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11  
12 BEFORE THE  
13 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
14

15 In the Matter of the Petition of the City of  
Lompoc for Review of Action and Failure to Act  
16 by Central Valley Regional Water Quality  
Control Board.

SWRCB/OCC File \_\_\_\_\_  
17 STATEMENT OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITION FOR REVIEW  
18 [Water Code, section 13320]

19 In accordance with section 13320 of the Water Code, Petitioner City of Lompoc (City or  
20 Petitioner) has filed concurrently herewith a Petition for Review of Resolution No. R3-2008-0071  
21 adopted by the Central Coast Regional Water Quality Control Board (Regional Water Board) and  
22 its other actions or inactions. Resolution No. R3-2008-0071, attached as Exhibit B to the Petition  
23 for Review, approves the City's Storm Water Management Program (SWMP), but requires the  
24 City to amend the SWMP no later than February 28, 2009, as provided in the Table of Required  
25 Revisions attached to the resolution. Failure of the City to revise the SWMP in accordance with  
26 the Table of Required Revisions may subject the City to enforcement action.

27 The City files this statement of points and authorities in support of the Petition for Review  
28 pursuant to title 23, section 2050(a) of the California Code of Regulations. The City requests the

1 opportunity to file a supplemental or reply memorandum after receipt of the administrative record  
2 and Regional Water Board's response. The City incorporates by reference all of its comments,  
3 evidence and testimony in the record.

4 I. INTRODUCTION

5 This appeal raises issues of law and policy that the State Water Resources Control Board  
6 (State Water Board) is in a unique position to address. The overarching question presented by the  
7 Petition for Review is whether the Regional Water Board acted inappropriately and unreasonably  
8 when it ordered Petitioner to revise its SWMP in a manner that is inconsistent with the legal  
9 standard of "maximum extent practicable" (MEP) for storm water programs under the National  
10 Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act (CWA), the  
11 *Waste Discharge Requirements (WDRs) for Storm Water Discharges from Small Municipal*  
12 *Separate Storm Sewer Systems (General Permit)*, Water Quality Order No. 2003-0005-DWQ  
13 (NPDES General Permit No. CAS000004) (General Permit or Order No. 2003-0005), other  
14 federal and state requirements for municipal separate storm sewer systems (MS4s), and the Water  
15 Code. The Required Revisions challenged place the City in the untenable position of expending  
16 significant public resources to comply with SWMP requirements that are unnecessary,  
17 unreasonable and not supported by the evidence.

18 Thus, the City respectfully requests that the State Water Board revise Resolution  
19 No. R3-2008-0071 and the Table of Required Revisions as described below. In the alternative,  
20 the City respectfully requests that the State Water Board remand Resolution No. R3-2008-0071  
21 and the Table of Required Revisions to the Regional Water Board for revisions consistent with  
22 the State Water Board's direction.

23 II. FACTUAL BACKGROUND

24 In April 2003, the State Water Board adopted the General Permit in accordance with the  
25 CWA and its implementing regulations. The General Permit expressly identifies the City as a  
26 small municipal storm sewer system (MS4) that requires a storm water permit under the federal  
27 NPDES program. (Order No. 2003-0005 at p. 2.) The General Permit requires permittees to  
28 implement best management practices (BMPs) to reduce the discharge of pollutants in storm

1 water to the MEP. (Order No. 2003-0005 at p. 8.) To achieve the technology-based MEP  
2 standard, permittees must develop and implement a SWMP that “serves as a framework for  
3 identification, assignment, and implementation of control measures/BMPs.” (Order No. 2003-  
4 0005 at p. 8.) To obtain coverage under the General Permit, a small MS4 must submit a Notice of  
5 Intent (NOI), a SWMP approved by the Regional Water Board and the appropriate fee. (Order  
6 No. 2003-0005 at p. 7.)

7 Before the State Water Board adopted the General Permit in April 2003, the City  
8 anticipated the need to develop and implement a SWMP. Accordingly, the City began to evaluate  
9 storm water issues as early as 1998, and submitted a SWMP with a complete General Permit  
10 application to the Regional Water Board on March 7, 2003. The SWMP and its revisions  
11 underwent extensive review by the public and Regional Water Board staff. However, on  
12 February 15, 2008, staff issued a letter to inform small MS4s of a new, Region-wide process to  
13 enroll under the General Permit. (Letter from Roger W. Briggs, Executive Officer, Central Coast  
14 Regional Water Board (Feb. 15, 2008), Notification to Traditional, Small MS4s on Process for  
15 Enrolling under the State’s General NPDES Permit for Storm Water Discharges (February Letter),  
16 attached hereto as Attachment 1.) This enrollment process differs from that of any other Region.

17 A. The New, Region-Wide Process to Enroll Under the General Permit

18 The February Letter describes new substantive elements that SWMPs must include for  
19 Regional Water Board staff to recommend their approval to the Regional Water Board. For  
20 example, SWMPs must include BMPs that: (1) maximize the infiltration of clean storm water  
21 and minimize runoff volume and rate; (2) protect riparian areas, wetlands and their buffer zones;  
22 (3) minimize pollutant loading; and (4) provide long-term watershed protection. (February Letter  
23 at p. 4.) The letter also prescribes how SWMPs are to address these conditions.

