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11 **STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

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15 In the Matter of Petition for Review of
Petitioners of the Approval By the Regional
Water Quality Control Board, Los Angeles
16 Region Adopting the National Pollutant
Discharge Elimination System Permit for
17 the Los Angeles County Municipal Separate
Storm Sewer System, Order No. R4-2012-
18 0175; NPDES Permit No. CAS004001

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

**RESPONSIVE BRIEF IN SUPPORT OF
PETITION FOR REVIEW OF
PETITIONER MANHATTAN BEACH**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Petitioner Manhattan Beach (“City”) is a city in the County of Los Angeles
4 (“Petitioner”) subject to the Los Angeles Municipal Separate Storm System Sewer Permit,
5 Order No. R4-2012-0175, reissuing National Pollutant Discharge Elimination System
6 (“NPDES”) Permit No. CAS004001 (“2012 Permit”), adopted by the Regional Water
7 Quality Control Board, Los Angeles Region (“Regional Board”) on November 8, 2012.
8 Prior to or on the filing deadline of December 10, 2012, Petitioner filed a Petition for
9 Review with the State Water Resources Control Board (“State Board”) challenging the
10 2012 Permit on various legal and policy grounds. In accordance with notice of completion
11 issued by State Board on June 8, 2013, and supplemented on July 15, 2013 and September
12 18, 2013, Petitioner respectfully submits this responsive brief for the State Board’s
13 consideration, in response to the briefs filed by other interested parties.

14 The 2012 Permit imposes numeric standards in the form of total maximum daily
15 load (“TMDL”) waste load allocations (“WLA”) and water quality based effluent
16 limitations (“WQBELs”), in addition to other numeric receiving water limitations, in a
17 manner that violates controlling state and federal law. Such limits may be imposed only
18 when “feasible,” and a number of the 33 new TMDLs likely cannot be achieved in a
19 feasible manner in the required timeframes.

20 The 2012 Permit’s imposition of numeric standards also triggered the requirement to
21 conduct an economic analysis under Water Code Sections 13241 and 13263. The 2012
22 Permit’s economic analysis was deficient in that it was based on data from 2004 that did not
23 account for the 2012 Permit’s increased standards and obligations, particularly the single
24 most economically impactful aspect of the 2012 Permit—the 33 new TMDLs. On these
25 bases, the 2012 Permit should be remanded to the Regional Board for revisions either to:
26 (1) ensure that the sole compliance determinant is good faith adherence to the “iterative”
27 process, rather than adherence to strict numeric limits that are infeasible at this time; or, in
28 the alternative, (2) conduct an economic analysis that assesses the actual economic impact

1 of the 2012 Permit on permittees.¹

2 **II. THE 2012 PERMIT COULD BE CONSTRUED TO APPLY INFEASIBLE**
3 **AND IMPROPERLY-FORMULATED NUMERIC LIMITS**

4 **A. The 2012 Permit Appears to Require Strict Adherence to Numeric Limits**

5 The 2012 Permit appears to impose numeric limits on permittees in the form of
6 TMDL-based effluent limitations and receiving water limitations. Part V.I.E. of the 2012
7 Permit—the TMDL provisions—states that permittees “shall comply with the applicable
8 water quality-based effluent limitations and/or receiving water limitations contained in
9 Attachments L through R, consistent with the assumptions and requirements of the [waste
10 load allocations (“WLAs”)] established in the TMDLs, including the implementation plans
11 and schedules, where provided for . . .”.² The imposition of numeric WQBELs in various
12 forms are further explained on pages 21 through 23 of the 2012 Permit.³ The 2012 Permit’s
13 watershed management plan compliance approach also requires permittees to ensure
14 through computer modeling at the outset of plan implementation that they will attain
15 interim and final WQBELs, WLAs, and receiving water limitations, and then actually attain
16 those targets through plan implementation.⁴

17 The 2012 Permit’s receiving water limitations language can reasonably be read to
18 state that it does not require strict adherence to numeric limits, but at least one court and the
19 Regional Board have indicated otherwise. The receiving water limitations language in the
20 2012 Permit contains three essential subparts.⁵ Subpart 1 is “discharges from the MS4 that
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22 ¹ The City files this separate brief on its own behalf to address issues specific to the City, but incorporates by
23 reference the responsive brief filed by the cities of San Marino, Rancho Palos Verdes, South El Monte,
24 Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia,
25 Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach.

26 ² 2012 Permit, p. 141-146; 10/4/12, 2012 Permit Hrg. Tr. at p. 45 [testimony of R. Purdee]. It is worth
27 noting that EPA-established TMDLs, however, are to be complied with through BMPs “that will be
28 effective in achieving compliance with USEPA established numeric WLAs.” *See* 2012 Permit, pp. 145-46.
As set forth in the Petitioners’ petitions for review, these inconsistent standards are highly problematic and
violate various state and federal laws and policies.

³ 2012 Permit, pp. 21-23 [Part II. K.1].

⁴ 2012 Permit, at pp. 49-52; 63-64.

⁵ 2001 Permit, Order No. 01-182, Part 2.1.

1 cause or contribute to the violation of receiving water limitations are prohibited.”⁶ Subpart
2 2 is “[d]ischarges from the MS4 of storm water, or non-storm water, for which a Permittee
3 is responsible, shall not cause or contribute to a condition of nuisance.”⁷ Subpart 3 states
4 “[t]he Permittees shall comply with Parts V.A.1 and V.A.2 through timely
5 implementation of control measures and other actions to reduce pollutants in the
6 discharges in accordance with the storm water management program and its components
7 and other requirements of this Order including any modifications.”⁸

8 A plain language reading of this provision would seem to indicate that the way to
9 comply with subparts 1 and 2 is solely through good faith adherence to the iterative process
10 as spelled out in subpart 3. This reading is also consistent with the determination of the
11 trial court in reviewing petitions for writ of mandate in connection with the prior 2001
12 Permit in reviewing the 2001 Permit’s similar (but not identical) receiving water limitations
13 language.⁹ But in more recent litigation, at least one federal court has interpreted the 2001
14 Permit without regard to its clear language or common sense.

