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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of: THE CITY OF CLAREMONT 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) SWRCB/OCC A-2236(i)	RESPONSE TO CLAIMS RAISED IN OPPOSING PETITIONS [Water Code § 13320(a)]

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I.

INTRODUCTION

Petitioner, the City of Claremont ("City" or "Petitioner") submits this response in suppor of its Petition to the State Water Resources Control Board ("State Board") requesting that the State Board review and revise the California Regional Water Quality Control Board, Los Angeles Region's ("Regional Board") Order No. R4-2012-0175 (NPDES No. CAS 004001) ("2012 Permit"). The City previously responded to the State Board's requested comments concerning receiving water limitations ("RWLs") in filings made on August 15, 2013.

The City now submits these comments on the legal and factual allegations in the petition ("Petition or NRDC Petitioner") filed by the Natural Resources Defense Council, Inc., Heal the Bay and Los Angeles Water Keeper (collectively "NRDC").

II.

RESPONSE TO ISSUES RAISED IN THE PETITIONS

The NRDC Petition in essence raises a single claim: Failure to incorporate TMDLS and water quality standards in the 2012 permit is a violation of state and federal law. In this regard, the Petition is a direct attack on the ability of permit writers to work with municipal dischargers to develop a comprehensive and adaptable approach to addressing the complex challenges to managing discharges from municipal separate storm sewer systems ("MS4s").

The NRDC's position is fundamentally at odds with the nature of MS4s, the legal framework for regulating the unique challenges presented by MS4s and modern scientific analysis of how best to tackle the significant water quality challenges associated with MS4 discharges. The NRDC's claim is therefore without merit and should be set aside.

A. THE 2012 PERMIT'S RWL REQUIREMENTS ARE NOT A "SAFE HARBOR"

The NRDC routinely describes the 2012 Permit's BMP-based compliance approach to RWL and TMDL requirements as "safe harbors." (See Petitioner's Memorandum of Points and Authorities, pp. 13, 15 and 25.) This is simply not the case. The challenged provisions impose rigorous, stringent requirements on the City and in no way provide a "safe harbor."

1. The 2012 Permit Imposes Stringent, Times Sensitive Requirements

To take advantage of the 2012 Permit's BMP-based compliance options, the City will need to develop either a Watershed Management Plan ("WMP") or an Enhanced Watershed Management Plan ("EWMP"). Both plans must include ensure that discharges from the City's MS4:

- Achieve applicable water quality-based effluent limitations ("WQBELs") in the TMDLs incorporated into the 2012 Permit in accord with the corresponding compliance schedules;
- Do not cause or contribute to exceedances of receiving water limitations; and
- Do not include non-storm water discharges that are effectively prohibited under the 2012 Permit.

(2012 Permit section VI.C.1.d.)

The plans must be robust and include a prioritization of water quality issues resulting from storm water and non-storm water discharges from the MS4; strategies, control measures, and BMPs to achieve the above listed requirements; an integrated monitoring and assessment program; and they must be developed with "meaningful stakeholder input" from the public and members of a technical advisory committee that will advise and participate in the development of the programs. (2012 Permit section VI.C.1.f.)

Prior to WMP/EWMP approval, the City must continue to implement all other aspects of the its stormwater program, and continue to work toward meeting TMDL and RWL requiements. Specifically, during plan development, the City must:

- Continue to implement six elements of existing stormwater management plan ("SWMP") and monitoring programs
- Implement necessary watershed control measures to achieve interim and final trash WQBELs per deadlines occurring prior to approval of WMP/EWMP
- Implement necessary watershed control measures to achieve other final WQBELs per deadlines occurring prior to approval of WMP/EWMP, or alternatively,

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- Request time schedule order for final WQBELs with deadlines occurring prior to approval of WMP/EWMP
- Meet all interim and final deadlines for development of a WMP/EWMP
- Target watershed control measures in existing SWMP, including watershed control measures to eliminate non-storm water discharges of pollutants, to address known contributions of pollutants from MS4 discharges

Moreover, 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.)

The Administrative Record is replete with evidence demonstrating that implementation of BMPs through the 2012 Permits WMP and EWMP programs will improve water quality in receiving waters within the jurisdiction of the LA Regional Board. Failure to implement the plans and programs required by the 2012 Permit requirements will cause the City to be out of compliance and potentially subject to enforcement orders, fines, and third part lawsuits. There is no "safe harbor."

