

LEAH S. GOLDBERG
Sr. Deputy City Attorney
Direct Line: (408) 535-1901

May 16, 2016

VIA ELECTRONIC MAIL

Ryan Mallory-Jones, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: SWRCB/OCC File A-2455 (A thru M); Petitions of City of Alameda, et al., (Waste Discharge Requirements Order No. R2-2015-0049 [NPDES Permit CAS612008], Municipal Regional Stormwater NPDES Permit for Municipalities within the Counties of Alameda, Contra Costa, Santa Clara, and San Mateo, the Cities of Fairfield, Suisun City and Vallejo, and Vallejo Sanitation and Flood Control District) San Francisco Bay Regional Water Quality Control Board

Dear Mr. Mallory-Jones:

The City of San José ("San José") submits this Response to the Petition filed by San Francisco Baykeeper ("Baykeeper") challenging Waste Discharge Requirements Order No. R2-2015-0049 [NPDES Permit CAS612008] ("MRP 2.0"), adopted by the San Francisco Bay Regional Water Quality Control Board ("Regional Board") on November 19, 2015.

San José also submitted a Petition for Review of the MRP 2.0. San José and Baykeeper, however, seek different remedies. San José's request does not ask that the State Board completely overturn the MRP 2.0. Instead, San José requests that the State Water Resources Control Board ("State Board") remand only specific provisions in the MRP 2.0 to the Regional Board with specific instructions.

Baykeeper requests that the State Board completely overturn the MRP 2.0 and remand to the Regional Board with instructions to revise the MRP 2.0 to set strict Receiving Water Limitations and Discharge Prohibitions instead of allowing alternative

compliance pathways for certain pollutants, and to mandate monitoring requirements over and above those in the MRP 2.0 including end-of-pipe wet weather sampling.

San José, on the other hand, urges the State Board to remand the MRP 2.0 to the Regional Board, but to limit its remand order to sections C.10, C.11 and C.12 and to give instructions to the Regional Board as follows: With respect to Provision C.10, the Regional Board should be directed to conduct the appropriate public comment and a fair and impartial hearing, conduct a reasonable economic analysis and conduct the appropriate environmental analysis. With respect to Provisions C.11 and C.12, the Regional Board should be directed to convert the numeric effluent limitations to numeric action levels with an accompanying set of appropriate exceedance response action requirements if the benchmarks are not met.

San José urges the State Board to reject Baykeeper's Petition because Baykeeper's legal analysis of the Clean Water Act requirements and the application of the Los Angeles Municipal Permit [State WQ Order 2015-0075] ("LA Order") to the MRP 2.0 is flawed. Baykeeper contends that the MRP 2.0 contravenes the Clean Water Act and the LA Order. In particular, Baykeeper objects to certain provisions in C.1 of the MRP 2.0 arguing that they violate the Clean Water Act's anti-backsliding provisions and State requirements in the LA Order. Baykeeper also challenges the monitoring requirements in the MRP 2.0 alleging that they violate the Clean Water Act's mandate to ensure compliance with the Receiving Water Limitations and Discharge Prohibitions in MRP 2.0. San José disagrees with Baykeeper's interpretation of both the anti-backsliding provisions and the application of the LA Order. San José agrees with the Regional Board's conclusion that the monitoring obligations in the MRP 2.0 satisfy the Clean Water Act's compliance objectives.

I. THE ALTERNATIVE COMPLIANCE PATHWAYS IN THE MRP 2.0 DO NOT VIOLATE FEDERAL ANTI-BACKSLIDING REQUIREMENTS.

Baykeeper asserts that language in Provision C.1 of the MRP 2.0 violates federal Clean Water Act anti-backsliding requirements.¹ The Regional Board expressly rejected this assertion in adopting the MRP 2.0.² The State Board also rejected application of federal anti-backsliding requirements to Receiving Water Limitations in municipal stormwater permits in the LA Order.³

Baykeeper mischaracterizes Provision C.1 in two ways. First, by characterizing Provision C.1 as a "safe harbor" provision, Baykeeper ignores the connection between the "shall constitute compliance" and the "requirements and schedule" language in Provision C.1. Provision C.1 is an alternative compliance pathways approach to

¹ Baykeeper Petition, p. 8.

² MRP 2.0 Fact Sheet, p. 16-17.

