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8/4/09 Bd Mtg. Item 10
A-1780-County of LA
Deadline: 7/31/09 by 12 noon

July 30, 2009

VIA OVERNITE EXPRESS

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Legal Comments on May 4, 2009 Draft State Board Order for File/Petition No. A-1780

Dear Ms. Townsend:

These legal comments are being submitted on behalf of the Cities of Downey and Signal Hill, and the ad hoc group of cities known as the Coalition for Practical Regulation[1] (hereafter collectively "Cities"), with respect to a Draft Order dated May 4, 2009 and proposed by the State Board in *In The Matter of the Petition of the County of Los Angeles and Los Angeles County Flood Control District*, SWRCB/OCC File No. A-1780 ("Petition"). The Cities are permittees under the existing municipal separate storm sewer system ("MS4") National Pollutant Discharge Elimination System ("NPDES") permit ("NPDES No. CAS004001") in issue, and have an interest in the outcome of this Petition, as the Cities may become subject to future total maximum daily loads ("TMDLs") to be referenced in either the existing Municipal NPDES permit, or in future Municipal NPDES permit(s) to be issued by the Regional Board. The Cities request that these comments be made a part of the administrative record in connection with this pending Petition, and ask that the Comments be forwarded on to the Chair and members of the State Board prior to the upcoming hearing scheduled for August 4, 2009.

[1] The Coalition for Practical Regulation also known as "CPR" is an ad hoc group of municipalities in Los Angeles County committed to obtaining clean water through cost-effective and reasonable storm water regulations, and consists of the following Cities: Arcadia, Artesia, Baldwin Park, Bell, Bell Gardens, Bellflower, Carson, Cerritos, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Canada Flintridge, La Mirada, Lakewood, Lawndale, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pico Rivera, Pomona, Rancho Palos Verdes, Rosemead, Santa Fe Springs, San Gabriel, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Vernon, Walnut, West Covina, and Whittier.

The legal comments discussed herein are not intended to be a comprehensive discussion of all legal defects with the Draft Order, but address only the more significant defects the Cities believe exist with the Draft Order. In fact, the Cities believe there are other legal defects in the Draft Order which are not raised here, but which have been raised by the County Petitioners in their briefing on the issues. Based on the comments set forth herein, as well as the attached exhibits, and based on the previous exhibits and contentions made by the County Petitioners, the Cities respectfully request that the Draft Order not be issued, and that instead an Order be issued granting the Petition and providing for the issuance of relief consistent with the relief requested in the Petition and the comments below. The Draft Order should not be issued, in part, as a result of the following legal defects with such Order:

(1) Any incorporation of a TMDL into a Municipal NPDES permit for the Los Angeles Region is premature at this time, in light of the Orange County Superior Court's recent decision in *City of Arcadia v. State Board*, OCSC Case No. 06CC02974, Fourth Appellate District Case No. G041545 (the "*Arcadia* Case"). Given the decision in the *Arcadia* Case, no new TMDLs should be further developed and no existing TMDL should be incorporated into the operative Municipal NPDES permit or permits, until such time as the *Arcadia* Case has been finally resolved.

(2) The maximum extent practicable ("MEP") Standard under the Clean Water Act ("CWA" or "Act") applies to all "discharges of pollutants" "from" a municipal separate storm sewer system ("MS4"), regardless of whether the pollutants contained within the discharge arose from "storm water" or "non-storm water."

(3) The Draft Order improperly treats "dry weather" as "non-stormwater," ignoring the clear definition of the term "storm water" in the federal regulations, and thus improperly attempting to require strict compliance with the waste load allocations ("WLAs") in the TMDL, and going beyond the MEP standard provided for under federal law.

(4) Federal law and State policy do not require or even recommend compliance with TMDLs through the use of numeric limits, i.e., strict compliance with WLAs in a TMDL. Instead, both State and federal policy provide for compliance with TMDLs through the use of iterative MEP-compliant Best Management Practices ("BMPs"), and not through strict compliance with WLAs (which are a form of numeric effluent limits).

(5) Any amendment to an NPDES permit, whether incorporating a TMDL or otherwise, as confirmed by the California Supreme Court in the *City of Burbank v. State Board* ("*Burbank*") (2005) 35 Cal.4th 613, can only be adopted once the factors and considerations required under Water Code section 13241, as well as section 13000, have been met.

(6) Any TMDL incorporated into a municipal NPDES permit in a fashion that is not otherwise required by federal law, cannot be imposed unless the State first provides funding for this non-federal mandate, in accordance with the requirements of the California Constitution.

I. THE INCORPORATION OF A TMDL INTO ANY MUNICIPAL NPDES PERMIT FOR THE REGION IS PREMATURE AT THIS TIME.

Any incorporation of a TMDL into a Municipal NPDES permit for the Los Angeles Region is premature at this time in light of the Orange County Superior Court's recent decision in the *Arcadia* Case. The incorporation of a TMDL into a Municipal NPDES Permit is, in effect, the final step in the process of seeking to enforce Water Quality Standards ("Standards") as against storm water dischargers. (The term "storm water," hereafter "Stormwater," plainly includes "urban runoff" as discussed below.) As recognized by the Court of Appeal in *City of Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404, "[a] TMDL must be 'established' at a level necessary to implement the applicable water quality standards." (*Also see City of Arcadia v. EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1145 ["each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES Permits or establishing nonpoint source controls."].)

In the recent *Arcadia* Case, a number of the Cities successfully challenged the propriety of the Standards in the Basin Plan, and particularly the Water Boards' failure to conduct a Water Code section 13241/13000 analysis during the course of the 2004 Triennial Review, and to correct the improperly designated "potential" use designations in the Basin Plan. As discussed below, the Superior Court determined that the State and Regional Boards were required to conduct this 13241/13000 review in relation to Stormwater, and to make appropriate revisions to the Standards, including deleting the "potential" use designations.

Thus, any consideration of the incorporation of a TMDL into a Municipal NPDES Permit for the Los Angeles Region, should be delayed until such time as the propriety of the Standards upon which the TMDL is based, have been reviewed and revised in accordance with the Superior Court's determinations. Moreover, although the *Arcadia* Case is presently on appeal, at a minimum, in light of the significance of the Court's rulings that the "potential" use designations are improper and are to be replaced with other more appropriate use designations, and given that other changes to the Standards may be necessary once the review under Water Code sections 13241 and 13000 has been completed, any decision to attempt to enforce existing Standards through the incorporation of this bacteria TMDL or other TMDLs, into a Municipal NPDES Permit, should, at a minimum, be delayed until such time as the *Arcadia* Case has been finally decided. To proceed with the incorporation of the subject TMDL into the existing NPDES Permit, blindly, understanding that the Standards supporting the TMDL may be defective, and thus, that the TMDL itself may need to be revised, is arbitrary and capricious action that will only lead to further litigation.

