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**STATE OF CALIFORNIA**

**STATE WATER RESOURCES CONTROL BOARD**

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| In the matter of the Petition of:<br><br>THE CITY OF CLAREMONT<br><br>FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, IN ISSUING ORDER NO. R4-2012-0175 (NPDES NO. CAS 004001) | RESPONSE TO JULY 8, 2013, STATE WATER RESOURCES CONTROL BOARD QUESTIONS ON RECEIVING WATER LIMITATIONS REQUIREMENTS<br><br>[Water Code § 13320(a)] |

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Petitioner, the City of Claremont ("City" or "Petitioner") submits this response in support of its Petition to the State Water Resources Control Board ("State Board") requesting that the State Board review and set aside all or portions of the California Regional Water Quality Control Board, Los Angeles Region's ("Regional Board") Order No. R4-2012-0175 (NPDES No. CAS 004001) ("2012 Permit"). On July 8, 2013, the State Board requested comments on the following two questions pertaining to the City's petition:

1. Is the watershed management program/ enhanced watershed management program alternative contained in the Los Angeles MS4 Permit an appropriate approach to revising the receiving water limitations in MS4 Permits?

2. If not, what revisions to the watershed management program/ enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 Permits?

While the City generally supports the 2012 Permit's approach to receiving water limitations ("RWL") the City remains concerned about the compliance process. The 2012 Permit contains standard RWL language prohibiting discharges the "cause or contribute" to an exceedance of Water Quality Standards. The 2012 Permit allows the City to attain compliance with this prohibition if it develops and implements either a "Watershed Management Plan" ("WMP") or an Enhanced Watershed Management Plan ("EWMP").

The City is working with the cities of Pomona, LaVerne and San Dimas on the development of a WMP. While the City initially investigated the possibility of implementing an EWMP, it was not a viable option because available land and other constraints made retaining the runoff from the 85th percentile storm infeasible. Development and implementation of an WMP will only give the City partial BMP-based compliance with the 2012 Permit's RWL requirements. The 2012 Permit will still require the City to comply with deadlines for meeting Water Quality Standards as numeric limits.

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The City is therefore concerned that the only compliance mechanism available to it, the WMP, does not give the City the BMP-based of compliance. The City's only options under the 2012 Permit require it to implement a WMP or comply immediately with the 2012 Permit's RWL prohibitions. Either option will require the City to meet Water Quality Standards as end of pipe effluent limits. It is therefore the City's position that:

1. The BMP-based compliance approach at set forth in State Board Precedential Orders 98-01, 99-05 and 2001-15 remains the most appropriate one for all MS4 permits. Through the Petition process the State Board should re-affirm its commitment to BMP-based compliance by re-affirming its decisions in those orders;

2. If the State Board is going to revise the 2012 Permit's requirements, then it needs to provide clear BMP-based compliance for all permitees, including those that engage in the WMP process. Imposing Water Quality Standards as end-of-pipe effluent limits that the permittees are incapable of attaining represents an abuse of discretion on the part of the regulating authority; and

3. The RWL language proposed by CASQA provides a compliance mechanism that is similar to the approach taken by the 2012 Permit and as such it is an appropriate means of addressing BMP-based compliance.

## I. The Los Angeles Regional Board appropriately included BMP-based compliance options in the 2012 Permit.

### A. Existing State Board policy provides for BMP-based compliance with Receiving Water Limitations discharge requirements.

The RWL language in the City's 2001 Permit was originally required by the State Board based on the State Board's conclusion that Section 402(p)(3)(B) of the Clean Water Act required MS4 permits to include effluent limitations based on Water Quality Standards in accordance with Section 301 of the Act. The State Board reasoned that the maximum extent practicable ("MEP") requirements of Section 402(p)(3)(B) of the Act only modified the technology-based

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requirements of Section 301, and left in place the water quality-based requirements of Section 301, even if those requirements were more stringent than MEP.