³ PA permit, p. 19-23.

compliance with certain Discharge Prohibitions and Receiving Water Limitations that would otherwise apply.⁴ This comprehensive approach to water quality protection has been accepted by both the State Board and the US Environmental Protection Agency.⁵

A. Federal Anti-backsliding Requirements Are Not Applicable to the Receiving Water Limitations and Discharge Prohibitions in the MRP 2.0.

Baykeeper cites both federal statutory and regulatory anti-backsliding provisions as applying to the Receiving Water Limitations and Discharge Prohibitions in the MRP 2.0. The Regional Board correctly found that federal statutory anti-backsliding provision does not apply to the Receiving Water Limitations in the MRP 2.0 because those limitations are not imposed under any of the Clean Water Act sections to which the anti-backsliding statute applies.⁶ The State Board also rejected the application of federal statutory anti-backsliding to Receiving Water Limitations in the LA Order.⁷

The Regional Board in adopting the MRP 2.0, and the State Board in the LA Order, further considered whether federal regulatory anti-backsliding requirements applied to Receiving Water Limitations in municipal stormwater permits. Although both the Regional Board and State Board assumed for the sake of analysis that the federal regulatory requirements did apply to municipal stormwater permits, we concur with the Alameda Countywide Clean Water Program⁸ ("ACCWP") that the regulatory anti-backsliding analysis does not apply to the MRP 2.0. The plain language and history of the federal regulation cited by Baykeeper⁹ does not support application of the anti-backsliding regulation to the Receiving Water Limitations and Discharge Prohibitions because both the Discharge Prohibitions and Receiving Water Limitations are discretionary permit provisions adopted under a section of the Clean Water Act to which the anti-backsliding requirements do not apply.

⁴ The Receiving Water Limitations covered by Provision C.1 are pesticides, trash, mercury, polychlorinated biphenyls (PCBs) and bacteria. The only Discharge Prohibition covered by Provision C.1 is trash.

⁵ The LA Order not only finds alternative compliance pathways an acceptable approach to compliance with Receiving Water Limitations, but encourages and provides a template to regional boards considering the approach. US EPA has acknowledged the wide range of acceptable approaches for establishing permit requirements based on waste load allocations, including non-numeric limitations. See US Environmental Protection Agency memoranda, November 26, 2014.

⁶ MRP Fact Sheet, p. 17.

⁷ LA Order, p. 20.

⁸ ACCWP Response to Baykeeper Petition dated May 12, 2016, p. 5.

⁹ 40 C.F. R. §122.44(1)(1).

B. Even if Federal Anti-backsliding Requirements were Applicable, the Alternative Compliance Pathways in the MRP 2.0 do Not Violate Anti-Backsliding Because Provision C. 1 in the MRP 2.0 is Not Less Stringent than Provision C.1 in the 2009 Municipal Regional Permit.

The Regional Board found that even if anti-backsliding applied, it was not violated by the alternative compliance pathway language in the MRP 2.0 because “the actual requirements in Provisions C.9 to C.12 and C.1 [of the MRP 2.0] are as or more stringent than the previous permit.”¹⁰ Baykeeper asserts that the Regional Board “provides no factual or legal basis for its suggestion that the requirements . . . are any more stringent than the prior permit.”¹¹ Baykeeper’s argument misses the point that the legal standard is only that the requirements not be less stringent. This argument also fails to take into account the actual language in Provision C.1 in the MRP 2.0 versus the actual language in Provision C. 1 in the 2009 Municipal Regional Permit.

Baykeeper focuses on the “shall constitute compliance” language in Provision C.1 in the MRP 2.0 but ignores that the 2009 Municipal Regional Permit had language expressly stating that even if exceedances of water quality standards or objectives persisted in receiving water, the permittees were exempted from doing any additional reporting or implementation of best management practices.¹² Baykeeper also does not compare the substantive compliance requirements in Provision C.1 of the MRP 2.0 with the comparable requirements in the 2009 Municipal Regional Permit. When the combination of the substantive requirements and the compliance language of the two permits are compared, it is clear that the MRP 2.0 has new provisions, not in the the prior permit that make MRP 2.0 at least as stringent as the prior permit. (See **Attachment A** for relevant MRP 2.0 provisions¹³ related to the four pollutants of concern here that are covered by Provision C. 1 in the MRP 2.0 and the 2009 Municipal Regional permit.¹⁴)

C. Provision C. 1 of the 2015 MRP 2.0 is Justified Based on New Information and Changed Circumstances since the 2009 Municipal Regional Permit was Adopted.