2. The BMP-based Approach is Consistent with State and Federal Law

The Petition nonetheless repeatedly asserts that the 2012 Permit somehow gives municipalities a free pass or otherwise excuses compliance. (See Petitioner's Memorandum of Points and Authorities, pp. 13, 15 and 25.) Rather than providing a free pass, the 2012 Permit establishes different voluntary and rigorous ways in which municipalities may tailor their

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programs to address complex water quality issues. Such an approach is specifically contemplated by the Cleam Water Act and EPA's implementing regulations.

A fundamental aspect of the Clean Water Act is that compliance with the terms of an NPDES permit is "deemed" compliance with the requirements of the Act. 33 U.S.C. section 1342(k) provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 and 1365 of this title, with section 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health." Indeed, the arguments over "safe harbor provisions" is "much ado about nothing because Section 1342(k) already establishes a 'deemed compliance' approach through compliance with permit terms." (*City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1388.) Rather than being some type of deviation from the Act, the concept of a compliance path is imbedded in the Act itself.

EPA has acknowledged that establishing the means of compliance in an NPDES permit is one of the advantages of the NPDES program. For example, in the Phase II Rule, EPA noted that one of the advantages of an NPDES permit is that the "NPDES permit informs the permittee about the scope of what it is expected [to] do to be in compliance with the Clean Water Act." EPA has also not objected to the concept of a compliance option in either the 2012 Permit process or the San Diego Regional MS4 Permit process, although it has expressed some concerns about the technical details of specific compliance paths. Thus, the Petition's broad scale attack on and rejection of the concept of a compliance path simply finds no support in the Clean Water Act or its implementing regulations. Compliance path based on a well-written permit is inherent in the Act and one of the advantages of the NPDES program.

Consistent with Section 1342(k), the 2012 Permit set forth different ways in which permittees may comply with the Permit and therefore with the Act. The 2012 Permit maintains baseline requirements and permittees may elect to be measured by those baseline requirements. However, the 2012 Permit also contains voluntary programs that must comprehensively address water quality impacts resulting from MS4 discharges and develop specific measurable approaches

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to addressing those impacts on a comprehensive basis. Such a program must provide "reasonable assurance" that implementation of the measures will achieve the desired result. Failure to implement the measures would result in a Permit violation, while implementation of the measures would establish compliance with specific Permit requirements. Such an approach is entirely consistent with Section 1342(k) of the Act and EPA's regulations.

At the State Board's recent workshop on the RWL language issue, the NRDC proposed a compliance approach that would depend on time schedule orders, cease and desist orders or other enforcement orders rather than through the permit. This proposed approach is deficient for several reasons. First, consistent with Section 1342(k), the Act contemplates that the permit is the way in which compliance with the Act should be measured. This approach has the important value of directly linking the programmatic requirements of a permit with compliance. Separating the permit requirements and compliance through enforcement mechanism will undermine the permit process itself and will shift control from the regulatory permit to a parallel enforcement process. Second, as was properly noted by the Chief Counsel during the workshop, enforcement orders do not always provide the same type of "deemed compliance" protections as found in Section 1342(k). The better approach, as embodied in the Los Angeles MS4 Permit, is to specify compliance in the permit, and supplement that approach as necessary through enforcement orders if, and only if, warranted.

B. THE 2012 PERMIT IS FULLY COMPLIANT WITH FEDERAL ANTI-BACKSLIDING REQUIREMENTS

The NRDC has repeatedly alleged that the 2012 Permit violates federal law because it is inconsistent with the Clean Water Act's Anti-backsliding requirements. A review of the Act and its implementing regulations demonstrate that this is not the case.

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:

> In the case of ***effluent limitations established on the basis of subsection (a)(1)(B) of this section,*** a permit ***may not be renewed,***

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> reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, ***to contain effluent limitations which are less stringent*** than the comparable effluent limitations in the previous permit. In the case of ***effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title***, a permit may not be renewed, reissued, or modified ***to contain effluent limitations which are less stringent*** than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title. (§1342(o)(1), emphasis added.)

There are several reasons why Section 402(o) has no application to the BMP-based compliance options in the 2012 Permit. First, the RWL compliance option challenged by the NRDC is not an "effluent limitation" as defined in the Act. Under the Clean Water 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, including schedules of compliance." (33 U.S.C. §502(11)(Emphasis added).) An "effluent limitation" is thus a limit measured at the point of discharge from a point source. In contrast, the 2012 Permit's RWL prohibition (and that in the 2001 Permit) measures compliance in the receiving water.