15 In *NRDC v. County of Los Angeles*, the Ninth Circuit Court of Appeals imposed
16 liability upon the former Principal Permittee, the Los Angeles County Flood Control
17 District (“District”), for alleged “discharges” that impacted a mass emission station,
18 notwithstanding numerous permit provisions indicating that such mass emission station
19 monitoring points outside the MS4 system were not to be used to determine permit
20 compliance *by themselves*.¹⁰ The Ninth Circuit thus found the District liable despite the

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22 ⁶ 2012 Permit, p. 38 [Part V.A.1.].

23 ⁷ 2012 Permit, p. 38 [Part V.A.2.].

24 ⁸ 2012 Permit, p. 38 [Part V.A.3.], (emphasis added).

25 ⁹ *Statement of Decision from Phase I Trial on Petitions for Writ of Mandate* (March 24, 2005) at p. 6 (“It
26 seems clear that the Regional Board followed these principles when it established subparts 2.1 and 2.2 as the
27 basic receiving water requirements for Los Angeles area waters and subparts 2.3 and 2.4 as the procedure
28 the Board intends to implement to resolve any violations those requirements.”)

¹⁰ The Ninth Circuit brushed aside the arguments that “the Permit provides that ‘[e]ach permittee is
responsible only for a discharge for which it is the operator.’ County Defendants also cite language in Part 2
that reads: ‘Discharges from the [LA] MS4 of storm water, or non-storm water, for which a Permittee is
responsible for [sic], shall not cause or contribute to a condition of nuisance.’ The County Defendants read
this language as precluding a finding of liability against them—or any other Permittee—without

(Continued...)

1 absence of any data showing a “discharge from the MS4 that caused or contributed to a
2 violation,” in contravention of the plain language of the Receiving Water Limitations
3 provision of the 2001 Permit.¹¹ Thus, according to this particular panel of the Ninth
4 Circuit, permittees not only have to ensure their MS4 effluent meets all numeric effluent
5 limitations, they also have to cross their fingers and hope the receiving waters meet all
6 numeric receiving water limitations as well.

7 Based on the language of the 2012 Permit itself and statements of the Regional
8 Board staff, Petitioner understands that the Regional Board’s current interpretation of the
9 receiving water limitations language is that it requires adherence to numeric water quality
10 standards regardless of whether a permittee adheres to the iterative process in good faith.¹²
11 Petitioner is also concerned that it can potentially be held liable even without data showing
12 a discharge, under the flawed reasoning of the Ninth Circuit panel.

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25 independent monitoring data establishing that discharges from a particular entity's ms4 outfalls exceeded
standards.” *National Resources Defense Council v. LA County*, __ F3d. __ (9th Cir., August 8, 2013.)

26 ¹¹ 2012 Permit, p. 38 [Part V.A.1.]; 2001 Permit, Part 2.1.

27 ¹² See 2012 Permit, pp. 21-22, 49-50, 141-144; 10/4/12, 2012 Permit Hrg. Tr. at p. 45 [testimony of R.
28 Purdee] (“So this greater accountability comes with the advent of the numeric water quality based effluent
limitations that we’re inserting as a result of TMDLs, as well as their associated compliance schedules for
achieving those numeric water quality based effluent limits.”).

1 **B. Compliance With the Permit’s Receiving Water Limitations Should Be**
2 **Based on Good Faith Adherence the BMP-Based, Iterative Process and**
3 **Not Numeric Limits**

4 **1. The Federal Maximum Extent Practicable Standard Does Not**
5 **Require Strict Adherence to Numeric Limits**

6 Recognizing the inherent challenges of local government agency regulation of storm
7 water pollution, the Clean Water Act set forth a unique standard for Municipal Separate
8 Storm Sewer Systems (“MS4”) that, unlike other kinds of the NPDES permits, does not
9 require strict adherence to numeric water quality standards and effluent limitations. Rather,
10 the Clean Water Act only requires reductions in storm water pollution to the maximum
11 extent practicable (“MEP”).

12 Following the 1972 passage of the Clean Water Act, EPA originally sought to
13 exempt storm sewer systems entirely from the Clean Water Act’s NPDES program.¹³ In
14 *NRDC v. Costle*, 568 F.2d 1369, 1378-79 (D.C. Cir. 1977), superseded by statute on other
15 grounds, the EPA explained why it sought the exemption:

16 “The major characteristic of the pollution problem which is generated by runoff . . .
17 is that the owner of the discharge point . . . has no control over the quantity of the
18 flow or the nature and amounts of the pollutants picked up by the runoff. The
19 amount of flow obviously is unpredictable because it results from the duration and
20 intensity of the rainfall event, the topography, the type of ground cover and the
21 saturation point of the land due to any previous rainfall.”¹⁴

22 Despite the inherent difficulties of regulating storm sewer runoff identified by EPA,
23 the *Costle* court ruled that the language of the Clean Water Act did not allow EPA to
24

25 ¹³ “Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES),
26 ‘[t]he primary means’ for enforcing effluent limitations and standards under the Clean Water Act. The
27 NPDES sets out the conditions under which . . . a state with an approved water quality control program can
28 issue permits for the discharge of pollutants in wastewater.” *City of Burbank v. State Water Resources*
Control Bd., 35 Cal.4th 613, 621(2005) (internal citations omitted).

¹⁴ *Costle*, 568 F.2d at 1378-79.