Baykeeper challenges the Regional Board’s finding that an exception to the federal anti-backsliding requirement is justified based on “new information available to the Board from experience and knowledge gained through implementation of actions

¹⁰ MRP 2.0 Fact Sheet, p. 17

¹¹ Baykeeper Petition, p. 12.

¹² Regional Board Order No. R2-2009-0074, Provision C.1.

¹³ Attachment A is limited to citing provisions in the MRP 2.0 that are not being challenged by San José. In other words, after modification of the MRP 2.0 as requested by San José, the MRP 2.0 will still be no less stringent than the prior permit.

¹⁴ Our analysis includes only pesticides, trash, mercury, and polychlorinated biphenyls (PCBs), as San José is not subject to the bacteria controls.

required by the previous permit and results of source identification studies and control measure effectiveness studies since the adoption of the previous permit . . . [and] the need and significance of explicitly allowing time to plan, design, fund, operate and maintain controls necessary to attain water quality improvements and comply with receiving water limits."¹⁵ We concur with the ACCWP that the nature of stormwater discharges and the experience of municipal stormwater discharges supports this finding.¹⁶

The Regional Board's new information finding is also completely consistent with the new information finding made by the State Board in the LA Order.¹⁷

D. Exceptions to Federal Anti-Backsliding Requirements Are Not Limited by the Federal Anti-Degradation Policy.

Baykeeper asserts that even if exceptions to the federal anti-backsliding requirements justify a lessening of prior effluent limitations, federal anti-degradation regulations prohibit application of the exceptions in this case. The first problem with Baykeeper's assertion is that the federal regulation cited in the Petition (40 C.F.R. §122.44(l)(2)(ii)) applies to permits issued by the administrator of the US Environmental Protection Agency under Section 404(a)(1)(b) of the Clean Water Act. The second problem with the assertion is that it assumes that Provision C.1 is an effluent limitation. As indicated in the discussion of the federal anti-backsliding regulations above (Section A.1) the plain language and history of the federal regulation do not support its application to discretionary Receiving Water Limitations and Discharge Prohibitions.

More significantly, Baykeeper is wrong in asserting that the Regional Board failed to address anti-degradation in the MRP 2.0. Consistent with the discussion of applicable anti-degradation policies in the LA Order, the Regional Board found that the MRP 2.0 permit provisions implement total maximum daily load (TMDL) allocations that not only ensure maintenance and protection of existing beneficial uses of water, but restoration of impaired uses.¹⁸ Further, in light of the lack of historic water quality data, and in order to address anti-degradation with respect to potential high quality waters, the Regional Board adopted findings related to the need to accommodate important social and economic development in the area covered by the MRP 2.0.¹⁹ In short, the Regional Board performed the precise anti-degradation analysis outlined by the State Board in the LA Order, and the State Board should find that analysis sufficient, without even needing to supplement it, as was required in the LA Order.

¹⁵ MRP 2.0 Fact sheet, p. 17.

¹⁶ ACCWP Response to Baykeeper Petition dated May 12, 2016, p.6.

¹⁷ LA Order, p. 22-13.

¹⁸ MRP Fact Sheet, p. 15.

¹⁹ MRP Fact Sheet, p. 16.

II. WITH SENSITIVITY TO LOCAL CONDITIONS, THE REGIONAL BOARD ADOPTED ALTERNATIVE COMPLIANCE PATHWAYS CONSISTENT WITH THE ANALYSIS THE STATE BOARD APPROVED IN THE LA ORDER.

Baykeeper asserts that the MRP 2.0 alternative compliance pathways²⁰ violate the LA Order.²¹ Not only is such “violation” a legal misnomer, it is inaccurate. Far from violating the LA Order, the Regional Board took guidance from that order and realized its vision through sensitive local implementation.

A. The LA Order Resolved Certain Legal Issues and Established Certain Guiding Principles, but It Did Not And Could Not Set the Statewide Requirements Baykeeper Asserts.

As a threshold matter, the MRP 2.0 order cannot “violate” the LA Order in the manner Baykeeper asserts. State water quality orders cannot adopt a “rule, regulation, order, or standard of general application” so as to “implement, interpret, or make specific the law enforced or administered” by the State Board.²² Pursuant to Government Code section 11342.600, *et seq.*, such orders require the full rulemaking process under the Administrative Procedures Act.²³ Instead, as stated in State Board Order Number WR 96-1, State Board water quality orders are precedential under Government Code section 11325.60 to the extent they contain “a significant legal or policy determination of general application that is likely to recur.”

