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June 21, 2005

The Honorable Chief Justice Ronald George
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Amicus Curiae Letter in Support of Cities of Los Angeles and Burbank's Petition for Rehearing and in Opposition to Water Board's Petition for Rehearing in Cities of Burbank and Los Angeles v. State Water Resources Control Board, et al., Case No. B150912

Dear Chief Justice George and Associate Justices of the Supreme Court:

Amicus curiae the National Association of Clean Water Agencies (NACWA) (formerly the Association of Metropolitan Sewerage Agencies, or AMSA) submits this letter in support of the Petition for Rehearing filed by the Cities of Los Angeles and Burbank (the Cities) and in opposition to the Petition for Rehearing filed by the State Water Resources Control Board and the Regional Water Quality Control Board, Los Angeles Region (collectively, the Water Boards). Under its former name, the Association of Metropolitan Sewerage Agencies, NACWA participated in this case by the submission of an *amicus* brief in support of the Petitioners on April 26, 2004.

NACWA's Membership.

NACWA represents the interests of nearly 300 of the nation's publicly-owned wastewater treatment agencies. Our membership includes 32 California agencies and more than 60 member agencies within the jurisdiction of the Ninth Circuit Federal Court of Appeals. NACWA member agencies serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. NACWA members are regulated by the federal Clean Water Act (CWA), including the National Pollutant Discharge Elimination System permit program, as implemented by the United States Environmental Protection Agency (U.S. EPA) and through delegated State water quality control programs, such as the one implemented in California under the Porter-Cologne Water Quality Control Act, Cal. Water Code §13000 et seq. As a result, NACWA is an active participant in state and federal court litigation raising important CWA implementation and policy questions.

NACWA's Position on Rehearing.

NACWA supports the Cities' contention in their Petition for Rehearing that the Water Board's failure to adopt an approved methodology for translating its *narrative* toxicity standards into numeric permit limits violated the Clean Water Act and U.S. EPA's implementing regulations. Consequently, the Cities' permit limits were not based upon a lawful or approved state or federal water quality standard. Thus, consideration of the factors in California Water Code § 13241 required as a matter of law. *See* Brief of *Amicus Curiae* AMSA at 11-15.

For similar reasons, NACWA opposes the Water Board's Petition for Rehearing, and is particularly concerned with the Water Board's misleading suggestion that all of the pollutant restrictions at issue in this case "were intended to implement clean water standards in a matter consistent with federal law." Water Boards' Petition for Rehearing, at 6, n.3. To the contrary, as the Petitioners have argued, the permit limits that were based upon California's narrative criterion for toxicity were *not* required to implement federally-enforceable Clean Water Act requirements, because that standard failed to comply with legal requirements and had not been approved by U.S. EPA at the time the permits in this case were issued. *See* The Cities of Los Angeles and Burbank's Petition for Rehearing at 8-9. In *Alaska Clean Water Alliance v. Clark*, (W.D. Wash. July 8, 1997), 1997 U.S. Dist. LEXIS 11114, 45 ERC (BNA) 1664, 27 ELR 21330, certain non-profit groups had challenged a U.S. EPA regulation that allowed state standards to go into effect for Clean Water Act purposes as soon as they were adopted under state law, and to remain in effect unless and until they were replaced by another standard. The District Court held that the plain meaning of the Clean Water Act was that *new and revised state standards* are *not* effective until they are approved by U.S. EPA. Although U.S. EPA subsequently amended the challenged rule to allow certain pre-existing state standards to remain in effect, that amendment was not effective until *after* the permits at issue in this case had been issued. *See also Save the Lake v. Schregardus*, 141 Ohio App. 3d 530 (Franklin Cty. 2001).

Nor can the Water Boards claim that the limits at issue in this case were somehow required by federal law because they were "based on" U.S. EPA's recommended "Water Quality Criteria." Water Boards' Petition for Rehearing at 6, n.3. Under the Clean Water Act, U.S. EPA develops "recommended" water quality guidance criteria, which must be formally adopted by each state (and approved by U.S. EPA) *before* they become federally-enforceable water quality standards. *See* Clean Water Act §§ 303(c) and 304(a), 33 U.S.C. §§ 1313(c) and 1314(a). *See, generally*, P. Evans, *The Clean Water Act Handbook* (ABA, 1994) at 27 and 33.

Conclusion.

NACWA respectfully requests that the Water Boards' Petition for Rehearing be denied because it is based upon a fundamental misreading of the Clean Water Act and misrepresents the standards that are binding upon the states as a matter of federal law. NACWA respectfully requests that the Cities' Petition for Rehearing be granted because, as the Cities have correctly observed, the record in this case clearly establishes that the permit limits at issue were *not required* by federal law because the objective was unlawfully adopted and not federally approved at the time the permits were issued. Thus, the Water Boards should have considered the factors specified in California Water Code § 13241, including economics. California Water Code § 13263(a).

Respectfully submitted,

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Cities of Burbank and Los Angeles v. State Water Resources Control Board, et al.

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Superior/Appellate Courts

<p>Honorable Dzintra I. Janavs Superior Court of California County of Los Angeles – Central District 111 North Hill Street Los Angeles, CA 90012-3117 Tele: (213) 974-5889 <i>Casae Nos. BS060960 and BS060957</i></p>	<p>Clerk of the Court California Court of Appeal Second Appellate District, Division 3 300 South Spring Street North Tower – 2nd Floor Los Angeles, CA 90013-1213</p>
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Specially Appearing for Amicus Curiae

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