1 exclude classes of “point sources”¹⁵ such as storm sewer systems from the NPDES
 2 program.¹⁶ Throughout the 1980s, EPA promulgated various regulations to address
 3 pollution from storm sewer runoff.¹⁷ In accord with the regulations developed by EPA, in
 4 1987 Congress added Section 402(p) to the Clean Water Act specifically to address NPDES
 5 permits for storm sewers.¹⁸

6 Clean Water Act Section 402(p) set up two different standards for storm sewer
 7 systems: one for “industrial” sources and one for MS4s.¹⁹ First, industrial sources are
 8 required to strictly comply with the technology and water-quality based standards under
 9 Clean Water Act Section 301.²⁰ Industrial sources are therefore strictly required to comply
 10 with: (1) technology-based standards known as best available technology economically
 11 achievable (BAT) or best conventional pollutant control technology (BCT); and (2) the two
 12 sets of Clean Water Act water quality criteria: EPA-created effluent limitations²¹ and water
 13 quality standards²² created by the states.²³

14 Second, given the inherent difficulties associated with regulating MS4s, municipal
 15 storm sewers were expressly exempted from the strict requirements of Clean Water Act
 16 Section 301.²⁴ Instead, local government MS4 owners and operators were obligated to
 17

18 ¹⁵ Under Clean Water Act Section 402, the NPDES controls water pollution by regulating “point sources”
 19 that discharge pollutants into waters of the United States. Point sources are discrete conveyances such as
 pipes or man-made ditches. 33 U.S.C. §§ 1311, 1314, 1362(14); 40 C.F.R. § 122.2.

20 ¹⁶ *Costle*, 568 F.2d at 1383.

21 ¹⁷ See *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992).

22 ¹⁸ 33 U.S.C. § 1342(p).

23 ¹⁹ *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999) (“*Browner*”).

24 ²⁰ *Browner*, 191 F.3d at 1164-65; 33 U.S.C. § 1311.

25 ²¹ “Effluent limitations” are end-of-pipe numeric limits promulgated by the EPA that restrict the quantities,
 26 rates, and concentrations of specified substances which are discharged from point sources. See 33 U.S.C. §§
 1311, 1314.

27 ²² “Under the ... NPDES permit system, the states are required to develop water quality standards.
 [Citations.] A water quality standard ‘establish[es] the desired condition of a waterway.’ [Citation.] A water
 28 quality standard for any given waterway, or ‘water body,’ has two components: (1) the designated beneficial
 uses of the water body and (2) the water quality criteria sufficient to protect those uses. [Citations.]”
Communities for a Better Environment v. State Water Resources Control Bd., 109 Cal.App.4th 1089, 1092
 (2003); see also 33 U.S.C. §§ 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) (2010).

²³ *Browner*, 191 F.3d at 1164; 33 U.S.C. § 1311(b)(1)(C).

²⁴ *Browner*, 191 F.3d at 1165.

1 comply with the “maximum extent practicable” (“MEP”) standard. Clean Water Act
2 Section 402(p)(3)(B) states:

3 “Permits for discharges from municipal storm sewers . . . **shall require controls to**
4 **reduce the discharge of pollutants to the maximum extent practicable**, including
5 management practices, control techniques and system, design and engineering
6 methods, and such other provisions as the Administrator or the State determines
7 appropriate for the control of such pollutants.”²⁵

8 The MEP standard was therefore not intended by Congress to require strict
9 adherence to numeric effluent limitations or water quality standards. As the court in
10 *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.*, 124
11 Cal.App.4th 866 (2004) (“*BIA*”) stated:

12 “Congress clarified that the EPA had the authority to fashion NPDES permit
13 requirements to meet water quality standards **without specific numerical effluent**
14 **limits and instead to impose ‘controls to reduce the discharge of pollutants to**
15 **the maximum extent practicable’ . . .**”²⁶

16 Although MEP is not defined under the Clean Water Act or EPA’s Clean Water Act
17 regulations, “practicable” is defined as “available and capable of being done after taking
18 into consideration cost, existing technology and logistics in light of overall project
19 purposes.”²⁷

20 The State of California’s current definition of MEP derives from a 1993 State Board
21 memorandum (“1993 MEP Memo”) and reflects the aforementioned federal standards.²⁸
22 The 1993 MEP Memo notes the importance of the distinction between industrial and
23 municipal storm sewers when it points out that:

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26 ²⁵ 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

27 ²⁶ *BIA*, 124 Cal. App.4th at 874 (emphasis added).

28 ²⁷ 40 C.F.R. § 230.10(a)(2).

²⁸ See State Board Memorandum, “Definition of Maximum Extent Practicable” (February 11, 1993) (*1993 MEP Memo*).

1 “[T]he requirement [for MS4s] is to reduce the discharge of pollutants, rather
2 than totally prohibit such discharge. Presumably, the reason for this standard (and
3 the difference from the more stringent standard applied to industrial dischargers in
4 Section 402(p)(3)(A)) is the knowledge that **it is not possible for municipal**
5 **dischargers to prevent the discharge of all pollutants in storm water.**”²⁹

6 The 1993 MEP Memo then defines MEP for the purposes of MS4 permits in the
7 State in the following manner:

8 “Although MEP is not defined by the federal regulations, use of [the BMP Guidance
9 Manual] in selecting BMPs should assist municipalities in achieving MEP. In
10 selecting BMPs which will achieve MEP, it is important to remember that
11 municipalities will be responsible to reduce the discharge of pollutants in storm
12 water to the maximum extent practicable. This means choosing effective BMPs, and
13 rejecting applicable BMPs only where other effective BMPs will serve the same
14 purpose, the BMPs would not be technically feasible, or the cost would be
15 prohibitive. The following factors may be useful to consider:

- 16 1. Effectiveness: Will the BMP address a pollutant of concern?
- 17 2. Regulatory Compliance: Is the EMP in compliance with storm water
18 regulations as well as other environmental regulations?
- 19 3. Public acceptance: Does the BMP have public support?
- 20 4. Cost: Will the cost of implementing the BMP have a reasonable
21 relationship to the pollution control benefits to be achieved?
- 22 5. Technical Feasibility: Is the BMP technically feasible considering soils,
23 geography, water resources, etc.?

24 After selecting a menu of BMPs, it is of course the responsibility of the
25 discharger to insure that all BMPs are implemented.”³⁰

26
27 ²⁹ 1993 MEP Memo, at pp. 4-5 (emphasis added).

28 ³⁰ 1993 MEP Memo, at pp. 4-5.