In the *Arcadia* Case, with respect to the propriety of the Standards in the existing Basin Plan, as they are to be applied to Stormwater, in a Notice of Ruling/Decision dated March 13, 2008 (Exhibit "1," hereafter "Decision"), the Orange County Superior Court, the Honorable Thierry P. Colaw presiding, held, among other things, as follows:

> **The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objective. . . . They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975." [Citation.] This was confirmed by the State Board in a 1991 Order when it stated: "The Basin Plan specified requirements and controls for 'traditional' point sources, but storm water discharges were not covered . . . The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. Clearly, the effluent limitations listed for other point sources are not meant to apply." [Citation.] There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water.** (*See* Exhibit "1," Decision p. 5-6; bolding in original.)

Similarly the Superior Court found that the Water Boards' development of Standards based on mere "potential" uses, was inappropriate, holding:

> **Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probably future beneficial uses of water." Water C. § 13241(a).**

* * *

> **The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirements in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. Of California* (2003) 31 Cal.App.4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.** (Exhibit "1," Decision, p. 5.)

Accordingly, the Cities respectfully request that the subject TMDL, and any other TMDLs, not be incorporated into the subject Municipal NPDES Permit, or any future Municipal NPDES Permits, until such time as a final decision has been rendered in the *Arcadia* Case, and if the Superior Court's decision is upheld, until such time as the Judgment and Writ of Mandate issued in that case, have been complied with. (*See* Exhibits "2" and "3" hereto, the Judgment and Writ of Mandate entered in the *Arcadia* Case by the Superior Court.)

II. THE DRAFT ORDER WRONGLY SEEKS TO AVOID APPLICATION OF THE MEP STANDARD BY IMPROPERLY TREATING "DRY WEATHER" AS "NON-STORM WATER"

A. The MEP standard Under the Clean Water Act Applies to All "Discharges of Pollutants" From the MS4, Regardless of Whether the Pollutants in the Discharge Arise from "Stormwater" or "Non-Stormwater."

It is clear from the plain language of the Clean Water Act that any attempt to exclude "dry weather" from the definition of "Stormwater," does not in any way result in the Boards having additional authority under State or federal law to impose strict "numeric effluent limits" on the County Petitioners or the Cities. To the contrary, the Clean Water Act expressly applies the MEP standard to all "pollutants" discharged from the MS4, whether they are classified as "non-stormwater" or "Storm water." Although "non-stormwater" is required to be "effectively prohibited" from entering ***"into"*** the MS4, the CWA clearly does not treat discharges ***"from"*** the MS4 any differently if the "pollutants" in issue arose as a result of a "Stormwater" versus a "non-stormwater" discharge. (33 U.S.C. § 1342(p)(3)(B). As such, if "dry weather" is improperly classified as "non-stormwater," such a definition does not in any way change how the

"pollutants" in the discharge are to be addressed. Instead, under the CWA, regardless of the nature of the discharge, *i.e.,* be it "Stormwater" or "non-stormwater," the MEP standard applies.

The language in the Act requires municipalities to "require controls to reduce the discharge of ***pollutants*** to the maximum extent practicable." The Act then applies the MEP standard to the "discharge of pollutants" from the MS4, not to the discharge of "Stormwater" or "non-stormwater" from the MS4. As such, the State Board's attempted classification of "dry-weather" as "non-stormwater," has no relevance to the issue of the types of "controls" required under the Act to address the "pollutants" in issue. Section 1342(p)(3)(B) of the Act entitled "Municipal Discharge" provides, in its entirety, as follows:

> Permits for discharges **from** municipal storm sewers –
>
> (i) may be issued on a system– or jurisdictional– wide basis;
>
> (ii) shall include a requirement to effectively prohibit **non-stormwater** discharges **into** the storm sewers; and
>
> (iii) shall require controls **to reduce the discharge of pollutants to the maximum extent practicable**, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C. § 1342(p)(3)(B).)

Moreover, this language has consistently been interpreted as allowing for a different set of requirements on "municipal" discharges, versus "industrial" or "traditional" dischargers, with federal law only requiring that the MEP standard be applied to "municipal" dischargers, and with a standard of strict compliance with numeric effluent limits to be applied to industrial dischargers. As the Ninth Circuit in *Defenders of Wildlife v. Brown* (*"Defenders"*) (9th Cir. 1999) 191 F.3d 1159, found "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' finding that the Clean Water Act was "***not merely silent***" regarding requiring "municipal" dischargers to strictly comply with numeric limits, but in fact that the requirement for traditional industrial waste dischargers to strictly comply with the limits was "replaced" with an alternative requirement, i.e., "that ***municipal*** storm-sewer dischargers 'reduce the discharge ***of pollutants*** to the maximum extent practicable . . . in such circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C). (*Id* at 1165; emphasis added.)

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* ("*BIA*") (2004) 124 Cal.App.4th 866, there as well the Appellate Court, relying upon the Ninth Circuit's holding in *Defenders*, agreed that "with respect to ***municipal*** stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharger ***of pollutants*** to the maximum extent practicable.'" (*Id* at 874, emphasis added.)

The Court of Appeal in the *BIA* Case explained the reasoning for Congress' different treatment of Stormwater dischargers versus industrial waste dischargers when it stated that:

> Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act and making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators pointed out, although Congress was reacting to the **physical differences between municipal storm water runoff and other pollutant discharges** that made the 1972 legislation's blanket effluent limitations approach **impractical and administratively burdensome**, the primary points of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (*Id* at 884.)

The Draft Order, by attempting to impose numeric effluent limits on municipal dischargers, goes beyond what was required by Congress with the 1987 amendments to the CWA, and treats municipal dischargers in precisely the same manner as industrial waste dischargers. As discussed below, such a significant shift in policy is directly contrary to well-established State Board and US EPA policy.

In State Board Order No. 91-04 (Exhibit "4," hereto), the State Board addressed the propriety of the 1990 Municipal NPDES Permit for Los Angeles County, and particularly whether such permit, in order to be consistent with applicable State and federal law, was required to have included "numeric effluent limitations." In addition to the State Board's interchangeable use of the terms "storm water" and "urban runoff" when discussing the applicable standard to be applied under the Act (*see* discussion below), the State Board confirmed that the MEP standard applies to the ***"discharge of pollutants"*** from the MS4, and made no mention of the need to apply a different standard if the ***"discharge of pollutants"*** arose from "non-stormwater" rather than "storm water." To the contrary, the State Board recognized the MEP standard applied to "pollutants in runoff," irrespective of the source of the pollutants, finding as follows:

> [T]he applicable water quality standards are those established for the receiving waters of the **storm water discharges.** We further concluded there [in Order No. 91-03] that even if such effluent limitations are intended to require compliance with water quality standards, "best management practices" constitute legally acceptable effluent limitations. We find here, as we did in Order No. WQ 91-03, that the permit includes a comprehensive and stringent program for reducing **pollutants in storm water discharge,** and that it will implement the Basin Plan, including the protection of beneficial uses.
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> * * *
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> We find here also that the approach of the Regional Board, requiring the dischargers to implement **a program of best management practices** which will reduce **pollutants in runoff, prohibiting non-stormwater discharges,** is appropriate and proper. **We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis,** the lack of technology available to treat **storm water discharges** at the end of the pipe, the huge expense such treatment would entail, and the level of **pollutant reduction** which we anticipate from the Regional Board's regulatory program. (Exhibit "4," State Board Order No. 91-04, p. 16-17.)