Second, even if the 2012 Permit's RWL prohibition could be characterized as an "effluent limitation," it was not developed in accordance with the specific sections listed in Section 402(o). Namely, the technology-based effluent limitation requirements of Section 402(a)(1)(B), and the WQBEL requirements of sections 301 and 303 of the Clean Water Act.

As the Ninth Circuit Court of Appeals held in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999) because MS4 Permits are issued pursuant to Section 402(p) of the Clean Water Act effluent limits issued pursuant to Section 301 do not apply. Consequently, the 2012 Permit's RWL discharge prohibition 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.

The RWL prohibition is likewise not an effluent limitation developed under Section 303(d) or (e), which involve the continuing planning process and TMDLs. Even if it was,

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pursuant to the *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999) decision, i would not be required to be incorporated into the 2012 Permit.

Federal regulations contain similar anti-backsliding requirements. (40 CFR § 122.44(l).) and must be addressed in NPDES permits "when applicable." 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. However, due to the unique nature of MS4s and the special standards Congress created in Section 402(p)(3)(B), as discussed above, these regulations are not "applicable" to MS4 permits. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); *see also* NPDES Permit Writers' Manual, page 7-4.)

C. THE 2012 PERMIT IS FULLY COMPLIANT WITH STATE AND FEDERAL ANTI-DEGRADATION REQUIREMENTS

Federal regulations require a state's water quality standards to include an antidegradation policy that is consistent with the EPA antidegradation policy. (40 C.F.R. § 131.12.) The State Board has complied with this requirement of the EPA antidegradation policy by adopting Resolution No. 68-16, "Statement of Policy With Respect to Maintaining High Quality of Waters in California" as part of the State policy for water quality control. Resolution No. 68-16 has been adopted as a general water quality objective in all sixteen regional water board basin plans. Further, the State Board has issued guidance on its policy through Administrative Procedures Update ("APU") 90-004.

As APU 90-004 make 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." There is no honest argument that can be made that the 2012 Permit will result in a degradation of water quality versus the 2001 Permit, and the NRDC has produced no evidence of such a degradation of water quality.

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In fact, the evidence is to the contrary. The Administrative Record is rife with studies and other data that demonstrate the 2012 Permit's BMP-based compliance approach will result in improved water quality. (*See e.g.* RB-AR29180-29248; RB-AR29263-29311; RB-AR29312-29328; RB-AR29329-29367; RB-AR29368-29486.)

The Regional Board's own analysis of the Anti-degradation is the same:

> . . . Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.
>
> The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p). . .
>
> The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.

This analysis is consistent with applicable case law regarding anti-degradation. In a recent decision, the California Court of Appeals for the Third District held that the State's anti-degradation policy does not apply if it can be shown that the discharge of waste will not degrade the quality of the receiving water. (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1268 fn 8.) Here, the City will continue its existing discharge, and its efforts pursuant to the 2012 Permit will improve water quality. The anti-degradation provisions therefore do not apply.

D. FAILURE TO INCLUDE WLA'S AS NUMERIC EFFLUENT LIMITS IS NOT A VIOLATION OF STATE OR FEDERAL LAW

The Petition asserts that the 2012 Permit's failure to incorporate thirty-three (33) TMDLs into the 2012 Permit as numeric effluent limits. In making these claims, the NRDC ignore the

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basic point that the 2012 Permit remains an "MS4" permit, and as such, waste load allocations ("WLAs") are not required to be incorporated into the 2012 Permit as a strict numeric limits.

1. Defenders of *Wildlife v. Browner*

The Federal Clean Water Act and its implementing regulations do not require municipal stormwater permits to strictly adhere to Water Quality Standards or incorporate WLAs as numeric effluent limits. The Ninth Circuit Court of Appeals addressed both issues in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).

In *Defenders*, the Ninth Circuit held that the EPA has the authority to impose numeric effluent limits in MS4 Permits, but that the Clean Water Act does not require numeric effluent limits. The Ninth Circuit additionally held that municipal stormwater 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."

The Ninth Court focused on the difference between traditional, industrial discharges and municipal stormwater, holding that Congress replaced the requirements applicable to industrial discharges "with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable. . ." and that the statute "unambiguously demonstrates" that Congress did not require municipal storm-sewer discharges to comply strictly with Water Quality Standards. (*Defenders of Wildlife v. Browner*, 191 F.3d at 1165.)