24 The February Letter directs that, to maximize the infiltration of clean storm water and  
25 minimize runoff volume and rate, SWMPs must provide a schedule for development and adoption  
26 of hydromodification control standards. (February Letter at p. 4.) Until the applicant develops  
27 such standards acceptable to staff, the applicant is to comply with prescriptive interim  
28 requirements adopted with the SWMP. (February Letter at p. 4.) These interim

1 hydromodification requirements would: (1) limit the Effective Impervious Area (EIA) to less  
2 than 5 percent (5%) of the total project area for all new and redevelopment projects; (2) require  
3 post-construction runoff hydrographs to match within one percent (1%) pre-construction runoff  
4 hydrographs for new or redevelopment projects that create and/or replace 5,000 square feet or  
5 more of impervious surface; and (3) require preservation of pre-construction drainage density for  
6 all drainage areas serving a first order stream or larger for projects where the disturbed project  
7 area exceeds two acres. (February Letter at p. 4.) In response to feedback on these interim  
8 criteria, staff agreed in a letter dated July 10, 2008, to consider other hydromodification control  
9 criteria developed by the applicant as long as they are "reasonably equivalent." (July 10, 2008,  
10 Follow Up to Notification to Traditional, Small MS4s Regarding Process for Enrolling Under the  
11 State's General Permit NPDES Permit for Storm Water Discharges (July Letter), attached hereto  
12 as Attachment 2 at p. 3.)

13 According to the February Letter, a SWMP should also include BMPs and/or other control  
14 measures to establish and maintain minimum 30-foot buffer zones to protect riparian areas and  
15 wetlands. (February Letter at p. 5.) To minimize pollutant loading, the SWMP is to include  
16 volume- and/or flow-based treatment criteria. (February Letter at p. 5.) For long-term watershed  
17 protection, the SWMP is to include a strategy to develop watershed-based hydromodification  
18 management plans. (February Letter at p. 5.) Such plans should incorporate low impact  
19 development (LID) strategies for a post-construction EIA of no more than three to ten percent  
20 (3-10%) of watershed area within the permittee's jurisdiction. (February letter at p. 5.)

21 The February Letter states that the Regional Water Board staff intends to evaluate each  
22 SWMP for compliance with the General Permit and MEP standard before a small MS4 may  
23 enroll under the storm water program. (February Letter at p. 1.) The letter further states that if  
24 staff determines that the SWMP would be ineffective, staff would recommend SWMP  
25 requirements to the Regional Water Board consistent with those expressed in the letter. (February  
26 Letter at p. 1.)

1 B. Actions of the City and Regional Water Board After Notification of the New Enrollment  
2 Process

3 The City revised its SWMP submittal in part in response to the new Region-wide  
4 enrollment process described in the February Letter. For the reasons stated herein, and in  
5 testimony before the Regional Water Board and correspondence with staff, the City's revised  
6 SWMP did not address the hydromodification, post-construction or long-term watershed  
7 protection BMPs described in the February Letter. On October 17, 2008, after a period of public  
8 review and a public hearing, the Regional Water Board adopted Resolution No. R3-2008-0071  
9 with which the City must now comply. Resolution No. R3-2008-0071 approves the City's  
10 SWMP subject to revisions the City must make by February 28, 2009.<sup>1</sup> In particular, the City  
11 must incorporate the Required Revisions specified in the Table of Required Revisions attached to  
12 the resolution. (Resolution No. R3-2008-0071 at p. 3.) The Required Revisions at issue in the  
13 Petition for Review (i.e., Nos. 16, 17, 18 and 20) direct the City to develop hydromodification  
14 control standards, interim hydromodification criteria, a hydromodification management plan, and  
15 BMPs for long-term watershed protection as specified in the February Letter. (See Table of  
16 Required Revisions at pp. 9-13.)

17 Specifically, Required Revision No. 16 requires the City to have adequate development  
18 review and permitting procedures to impose conditions of approval or other enforceable  
19 mechanisms to implement numeric criteria for hydromodification control. (Table of Required  
20 Revisions at p. 9.) Required Revision No. 17 directs the City to develop interim  
21 hydromodification criteria and an associated schedule, including a three-week review by staff of  
22 the proposed criteria that are "as effective" as the interim criteria in the February Letter. (*Id.* at  
23 pp. 9-11.) Required Revision No. 18 calls for the City to develop long-term hydromodification  
24 criteria and control measures that result in numeric criteria for runoff rate, volume control and  
25 stream stability impacts. (*Id.* at pp. 11-12.) Required Revision No. 20 obligates the City to  
26 develop quantifiable measures to assess the effectiveness of its watershed protection efforts to

27 \_\_\_\_\_  
28 <sup>1</sup> The City may be subject to enforcement action for failure to make the Required Revisions by February 28, 2009.  
(Resolution No. R3-2008-0071 at p. 3.)

1 achieve desired watershed conditions and evaluate existing land use policies, plans, ordinances,  
2 etc. for watershed protection. (*Id.* at pp. 12-13.)

3 III. ARGUMENT

4 The State Water Board should adopt an order striking Required Revision Nos. 16, 17, 18,  
5 and 20 in the Table of Revisions adopted under Resolution No. R3-2008-0071. As subsequently  
6 explained, Required Revision Nos. 16, 17, 18, and 20 are inappropriate and improper because  
7 they are inconsistent with the MEP standard, General Permit, other federal and state requirements  
8 for MS4s, and the Water Code. In addition, the Required Revisions are unreasonable, arbitrary  
9 and not supported by the evidence.

10 A. The Required Revisions Are Inconsistent with the MEP Standard

11 Required Revision Nos. 16, 17, 18, and 20 are inconsistent with the MEP standard  
12 established under the CWA, federal regulations, State Water Board orders (including the General  
13 Permit), and state guidance. All MS4 permits must:

14 [R]equire controls to reduce the discharge of pollutants to the maximum extent  
15 practicable, including management practices, control techniques and system,  
16 design and engineering methods, and such other provisions as the [permitting  
17 authority] determines appropriate for the control of such pollutants. (33 U.S.C.  
18 § 1342(p)(3)(B)(iii).)

19 The federal regulations and the state's General Permit require MS4 permittees to develop,  
20 implement and enforce SWMPs to reduce discharges of pollutants to the MEP. (40 C.F.R.