The State Board explained its rationale in State Water Resources Control Board Order No. WQ 98-01, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order 96-03, NPDES Permit No. CAS0108740, for Storm Water and Urban Runoff from the Orange County Flood Control District and the Incorporated Cities of Orange County Within the San Diego Region*:

> CWA section 301(a) prohibits the discharge of any pollutant unless pursuant to an NPDES permit. Section 301(b)(1)(A) requires compliance with effluent limitations necessary to achieve compliance with technology based standards (e.g. best practicable control technology currently available or secondary treatment). Section 301(b)(l)(C) also requires compliance with any more stringent effluent limitation "necessary to meet Water Quality Standards."
> (Order No. WQ 98-01, p 2-3 [internal citation omitted].)

The State Board further held that although water quality based effluent limits are required, the most appropriate way to meet Water Quality Standards is through the use of BMP-based effluent limits:

> The SWRCB has determined that for municipal separate storm water permits, BMPs constitute valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements. In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA.
>
> (Order No. WQ 98-01, p 5 [internal citation omitted, emphasis added].)

Subsequent State Board decisions expressly confirmed that the State Board intended the RWL language to implement the requirement of Section 301(b)(1)(C) that, in addition to technology-based requirements, NPDES permits include any more stringent effluent limitations necessary to meet Water Quality Standards.[1] The confusion about whether Section 301 applied to Section 402(p)(3)(B) was understandable because prior to 1999 no precedential legal decision had

[1] State Board Order No. WQ 99-05.

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addressed the issue. In 1999, however, the 9th Circuit Court of Appeals unequivocally held that MS4 permits are not required to include water quality based effluent limits.[2]

In *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), the 9th Circuit Court of Appeals held that Section 402(p)(3)(B) was unambiguous and *completely replaced* the requirements of Section 301 for MS4 permits. Therefore, neither the technology-based nor water quality-based requirements of Section 301 applied to MS4 permits. Moreover, the 9th Circuit held that MS4 permits do not need to comply with Water Quality Standards, stating "industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges." (*Defenders of Wildlife v. Browner*, 191 F.3d at 1165.) In other words, the legal premise on which the State Board's RWL language was based was wrong.

In 2001, the State Board had the opportunity to clarify its RWL language in light of the *Defenders of Wildlife v. Browner* decision in State Board Order WQ 2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001). In discussing the propriety of requiring strict compliance with Water Quality Standards, and the applicability of the MEP standard, the State Board held:

> While we will continue to address Water Quality Standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. ***We will generally not require "strict compliance" with Water Quality Standards through numeric effluent limits and we will continue to follow an iterative approach, which seeks compliance over time.*** The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems.
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> (Order 2001-15, p. 7-8 [emphasis added].)

Following its decision in Order No. WQ 2001-15, State Board policy is, and has been, that Water Quality Standards are to be achieved over time through the iterative process. In State

[2] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

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Board Order WQ 2001-15, the State Board further explained, in the context of its review of the 2001 San Diego MS4 Permit, that:

> In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that ***our language, similar to U.S. EPA's permit language discussed in the Browner case, does not require strict compliance with Water Quality Standards***. Our language requires that storm water management plans be designed to achieve compliance with Water Quality Standards. ***Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.***
>
> (*Id.*, at 7 [emphasis added].)

The State Board thus established a "middle ground" position where MS4 permits had to require compliance with Water Quality Standards but where compliance was to be achieved over time in recognition of the unique nature of stormwater discharges:

> We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of water quality objectives. ***The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2.*** The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.
>
> (*Id.*, at 8-9 [emphasis added].)

It is true that the State Board declined to eliminate, the need to address Water Quality Standards at all in MS4 permits in California. The State Board found that a technology-based standard alone would ignore the impacts urban runoff was having on receiving waters. The State Board thereby established a middle course in which strict compliance with Water Quality Standards would not generally be required, but where Water Quality Standards would still be addressed through an iterative approach, which seeks compliance over time. This approach, the State Board found, "is protective of water quality, but at the same time considers the difficulties

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of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems."

The State Board's 2001 precedential interpretation of the RWL language remains the State Board's last precedential order on the subject. Had the iterative approach as articulated in the State Board's 2001 Order been uniformly applied, the City's current concerns with the RWL requirements in its 2012 permit would have been ameliorated. Such an iterative approach establishes a high bar—the ultimate achievement of Water Quality Standards—but also recognizes the difficulties faced by MS4s in achieving those standards because of the open nature of MS4 systems, significant variability in rainfall and technical and financial feasibility.