This State Board Order, and others as discussed below, all show that although there are two requirements imposed upon municipalities under the CWA, one requiring that municipalities effectively prohibit "non-stormwater" "into" the MS4, and a second requiring municipalities to "reduce the discharge of pollutants to the maximum extent practicable," that the MEP standard applies to "pollutants in runoff" coming out of the MS4 system, regardless of whether such discharges are Stormwater or non-stormwater. The only difference in the requirements to be imposed upon the municipalities between Stormwater and non-stormwater, involve the need for municipalities to "effectively prohibit non-stormwater discharges into the" MS4.

The Draft Order wrongly seeks to limit the application of the MEP standard to wet weather discharges, and fails to acknowledge that any attempted application of "numeric limits" to a municipal discharger, goes beyond the requirement of federal law, thereby requiring an analysis of the Water Code sections 13241 and 13000 factors discussed below.

B. The Definition of "Stormwater" Includes "Dry Weather" Runoff.

The Draft Order improperly provides that: "The challenged permit provisions do not apply to storm water flows. U.S. EPA has previously rejected the notion that 'storm water,' as defined at 40 Code of Federal Regulations section 122.26(b)(13), includes dry weather flows." (Draft Order, p. 7.) Yet, the assertion that "dry weather" is something other than "storm water" is inaccurate and is directly controverted by the very regulations cited in the Draft Order. In addition, this purported finding that the term "storm water" does not include "dry weather," *i.e.*, "urban runoff," has already been rejected by the Superior Court in the *Arcadia* Case, and the fact that the definition of "storm water" includes "urban runoff," has also already been admitted to by the State and Regional Boards in the *Arcadia* Case, as well as by the NRDC, the Santa Monica Baykeeper and Heal the Bay. As such, any attempt to redefine the term "Stormwater" to exclude "dry weather," is contrary to law and should be rejected.

First, it is clear from the plain language of the regulations that the term "Stormwater" includes all forms of "urban runoff" in addition to precipitation events. Specifically, section 122.26(b)(13) reads as follows: "*Storm water* means storm water runoff, snow melt runoff, ***and surface runoff and drainage***." (40 C.F.R. § 122.26(b)(13); italics in original, bolding and underlining added.) This definition starts with the inclusion of "storm water" and "snow melt runoff," and is then further expanded to include not only "storm water" and "snow melt runoff," but also "surface runoff" and "drainage." The State and Regional Board's interpretation of this definition, as proposed in the Draft Order, is thus an attempt to read the terms "surface runoff" and "drainage" out of the regulations. Such an interpretation is contrary to the plain language of the regulation itself, and is contrary to law. (*See e.g., Astoria Federal Savings and Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 112 ["[W]e construe statutes, where possible, ***so as to avoid rendering superfluous any parts thereof.***"]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 ["We ordinarily reject interpretations that render particular terms of a statute as mere surplusage, ***instead giving every word some significance.***"]; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 92 ["In construing the words of a statute . . . an interpretation ***which would render terms surplusage should be avoided***, and every word should be given some significance, ***leaving no part useless or devoid of meaning.***"]; *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1022 [***"We are required to avoid an interpretation which renders any language of the regulation mere surplusage."***; and *Hart v. McLucas* (9th Cir. 1979) 535 F.2d 516, 519 [***"[I]n the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided."***].)

Second, the Municipal NPDES Permit in question specifically defines "Storm water" consistent with the federal regulations as including "***surface runoff*** and drainage." (Permit [Order No. 01-182], p. 61.) Said Municipal NPDES Permit then defines the term "Runoff" as meaning "runoff including storm water ***and dry weather flows . . . .***" (*Id*, p. 60.) As such, by

defining "Storm water" to include "***surface runoff,***" and then defining "***Runoff***" specifically to include "***dry weather flows,***" the Municipal NPDES Permit in issue itself expressly defines "Storm water" to include "dry weather." Any contention to the contrary is directly refuted by the plain language of the subject Permit.

Third, in the *Arcadia* Case, in its Decision, Judgment and Writ of Mandate, the Superior Court found that the term "Stormwater" was defined in the federal regulations to include not only "storm water" but also "urban runoff." (*See*, Decision, Exhibit "1" hereto, p. 1 [" . . . the Standards apply to storm water [*i.e.,* storm water and urban runoff]."]; Exhibit "2," Judgment in the *Arcadia* Case, p. 2, fn 2, [citing to 40 C.F.R. § 122.26(b)(13) and finding that: "Federal law defines 'storm water' to include urban runoff, *i.e.,* 'surface runoff and drainage'".]; and Exhibit "3," Writ of Mandate in the *Arcadia* Case, p. 2, n. 2 ["Federal law defines 'storm water' to include urban runoff, *i.e.,* 'surface runoff and drainage.'"].)

This interpretation of the term "storm water" as including "urban runoff," as found by the Court in the *Arcadia* Case, has not been challenged on appeal by the State or Regional Boards, and in fact, has been agreed to by both the State and Los Angeles Regional Boards, as well as by the Intervenors. Specifically, in the State and Regional Boards' Opening Appellate Brief in the *Arcadia* Case, they agreed that the term "Stormwater" is to include "urban runoff," where they stated as follows:

> **"Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but stormwater emanates from diffuse sources, including surface run-off following rain events (hence "storm water") and urban run-off."** (See Exhibit "5" hereto, which is a true and correct copy of the cited portion from the Water Boards' Opening Appellate Brief in the *Arcadia* Case; emphasis added.)

Thus, both the State and the Regional Boards, through their counsel of record in the *Arcadia* Case, have acknowledged that the term "Stormwater" includes not only "storm water" runoff from "rain events," but also other discharges from a storm sewer conveyance system, specifically including "urban runoff."

This definition of the term "Stormwater" as including "urban runoff," has also been accepted by the NRDC, the Santa Monica Baykeeper, and Heal the Bay (collectively, "Intervenors") in the Intervenor's Opening Brief in the *Arcadia* Case. In their Opening Brief, these Intervenors admit as follows:

> For ease of reference, throughout this brief, **the terms "urban runoff" and "stormwater" are used interchangeably to refer**

> **generally to the discharges from the municipal Dischargers' storm sewer systems.** The definition of "stormwater" includes "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).) (See Exhibit "6," hereto, which is a true and correct copy of the cited portion of the Intervenors' Opening Appellate Brief in the *Arcadia* Case; emphasis added.)