Because TMDLs are an expression of Water Quality Standards, the Ninth Circuit's decision in *Defenders of Wildlife v. Browner* therefore extends to TMDLs. (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1129 [TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans]; *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1415 [TMDL does not establish water quality objectives, but merely implements, under Water Code section 13242, the existing narrative water quality objectives].)

Defenders of Wildlife v. Browner is the law in California and the Court's rationale has been adopted by California courts. In *Divers' Environmental Conservation Organization v. State*

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Water Resources Control Board (Divers' Environmental) (2006) 145 Cal.App.4th 246, a plaintiff brought suit against the San Diego Regional Water Quality Control Board claiming that an NPDES Permit issued to the United States Navy was contrary to law because it did not incorporate WLAs as numeric effluent limits.

The Court of Appeal held that in regulating stormwater permits EPA "has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations." (*Id.* at 256.) The Court went on to find that "it is now clear that in implementing numeric water quality standards, such as those set forth in CTR, permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL's [Water Quality Based Effluent Limit]." (Id. at 262.)

Likewise, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the Court of Appeal found that Congress intentionally gave the EPA "the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable."

The inclusion of a TMDL in an MS4 permit is purely a function of State law, and at the discretion of the Regional Board. No State or Federal law requires TMDLs to be included in MS4 permits as numeric effluent limts.

2. Federal Regulations at 40 C.F.R. section 122.44(d) and (k)

When issuing NPDES permits, the Regional Board is required to follow Federal Regulations. (23 Cal Code Regs § 2235.2 ["Waste discharge requirements for discharge from point sources to nagivable waters shall be issued and administered in accordance with the currently applicable federal regulations for the National Pollutant Discharge Elimination System (NPDES) program"].)

Thus although inclusion of the TMDL is not required by Federal law, if the Regional Board is going to include one in an MS4 permit, it must be in accordance with Federal Regulations. Federal Regulations at 40 C.F.R. § 122.44(d) require the Regional Board to incorporate WQBELs into industrial NPDES permits when it finds there is a "reasonable

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potential" that the discharge of the pollutant to be regulated under the permit "has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard." (40 C.F.R. § 122.44(d)(1)(iii).)[1]

In essence, if a TMDL has been developed, the WQBEL must be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA." (40 C.F.R. § 122.44(d)(1)(vii)(B).) Federal Regulations do not define "consistent" but any natural reading of the term would does not require a verbatim inclusion of any applicable WLAs.

Moreover, 40 C.F.R. 122.44(k) clearly allows for a BMP-based approach to any discharges covered by a municipal stormwater permit:

> [E]ach NPDES permit shall include conditions meeting the following requirements when applicable . . .(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:
>
> (1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;
> (2) Authorized under section 402(p) of the CWA for the control of storm water discharges;
> (3) Numeric effluent limitations are infeasible; or
> (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

Paragraph (k)(2) unequivocally states that numeric effluent limits are not required in municipal stormwater permits. Furthermore, the State Board Blue Ribbon Panel's findings that numeric effluent limits are not feasible trigger Paragraph (k)(3).(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) Additionally, paragraph (k)(3) provides that BMPs shall be used where numeric effluent limits are infeasible. As a result, there

[1] Pursuant to the *Defenders of Wildlife* decision, 40 CFR § 122.44(d) does not apply to municipal stormwater permits. Section 122.44(d) requires implementation of WQBELs to attain water quality standards. Under the *Defenders* opinion, water quality standards are not required to be incorporated into this MS4 permit; therefore WQBELs necessary to meet water quality standards are not required in this Permit.

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is no question that the Regional Board's decision to allow BMP-based compliance with both the 2012 Permit's RWL and WLA requirements.

E. THE 2012 PERMIT'S FINDINGS, FACT SHEET, AND UNDERLYING DOCUMENTS IN THE ADMINISTRATIVE RECORD SUPPORT THE BMP-BASED APPROACH

The Petition places considerable significance on the alleged lack of a model that would demonstrate the BMP-based approach set forth in the 2012 Permit will ensure that discharges to receiving waters in the LA Region from the City's MS4 will ensure that the receiving waters meet Water Quality Standards. This claim is without merit for two reasons. First, contrary to Petition's claims, LA County's Tetra-Tech Model is in the record at RB-AR30695 through RB-AR32210. More importantly however, the Regional Board had no obligation to develop the requested model or make such findings before adopting the 2012 Permit.