### B. The 9th Circuit Re-wrote the State Board's Receiving Water Limitations Compliance Requirements

In 2011, the 9th Circuit Court of Appeals issued an opinion in *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011), *rev'd on other grounds* by 133 S.Ct. 710 (2013), that turned the State Board's policy on its head. Rather than finding the iterative process to be an integral part of the State's effort to achieve compliance with Water Quality Standards over time through improved BMPs, the 9th Circuit held that strict compliance with Water Quality Standards was required and was subject to strict enforcement separate from the iterative process.

The 9th Circuit's decision appears rooted in the same misunderstanding of Section 402(p)(3)(B) and Section 301 of the Act that existed at the time of the original development of the RWL language. The 9th Circuit quoted with support from non-MS4 cases that are based on the strict application of Water Quality Standards. For example, the 9th Circuit noted that "[o]nly by enforcing the water-quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated." The 9th Circuit rejected the notion (as it previously had supported in *Browner*) that Section 402(p)(3)(B) was a "lesser standard." The 9th Circuit reasoned that "Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their storm-water discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring MS4 operators under the NPDES-permitting system."

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Although the 9th Circuit's decision was reversed by the United States Supreme Court on other grounds, its interpretation of the RWL language was not addressed by the Supreme Court. Moreover, on August 8, 2013, the 9th Circuit reconsidered its previous decision on remand from the Supreme Court. The Court reversed its prior decision to again hold the Los Angeles Flood Control District liable for the quality of the receiving water, even though there was no evidence of a discharge of pollutants from the Flood Control District's MS4.[3]

The 9th Circuit reiterated its previous position that each and every requirement in an NPDES permit is strictly enforceable and to be interpreted as a contract:

> Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not—NPDES permits are treated like any other contract. [ ] If the language of the permit, considered in light of the structure of the permit as a whole, "is plain and capable of legal construction, the language alone must determine the permit's meaning."
>
> (*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. August 8, 2013) ____ F.3d _____ [Dock. No. 10-56017] 21-22 [internal citations omitted].)

The Court of Appeals went further and held that despite the Supreme Court's decision that there is no evidence of a discharge (and thus no Clean Water Act liability) the County of Los Angeles Flood Control District violated the 2001 Permit:

> the language of the Permit is clear—the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions.
>
> (*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. August 8, 2013) ____ F.3d _____ [Dock. No. 10-56017] 26.)

[3] In its 2011 opinion, the 9th Circuit had rejected the contention that the mass-emissions monitoring station data conclusively established the Flood Control District's liability. The 9th Circuit held that there must be some additional proof of the Flood Control District's individual contribution to the water quality exceedance. However, on August 8, 2013, the reconsidered this argument and held that the monitoring data only established liability, even absent evidence of the District's individual contribution.

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The 9th Circuit's new decision highlights the need for RWL reform because it appears to hold permittees liable for the quality of the receiving waters absent any evidence of an individual contribution to the problem. It is thus as a fundamental shift away from the State Board's approach in its 2001 precedential order.

### C. BMP-based Compliance is the only feasible means for MS4 Dischargers to achieve Water Quality Standards; imposing any other standard of compliance would be an abuse of discretion

The United States Congress, the EPA, and the State Board have all recognized on multiple occasions that municipal stormwater discharges are different, and are best addressed through the implementation of BMPs. This distinction is most clear in the language of the Clean Water Act itself, which Congress amended in 1987 to include stormwater discharges, and regulated under a standard that was more deferential than that applied to industrial and other wastewater discharges. (See 33 U.S.C. § 1342(p).)

Likewise, the EPA has repeatedly expressed a preference for regulating stormwater discharges by requiring the implementation of BMP's, rather than by way of imposing either technology-based or water quality-based numerical limitations. "Site-specific stormwater pollution prevention plans allow permittees to develop and implement 'best management practices', whether structural or non-structural, that are best suited for controlling stormwater discharges from their industrial facility." (U.S. EPA NPDES Permit Writers' Manual (Dec. 1996) pp. 149–150; U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761 (Aug. 26, 1996); and U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996); *see also Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256-57 [citing *id.*].)

The 9th Circuit reiterated the EPA's BMP-based approach in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), holding:

> the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less

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> than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide for the attainment of Water Quality Standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion.
>
> (Id., at 1166-67.)