1 Consistent with statements in the 1993 MEP Memo, in 2000 the State Board stated
2 the following in a precedential water quality order regarding compliance with the MEP
3 requirement:

4 “There must be a serious attempt to comply, and practical solutions may not be
5 lightly rejected. If, from the list of BMPs, a permittee chooses only a few of the least
6 expensive methods, it is likely that MEP has not been met. On the other hand, if a
7 permittee employs all applicable BMPs except those where it can show that they are
8 not technically feasible in the locality, or whose cost would exceed any benefit to be
9 derived, it would have met the standard. MEP requires permittees to choose effective
10 BMPs, and to reject applicable BMPs only where other effective BMPs will serve
11 the same purpose, the BMPs would not be technically feasible, or the cost would be
12 prohibitive.”³¹

13 Based on the foregoing, four things are clear about the MEP requirement under state
14 and federal law: (1) MEP does not require strict adherence to Clean Water Act technology-
15 based requirements, EPA-created effluent limitations, or state-created water quality
16 standards; (2) MEP requires only the reduction, not the elimination, of contamination in
17 stormwater discharges; (3) MEP is meant to utilize a BMP-based, “iterative” process; and
18 (4) MEP-compliant BMP-selection requires consideration of cost, logistics, benefit and
19 must include public notice and comment.

20 The 2012 Permit adopted the 1993 MEP Memo’s definition of MEP.³² Accordingly,
21 requiring anything beyond the BMP-based standards would exceed MEP.

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27 ³¹ State Board Order No. 2000-11, at p. 20.

28 ³² See 2012 Permit, Attachment A, at p. 11.

1 **2. Good Faith Adherence to The BMP-Based “Iterative” Standard**
2 **Has Always Been the MS4 Permit Compliance Determinant Under**
3 **State Board Policy**

4 a) Good Faith Adherence to the Iterative Process Has Always
5 Been the Standard for MS4 Permit Compliance

6 The State Board has issued various memoranda indicating that Permit compliance is
7 to be measured through good faith adherence to the “iterative” process, as opposed to strict
8 compliance with numeric effluent criteria, which the Clean Water Act and the MEP
9 standard do not require for MS4s.³³ There is no reason to change this with the 2012 Permit.

10 The iterative process was generally described in State Board Order No. 99-05, which
11 states that the purpose of the process is to achieve compliance with water quality standards
12 through implementation of BMPs and other control measures.³⁴ After BMPs and control
13 measures are implemented, a permittee conducts monitoring to ensure compliance with
14 water quality standards. If there are persistent violations of water quality standards, the
15 permittees are required to notify the Regional Board with a report that describes the BMPs
16 that have been implemented and additional BMPs that will be implemented to help achieve
17 water quality standards, along with an implementation schedule for the BMPs. This
18 process is repeated as many times as necessary until water quality standards are achieved.

19 The State Board has repeatedly stated that permittees’ adherence to the iterative
20 process in good faith is the compliance determinant for the permit’s receiving water
21 limitations, effluent limitations, and non-stormwater discharge provisions, and not strict
22 adherence to numeric limits. In 1991, the State Board concluded that “numeric effluent
23 limitations are infeasible as a means of reducing pollutants in municipal storm water

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26 ³³ See, e.g., *Divers Envt’l Conservation Org. v. State Water Resources Control Bd.*, 145 Cal.App.4th 246,
27 256 (2006) (“[i]n regulating stormwater permits the EPA has repeatedly expressed a preference for doing so
28 by the way of BMPs, rather than by way of imposing either technology-based or water quality-based
numerical limitations.”)

³⁴ See State Board Order No. 99-05 at pp. 2-3.

1 discharges, at least at this time.”³⁵ In 2001, the State Board reiterated that the compliance
2 standard for MS4 permits is to be an “iterative” one, and that “we will generally not require
3 ‘strict compliance’ with water quality standards through numeric effluent limitations and
4 we continue to follow an iterative approach, which seeks compliance over time.”³⁶

5 No subsequent State Board regulation or water quality order says otherwise.
6 Furthermore, at no point has the State Board or the State Legislature indicated that the
7 regional boards must require strict enforcement of numeric limits in MS4 permits.

8 Accordingly, there is no law or guidance indicating that strict compliance with numeric
9 limits should actually be imposed on MS4 permittees.

10 b) The Iterative Process Does Not “Excuse” Water Quality
11 Standard Violations and is Not a Safe Harbor

12 The iterative process is not a safe harbor and does not “excuse” violations of water
13 quality standards. Under the iterative approach, water quality standard violations trigger
14 the requirement for permittees to report the failure to the Regional Board and implement
15 additional BMPs and control measures geared toward correcting the violations and
16 achieving water quality standards within rigidly defined implementation schedules.³⁷ These
17 additional BMPs and control measures are subject to public input and Regional Board
18 approval.³⁸

19 Thus, the iterative process is not a “safe harbor” as there are clear consequences to
20 failing to attain water quality standards—the requirement to implement costly new BMPs
21 and other control measures. Properly implemented, the iterative process is far more
22 effective for improving water quality than enforcing numeric limits. This commonsense
23 proposition was expressed by Regional Board Executive Director Sam Unger during the
24 Permit adoption hearings in explaining the Regional Board’s rationale for creating a

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27 ³⁵ State Board Order No. 91-03, at p. 49.

28 ³⁶ State Board Order No. 2001-15, at p. 8.

³⁷ 2012 Permit, pp. 38-39

³⁸ 2012 Permit, pp. 38-39; Attachment A, at p. 11.

1 modified iterative approach through the Permit’s watershed management program in lieu of
2 requiring strict adherence to *all* numeric limits:

3 “Over the past 10 years, we have realized we have made more progress in improving
4 water quality through implementation of BMPs tailored by TMDLs and Watershed
5 Plans to addressing specific water quality issues of concern rather than attempted
6 enforcement of receiving water limitations.”³⁹

7 Indeed, following the BMP-based iterative process is all permittees can do
8 realistically to comply. Requiring adherence to numeric limits that, in many instances, are
9 not feasible will not result in increased water quality. Indeed, water quality is more likely
10 to improve if funds that should go toward water quality improvements are not redirected to
11 paying for costly legal battles that do nothing to improve water quality.⁴⁰ As stated by Mr.
12 Unger, water quality is best improved by aggressive implementation of the iterative
13 process, rather than seeking to punish permittees for numeric standard exceedances that are
14 often entirely beyond their ability to control. To the extent there have been failures in the
15 past regarding the imposition of the iterative standard, the answer is more robust monitoring
16 requirements—which the 2012 Permit has⁴¹—not the wholesale imposition of various
17 infeasible, enforceable numeric limits.