In sum, in light of the plain language of the federal regulation defining the term "Stormwater" to include "urban runoff," *i.e.,* "surface runoff" and "drainage," in addition to "storm water" and "snow melt," and given the clear language in the subject Municipal NPDES Permit itself, as well as the findings of the Superior Court in the *Arcadia* Case, and the admissions by the State and Regional Boards and the Intervenors in that case, it is clear that the term "Stormwater" as defined, includes "surface runoff and drainage," *i.e.,* it is clear that the term "Stormwater" includes "dry weather" runoff.

Fourth, beyond the plain language of the regulation and the parties' concurrence to the definition of "Stormwater" as including "urban runoff," prior orders of the State Board have also confirmed that the term "urban runoff" is included within the definition of "storm water." For example, in State Board Order No. 2001-15, the State Board regularly interchanges the terms "urban runoff" with "storm water," and discusses the "controls" to be imposed under the Clean Water Act as applying equally to both. In discussing the propriety of requiring strict compliance with water quality standards, and the applicability of the MEP standard, in Order No. 2001-15, the State Board asserted as follows:

> **Urban runoff** is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on **urban runoff**. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where **urban runoff** is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.
>
> While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. **We will generally not require "strict compliance" with water quality standards through numeric**

> **effluent limits and we will continue to follow a iterative approach, which seeks compliance over time.** The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems." (See Order 2001-15, Exhibit "7," hereto, p. 7-8; emphasis added.)

Moreover, at the urging of the petitioner in Order No. 2001-15, the State Board went so far as to modify the "Discharge Prohibition A.2" language, which was challenged by the Building Industry Association of San Diego County ("BIA"), because such Discharge Prohibition was not subject to the iterative process. The State Board found as follows in this regard: "The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. . . . Language clarifying that the iterative approach applies to that prohibition is also necessary." (Exhibit "7" State Board Order No. 2001-15, p. 9.)

The State Board further required that the Municipal NPDES permit challenged in that case be modified because the permit language was overly broad, as it sought to apply the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s, with the BIA claiming that it was inappropriate to require the treatment and control of discharges "prior to entry ***into*** the MS4," and with the State Board agreeing that such a regulation of discharges ***"into"*** the MS4 was inappropriate. [*Id* at 9 ["We find that the permit language is overly broad because it applies the MEP standard not only to discharges 'from' MS4s, but also to discharges "into' MS4s."].)

In State Board Order No. 91-04 (Exhibit "4") discussed above, the State Board specifically relied upon EPA's Stormwater Regulations, and finding that: "Storm water discharges, by ultimately flowing through a point source to receiving waters, are by nature more akin to non-point sources as they flow from diffuse sources over land surfaces." (Exhibit "4," p. 13-14.) The State Board then relied upon EPA's Preamble to the Storm Water Regulations, and quoted the following from the Regulation:

> "For the purpose of [national assessments of water quality], **urban runoff** was considered to be a diffuse source for non-point source pollution. From a legal standpoint, however, most **urban runoff** is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the [Clean Water Act]." 55 Fed.Reg. 47991. (Exhibit "4," State Board Order No. 91-04, p. 14; emphasis added.)

The State Board went on to conclude that the lack of any numeric objectives or numeric effluent limits in the challenged permit "will not in any way diminish the permit's enforceability or its ability to reduce ***pollutants in storm water discharges*** substantially. . . . In addition, the [Basin] Plan endorses the application of 'best management practices' rather than numeric limitations as a means of reducing the level of ***pollutants in storm water discharges***." (*Id* at 14, emphasis added.)

(*Also see* Storm Water Quality Panel Recommendations to the California State Water Resources Control Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, June 19, 2008, p. 1 ["MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP)"], and p. 8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs ***and in particular urban dischargers***."] [Exhibit "8,"]; State Board Order No. 98-01, p. 12 ["***Storm water permits*** must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limits."] [Exhibit "9"]; and State Board Order No. 2001-11, p. 3 ["In prior Orders this Board has explained the need for the ***municipal stormwater programs*** and the emphasis on BMPs in lieu of numeric effluent limitations."] [Exhibit "10"].)

In short, not only does the definition of "Stormwater" plainly include "non-stormwater" i.e., "surface runoff and drainage," furthermore, the Clean Water Act clearly applies the "MEP" standard to all "discharges of pollutants" from the MS4 system. As such, because the Draft Order wrongly seeks to apply a different standard to "dry weather" than to "wet weather," it should not be issued.

III. FEDERAL LAW AND STATE POLICY DO NOT REQUIRE OR EVEN RECOMMEND COMPLIANCE WITH TMDLS THROUGH THE USE OF NUMERIC LIMITS, I.E., STRICT COMPLIANCE WITH WLAs IN A TMDL.

At the time when either the subject TMDL or any other TMDL is being properly evaluated for purposes of inclusion in a Municipal NPDES Permit, the Water Boards must consider all applicable federal and State laws, as well as applicable policies governing whether and how a TMDL is best incorporated into a Municipal NPDES Permit.

Initially it must be recognized that existing federal law does ***not*** require that Stormwater dischargers strictly comply with WLAs forth in a TMDL, but instead only requires compliance with WLAs through the use of the MEP standard, and importantly, through the use of best management practices ("BMPs"). In fact, time and again the Courts, US EPA and the State Board have all recognized that Stormwater discharges are different from traditional point source discharges, and that Stormwater must be analyzed and treated as such in accordance with the requirements of the Clean Water Act.

For example, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the Appellate Court determined that "in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'" (*Id*, emphasis in original, citing 33 USC § 1342 (p)(3)(B)(iii) & *Defenders of Wildlife v. Browner ("Defenders")* (9th Cir. 1999) 191 F.3d 1159, 1163.)

In *Defenders, supra,* 191 F.3d 1159, relied upon by the *BIA* Court of Appeal, the Ninth Circuit similarly recognized the different approach taken by Congress when addressing storm water discharges versus industrial discharges, finding that "industrial discharges must comply strictly with state water-quality standards," with Congress choosing "not to include a similar provision for municipal storm-sewer discharges." (*Id* at 1165.) As the *Defenders* Court held, instead, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' . . . ." (*Id.*) The Ninth Circuit went on to find, after reviewing the relevant portions of the Clean Water Act, that "because 33 U.S.C. § 1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. § 1311," but instead Section 1342(p)(3)(B)(iii) "*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable . . . . In such circumstances, the statue unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)." (*Id* at 1165, emphasis in original.)