Properly understood, the LA Order is “precedential” in its resolution of certain recurring legal issues, but is not a law or regulation in and of itself. For instance, the LA Order dispositively resolves whether alternative compliance pathways necessarily violate the anti-backsliding provisions of the Clean Water Act (33 U.S.C. § 1342(o)), the anti-backsliding implementation regulations (40 C.F.R. § 122.44(l)), or federal anti-degradation policies (40 C.F.R. § 131.12).²⁴ The LA Order, however, does not and cannot establish a “standard of general application” for alternative compliance pathways to meet in all MS4 Permits statewide. Establishing minimum requirements for a particular permit scheme (such as for all MS4 Permits) is properly the subject of

²⁰ Baykeeper alternatively discusses these provisions as “safe harbors,” “WMP/EWMP,” and “alternative compliance pathways.” This response consistently uses the more accurate and descriptive term “alternative compliance pathways.” This term correctly indicates that the Regional Board opted for a dynamic, regional, and programmatic approach for achieving water quality standards rather than simply setting numeric limits. “Safe harbor” misleadingly implies that these provisions are somehow easier to comply with or constitute something less than the water quality standards in the permit. “WMP/EWMP” is a defined term with limited application to the LA Order.

²¹ Baykeeper Petition, p. 13-16.

²² *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572 (overturning board policy directing deputy hearing officers on how to handle particular types of orders).

²³ *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App. 4th 625, 648.

²⁴ LA Order, p. 18-30.

rulemaking.²⁵ Baykeeper's suggestion that the MRP 2.0 be overturned because it lacks certain provisions contained in the LA Order is legally unsound. The question before the State Board is whether the MRP 2.0 *in its own right* contains legally and technically sound alternative compliance pathways that will help achieve local Receiving Water Limitations.

B. Baykeeper's Petition Argues for a Level of Similarity Between the LA Order and the MRP 2.0 that is Unnecessary and Unsound.

Instead of verifying that the MRP 2.0 is guided by the seven principles in the LA Order²⁶ that the State Board implores Regional Boards to follow, Baykeeper criticizes the MRP 2.0 for failing to mirror certain types of provisions in the LA Order. Baykeeper therefore variously criticizes the MRP 2.0 for (1) failing to have a "validation" procedure requiring "peer-reviewed acceptable modeling methods" and "minimum data requirements"; (2) containing insufficient "detail or technical guidance" for modeling during the compliance period; (3) failing to have a "mechanism for public review and comment"; and (4) excusing "compliance with Discharge Prohibitions and Receiving Water Limitations throughout the 5-year term of the Permit."²⁷ As detailed individually below, each of these assertions are inaccurate.

More fundamentally, as a whole Baykeeper's argument insists upon a level of similarity between the LA Order and the MRP 2.0 that is both unreasonable, unnecessary and often impractical. In the LA Order, this Board recognized that regional differences will dictate variations on the WMP/EWMP approach adopted in Los Angeles.²⁸ There is thus no cause to demand any level of similarity between the WMP/EWMP approach used in Los Angeles and the alternative compliance pathways adopted in the Bay Area. The Regional Board, with local sensitivity, properly undertook to determine what sorts of alternative compliance pathways were ambitious and rigorous but also practically obtainable in the Bay Area.

²⁵ In the LA Order, this Board therefore properly limited its inquiry to the factually specific question of whether the LA Order's WMP/EWMP provisions constituted a legal and technically sound compliance pathway. (See LA Order at p. 16.) This limited holding is consistent with the case law. (See, e.g., *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-75 ("A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law."); *Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 146 Cal.App.4th 1457, 1470 (requiring rulemaking when an agency sets a formula for how a certain class of cases will be decided).)

²⁶ LA Order p. 51-52.

²⁷ Baykeeper also criticizes the permit for lacking "rigorous receiving water and end-of-pipe monitoring." As this issue is addressed in detail in Section III, *infra*, it will not be addressed here.

²⁸ LA Order, p. 51.