More recently, the State Board convened a "Blue Ribbon Panel" of experts to determine whether compliance with numeric effluent limits in stormwater permits was feasible. The panel found that "[m]ost all existing development rely on non-structural control measures, making it difficult, if not impossible to set numeric effluent limits for these areas" and that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." (Storm Water Quality Panel Recommendations to the California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, June 19, 2006, pp. 8, 12.)

Nonetheless, the 9th Circuit's interpretation of the 2001 Permit's RWL requirements would impose strict compliance with numeric effluent limits on the City. Moreover, under the 9th Circuit's "strict liability" approach, it appears that even one molecule of discharge could be enough to violate permit requirements. In the underlying District Court case, the District Court found the Los Angeles County Flood Control District liable for *contributing* to Water Quality Standards even if it was not the sole source of the exceedance:

> The existence of other potential sources is irrelevant to determining whether there has been a violation under the Permit. . . Thus, Defendants are liable for the exceedances so long as they contributed to them.
>
> (*NRDC v. County of L.A.*, CV 08-1467 AHM (C.D. Cal., Mar 2, 2010) 28.)

With some pollutants, such as bioaccumulative toxics, *contribution* might occur even where the discharge is at concentrations that are at, or lower than the applicable Water Quality Standard. Thus under the 9th Circuit's interpretation of the 2001 permit, even one molecule of

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discharge could place the City out of compliance. Meeting this standard is simply not possible, and imposing it on the City would represent a violation of law. (*Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.*, 519 U.S. 993 (1996).)

The 2012 Permit regulates 140 pollutants in total, the majority of which can be exceeded at any time. The sheer number of TMDLs and other regulated pollutants makes compliance with numeric standards, including at least some interim and final TMDL targets, a practical impossibility.

In *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.*, 519 U.S. 993 (1996), the plaintiff sued JMS Development Corporation ("JMS") for failing to obtain a storm water permit that would authorize the discharge of storm water from its construction project. The plaintiff argued JMS had no authority to discharge any quantity or type of storm water from the project, i.e. a "zero discharge standard," until JMS had first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was being discharged from its property and that it had not obtained an NPDES permit, but claimed it was not in violation of the Clean Water Act (even though the Act required the permit) because the Georgia Environmental Protection Division, the agency responsible for issuing the permit, was not yet prepared to issue such permits. As a result, it was impossible for JMS to comply. (*Id.*)

The Eleventh Circuit Court of Appeal held that the CWA does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (*Id.* at 1529.) The Court then found that:

> In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. ***Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible.*** The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge.
>
> (Id. at 1530.)

The Court concluded, "*Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities." (*Id.*) The same rule applies here. (*See also Atl. States Legal Found., Inc. v.*

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*Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1994) ["it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants . . . Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit"].)

It is technically and economically infeasible to strictly comply with Water Quality Standards as end of pipe numeric limits. Imposing such requirements goes beyond "the limits of practicability" (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1162). Neither the State Board, nor Los Angeles Regional Board have the authority to impose requirements on the City that are impossible to achieve. Such action would represent an unlawful abuse of discretion that the Los Angeles Regional Board was right to avoid.

## II. The Regional Board's Revisions to the 2012 Permit's Receiving Water Limitations Compliance requirements do not implicate the Clean Water Act's Anti-Backsliding or Anti-Degradation requirements

### A. Anti-Backsliding

In its petition, the Natural Resources Defense Council ("NRDC") asserts that the anti-backsliding provisions of the Clean Water Act and federal regulations preclude any changes to the RWL language. A careful reading of the Act and the regulations demonstrate otherwise.

Section 402(o) of the Act provides that for specific effluent limitations established on the basis of specific sections of the Act, a permit may not be renewed or reissued that contains effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. There are several reasons why Section 402(o) has no application to the RWL language.

First, the RWL language is not an "effluent limitation" as defined in the Act. An "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources* into navigable waters, the waters of the contiguous zone, or the ocean,

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including schedules of compliance."[4] An "effluent limitation" is thus a limit measured at the point of discharge from a point source. In contrast, the RWL language measures compliance in the receiving water.