21 § 122.34(a); General Permit at p. 8.) SWMPs must include BMPs and associated measurable  
22 goals to fulfill requirements associated with the following six minimum control measures:

23 (1) public education and outreach on storm water impacts; (2) public involvement and  
24 participation in SWMP development and implementation; (3) illicit discharge detection and  
25 elimination; (4) construction and site storm water runoff control; (5) post-construction storm  
26 water management in new development and redevelopment; and (6) pollution prevention and  
27 good housekeeping for municipal operations. (40 C.F.R. § 122.34; General Permit at pp. 8-12.)

28 Federal regulations describe narrative effluent limits that require the permittee to  
implement BMPs as "generally the most appropriate form of effluent limitations when designed  
to satisfy technology requirements (including reduction of pollutants to the maximum extent

1 practicable) and to protect water quality.” (40 C.F.R. § 122.34(a).) The federal regulations  
2 provide that implementation of BMPs consistent with the SWMP “and the provisions of the  
3 permit required pursuant to § 122.33” constitutes compliance with the MEP standard. (*Ibid.*)  
4 MEP represents an iterative process whereby the permittee must review and improve BMPs over  
5 time. (40 C.F.R. § 122.34(g); General Permit at p. 8; see *In the Matter of the Petitions of*  
6 *Building Industry Association of San Diego County and Western State Petroleum Association,*  
7 *State Water Board Order WQ 2001-15 (Nov. 15, 2001) at pp. 5, 7; In the Matter of the Petitions*  
8 *of the Cities of Bellflower, et al., the City of Arcadia, and Western States Petroleum Association,*  
9 *State Water Board Order WQ 2000-11 (July 19, 2001) at pp. 3, 16.)*

10 The discussion immediately following provides an overview of MEP to demonstrate the  
11 importance of the consideration of flexibility and site-specific factors (e.g., cost) as emphasized in  
12 the applicable legal authority and guidance. It then explains how the Required Revisions run  
13 afoul of MEP under the authority and guidance.

14 1. An Overview of the MEP Standard

15 Neither the CWA nor federal or state law expressly defines MEP. However, legal  
16 authority and guidance make clear that MEP is a flexible, site-specific standard that involves the  
17 consideration of various factors. Such factors include public acceptance, cost and technical  
18 feasibility.

19 EPA does not define MEP “to allow the permitting authority and regulated MS4s  
20 *maximum flexibility* in their interpretation of it as appropriate.” (Storm Water Phase II  
21 Compliance Assistance Guide, EPA 833-R-00-002 (March 2000) at pp. 4-17, emphasis added.)<sup>2</sup>  
22 EPA guidance emphasizes the importance of applying MEP in a flexible, site-specific manner as  
23 part of an iterative process. (See, e.g., 64 Fed. Reg. 68722, 68732, 68755 (Dec. 8, 1999); MS4  
24 Program Evaluation Guidance, EPA 833-R-07-003 (Jan. 2007) at p. 2; Stormwater Phase II Final  
25 Rule, EPA 833-F-00-009 (Jan. 2000) at p. 1.) For example, EPA guidance for small MS4s states:  
26  
27

28 <sup>2</sup>This quote is from EPA guidance related to small MS4s and represents the same standard that applies to large MS4s.

1            *This final rule requires the permittee to choose appropriate best management*  
2            *practices (BMPs) for each minimum control measure. In other words, EPA*  
3            *expects Phase II permittees to develop and update their stormwater management*  
4            *plans and their BMPs to fit the particular characteristics and needs of the permittee*  
5            *and the area served by its MS4. Therefore the Federal or State operator of a*  
6            *regulated storm sewer system can take advantage of the flexibility provided by the*  
7            *rule to utilize the most suitable minimum control measures for its MS4.*  
8            (Stormwater Phase II Final Rule, Federal and State-Operated MS4s: Program  
9            Implementation, EPA 833-F-00-012 (Dec. 2005) at p. 2, emphasis added.)

10           Additional EPA guidance for small MS4s states: “Because redevelopment projects may  
11           have site constraints not found on new development sites, the Phase II Final Rule provides  
12           flexibility for implementing post-construction controls on redevelopment sites that consider these  
13           constraints.” (Storm Water Phase II Final Rule, Post-Construction Runoff Minimum Control  
14           Measure, EPA 833-F-00-009 (Dec. 2005) at p. 2.) Further, “[i]t is important to recognize that  
15           many BMPs are climate-specific, and not all BMPs are appropriate in every geographic area.”  
16           (*Ibid.*) Other EPA guidance for new development and redevelopment states: “EPA recommends  
17           that the BMPs chosen: *be appropriate for the local community; minimize water quality impacts;*  
18           *and attempt to maintain pre-development runoff conditions.*” (See 40 C.F.R. § 122.34(b)(5)(iii),  
19           emphasis added.)

20           The General Permit echoes the importance given by the U.S. EPA guidance that the  
21           permittee have flexibility to develop its BMPs based on local conditions:

22           [B]ecause storm water programs are locally driven and local conditions vary, some  
23           BMPs may be more effective in one community than in another. A community  
24           that has a high growth rate would derive more benefit on focusing on construction  
25           and post-construction programs than on an illicit connection program because  
26           illicit connects are more prevalent in older communities. (General Permit at p. 9.)

27           Moreover, the General Permit describes MEP as “an ever-evolving, flexible, and  
28           advancing concept, which considers technical and economic feasibility.” The General Permit  
29           emphasizes the need for such flexibility and an iterative process as follows:

30           As knowledge about controlling urban runoff continues to evolve, so does that  
31           which constitutes MEP. Reducing the discharge of storm water pollutants to MEP  
32           in order to protect beneficial uses requires review and improvement, which  
33           includes seeking new opportunities. To do this the Permittee must conduct and

1 document evaluation and assessment of each relevant element of its program and  
2 revise activities, control measures, BMPs and measurable goals, as necessary to  
meet MEP. (General Permit at p. 4.)

