which
7 includes a discussion of the specific purpose of the regulation, "an identification of each
8 technical, theoretical, and empirical study, report, or similar document, if any, upon which the
9 agency relies in proposing the adoption, amendment, or repeal of a regulation...", and "...the
10 alternatives to the regulation considered by the agency and the agency's reasons for rejecting
11 those alternatives...", among other things. That section also allows the Board to:

12 "... adopt regulations different from federal regulations contained in the Code of Federal
13 Regulations addressing the same issues upon a finding of one or more of the following
14 justifications:

- 15 (A) The differing state regulations are authorized by law.
- 16 (B) The cost of differing state regulations is justified by the benefit to human
17 health, public safety, public welfare, or the environment." Government Code § 11346.2.

18 In this case, the Board believes that it is only carrying out federal mandates.
19 Under such circumstances, Government Code § 11346.2(c) requires that

20 "(c) ... the agency shall comply fully with this chapter with respect to any
21 provisions in the regulation that the agency proposes to adopt or amend that are different from
22 the corresponding provisions of the federal regulation."

23 Most importantly, Government Code § 11346.5(a) requires the agency to make:

- 24 "(5) A determination as to whether the regulation imposes a mandate on local
25 agencies or school districts and, if so, whether the mandate requires state
26 reimbursement pursuant to Part 7 (commencing with Section 17500) of
27 Division 4.

- 28 (6) An estimate, prepared in accordance with instructions adopted by the

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1 Department of Finance, of the cost or savings to any state agency, the cost to any
 2 local agency or school district that is required to be reimbursed under Part 7
 3 (commencing with Section 17500) of Division 4, other nondiscretionary cost or
 4 savings imposed on local agencies, and the cost or savings in federal funding to
 5 the state. For purposes of this paragraph, "cost or savings" means additional
 6 costs or savings, both direct and indirect, that a public agency necessarily incurs in
 7 reasonable compliance with regulations."

8 Government Code § 11346.3(a) also requires the agency to "assess the potential
 9 for adverse economic impact on California business enterprises and individuals, avoiding the
 10 imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or
 11 compliance requirements." (See also, Government Code § 11346.3(c) and Government Code
 12 § 11346.9, 11347.3.

13 Government Code § 11346.3(a)(11) requires a determination of the impact of the
 14 regulation on housing costs.

15 In State Water Resources Control Board v. Office of Admin. Law (1993) 12 Cal.
 16 App. 4th 697, 706, a Regional Water Quality Control Board adopted, and the State Water
 17 Resources Control Board approved, amendments to the water quality control plan for the San
 18 Francisco Basin. The court held that regulatory matters contained in water quality control plans
 19 are, in fact, regulations and that such regulations are neither expressly nor impliedly exempt from
 20 the provisions of the APA. The Court held that the adoption and approval of the amendments
 21 were quasi-legislative actions immediately binding on property owners, municipalities and port
 22 authorities.

23 Also, as the Court held in Grier v. Kizer (1990) 219 Cal. App. 3d 422, 438:

24 "Further, because the Legislature adopted the APA to give interested persons the
 25 opportunity to provide input on the proposed regulatory action [citation], we are of
 26 the view that any doubt as to the applicability of the APA's requirements should be
 27 resolved in favor of the APA."
 28

1 The need for the analysis inherent in formal rulemaking under the APA is readily
 2 apparent in this case. The Permit will have a significant impact not only on the individual
 3 Permittee cities, but also on their residents, businesses and industries, and the economy and
 4 housing market in Southern California. The procedures set forth in the APA ensure that the
 5 important policy, cost and scientific issues are fully addressed and a proper administrative record
 6 is made. The failure to institute formal rulemaking early in the process has resulted in many of
 7 the flaws found in the Permit.

8 **IV. THE DISCHARGE PROHIBITIONS AND RECEIVING WATER LIMITATIONS**
 9 **SECTIONS OF THE PERMIT FAIL TO CONTAIN SAFE HARBOR**
 10 **PROVISIONS AND PROTECTIONS AS PERMITTED BY STATE AND**
 11 **FEDERAL LAW AND THE 1990 AND 1996 PERMITS.**

12 The Regional Board adopted the Discharge Prohibitions in Part A and B of the
 13 Permit and Receiving Water Limitations in Part C of the Permit without including a "Safe
 14 Harbor" provision and protections, as permitted by state and federal law, and specifically
 15 approved by the State Board. By failing to include a Safe Harbor provision in these sections of
 16 the Permit, the Regional Board has failed to provide any assurance to Petitioner that once they
 17 have implemented the storm water management programs set forth in the Permit in a timely and
 18 complete manner, they will be deemed to be in compliance with the Permit. A "Safe Harbor"
 19 provision would provide the Petitioner and the Permittees with important protections from
 20 third-party liability once they have implemented the storm water management programs
 21 prescribed in the Permit.

22 Petitioner suggests that the addition of the specific "Safe Harbor" provision found
 23 in the prior South Orange County NPDES Permits. For example, Section 1 of Part 1 at Page 12
 24 of the 1996 Los Angeles County Permit, provides:

25 "Compliance with this Order through the timely development and
 26 implementation of programs described herein shall constitute
 27 compliance with this prohibition."
 28

1 The Receiving Water Limitations of the Los Angeles County 1996 Permit, provides at Page 12:

2 "Timely development and complete implementation of the storm
3 water management programs described in this Order shall satisfy
4 the requirements of this section and constitute compliance with
5 receiving water limitations."

6 The inclusion of these "Safe Harbor" provisions is of critical importance to the
7 Petitioner. For example, in Carson Harbor Village, Ltd. v. Unocal Corporation, 990 F. Supp.
8 1188 (C.D. Cal 1997), the owner of land, which was allegedly contaminated by small quantities
9 of lead contained in storm water runoff sued the County of Los Angeles and two Permittee cities
10 under the CWA, CERCLA, RCRA and California common law. The District Court granted
11 summary judgment on the CWA and state common law claims, based on the Permittees'
12 compliance with the 1990 and 1996 Permits. That determination was recently affirmed on appeal.
13 (See, Carson Harbor Village, Ltd. v. Unocal Corporation, et al., 270 F.3d 863 (9th Cir. 2001).

14 The State Board adopted the Receiving Water Limitations language for municipal
15 NPDES permits in its WQO No. 98-01, which was subsequently amended in WQO No. 99-05.
16 However, the State Board specifically approved the inclusion of Safe Harbor provisions in
17 NPDES Permits in WQO No. 98-01. In Environmental Health Coalition, WQO No. 98-01
18 (1998), the petitioner contended that the receiving water limitations section in the NPDES Permit
19 for certain Orange County cities violated the CWA and implementing regulations because it did
20 not require compliance with water quality standards. That permit stated "...that the permittees
21 'will not be in violation of [receiving water limitations] so long as they are in compliance with
22 the requirements' for evaluating the DAMP." The State Board specifically rejected the
23 petitioners' contention, noting that it had previously approved the same "Safe Harbor" provision
24 in WQO No. 96-13, with respect to the storm water permit for certain permittees in the Santa
25 Clara Valley issued by the San Francisco Bay Regional Board. As the State Board stated:

26 "The SWRCB has already determined that the use of BMPs to
27 achieve both the technology-based effluent limitations and the
28 water quality-based effluent limitations complies with the CWA

1 and the Porter-Cologne Act. See SWRCB WQO No. 91-03.
 2 Accordingly, the SWRCB agrees that use of the phrase that the
 3 "permittees will not be in violation of . . ." complies with the CWA
 4 and, in fact, used that same phrase in SWRCB Water Quality Order
 5 97-03-DWQ (Waste Discharge Requirements for Discharges of
 6 Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES
 7 General Permit No. CAS000001) (the General Industrial Permit)."

8 As the State Board noted in In the Matter of the Petition of Save San Francisco
 9 Bay Association, et al., WQO No. 96-13 , USEPA approved the inclusion of a Safe Harbor
 10 provision in the Receiving Water Limitations. Furthermore, in WQO 2001-12, the Statewide
 11 General NPDES Permit for Discharges From Aquatic Pesticides to Waters of the United States,
 12 the State Board approved language similar to that requested by the Petitioners for this Permit.
 13 The language stated that: "[A] discharger will not be in violation of receiving water limitations as
 14 long as the discharger has implemented the BMP's required by this General Permit . . ." (Order
 15 WQ 2001-12, p.9.)

16 The retention of the "Safe Harbor" provision found in prior permits certainly
 17 would not be contrary to the State Board's orders dictating the Receiving Water Limitations
 18 found in the Permit, and, in fact, would be complementary to those limitations. No
 19 State Board order or directive dictated the deletion of the Safe Harbor provision from the
 20 Discharge Prohibitions.

21 **V. THE REGIONAL BOARD FAILED TO COMPLY WITH THE CALIFORNIA**
 22 **ENVIRONMENTAL QUALITY ACT WHEN ADOPTING THE PERMIT.**

23 The Regional Board did not conduct any analysis as to whether the Permit would
 24 have a significant impact on the environment, as required under the California Environmental
 25 Quality Act (Cal. Pub. Res. Code §§ 2100, et seq., and 23 CCR § 3733) ("CEQA"). CEQA
 26 requires that such an analysis be performed prior to the issuance of the Permit by the Regional
 27 Board. CEQA applies to "discretionary projects proposed to be carried out or approved by public
 28 agencies . . ." Cal. Pub. Res. Code § 21080(a). CEQA also generally applies to "the issuance of

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1 permits." Id., § 21006. Here, the issuance of the Permit was a "project" under CEQA § 21065.

2 Finding 39 at page 8 of the Permit asserts the Permit is exempt from the
3 provisions of CEQA pursuant to Water Code § 13389.

4 Section 13389 of the Water Code provides that:

5 "Neither the state board nor the regional boards shall be required to
6 comply with the provisions of Chapter 3 of Division 13 of the
7 Public Resources Code prior to the adoption of any waste discharge
8 requirement, except requirements for new sources as defined in the
9 federal Water Pollution Control Act or acts amendatory thereof or
10 supplementary thereto."

11 Section 13389, however, only exempts from CEQA permit provisions required to meet the
12 requirements of the CWA. See, Water Code § 13374. This exemption is only a partial
13 exemption. The California legislature did not provide a CEQA exemption for anything other
14 than CWA mandates.

15 The remaining non-exempt provisions of CEQA require the Regional Board to
16 consider the environmental consequences of their permitting actions and to explore feasible
17 alternative and mitigation measures prior to the adoption of waste discharge requirements. Cal.
18 Pub. Res. Code § 21002. Substantial evidence exists which shows that the Permit will have a
19 significant impact on the environment. Some of these environmental impacts may include issues
20 that may arise with the development and implementation of certain structural Best Management
21 Practices, additional energy requirements and potential air quality impacts. These are all
22 environmental impacts which are not CWA exemptions and should have been fully considered.

23 The limited exemption on the Regional Board relied on to disregard CEQA does
24 not apply to those sections of the Permit which are beyond the CWA. In taking these actions the
25 Regional Board abused its discretion, acted contrary to law and their decision that the entire
26 Permit was exempt from CEQA was not supported by substantial evidence.

27 ///

28 ///

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VI. THE REGIONAL BOARD'S RE-CHARACTERIZATION OF THE MAXIMUM EXTENT PRACTICABLE STANDARD IS CONTRARY TO SECTION 402 OF THE CLEAN WATER ACT.

The Regional Board's re-characterization of the "Maximum Extent Practicable" standard ("MEP") in the Permit is contrary to Section 402 of the CWA. 33 U.S.C. §§ 1342. The Regional Board's authority under Section 402(p) of the CWA is limited to those controls on storm water that are "to the maximum extent practicable . . ." 33 U.S.C. § 1342(p)(3)(B)(iii). CWA section 402(p) states that: "Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutant . . . to the maximum extent practicable"

In a recent Order, the State Board, addressing language in the San Diego MS4 NPDES Permit, concluded that the San Diego NPDES Permit could only require best management practices to the maximum extent practicable. The State Board determined that, "We find that the permit language is overly broad because it applies the 'maximum extent practicable' ('MEP') standard not only to discharges from MS4s, but also discharges into MS4s." (Order No. WQ 2001-15, p. 10.) The language of Section 402(p), as well as the direction provided by the State Board in Order No. WQ 2001-15, provides little doubt that an MS4 Permit can only regulate the discharge of pollutants "from" the MS4.

The Permit far exceeds this requirement of CWA by incorporating language which exceeds the MEP Standard. Some of the Permit requirements where the MEP standard and the requirements of the CWA have been exceeded include: (1) Finding No. 10 which states the Urban Runoff Management Program ("URMP") is deigned to reduce discharge of pollutants "into and from MS4s" (2) Part A.1, Page 8 which identifies "Discharges into" the MS4; (3) Part D, Page 10-11, throughout the "Legal Authority" section there are references to "into the MS4," "to its MS4," "hold dischargers to its MS4 accountable"; and

These examples of Permit language which are inconsistent with Section 402(p) of the CWA reflects how the Regional Board has elected to incorporate provisions which exceed the requirements of the CWA. There is no justification for these actions by the Regional Board

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1 and based on this inaccurate application of the MEP Standard, the Permit should be revised in
2 accordance with the requirements of the CWA and the regulations thereunder.

3 **VII. THE MANNER OF COMPLIANCE SHOULD BE LEFT TO THE PERMITTEES.**

4 The Permit is overly prescriptive and fails to provide the permittees the flexibility
5 embodied in the CWA. The Permit is almost 80 pages in length and sets forth specific
6 procedures as to how the Petitioner and the other permittees are to comply. The prescriptive
7 nature of the Permit violates Water Code § 13360 which (1) specifically prohibits a regional
8 board from dictating the "particular manner in which compliance may be had," and (2) that any
9 person subject to a regional board order "shall be permitted to comply in any lawful manner."

difficult

10 The reason for the overly prescriptive nature of the Permit is because it is a mirror
11 image of the San Diego Municipal Storm Water Permit (Order No. 2001-01) as amended by
12 WQO 2001-15. By adopting virtually the same type of permit, the Regional Board has failed to
13 recognize the difference between the storm water programs implemented in San Diego County
14 and the storm water programs implemented in South Orange County. While there is always
15 room for improvement, the overly prescriptive components of the Permit appear to be punitive in
16 nature rather than providing the Petitioner and other permittees the flexibility they deserve, and
17 which the law affords.

18 **VIII. THE REGIONAL BOARD ABUSED ITS DISCRETION BY REQUIRING**
19 **PERMITTEES TO INSPECT CONSTRUCTION AND INDUSTRIAL/**
20 **COMMERCIAL FACILITIES WHICH ARE ALREADY COVERED BY STATE-**
21 **ISSUED PERMITS.**

22 The Regional Board abused its discretion by requiring Permittees to inspect
23 construction and Industrial/Commercial Sites which already are covered by State-issued permits.
24 Site inspection responsibilities for commercial and industrial facilities are already covered by
25 state- or federally-issued permits, including NPDES general permits. The responsibility for
26 inspections under these permits belongs to the State Board and Regional Boards. Water Code
27 §13163, §13267(c).