Second, even if the RWL language could be characterized as an "effluent limitation," it is not one developed in accordance with the specific sections listed in Section 402(o). It is not a technology-based effluent limitation established based on best professional judgment in accordance with Section 402(a)(1)(B). Rather, it derives its legal authority from Section 402(p)(3)(B). Moreover, as *Browner* makes clear, the RWL language is not (and could not be) a technology-based or water-quality based effluent limitation established on the basis of Section 301(b)(1)(c) *because Section 301 has no application to MS4 permits*. Finally, the RWL language is not an effluent limitation developed under Section 303(d) or (e), which involve the continuing planning process and TMDLs. The RWL language is, at its core, an exercise of discretion under the "such other provisions" language of Section 402(p)(3)(B)(iii) and is not subject to Section 402(o).

The federal regulations also contain anti-backsliding provisions.[5] These regulations must be addressed in NPDES permits "when applicable." Due to the unique nature of MS4s and the special standards Congress created in Section 402(p)(3)(B) for such systems, these regulations are not "applicable" to MS4 permits. The regulations provide that interim effluent limitations, standards or conditions of renewed or reissued permits must be at least as stringent as the final effluent limitations, standards or conditions in the previous permit. For the same reasons as discussed above regarding Section 402(o), these regulations do not apply to MS4 permits. It is also commonly recognized that these regulations do not govern requirements based on state Water Quality Standards.[6] Because the RWL language is, at its core, intended to protect state Water Quality Standards, these regulations have no application to the RWL language.

**B. Anti-Degradation**

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[4] 33 U.S.C. §502(11)(Emphasis added).

[5] 40 CFR § 122.44(l).

[6] See, e.g., NPDES Permit Writers' Manual, page 7-4.

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EPA's regulations require that each state develop and adopt a statewide anti-degradation policy and identify the methods for implementing such policy.[7] California adopted its anti-degradation policy in 1968.[8] The State Board has issued guidance on its policy through Administrative Procedures Update ("APU") 90-004.

As APU 90-004 makes clear, the State's anti-degradation policy does not apply when a discharge "will not be adverse to the intent and purpose of the state and federal anti-degradation policies." Likewise, APU 90-004 provides that if there is "no reason to believe that existing water quality will be reduced due to the proposed action, no anti-degradation analysis is required." As noted above, revisions to the RWL language will allow MS4s through-out the State to better address water quality problems and will lead to better water quality outcomes. Thus, there is no reason to believe that revisions to the RWL language will reduce existing water quality. If anything, the type of approach presented in the LA Permit or the alternative put forward by CASQA present more enforceable requirements and will result in greater water quality benefits. Therefore, the anti-degradation policy does not apply.

This analysis is consistent with recent case law regarding anti-degradation. In a recent case, the court acknowledged that the anti-degradation policy might not apply if it can be shown that the discharge of waste will not degrade the quality of the receiving water.[9] To support such a conclusion, a water board must ensure that the regulatory action includes sufficient requirements, including an effective monitoring program, to demonstrate that the discharge will not degrade the quality of the receiving water. MS4 permits contain such requirements, including an effective monitoring program. Therefore, the anti-degradation provisions do not apply.

## III. The City supports the 2012 Permit's BMP-based compliance.

The 2012 Permit includes two options for compliance with Receiving Water Limitations: 1) develop and implement an EWMP that includes regional projects to retain all runoff from the

[7] 40 CFR 131.12.

[8] State Board Resolution No. 68-16.

[9] 210 Cal.App.4th 1255 (2012).

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85th percentile storm; or 2) develop and implement a WMP that includes projects designed to attain Water Quality Standards. Cities that successfully implement an EWMP are deemed compliant with the Permit's RWL requirements. Cities that only develop a WMP must still meet Water Quality Standards as numeric effluent limits.

It is the City's position that compliance with numeric effluent limits in an MS4 permit will always be problematic. The 2012 Permit's WMP requirements should therefore be revised to bring them in line with existing State Board precedential orders, and to ensure that compliance can be attained through implementation of BMPs.

### A. State Board should reaffirm its 2001 Order holding that BMP-based compliance is required.

As described in detail above, existing precedential orders of the State Board provide the MS4 permits must include requirements to meet Water Quality Standards, but compliance with those requirements may be through the implementation of an iterative, BMP-based process.