With respect to TMDLs specifically, that WLAs within a TMDL are not required under the Clean Water Act to be strictly met, was confirmed by U.S. EPA itself in a November 22, 2002 EPA Guidance Memorandum on "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs." (Exhibit "11" hereto.) In the EPA Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges, should be "***in the form of BMPs and that numeric limits will be used only in rare instances.***" (Exhibit "11," p. 6, emphasis added.) The EPA recommended that "***for NPDES-regulated municipal . . . dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits.***" (*Id* at p. 4.) EPA went on to expressly recognize the difficulties in regulating Stormwater discharges, explaining its policy as follows:

> **EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.** (EPA Guidance Memo, Exhibit "11," p. 4.)

As such, because EPA has expressly found, particularly when it comes to the incorporation of a TMDL into a Municipal NPDES Permit, "that numeric limits will be used only in rare instances," and because in this case, there is no evidence that this is a "rare instance" that would justify the inclusion of a numeric limit, any incorporation of the subject TMDL into the Municipal NPDES Permit in issue should be limited to the inclusion of MEP-complaint BMPs, and not "numeric limits."

In addition, the policy of the State of California is that strict numeric limits are ***not*** an appropriate means by which to implement the MEP standard under the Clean Water Act. The State's policy to apply the MEP standard through an iterative BMP process, and not through the use of strict numeric discharge limitations, is reflected in numerous prior orders and other documentation from the State Board. (*See*, e.g., State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14] [Exhibit "4"]; State Board Order No. 96-13, p. 6 [***"federal laws does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."] [Exhibit "12"]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."] [Exhibit "7"]; State Board Order No. 2001-11, p. 3 ***["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."***] [Exhibit "10"]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, ***we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate."***] [Exhibit "7"]; State Board Order No. 2006-12, p. 17 [***"Federal regulations do not require numeric effluent limitations for discharges of stormwater***"] [Exhibit "13"]; Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with*

Municipal, Industrial and Construction Activities, June 19, 2006, p. 8 ["***It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."] [Exhibit "8"]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"] [Exhibit"14"].)

In short, neither State or federal law, nor State or federal policy, provide for the incorporation of WLAs as strict numeric limits into a municipal NPDES Permit. In fact, they provide for the contrary, and recognize that numeric limits should only be incorporated into a municipal NPDES Permit in "rare instances" with the State Board's Numeric Effluent Limits Panel concluding that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Exhibit "8," p. 8.)

IV. AS CONFIRMED BY THE CALIFORNIA SUPREME COURT IN *CITY OF BURBANK v. STATE BOARD* (2005) 35 CAL.4TH 613, ANY AMENDMENT TO AN NPDES PERMIT, WHETHER INCORPORATING A TMDL OR OTHERWISE, MAY ONLY BE ADOPTED ONCE THE FACTORS AND CONSIDERATIONS REQUIRED UNDER WATER CODE SECTION 13241, AS WELL AS 13000, HAVE BEEN MET.

As explained by the Court of Appeal in *BIA San Diego County v. State Board, supra,* 124 Cal.App.4th 866, 874, in the Clean Water Act, Congress distinguished between industrial and storm water discharges and clarified that with respect to municipal storm water discharges, "the EPA has the authority to fashion NPDES Permit requirements to meet storm water quality standards without specific numeric effluent limits . . . ." Accordingly, any attempt to proceed at this time and impose a permit term that requires strict compliance with a WLA, *i.e.*, a numeric effluent limit, is clearly a requirement that goes beyond what is compelled under federal law. As such, all aspects of State law must be adhered to before any such permit term may be adopted.

In *Burbank, supra,* 35 Cal.4th 613, the California Supreme Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, that the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the ***"dischargers cost of compliance."*** (*Id* at 618.) The Supreme Court in *Burbank* also specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that case. (*Id* at 625.)

Sections 13000 and 13241 of the Porter-Cologne Act clearly require a consideration of a series of factors in not only establishing water qualify policy and developing water quality standards, but also in developing applicable permit terms. (*See City of Burbank v. State Board,*

supra, 35 Cal.4th 613, 625 ["The plain language of *Sections 13263 and 13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the costs of compliance when setting effluent limitations in a waste water discharge permit."].) The goal of the Porter-Cologne Act is to "attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Water Code § 13000; *see also Burbank*, 35 Cal.4th 613, 618.)

Accordingly, when establishing water quality objectives, the Water Boards must "ensure the reasonable protection of beneficial uses," recognizing that it "may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (Water Code § 13241.) Section 13241 thus compels the Boards to consider the following factors when developing NPDES Permit terms (*see Burbank*, 35 Cal.4th 613, 625):

> **(a) Past, present, and probable future beneficial uses of water.**
>
> **(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.**
>
> **(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.**
>
> **(d) Economic considerations.**
>
> **(e) The need for developing housing in the region.**
>
> **(f) The need to develop and use recycled water.**

In *U.S. v. State Board* (1986) 182 Cal.App.3d 82, the State Board issued revised water quality standards for salinity control because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento–San Joaquin Delta ("Delta"). (*Id* at 115.) The State Board approved the revised standards with the understanding it would impose more stringent salinity controls in the future. In invalidating the revised standards, the Court recognized the importance of complying with the policies and factors set forth under Water Code sections 13000 and 13241, and emphasized section 13241's requirement of an analysis of "economics." The Court also stressed the importance of establishing water quality objectives which are "reasonable," and the need for adopting "reasonable standards consistent with overall State-wide interests":

> In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality **which is reasonable**, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, **economic and social, tangible and intangible.**" **(§ 13000.)** In fulfilling its statutory imperative, the Board **is required** to "establish such water quality objectives . . . as in its judgment will ensure the **reasonable protection** of beneficial uses . . ." **(§ 13241)**, a conceptual classification far-reaching in scope. (*Id* at 109-110, emphasis added.)
>
> * * *
>
> The Board's obligation is to attain the highest reasonable water quality "considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, *economic* and social, tangible and intangible." (§13000, italics added.) (*Id* at 116.)
>
> * * *
>
> In performing its dual role, including development of water quality objectives, **the Board is directed to consider** not only the availability of unappropriated water (§ 174) **but also all competing demands for water in determining what is a reasonable level** of water quality protection (§ 13000). In addition, **the Board must consider** . . . "[water] quality conditions that could **reasonably be achieved** through the coordinated control of *all* factors which affect water quality in the area." (*Id* at 118, emphasis added.)

Justice Brown in her concurring opinion in *Burbank* made several significant comments regarding the importance of considering "economics" in particular, and the Water Code section 13241 factors in general, when considering including numeric effluent limitations in an NPDES Permit. These comments are equally relevant today to the State Board's Draft Order:

> **Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) – the body responsible to enforce the**

> **statutory framework –failed to comply with its statutory mandate.**
>
> **For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.** (*Id* at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

> **Accordingly, the Board has failed its duty to allow public discussion – including economic considerations – at the required intervals when making its determination of proper water quality standards.**
>
> **What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.** (*Id* at 632-33.)