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1 While many powers and duties of the Regional Board may be delegated to the
 2 Executive Officer, the Water Code does not provide for delegation of these duties to Permittees.
 3 See Water Code §13223(a).

4 The CWA does not require the Petitioners to control pollutants from any
 5 commercial or residential facility. (See, 40 C.F.R. 122.2b(d)(2)(i).) Under these regulations,
 6 "storm water associated with industrial activity" interpreted as discharges from Phase I Industrial
 7 facilities. These facilities are already permitted by the State Board and the responsibility for the
 8 inspection of these facilities lies with the Regional Board. (40 C.F.R. 122.2b(b)(14).)

9 The Industrial-Commercial Facilities Control Program in the Permit shifts the
 10 responsibility of inspection of a portion of Phase I facilities covered under the State's General
 11 Industrial Permit to the Permittees. This attempt to pass along a current obligation of the
 12 Regional Board, and especially one which the Regional Board actually receives a fee for, to
 13 Permittees who would not be compensated for these inspections, clearly exceeds any authority of
 14 the Regional Board currently existing under state or federal law.

15 **IX. THE REGIONAL BOARD HAS ATTEMPTED TO DICTATE AND CONTROL**
 16 **THE PERMITTEES' LOCAL LAND USE POWERS AND AUTHORITY.**

17 The Permit contains a number of provisions that specifically require the
 18 Petitioners to adopt or modify ordinances and policies for the review and approval of
 19 development and redevelopment projects in areas where discretion has been typically reserved to
 20 the City. However, the Regional Board has exceeded its authority in this area because the
 21 California Environmental Quality Act ("CEQA") (Cal. Pub. Res. Code §§ 2100 et seq. and 23
 22 C.C.R. §3733), not an NPDES permit, controls the mitigation of significant environmental
 23 impacts created by such projects and is the proper vehicle to regulate development.

24 The Permit specifically requires the Petitioner and other permittees to
 25 fundamentally change the local land use planning process. For example, Finding 21 at page 4 of
 26 the Permit requires "fundamental changes to existing policies and practices about urban
 27 development are needed." However, these "fundamental changes" are beyond the authority of
 28 the Regional Board and the scope of a municipal storm water permit.

new

1 Development controls like those in the Permit typically only apply to
2 "Discretionary Projects," as those projects are defined in Section 15357 of the Guidelines for
3 Implementation of the California Environmental Protection Act, which applies to projects
4 requiring the exercise of judgment or deliberation by a city in connection with the decision to
5 approve or disapprove the project, as distinguished from "ministerial" projects where a city
6 merely must determine whether there has been conformity with applicable statutes, ordinances,
7 or regulations. These ministerial decisions are expressly exempt from CEQA and thereby
8 expressly exempt from review for purposes of imposing additional mitigation measures. Pub.
9 Res. Code § 21080(b)(1). Since CEQA expressly exempts ministerial projects, the Regional
10 Board has no authority to require municipalities to impose mitigation measure not only on
11 discretionary projects, but also ministerial projects.

12 Furthermore, in Part F.1. of the Permit, the Regional Board is requiring each
13 Permittee to incorporate into its environmental review process, or CEQA process, procedures for
14 considering potential storm water quality impacts and providing appropriate mitigation measures.
15 While this sounds like a good idea, the Regional Board is once again attempting to regulate in an
16 area which has been preempted by the legislature and which is not within the authority of the
17 Regional Board, nor the scope of a MS4 permit. It is also worth identifying that

18 Additionally, the Permit assumes, without evidence, that Peak Flow Control
19 should be the standard for control of runoff from post-development areas. Part 4.D.1. of the
20 Permit requires Petitioners to control post-development peak stormwater runoff discharge rates,
21 velocities, and duration (collectively, "peak flow control") in six identified Natural Drainage
22 Systems through mimicking pre-development hydrology to prevent accelerated stream erosion
23 and to protect stream habitat. Section III of the Monitoring and Reporting Program ("MRP"),
24 also requires the Petitioners to conduct a Peak Discharge Impact Study and develop numerical
25 criteria for peak flow control. There is no evidence in the record, that post-development flow
26 causes the impacts suggested in the Permit.

27 The requirements imposed by the Regional Board infringe on the local land use
28 authority of the municipalities and exceed the Regional Board's authority.

1 X. THE REGIONAL BOARD FAILED TO COMPLY WITH THE FEDERAL
2 PAPERWORK REDUCTION ACT (44 U.S.C. §§ 3501, et seq.) AND
3 GOVERNMENT CODE § 11346.3 IN IMPOSING NEW REPORTING
4 OBLIGATIONS.

5 The Permit contains numerous information collection requirements which were not
6 submitted for approval to the Office of Management and Budget ("OMB") under the provisions
7 of the federal Paperwork Reduction Act (44 U.S.C. §§3501, et seq.) ("PRA"). Any information
8 collection requirements mandated by federal regulations must be submitted for approval to the
9 Office of Management and Budget under the provisions of the PRA. While OMB may have
10 approved EPA's NPDES regulations, the OMB's approval did not contemplate the type of
11 information-gathering activities required by the Permit. The paper work requirements analyzed
12 by the EPA in drafting its regulations focused almost exclusively on the preparation of an
13 application, not on reporting requirements in implementing a municipal storm water permit. The
14 PRA requires all agencies to submit all "information collection requests" to the Director of OMB
15 for review and approval. 44 U.S.C. § 3507. An agency "shall not conduct or sponsor the
16 collection of information unless the information collection request has been submitted to and
17 approved by the Director . . ." (See, United States v. Smith, 866 F.2d 1092, 1094 (1989))

18 Furthermore, Government Code § 11346.3(a) provides:

19 "State agencies proposing to adopt, amend, or repeal any
20 administrative regulation shall assess the potential for adverse
21 economic impact on California business enterprises and individuals,
22 avoiding the imposition of unnecessary or unreasonable regulations
23 or reporting, recordkeeping, or compliance requirements. For
24 purposes of this subdivision, assessing the potential for adverse
25 economic impact shall require agencies, when proposing to adopt,
26 amend, or repeal a regulation, to adhere to the following
27 requirements, to the extent that these requirements do not conflict
28 with other state or federal laws:

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(1) The proposed adoption, amendment, or repeal of a regulation shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.

(2) The state agency, prior to submitting a proposal to adopt, amend, or repeal a regulation to the office, shall consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties."

Government Code § 11346.3(c) provides:

"No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses."

No such finding has been made here.

Implementing the reporting obligations prescribed by the Permit would require the Petitioners to collectively hire dozens of additional employees to implement these mandates. We do not believe that these additional information collection requirements were contemplated by EPA, nor submitted to OMB for approval, nor are they consistent with the requirements of the federal Paperwork Reduction Act or the Government Code.

XI. THE PERMIT CANNOT SHIFT THE REGIONAL BOARD'S STATUTORY RESPONSIBILITY TO ENFORCE THE GENERAL PERMITS.

Part F.3.b of the Permit requires the Petitioners and other permittees to inspect Phase I industrial facilities subject to the General NPDES Permit for Storm Water Discharges Associated With Industrial Activities ("GIP"). The Permit also requires Petitioners and the other

missing construction sites specified

1 permittees to take steps to enforce the GIP against permit holders. Part F.3.b.(7). Part F.3.b.(8)
2 of the Permit requires the permittees to refer violators of the GIP to the Regional Board. Oral
3 notification must be provided within 24 hours of discovery of noncompliance if there exists a
4 threat to human health or the environment.

5 These provisions attempt to shift enforcement responsibility to the cities from the
6 Regional Board. The Clean Water Act regulations governing MS4 permits do not require
7 municipalities to inspect GIP facilities. Instead, the regulations require municipalities to inspect
8 only a limited category of facilities (referred to as "Federally-mandated Facilities" in the Permit).
9 Furthermore, the State Board has expressly directed that the Regional Board is responsible for
10 enforcing the GIP. In Water Quality Order No. 97-03-DWQ, which adopted the current GIP, the
11 State Board found:

12 "[f]ollowing adoption of this General Permit, the Regional Water
13 Boards shall enforce its provisions." (Finding 13).

14 Similarly, in Order No. 99-08-DWQ, which adopted the current GCASP, the State
15 Board found and directed that:

16 "[f]ollowing adoption of this General Permit, the RWQCBs shall
17 enforce the provisions herein including the monitoring and
18 reporting requirements." (Finding 11). See also Permit, Finding
19 E.22.

20 Both the GIP and the GCASP are NPDES permits, issued by the State Board
21 under Section 402 of the Clean Water Act. The State Board is the California agency designated
22 by the Legislature as the "state water pollution control agency for all purposes stated in the
23 Federal Water Pollution Control Act." Water Code § 13160.

24 State agencies delegated the responsibility for administering NPDES permits must
25 meet the requirements contained in 40 CFR Part 123, including having a program capable of
26 conducting inspections to determine compliance with permit conditions. 40 CFR § 123.26(b)(2).
27 Any agency sharing NPDES administration obligations with a designated state agency must have
28 "[s]tatewide jurisdiction over a class of activities or discharges." 40 CFR § 123.1(g). The

1 Petitioners do not have authority to administer NPDES permits, inspect facilities for compliance
2 with such permits nor, as importantly, have "statewide jurisdiction" over any activities or
3 dischargers.

4 Federal regulations do not require cities to inspect industrial facilities in general,
5 including the entire subset of facilities required to obtain a GIP or GCASP. 40 CFR
6 § 122.26(d)(2)(iv)(C). The regulations clearly contemplate that GIASP and GCASP facilities are
7 a category separate and different than the facilities specifically identified in Section
8 122.26(d)(2)(iv)(C).

9 The Regional Board cannot unilaterally delegate to the Petitioners the
10 responsibility to inspect GIP and GCASP facilities. That responsibility belongs to the Regional
11 Board.

12 **XII. THE REGIONAL BOARD FAILED TO COMPLY WITH HEALTH & SAFETY**
13 **CODE § 57004.**

14 By not obtaining a scientific peer review, the Regional Board failed to comply
15 with Health & Safety Code § 57004 in adopting the Permit. Health & Safety Code § 57004(d)
16 provides in pertinent part:

17 "No board, department, or office within the agency shall take any
18 action to adopt the final version of a rule unless all of the following
19 conditions are met:

20 (1) The board, department, or office submits the scientific portions
21 of the proposed rule, along with a statement of the scientific
22 findings, conclusions, and assumptions on which the scientific
23 portions of the proposed rule are based and the supporting scientific
24 data, studies, and other appropriate materials, to the external
25 scientific peer review entity for its evaluation.

26 (2) The external scientific peer review entity,.....prepares a written
27 report that contains an evaluation of the scientific basis of the
28 proposed rule. If the external scientific peer review entity finds that

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the board, department, or office has failed to demonstrate that the scientific portion of the proposed rule is based upon sound scientific knowledge, methods, and practices, the report shall state that finding, and the reasons explaining the finding, within the agreed-upon timeframe. The board, department, or office may accept the finding of the external scientific peer review entity, in whole, or in part, and may revise the scientific portions of the proposed rule accordingly. If the board, department, or office disagrees with any aspect of the finding of the external scientific peer review entity, it shall explain, and include as part of the rulemaking record, its basis for arriving at such a determination in the adoption of the final rule, including the reasons why it has determined that the scientific portions of the proposed rule are based on sound scientific knowledge, methods, and practices."

The term "rule" is defined in Health & Safety Code § 57004(a)(1) as meaning:

- (A) A regulation, as defined in Section 11342.600 of the Government Code.
- (B) A policy adopted by the State Water Resources Control Board pursuant to the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code) *that has the effect of a regulation and that is adopted in order to implement or make effective a statute.* (Emphasis added.)

The terms "Scientific basis" and "scientific portions" are defined in Section 57004(2) as:

"[T]hose foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment." (Emphasis added.)

1 There is nothing in the administrative record for this action by the Regional Board
2 which indicates that the Regional Board has complied with Health & Safety Code § 57004 in
3 drafting or adopting the Permit, or that there was any scientific peer review of any aspect of the
4 Permit.

5 **XIII. THE PERMIT IMPOSES OBLIGATIONS BEYOND THE SCOPE OF THE**
6 **PERMITTEES'S JURISDICTIONAL AUTHORITY.**

7 Individual permittees only have the responsibility and the ability to prohibit
8 non-storm water discharges over which they have actual control, not over all which occur within
9 their "jurisdiction", as proposed by Section A.I. EPA's regulations define a "co-permittee" in 40
10 CFR §122.26(b)(1) as a "permittee to a NPDES permit that is only responsible for permit
11 conditions relating to the discharge *for which it is operator.*" Nevertheless, the Permit purports
12 to make each co-permittee responsible for any discharge within its boundaries, whether or not it
13 was the operator of the system or had anything to do with the discharge.

14 Therefore, the Permit needs to be modified to clarify that Permittees are not
15 responsible for discharges over which they have no control or jurisdiction.

16 **XIV. A STAY OF THE PERMIT IS NECESSARY AND IS IN THE PUBLIC'S**
17 **INTEREST.**

18 Section 2053 of Title 23 and Water Code § 13321(a) allow the stay of a Regional
19 Board action where the facts demonstrate that:

- 20 "(1) substantial harm to petitioner or to the public interest if a stay
- 21 is not granted,
- 22 (2) a lack of substantial harm to other interested persons and to the
- 23 public interest if a stay is granted; and
- 24 (3) substantial questions of fact or law regarding the disputed
- 25 action."

26 As discussed above and in the Petition itself, the Permit will require Petitioners to
27 undertake numerous new or revised programs over the life of the Permit, many of which will
28 need to be implemented within the first year of the Permit alone. For example, Section F.2.g(2)

new

1 appears to require the Petitioner to inspect all construction sites within the city by April 30,
2 2002, despite the fact that the Petitioner has not had any time to develop an inspection program
3 and a means of actually implementing it.

4 When the procedural due process errors committed by the Regional Board are
5 considered, along with the obvious exceedances of the MEP standard and State law standards for
6 WDRs, as well as the attempts by the Regional Board to effectively "legislate" requirements that
7 are not authorized by the State legislature, there are clearly a number of significant deficiencies
8 that would require that the Permit be modified. Unless a stay is issued, compliance with the
9 subject Permit will result in the diversion of significant resources away from necessary programs
10 and away from an effective storm water management program for Orange County.

11 The issuance of a stay pending review of this Petition, will result in little, if any,
12 harm to other interested persons and the public, as the terms of the existing Permit would remain
13 in effect pending review of the Permit.

14 There is no evidence in the administrative record that would indicate that any short
15 delay in the implementation of the Permit, pending review by the State Board of this Petition,
16 will result in substantial harm to the public. Clearly, the harm that will result to the Petitioner
17 and the public at large, as well as the regulated community, if the Petitioner is forced to comply
18 with the action taken by the Regional Board will far outweigh any alleged harm to interested
19 persons and the public at large.