C. The Criticisms Baykeeper Makes Are Contrary to the Plain Text of the MRP 2.0 and the LA Order.

First, Baykeeper inaccurately complains that the MRP 2.0 contains no “peer-reviewed acceptable modeling methods,” “minimum data requirements,” and “detail or technical guidance” for modeling and monitoring during the compliance period.²⁹ This ignores the fact that several of the programs explicitly require that the modeling and monitoring methods used be “peer reviewed.”³⁰ Baykeeper also ignores the fact that the MRP 2.0 makes explicit reference to several different sources of guidance for permittees to use for modeling and monitoring³¹ and in some instances provides particularly detailed modeling and monitoring guidance.³²

Second, Baykeeper argues that the MRP 2.0 contains no “validation” procedure. This is also inaccurate. Each of the pathways requires annual reports and various other reports to be submitted for approval by the Regional Board.³³ In this way the Regional Board validates the work as being in compliance with the MRP 2.0.

Third, Baykeeper asserts that the Permit provides “no opportunity for public review or comment.”³⁴ Baykeeper ignores the fact that because reports must be filed with and approved by the Regional Board, the public has an opportunity to review and comment on these reports. This is the same kind of public comment and transparency approved of in the LA Order.³⁵

Finally, Baykeeper’s assertion that the MRP 2.0 impermissibly excuses compliance with Discharge Prohibitions and Receiving Water Limitations throughout the five-year term of the MRP 2.0 is equally meritless.³⁶ Consistent with the LA Order,³⁷ the MRP 2.0 provides for an iterative process.³⁸ Consistent with the LA Order,³⁹ “good faith compliance” with the iterative process is not deemed compliance with the Receiving

²⁹ Baykeeper Petition, p. 14

³⁰ See MRP 2.0 Sections C.10.b.v.b; C.11.c.ii.(2), C.11.c.iii.(3); C.12.c.ii.(2), C.12.c.iii.(3).

³¹ See, e.g., Fact Sheet, p. 84 (directing permittees to use the resources of the Urban Pesticide Committee, the “information clearinghouse” for such studies), A-109 (directing permittees to use reasonable assurance analysis methodology developed by the Los Angeles Regional Water Board); MRP 2.0 Sections C.11.c (requiring reasonable assurance analysis explicated in Fact Sheet), C.12.c (requiring reasonable assurance analysis explicated in Fact Sheet).

³² See, e.g., MRP 2.0 Section C.10.b. Rather than just the visual monitoring to which Baykeeper takes exception (Petition at p. 15), this Pathway also requires “direct measurements and/or observations of trash in receiving water(s),” or, if that is not possible, surrogate monitoring (C.10.b.v.).

³³ See MRP 2.0 Sections C.9.g; C.10.b.v.b; C.11.b.iii.(1), (3); C.12.b.iii.(1), (3); C.13.a.iii., C.13.b.iii., and C.13.c.iii.

³⁴ Baykeeper Petition, p. 16

³⁵ See LA Order, p. 35, 37, and 53.

³⁶ Baykeeper Petition, p. 14-15

³⁷ LA Order, p. 22, 30-32.

³⁸ See MRP 2.0 Section C.1.

³⁹ LA Order, p. 10, 14.

Water Limitations. The iterative process is structurally distinct from the programmatic and alternative compliance pathways set forth in Provisions C.2 through C.15 of the MRP 2.0. The LA Order generally recognizes that “MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process” may be deemed in compliance with the receiving water limitations.⁴⁰ The LA Order particularly approves of “safe harbors” during the “planning phase” for these undertakings provided such “safe harbors” are “clearly constrained in a manner that sustains incentives to move on to approval and implementations” and has “clear, enforceable provisions.”⁴¹ The Regional Board’s decision is therefore not inconsistent with the approach used by the State Board in the LA Order.

III. THE MRP 2.0’S MONITORING REQUIREMENTS ARE SUFFICIENT TO MONITOR COMPLIANCE WITH THE PERMIT.

A. End-of-Pipe, Wet Weather Sampling Is Not the Only Means of Determining Compliance with the MRP 2.0

Baykeeper contends that the MRP 2.0 is “insufficient to determine compliance with the Permit’s Discharge Prohibition and Receiving Water Limitations” because the permit fails, with one exception, to obligate permittees to conduct stormwater outfall, end-of-pipe or wet weather monitoring. Baykeeper’s contention, however, assumes that end-of-pipe wet weather sampling is the only method to determine compliance with the permit. This contention contravenes the statutory and regulatory MS4 Permit scheme and the applicable case law.