The above-referenced statutory, regulatory and case authority all confirm, not only that municipal dischargers are to be treated differently than other industrial dischargers, but also that numeric limits should not be applied to any municipal discharger at this time. "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, Exhibit "8," p. 8.) Accordingly, strict compliance with WLAs in any TMDL, should not be required at this time, and to the extent a WLA is attempted to be incorporated into a Municipal NPDES Permit, and enforced as such through a means other than through the use of MEP-complaint BMPs, all applicable requirements of State law, including the analysis required under Water Code Sections 13241/13000, must be met.

V. ANY TMDL INCORPORATED INTO A MUNICIPAL NPDES PERMIT IN A FASHION THAT IS NOT OTHERWISE REQUIRED BY FEDERAL LAW, CANNOT BE IMPOSED UNLESS A STATE FIRST PROVIDES FUNDING FOR THIS NON-FEDERAL MANDATE, IN ACCORDANCE WITH THE REQUIREMENTS OF THE CALIFORNIA CONSTITUTION.

Finally, any new requirements in the existing NPDES Permit that goes beyond what is otherwise required under federal law, *e.g.*, forcing the County Petitioners to strictly comply with the WLAs, as opposed to requiring compliance with the WLAs through the use of MEP-complaint BMPs, and any other accompanying mandates that go beyond the requirements of federal law, can only be imposed where adequate funds have first been provided to comply with such mandates.

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides in relevant part as follows:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service. . . .

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it "***was intended to preclude the state from shifting financial responsibility to local entities that were ill equipped to handle the task.***" (*Id.*)

Accordingly, because the State Board in the Draft Order proposes to require strict compliance with WLAs in a TMDL, a requirement that exceeds the requirements set forth in federal law, the State Board would be seeking to impose a new mandate upon municipalities that can only be adopted where necessary funding has first been provided. The incorporation of new permit requirements that are not mandated by federal law, and that go unfunded by the State, would violate Article XIII B, Section 6 of the California Constitution. (*See County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 914 ["We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."].)

VI. CONCLUSION.

Based on the above comments as well as the attached exhibits, the Cities respectfully request that the State Board grant the Petition of the County Petitioners, and direct that the Los Angeles Regional Board comply with State and federal law and this Board's policies, before addressing the bacteria TMDL in the subject Municipal NPDES permit, and further, that this TMDL and any other TMDL not be included in any Municipal NPDES Permit for the Los Angeles Region, until the decision in the *Arcadia* Case has become final.

Sincerely,

RUTAN & TUCKER, LLP

Richard Montevideo

RM:clc
Enclosures
(1) Exhibit List
(2) Exhibits 1 - 14

LIST OF EXHIBITS IN SUPPORT OF RUTAN & TUCKER'S LEGAL COMMENTS ON MAY 4, 2009 DRAFT STATE BOARD ORDER FOR FILE/PETITION NO. A-1780

DESCRIPTION	EXHIBIT NO.
March 13, 2008 Decision of Superior Court in *Arcadia* Case	1
November 26, 2008 Judgment of Superior Court in *Arcadia* Case	2
November 10, 2008 Peremptory Writ of Mandate of Superior Court in *Arcadia* Case	3
State Board Order No. WQ 91-04	4
Cited portions of Appellant Water Boards' Opening Brief on Appeal in *Arcadia* Case filed June 11, 2009	5
Cited portions of Intervenors, NRDC, the Santa Monica Baykeeper and Heal the Bay's Opening Brief in *Arcadia* Case filed June 9, 2009	6
State Board Order No. WQ 2001-15	7
Storm Water Panel Recommendations to the California State Water Resources Control Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, June 19, 2006	8
State Board Order No. WQ 98-01	9
State Board Order No. WQ 2000-11	10
November 22, 2002 EPA Guidance Memorandum on "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs."	11
State Board Order No. WQ 96-13	12
State Board Order No. WQ 2006-0012	13
April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates	14

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
COMPLEX LITIGATION CENTER

MINUTE ORDER

Date: 03/13/2008 Time: 09:52:22 AM Dept: CX104
Judicial Officer Presiding: Judge Thierry Patrick Colaw
Clerk: P. Rief

Bailiff/Court Attendant: Allison Hreha

Reporter: None

Case Init. Date: 02/09/2006

Case No: 06CC02974 Case Title: CITIES OF ARCADIA VS STATE WATER RESOURCES CONTROL

Case Category: Civil - Unlimited Case Type: Judicial Review - Other

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Event Type: Chambers Work

Causal Document: Answer to Complaint; Appendix of Authorities; Case Management Statement; Complaint; Declaration - Other; Demurrer - Other; Demurrer to Complaint; Document - Other; Ex Parte

Appearances:

PETITION FOR A WRIT OF MANDATE AND FOR DECLARATORY RELIEF

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on February 27, 2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

SEE ATTACHED RULING.

Court orders clerk to give notice.

THE CITIES OF ARCADIA, BELLFLOWER CARSON, CERRITOS, CLAREMONT, COMMERCE, DOWNEY, DUARTE, GARDENA, GLENDORA, HAWAIIAN GARDENS, IRWINDALE, LAWNDALE, MONTEREY PARK, PARAMOUNT, SANTE FE SPRINGS, SIGNAL HILL, VERNON, WALNUT, WEST COVINA, and WHITTIER, municipal corporations, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a non-profit corporation,
Petitioner Plaintiffs

vs.

THE STATE WATER RESOURCES CONTROL BOARD; and THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, etc., *et alia*,
Respondent Defendants

ORANGE COUNTY SUPERIOR COURT CASE NO. 06CC02974

NOTICE OF RULING/DECISION

The Court has before it the Petition by multiple government entity Petitioners ["Cities" or "Petitioners"] for a Writ of Mandate and for Declaratory Relief as against the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region ["Boards"] which has been extensively briefed and argued at a full day hearing on 27 February 2008. What follows is the ruling and decision by the Court on this complex and serious matter.

I. **The Basic Controversy:**

A. Petitioners contend that Respondents never considered Water Quality Standards ["Standards"] in relation to how the Standards apply to storm water [i.e. storm waters and urban runoff].

They urge the court to consider that pursuant to Water Code § 13000 et seq. and specifically Water C. § 13241 ["13241/13000"] the Respondents must consider several factors including, but not limited to, probable future beneficial uses of water, environmental characteristics of the water, water quality conditions that could be reasonably be achieved through the coordinated control of all factors which might affect the quality of water, economic considerations, and the need for developing housing within the region. See Water C. § 13241 (a) – (e).

B. Respondents argue that they did consider these 13241/13000 Standards originally in 1975 and in later reviews and that any challenge to those considerations and reviews has long since passed by way of expiration of the statute of limitations.