1. The Regional Board had no obligation to make findings that specific program requirements were capable of attaining Water Quality Standards.

Under the 9th Circuit's decision in *Defenders of Wildlife*, the Regional Board is not required to tie the 2012 Permit directly to Water Quality Standards. This obviates the need under federal law to find that the specific programs and BMPs required in the 2012 Permit would meet Water Quality Standards. To the extent that state law, as dictated in State Board Orders, requires a tie to Water Quality Standards, the Regional Board was only required to demonstrate that the iterative approach will improve overall water quality and "advance the ball" toward attaining Water Quality Standards.

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), the State Board responded to the building industry's claim that the Ninth Circuit's decision in *Defenders of Wildlife v. Browner* rendered requirements in the 2001 San Diego County MS4 Permit unnecessary and contrary to the MEP standard. While retaining the requirement that the San Diego permit prohibit discharges that cause or contribute to violations of Water Quality Standards, the State Board made clear that compliance with this requirement was to be achieved over time, and through the iterative process:

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> 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 a 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.
>
> (Order 2001-15, p. 7-8 [emphasis added].)

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].)

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The State Board's position on the receiving water limitations language has been consistent and clear: Water Quality Standards are to be achieved over time through the iterative process. For that reason, the Regional Board was not required to make findings that individual permit requirements would on their own attain Water Quality Standards.

2. Multiple studies and other evidence in the Administrative Record support the LA Regional Board's decision to allow BMP-based compliance with RWL and TMDL requirements.

As stated above, the Additionally, the Administrative Record includes numerous studies and other evidence that BMPs can be used to improve water quality, and thus can be used to attain Water Quality Standards. The following documents provide a factual basis for the 2012 Permit's BMP based approach:

- Community Conservancy International. The Green Solution Project: Identification and Quantification of Urban Runoff Water Quality Improvement Projects in Los Angeles County. Technical Report, Analysis and Mapping by Geosyntec Consultants and GreenInfo Network, March 2008. RB-AR29180.
- The Council for Watershed Health, Geosyntec Consultants, and Santa Monica Bay Restoration Commission. Stormwater Recharge Feasibility and Pilot Project Development Study: Final Report. Prepared for the Water Replenishment District of Southern California, August 20, 2012. RB-AR29263
- Design Storm. Presentation to SCCWRP Commission Technical Advisory Group.17 pp. [undated]. RB-AR29312
- Dreher, Jim Sullivan and Scott Taylor, Presentation from California Department of Transportation, Design Storm for Water Quality. Design Storm Meeting, March 20, 2006. RB-AR29329
- National Research Council. Urban Stormwater Management in the United States. Prepublication Copy. Oct. 15, 2008. RB-AR29507
- SCCWRP, Evaluation of Exceedance Frequencies and Load Reductions as a Function of BMP Size. Presentation to Project Steering Committee, June 12, 2007. RB-AR30036

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- SCCWRP, Exceedance Frequency and Load Reduction Simulation: Evaluation c Three BMP Types as a Function of BMP Size and Cost. Presentation to Projec Steering Committee, July 18, 2007. RB-AR30065
- SCCWRP Technical Report 520, Concept Development: Design Storm for Wate Quality in the Los Angeles Region, October 2007. RB-AR30096
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- USEPA, Watershed-Based National Pollutant Discharge Elimination System (NPDES) Permitting Implementation Guidance. EPA 833-B-03-004, December 2003. RB-AR32211
- USEPA-Washington, D.C. Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans, October 27, 2011. RB-AR32304.

3. There is no evidence that numeric effluent limits are feasible or will provide water quality benefits in excess of those attained through implementation of BMPs

The State Board has recognized that municipal stormwater discharges are different. In 2006, 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.)

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

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project, *i.e.* a "zero discharge standard," until JMS had first obtained an NPDES permit. (*Id.* a 1527.) JMS did not dispute that storm water was being discharged from its property and that i had not obtained an NPDES permit, but claimed it was not in violation of the Clean Water Ac (even though the Act required the permit) because the Georgia Environmental Protectior 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. 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"].)