20 Substantial questions of law and fact exist which must be resolved before a
21 determination can be made on whether the actions taken by the Regional Board, both
22 procedurally and substantively, are consistent with State and federal law. Until such a
23 determination is made, Petitioner asks that the Permit be stayed.

24 **XV. CONCLUSION.**

25 Based on the foregoing, Petitioners respectfully request that the State Board
26 modify the provisions of the Permit identified herein, issued, and in the interim, a stay be issued

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1 staying the effective date of the Permit and implementation of the programs required by the
2 Regional Board's actions of February 13, 2002.

3
4 DATED: March 15, 2002

5 Respectfully submitted,

6 PETER M. THORSON (83088)
7 CITY ATTORNEY
8 CITY OF MISSION VIEJO

9 and
10 RICHARDS, WATSON & GERSHON
11 A Professional Corporation
12 JOHN J. HARRIS
13 JAY F. GOLIDA

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By: 
JOHN J. HARRIS
Attorneys for Petitioner,
THE CITY OF MISSION VIEJO

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

PROOF OF SERVICE

1
2 I, Lillian Dominguez declare:

3 I am a resident of the State of California and over the age of eighteen years, and
4 not a party to the within action; my business address is Richards, Watson & Gershon, 355 South
5 Grand Avenue, Fortieth Floor, Los Angeles, California 90071-3101. On March 15, 2002, I
6 served the within documents:

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**PETITIONER THE CITY OF MISSION VIEJO'S PRELIMINARY
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR REVIEW**

by causing facsimile transmission of the document(s) listed above from (213) 626-0078 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.

by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a n agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by causing personal delivery by First Legal Support Services, 1814 "I" Street, Sacramento California 95814 of the document(s) listed above to the person(s) at the address(es) set forth below.

VIA FACSIMILE/PERSONAL SERVICE

Attn: Elizabeth Miller Jennings
Senior Staff Counsel
State Water Resources Control Board, Office of Chief
Counsel
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 15, 2002.


Lillian Dominguez

PROOF OF SERVICE

I, Lillian Dominguez declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand Avenue, Fortieth Floor, Los Angeles, California 90071-3101. On March 15, 2002, I served the within documents:

PETITIONER THE CITY OF MISSION VIEJO'S PRELIMINARY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

by causing facsimile transmission of the document(s) listed above from (213) 626-0078 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.

by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a n agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 15, 2002.


Lillian Dominguez

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John Robertus
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JAN 17 2003

John A. Clarke, Executive Officer/Clerk

By SUE GABB Deputy

1 RUTAN & TUCKER, LLP
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2 611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1998
3 Telephone: 714-641-5100
Facsimile: 714-546-9035

4 Attorneys for Petitioners/Plaintiffs

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8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

Case No. BS080548

11 THE CITIES OF ARCADIA, BALDWIN
PARK, BELL GARDENS, BELLFLOWER,
12 CERRITOS, CLAREMONT, COMMERCE,
COVINA, DIAMOND BAR, DOWNEY,
13 GARDENA, HAWAIIAN GARDENS,
IRWINDALE, LAWNSDALE,
14 MONTEBELLO, MONTEREY PARK,
PARAMOUNT, PICO RIVERA, POMONA,
15 ROSEMEAD, SAN GABRIEL, SANTA FE
SPRINGS, SIERRA MADRE, SIGNAL HILL,
16 SOUTH GATE, SOUTH PASADENA,
TEMPLE CITY, VERNON, WALNUT, WEST
17 COVINA, WHITTIER and THE BUILDING
INDUSTRY LEGAL DEFENSE
18 FOUNDATION, a non-profit mutual benefit
corporation, and the CONSTRUCTION
19 INDUSTRY COALITION ON WATER
QUALITY, a non-profit corporation,

20 Petitioners/Plaintiffs,

21 vs.

22 THE CALIFORNIA REGIONAL WATER
23 QUALITY CONTROL BOARD, LOS
ANGELES REGION, and DOES 1 through 50,
24 inclusive,

25 Respondents/Defendants.

Case No.

[Exempt from Filing Fees – Government
Code § 6103]

**PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

[Code of Civil Procedure §§ 1085,
1094.5, 526 and 527; Water Code
§§ 13330 and 13361; Public Resources
Code § 21167; Government Code
§§ 11350 and 11350.3; Civil Code
§ 3422; Request for Hearing]

1 STATE WATER RESOURCES CONTROL
2 BOARD, COUNTY OF LOS ANGELES, LOS
3 ANGELES COUNTY FLOOD CONTROL
4 DISTRICT, THE CITIES OF AGOURA
5 HILLS, ALHAMBRA, ARTESIA, AZUSA,
6 BELL, BEVERLY HILLS, BRADBURY,
7 BURBANK, CALABASAS, CARSON,
8 COMPTON, CUDAHY, CULVER CITY,
9 DUARTE, EL MONTE, EL SEGUNDO,
10 GLENDALE, GLENDORA, HAWTHORNE,
11 HERMOSA BEACH, HIDDEN HILLS,
12 HUNTINGTON PARK, INDUSTRY,
13 INGLEWOOD, LA CANADA FLINTRIDGE,
14 LA HABRA HEIGHTS, LA MIRADA, LA
15 PUENTE, LA VERNE, LAKEWOOD,
16 LOMITA, LOS ANGELES, LYNWOOD,
17 MALIBU, MANHATTAN BEACH,
18 MAYWOOD, MONROVIA, NORWALK,
19 PALOS VERDES ESTATES, PASADENA,
20 RANCHO PALOS VERDES, REDONDO
21 BEACH, ROLLING HILLS, ROLLING
22 HILLS ESTATES, SAN DIMAS, SAN
23 FERNANDO, SAN MARINO, SANTA
24 CLARITA, SANTA MONICA, SOUTH EL
25 MONTE, TORRANCE, WEST
26 HOLLYWOOD, and WESTLAKE VILLAGE,
27 and DOES 51-100, inclusive,

Real Parties In Interest.

16
17 Petitioners and Plaintiffs, the Cities of Arcadia, Baldwin Park, Bell Gardens,
18 Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena,
19 Hawaiian Gardens, Irwindale, Lawndale, Montebello, Monterey Park, Paramount, Pico
20 Rivera, Pomona, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill,
21 South Gate, South Pasadena, Temple City, Vernon, Walnut, West Covina, Whittier and the
22 Building Industry Legal Defense Foundation, a non-profit mutual benefit corporation, and
23 the Construction Industry Coalition on Water Quality, a non-profit corporation (hereinafter
24 collectively "Petitioners") hereby petition this Court and allege as follows:

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1 I.

2 GENERAL ALLEGATIONS

3 1. City Petitioners herein, are and at all relevant times herein, were cities
4 organized under and existing under laws of the State of California and located in the
5 County of Los Angeles, California.

6 2. City Petitioners, and each of them, are Permittees under that Permit/Order
7 issued by Respondent, the California Regional Water Quality Control Board, Los Angeles
8 Region, on December 13, 2001, Waste Discharge Requirements for Municipal Storm
9 Water and Urban Runoff Discharges within the County of Los Angeles, and the
10 incorporated cities therein, except the City of Long Beach, Order No. 01-182, NPDES No.
11 CAS004001 (hereinafter "Permit" or "Order").

12 3. Petitioner BILD is a California non-profit corporation dedicated to
13 representing the interests of members of the Southern California construction and building
14 industry. BILD is a wholly owned subsidiary of the Building Industry Association of
15 Southern California ("BIA/SC") whose purposes are to monitor legal developments and
16 participate in litigation impacting the residential construction industry in Southern
17 California. BIA/SC's 1,800 members include a significant number of residential
18 developers and associate businesses that construct approximately 70% of all the residential
19 housing units built annually in the Southern California Region. BILD and BIA/SC
20 members reside and conduct commercial land development activities within the
21 jurisdiction of the California Regional Water Quality Control Board, Los Angeles Region,
22 and within the City Petitioners' jurisdictions. BIA/SC and BILD members are currently
23 engaged in, and in the future will engage in, development projects that must comply with
24 and implement various portions of the Order. BILD is authorized to bring legal action,
25 including this Petition, on behalf of BILD members.

26 4. Petitioner CICWQ is a non-profit corporation made up of four entities,
27 including BIA/SC, along with the Associated General Contractors of California, the
28 Engineering Contractors Association, and the Southern California Contractors Association,

1 all of which are associations organized under and existing under the laws of the State of
2 California. Petitioner CICWQ has a membership of over 3,300 members and companies
3 and is comprised of construction contractors, labor unions, landowners, developers and
4 home builders throughout the Los Angeles region and the State of California. All
5 segments of CICWQ are impacted by the permit, including construction employees who
6 rely upon jobs within the region, landowners within the region and potential builders
7 which require land resources to satisfy the State's ever-growing demand for housing.
8 Petitioner CICWQ is aggrieved by the actions of Respondents herein as set forth in this
9 Petition as the livelihood of Petitioner's members will be impacted by the regulatory and
10 jurisdictional scope of the Permit and as the Permit imposes regulatory mandates beyond
11 the scope and intent of State and federal law and as such are illegal and inappropriate
12 regulatory actions.

13 5. Respondent, the California Regional Water Quality Control, Los Angeles
14 Region (hereinafter "Respondent" or "Regional Board"), is the entity that issued the
15 disputed Order on December 13, 2001.

16 6. Petitioners are interested and aggrieved parties as said Petitioners have been
17 adversely impacted by the actions taken by Respondents in connection with the issuance of
18 the subject Order. Petitioners herein, as aggrieved parties, with this Petition are
19 challenging the actions taken by the Respondent on December 13, 2001 through the
20 adoption of the Subject Permit, and the actions leading to the adoption of the Order,
21 including the manner in which Respondent approved the Permit and the lack of adequate
22 notice of changes, deletions and additions to the Permit, and the lack of a fair and
23 meaningful opportunity to be heard on such modifications, i.e. the lack of due process, and
24 including challenging the approval of the Order itself, along with the lack of findings to
25 support the terms of the Order, and the lack of evidence to support the findings, as such
26 actions and approval were improper, inappropriate, arbitrary and capricious, and contrary
27 to State and federal law.

28 7. Respondent the Regional Board Water Quality Control Board, Los Angeles

1 Region (hereafter "Respondent" or "Regional Board"), is and at all relevant times herein,
2 was a regional agency created pursuant to the provisions of California Water Code Section
3 13200 *et seq.*, and is one of nine Regional Water Quality Control Board, which, pursuant
4 to the California Water Code, is to operate under the purview of the State Water Resources
5 Control Board.

6 8. Petitioners do not know the true names or capacities of Respondents/
7 Defendants named herein as DOES 1 through 50, inclusive, and for that reason have sued
8 such Respondents/ Defendants by these fictitious names pursuant to Code of Civil
9 Procedure section 474. Petitioners will amend this Petition to show their true names and
10 capacities when the same have been ascertained.

11 9. Petitioners are informed and believe and, based thereon, allege that
12 Respondents, and each of them, are responsible, in whole or in part, for the acts or
13 omissions alleged herein, and that at all times herein mentioned, Respondents, and each of
14 them, were acting as agents, servants, and employees of each other and were acting within
15 the full course and scope of their agency and employment with the full knowledge and
16 consent, either express or implied, of each of the other Respondents. As such,
17 Respondents, and each of them, were and are jointly and severally responsible, with each
18 of the other Respondents herein, for those actions, inactions, or omissions alleged herein.

19 10. On information and belief, Petitioners herein allege that Real Parties in
20 Interest County of Los Angeles, Los Angeles County Flood Control District, the Cities of
21 Agoura Hills, Alhambra, Artesia, Azusa, Bell, Beverly Hills, Bradbury, Burbank,
22 Calabasas, Carson, Compton, Cudahy, Culver City, Duarte, El Monte, El Segundo,
23 Glendale, Glendora, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry,
24 Inglewood, La Canada Flintridge, La Habra Heights, La Mirada, La Puente, La Verne,
25 Lakewood, Lomita, Long Beach, Los Angeles, Lynwood, Malibu, Manhattan Beach,
26 Maywood, Monrovia, Norwalk, Palos Verdes Estates, Pasadena, Rancho Palos Verdes,
27 Redondo Beach, Rolling Hills, Rolling Hills Estates, San Dimas, San Fernando, San
28 Marino, Santa Clarita, Santa Monica, South El Monte, Torrance, West Hollywood, and

1 Westlake Village, and DOE Real Parties In Interest 51-75, inclusive, are public bodies
2 located in the County of Los Angeles, and organized under the laws of the State of
3 California, and are all Co-Permittees under the subject Order.

4 11. Real Party in Interest, the State Water Resources Control Board ("State
5 Board") is a state agency created pursuant to California Water Code Sections 174 *et seq.*
6 and 13200 *et seq.*, and is charged with formulating and adopting state policy for water
7 quality control within the State of California.

8 12. On information and belief, Petitioners allege that DOE Real Parties In
9 Interest are persons or entities, other than those identified above as Petitioners,
10 Respondents or Real Parties in Interest, who have a legally recognizable beneficial interest
11 in the Permit. Petitioners are unable to ascertain the true names, identities or capacities of
12 those sued herein as DOE Real Parties In Interest 51-100, inclusive. Petitioners therefore
13 sue such parties by such fictitious names. Petitioners will seek leave to amend this Petition
14 to set forth the true names and capacities of these DOE Real Parties In Interest after they
15 have been ascertained.

16 13. In accordance with California law, in formulating and revising state policy
17 for water quality control, the State Board is to consult with and carefully evaluate the
18 recommendations of concerned federal, state *and local agencies* on water policy issues.
19 (Cal. Water Code § 13144.) The State Board is designated as the state water pollution
20 control agency for all purposes stated under the Federal Water Pollution Control Act
21 ("Clean Water Act" - 33 U.S.C. § 1251 *et seq.*) and is the authorized agency to exercise
22 powers delegated to it under the Clean Water Act and amendments thereto. (Cal. Water
23 Code § 13160.) The State Board is further empowered, pursuant to State and federal law,
24 to adopt water quality control plans as required by the Clean Water Act, and such plans,
25 when adopted, supersede any regional water quality control plans that are in conflict with
26 the State Plan. (Cal. Water Code § 13170.)

27 14. City Petitioners own and operate municipal separate storm sewer systems
28 ("MS4s") and are permittees under the disputed Permit, which is identified as being a

1 National Pollutant Discharge Elimination System (“NPDES”) permit, and which was
2 issued by Respondent Regional Board on December 13, 2001, and referenced as the Waste
3 Discharge Requirements for Municipal Storm Water and Urban Run-off Discharges within
4 the County of Los Angeles and the incorporated cities therein, except the City of Long
5 Beach.

6 15. With this Petition, Petitioners herein, as aggrieved parties, are challenging
7 the actions taken by Respondents, and the failures of Respondents to act lawfully in
8 establishing and adopting the subject Order, in accordance with State and federal law, as
9 described below. The actions taken by Respondents, and their failures to act, were
10 improper, inappropriate, arbitrary and capricious, and in violation of State and federal law.