“Rather, EPA regulations make clear that while MS4 NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme ‘sufficient to yield data which are *representative of the monitored activity.*’⁴² The permitting agency must describe the locations to be sampled and “explain ‘why the (chosen) location is *representative.*’⁴³ The Regional Board did just that by explaining in detail the MRP 2.0 monitoring scheme that generally requires monitoring in the receiving waters and why that monitoring will result in representative data. In fact, the Regional Board explained by way of example why receiving water monitoring provides superior data to outfall monitoring. Using chloramine as the constituent of concern, the Regional Board explained that “outfall monitoring would need to be done at the exact location and time of an illicit chloramine discharge otherwise it would go undetected, whereas receiving water monitoring could detect chloramine for a longer period of time from upstream outfalls.”⁴⁴ The Regional

⁴⁰ LA Order, p. 16.

⁴¹ LA Order, p. 49.

⁴² *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1209 (2013) (emphasis in original), citing 40 C.F.R. § 122.48(b).

⁴³ *Id.* At 1209 (emphasis in original), citing 40 C.F.R. § 122.26(d)(2)(iii)(D).

⁴⁴ MRP 2.0 Fact Sheet, p. 72.

Board also relied on a National Research Council report's findings that end-of-pipe monitoring produces data of limited usefulness and urges watershed scale analysis.⁴⁵

From the municipal perspective, wet weather, end-of-pipe sampling presents health and safety concerns for little value in return. It can be dangerous to have employees sample at the end of the pipe during rainstorms. The velocity of the creek coupled with slippery creek banks create a hazardous situation. Moreover, depending upon the amount of rain, the outfalls can be under water meaning that the samples are actually taken from the receiving water. Given the Regional Board's conclusion that end-of-pipe sampling is of limited usefulness because it is a snapshot in time that is not necessarily representative and it does not guarantee detection of all constituents of concern, such sampling does not warrant obligating municipal employees to work under potentially dangerous conditions.

B. The Trash, Pesticide Toxicity Control, Mercury and PCB Monitoring Requirements in the MRP 2.0 Fashion Regionally Appropriate Compliance Monitoring

Baykeeper complains that the MRP 2.0 does not contain adequate receiving water monitoring to determine compliance with the permit during the term of the MRP 2.0. San José disagrees with Baykeeper's position for the reasons discussed in the Responses to Baykeeper's Petition filed by the California Stormwater Association (CASQA) and the ACCWP. Rather than restate the responses made by those two organizations, San José concurs with and incorporates the CASQA and the ACCWP responses into this response by this reference.

C. Making the Changes that Baykeeper Proposes to the Monitoring Requirements in the MRP 2.0 will Require and Economic Analysis as well as Compliance with CEQA.

Since the Regional Board made the determination that the MRP 2.0's monitoring obligations are sufficient to determine compliance with Discharge Prohibitions and Receiving Water Limitations, if the State Board grants the relief that Baykeeper seeks by remanding the MRP 2.0 to the Regional Board with direction to include additional monitoring requirements in the form of end-of-pipe, wet weather sampling, the Regional Board will be obligated to comply with the California Environmental Quality Act ("CEQA") and will be required to perform an economic analysis. Permit conditions that are imposed pursuant to State law that exceed the mandatory requirements of the

⁴⁵ *Id.* at 73.

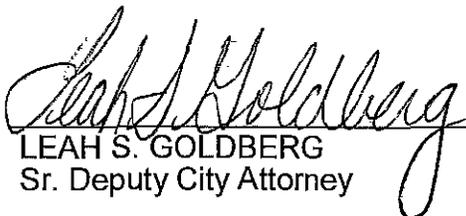
Clean Water Act trigger CEQA review.⁴⁶ Likewise, the economic factors must be considered when imposing conditions that exceed federal requirements.⁴⁷

IV. CONCLUSION

For the reasons stated above, San José urges the State Board to deny the relief sought by Baykeeper and to remand the MRP 2.0 to the Regional Board but to limit its remand order to sections C.10, C.11 and C.12 and to give instructions to the Regional Board to conduct the appropriate public comment and a fair and impartial hearing, to conduct a reasonable economic analysis and to conduct the appropriate environmental analysis of the C.10 provisions, and to convert the numeric effluent limitations in Provisions C.11 and C.12 to numeric action levels with an accompanying set of appropriate exceedance response action requirements if the benchmarks are not met. Thank you for considering San José's Response to the Baykeeper Petition.