18 c) Numeric Effluent Criteria May Imposed, But Only Where
19 Feasible

20 There is one important legal limitation on the Regional Boards’ ability to impose
21 numeric limits in the MS4 context: it may be done only where it is “feasible.” The EPA’s
22 Clean Water Act regulations authorize use of the iterative process as the compliance
23 mechanism “when numeric effluent limitations are **infeasible**,” only otherwise demanding
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26 ³⁹ 10/4/12, 2012 Permit Hrg. Tr., at p. 37 [testimony of S. Unger].

27 ⁴⁰ See *Natural Resources Defense Council v. County of Los Angeles*, 133 S.Ct. 710 (2013) (ongoing multi-
year litigation between NRDC and LA County regarding numeric receiving water limitation violations under
the prior LA County MS4 permit.) .

28 ⁴¹ See 11/8/12, 2012 Permit Hrg. Tr., p.315 [testimony of R. Purdee].

1 numeric effluent criteria in circumstances that do not apply in the case of the 2012 Permit.⁴²

2 In 2010, EPA issued a guidance memorandum (“2010 EPA Memorandum”) stating
3 for the first time that numeric limits may begin to be imposed, but only where “feasible.”
4 The 2010 EPA Memorandum reiterated EPA’s commitment to the iterative process as a
5 means of permit compliance, and directed permit writers to impose numeric effluent limits
6 only “where feasible,” stating “**where feasible**, the NPDES permitting authority exercises
7 its discretion to include **numeric effluent limitations** as necessary to meet water quality
8 standards.”⁴³ It is important to note that the 2010 EPA Memorandum is not final – it is
9 merely a proposal that is still under review at OMB’s Office of Regulatory Information and
10 Review, which may yet find the approach outlined in the Memorandum to exceed the
11 authority of the Clean Water Act or to be otherwise improper. Nonetheless, the term
12 “feasible” is repeated numerous times throughout the 2010 EPA Memorandum.

13 The position of the EPA is clear: the iterative process is to be used until such time as
14 imposing numeric criteria is “feasible.” As EPA has made clear in the cited regulations and
15 policy statements, the focus of MS4 regulation is in improving BMPs over time through the
16 iterative process. In addition, the permit writer should have the permittee assess and
17 modify, as necessary, any or all existing Storm Water Management Plan (“SWMP”)⁴⁴
18 components and adopt new or revised SWMP components to optimize reductions in
19 stormwater pollutants through an iterative process. This iterative process should include
20 routine assessment of the need to further improve water quality and protect beneficial uses,
21

22 _____
23 ⁴² 40 C.F.R. § 122.44(k) (emphasis added); 40 C.F.R. § 122.44(d)(iii) *requires* numeric effluent limitations in
24 circumstances that do not apply here. Namely, where a reasonable potential analysis under subsection (d)(ii)
25 shows that the permittee’s MS4 has the reasonable potential to cause or contribute to an in-stream excursion
26 above an allowable *ambient* concentration of a numeric state water quality standard for the individual
27 pollutant. As argued in the Petitioners’ original petitions, such a reasonable potential analysis was not
28 performed by the Regional Board, which is itself a compelling reason that the numeric effluent criteria
imposed by the 2012 Permit are entirely improper and cannot rightfully be imposed on permittees.

⁴³ See “Revisions to the November 22, 2002 Memorandum ‘Establishing Total Maximum Daily Load
(TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based
on those WLAs’” (November 12, 2010) (*2010 EPA Memorandum*) at p. 2 (emphasis added).

⁴⁴ See, e.g., 2012 Permit, pp. 67-68.

1 review of available technologies and practices to accomplish the needed improvement, and
2 evaluate resources available to implement the technologies and practices.⁴⁵ Numeric
3 criteria are to be introduced gradually, in a measured and conscientious manner, over
4 successive permits.

5 In this case, the 2012 Permit has introduced new numeric effluent limitations all at
6 once for 33 TMDLs.⁴⁶ This is the opposite of gradual and measured, and is neither sensible
7 nor productive. The standard for imposing numeric criteria is feasibility—not frustration,
8 impatience, or the failure to meet water quality standards under prior permits. Furthermore,
9 state and federal policy prefer the Regional Board and the permittees to address those
10 failures through the imposition of BMPs within the iterative process, not through the
11 wholesale and immediate imposition of dozens of new numeric effluent and receiving water
12 limitations based on highly contentious science. This is all in addition to having to comply
13 with allegedly preexisting enforceable numeric receiving water limitations for *all* of the
14 Permit’s 140 regulated pollutants, not just those for which TMDLs are created.⁴⁷

15 The word “feasible” is not defined in the Clean Water Act or its regulations, or the
16 Porter-Cologne Act or its regulations. In *Surfrider Found. v. California Regional Water*
17 *Quality Control Bd.*, 211 Cal.App.4th 557, 582 (2012), the Court of Appeal affirmed the
18 San Diego Regional Board’s use of the California Environmental Quality Act (“CEQA”)
19 definition of “feasibility” in the NPDES context. Under the California Environmental
20 Quality Act, “[f]easible” means capable of being accomplished in a successful manner
21 within a reasonable period of time, taking into account economic, environmental, social,
22

23
24 ⁴⁵ See, e.g., EPA, Office of Wastewater Management, MS4 Permit Improvement Guide, April 2010, at p.
25 104 (“In addition, the permit writer should have the permittee assess and modify, as necessary, any or all
26 existing SWMP components and adopt new or revised SWMP components to optimize reductions in
27 stormwater pollutants through an iterative process. This iterative process should include routine assessment
28 of the need to further improve water quality and protect beneficial uses, review of available technologies and
practices to accomplish the needed improvement, and evaluate resources available to implement the
technologies and practices.”)