3 The Fact Sheet for the General Permit explains that technical feasibility, cost,  
4 effectiveness and public acceptance are factors used to develop BMPs that achieve MEP:

5 *In choosing BMPs, the major focus is on technical feasibility, but cost,*  
6 *effectiveness, and public acceptance are also relevant. If a Permittee chooses only*  
7 *the most inexpensive BMPs, it is likely that MEP has not been met. If a Permittee*  
8 *employs all applicable BMPs except those that are not technically feasible in the*  
9 *locality, or whose cost exceeds any benefit to be derived, it would meet the MEP*  
10 *standard. MEP requires Permittees to choose effective BMPs, and to reject*  
11 *applicable BMPs only where other effective BMPs will serve the same purpose,*  
12 *the BMPs are not technically feasible, or the cost is prohibitive. (General Permit*  
13 *Fact Sheet at p. 9; see also Memorandum from E. Jennings, State Water Board*  
14 *Office of the Chief Counsel, to A. Matthews, State Water Board Division of Water*  
15 *Quality (Feb. 11, 1993) (1993 Memorandum), attached hereto as Attachment 3 at*  
16 *pp. 4-5, emphasis added.)*

17 State Water Board Order WQO 2000-11 and state guidance also emphasize the flexible,  
18 site-specific nature of MEP. (See, e.g., State Water Board Order WQ 2000-11, *supra*, at p. 20;  
19 1993 Memorandum.) The State Water Board held that where “a permittee employs all applicable  
20 BMPs [best management practices] except those where it can show that they are *not technically*  
21 *feasible in the locality*, or whose costs would exceed any benefit to be derived, it would have met  
22 the [MEP] standard.” (State Water Board Order WQ 2000-11, p. 20, emphasis added, and see *id.*  
23 at p. 19 [cost is a factor to determine MEP].)

24 Similarly, the 1993 Memorandum from the Office of the Chief Counsel of the State Water  
25 Board instructs that selecting BMPs to achieve MEP means “choosing effective BMPs, and  
26 rejecting applicable BMPs only where other effective BMPs will serve the same purpose, the  
27 BMPs would not be technically feasible, or the cost would be prohibitive.” (1993 Memorandum  
28 at p. 4.) The 1993 Memorandum recommends consideration of the following site-specific factors  
to determine whether a municipality would achieve MEP in a given instance:

1. Effectiveness: Will the BMP address a pollutant of concern?

- 1           2.     Regulatory Compliance: Is the BMP in compliance with storm water regulations
- 2                     as well as other environmental regulations?
- 3           3.     *Public acceptance: Does the BMP have public support?*
- 4           4.     *Cost: Will the cost of implementing the BMP have a reasonable relationship to*
- 5                     *the pollution control benefits to be achieved?*
- 6           5.     *Technical Feasibility: Is the BMP technically feasible considering soils,*
- 7                     *geography, water resources, etc.?* (1993 Memorandum at pp. 4-5, emphasis
- 8                     added.)
- 9           2.     Reasons the Required Revisions Are Inconsistent with the MEP Standard and
- 10                    General Permit

11           The General Permit does not require the Required Revisions to control hydromodification.

12           That is, Required Revision Nos. 16, 17, 18, and 20 are not part of the six minimum control

13           measures described in the General Permit. (See General Permit at pp. 8-12.) Further, the

14           Required Revisions are not feasible or practicable. (See section III.D. below.) Thus, the

15           additional requirements exceed those established by the General Permit for MEP. By mandating

16           the additional requirements over the City's objection and substantive evidence in the record, the

17           Regional Water Board acted in a manner inconsistent with the General Permit. A Regional Water

18           Board may not require SWMP provisions inconsistent with the terms of the General Permit. (See

19           State Water Board Order WQ 2000-11, *supra*, at p. 13.)

20           In addition, Required Revision Nos. 16, 17 and 18 would exceed MEP because they

21           impose specific numeric standards (e.g., EIA <5%) that do not take into account site-specific

22           conditions or allow for local flexibility. As explained more fully in section D below, the local

23           characteristics of the City's older, substantially built-out community result in serious problems

24           related to technical feasibility associated with geographic, soil and other development conditions

25           as well as costs. But under the Required Revision, even if the City need not adopt the exact

26           numeric criteria set forth in the February Letter, the City must adopt interim criteria that are as

27           effective. (Table of Required Revisions at pp. 9-11.) Thus, the City is constrained in its

28           development of local criteria and the requirements exceed MEP.

1 Further, the Required Revisions would impose specific numeric standards on the City's  
2 discretionary actions for new development and redevelopment projects. The requirements exceed  
3 MEP on their face since they are neither flexible nor site-specific. For example, the Regional  
4 Water Board staff sent the February Letter to 35 small MS4s within the Region seeking coverage  
5 under the General Permit. (See February Letter at p. 2, Table 1.) The small MS4s subject to the  
6 letter and its requirements include small municipalities and universities that vary in size and  
7 geography, extending from Boulder Creek in the north to Carpinteria in the south. A letter of  
8 such broad distribution and application does not and cannot account for site-specific conditions,  
9 public acceptance, cost, or technical feasibility. Thus, when the Regional Water Board adopted  
10 the Required Revisions it failed to consider or satisfy MEP for the City.