Sincerely yours,

RICHARD DOYLE, City Attorney

By: 
LEAH S. GOLDBERG
Sr. Deputy City Attorney

LSG/lsg

cc: A-2466 (a-m) Distribution List (email only)

⁴⁶ Pub. Res. Code § 21000 *et seq.*

⁴⁷ See *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613, 627 n. 8 and 629 (remanding to the trial court "to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits"); see also Water Code §§ 13236 and 13241.

ATTACHMENT A

| MRP 2.0 Provision | New Findings/Requirements | MRP 2.0 Pg. No. |
|-------------------|--|-----------------|
| C.9 | TMDL recognized that Permittees are not solely responsible for attaining allocation because their authority to regulate others' pesticide use is constrained by federal and State law; and a realistic date for achieving allocations cannot be determined given framework for pesticide regulation. | 91 |
| | Observe contractor pesticide application to verify compliance with IPM policies, ordinances or standard operating procedures. | 93 |
| | Evaluation of effectiveness of implementation action. | 95 |
| C.10 | 60% trash reduction goal by July 1, 2016; document additional controls if reduction not met. | 97 |
| | Mew mandatory requirements and accounting to reduce trash generation by using actions equivalent to full trash capture. | 98 |
| | Ensure that loads from lands not owned or operated by permittees have full trash capture if plumbed directly to MS4 in very high, high, and moderate trash generation areas. | 98 |
| | New maintenance and record keeping requirements for full trash capture devices. | 100 |
| | New requirements for assessing effectiveness of full trash capture systems. | |

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|--------------|---|---------|
| C.10, cont'd | Strict formula for calculating whether reduction is achieved. | 101 |
| | | |
| | Much more detailed reporting requirements. | 104 |
| | | |
| C.11* | Requirements for green infrastructure projects to reduce mercury loads. | 109-111 |
| | | |
| | Increased risk reduction program requirements. | 112 |
| | | |
| C.12* | Requirements for green infrastructure projects to reduce PCB loads. | 116-118 |
| | | |
| | Management PCB materials during demolition. | 120 |
| | | |
| | Increased risk reduction program requirements. | 132 |

*San Jose has requested that the State Board remand Provisions C.11 and C. 12, to the Regional Board with directions to convert the numeric effluent limitations to numeric action levels with an accompanying set of appropriate exceedance response action requirements if the benchmarks are not met. The additional exceedance response action requirements will further strengthen MRP 2.0 in comparison to the prior permit.

A-2455 (a thru m) Distribution List

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|--|--|
| <p>City of Alameda (via email only) Elizabeth Warmerdam, Interim City Manager Attn: Janet Kern, City Attorney 2263 Santa Clara Ave. Alameda, CA 94501 jkern@alamedacityattorney.org</p> | <p>Wen Chen, PhD. PE, CFM, QSD/P (via email only) Senior Engineer City of Albany Public Works 548 Cleveland Avenue Albany, C 94710 wchen@albanyca.org</p> |
| <p>Antonio Acosta (via email only) City of Union City 34009 Alvarado-Niles Road Union City, CA 94587 TAcosta@unioncity.org</p> | <p>Soren Fajeau, P.E. (via email only) Assistant City Engineer 37101 Newark Blvd. Newark, CA 94560 Soren.fajeau@newark.org</p> |
| <p>Robert L. Falk (via email only) Legal Counsel Santa Clara Valley Urban Runoff Pollution Prevention Program Morrison & Foerster, LLP 425 Market St., 32nd Floor San Francisco, CA 94105 RFalk@mofo.com</p> | <p>Elisa Wilfong (via email only) Water Pollution Control Administrator City of Hayward 777 B Street Hayward, CA 94541 Elisa.Wilfong@hayward-ca.gov</p> |
| <p>Matthew Fabry, PE (via email only) San Mateo Countywide Water Polluting Prevention Program City/County Assoc. of Governments of San Mateo County 555 County Center, 5th Floor Redwood City, CA 94063 MFabry@smcgov.org</p> | <p>Erik Pearson (via email only) Environmental Services Manager City of Hayward 777 B Street Hayward, CA 4541 Erik.pearson@hayward-ca.gov</p> |
| <p>Michael Lawson (via email only) City Attorney City of Hayward 777 B Street Hayward, CA 94541 Michael.Lawson@hayward-ca.gov</p> | <p>Phillip Wyels, Esq. (via email only) Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22nd Floor P. O. Box 100 Sacramento, CA 95812 Phillip.Wyels@waterboards.ca.gov</p> |
| <p>City of Albany (via email only) Public Works Attn: Ray Chan</p> | <p>County of Alameda (via email only) c/o Kathy Lee, Esq. Deputy County Counsel</p> |