⁴⁶ 2012 Permit, p. 13.

⁴⁷ 2012 Permit, Attachment E, at pp. E-17-E-20.

1 and technological factors.”⁴⁸ This definition dovetails perfectly with California’s definition
2 of MEP, which references both technical and economic feasibility in the process of BMP
3 selection.⁴⁹ It is also consistent with California Water Code Sections 13000, 13263, and
4 13241. Accordingly, it makes the most sense to define what is “feasible” in roughly the
5 same terms as CEQA and the MEP definition of “practicable,” which generally require
6 consideration of cost, benefits, technical feasibility, and public support.⁵⁰

7 The feasibility question should thus be based on a real world assessment of what
8 permittees can actually do with MS4 effluent pollution in light of logistical, technological
9 and economic restraints. When the facts are examined in light of reality, imposing numeric
10 limits is simply not feasible at this time—especially not in the manner in which it was done
11 in the 2012 Permit.

12 In particular, the City is subject to a number of expensive TMDL’s: The Santa
13 Monica Bay Beaches Bacteria TMDL, The Santa Monica Bay Nearshore and Offshore
14 Debris TMDL, The Santa Monica Bay TMDL for DDTs and PCBs, the Dominguez
15 Channel and Greater Los Angeles and Long Beach Harbor Waters Toxic Pollutants
16 TMDL.⁵¹ Complying with all these TMDLs will be cost prohibitive, and meeting their
17 numeric final wasteload allocations is likely impossible.

18 3. Imposing Numeric Criteria in the Manner of the MS4 Permit is Not
19 Feasible at This Time

20 In 2006, the State Board convened the “Storm Water Panel,” a group of scientific
21 and academic experts in storm water regulation, who made recommendations to the State
22 Board in a commissioned report (“2006 SWP Report”) regarding the efficacy of imposing
23 numeric limits on MS4 permittees.⁵² The 2006 SWP Report concluded that “[i]t is not
24

25 ⁴⁸ Cal. Pub. Resources Code, § 21061.1.

26 ⁴⁹ 1993 MEP Memo at pp.4-5; see also 40 C.F.R. § 230.10(a)(2).

27 ⁵⁰ 1993 MEP Memo at pp.4-5.

28 ⁵¹ 2012 MS4 Permit, Attachment K at pp. K-2, K-4

⁵² *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) at pp. 2-3 (2006 SWP Report).

1 feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in
2 particular urban dischargers."⁵³

3 The reasons for the infeasibility determination in the 2006 SWP Report have not
4 come close to being resolved. One glaring problem identified by the 2006 SWP Report is
5 the fact that cost-effective BMPs for MS4s capable of achieving water quality standards
6 have not yet been developed to deal with all the constituents addressed in TMDLs or
7 otherwise in the Permit.⁵⁴ As an indication of the problem permittees face in this regard,
8 Regional Board member Madelyn Glickfeld had the following exchange with Regional
9 Board staff member Deborah Smith at the 2012 Permit adoption hearings:

10 "MS. GLICKFELD: [W]hy is it that we [use the] BMP approach in trash the [sic]
11 and that we couldn't fashion that in a scientifically valid way for the other TMDLs
12 that are actually numeric and appear to be numeric and it's not a BMP approach
13 which the cities seemed to like a lot. And I understand the environmental groups
14 actually developed that with you, was the BMP approach for trash. Is it that that
15 doesn't work as well for other kinds of pollutants? Or we don't know the right
16 BMPs?

17 MS. SMITH: I'll take a stab at that. I think trash inherently because of its size lends
18 itself better to developing technologies to keep it out of the street, but there have
19 been -- a lot of companies have researched, you know, various inserts that take out
20 oil and grease, and people are looking at ones for bacteria and metals and things like.
21 *Those are going to be more complicated to develop. . .*"⁵⁵

22 The Regional Board staff truthfully conceded that there are no BMPs currently in
23 existence that can achieve the required reductions for bacteria and metals within given
24 timeframes, which is a fact repeatedly lamented by the parties to the TMDLs in their public
25

26 _____
27 ⁵³ 2006 SWP Report, at p. 8.

28 ⁵⁴ 2006 SWP Report, at pp. 4-6.

⁵⁵ 10/5/12, 2012 Permit Hrg. Tr. pp. 221-222 (emphasis added).

1 comments.⁵⁶ That no technology—much less an cost effective technology—exists
2 sufficient to attain numeric criteria for bacteria and metals in MS4 systems should be a
3 compelling reason to conclude that imposing such numeric limits is infeasible at this time.⁵⁷
4 In the eyes of the Regional Board, however, the opposite is true: the non-existence of
5 effective BMPs is a reason to impose strict numeric limits. This reasoning is clearly
6 backwards, and imposes more onerous numeric standards only where such standards are
7 effectively impossible to meet. This approach is not only illogical, it clearly sets permittees
8 up to fail, and will do nothing but result in open-ended potential liability and third party
9 “citizen suits”—all of which tragically damage permittees’ ability to improve water quality
10 by diverting limited funds to costly legal battles.

11 The 2012 Permit adopted six different bacteria and metals TMDLs that, given the
12 absence of effective and affordable control technology, will be impossible to comply with.⁵⁸
13 Permittees lack research and development budgets, and they simply cannot count on
14 someone else coming up with a miraculous, cost-effective solution. The unlikelihood of
15 compliance for permittees within requisite timeframes is compounded when one considers
16 that numeric limits for bacteria and metals TMDLs are in some cases set at zero or non-zero
17 levels.