11 From a practical standpoint, the development and adoption of local control standards for  
12 hydromodification would require the expenditure of significant and increasingly scarce public  
13 resources. At the October 17, 2008 Regional Water Board hearing where the City contested the  
14 application of such requirements to its SWMP, local building representatives and consultants  
15 testified with regard to the feasibility and cost to develop local criteria. According to local  
16 consultants, the City of Santa Barbara spent more than \$250,000 to develop local  
17 hydromodification criteria for its community. Further, The San Francisco Bay Area Phase I  
18 permittees have spent significant time and resources since 2001 to develop appropriate  
19 hydromodification criteria and have yet to settle on a common approach. (See Letter to Roger  
20 Briggs from California Stormwater Quality Association regarding February letter (June 27, 2008),  
21 attached hereto as Attachment 4 at p. 2.)

22 Also objectionable is the difficulty of applying local hydromodification criteria once  
23 developed. In testimony provided before the Regional Water Board, local engineers and  
24 developers in Santa Barbara County testified that it has been very difficult to virtually impossible  
25 to design projects to meet the local criteria established by the City of Santa Barbara. As a result,  
26 the cost of doing business in the City of Santa Barbara has increased significantly. In addition,  
27 other testimony at Petitioner's hearing provides evidence of an overall lack of public acceptance  
28 for applying the hydromodification requirements on Phase II communities. These local

1 acceptance, cost and technical concerns evince that the Required Revisions exceed the MEP  
2 standard as applied to the City.

3 B. The Required Revisions Are Inconsistent with Other Federal and State Regulatory  
4 Requirements for Small MS4s

5 When the Regional Water Board adopted Required Revision Nos. 16, 17, 18, and 20, it  
6 inappropriately ignored the purposeful differences between the small and large MS4 programs.  
7 Indeed, Congress and EPA intended to develop a regulatory program that includes different  
8 requirements and milestones for small MS4s as compared to large MS4s. Further, the State  
9 Water Board recognized this intended distinction in the General Permit. Specifically, the State  
10 Water Board anticipates that the more established Phase I program may serve to inform the  
11 Phase II program over time. In this case, the Regional Water Board reversed Congress, EPA and  
12 the State Water Board's intended framework. This is despite the fact that the Phase I program is  
13 much better established than the Phase II program and that Phase I communities have more  
14 resources than Phase II communities.

15 1. The Required Revisions Exceed Federal and State Regulatory Requirements for  
16 Small MS4s

17 Congress distinguished between large and small MS4s when it amended the CWA in 1987  
18 to require NPDES permits for storm water. (See 33 U.S.C. § 1342(p)(6).) The federal regulatory  
19 scheme establishes separate requirements for MS4 permits and applications based on whether the  
20 discharger is a large, medium or small MS4. (See 40 C.F.R. § 122.26.) In 1990, EPA adopted  
21 the Phase I regulations to govern the issuance of storm water permits for industrial sites and large  
22 and medium MS4s. (55 Fed. Reg. 47990 (Nov. 16, 1990).) Large and medium MS4s typically  
23 serve incorporated areas with populations of 250,000 or more, or between 100,000 and 249,999,  
24 respectively. (See 40 C.F.R. §§ 122.26(b)(4), (7).) In 1999, EPA adopted the Phase II  
25 regulations to govern the issuance storm water permits for small MS4s. (40 C.F.R. §§ 122.30-  
26 122.37.) Small MS4s generally include MS4s not defined as "large" or "medium" MS4s. (See  
27 40 C.F.R. § 122.26(b)(16).)  
28

1 EPA continues to stress this distinction in guidance that “strongly recommends” that:

2 [N]o additional requirements beyond the minimum control measures be imposed  
3 on regulated small MS4s without the agreement of the operator of the affected  
4 small MS4, except where an approved TMDL [total maximum daily load] or  
5 equivalent analysis provides adequate information to develop more specific  
6 measures to protect water quality. (40 C.F.R. § 122.34(e)(2).)

7 Thus, EPA intends that the six minimum control measures remain the regulatory basis for  
8 small MS4s until EPA can review and evaluate the effectiveness of the small MS4 regulations  
9 after December 10, 2010. (See 40 C.F.R. §§ 122.34(e)(2), 122.37.) The State Water Board  
10 endorses EPA’s approach for regulating small MS4s. The Fact Sheet for the General Permit  
11 states:

12 Many Phase I MS4s have been permitted under storm water regulations for more  
13 than ten years and have had that time to develop programs intended to reduce  
14 pollutants in their storm water discharge to MEP. It is understood that storm water  
15 quality programs and regulations are new to the entities that will be regulated  
16 under this General Permit. Therefore, it is anticipated that this General Permit  
17 term will serve as a “ramping-up” period and that programs implemented by  
18 Phase II communities will not necessarily conform to programs implemented by  
19 Phase I communities. (General Permit at Fact Sheet, p. 9.)

20 The Required Revisions include requirements that go well beyond the six minimum  
21 control measures required by federal regulation and the General Permit. As previously explained,  
22 the General Permit does not require the Required Revisions to control hydromodification. The  
23 Required Revisions are not feasible or practicable. Thus, the additional requirements exceed  
24 those established for MEP.