The Clean Water Act does not require municipal permittees to do the impossible. Nor does State law. Because municipal permittees are involuntary permittees, that is, because they have no choice but to obtain a municipal storm water permit, the Permit, as a matter of law, cannot impose terms that are unobtainable. (*Id.*) In this case, as reflected in the numerous comments submitted during the permit adoption process, complying with numeric limits is simply not achievable by the permittees, given the variability of the potential sources of pollutants and urban runoff, as well as the unpredictability of the climate in Southern California.

In fact, as discussed above in *Divers, supra*, 145 Cal.App.4th 246: "In regulating storm

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water permits the EPA has repeatedly expressed the preference for doing so by way of BMP rather than by way of imposing either technology-based or water quality-based numeri limitations." (*Id.* at 256.) According to the *Divers* Court: "EPA has repeatedly noted, storm water consists of a variable stew of pollutants, including toxic pollutants, from a variety o sources which impact the receiving body on a basis which is only as predictable as the weather.' (*Id.* at 258.)

It is technically and economically infeasible to strictly comply with Water Quality Standards as end of pipe numeric limits. (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.)

There is nothing in the Administrative Record, that gives any indication that compliance with numeric effluent limits is achievable or in any way feasible. In fact, the reverse is the case. The City, in conjunction with other petitioners, submitted numerous comments, oral testimony, and reports indicating that compliance with RWL reuqirements as numeric effluent limits is simply not feasible. These include the following documents in the Administrative Record:

- City of Los Angeles, Watershed Protection Division, Sanitation Department of Public Works and Stormwater Program: Comments on the Working Proposals for Minimum Control Measures and Non-Stormwater Discharges. RB-AR1508
- Presentation on behalf of the Cities of Azusa, Baldwin Park, Carson, Claremont, Compton, Duarte, El Monte, Gardena, Irwindale, Lawndale, Lomita, Pico Rivera, San Fernando, San Dimas, San Gabriel, South El Monte, and West Covina: Non-Stormwater Discharges. RB-AR1513
- Joint Presentation by Association of California Water Agencies, California-Nevada Section of the American Water Works Association, and California Water Association: Community Water System Discharges & The Los Angeles County MS4 Permit. RB-AR1535
- City of Downey: Numeric Standard for Real World? RB-AR1556

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- Comment Letter from BIASC and CICWQ. RB-AR5930
- Comment Letter from Building Industry Legal Defense (BILD) Foundatior RB-AR5968
- Comment Letter from Leighton Group. RB-AR5992
- Comment Letter from California Stormwater Quality Association. RB-AR5995
- October 4, 2012 2012 Permit Group Presentation: Comments on the Developmen of the Greater LA County MS4 NPDES Permit NPDES No. CAS004001. RB-AR18002

As demonstrated by the above cited evidence, imposing numeric requirements goes beyond "the limits of practicability" (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1162). Accordingly, the imposition of the Receiving Water Limitations as strict numeric would impose an obligation that not only goes beyond the requirements of State and Federal law, but also imposes provisions that go beyond what is "feasible."

4. The 2012 Permit will require the City to develop evidence and make findings that implementation of a WMP or EWMP will result in attainment of Water Quality Standards.

The findings and evidence that the NRDC are requesting will be developed by the City and other permittees through the WMP and EMWP process. 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.)

Thus, the City must use the results of the RAA to demonstrate that its WMP (or EWMP) 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 a result, the information the NRDC is seeking as justification for the 2012 Permit's BMP-based approach to WLAs and RWLs will be developed as part of the process it opposes.

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F. THE CITY IS NOT ESTOPPED FROM CHALLENGING THE INCLUSION OF NUMERIC EFFLUENT LIMITS IN THE 2012 PERMIT

In its brief responding to the State Board's request for comments on the proposed Permit, the NRDC asserts that the City is precluded from raising claims about the 2012 Permit's RWL discharge prohibitions because similar issues were decided in *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super Ct., No BS 080548, Mar. 23, 2005), a 2005 superior court decision. The Activist Petitioner's claims are without merit.

For collateral estoppel to bar relitigation of an issue decided in a previous proceeding, each of the following requirements must be met:

1. The issue sought to be precluded from relitigation is identical to the issue decided in the former proceeding;
2. This issue was actually litigated in the former proceeding;
3. The issue was necessarily decided in the former proceeding;
4. The judgment in the former proceeding must be final and on the merits; and
5. The party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding.

(*See Pacific Lumber Co. v State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943; *See also People v Sims* (1982) 32 Cal.3d 468, 479.)