C. Petitioners counter that the record of events shows, and Respondents admit, that they never actually considered 13241/13000 requirements for storm water at any time, that the appropriate time to do so only became ripe at the time of the 2004 Triennial Review, and that Respondents abused their discretion by not appropriately considering the 13241/13000 factors in the 2004 Triennial Review. They want the court to order the Respondents inter alia to go back and redo the 2004 Triennial Review ["2004 TR"] and, in conformance with law, properly consider the 13241/13000 factors in relation to storm water.

II. **The Decision:**

A. **Standard of Review**

The standard of review in this matter under C.C.P. § 1085 is whether the action by a respondent was arbitrary or capricious or totally lacking in evidentiary support [i.e., substantial evidence] or whether the agency in question failed to follow the required procedure and act according to the law. *City of Carmel-by-the Sea v. Board of Supervisors* (1986) 183 Cal. App. 3d 229; *Corrales v. Bradstreet* (2007) 153 Cal. App. 4th 33, 47.

B. **Specific Issues**

1. As argued by the Respondents, is it too late pursuant to limitations periods to consider 13241/13000 in relation to storm water?

It is not.

(a) The 5th, 6th, and 8th causes of action are not barred by the statute of limitations. The 5th cause of action challenges the 2004 TR, clearly within the four year statute of C.C.P. § 343. The 6th cause of action is for declaratory relief regarding future Basin Plan amendments, Total Maximum Daily Loads of pollutants ["TMDLs"], National Pollution Discharge Eliminations System ["NPDES"] permits, and

Triennial Reviews. On its face it is not affected by the statute of limitations. Likewise is the case with the 8th cause of action.

(b) The law is clear that no statute of limitations applies to a "continuing violation of an ongoing duty." See *California Trout, Inc. v. State Board* (1989) 207 Cal. App. 3d, 585, 628. Here periodic triennial reviews were required under Water C. § 13143 and the federal Clean Water Act ["CWA"] section 1313(c) (1) as well as the duty required by Boards to consider the "discharger's cost of compliance" when the 13241/13000 factors are applicable. *City of Burbank v. State Water Resources Control Bd.* 35 Cal.4th 613, 625. Respondents had a duty to at a minimum to appropriately consider the Standards when they were presented with evidence of the deficiencies during the 2004 TR. [See below].

The case of *Howard Jarvis Taxpayers Assn. v. City of la Habra* (2001) 25 Cal.4th 809 is also instructive here. While the *Jarvis* decision was limited to tax assessments, the same reasoning applies here, that is, a new cause of action applies every time the regulation is applied to the Petitioner. Here, the Boards are applying what are purported to be defective Standards to Petitioners on a continuing and ongoing basis. The Petitioners are seeking prospective relief regarding application of the Standards until the correct 13241/13000 analysis has been performed. Each TMDL has been based upon alleged defective standards, and the relief requested involves continuing and ongoing violations of the law.

Respondents' arguments imply that Petitioners failed to challenge an invalid regulation upon its adoption, even if it did not apply to Petitioners when adopted [i.e. storm water]. They further argue that Petitioners have no right to later challenge the regulation once it is applied to them. These arguments are not supported by appropriate authority. The authority offered by Petitioners is persuasive. (See *Solid Waste Agency, Inc. v. United States Army Corps of Eng'rs* (7th Cir. 1999) 191 F. 3d 845,853 ["we doubt that a party must (or even may) bring an action [challenging an environmental regulation] before it knows that a regulation may injure it or even be applied to it"].

2. Do the doctrines of Res Judicata or Collateral Estoppel apply here?

The Petitioners have never challenged the Standards in the Basin Plan before this challenge and the doctrines of res judicata and collateral estoppel are not applicable. Some of the Petitioners previously sued the Boards based upon other matters such as purported unlawful adoption of an NPDES Permit or unlawful adoption of trash or metal TMDLs. Those lawsuits challenged particular decisions of the Boards concerning the adoption of permits and TMDLs. They did not challenge the legality of applying Standards to <u>storm water</u> without the Boards first appropriately considering the 13241/13000 factors. The 2004 TR process was never previously challenged. Those previous lawsuits involved entirely different

decisions of the Boards and completely different administrative records. They concerned completely separate primary rights. These were not identical issues, previously decided between the same parties or parties in privity. Res judicata and collateral estoppel do not apply here.

3. The Petitioners were not required to challenge the 1990 or 1996 NDPES permits. Respondents claim that Petitioners cannot challenge the Standards since they did not exhaust administrative remedies by filing a challenge to the NDPES permits issued by the Regional Board in 1990 and 1996 pursuant to the process described in Water C. sections 13320 and 13330. Those sections do not apply to this challenge made by Petitioners. It is not the adoption of an NPDES permit that triggered the application of the Standards which Petitioners challenge. It is rather the adoption of TMDLs followed by their incorporation into the NPDES permit that triggers the application of the Standards. *City of Arcadia v. State Board* (2006) 135 Cal. App. 4th 1392, 1404; *City of Arcadia v. US EPA* (9th Cir. 2005) 411 F.3d 1103, 1105.
The Boards in this record aptly explained the process whereby the imposition of TMDLs trigger the injury or wrong claimed here:
"we use water quality standards to determine which water bodies are impaired and, thus, to identify water bodies for which we must develop total maximum daily loads (TMDLs). These standards translate into the numeric targets in a TMDL." (AR 2002 BAC 6.)
It would not have been timely or ripe for the Petitioners to challenge the Standards by challenging the 1990 or 1996 NDPES permits.

4. Does Water C. § 13241 require consideration by the Boards of "probable" not "potential" future uses?
This portion of the Petitioners' challenge was not argued orally to any great extent, but it was briefed at some length in the Petition, Opposition and Reply.
Responding Parties characterize this as a side battle over semantics (page 34 opposition Brief).
In the Prayer for Relief of the Petition, Moving Parties ask for specific exclusion of "potential" use designations in the 2004 Triennial Review as opposed to "probable" use designations. Since it is integral to the relief requested it requires examination and analysis.
Petitioners argue that 13241(a) specifies "probable future beneficial uses of water" rather than "potential" uses. By using a vague "potential uses" objective the Boards are not in compliance with the mandate of the statute, and are using improperly designated uses which will lead to improper Standards. These in turn will lead to unreasonable and unachievable TMDLs. (Page 32 of Petitioners' Brief.)

Respondents argue that the Boards designation of "potential uses" is well founded in both state and federal law.

Section 13241 does not use the word "potential" anywhere in the statute. It does describe the factors previously discussed and specifically states that a factor "to be considered" is "Past, present, and probable future beneficial uses of water." Water C. § 13241 (a).