25 2. The Required Revisions Impose More Stringent Requirements than those Adopted  
26 or Contemplated for Large MS4s

27 The Required Revisions exceed those currently adopted or contemplated for *large* MS4s.  
28 The Los Angeles Regional Water Board is evaluating whether to mandate requirements similar to  
those adopted for the City for the large MS4 permit for Ventura County (e.g., to require EIA for  
development and redevelopment to be <5% of the total project area). (Calif. Regional Water  
Quality Control Board, Los Angeles Region, Draft Tentative Order 08-xxx, NPDES Permit  
No. CAS004002, Waste Discharge Requirements for Storm Water and Non-Storm Water  
Discharges from the Municipal Separate Storm Sewer Systems Within the Ventura County

1 Watershed Protection District, etc. (April 29, 2008) at p. 53.) However, there has been no such  
2 requirement adopted, and the efficacy of adopting specific numeric criteria for hydromodification  
3 control is the subject of considerable debate and controversy. Further, the proposed measures  
4 being considered for the Ventura County large MS4 permit are still not as restrictive as the  
5 1% hydrograph requirement imposed by the Regional Water Board. Similarly, the North Coast  
6 Regional Water Board is currently evaluating various hydromodification criteria for application to  
7 the large MS4 permit for the City of Santa Rosa, County of Sonoma and Sonoma County Water  
8 Agency. (See Draft Order No. R1-2008-0106.) In both cases, the requirements are controversial  
9 and merely under consideration, and have not been adopted even as a site-specific matter for a  
10 large MS4.

11 Thus, the Required Revisions are more restrictive than requirements currently adopted for  
12 large MS4 permits. As a general policy, it is inappropriate to impose more restrictive  
13 requirements on small MS4s that have more limited resources. As previously discussed, the  
14 federal and state regulatory scheme dictates a framework of a more established NPDES storm  
15 water program for large MS4s. This framework is purposefully efficient. It capitalizes on the  
16 ability of large MS4s to employ greater resources to the optimal benefit of both the small and  
17 large MS4 programs. “[B]ecause larger communities have greater resources (both financial  
18 resources as well as existing related programs that can help in implementing storm water quality  
19 programs), it may appear that they have more robust storm water programs.” (General Permit at  
20 p. 9.) In addition, the Required Revisions are premature as they precede the State Water Board’s  
21 development of a new General Permit for small MS4s. The new or revised General Permit may  
22 include requirements related to Low Impact Development (LID) and controls for  
23 hydromodification.

24 The Regional Water Board provides no explanation or evidence in the record as to why it  
25 is necessary to adopt the Required Revisions here in advance of such requirements being included  
26 in large MS4 permits or a revised General Permit for Phase II communities. As such, the  
27 Regional Water Board’s action is improper and the Required Revisions at issue should be  
28 removed from the Table of Required Revisions.

1 C. The Regional Water Board Failed to Consider the Factors Established in Water Code  
2 Section 13241 for Permit Requirements that Exceed Federal Law

3 Water Code sections 13263(a) and 13241 require the Regional Water Board to consider  
4 the factors of Water Code section 13241 when adopting permit-based requirements more  
5 restrictive than those required by federal law. The factors listed in Water Code section 13241  
6 include environmental characteristics of the hydrographic unit under consideration; water quality  
7 conditions that could reasonably be achieved through the coordinated control of all factors which  
8 affect water quality in the area; and economic considerations. As explained by the Supreme  
9 Court in *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4<sup>th</sup> 613, 626-627  
10 (*Burbank*), “economic considerations” includes the cost the permit holder will incur to comply  
11 with the numeric pollutant restrictions adopted by the Regional Water Board. (*Id.* at p. 627.)  
12 Further, as the Chief Counsel has recognized, the Regional Water Boards have affirmative duties  
13 with respect to consideration of economics and must engage in a balancing of public interest  
14 factors. (Memorandum to Regional Water Board Executive Officers and Regional Water Board  
15 Attorneys, from William R. Attwater, Chief Counsel, SWRCB, re Guidance on the Consideration  
16 of Economics in the Adoption of Water Quality Objectives (Jan. 4, 1994).)

17 Given that the requirements outlined in the February and July letters, which are imposed  
18 on the City through the Table of Required Revisions exceed those of the General Permit and  
19 MEP, the Regional Water Board had a duty to consider economics and the other public interest  
20 factors in Water Code section 13241.<sup>3</sup> (Wat. Code, § 13263; *Burbank, supra*, 35 Cal.4<sup>th</sup> at  
21 p. 627.) Because the Regional Water Board has failed to adequately and properly consider the  
22 factors of Water Code section 13241, the Required Revisions that exceed federal law must be  
23 removed from the Table of Required Revisions. Thus, the State Water Board should strike the  
24 Required Revisions.

25  
26  
27 <sup>3</sup> This is consistent with the current understanding of MEP that permittees and the permitting authority are to  
28 consider costs when they develop or approve BMPs. (See section III.A, *ante.*) Indeed, even the General Permit  
recognizes the importance of economic feasibility. (See section III.A, *ante.*)

1 D. The Required Revisions Are Unreasonable, Arbitrary and Not Supported by the Evidence

2 The Regional Water Board has a duty to be reasonable when it regulates water quality:  
3 “[A]ctivities and factors which may affect the quality of the waters of the state shall be regulated  
4 to attain the highest water quality which is reasonable, considering all demands being made and  
5 to be made on those waters and the total values involved, beneficial and detrimental, *economic*  
6 *and social*, tangible and intangible.” (Wat. Code, § 13000, emphasis added.) The Regional  
7 Water Boards are required to conform all their actions to this policy. (*Id.* at § 13001.) In  
8 addition, the Regional Water Board has a duty to “bridge the analytic gap between the raw  
9 evidence and the ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. County*  
10 *of Los Angeles* (1974) 11 Cal.3d 506, 515.) This serves to “conduce the administrative body to  
11 draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to  
12 facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from  
13 evidence to conclusions.” (*Id.* at p. 516.)

14 The Regional Water Board failed to satisfy these duties when it adopted Required  
15 Revision Nos. 16, 17, 18, and 20. In particular, these Required Revisions are unreasonable,  
16 arbitrary and not supported by the evidence. Perhaps the best examples of this are the required  
17 interim hydromodification criteria and long-term watershed protection measures, as applied to the  
18 City.