11 16. This action is brought pursuant to Code of Civil Procedure sections 1094.5
12 and 1085 and Water Code section 13330, for declaratory relief under Code of Civil
13 Procedure section 1060 and Government Code sections 11350 and 11350.3, and/or
14 injunctive relief under the Code of Civil Procedure sections 526 and 527 and Civil Code
15 section 3422. Petitioners and/or others presented the objections and grounds upon which
16 this petition is based to Respondents, both in writing and orally, prior to the close of the
17 various hearings on the approval and establishment of the subject Order. Various
18 Petitioners have exhausted all administrative remedies, except for where exhaustion would
19 be futile, and have performed all conditions precedent to the filing of this Petition by
20 raising each and every issue known to them before the subject Respondents. Further,
21 various Petitioners herein have raised the same or similar arguments that are being raised
22 in this Petition, to the State Water Resources Control Board, also challenging the actions of
23 Respondents herein in issuing the subject Order to the State Water Resources Control
24 Board, through a prior petition filed with the State Board pursuant to California Water
25 Code section 13320 (hereinafter “Administrative Petition”). The State Board through a
26 letter dated December 18, 2002, failed to act on the Administrative Petition, and rejected
27 the Administrative Petition, taking no action on any of the issues raised therein.
28 Accordingly, this action is appropriately brought pursuant to California Water Code

1 section 13330.

2 17. Venue is proper for this action in the Superior Court of California in and for
3 the County of Los Angeles, as Petitioners and each of them are located in Los Angeles
4 County, and as the situs of the focus of the regulatory actions of Respondents, as well as
5 the situs of the discharges in issue, is Los Angeles County. Thus, the injury that will result
6 to the environment and to Petitioners will occur in Los Angeles County. Accordingly,
7 pursuant to Government Code section 955.3 which provides in relevant part that
8 “[n]otwithstanding any provision of law, when a city, county, or city and county, or local
9 agency is a plaintiff in an action or proceeding against the State of California, the action
10 may be tried in any city or county, or city and county, where the city, county, or city and
11 county, or local agency is situated,” venue is appropriate in the County of Los Angeles.

12 18. This Petition has been brought within the appropriate time period to
13 challenge Respondents’ actions and inactions in the subject Order, as required by Public
14 Resources Code sections 21080.5(g) and 21167(a) and Title 14, section 15112 of the
15 California Code of Regulations, and pursuant to Water Code section 13330.

16 19. On January 17, 2003, before the commencement of this action, Petitioners
17 served written notice of the commencement of this action on Respondents in accordance
18 with requirements of Public Resources Code section 21167.5. A true and correct copy of
19 the notice of commencement of action under CEQA is attached hereto and marked as
20 Exhibit “A” and incorporated herein by this reference.

21 20. Petitioners have also furnished the California Attorney General’s Office with
22 a copy of this Petition, pursuant to Public Resources Code section 21167.7 and Code of
23 Civil Procedure section 388, as shown by the proof of service by mail attached hereto and
24 marked as Exhibit “B.”

25 21. Unless the requested writs herein are issued and the other relief requested
26 herein is granted, Respondents will proceed with the enforcement of the subject Order, in
27 violation of and in excess of Respondents’ authority under the Federal Clean Water Act
28 (the “Act” or the “CWA”), the California Porter-Cologne Act, the California

1 Environmental Quality Act, the California Administrative Procedures Act, California
2 Government Code section 17561, and other State law and the United States and California
3 Constitutions.

4 **II.**

5 **STANDARD OF REVIEW**

6 22. Pursuant to California Code of Civil Procedure sections 1085 and 1094.5(c),
7 Water Code section 13330(d), and Public Resources Code section 21187.5, this Court has
8 jurisdiction to exercise its independent judgment of the evidence to determine whether
9 Respondents have abused their discretion or otherwise acted contrary to law.

10 23. Pursuant to Government Code sections 11350 and 11350.3, this Court has
11 jurisdiction to determine whether there is substantial evidence that Respondents have acted
12 in compliance with the process set forth in California's Administrative Procedures Act for
13 adopting administrative regulations.

14 24. California Code of Civil Procedure section 1094.5 authorizes this Court to
15 issue a stay of the operation of an administrative order or decision pending judgment of the
16 Court, if the Court determines that the stay is in the interest of the public, as it is in this
17 case. Further, California Code of Civil Procedure sections 526 and 527 and California
18 Water Code section 13361, authorize this Court to issue a temporary restraining order,
19 preliminary injunction and/or a permanent injunction under the present circumstances.

20 **III.**

21 **RESPONDENTS ACTED CONTRARY TO THE REQUIREMENTS OF THE**
22 **CLEAN WATER ACT AND STATE LAW**

23 25. The Federal Water Pollution Control Act was adopted in 1948, amended in
24 1972, and again amended in 1977 as the Clean Water Act of 1977 (hereinafter the "Act,"
25 the "Clean Water Act" or the "CWA"). In 1987, the Act was amended to establish new
26 controls on industrial and municipal storm water discharges. The 1987 amendments, in
27 part, required National Pollutant Discharge Elimination System ("NPDES") Permits for
28 storm water discharges from Municipal Separate Storm Sewer Systems ("MS4s").

1 26. Under the Act, NPDES Permits are to be limited to discharges to “navigable
2 waters.” (See 33 USC §§ 1251(a), and 1362(12), and the regulations thereunder, 40 CFR
3 § 122.2.) Further, the term “navigable waters” refers to waters that “were or had been
4 navigable in fact or which reasonably could be made so.” (40 CFR § 122.2.) As the
5 Subject Permit seeks to regulate discharges to things that are not “waters of the United
6 States” and that are not “navigable waters,” Respondents actions in establishing and
7 adopting the Subject Permit were arbitrary and capricious, and contrary to law.

8 27. The Clean Water Act’s NPDES program further prohibits only “point”
9 source discharges of pollutants into navigable waters, and excludes agricultural storm
10 water discharges and irrigated return flows from NPDES Permits, by excluding these
11 discharges from the definition of “point source.” (See 33 USC §§ 1342(a), 1362(12), and
12 1362(14).) Further, overland street flow, aerial deposition, and all other discharges which
13 do not constitute “point sources” are to be considered non-point source discharges, i.e., are
14 discharges which are not subject to NPDES permits. As the Subject Permit seeks to
15 regulate “non-point sources” through regulations on municipalities, it is arbitrary and
16 capricious and was adopted contrary to law.

17 28. In addition, the Subject Permit regulates discharges into things other than
18 “navigable waters,” through its regulation of discharges into municipal streets, gutters, and
19 curbs, and other similar regulation of discharges into “things” other than “navigable
20 waters.” The Permit’s regulation of such discharges is a regulation of things other than to
21 “waters of the United States” and constitutes action by Respondents which is arbitrary and
22 capricious and contrary to law.

23 29. The Act requires permits for discharges “*from*” municipal storm sewer
24 systems to require controls “to reduce the discharge of pollutants to the *maximum extent*
25 *practicable* to waters of the United States.” (33 U.S.C. § 1342(p)(3)(B).) Dischargers
26 who are issued permits and who operate within the terms of such permits are thus in
27 compliance with the requirements of the Clean Water Act.

28 30. The regulations to the Act require the consideration of quantitative data on

1 the volume and quality of discharges from the MS4s, including a list of water bodies that
2 receive discharges from the MS4 where the pollutants in issue may accumulate and cause
3 water degradation. These federal regulations require the consideration of and a description
4 of known water quality impacts (see 40 C.F.R. 122.26(d)(1)(iv)(B) and (C)), and further
5 require a description of such things as: whether the body is expected to meet water quality
6 standards and goals as a result of the described impacts; whether the water body is listed as
7 a non-point source under the Act; whether such bodies can, without additional action to
8 control non-point sources of pollution, reasonably be expected to maintain water quality
9 standards due to storm sewers, construction, highway maintenance and runoff from
10 municipal landfill and municipal sludge; and whether the water body is recognized as a
11 highly valued or sensitive water or is defined as a "wetland." (See 40 C.F.R.
12 §§ 122.26(d)(1)(iv)(C)(1) - (9).)

13 31. The Clean Water Act thus requires a quantitative and qualitative review of
14 the volume and quality of discharges from MS4s, as well as a study of the receiving waters
15 in which pollutants may accumulate, as a part of the process of issuing the MS4 NPDES
16 Permit. The regulations mandate that a specifically designed program be adopted to
17 address pollutants reported to exist in such receiving waters, with the programs focusing
18 particularly on the sources of the pollutants. (40 C.F.R. §§ 122.26(d)(1) and (2).) Though
19 the NPDES Permit applications submitted by the Permittees have been found to be
20 complete and in compliance with these provisions, the subject Permit issued by the
21 Regional Board on December 13, 2001, is not consistent with the regulations and their
22 requirements that the Permit be specifically designed to address pollutants reported to exist
23 in particular receiving waters. Nor does the Permit contain the necessary information on
24 "Source Identification," "Discharge Characterization," and "Characterization Data" as
25 envisioned by the regulations to the Act, i.e. the Permit was not issued by Respondents
26 based on the "Source Identification," "Discharge Characterization," and "Characterization
27 Data" set forth throughout the application process.

28 32. Respondents herein have failed to develop a permit, with appropriate

1 findings, that identifies the “pollutants of concern” and their sources, and that is geared to
2 addressing such “pollutants of concern.” Respondents’ Order thus does not comply with
3 the requirements of the Act or the regulations under the Act.

4 33. The State of California is authorized to administer certain aspects of the
5 NPDES Program within the State of California. The State Board administers the NPDES
6 Program in California pursuant to the Clean Water Act and pursuant to that Memorandum
7 Of Understanding between the U.S. Environmental Protection Agency (“U.S. EPA”) and
8 the California State Water Resources Control Board, effective September 22, 1989.

9 34. Pursuant to California Water Code Section 13160, the *State Board* is the
10 designated agency to exercise the powers delegated to the State under the Clean Water
11 Act, including the right and obligation to administer the NPDES Program. Further,
12 pursuant to Water Code Section 13000, there is to be a state-wide program for water
13 quality control which is to be administered regionally, but within a framework of state-
14 wide coordination and state policy. Federal regulations allow NPDES authority within a
15 state to be shared between two or more state agencies, *if each agency has statewide*
16 *jurisdiction* over a class of activities or discharges. When more than one agency is
17 responsible for issuing permits within the state, each agency must make a submission
18 meeting the requirements of the Federal regulations. (40 C.F.R. §§ 123.1(g)(1) and
19 123.22(b).) *Respondent Regional Board is not a state agency with statewide jurisdiction*
20 *over a class of activities or discharges, and has not been authorized under the Clean Water*
21 *Act or the Federal regulations to administer the NPDES Program in California, and*
22 *accordingly, has no authority to do so.*

23 35. As Respondent Regional Board is not an agency with statewide jurisdiction
24 over a class of activities or discharges and does not have the authority to issue NPDES
25 Permits under the Clean Water Act, the subject Permit was invalidly issued and is
26 unenforceable. The inability and failure of Respondent Regional Board to adhere to the
27 application process and the requirements in the regulations to the Clean Water Act for
28 issuing an NPDES MS4 permit, as set forth herein, further highlight the problems

1 encountered when an unauthorized agency, without statewide authority, seek to administer
2 the provisions of the Clean Water Act. Without specific regulatory direction from the
3 State Board, such as has occurred with the issuance of various general permits for
4 industrial and construction activities, Respondent Regional Board is and was without
5 authority and jurisdiction to have issued the municipal NPDES Permit in question.

6 36. The lack of authority of Respondent Regional Board to issue the subject
7 NPDES under the Clean Water Act has added to the problem of inconsistency in the
8 issuance of the municipal NPDES permits throughout the State of California, as varying
9 municipal NPDES permit with differing terms, have been adopted by different regional
10 agencies without statewide jurisdiction, thus resulting in a patchwork of municipal NPDES
11 permits that lack continuity and consistency. In addition, municipalities throughout the
12 State who straddle regional board jurisdictional lines, with both storm water and non-storm
13 water moving from one jurisdiction to another, must comply with differing municipal
14 NPDES permits for virtually identical discharges and identical pollutants of concern. As
15 Respondent Regional Board is not an agency with statewide jurisdiction over a class of
16 activities or discharges, and as no regulatory consistency through general permit terms, or
17 otherwise, has been provided by the State Board, the subject Order is the result of a flawed
18 and illegal process, and one that is directly contrary to the express provisions of the Clean
19 Water Act. Pursuant to Water Code Section 13000, the waters of the State of California
20 are to be regulated as necessary to “attain the highest water quality which is *reasonable*,
21 considering all demands being made and to be made on those waters, and the total values
22 involved, beneficial and detrimental, *economic* and social, tangible and intangible.”

23 37. In addition, in formulating water quality policy within their regions, regional
24 boards are required to consult with and consider *the recommendations of affected local*
25 *agencies*. (Cal. Water Code § 13240.) Further, in establishing water quality objectives
26 and water quality control plans within its region, a regional board is required to consider
27 specific factors, including: (a) Past, present and probable future *beneficial uses of water*;
28 (b) Environmental characteristics of the hydrographic unit under consideration, including

1 the quality of water available thereto; (c) Water quality conditions *that could reasonably*
2 *be achieved* through the coordinated control of all factors which affect water quality in the
3 area; (d) *Economic considerations*. (Cal. Water Code § 13241.)

4 38. Further, under Water Code section 13263, “waste discharge requirements”
5 such as those issued with the adoption of the subject Order, are to be issued “with relation
6 to the conditions existing in the disposal area or receiving waters upon, or into which, the
7 discharge is made or proposed. The requirements shall implement any relevant water
8 quality control plans that have been adopted, and shall take into consideration the
9 beneficial uses to be protected, the water quality objectives *reasonably required* for that
10 purpose, other waste discharges, the need to prevent nuisance, *and the provisions of*
11 *section 13241.*” (Cal. Water Code §13263.) Section 13263 further specifically limits the
12 Respondents’ authority in issuing waste discharge requirements to the “proposed
13 discharge” in issue, i.e., discharges of pollutants from the municipal storm sewer system.
14 Thus, under Section 13263, Respondents have no jurisdiction to impose waste discharge
15 requirements on discharges that are outside of the control of the Petitioners, and that are
16 outside of the jurisdiction of the Clean Water Act.

17 39. The subject Permit exceeds the standard for the issuance of waste discharge
18 requirements as set forth under sections 13263 and 13241, as there are no findings and no
19 evidence that the requisite factors set forth in section 13241 were properly considered, as
20 required under section 13263 of the Water Code, and as there is no indication that the
21 water quality objectives that have been attempted to be met have been “*reasonably*
22 *required*” as set forth under section 13263.