There is no room in the text of any of the State Board's decisions on the RWL issue for strict compliance with Water Quality Standards as numeric effluent limits. Moreover, because compliance with Water Quality Standards as end-of-pipe numeric effluent limits is infeasible, imposing such requirements on the City would represent an abuse of discretion. The City therefore requests that the State Board reaffirm its holding in Orders 98-01, 99-05, and 2001-15, that iterative implementation of BMPs is the only feasible means of achieving Water Quality Standards.

### B. The 2012 Permit's WMP requirements need to be revised.

The Cities of Claremont, Pomona, LaVerne and San Dimas have entered into an agreement for the joint preparation of a WMP. The option of preparing an EWMP was studied by the group, but not considered a viable option based on many factors, including requirements related to construction of a multi-benefit regional project. Based on preliminary review, the cities determined that a regional project was infeasible due to the limited area available for within the four cities, and the significant financial constraints associated with the project. As such, the Cities

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have submitted a Notice of Intent to the Regional Board indicating that the group will be preparing a joint-WMP.

The need to prepare a WMP places the City in the position of being required to meet the applicable WQBELs and RWL prohibitions as numeric standards. This in turn could result in potential enforcement actions and the issuance of fines by the Regional Board. The final goal of improving Water Quality Standards, however, will not be achieved.

To be clear, the City generally supports the 2012 Permit's approach to compliance. There are many good things about the 2012 Permit's WMP requirements, including:

- Voluntary participation by the permittees (2012 Permit § VI.C.1.b)
- Flexibility to implement WMPs or EWMPs on watershed or jurisdictional basis (2012 Permit § VI.C.1.e)
- Ability to prioritize pollutant-water body combinations (2012 Permit § VI.C.1.f.i)
- Adaptive management to allow for adjustment of BMPs as necessary (2012 Permit § VI.C.1.f.iv)

Strategic compliance programs that provide for BMP-based compliance better reflect the reality and practice of storm water management. Moreover, BMP-based compliance programs are more likely to result in water quality improvements than the status quo receiving water limitations language because they encourage collaboration between permittees to implement regional projects that cross jurisdictional boundaries. Such programs improve the ability of municipal storm water program staff to obtain the funding needed to implement water quality projects and BMPs.

It is likewise more palatable for the public to spend millions of dollars on water quality improvement projects where implementing those projects will achieve permit compliance. The 2012 Permit contains the core elements of an appropriate BMP-based compliance program, and is therefore an appropriate approach to revising the receiving water limitations provisions in MS4 permits.

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However, development and implementation of a WMP will not give the City full BMP-based compliance. Instead, the 2012 Permit requires any permittee who is developing a WMP to conduct a reasonable assurance analysis ("RAA"):

> Permittees shall demonstrate using the RAA that the activities and control measures identified in the Watershed Control Measures will achieve applicable water quality-based effluent limitations and/or receiving water limitations in Attachments L through R with compliance deadlines during the permit term.
>
> (2012 Permit § VI.C.5.b.iv(5)(a); p 64.)

The permittee must use the results of the RAA to demonstrate that the WMP will meet the numeric Water Quality Standards in the Basin Plan, and incorporate compliance deadlines for each pollutant into the plan. (2012 Permit § VI.C.5.c.; p 65.)

As described in detail above, compliance with Water Quality Standards as numeric effluent limits is simply not feasible. It is the City's position that compliance with Water Quality Standards is an appropriate goal for the MS4 permitting scheme, however strict compliance with numeric standards is not an appropriate means of achieving that goal.

The City therefore requests that the State Board revise the 2012 Permit's WMP requirements to allow the City to demonstrate compliance with the RWL limitations without strict compliance with numeric standards. This could be achieved by modifying the 2012 Permit to emphasize the adaptive management requirements, and removing the RWL prohibition as a point of compliance.

### C. The City supports the proposed CASQA language

Although the City views the 2012 Permit's approach as a good first step, the City believes that the language requires further refinement. In addition to the changes requested above, the City supports the RWL language put forward by CASQA in its response to the State Board. CASQA's refinements to the 2012 Permit approach makes the compliance program process more usable and comprehensive. It also represents a consensus among many municipalities as to the appropriate way to address the RWL issue.

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## CONCLUSION

For the reasons expressed in this response, and the City respectfully requests that the State Board revise the 2012 Permit consistent with its previous precedential orders.