18 For just one example, the City is subject to the Santa Monica Bay Bacteria TMDL,
19 which sets a summer dry weather standard for indicator bacteria at zero exceedances. Data
20 collected at the reference beach since adoption of the TMDL in 2006, however,
21 demonstrates that natural conditions associated with freshwater outlets transporting runoff
22

23
24 ⁵⁶ See Regional Board Response to Comments, June 2012, Santa Monica Bay Beaches, Marina del Rey
Harbor Mothers’ Beach, Los Angeles Harbor Inner Cabrillo Beach and Main Ship Channel Bacteria TMDL
Reconsideration, at pp. 17, 48-49, 69, 71

25 ⁵⁷ See *BIA*, 124 Cal.App.4th at 889-90 (MEP standard balances technical feasibility, costs, public
26 acceptance.)

27 ⁵⁸ (1) the Bacteria TMDL for the Los Angeles River; (2) the EPA adopted Long Beach City Beaches and
28 Los Angeles River Estuary Bacteria TMDL; (3) the Dominguez Channel and Greater Los Angeles Harbor
and Long Beach Harbor Waters Toxic Pollutants TMDL; (4) the Los Angeles River Metals TMDL; (5) the
Los Cerritos Channel Metals TMDL. See 2012 Permit, Attachments L-R.

1 from undeveloped watersheds results in exceedances of the single sample bacteria limits
2 during both summer and winter dry weather. Thus, enforceable numeric limits will result in
3 violations because—in addition to lack of effective and affordable control technology—
4 sources completely outside the permittees' control cause exceedances all on their own.⁵⁹ As
5 has been the case with numerous TMDLs, when the problem with natural sources and non-
6 point source pollution was pointed out the Regional Board staff, they threw up their hands,
7 admitted it was a problem, and then stated that further studies are needed.⁶⁰ If numeric
8 standards are imposed until such time as further studies, trial and error BMP
9 implementation, possible new technologies, and TMDL reopeners can fix the problems,
10 permittees will face ever ending, open-ended liability for exceedances of numeric limits
11 that even the Regional Board admits are deeply flawed. Imposing flawed, impossible
12 numeric limits and asking for further studies to correct them is a deeply problematic and
13 unfair strategy to solving the complex problem of reducing stormwater pollution.

14 Beyond the TMDLs, the 2012 Permit regulates 140 pollutants in total, for which
15 numeric water quality standards exist and can be exceeded at any time.⁶¹ The sheer number
16 of TMDLs and other regulated pollutants—many of which do not have existing effective or
17 affordable BMPs—makes compliance with all numeric limits a practical impossibility.
18 Holding permittees to these numeric standards cannot be considered “feasible” by *any*
19 reasonable definition of the word.

20 Accordingly, the 2012 Permit should be remanded with the express instruction that
21 compliance with TMDL numeric limits and receiving water limitations should be
22 accomplished through only good faith adherence to the iterative process, unless it can be
23

24 ⁵⁹ See 10/4/12, 2012 Permit Hrg. Tr. at pp. 142-143.
25 ⁶⁰ See Regional Board Response to Comments, June 2012, Santa Monica Bay Beaches, Marina del Rey
26 Harbor Mothers' Beach, Los Angeles Harbor Inner Cabrillo Beach and Main Ship Channel Bacteria TMDL
27 Reconsideration, at pp. 37, *see also* pp. 44, 52, 56 (“During the data period examined, exceedances of the
28 geometric mean water quality objectives were observed at Leo Carrillo Beach. However, Leo Carrillo
remains the best available reference system. Staff acknowledges further study and corrective actions may be
⁶¹ 2012 Permit, Attachment E, at pp. E-17-E-20

1 specifically shown that such limits are indeed feasible. Unless such measures are taken, the
2 2012 Permit is not legally valid under both state and federal law.

3 **III. THE 2012 PERMIT IS INVALID BECAUSE IT FAILED TO INCLUDE A**
4 **SUFFICIENT ECONOMIC ANALYSIS**

5 The Regional Board has the legal authority to impose standards that exceed MEP,
6 including strict adherence to water quality standards.⁶² By imposing infeasible numeric
7 standards without regard to the iterative process that exceed the requirements of the federal
8 MEP standard, however, the 2012 Permit was required to conduct an economic analysis
9 pursuant to Water Code Sections 13241 and 13263.⁶³ The 2012 Permit failed to adequately
10 do so, rendering it invalid.

11 Water Code Section 13263 states that when a regional board “prescribe[s]
12 requirements as to the nature of any proposed discharge” of wastewater, it “shall take into
13 consideration” certain factors including “the provisions of Section 13241.”⁶⁴ One of the
14 factors under Water Code Section 13241 is “economic considerations,” “such as the costs
15 the permit holder will incur to comply with the numeric pollutant restrictions set out in the
16 permits”⁶⁵ Under the *City of Burbank* case, the Section 13241 analysis must be performed
17 when a state-issued MS4 permit exceeds the federal MEP standard.⁶⁶

18 The 2012 Permit’s Fact Sheet does contain a section called “California Water Code
19 Section 13241” that purports to set out the requisite economic analysis.⁶⁷ This analysis
20 mistakenly asserts that the 2012 Permit does not exceed the federal MEP standard and
21 therefore that the analysis is actually unnecessary.⁶⁸ But, as argued above, by imposing
22 numeric effluent limits—particularly ones that are not feasible—the 2012 Permit does
23

24 ⁶² *BIA*, 124 Cal. App. 4th at 889-90.

25 ⁶³ *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613, 618, 627 (2005) (*Burbank*).

26 ⁶⁴ Cal. Water Code § 13263.

27 ⁶⁵ Cal. Water Code § 13241(d); *Burbank*, 35 Cal.4th at 627.

28 ⁶⁶ *City of Burbank*, 35 Cal.4th at 618, 627.

⁶⁷ 2012 Permit, Fact Sheet, pp. F-137- F-155.

⁶⁸ 2012 Permit, Fact Sheet, pp. F-138- F-139.

1 indeed exceed the MEP standard by the express terms of the Clean Water Act.⁶⁹ Indeed, in
2 2006, the State Board itself noted that “[f]ederal regulations do not require numeric effluent
3 limitations for discharges of storm water.”⁷⁰ This fact has not changed since then.