23 40. Similarly, each regional board with respect to its region is required, in
24 addition to its other duties to: “[r]equire as necessary any state or local agency to
25 investigate and report on any technical factors involved in water quality control or to
26 obtain and submit analyses of water, *provided that the burden, including costs, of such*
27 *reports shall bear a reasonable relationship to the need for the report and the benefits to*
28 *be obtained therefrom.*” (Cal. Water Code § 13225(c).) (Also see Water Code section

1 13165, which requires the State Board, when requiring any State or local agency to
2 investigate and report on technical factors involved in water quality, to weigh the burdens,
3 including the costs of such reports, which burdens must bear a reasonable relationship to
4 the need for the report and the benefits to be obtained therefrom.) In addition, pursuant to
5 Water Code section 13267, where a regional board requires a discharger such as the City
6 Petitioners herein, to provide technical and monitoring reports, again before making such a
7 requirement, the regional board is to perform a cost/benefit analysis whereby, "the burden,
8 including costs, of these reports shall bear a reasonable relationship to the need for the
9 reports and the benefits to be obtained from the reports." (Water Code § 13267(b).) In
10 fact, the regional board is required to provide the person with a written explanation with
11 regard to the need for the reports, and is required to identify the evidence that supports
12 requiring that person to provide the reports.

13 41. A regional board is also obligated to take into consideration the effect of its
14 actions on the California Water Plan and "on any other general or coordinated
15 governmental plan looking toward the development, utilization or conservation of the
16 water resources of the state." (Cal. Water Code § 13225(h).)

17 42. The Southern California Association of Governments (hereafter "SCAG") is
18 a regional joint powers authority, created pursuant to California Government Code
19 Sections 6500 et seq. SCAG represents over one hundred and eighty cities in Southern
20 California and the counties of Los Angeles, Orange, San Bernardino, Riverside, Ventura
21 and Imperial. The SCAG region encompasses 38,000 square miles and a population of 15
22 million. SCAG'S mission statement is "to enhance the quality of life of all Southern
23 Californians by working in partnership with all levels of government, the business sector,
24 and the community at large to meet regional challenges and to resolve regional
25 differences."

26 43. SCAG, as the Regional Council of Governments, is independently
27 responsible pursuant to state and federal statutes for a number of regional activities such as
28 transportation planning, water planning, housing needs planning, and air quality planning.

1 44. SCAG has been designated as an Areawide Waste Treatment Management
2 Planning Agency pursuant to 33 U.S.C. Section 1288 (a)(2) (Section 208 of the Clean
3 Water Act). As such, SCAG is responsible for a continuing areawide waste treatment
4 management planning process under the Clean Water Act.

5 45. Under Section 208(e) of the CWA (33 U.S.C. § 1288(e)), no NPDES Permit
6 is to be issued which is in conflict with the approved Areawide Waste Treatment
7 Management Plan. The Permit adopted on December 13, 2001 is generally in conflict with
8 the Areawide Waste Treatment Management Plan adopted by SCAG and/or the
9 requirements for such a plan under the Act, particularly with the failure of the Order to
10 provide "regional solutions" and to provide necessary "financial arrangements" for the
11 implementation of the terms of the Permit. The Permit violates the Clean Water Act and
12 Water Code Section 13225(h) as Respondent has failed to make a finding of consistency
13 with the Area-Wide Waste Treatment Management Plan.

14 46. California Water Code section 13360, moreover, prohibits Respondents from
15 specifying, in any order or set of waste discharge requirements, specific designs, locations,
16 or types of construction standards, or a particular manner in which compliance with an
17 order, requirement or set of waste discharge requirements, is to be met. Under Water Code
18 section 13360, all persons are permitted to comply with the requirements of any order or
19 waste discharge requirements in any lawful manner. (Cal. Water Code § 13360(a).)

20 47. On or about June 18, 1990, the Respondent issued Order No. 90-079
21 (NPDES No. CA0061654) for Los Angeles County and its co-permittees, 85 cities in the
22 County of Los Angeles (hereinafter "1990 Permit"). Because this 1990 Permit was
23 adopted prior to adoption of applicable federal regulations, the 1990 Permit was a permit
24 that was commonly referred to as an "Early Permit" under the Act.

25 48. Thereafter, on or about July 15, 1996, effective on July 31, 1996, the Early
26 Permit was rescinded and the Petitioners were issued a new Storm Water Permit, Order
27 No. 96-054 (NPDES No. CAS614001), Waste Discharge Requirements for Municipal
28 Storm Water and Urban Runoff Discharges within the County of Los Angeles (hereinafter

1 “1996 Permit”). Both the Early Permit and the 1996 Permit were, by their own terms, to
2 be 5-year permits, which, under the Act, would continue in effect with the filing of a
3 timely permit application until a new permit was issued.

4 49. On or about February 1, 2001, the Report of Waste Discharge (“ROWD”)
5 was submitted as an application for renewal of the 1996 Permit for an additional 5 year
6 period (hereafter “Permit Application”) on behalf of the City Petitioners and other
7 municipalities in the County.

8 50. Respondent Regional Board reviewed the Permit Application presumably to
9 determine compliance with the requirements of the Clean Water Act. Upon its review, the
10 Regional Board determined that the Application was in fact complete and was consistent
11 with the U.S. Environmental Protection Agency’s (“US EPA”) application process for
12 Municipal Separate Storm Sewer Systems (“MS4s”). Respondent thus specifically
13 determined that the Permittees’ Storm Water Quality Management Plan put forth in the
14 Permit Application met the minimum requirements set forth under the federal regulations
15 to the Clean Water Act.

16 51. On or about December 13, 2001, Respondent Regional Board adopted the
17 subject disputed NPDES Permit, and rescinded the 1996 Permit. A draft of the subject
18 Permit dated October 11, 2001, was originally scheduled for adoption on November 29,
19 2001. In mid-November 2001, the hearing on the adoption of the Permit was continued
20 until December 13, 2001. On December 4, 2001, a change sheet for the October 11, 2001
21 Permit was circulated. On December 10, 2001, an additional change sheet was issued by
22 the Regional Board, along with another draft of the Permit. However, the December 10,
23 2001 Change Sheet was never publicly circulated. Thereafter, on December 13, 2001, on
24 the morning of the hearing on the Permit, an additional change sheet dated December 13,
25 2001 and entitled “Additions to Supplemental Change Sheet” was distributed with yet
26 further changes to the Permit, along with the December 10, 2001 draft of the Permit. Still
27 more, in the course of the December 13 hearing yet additional changes were proposed and
28 made by Respondent to the Order. Still, at the hearing on December 13, 2001, the subject

1 Permit was adopted by Respondent Regional Board.

2 52. The changes put forth in the various change sheets to the Permit, along with
3 those at the hearing, were collectively significant in number and in scope. Yet, no
4 additional time for public comment was provided by Respondent for review and comment
5 of all such changes by the public and interested shareholders. An additional public
6 comment period of at least 30 days should have been provided in accordance with the
7 requirements of the regulations to the Clean Water Act. Specifically, the regulations
8 require a 30-day notice and publication period for hearings on NPDES Permits, but such
9 requirements was violated as substantial revisions were made to the Permit less than ten
10 (10) days and four (4) days prior to the hearing, with even more changes and revisions
11 having been made both in writing and orally on the day of the hearing itself.

12 53. Additional evidence could have and would have been presented by the
13 Petitioners on the proposed modifications, report references and the numerous changes to
14 the Permit, had Petitioners been given sufficient time and opportunity to review the
15 changes and proposed references, and had Respondent Regional Board complied with the
16 regulations to the Clean Water Act and provided the requisite 30-day notice. Respondent
17 Regional Board improperly denied Petitioners and other interested parties a fair hearing in
18 its consideration of the Permit, as the last minute changes to the proposed Permit were
19 significant in both number and scope. The Permit was required to have been recirculated
20 for additional public review and comment, and the Respondents' failure to recirculate the
21 Permit is a violation of the hearing requirements under the regulations to the Act, and a
22 violation of due process of law.

23 54. In addition, scientific peer review of the Subject Permit was required
24 pursuant to California Health and Safety Code Section 57004, and Respondents acted
25 arbitrarily and capriciously and contrary to law by failing to cause such a required
26 scientific peer review to be conducted.

27
28

1 IV.

2 THE PERMIT IS CONTRARY TO THE MEP STANDARD UNDER THE CWA
3 AND REQUIREMENTS UNDER THE PORTER-COLOGNE ACT.

4 55. Under section 402 of the Clean Water Act (33 U.S.C. § 1342(p)(3)(B)), the
5 Act authorizes the issuance of permits for municipal dischargers to reduce the discharge of
6 pollutants to the “*maximum extent practicable*” “*from*” municipal storm sewers to
7 navigable *waters of the United States*. Municipal NPDES permits are not authorized or
8 necessary for discharges *to* the MS4 under any federal law, or otherwise under any State
9 law, and there is no other stricter standard than the MEP standard required to be adhered to
10 under federal or State law for municipal NPDES discharges. Moreover, it is apparent from
11 the language under the Act and recent case authority, that the Clean Water Act only applies
12 to *navigable waters of the United States*. (33 USC § 1251(a).) Thus, the provisions
13 throughout the Permit that attempt to regulate the discharge of pollutants “*to*” or “*into*” the
14 MS4, either directly or indirectly (including, but not limited to the Industrial/Commercial
15 Facilities Control Program; the Standard Urban Storm Water Mitigation Program
16 (hereinafter “SUSMP”); the Receiving Water Limitation provisions in the Permit; the
17 Permit language allowing the automatic incorporation of total maximum daily loads
18 (“TMDLs”) into the Permit, and the numerous provisions directly infringing on the local
19 land use authority of the City Petitioners), without consideration of the MEP standard, all
20 violate: (1) the application of the “maximum extent practicable standard,” (2) the
21 requirement that only municipal discharges “*from*” the MS4 are to be regulated; and (3)
22 the Act’s limitation regulating only navigable waters of the United States.

23 56. Clean Water Act Section 402 permits are to be issued “from municipal storm
24 sewers . . . to reduce the discharge of pollutants to the *maximum extent practicable*” to
25 waters of the United States (“MEP standard”). The MEP standard is a maximum standard,
26 and is the *only* standard to be applied to Permittees under either State or federal law. The
27 subject Permit exceeds the MEP standard under each of the major parts of the Permit,
28 including Part I entitled “Discharge Prohibitions,” Part 2 entitled “Receiving Water

1 Limitations,” Part 3 entitled “Storm Water Quality Management Program (‘SQMP’)
2 Implementation” Part 4 entitled “Special Provisions,” and Part 5 entitled “Definitions.”

3 57. Under Part 1 entitled “Discharge Prohibitions,” the Executive Officer of
4 Respondent Regional Board has discretion to remove “exempted” discharges from the list
5 of prohibited discharges, and/or to impose additional prohibitions on non-storm water
6 discharges, in consideration of anti-degradation policies and what are known as total
7 maximum daily loads. These modifications and this discretion is permitted by the Order,
8 irrespective of whether prohibiting these discharges will entail imposing requirements on
9 the Petitioners that exceed the “maximum extent practicable” standard.

10 58. Under Part 2 entitled “Receiving Water Limitations,” the MEP standard has
11 been exceeded as the Permit, as written, imposes more stringent standards and
12 requirements beyond those set forth either in the Clean Water Act or Water Code
13 section 13263, and imposes standards that are stricter than the standards set forth under
14 any applicable State or federal law. In particular, irrespective of the maximum extent
15 practicable standard, Part 2 of the Permit provides that any discharge from the municipal
16 storm drain system that causes or contributes to a violation of a water quality standard or
17 water quality objective, or that causes or contributes to a condition of nuisance, is
18 prohibited and requires that in the event of any such violation of a water quality standard
19 or contribution to a condition of nuisance (hereinafter collectively “exceedence”), that
20 Permittees are to develop additional best management practices that will be “implemented
21 to prevent or reduce any pollutants that are causing or contributing to the exceedences . . .”
22 Under the language of Part 2 of the Permit, the Best Management Practices to be
23 implemented to address exceedences are not limited to those BMPs that are consistent with
24 the maximum extent practicable standard, but rather include all BMPs as necessary to
25 prevent or reduce exceedences. Accordingly, Part 2 of the Permit effectively imposes a
26 “strict liability” standard on municipalities by not requiring the implementation of those
27 BMPs that are consistent with the maximum extent practicable standard. The language
28 under Part 2 of the Permit also inappropriately exposes Permittees to unjustified

1 enforcement actions and spurious third party lawsuits, as it improperly holds Permittees
2 responsible for the discharges of others “to” its MS4, and as it inappropriately holds the
3 Permittees to a “strict liability” standard that is not supported anywhere under State or
4 federal law.

5 59. In Part 3 of the Permit, “Stormwater Quality Management Program”
6 (“SQMP Implementation”), both the MEP and “from” standards under the Act are violated
7 as the various provisions throughout Part 3 attempt to impose obligations on the Permittees
8 to control and reduce the “discharge of pollutants *in* stormwater to the MEP.” With the
9 SQMP provisions, Respondent seeks to require the Permittees to implement or require the
10 implementation of the most effective combination of BMPs for storm water/urban runoff
11 pollution control. When implemented, the BMPs are then to result in the reduction of
12 pollutants *in* storm water into the MS4. Other provisions within Part 3 require that
13 Permittees implement controls “to reduce the discharge of pollutants *in* stormwater to the
14 MEP.” Such a standard is contrary to the provisions of the Clean Water Act, and is not
15 supported under any State or other federal law.

16 60. Further, under Part 3 of the Permit, subsection (c) allows the Executive
17 Officer of the Regional Board to incorporate and require the implementation of total
18 maximum daily loads into what is referred to as the SQMP (“Storm Water Quality
19 Management Program”), which is thus, an indirect incorporation of any such TMDL
20 requirement into the Permit itself. Yet, the incorporation of TMDLs under the Permit is
21 not restricted only to those best management practices that are consistent with the
22 maximum extent practicable standard. Rather, under the Permit, the Executive Officer has
23 the discretion to incorporate TMDLs into the Permit without regard to whether the BMPs
24 to be implemented to comply with the TMDLs are “practicable.” Accordingly, the Permit
25 in question was issued contrary to the maximum extent practicable standard, as it allows
26 for the incorporation of TMDLs without regard to whether the best management practices
27 to be implemented thereunder, are consistent with the maximum extent practicable
28 standard.

1 61. In addition, the discretion provided to the Executive Officer under the Permit
2 to incorporate TMDLs into the Permit, similarly violates other requirements under the
3 Clean Water Act and the Porter-Cologne Act. Specifically, under the Clean Water Act, an
4 NPDES permit cannot be modified without appropriate notice and public comment (see 40
5 CFR §§ 124.5, 124.6, 124.10 and 122.62). Similarly, under the Porter-Cologne Act, a
6 regional board may only delegate certain powers to its Executive Officer, and the Porter-
7 Cologne Act expressly prohibits an Executive Officer from issuing, modifying or revoking
8 an order which contains waste discharge requirements, such as the Subject Permit. (See
9 Water Code § 13223(a).) Moreover, even the Permit itself prohibits modifications to its
10 terms without compliance with procedural requirements under California and federal law.
11 Finally, Water Code Section 13263 governs the adoption of waste discharge requirements,
12 and only those waste discharge requirements which are “reasonably required” may be
13 imposed, which would accordingly prohibit the automatic incorporation of unreasonable
14 TMDLs. Similarly, TMDLs that otherwise fail to comply with waste discharge
15 requirements under the Porter-Cologne Act cannot be incorporated into the Permit.
16 Accordingly, Part 3 of the Permit contains language which is contrary to the MEP
17 Standard, the “reasonableness” and other waste discharge requirement provisions of the
18 Porter-Cologne Act, the notice, hearing and public comment requirements of State and
19 federal law, and the provisions of the Porter-Cologne Act which restrict the authority of
20 the Executive Officer to act in such fashion.