19 1. The Required Revisions Related to the Interim Criteria for Hydromodification  
20 Control Are Unreasonable, Arbitrary and Not Supported by the Evidence

21 There is no scientific or technical basis in the record to require the numeric standards  
22 specified for the interim criteria for hydromodification. To the contrary, the record is replete with  
23 evidence indicating that the application of the interim hydromodification criteria are infeasible  
24 and impractical as applied to the City. (Table of Required Revisions at pp. 9-12.) Indeed, the  
25 interim criteria would require a great deal of land with appropriate soil and groundwater  
26 conditions to implement as explained below. These factors are simply not present in this case.  
27 Several practical, technical and economic constraints make implementation of the required  
28 numeric standards, or their effective equivalent, difficult to achieve in areas of redevelopment and

1 infill development as opposed to new development of large parcels of land. It would be difficult  
2 (if not impossible) for the City to impose numeric standards equivalent to the standards identified  
3 in the February 2008 letter for the following reasons:

- 4 • The City is primarily built-out; little developable land remains within the City's  
5 jurisdiction. Surrounding development severely constrains the undeveloped, or  
6 underdeveloped land (much of which is currently under land use entitlement) that  
7 remains.
- 8 • Lots within the City are primarily small commercial and residential lots, many of  
9 which were created when the community was established in 1877.
- 10 • The City less the United States Bureau of Prisons' controlled property is only about  
11 seven square miles in size.
- 12 • Most of the soil in Lompoc is expansive and requires over-excavation and re-  
13 compaction-at-depth prior to development. The alluvial soils that cover the majority  
14 of the City incorporate clay lenses and fine silts, which further limits infiltration. As a  
15 result, mechanisms installed to maximize infiltration will not achieve the desired rate  
16 and volume of infiltration and will result in long-term nuisance ponding and soil  
17 saturation. This is detrimental to structures and improvements and can encourage the  
18 spread of mosquito borne diseases, such as West Nile Virus.
- 19 • The City of Lompoc lies directly above the aquifer that serves as the water supply for  
20 the City. As a result, City policy does not to allow storm water runoff from paved  
21 areas used by vehicles or other high pollutant sources to infiltrate the soil. The City  
22 requires storm water filters that capture oil and grease to be installed in new and  
23 substantially reconstructed areas of vehicle travel and parking to reduce the potential  
24 for groundwater contamination.

25 In a substantially built-out community, and based on technical and economic factors, it is  
26 unreasonable to meet the goal of 3-10% EIA of the watershed within the City's jurisdiction. In  
27 this economy, local citizens or the City would have to redo driveways to pervious pavement,  
28 create small basins in the back of sidewalks, re-grade away from the street, eliminate curbs to use

1 drainage swales instead, use eminent domain to get the land to create area basins, or undertake  
2 other similar measures. In the meantime, any water quality benefit of such action is speculative.

3 As a consequence of the local, site-specific conditions in the City, the prescriptive,  
4 inflexible interim modification criteria are likely to result in the abandonment of infill  
5 development and smart growth practices. The interim criteria will serve to encourage new  
6 development outside of urban centers and thus contribute to urban sprawl and exacerbate the loss  
7 of agricultural lands and open space. This, in turn, would result in water quality impacts, as less  
8 and less open space remains.

9 The Center for Watershed Protection (CWP) also recognizes that there are several  
10 conditions under which significant infiltration is not desirable or feasible. These include infill  
11 and redevelopment situations where adjacent developed properties cannot handle increased soil  
12 saturation due to infiltration from neighboring properties. Increased percolation can damage  
13 structural foundations and increase land slippage where soils and/or original grading and drainage  
14 design did not account for increased saturation. Maximizing infiltration is not appropriate or  
15 feasible in some areas due to adverse soil characteristics. The CWP analyzed LID BMPs and  
16 determined that it is difficult to implement them in redevelopment when the project site is an  
17 older, highly urban sub-watershed with small lots on flat terrain and where development occurred  
18 prior to the advent of storm water requirements. These conditions exist throughout the City.

19 The CWP's Urban Storm Water Retrofit Practices Manual states that construction costs  
20 are 1.5 to 4 times greater when incorporating LID into redevelopment proposals than the cost to  
21 construct storm water practices at new development sites. (CWP Web site at  
22 <http://www.cwp.org/Store/usrm.htm#3>.) The extra costs for retrofits relate to site constraints,  
23 higher excavation costs, greater design complexity, more construction contingencies, additional  
24 engineering studies, enhanced landscaping, and the experimental nature of many technologies.  
25 (*Ibid.*) The CWP recognizes that all candidate sites are not feasible for LID and urban soils often  
26 cannot support infiltration. (*Ibid.*) The requirement of the interim hydromodification criteria, in  
27 light of these identified concerns, reflect the fact that the Regional Water Board did not  
28 adequately consider these factors when it adopted the LID standards. (*Ibid.*)

1 Other technical experts in the field have also explained that such interim criteria are not  
2 practical. For example, the interim criterion that requires new and redevelopment projects to  
3 maintain an EIA of less than 5% mirrors a proposed requirement in a *draft* Phase I MS4 permit  
4 for the County of Ventura and the incorporated cities within Ventura County. As part of the  
5 Ventura MS4 process, Geosyntec Consultants (known experts in this field) prepared comments  
6 explaining the problems associated with such a blanket requirement. These comments were  
7 discussed in the Regional Water Board hearing on the City's SWMP on October 17, 2008. As  
8 conveyed during the hearing, the Geosyntec Consultants stated that the requirement was  
9 presumably based on existing literature but that the use of this information was premature  
10 because it had not been developed locally. Further, testimony was provided that indicated a  
11 blanket requirement is not needed in all cases and that such a requirement may discourage urban  
12 infill development, which is an integral component of smart growth principles.