"The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341; Santa Clara Valley Transportation Authority v. Rea (2006) 140 Cal. App.4th 1303 ["we cannot tell to what extent the issue was actual litigated"].)

In the instant case the NRDC cannot establish collateral estoppel for the simple reason that the issues decided in the 2005 Superior Court case cited throughout NRDC's filings raised issues that are significantly different from those raised by the City in its petition challenging the 2012 Permit.

1. The City's challenge is based on different issues and causes of action

The Petitioners recognize that certain parts of the 2012 Permit with respect to its receiving

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water limitations are similar to the 2001 Permit. However, the principle argument made by the City in connection with the 2012 Permit is not that numeric limits cannot lawfully be imposed under the CWA (as was argued in connection with the 2001 Permit), but instead that doing so goes beyond the requirements of the CWA, fails to comply with the requirements of the Porter Cologne Act, namely Water Code sections 13000, 13263, and 13241, and because of a lack of evidence in the Administrative Record, exceeds the Regional Board's authority under applicable State law.

The importance in collateral estoppel of meeting the requirement that the issue in the later proceeding is identical to the issue in the original proceeding is emphasized in *Bronco Wine Co. v Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 708. During a disciplinary proceeding against a wine maker for underpaying a grape grower, a payment figure was set as reasonable to settle the administrative proceeding and restore the wine maker's license.

In the later contract action by the grower seeking full compensation for the underpayment, the court determined that the issue of what constitutes a reasonable settlement amount in a disciplinary proceeding was not the same as the issue of what amount will compensate the grower for the breach of contract. In arriving at this decision, the court stressed the fundamental difference between the nature of the administrative proceeding and the trial for civil damages. The primary issue in the administrative hearing was whether to revoke the wine maker's license; the primary issue in the civil action was the amount that was necessary to compensate the grower.

Thus, neither the purpose of the disciplinary proceedings nor the remedies available in it were the same as the purpose and remedies in the civil action. (*See also Smith v Selma Community Hosp.* (2010) 188 Cal.App.4th 1, 25 [judicial review committee decided whether proposal by hospital's medical executive committee to terminate plaintiff's privileges was reasonable, whereas issue presented to court was whether hospital's conduct in defending and litigating mandamus proceeding was unreasonable; former issue is intertwined with latter but they are not identical].)

The situation is presented here. The arguments made in connection with the 2001 Permit was significantly different from those raised in the City's Petition challenging the 2012 Permit.

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There, the argument was that as a matter of law, an MS4 Permit could not contain permit terms that went beyond the MEP standard under the CWA. Here, the argument is first and foremost that the inclusion of a numeric limitation in an MS4 Permit is beyond the requirements of the MEP standard, and subsequently not in compliance with state law requirements applicable to MS4 permits. Accordingly, the primary issue litigated in connection with the 2001 Permit was anything but "identical" to the primary issue to be litigated by the Cities herein in connection with the 2012 Permit.

Because of this fundamental difference the NRDC's claim is without merit.

2. The 2005 Superior Court case has no bearing on the City's claims in the instant proceedings

In addition to alleging that the City's claims are barred by the doctrine of collateral estoppel, the NRDC cites the 2005 Superior Court decision as though it has precedential value in the instant proceeding. It does not. The 2012 Permit includes numerous requirements that are challenged by the City and others that were not at issue in the superior court case. Moreover, as described above, even the similar issues raised by the City are significantly different.

A court may decline to apply collateral estoppel based on a depublished decision against the same party when it finds the depublished decision unpersuasive. (*Diep v. California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205.) Because the decision on the RWL issues *in County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, was in the unpublished portion of the opinion, it may not be cited as legal authority. Furthermore, there is continuing uncertainty about how the CWA and State law are to be applied to MS4 dischargers, and public policy dictates that these evolving disputes over important public issues be resolved.

Lastly, the doctrine of collateral estoppel is not binding on an administrative agency. (See, e.g., Pacific Lumber Co. v. State Board (2006) 37 Cal.4th 921, 944 ["We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting."].) The State Board is simply not bound by the 2005 decision in this proceeding. The decision provides no precedential authority and should have no bearing on the outcome of the State Board's decision.

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III.

CONCLUSION

For the reasons expressed in this response, the City respectfully requests that the State Board reject the NRDC's opposition to the BMP-based approach to compliance with RWL and TMDL requirements in the 2012 Permit.

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