21 62. With respect to Part 4, the MEP Standard is ignored in various sections,
22 including but not limited to: (a) in the general requirements under Section A of Part 4
23 dealing with MEP; (b) in various portions of the Public Information and Public
24 Participation Program under Section B of Part 4; (c) throughout the provisions under
25 Section C of Part 4 entitled “Industrial/Commercial Facilities Program;” (d) throughout
26 Section D of Part 4 entitled “Development Planning Program,” including the entire
27 SUSMP provisions; (e) throughout Section E of Part 4 entitled “Development Construction
28 Program;” (f) throughout Section F of Part 4, “Public Agency Activities Program;” and (g)

1 in Section G of Part 4, "Illicit Connections and Illicit Discharges Elimination Program."

2 63. In addition, the MEP standard and its limited application to discharges
3 "*from*" MS4s, has been exceeded by Respondent in Part 5 of the Permit, the various
4 definitions in the Permit, specifically including the definitions of the terms
5 "Environmentally Sensitive Areas," "Inspection," "Maximum Extent Practicable,"
6 "Planning Priority Projects," "Redevelopment," "Significant Ecological Areas," and
7 "Waters of the United States or Waters of the U.S."

8 V.

9 THE INDUSTRIAL/COMMERCIAL FACILITIES PROGRAM

10 SECTION IS CONTRARY TO STATE AND FEDERAL LAW.

11 64. The Industrial/Commercial Facilities Program under Part 4 of the Permit,
12 and particularly the inspection requirements imposed on the Petitioners therein, similarly
13 exceeds both the MEP and "from" standards *and* other requirements under the Clean
14 Water Act and State law. Respondent Regional Board has no authority to impose such
15 inspection and related obligations on the Petitioners under State or federal law, and neither
16 requires, nor authorizes, a municipality to inspect any *commercial* facilities for purposes of
17 determining compliance with BMPs, or otherwise.

18 65. Evidence of the need for statutory authority on the part of Respondent
19 Regional Board to require "inspections" is contained in Water Code Section 13362,
20 wherein in this Statute, the State Legislature expressly provided specific "inspection"
21 authority to POTWs to inspect and regulate certain private facilities. (See Water Code
22 § 13362). No such similar inspection authority has been provided in connection with
23 storm water runoff to the Respondents herein, or otherwise. Accordingly, neither federal
24 or State law provides authority to Respondent Regional Board to require that
25 "*commercial*" facilities of any kind, including restaurants, automotive service facilities,
26 retail gasoline outlets and automotive dealerships, and any other commercial facilities that
27 would fall within the inspection provisions of the Permit, be inspected for purposes of
28 compliance with specific BMPs or determining discharges "to" the MS4.

1 66. In addition, under the federal regulations, any responsibility on Permittees to
2 inspect *industrial facilities* is specifically limited to those industrial facilities described in
3 the federal regulations themselves, i.e., municipal landfills, hazardous waste treatment,
4 disposal and recovery facilities, SARA Title 3 facilities, and industrial facilities that the
5 “*municipal permit applicant determines* are contributing a substantial pollutant loading to
6 the municipal storm sewer system.” (See 40 C.F.R. § 122.26(d)(2)(iv)(C).) With the
7 subject NPDES Permit, there has been no determination by the Petitioners that the
8 particular industrial facilities identified in the subject Permit are “*contributing a*
9 *substantial pollutant loading to the municipal storm sewer system,*” and as such, the
10 provisions within the Permit in issue are in conflict with the limitations and requirements
11 of the Clean Water Act and are not supported by any other federal law or State authority.

12 67. Further, the provisions under the legal authority section of the Permit (Part 3.
13 G.) require the Permittees to have Adequate Legal Authority to control pollutants
14 “*including potential contribution,*” and further to inspect, sample, and review and copy
15 records and require regular reports from industrial facilities “with *the potential to*
16 *discharge* polluted storm water runoff into [the Permittees] MS4.” Such requirements are
17 not supported anywhere under State or federal law and are requirements that far exceed
18 any limited inspection obligation that may be placed upon municipalities in connection
19 with certain industrial facilities.

20 68. Further, the definition of “inspection” on the Permit is invalid as it attempts
21 to impose obligations on the Permittees that exceeds the requirements of State and federal
22 law, and to require the Permittees to take action in violation of the California and U.S.
23 Constitutions. Specifically, the definition of “inspection” is defined to mean “entry and
24 the conduct of an on-site review of facility and its operations, at reasonable times, and to
25 determine compliance with specific municipal or other legal requirements.” The definition
26 goes on to identify various steps that are to be performed in conducting an “inspection,”
27 including but not limited to: “interview of facility personnel;” “facility walk-thru;”
28 “examination and copying of records as required;” “sample collection (if necessary or

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VI.

THE RECEIVING WATER LIMITATION LANGUAGE EXCEEDS STATE AND FEDERAL LAW.

71. Under Part 2 of the Permit, "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Further under Part 2, "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance." As these standards are standards that exceed the maximum extent practicable standard as well as the standards for the issuance of Water Discharge Requirements under State law, they were adopted contrary to law.

72. The very purpose of an NPDES Permit and WDRs is to *allow* for the discharge of pollutants to waters of the United States "*from*" the municipal storm drain system. The imposition of a standard that is inconsistent with the requirements of the Porter-Cologne Act (particularly Water Code Sections 13263 and 13241), as well as the MEP standard, is action contrary to State and federal law. The MEP standard is a standard that by definition, requires the consideration of "practicability" in evaluating compliance. The language under Part 2 of the Permit ignores the standard of "practicability," and ignores the fact that municipalities have no jurisdiction over otherwise permitted discharges from industrial facilities, or permitted or unpermitted discharges from State, regional or federal lands and facilities, including special districts, universities and community colleges. The provisions under Part 2 of the Permit are contrary to law and should be invalidated.

VII.

THE DEVELOPMENT PLANNING PROVISIONS ("SUSMPs") AND THE CONSTRUCTIONS PROVISIONS UNDER THE PERMIT ARE INVALID AND CONFLICT WITH STATE AND FEDERAL LAW.

73. Under Section 4 of the Permit, specifically Section D entitled "Development Planning Program," the development planning program and SUSMP requirements

1 thereunder, along with the peak flow restrictions, the numerical design criteria, and the
2 requirements for Petitioners to revise and modify their CEQA and General Plan processes,
3 are all provisions that have been imposed in excess of Respondents' authority, and in
4 excess of State and federal law, including the MEP and "from" standards and the
5 limitations imposed thereunder.

6 74. The SUSMP requirements exceed the MEP standard both in the application
7 of the Permit to discharges "to" the MS4, and in the breadth of the numerous categories
8 and the one-size-fits-all program set forth therein. In addition, the proposed numerical
9 design criteria itself is *not* based on any scientific data or qualitative evidence or on the
10 pollutants of concern and the sources of those pollutants, and the benefits of the program
11 have not been shown to exceed its costs.

12 75. Similarly, the application of the SUSMP Program to "non-discretionary"
13 projects is inappropriate and in conflict with the findings required by Order No. 2000-11,
14 and is directly contrary to the California Environmental Quality Act ("CEQA"), as is the
15 entirety of the SUSMP program.

16 76. The SUSMP provisions in general are contrary to CEQA, as the provisions
17 of CEQA govern the types of development projects that are subject to local agency review
18 for purposes of imposing mitigation measures to address potential impacts on the
19 environment. CEQA spells out the procedure to follow in determining whether and what
20 mitigation measures are to be imposed on a proposed development "project," and whether
21 overriding considerations would allow the "project" to be approved without imposing
22 mitigation measures. As the California Legislature has already established a procedure to
23 follow to assess, and if necessary, mitigate environmental impacts from proposed
24 development "projects," and as the SUSMP provisions in the subject Permit are contrary to
25 the process already established by the California Legislature, Respondents acted contrary
26 to law in adopting the SUSMP provisions in the subject Permit.

27 77. In addition to the deficiencies set forth above, the Development
28 Planning/SUSMP requirements under the Permit are further invalid for the following

1 reasons: (1) the .75 standard is an inappropriate one size fits all standard that is not
2 supported by findings or substantial evidence, that was developed without scientific data
3 on the pollutants of concern and their sources, and that has not been shown to be the
4 appropriate standard or criteria to be applied to one or any of the categories set forth within
5 the Permit; (2) Respondents failed to take into account the requirements of Water Code
6 sections 13000, 13263 and 13241 and the regulations under the Clean Water Act in
7 developing the SUSMP requirements; (3) Respondents failed to perform a cost/benefit
8 analysis and to consider economic considerations in the development of the Development
9 Planning and SUSMP provisions; (4) Respondents lack the authority to regulate
10 “environmentally sensitive areas,” an area that is already “subject to extensive regulation
11 under other regulatory programs,” and because of such, an area that Respondent Regional
12 Board is preempted from regulating; (5) the definition of “redevelopment” is overly broad
13 and ambiguous, and Respondent Regional Board refused to adhere to the definition
14 provided under State Board Order No. 2000-11 or to utilize the definition of
15 “redevelopment” as set forth in the federal regulations (see 64 Fed. Reg. 68721, 68760);
16 (6) the Development Planning and SUSMP provisions are inappropriately applied to
17 “nondiscretionary” projects as such is contrary to existing State law; (7) Respondents
18 failed to include adequate provisions to allow for “regional solutions” as previously
19 required by the State Board in Order No. 2000-11; (8) Respondents failed to adequately
20 consider other unintended consequences from the Development Planning and SUSMP
21 provisions, such as adverse impacts to groundwater quality, adverse impacts on low or
22 moderate income housing, and the potential vector control problems created by
23 implementation of the SUSMP provisions; (9) Respondents failed to consider “conditions
24 existing in the disposal area or receiving waters” as required under Water Code section
25 13263; (10) Respondents violated Water Code section 13360 by imposing a “particular
26 manner” and a particular design standard on Petitioners; (11) Respondents acted contrary
27 to law by improperly mandating the transfer of liability onto municipalities for private
28 illicit discharges and by improperly imposing a “maintenance agreement and transfer

1 obligations” on the Petitioners, contrary to State or federal law, and since the Permittees
2 are without authority to impose such obligations on private parties; (12) Respondents
3 improperly expanded the SUSMP provisions to other development categories such as
4 “industrial” projects, and to projects of one or more acres of surface area, contrary to law;
5 and (13) Respondents failed to work cooperatively with the Permittees to formulate a
6 Mitigation Funding Program Planning before developing the SUSMP requirements.

7 78. Further, the SUSMP provision concerning “peak flow control” in natural
8 drainage systems to “prevent accelerated stream erosion and to protect stream habitat,” is
9 an expansion that is not supported by the State law, the Clean Water Act or the regulations
10 thereunder. The Clean Water Act provides for the control of the “quality” of storm water
11 being discharged into waters of the United States, not the “quantity” of such waters. Peak
12 flow provisions are thus not authorized under the Clean Water Act, and no State law
13 provides the authority to the Respondents to regulate the “quantity” of water being
14 discharged.

15 79. The Development Planning and SUSMP provisions further violate the MEP
16 standard and the authority provided for source control and treatment control provisions
17 under the regulations to the Clean Water Act. Specifically, the imposition of source
18 control measures for an MS4 NPDES Permit is expressly limited to “runoff from
19 commercial and residential areas that are discharged from the municipal storm sewer
20 system,” and such controls are required to be accompanied by “an estimate of the expected
21 reduction of pollutant loads” and “a proposed schedule” for implementing such controls.
22 (40 C.F.R. 122.26(d)(iv)(A).) The regulations are also clear that the source control
23 measures to be included in a proposed management plan are to “address controls to reduce
24 pollutants in discharges *from* municipal separate storm sewers after construction is
25 completed.” (40 C.F.R. 122.26(d)(2)(iv)(A)(1)&(2).) As the SUSMP provisions in
26 question have not been limited to source control measures designed to address runoff
27 “*from*” the municipal storm sewer system, but rather are plainly designed to impose source
28 control measures “*to*” the MS4, the entirety of the SUSMP provisions violate the Clean

1 Water Act.

2 80. Also, with respect to the inclusion of “industrial” facilities within the
3 SUSMP provisions, such facilities are already subject to regulation through the Phase I
4 industrial permit regulatory process. Under the regulations, an application for a permit for
5 an operator of an existing or new storm water discharge associated with a Phase I
6 industrial activity or associated with small construction activity, is to include specific
7 information on “proposed measures to control pollutants and storm water discharges that
8 will occur *after construction operations have been completed,*” as well as proposed best
9 management practices to control pollutants in the storm water discharge during
10 construction. (40 C.F.R. 122.26(c)(ii)(C)&(D).) Also, consistent with the source control
11 measures involving commercial and residential developments, such post-construction
12 measures for industrial facilities are to include an estimate of the runoff coefficient to the
13 site, and the increase in impervious area after the construction addressed in the permit
14 application is completed, and the nature of fill material and excavation, describing the soil
15 or the quality of the discharge. (40 C.F.R. 122.26(c)(i)(ii)(D)&(E).)

16 81. Further, the SUSMP program improperly expands the development planning
17 requirements to new development and redevelopment that do not presently require a
18 SUSMP, but which “potentially have adverse impacts on post-development storm water
19 quality, where one or more of the following project characteristics exist:” As there is
20 no evidence or other findings to support such an expansion of the SUSMP requirements,
21 such an expansion again violates the MEP standard as well as other provisions and
22 regulations to the Clean Water Act and State law.

23 82. In addition, the SUSMP requirements fail to consider “economic
24 considerations,” and no “cost-benefit analysis” was conducted, as required by State and
25 federal law. The failure of the SUSMP to properly consider “economic considerations,”
26 and the failure of Respondent Regional Board to perform a “cost-benefit analysis” requires
27 that the subject Permit be invalidated.

28 83. The SUSMP provisions also fail to address the need for developing housing

1 within the region, as required throughout State law, and as specifically set forth in
2 Government Code section 65580, as well as under California Water Code section 13241,
3 and other provisions of State law. The potential adverse impacts on available housing
4 within the County, along with the additional costs imposed on such housing, require that
5 the subject Permit be invalidated.

