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17 **STATE OF CALIFORNIA**

18 **STATE WATER RESOURCES CONTROL BOARD**

19 In the Matter of the Petitions for Review of
the California Regional Water Quality
Control Board, Los Angeles Region, in
20 Adopting the Los Angeles County
Municipal Separate Storm Sewer System
21 National Pollutant Discharge Elimination
System (NPDES) Permit; Order No. R4-
22 2012-0175; NPDES Permit No. CAS004001.

SWRCB/OCC File No. A-2236(a) through
(kk)

**JOINT OPPOSITION OF 23 MUNICIPAL
PETITIONERS TO REQUEST FOR
JUDICIAL NOTICE FILED BY
ENVIRONMENTAL PETITIONERS AS
PART OF "COMMENT LETTER" ON
STATE BOARD'S DRAFT ORDER**

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1 **I. INTRODUCTION AND SUMMARY OF OBJECTIONS**

2 The twenty-three Municipal Petitioners listed below¹ object to the request by
3 three environmental groups, Natural Resources Defense Council, Inc., Heal the
4 Bay, and Los Angeles Waterkeeper, (“Environmental Petitioners”) to augment the
5 record by a Request for Judicial Notice (“Request”). The Environmental
6 Petitioners’ Request does not conform to the exacting standards set forth in 23 Cal.
7 Code Regulations §2050.6 for introduction of supplemental evidence, and at least
8 five of the requests (Nos. 6-10) should be rejected on that basis alone.

9 Second, many of the other requests essentially seek review of an entire
10 document, presumably on the basis that something in the document is factually
11 correct. For example, the Environmental Petitioners’ Request Nos. 1 and 2 seek
12 admission of an entire pleading filed in federal court by an agency that is not a
13 party to the instant proceedings (the County of Los Angeles and its Flood Control
14 District) on the vague grounds that “this document will assist the State Board in
15 evaluating the impacts of the alternative compliance approach proposed in Order
16 R4-2012-0175 . . . [the 2012 LA MS4 Permit].” But, as has long been held, “judicial
17 notice” is limited to the recognition of a document, not for the truth of the facts
18 contained therein. *See Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063
19 (1994) (“While courts may notice official acts and public records, ‘we do not take
20 judicial notice of the truth of all matters stated therein.’”).

21 Third, at least one of the judicial requests is a covert attempt to re-argue a
22 point that the State Board has already rejected in its November 21, 2014 Draft
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24 ¹ This joint set of objections is joined by the following twenty-three (23) municipal entities:
25 City of Agoura Hills, City of Arcadia, City of Artesia, City of Beverly Hills, City of
26 Claremont, City of Commerce, City of Culver City, City of Downey, City of Duarte, City
27 of Hidden Hill, City of Huntington Park, City of Inglewood, City of La Mirada, City of
28 Manhattan Beach, City of Monrovia, City of Norwalk, City of Rancho Palos Verdes, City
of Redondo Beach, City of San Marino, City of South El Monte, City of Torrance, City of
Vernon, and City of Westlake Village. The Cities of Arcadia and Claremont will file a
separate joinder in support of this Opposition memorandum.

1 Order. In the Draft Order, the State Board explicitly stated it would not consider
2 post-Permit adoption evidence of compliance with Watershed Management Plans.
3 Yet, the Environmental Petitioners disregard this determination, and seek to have
4 in their Request No. 5, admitted under the guise of judicial notice, a “true and
5 correct copy of a Watershed Management Program” submitted by various cities in
6 the Lower San Gabriel River Watershed. The Environmental Petitioners Requests
7 Nos. 11-12 fail for the same reasons.

8 Finally, several of the Requests (Request Nos. 4, 5, 11, 12, and 13) fail to meet
9 the basic relevance standard for judicial notice of any document by either this
10 Board or by any judicial body. *See, e.g., Surfrider Foundation v. Calif. Regional*
11 *Water Quality Control Bd.*, 211 Cal. App. 4th 557, 569 n.7 (4th Dist. 2012)(declining
12 to take judicial notice of statewide Water Control Policy document because “it is
13 not relevant to our analysis because it concerns a federal statute not at issue here”).

14 For these reasons, the undersigned Municipal Petitioners request that the
15 State Board reject this new Request in its entirety.

16 **II. PORTIONS OF THE REQUEST FAIL TO CONFORM WITH THE**
17 **SECTION 2050.6 STANDARD REQUIRING A PRECISE EXPLANATION**
18 **OF WHY CERTAIN EVIDENCE WAS NOT PREVIOUSLY PROVIDED**
19 **TO THE REGIONAL WATER BOARD**

20 Section 2050.6 governs the submittal of “supplemental evidence” that was
21 “not previously provided to the regional board.” Section 2050.6(a) requires that a
22 person who requests such evidence be considered by the State Board “shall
23 provide a statement that additional evidence is available that was not presented to
24 the regional board.” Section 2050.6(a)(2) requires that any such request include a
25 detailed statement of the nature of the evidence and, if the evidence was not
26 presented to the regional board, the person requesting such consideration “provide
27 a detailed explanation of the reason why the evidence could not previously have
28 been submitted.”