| | |
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| <p>548 Cleveland Avenue Albany, CA 94710 rchan@albanyca.org</p> | <p>Office of County Counsel 1221 Oak Street, Suite 450 Oakland, CA 94612 Kathy.lee@acov.org</p> |
| <p>City of Dublin (via email only) Andrew Russell Asst. Public Works Director/City Engineer 100 Civic Plaza Dublin, CA 94568 Andrew.Russell@dublin.ca.gov</p> | <p>County of Alameda (via email only) Public Works Building Attn: Sharon Gosselin 399 Elmhurst Street Hayward, CA 94544 Sharon@acpwa.org</p> |
| <p>Sarah Quiter, Esq. (via email only) Meyers Nave 555 12th Street, Suite 1500 Oakland, CA 94607 Squiter@meyernave.com</p> | <p>San Francisco Baykeeper (via email only) Attn: George Torgun, Managing Attorney 1736 Franklin Street, Suite 800 Oakland, CA 94512 George@baykeeper.org</p> |
| <p>Dee Williams-Ridley (via email only) Interim City Manager City of Berkeley Administrative Division 2180 Molvia Street Berkeley, CA 94706 Dwilliams-ridley@cl.berkeley.ca.us</p> | <p>Celso D. Ortiz (via email only) Senior Deputy City Attorney City of Oakland One Frank Ogawa Plaza Oakland, CA 94612 cortiz@oaklandcityattorney.org</p> |
| <p>City of San Leandro (via email only) c/o Debbie Pollart, Director of Public Works 14200 Chapman Road San Leandro, CA 94578 dpollart@sanleandro.org</p> | <p>Keith Lichten (via email only) Supervising Water Resource Control Engineer 1515 Clay Street, Suite 1400 Oakland, CA 94612 Keith.Lichten@watersboards.ca.gov</p> |
| <p>Dale Bowyer (via email only) Senior WRC Engineer San Francisco Bay Regional Water Quality Control Board 1515 Clay Street, Suite 1400 Oakland, CA 94612 Dale.bowyer@waterboards.ca.gov</p> | <p>Marnie Ajello, Esq. (via email only) Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22nd Floor P. O. Box 100 Sacramento, CA 95812 Marnie.Ajello@waterboards.ca.gov</p> |
| <p>Bruce Wolfe (via email only) Executive Officer San Francisco Bay Regional Water Control Board 1515 Clay Street, Suite 1400 Oakland, CA 94612 Bruce.wolfe@waterboards.ca.gov</p> | <p>David W. Smith (via email only) Permits Office U.S. EPA, Region 9 75 Hawthorne Street San Francisco, CA 94105 Smith.davidw@epa.gov</p> |
| <p>Ms. Dylan Whyte (via email only) Assistant Executive Officer San Francisco Bay Regional Water 1515 Clay Street, Suite 1400</p> | <p>Ken Greenberg, Chief (via email only) Clean Water Act Compliance U.S. EPA, Region 9 75 Hawthorne Street</p> |

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| <p>Oakland, CA 94612 Dylan.whyte@waterboards.ca.gov</p> | <p>San Francisco, CA 94105 Greenberg,ken@epa.gov</p> |
| <p>Thomas Mumley (via email only) Assistant Executive Officer 1515 Clay Street, Suite 1400 Oakland, CA 94612 Thomas.mumley@waterboards.ca.gov</p> | <p>Gary Grimm, Esq. (via email only) Law Office of Gary J. Grimm 2390 Vine Street Berkeley, CA 94708 ggrimm@garygrimmlaw.com</p> |
| <p>Lori T. Okun, Esq. (via email only) Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22nd Floor P. O. Box 100 Sacramento, CA 95812 Lori.okun@waterboards.ca.gov</p> | <p>Kathy Cote (via email only) Environmental Services Manager 39550 Liberty Street Fremont, CA 94838 KCOte@fremont.gov</p> |
| <p>Tamarin Austin, Esq. (via email only) Office of Chief Counsel State Water Resources Control Board 1001 I Street, 22nd Floor P. O. Box 100 Sacramento, CA 95812 Tamarin.austin@waterboards.ca.gov</p> | |