6 84. Further, the Development Construction Program section of the subject
7 Permit were adopted contrary to law, as they inappropriately provide that various
8 minimum construction requirements be imposed requiring the "limiting of grading
9 scheduled during the wet season," retaining presumably all sediment and construction
10 related materials at all construction sites, irrespective of the practicability of such a BMP,
11 and irrespective of the effectiveness of other appropriate construction BMPs. Further, the
12 Development Construction Program provisions of the subject Permit are contrary to law as
13 they inappropriately seek to impose additional requirements and controls through the use
14 of a local storm water pollution prevention plan for all construction sites one acre and
15 greater, a requirement that is contrary to the requirements of the federal regulations. Such
16 additional requirements, prohibitions, and limitations on construction are contrary to law,
17 and further, are written in a vague and ambiguous manner.

18 85. In addition, the Development Construction Program provisions of the Permit
19 are contrary to law, as they impose additional requirements on construction activities
20 disturbing five acres or more, which are sites that are presently already regulated under the
21 Clean Water Act through the issuance of a General Construction Activities Storm Water
22 Permit issued by the State Board. Imposing additional and unnecessary requirements on
23 activities for construction sites five acres or greater will result in duplication in regulation
24 and in inconsistent regulations, and with respect to the subject Permit, in regulations that
25 are contrary to the existing General Construction Activities Storm Water Permit. Thus,
26 requiring the City Petitioners to impose additional obligations on construction activities
27 through the subject Permit, and imposing such additional requirements on the Private
28 Petitioners herein, are actions that are not authorized under the Clean Water Act or the

1 regulations thereunder, and are provisions that go beyond the provisions and obligations
2 permitted under existing law.

3 **VIII.**

4 **THE PERMIT IMPROPERLY INFRINGES ON PERMITTEES LOCAL LAND**
5 **USE AUTHORITY.**

6 86. The Development Planning requirements throughout the Permit violate the
7 policies and purpose of CEQA and applicable State laws which grant the Petitioners, not
8 Respondent, the authority to review “discretionary” projects for purposes of considering
9 whether such projects will have a significant adverse impact on the environment, and for
10 purposes, if necessary, of adopting appropriate “mitigation measures” such as SUSMPs, to
11 address such potentially significant adverse impacts.

12 87. In addition, the provisions of the Permit which require modifications to the
13 Petitioners’ CEQA process, violate State law, as the Regional Board has *no authority* and
14 is *not authorized* to adopt legislation or to impose regulations without complying with the
15 requirements of the California Administrative Procedures Act. (See Gov. Code § 11340 et
16 seq.)

17 88. The provisions of the Permit that require the Permittees to amend their
18 General Plans similarly violates State law, as Respondent is without authority to adopt
19 legislation or to impose regulations, and any attempted change by Respondent to
20 California law concerning General Plans, is preempted.

21 89. Government Code sections 65300 and 65307 require City Petitioners to
22 prepare Comprehensive General Plans, including specific elements of a General Plan, such
23 as a land use element, a circulation element, a housing element, a conservation element, an
24 open space element, a noise element and a public safety element. Under Government
25 Code section 65302(d), a General Plan must include a conservation element “for the
26 conservation, development and utilization of natural resources, including water and its
27 hydraulic force, soils, rivers and other waters, harbors, fisheries, wildlife, minerals and
28 other natural resources.” The General Plan requirements allow for the “conservation

1 element” to include, among other issues, *the prevention and control of pollution in*
2 *streams and other waters*, as well as the prevention, control and correction of the *erosion*
3 *of soils*, beaches and shores, and *the protection of watersheds*.

4 90. Pursuant to Government Code section 65300.9, the Legislature has already
5 expressed its intent that it is “for each city and county to coordinate its local budget
6 planning and local planning for federal and state program activities . . . with the local land
7 use planning process, recognizing that each city and county is required to establish its own
8 appropriate balance in the context of the local situation when allocating resources to meet
9 the purposes.” (Gov. Code § 65300.9.)

10 91. Similarly, Congress, under the Clean Water Act, specifically chose to
11 “recognize, preserve and protect the primary responsibility and rights of states . . . to plan
12 the development and use . . . of land and water resources . . .” (33 U.S.C. § 1251(b).) The
13 regulations to the Clean Water Act further recognize the concerns with “possible federal
14 interference with local land use planning,” and EPA has expressly determined not to
15 infringe on local land use authority.

16 92. Accordingly, the subject Permit seeks to improperly infringe upon and
17 interfere with the local land use planning and regulatory authority of the City Petitioners,
18 contrary to law.

19 IX.

20 **NO “COST/BENEFIT” ANALYSIS WAS CONDUCTED AND APPROPRIATE**
21 **CONSIDERATION WAS NOT GIVEN TO “ECONOMIC” CONSIDERATIONS.**

22 93. In adopting the subject, Permit Respondent failed to properly consider
23 “economic” considerations and did not develop the Permit based on a cost/benefit analysis.
24 Numerous provisions in State and federal law require the conducting of a cost/benefit
25 analysis (which Respondent has failed to perform), and further require that economic
26 considerations be addressed in adopting such permits. (See 33 U.S.C. §§ 1288, 1313,
27 1315(b), and 64 Fed. Reg. 68722, 68732; Water Code §§ 13000, 13165, 13241, 13225 and
28 13267.)

1 94. Estimates for carrying out and complying with the various requirements set
2 forth under the Permit are in the *billions* of dollars, yet no evidence has been developed to
3 identify the benefits from the additional 41 or more new or revised programs required
4 under the Permit, and no balancing of the benefits versus the costs of carrying out the
5 requirements of the Permit has been conducted.

6 X.

7 **RESPONDENTS HAVE VIOLATED WATER CODE SECTION 13360.**

8 95. The subject Permit was issued in violation of California Water Code § 13360
9 which prohibits a regional board or the State Board from imposing a specific “design,
10 location, type of construction, or particular manner in which compliance may be had” with
11 the subject order or permit. (Water Code § 13360.)

12 96. Numerous provisions within the subject Permit violate this prohibition under
13 section 13360, including but not limited to the SUSMP requirements and the .75 inch
14 numeric design criteria set forth therein, the Industrial/Commercial Facilities Control
15 Program (including the requirement that the Petitioners inspect specific industrial and
16 commercial facilities in a particular manner for specific BMPs), as well as the Illicit
17 Connection and Illicit Discharge Program, and other requirements imposed upon
18 Petitioners throughout the subject Permit, including the requirements to clean catch basins
19 at specific times, or to install trash receptacles at transit stops.

20 97. All such specific requirements are “particular manners, locations types of
21 construction or designs in which compliance is to be had,” and Permittees have not been
22 given the opportunity to comply with the Permit as otherwise generally permitted by law.
23 Respondent has violated Water Code Section 13360.

24 XI.

25 **THE PERMIT VIOLATES THE CALIFORNIA CONSTITUTION BY IMPOSING**
26 **NUMEROUS UNFUNDED MANDATES.**

27 98. The Permit violates the constitutional prohibition of imposing unfunded
28 mandates on Petitioners, as set forth under Article XIII B, Section 6 of the California

1 Constitution, and the corresponding statutory prohibition on mandating the construction of
2 major waste water treatment facilities, such as will result from the adoption of the subject
3 Order. (See, Gov. Code § 17516(c).) For example, Part II, of the Subject Permit requires
4 Permittees to implement best management practices as necessary to prevent exceedences
5 of water quality objectives or standards. Petitioners contend that such a requirement will
6 result in the construction of major waste water treatment facilities throughout the region, in
7 violation of the provisions of Article XIII B, Section 6 of the California Constitution, and
8 further in violation of Government Code Section 17516(c), since no State or federal
9 assistance was made available pursuant to the Clean Water Bond Act of 1970 and 1974, to
10 the Petitioners. In a study prepared by the University of Southern California entitled "An
11 Economic Impact Evaluation of Proposed Storm Water Treatment for Los Angeles
12 County," a true and correct copy of which is attached hereto and marked as Attachment
13 "C," the study concluded that anywhere from 65 to 130 treatment plants would need to be
14 constructed over the next 20 years to comply with the subject Permit and other stormwater
15 regulations, with capital costs ranging from \$43.7 billion to treat flows from approximately
16 70% of the historic average annual storm events, to \$283.9 billion for 97% of the expected
17 storm events.

18 99. As Part II of the Subject Permit requires the installation of BMPs as
19 necessary to prevent exceedences of water quality standards and water quality objectives
20 and to prevent discharges from storm drain systems causing or contributing to a condition
21 of nuisance, the Subject Permit is an order that will result in the construction of major
22 waste water treatment facilities, without any corresponding State or federal assistance
23 under the Clean Water Bond Act of 1970 and 1974, or otherwise.

24 100. Numerous other mandates imposed by the Permit, including the
25 Development Planning Program/SUSMP requirements, the Development Construction
26 Program, the Catch Basin Program, the Trash Receptacle Program, the Illicit Connection
27 and Illicit Discharge Program and various other requirements imposed upon Permittees are
28 similarly invalid unfunded mandates.

1 projects (i.e., CEQA), and is an attempt to impose additional legislative requirements
2 and/or regulations on the development and use of land throughout the region. As such, the
3 proposed Order is more than a set of waste discharge requirements and in effect, is a set of
4 regulations and/or is legislation, adopted in violation of the requirements of the
5 Administrative Procedures Act and California law.

6 **XIII.**

7 **RESPONDENTS HAD NO AUTHORITY TO ISSUE THE SUBJECT NPDES**
8 **PERMIT AND THE FINDINGS ARE NOT SUPPORTED BY THE RECORD AND**
9 **DO NOT SUPPORT ITS TERMS.**

10 105. Under the Clean Water Act, only state agencies with statewide jurisdiction
11 over class of activities or discharges may issue NPDES permit. (40 C.F.R. 123.1(g)(1) and
12 123.22(b).) As Respondent Regional Board is not a state agency and is not an agency with
13 statewide jurisdiction over a class of activities or discharges, without specific regulatory
14 direction from the State Board and direct oversight by the State Board of the issuance of an
15 NPDES permit, Respondent Regional Board was without authority to issue any NPDES
16 permit, specifically including the subject Permit.

17 106. Just as the State Board has issued general permits for construction activities
18 and industrial activities to be thereafter enforced and administered by the regional boards,
19 the State Board has jurisdiction to issue a general or specific permit for MS4s throughout
20 the State. No such authority, however, exists within any *regional* board unless and until
21 specific *regulatory* direction and guidance is provided by the State Board. (See 40 C.F.R.
22 123.1(g)(1) and 123.22(b).)

23 107. As a result of the failure of the State Board to date to take action to provide
24 the necessary regulatory guidance to all regional boards throughout the State for municipal
25 NPDES Permits, a series of petitions and challenges have been filed challenging individual
26 MS4 NPDES permits, thereby turning the regulatory process into an adjudicative process,
27 and a piecemeal process, without sufficient direction from the State Board on the
28 appropriate terms and provisions for issuing a municipal NPDES permit. Respondents

1 acted contrary to law in issuing the subject Permit as they had no authority to do so.

2 108. Finally, the subject Permit is defective and was improperly issued as
3 numerous findings throughout the Permit are not supported by the evidence and/or do not
4 support the various terms of the Permit. Specifically, Findings B.6, D.2, D.4, D.5, E.1,
5 E.5, E.6, E.7, E.14, E.16, E.18, E.19, E.24, E.25, F.1, F.3, F.4, F.9, F.10, and G.6, are all
6 findings that are either not supported by the evidence in the record and/or are findings that
7 do not support the terms of the Permit. The findings contained in the Subject Permit are
8 without substantial evidence in the record to support such findings. Respondents abused
9 their discretion and acted contrary to law and their decisions were not supported by
10 substantial evidence, since the findings were not supported by substantial evidence, and
11 since the findings were insufficient to support the terms of the Permit.

12 **FIRST CAUSE OF ACTION**

13 **For Peremptory Writ of Mandate**

14 **(Code of Civil Procedure § 1094.5 and Water Code § 13330)**

15 109. Petitioners incorporated herein by reference in their entirety each and every
16 allegation set forth in paragraphs 1 through 108 above, and further incorporate Code of
17 Civil Procedure section 1060 herein.

18 110. Petitioners, subject to the terms and requirements of the subject Order, either
19 directly as Permittees hereunder, or as persons whose activities will adversely be impacted
20 by the regulatory mandates imposed by the terms of the subject Permit, and thus are parties
21 who are beneficially interested in the subject of this Petition for Writ of Mandate.

22 111. Respondents adopted the subject Order ostensibly under the requirements of
23 the Clean Water Act and Water Code section 13263 and related provisions thereto, and
24 conducted a hearing on the adoption of such Order, wherein evidence was required to be
25 taken and discretion was vested in Respondent Regional Board; accordingly, Respondents'
26 actions, inactions and omissions are subject to judicial review in accordance with Code of
27 Civil Procedure section 1094.5 and pursuant to Water Code section 13330, a reviewing
28 court is to exercise its independent judgment in reviewing the subject actions, inactions,

1 and omissions of Respondents herein.

2 112. Respondents have prejudicially abused their discretion and have failed to
3 proceed in a manner required by law, in that:

4 (a) Respondents acted contrary to law and specifically the requirements
5 of the Clean Water Act and the regulations thereunder, as Respondents had no authority to
6 issue the subject Permit since Respondent Regional Board is not a state agency with
7 statewide jurisdiction over the matters addressed in the Permit;

8 (b) Respondents' findings in the subject Permit are not supported by
9 substantial evidence, and the requirements and conditions set forth in the subject Permit
10 are not supported by the findings;

11 (c) Respondents failed to comply with the requirements of the Clean
12 Water Act and regulations hereunder, and acted contrary to law as described herein in
13 developing, processing and adopting the subject Permit;

14 (d) Respondents failed to comply with the requirements of Porter-
15 Cologne Act, Water Code sections 13000 et seq., and acted contrary to law, as described
16 herein;

17 (e) Respondents acted contrary to the requirements of CEQA by failing to
18 comply with the requirements of CEQA and by adopting Permit terms that are inconsistent
19 with and contrary to the process set forth by the California Legislature in its adoption of
20 CEQA, and in the promulgation of regulations thereunder;

21 (f) Respondents' actions in adopting the subject Permit, and in modifying
22 the same, without providing Petitioners sufficient opportunity to review and comment on
23 all substantive changes prior to the adoption of the subject Permit, as required by law,
24 resulted in Petitioners being denied a full opportunity to review and comment on all such
25 changes, and being denied due process of law, in violation of the United States and
26 California Constitutions;

27 (g) Respondents failed to comply with the requirements of the California
28 Administrative Procedures Act, and acted contrary to law as described herein; and

1 (h) Respondents failed to comply with the requirements of the California
2 Constitution, Article XIII B, Section 6, and acted contrary to law as described herein by
3 violating Government Code Section 17516(c).

4 113. For reasons set forth in this Petition, issuance of a writ of mandate will result
5 in the enforcement of an important right affecting the public interest and will confer a
6 significant benefit on the general public. Respondents have the present ability to set aside
7 the terms of the subject Permit, which will result in reinstatement of the 1996 Permit
8 terms, pending the adoption of a new permit that is consistent with the requirement of
9 applicable law.

10 114. Respondents must set aside the subject Order, as the Order was issued in
11 violation of the procedures and processes required by law, is arbitrary, capricious, and
12 illegal, and/or is lacking in evidentiary support, for the reasons set forth herein.