1 The Environmental Petitioners’ Requests Nos. 6, 7, 8, and 9, contain
2 documents from 2001 (Request Nos. 6 and 8), 2000 (Request No. 7), and 2010
3 (Request No. 9), all of which were created years *before* the Regional Board’s
4 hearings and final adoption of the LA MS4 Permit in November 2012. Yet, the
5 Environmental Petitioners provide no written statement as to why this evidence
6 was not presented to the Regional Board.

7 Request No. 10 requests notice of an EPA Water Quality Standards
8 Handbook (Exhibit J) that was originally published in 1994 and updated in online
9 versions in 2007, 2012, and 2014. Once again, the Environmental Petitioners fail to
10 conform with the requirement of Section 2050.6(a)(2), and their submittal of
11 Requests Nos. 6-10 should be rejected on this basis alone.

12 **III. OTHER PORTIONS OF THE REQUESTS ASK FOR “RECOGNITION”**
13 **OF THE TRUTH OF STATEMENTS IN OFFICIAL DOCUMENTS,**
14 **WHICH IS NOT A PROPER FUNCTION OF JUDICIAL NOTICE**

15 The Environmental Petitioners in Request Nos. 1, 2, 3, and 4 ask that the
16 State Board consider various advocacy documents filed either by entities who are
17 *not* Petitioners in the current process (Los Angeles County and its Flood Control
18 District, Request Nos. 1-2), by the Environmental Petitioners themselves (Request
19 No. 4), and in one case the U.S. Environmental Protection Agency (Request No. 3).
20 Presumably, they make these requests not for the fact of the document itself, but
21 that something somewhere in the document is a “true fact” about alternative
22 compliance (Request Nos. 1-2), an evaluation of green infrastructure (Request No.
23 3), or comments by the Environmental Petitioners (Request No. 4).

24 The Environmental Petitioners, however, simply misapprehend the function
25 of judicial notice of an official document—it simply does *not* extend to recognizing
26 the truth of everything stated in the document. The classic case is the California
27 Supreme Court’s decision in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057,
28 1063 (1994), *overruled on other grounds in In re: Tobacco Cases II*, 41 Cal. 4th 1257

1 (2007). . In that case, the plaintiff sought recognition of two reports, one issued by
2 the U.S. Surgeon General on preventing tobacco smoking in youth and a 1994
3 report by the California Department of Health Services entitled: “Tobacco Use in
4 California.” The California Supreme Court in *Mangini* found that neither report
5 was relevant to the legal question before it—federal pre-emption of a state law
6 provision. But, the Supreme Court also held that:

7 Moreover, to the extent plaintiff asks us to notice the truth of matters
8 asserted in those documents, and not merely their existence, Reynolds
9 has stated a valid objection. While courts may notice official acts and
10 public records, ‘we do not take judicial notice of the truth of all
11 matters stated therein.’ (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 403;
12 accord, *People v. Long* (1970) 7 Cal.App.3d 586, 591.) ‘[T]he taking of
13 judicial notice of the official acts of a governmental entity does not in
14 and of itself require acceptance of the truth of factual matters which
15 might be deduced therefrom, since in many instances what is being
16 noticed, and thereby established, is no more than the existence of such
17 acts and not, without supporting evidence, what might factually be
18 associated with or flow therefrom.’ (*Cruz v. County of Los Angeles*
19 (1985) 173 Cal.App.3d 1131, 1134.) We therefore deny plaintiff’s first
20 two requests for judicial notice.

21 *Mangini v. R.J. Reynolds Tobacco Co*, 7 Cal. 4th at 1063-64.

22 Environmental Petitioners implicitly request that the State Board not just
23 accept that EPA issued a report on the “Economic Benefits of Low Impact
24 Development and Green Infrastructure Programs” (Request No. 3), but ask that the
25 State Board, without any further evidence, accept as true all of the statements
26 asserted in that official report. This is not a proper function of judicial notice.

27 Similarly, the Environmental Petitioners ask the State Board to “accept” for
28 purposes of judicial notice court filings by a non-party to these proceedings. But,
while a Court can take judicial notice of the date (or fact) of filing of a particular
document for purposes of a statute of limitations defense or an assertion of issue
preclusion (collateral estoppel), it is improper to submit an entire pleading and ask
that the determining agency review it to confirm the “alternative compliance”
option suggested by the Environmental Petitioners. See *Kilroy v. State*, 119 Cal.
App. 4th 140, 148 (3d Dist. 2004) (declining to take judicial notice of findings of fact

1 in prior judicial opinion; “Taking judicial notice of the truth of a judge’s factual
2 finding would appear to us to be tantamount to taking judicial notice that the
3 judge’s factual finding must necessarily have been correct and that the judge is
4 therefore infallible. We resist the temptation to do so.”). Therefore Requests Nos.
5 1-4 should be rejected.