Dated: August 15, 2013

BEST BEST & KRIEGER LLP

By: _____
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Attorneys for City of Claremont

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| **City of Westlake Village [A-2236(p)]:**<br><br>**[via U.S. Mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com | **City of Signal Hill [A-2236(ii)]:**<br><br>**[via U.S. Mail and email]**<br>David J. Aleshire, Esq., City Attorney<br>David D. Boyer, Esq., Special Counsel<br>Wesley A. Miliband, Esq., Special Counsel<br>Aleshire & Wynder, LLP<br>18881 Von Karman Avenue, Suite 1700<br>Irvine, CA 92612<br>daleshire@awattorneys.com<br>dboyer@awattorneys.com<br>wmiliband@awattorneys.com |
| **[via U.S. Mail and email]**<br>City of Westlake Village<br>c/o City Manager<br>31200 Oak Crest Drive<br>Westlake Village, CA 91361<br>ray@wlv.org<br>beth@wlv.org | **[via U.S. Mail and email]**<br>City of Signal Hill<br>c/o Mr. Kenneth Farfsing<br>City Manager<br>2175 Cherry Avenue<br>Signal Hill, CA 90755<br>kfarfsing@cityofsignalhill.org |
| **City of La Mirada [A-2236 (q)]:**<br><br>**[via U.S. mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com | **City of Redondo Beach [A-2236(ll)]:**<br><br>**[via U.S. Mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com |
| **[via U.S. Mail and email]**<br>City of La Mirada<br>c/o City Manager<br>13700 La Mirada Boulevard<br>La Mirada, CA 90638<br>citycontact@cityoflamirada.org | **[via U.S. Mail only]**<br>City of Redondo Beach<br>c/o Mr. Bill Workman, City Manager<br>415 Diamond Street<br>Redondo Beach, CA 90277 |
| **City of Manhattan Beach [A-2236(r)]:**<br><br>**[via U.S. Mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com | **City of West Covina [A-2236(kk)]:**<br>**[via U.S. Mail and email]**<br>Anthony Marinaccio, Esq.<br>Alvarez-Glasman & Colvin<br>13181 Crossroads Parkway North<br>West Tower, Suite 400<br>City of Industry, CA 91746<br>amarinaccio@agclawfirm.com |

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|---|---|
| **[via U.S. Mail and email]**<br>City of Manhattan Beach<br>c/o City Manager<br>1400 Highland Avenue<br>Manhattan Beach, CA 90266<br>cm@citymb.info | **[via U.S. Mail and email]**<br>City of West Covina<br>c/o Mr. Andrew Pasmant, City Manager<br>1444 West Garvey Avenue, Room 305<br>West Covina, CA 91790<br>andrew.pasmant@westcovina.org |
| **City of Covina [A-2236 (s)]:**<br><br>**[via U.S. Mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com | **[via U.S. Mail and email]**<br>City of West Covina<br>c/o Ms. Shannon Yauchzee<br>Director of Public Works<br>1444 West Garvey Avenue<br>West Covina, CA 91790<br>shannon.yauchzee@westcovina.org |
| **[via U.S. Mail and email]**<br>City of Covina<br>c/o City Manager<br>125 East College Street<br>Covina, CA 91273<br>ycastro@covinaca.gov | **Additional Interested Party By Request:**<br><br>**[via U.S. Mail only]**<br>Andrew R. Henderson, Esq. General Counsel<br>Building Industry Legal Defense Foundation<br>17744 Sky Park Circle, Suite 170<br>Irvine, CA 92614<br>ahenderson@blasc.org |
| **City of Vernon [A-2236(t)]:**<br><br>**[via U.S. Mail and email]**<br>Lisa Bond, Esq.<br>Candice K. Lee, Esq.<br>Andrew J. Brady, Esq.<br>Richards, Watson & Gershon<br>355 South Grand Avenue, 40th Floor<br>Los Angeles, CA 90071<br>lbond@rwglaw.com<br>clee@rwglaw.com<br>abrady@rwglaw.com | |
| **[via U.S. Mail and email]**<br>City of Vernon<br>c/o City Manager<br>4305 South Santa Fe Avenue<br>Vernon, CA 90058<br>carellano@ci.vernon.ca.us | |

# EXHIBIT B
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