13 Further, the interim criteria requirement for post-construction runoff hydrographs may be  
14 impractical as applied to redevelopment projects, and in particular, redevelopment projects for  
15 commercial and industrial sites. This requirement would require a redevelopment site to match  
16 the pre-construction runoff hydrographs, which is defined as undeveloped soil type and  
17 vegetation. (Table of Required Changes, footnote 2.) In other words, the redevelopment site  
18 would need to match conditions that existed prior to any development of the site. This would  
19 greatly impact redevelopment projects that are commercial or industrial in nature and, by virtue of  
20 the industry, require significant impervious areas (e.g., required parking, showroom area,  
21 trucking, storage, and shipping facilities).

22 In addition, hydromodification will not be a significant or meaningful factor within the  
23 City's jurisdiction for the practical reasons that follow:

- 24 • The only creek that runs through the City is San Miguelito Creek, a water body  
25 contained in a concrete trapezoidal channel. Therefore, hydromodification of the  
26 creek will not occur.
- 27 • The City receives on average only 15-16 inches of rain each year, deposited in three to  
28 five storms. At times the City receives as little as five to six inches of rain annually.

- 1       • The City is primarily flat and low in elevation, located approximately nine miles east
- 2       of California's coast.
- 3       • The City's storm water conveyance system is well established and is primarily a
- 4       surface flow system, wherein properties are graded to drain to streets.
- 5       • The City is primarily residential in nature with required front, side and rear yards.
- 6       Much of the rain that falls on the community already percolates into the ground of
- 7       these residential properties.
- 8       • The City has received the Tree City USA Award each year since 1988 and maintains
- 9       nearly 18,000 trees on public rights-of-way and in City parks.

10       Required Revision No. 18 mandates the development of long-term hydromodification  
11       criteria and control measures, based on an assessment of the impacts of urbanization on the  
12       watershed. The Regional Water Board staff's February 15, 2008 letter provides evidence as to  
13       what the Regional Water Board will expect to with regards to the implementation of this Required  
14       Revision. For example, the February 15, 2008 letter states that watershed-based  
15       hydromodification management plans need to be developed to achieve a goal of post-construction  
16       storm water management with an EIA of no more than three to ten percent (3-10%) of watershed  
17       area within the permittees' jurisdiction, depending on local conditions. Such a requirement as  
18       applied to the City is unreasonable considering the City's compact, urban nature. As discussed  
19       previously, the City is a built-out community, which has developed over the past 131 years. Due  
20       to the developed nature of the City, such a standard is infeasible and unreasonable.

21       Further, the current economic crisis is severely affecting credit and housing markets  
22       across the country. The City has not been immune from these impacts. Homes in the City have  
23       been foreclosed upon, homeowners are facing mortgages greater than the value of the homes and  
24       credit is very difficult to obtain. Thus, in this economy, the adoption of requirements for local  
25       jurisdictions to meet aggressive goals such as the 3-10% EIA for the whole of the City's  
26       jurisdiction constitutes an unreasonable economic burden on the City and its property owners.  
27       The City anticipates that to meet Required Revision Nos. 16, 17 and 18 collectively, the City will  
28       need to implement measures such as reconstruction of driveways with pervious pavement,

1 creation of small basins at the back of sidewalks, re-grading of properties to drain away from the  
2 street, and substituting drainage swales for curbs. Moreover, because of the stringent nature of  
3 the 3-10% requirement, the City is uncertain if implementation of these measures will be  
4 adequate to achieve the Regional Water Board's requirements

5 For these reasons, the Regional Water Board not only failed to satisfy MEP as explained  
6 in section III.A, *ante*, but adopted requirements that are unreasonable, arbitrary and not supported  
7 by the evidence. Accordingly, the State Water Board should reject and delete Required Revision  
8 Nos. 16, 17, 18, and 20.

9 2. Required Revision No. 20 Related to Long-Term Watershed Protection Is  
10 Unreasonable, Arbitrary and Not Supported by the Evidence

11 The Required Revision for long-term watershed protection expands the City's SWMP  
12 beyond the requirements of the General Permit and Phase II storm water program. Required  
13 Revision No. 20 obligates the City to develop quantifiable measures that indicate how the City's  
14 watershed protection efforts achieve desired watershed conditions, evaluate existing watershed  
15 protection efforts and adapt or change the existing efforts, if warranted. (Table of Required  
16 Revisions at pp. 12-13.) The Table of Required Revisions and the Regional Water Board's  
17 resolution fail to clearly indicate what constitutes the "desired watershed conditions" referred to  
18 in Required Revision 20. However, the February Letter provides sufficient evidence as to the  
19 Regional Water Board's intent with regards to what constitutes "desired watershed conditions."  
20 The February Letter states that an evaluation should include quantifiable measures for evaluating  
21 the program's effectiveness and should be based on the following objectives:

- 22 • Assess compliance with the requirements of the General Permit;
- 23 • Verify BMPs are being implemented;
- 24 • Assessment of the chemical, physical and biological impacts on beneficial uses caused  
25 by pollutants of concern in storm water discharges;
- 26 • Characterization of watersheds and storm water discharges;
- 27 • Identification of sources of pollutants; and
- 28 • Evaluation of long-term trends in receiving water quality. (February Letter at p. 6.)



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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is Hall of Justice Building, 813 Sixth Street, Third Floor, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

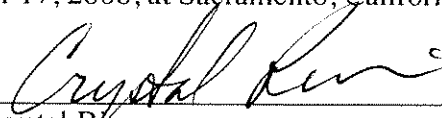
On November 17, 2008, I served a true and correct copy of:

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW  
[Water Code, section 13320]

X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

Roger W. Briggs, Executive Officer  
Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401-7906

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on November 17, 2008, at Sacramento, California.

  
\_\_\_\_\_  
Crystal Rivera