6 **IV. ENVIRONMENTAL PETITIONERS’ REQUEST NOS. 4, 5, 11, AND 12 FOR**
7 **JUDICIAL NOTICE OF A WATERSHED MANAGEMENT PLAN (OR**
8 **COMMENTS ON SUCH PLANS) WHICH WERE SUBMITTED AFTER THE**
9 **REGIONAL BOARD ISSUED THE PERMIT MUST BE REJECTED**

10 In ruling upon various requests for judicial notice the State Board in its Draft
11 Order rejected requests to supplement the administrative records, stating:

12 . . . [W]e are not granting the request to supplement the
13 Administrative Record with the notices of intent to develop a
14 WMP/EWMP and associated documents filed by Permittees following
15 adoption of the Los Angeles MS4 Order. With regard to factual
16 evidence regarding actions taken by Permittees to comply with the LA
17 MS4 Order after it was adopted, we believe it appropriate to close the
18 record with the adoption of the Los Angeles MS4 Order.

19 *State Board Draft Order* at pp. 6-7 (Nov. 21, 2014).

20 The Environmental Petitioners, however, evidently wish through the device
21 of judicial notice to ignore this tentative ruling. Instead, in Request No. 5 they seek
22 to have introduced into the administrative record a Watershed Management Plan
23 submitted by various cities for the Lower San Gabriel Valley Watershed. Then, to
24 make matters worse, the Environmental Petitioners seek judicial notice of *their own*
25 objections and comments on various Watershed Management Plans. They do so in
26 their Request Nos. 4, 11 and 12.

27 If only the Municipal Petitioners knew – what they cannot get into the
28 administrative record directly, they can get into the record indirectly by the simple
excuse of seeking judicial notice of their Watershed Management Plan submittals,
and all supporting documents! The Municipal Petitioners, however, accept the
decisions of the State Board on prior judicial notice requests and do not seek to re-

1 argue those procedural issues at this time. The Environmental Petitioners take an
2 opposite view, and request a second “bite” at the administrative record “apple.”
3 They seek this not because they hope to persuade, but because they plan to litigate
4 further. As Justice Sims of the Court of Appeal wrote on the subject of judicial
5 notice: “This must stop.” *Kaufman & Broad Communities, Inc. v. Performance*
6 *Plastering, Inc.*, 133 Cal. App. 4th 26. 29 (3d Dist. 2005).

7 **V. REQUESTS FOR JUDICIAL NOTICE MUST ALSO BE RELEVANT TO**
8 **THE LEGAL ISSUES AT HAND**

9 All requests for judicial notice must also satisfy another fundamental legal
10 requirement—they must be relevant to the issue before the determining board or
11 court. *See Mangini v. R.J. Reynolds Tobacco Co*, 7 Cal. 4th at 1063-64 (declining to
12 take judicial notice of governmental reports that were irrelevant to legal issue of
13 potential federal pre-emption of state law); *Surfrider Foundation v. Calif. Regional*
14 *Water Quality Control Bd.*, 211 Cal. App. 4th 557, 569 n.7 (4th Dist. 2012) (same).

15 Now, however, the Environmental Petitioners seek to have this Board take
16 judicial notice of a legal brief filed before the California Supreme Court involving a
17 different permit (the 2001 LA MS4 Permit) and a different issue—whether certain
18 requirements of that permit constituted an unfunded state mandate. In this matter,
19 however, what is pending before this Board is not whether the 2012 LA MS4 Order
20 creates (or does not create) an unfunded state mandate, but whether the 2012 LA
21 MS4 Order is wise policy and has a structure of compliance (the Watershed
22 Management Plans and EWMPs) that complies with federal and state.

23 Similarly, the Environmental Petitioners seek to bring in post-Permit
24 documents to challenge some portion of the LA MS4 Order, which was entered in
25 November 2012. They do so in Request No. 5 (Watershed Management Plan
26 submittal), and Nos. 4, and 11-12, which are their own comments on various
27 submittals of Watershed Management Plans.

28 The Environmental Petitioners Request No. 13 and Request Nos. 4, 5, 11 and

1 12 should all be rejected as irrelevant to the current legal issues before the State
2 Board.

3 **VI. CONCLUSION**

4 The twenty-three Municipal Petitioners jointly request that the State Board
5 *reject* the Request for Judicial Notice submitted by the three Environmental
6 Petitioners.

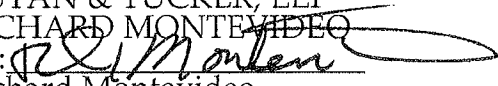
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