4 The 2012 Permit Fact Sheet’s economic analysis is deficient in a number of key
5 regards. First, it is based on a 2004 study that was conducted regarding the 2001 Permit.⁷¹
6 Because the 2012 Permit includes 33 TMDLs, no principal permittee, a watershed
7 management approach, and other expansive additional requirements, the 2004 analysis
8 simply does not apply to the 2012 Permit. In accordance with its basis on obsolete 2004
9 data, the 2012 Permit’s economic analysis completely fails to analyze the most expensive
10 part of the 2012 Permit for permittees: the 33 new TMDLs.

11 The 2012 Permit attempts to get around this failure by stating that the impact of the
12 TMDLs was considered “outside the Order” in the individual TMDLs.⁷² This argument
13 fails. First, the TMDLs only consider the full projected cost of the BMPs assumed to be
14 needed to meet the WQBELs and WLAs, not the impact on the permittees, their ability to
15 pay, or the availability of funding. Furthermore, the Regional Board here talks out of both
16 sides of its mouth, because it has been the consistent position of the water boards that
17 TMDLs do *not* require economic analysis under Water Code Section 13241.⁷³

18 The 2012 Permit then makes the incorrect argument that its failure to consider the
19 costs of the TMDLs is not a problem because the “costs of complying with the water
20 quality based effluent limitations and receiving water limitations derived from the 33
21 TMDLs, which are incorporated into this Order, *are not additive*.”⁷⁴ Thus, according to the
22

23
24 ⁶⁹ See, e.g., *BIA*, 124 Cal. App.4th at 874 (“Congress clarified that the EPA had the authority to fashion
25 NPDES permit requirements to meet water quality standards **without specific numerical effluent limits
and instead to impose ‘controls to reduce the discharge of pollutants to the maximum extent
practicable’** . . .”) (emphasis added).

26 ⁷⁰ State Board Order No. 2006-12, at p. 17 (citing 40 C.F.R. § 122.44(k)(2)).

27 ⁷¹ 2012 Permit, Fact Sheet, p. F-146.

28 ⁷² 2012 Permit, Fact Sheet, pp. F-144.F-145.

⁷³ *City of Arcadia v. State Water Resources Control Bd.*, 135 Cal.App.4th 1392, 1415 (2006).

⁷⁴ 2012 Permit, Fact Sheet, pp. F-144.F-145 (emphasis added).

1 Regional Board, to comply with one TMDL costs the same as complying with ten of them.
2 This is hardly ever the case, because even though certain technologies can be useful for
3 reducing loads of multiple categories of pollutants, such reductions usually have to be
4 coupled with other, pollution-specific control measures to attain the reductions mandated by
5 the TMDLs.⁷⁵ But even if it were true, analysis of the costs of the TMDLs is still required
6 in the 2012 Permit under Water Code Sections 13241 and 13263.

7 These problems with the 2012 Permit's economic analysis were fully recognized by
8 the Regional Board members at the adoption hearings. As Regional Board member Ms.
9 Glickfeld stated:

10 "Okay. So I am concerned about the costs. I am totally committed to seeing us have
11 performance-based water quality standards where we know what we're achieving.
12 It's really important to me to know what we're achieving. However, if there's a
13 problem in the way that the --we're getting the costs reported to us, and we think it's
14 unevenly being reported, I'd like to see whether or not we could develop some new
15 standards that everyone could agree on so that we actually get the real costs. The
16 other thing is I don't think that it's appropriate for us to take what were estimated as
17 costs in 2004 when we didn't even have close to this permit or the TMDLs and try to
18 project out what this permit will cost."⁷⁶

19 These sentiments were repeated by Regional Board Chairperson Ms. Meranian when
20 she stated that "the only thing that I thought was still a big hole was the cost. Could we help
21

22 ⁷⁵ The example given in the Fact Sheet is that the same technologies used to control metals in the Ballona
23 Creek Metals TMDL can also apply to pesticides, PCBs, and bacteria. 2012 Permit, Fact Sheet, p. F-145.
24 The Ballona Creek Metals TMDL estimates the cost of compliance for "sand filter" BMPs as being between
25 \$245-245 million dollars per year with an additional \$37 million per year in maintenance costs. *See Staff*
26 *Report, Ballona Creek Metals TMDL*, at p. 57. There is no indication that the BMPs suggested in the staff
27 report for metals would on their own attain compliance with the Ballona Creek Toxics TMDL, which
28 suggests other BMPs in addition to sand filters. *See Staff Report, Ballona Creek Estuary Toxics TMDL*, at
pp. 47-51. Thus, there would be additional costs for additional source-specific BMPs, not to mention
additional maintenance costs for BMPs that pull double or triple duty. While cost savings can be achieved
in this regard, the idea that there is no additional cost to deal with additional TMDL constituents is clearly
false. There are also other TMDLs whose BMPs are less compatible or incompatible.

⁷⁶ 10/5/2012, 2012 Permit Hrg. Tr., at p. 218.


1 having building cost model of a matrix of sorts that says these are the standard stuff that
2 you have to do, and there's average cost of this?"⁷⁷ Thus, even the Regional Board
3 members recognized that the economic analysis in the 2012 Permit was deficient. This
4 being the case, if numeric standards are imposed in a manner exceeding the federal MEP
5 standard, the 2012 Permit must be remanded for a full economic analysis. Failure to do so
6 would render the entire 2012 Permit invalid under Water Code Sections 13241 and 13263.

7 **IV. CONCLUSION**

8 Petitioner believes the 2012 Permit improperly imposed numeric standards.
9 Accordingly, Petitioner respectfully requests that the State Board remand the 2012 Permit
10 to the Regional Board with orders that: (1) the iterative process be established as the lone
11 determinant of Permit compliance for TMDL WQBELs, WLAs, receiving water
12 limitations, and non-stormwater discharge prohibitions unless there is a specific showing
13 that such numeric limits are feasible; (2) if this is not done, that a full financial analysis of
14 the 2012 Permit under Water Code Sections 13263 and 13241 be conducted.

15
16
17 Dated: October 15, 2013

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28 ⁷⁷ 10/5/2012, 2012 Permit Hrg. Tr., at p. 267.

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