13 115. By orally testifying before Respondents, and by the submission of written
14 and oral arguments and materials in evidence to Respondents, and further by petitioning
15 the State Board for review of Respondent Regional Board's actions, pursuant to Water
16 Code section 13320, Petitioners herein have exhausted all administrative remedies
17 available, have no further administrative remedies, and have no adequate legal remedy in
18 the ordinary course of law other than the issuance by this Court of a writ of mandate.

19 116. Petitioners herein further seek a stay of the implementation and enforcement
20 of the subject Order, as well as preliminary and permanent injunction pursuant to
21 California Water Code section 13361, as permanent damage and irreparable harm may
22 result as a result of the implementation and enforcement of the subject Order, and as
23 significant costs and resources will be expended towards compliance with a deficient and
24 invalid Order issued by Respondent Regional Board without authority to do so, and as
25 Petitioners herein will be subject to unwarranted and inappropriate citizen suits and
26 enforcement actions under the Clean Water Act, and other potential and unwarranted
27 litigation, if such relief is not granted.

28

1 SECOND CAUSE OF ACTION

2 For Writ of Mandate

3 (Code of Civil Procedure § 1085)

4 117. Petitioner herein incorporate by reference each and every allegation
5 contained in paragraphs 1 through 116 above.

6 118. Petitioners, subject to the terms and requirements of the subject Order, either
7 directly as Permittees hereunder, or as persons whose activities will adversely be impacted
8 by the regulatory mandates imposed by the terms of the subject Permit, and thus are parties
9 who are beneficially interested in the subject of this Petition for Writ of Mandate.

10 119. Respondents had a clear and present duty to provide a fair hearing, to comply
11 with the Clean Water Act, the California Porter-Cologne Act, the California
12 Environmental Quality Act, the California Administrative Procedures Act, Government
13 Code sections 11340 *et seq.*, and other state and federal laws and regulations, as well as to
14 act in accordance with the United States and California Constitutions, and must set aside
15 the subject Order which was issued in excess of Respondents' authority and in violation of
16 the procedures and processes required by law. Respondents' actions, as described herein,
17 were arbitrary, capricious, contrary to law, and/or entirely lacking in evidentiary support.

18 120. Respondents have a clear and present duty to proceed in the manner required
19 by law and to obtain authority and jurisdiction under the Clean Water Act through further
20 regulatory direction from the State Board, to issue NPDES permits, and to thereafter act in
21 accordance with the regulations and other federal and State law, and the United States and
22 California Constitutions.

23 121. Respondents have not proceeded in the manner required by law in that:

24 (a) Respondents acted contrary to law and specifically the requirements
25 of the Clean Water Act and the regulations thereunder, as Respondents had no authority to
26 issue the subject Permit since Respondent Regional Board is not a state agency with
27 statewide jurisdiction over the matters addressed in the Permit;

28 (b) Respondents' findings in the subject Permit are not supported by

1 substantial evidence, and the requirements and conditions set forth in the subject Permit
2 are not supported by the findings;

3 (c) Respondents failed to comply with the requirements of the Clean
4 Water Act and regulations hereunder, and acted contrary to law as described herein in
5 developing, processing and adopting the subject Permit;

6 (d) Respondents failed to comply with the requirements of Porter-
7 Cologne Act, Water Code sections 13000 et seq., and acted contrary to law, as described
8 herein;

9 (e) Respondents acted contrary to the requirements of CEQA by failing to
10 comply with the requirements of CEQA and by adopting Permit terms that are inconsistent
11 with and contrary to the process set forth by the California Legislature in its adoption of
12 CEQA, and in the promulgation of regulations thereunder;

13 (f) Respondents' actions in adopting the subject Permit, and in modifying
14 the same, without providing Petitioners sufficient opportunity to review and comment on
15 all substantive changes prior to the adoption of the subject Permit, as required by law,
16 resulted in Petitioners being denied a full opportunity to review and comment on all such
17 changes, and being denied due process of law, in violation of the United States and
18 California Constitutions;

19 (g) Respondents failed to comply with the requirements of the California
20 Administrative Procedures Act, and acted contrary to law as described herein; and

21 (h) Respondents failed to comply with the requirements of the California
22 Constitution, Article XIII B, Section 6, and acted contrary to law as described herein, by
23 violating Government Code Section 17516(c).

24 122. For the reasons set forth herein, the issuance of a writ of mandate will result
25 in the enforcement of an important right affecting the public interest and will confer a
26 significant benefit under the general public. Respondents have the present ability to set
27 aside the terms of the subject Permit, which will result in reinstatement of the 1996 Permit
28 terms, pending the adoption of a new permit that is consistent with the requirement of

1 applicable law.

2 123. Respondents must be ordered to set aside the subject Order, as the Order was
3 issued in violation of the procedures and processes required by law, is arbitrary, capricious,
4 and illegal, and/or lacking in evidentiary support, and for the reasons set forth herein.

5 124. By orally testifying before Respondents, and by the submission of written
6 and oral arguments and materials in evidence to Respondents, and further by petitioning
7 the State Board for review of Respondent Regional Board's actions, pursuant to Water
8 Code section 13320, Petitioners herein have exhausted all administrative remedies
9 available, have no further administrative remedy, and have no adequate legal remedy in the
10 ordinary course of law other than the issuance by this Court of a writ of mandate.

11 125. Petitioners herein further seek a stay of the implementation and enforcement
12 of the subject Order, as well as preliminary and permanent injunction pursuant to
13 California Water Code section 13361, as permanent damage and irreparable harm may
14 result as a result of the implementation and enforcement of the subject Order, and as
15 significant costs and resources will be expended towards compliance with a deficient and
16 invalid Order issued by Respondent Regional Board without authority to do so, and as
17 Petitioners herein will be subject to unwarranted and inappropriate citizen suits and
18 enforcement actions under the Clean Water Act, and other potential and unwarranted
19 litigation, if such relief is not granted.

20 **THIRD CAUSE OF ACTION**

21 **For Declaratory Relief**

22 **(Code of Civil Procedure § 1060 and Government Code §§ 11350 and 11350.3)**

23 126. Petitioners herein incorporate by reference each and every allegation
24 contained in paragraphs 1 through 125 above.

25 127. An actual controversy has arisen between Petitioners and Respondents
26 relating to their legal rights and duties concerning the subject NPDES permit. Specifically,
27 Petitioners contend that the Permit is invalid, was adopted by Respondent Regional Board
28 which had no authority to do so, and was adopted contrary to the requirements of State law

1 and the Clean Water Act, including the regulations thereunder, and was adopted contrary
2 to CEQA and the United States and California Constitutions, as well as Government Code
3 Section 17516(c), all as alleged herein.

4 128. Respondents, on the other hand, contend that the subject Order was adopted
5 in accordance with State and federal law.

6 129. No adequate remedy other than that prayed for herein exists by which the
7 rights of the parties hereto may be adjudicated and determined because of the public
8 interest requires a prompt resolution of this matter, and as the subject Permit concerns
9 unique rights. Declaratory relief is thus necessary and appropriate to resolve the pending
10 dispute and to avoid the multiplicity of actions over the same and/or similar actions by
11 Respondents herein, and as necessary to provide specific direction to Respondents in
12 taking any future action that may involve the subject Permit, or similar and/or related
13 permits and actions.

14 **FOURTH CAUSE OF ACTION**

15 **For Stay and a Preliminary and Permanent Injunction**

16 **(Code of Civil Procedure §§ 526, 527,**

17 **Civil Code § 3422, and Water Code §§ 13361)**

18 130. Petitioners herein incorporate by reference in their entirety each and every
19 allegations set forth in paragraphs 1 through 129 above.

20 131. The subject Order was adopted contrary to the Clean Water Act and the
21 regulations thereunder, and contrary to State law and the United States and California
22 Constitutions, for the reasons alleged herein.

23 132. Unless Respondents are enjoined by this Court from implementing,
24 administrating and enforcing the subject Order, Petitioners, the public at large and cities
25 throughout Los Angeles County will suffer substantial and irreparable harm. Petitioners,
26 and others, will be forced to expand their limited resources, and to commence
27 implementation of the terms of the subject Order to the detriment of Petitioners and the
28 public. Proceeding with the implementation, administration and enforcement of the

1 subject Order will, therefore, result in the waste of resources, and will further hinder future
2 environmental compliance efforts throughout Los Angeles County, as a result of the
3 imposition of unreasonable and overly expensive requirements and restrictions, and
4 requirements that are not cost effective, all which would result in irreparable damage to
5 untold businesses and citizens, without any appropriate corresponding benefit.

6 133. Petitioners herein have no adequate remedy other than that prayed for herein,
7 in that the subject matter is unique and in that monetary damages would be inadequate to
8 fully compensate Petitioners for the consequences of Respondents actions. Injunctive
9 relief is therefore in the interest of the public for the reasons alleged herein.

10 134. Petitioners therefore seek and are entitled under Code of Civil Procedure
11 sections 526 and 527, Civil Code section 3422 and Water Code section 13361, to a stay or
12 a preliminary and/or permanent injunction, enjoining Respondents from proceeding further
13 with the administration, implementation and enforcement of the subject Order.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Petitioners herein, and each of them pray as follows:

16 (1) That the Court issue a writ of mandate commanding Respondents to set aside
17 the subject Order, and in all actions taken or to be taken as a result of such Order towards
18 the enforcement and/or implementation of the Order, and all actions pertaining thereto, and
19 that the 1996 Permit be reinstated; or, in the alternative, that the Court issue a writ of
20 mandate commanding that the Respondents provide a full and fair hearing on the issuance
21 of a proper municipal NPDES permit for Los Angeles County, including the City of Los
22 Angeles and all municipalities therein, except the City of Long Beach, in accordance with
23 the requirements of State and federal law;

24 (2) That a declaratory judgment be entered declaring the subject Order invalid
25 and declaring that Respondents' actions were arbitrary and capricious and otherwise
26 contrary to State and federal laws, and requiring the reinstatement of the 1996 Permit
27 pending the development, processing and approval of a municipal NPDES Permit that is
28 consistent with law;

1 (3) That a stay and/or temporary restraining order, preliminary injunction and/or
2 permanent injunction be issued, enjoining the adoption, implementation, and enforcement
3 of the subject Permit;

4 (4) That an Order be issued by the Court setting aside the action through
5 adoption of the Order, and any related action of Respondents under such Order, or, in the
6 alternative, that the Court modify such actions so that they are in compliance with the
7 requirements of State and federal law;


8 (5) That an Order by issued by the Court providing for such other and further
9 relief as is just and proper; and

10 (6) That costs, attorney fees and other expert fees incurred in pursuing this
11 Petition be awarded to Petitioners, as permitted by law.

12 Dated: January 17, 2003

Respectfully submitted

13 RUTAN & TUCKER, LLP
14 RICHARD MONTEVIDEO

15 By: 
16 Richard Montevideo
17 Attorneys for Petitioners/Plaintiffs

VERIFICATION

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES


I have read the foregoing PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents.

I am General Counsel to the Building Industry Legal Defense Foundation, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on January 16, 2003, at Diamond Bar, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Building Industry Legal Defense Foundation



David C. Smith, Esq.

VERIFICATION

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents.

I am an officer of the Construction Industry Coalition on Water Quality, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on January 16, 2003, at West Covina, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

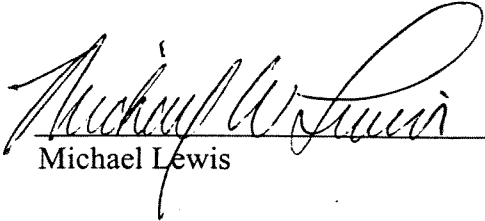

Michael Lewis

EXHIBIT "A"

RUTAN & TUCKER

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*A PROFESSIONAL CORPORATION
**PATENT AGENT

January 17, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Dennis Dickerson
Executive Officer
California Regional Water Quality
Control Board, Los Angeles Region
320 W. 4th Street, Suite 200
Los Angeles, California 90013-1105

Re: Notice of Intent to Commence Action under the California Environmental Quality
Act (Public Resources Code Section 21167.5)

Dear Mr. Dickerson:

Notice is hereby given, pursuant to Section 21167.5 of the California Public Resources Code, that the Cities of Arcadia, Baldwin Park, Bell Gardens, Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Irwindale, Lawndale, Montebello, Monterey Park, Paramount, Pico Rivera, Pomona, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Gate, South Pasadena, Temple City, Vernon, Walnut, West Covina, Whittier and potentially other Los Angeles County Cities, and the Building Industry Legal Defense Foundation, a non-profit mutual benefit corporation, and the Construction Industry Coalition on Water Quality, a non-profit corporation, intend to commence proceedings seeking a Writ of Mandate against the California Regional Water Quality Control Board, Los Angeles Region, and DOES 1 through 50, inclusive, ("Respondents") to challenge the Respondents' actions and inactions in developing and adopting Order No. 01-182, NPDES Permit No. CAS004001 Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the incorporated Cities therein, except for the City of Long Beach, in part because of said Respondents failure to comply with the requirements of the California Environmental Quality Act (Public Resources Code Section 21100, *et seq.*) and various other requirements of State and federal law.

Mr. Dennis Dickerson
January 17, 2003
Page 2

Please do not hesitate to contact the undersigned should you have any questions in this regard.

Respectfully submitted,

RUTAN & TUCKER, LLP



Richard Montevideo

RM:kmh

cc: Bill Lockyer, Esq., State Attorney General

EXHIBIT B

EXHIBIT "B"

1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3
4 I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of
5 California. I am over the age of 18 and not a party to the within action. My business address is
6 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

7 On January 17, 2003, I served on the party below the within:

8 **PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY
9 RELIEF AND INJUNCTIVE RELIEF**

10 by placing a true copy thereof in sealed envelope(s) addressed as stated below:

11 Bill Lockyer, Esq.
12 California Attorney General
13 300 S. Spring Street, Suite 13-N
14 Los Angeles, CA 90013

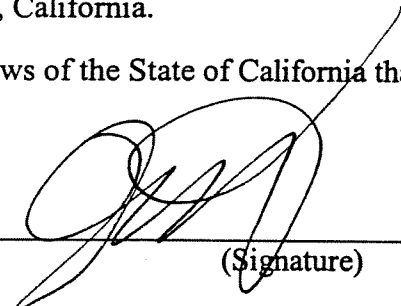
15 In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand
16 personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection
17 and processing correspondence for mailing with the United States Postal Service. Under that
18 practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan &
19 Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day
20 in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP
21 with regard to collection and processing of correspondence and mailing were followed, and I am
22 confident that they were, such envelope(s) were posted and placed in the United States mail at
23 Costa Mesa, California, that same date. I am aware that on motion of party served, service is
24 presumed invalid if postal cancellation date or postage meter date is more than one day after date
25 of deposit for mailing in affidavit.

26 Executed on January 17, 2003, at Costa Mesa, California.

27 I declare under penalty of perjury under the laws of the State of California that the
28 foregoing is true and correct.

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