The Boards argue that the statutory wording "factors to be considered in establishing water quality objectives shall include, but not necessarily be limited to ...." (Water C. § 13241 emphasis added.) *authorizes* the Boards to consider other factors such as potential uses. When terms are not clearly defined in statutes, interpreting such terms is a matter "within a regional board's discretion" and worthy due deference. (Citing *City of Arcadia v. State Water Resources Control Bd.* 135 Cal. App. 4th 1392, 1415 [Jan. 2006]. They argue further that the potential label is really the Board's nomenclature for "probable future beneficial uses". (Opposition page 30, citing AR 2004 TR 1348).

As pointed out by Petitioners, however, "the text of the Basin Plan itself shows that the difference between the terms "probable future beneficial uses" and "potential uses" is not merely semantics. According to the Basin Plan, "potential" beneficial uses can be designated for water bodies for any of five reasons, including: (1) implementation of the State Board's policy entitled "Sources of Drinking Water Policy"; (2) plans to put the water to such future use; (3) "**potential to put the water to such future use**"; (4) designation of a use by the Regional Board "**as a regional water quality goal**," or (5) "**public desire**" to put the water to such future use. (AR 1994 AMD 2731; emphasis added.)" Petitioners argue persuasively that the third reason above, that there is some undefined "potential to put the water to such future use" is remarkably vague.

The real problem is that basing Standards on "potential" uses is inconsistent with the clear and specific requirement in the law that Boards consider "probable future" uses. It is also inconsistent with section 13000 which requires that the Boards consider the "demands being made and to be made" on state waters. (Water C. § 13000 emphasis added.) The factors listed by the Legislature in 13241 were chosen for a reason. *Bonnell v. Medical Bd. of California* (2003) 31 Cal. App. 4th 1255, 1265 [courts will "not accord deference" to an interpretation which "is incorrect in light of the unambiguous language of the statute"]. Respondents have acted contrary to the law by applying the vague "potential" use designations to storm water.

5. The Standards cannot be applied to storm water without appropriate consideration of the 13241/13000 factors. There is no substantial evidence showing that the Boards considered the 13241/13000 factors before applying the Standards

to storm water in the 1975 Plan Adoption, the 1994 Amendment, or the 2002 Bacteria Objectives. In *City of Burbank, supra,* the California Supreme Court held that if NDPES permit conditions were not compelled by federal law, the Boards were required to consider economic impacts including the "discharger's cost of compliance." (Id. at 618.) The Court interpreted the need to consider economics as requiring a consideration of the cost of compliance on the cities. (Id. at 625.) So, under *Burbank*, the 13241 factors cannot be evaluated in a vacuum. They must be considered in light of the impacts on the "dischargers" themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it originally was adopted. The Respondents admit this. "[T]he regional board considered storm water to be essentially uncontrollable in 1975". (Opposition at page 23:24-25.)
This was confirmed by the State Board in a 1991 Order when it stated:
"The Basin Plan specified requirements and controls for "traditional" point sources, but storm water discharges were not covered... The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. **Clearly, the effluent limitations listed for other point sources are not meant to apply."**
(Second RJN, Ex. "A", p.6; emphasis added.)
There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water.

C. **The 2004 Triennial Review**
The 2004 TR was the appropriate vehicle at the appropriate time for the Board to consider the 13000 factors. Even Respondents agree with this. As they state in the opposition:

"If petitioners are truly interested in a new 13241 analysis related to existing objectives, and believe the analysis to date has been inadequate, they plainly have recourse. Petitioners may submit specific evidence during the triennial review process demonstrating why any specific objective is not currently appropriate. The triennial review hearing (the first phase of the review process) is the proper and legally contemplated time and place to consider such evidence."
(Opposition page 28-29.)

This is precisely what Petitioners did do when they submitted extensive comments along with a Basin Plan Review Report (AR 2004 TR177 *et seq.*) to the Regional Board. Those comments and the suggestions in the Basin Plan Review Report ["Review Report"] were rejected out of hand by the Board as being "legally

deficient" and "beyond the scope of the triennial review." This was an abuse of discretion. Both sides agreed in oral argument that the court could look to AR 2004 TR 1342 *et seq*., and from reading the comments and responses determine whether or not the Board abused their discretion. The Board and staff may have read portions or even all of the comments and Review Report, but it is clear that they did not consider it or, more to the point, conduct the analysis of the Standards required under 13241/13000.

To quote from the response to comments:
"The staff does agree that economic considerations and housing (along with the other factors identified in Water Code section 13241) are to be addressed when establishing a water quality objective or amending an existing water quality objective."
"The plain language of the Porter-Cologne Act only requires consideration of economics, housing, and other factors **when establishing the water quality objectives in the first instance. Moreover, the Water Code does not contemplate a continual reassessment of those considerations, which is what the commentator desires.** The section 13241 considerations do not become a part of the Basin Plan and hence are not part of regular review.
For the forgoing reasons and as discussed with more specificity in Response to comments 26.4-26.8, the **commentators objection is legally incorrect and beyond the scope of the Triennial Review**." (AR 2004 TR 1342-1343, emph. added; also similar comments at 1344, 1346 ["The commentator's economic contentions are noted, but they are beyond the scope of this triennial review."], 1347 ["commentator's procedural objections ... (are) beyond the scope of the triennial review."], and 1352 ["... is beyond the scope of triennial review."]).

To argue that the Petitioners should have attacked the Standards back in 1975, 1990, or 1994 when they had no reason to and were not harmed thereby, to suggest that the triennial review is the proper time and place to urge changes and then to fail to conduct the triennial review as suggested by the Boards themselves and as required by law is precisely the type of behavior that was so bitterly criticized in a concurring opinion of *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 632-633.
The Board should not have brushed off the Petitioners' comments and urgings to perform the 13241/13000 analysis at the 2004 TR. Had they included the petitioners in the process, studied, considered, and weighed their suggestions in light of 13241 factors, and then decided to make no changes, then this court would have deferred to their properly exercised discretion. Here they abused their discretion, did not proceed as the law required, and the writ should therefore issue.

The Legislature's finding in Water C. § 13000 of the people's primary interest in clean water and in the "conservation, control, and utilization of the water resources of the state" is the law of the land. Everyone wants the highest water quality "which is reasonable, considering all demands being made and to be made on those waters". (Id.) That legislative mandate as set forth in sections 13000 and 13241 including the requirements of reasonable consideration of "probable future beneficial uses of water" and "economic considerations" must be followed in compliance with the law.

D. Judicial Notice

The request by Respondents for Judicial Notice of Exhibits 9, 14 and 15 are denied. Respondents should have sought to augment the Administrative Record for these documents and Nos. 14 and 15 are irrelevant in any event. Exhibit 9 is a trial court opinion concerning the propriety of adopting a TMDL for metals for the Los Angeles River based upon "potential use" designations. It is not proper authority and is irrelevant to this proceeding.

III. **Disposition**

A. The Petition for a Writ of Mandate is granted and a Writ shall issue as to the 1st through 8th Causes of Action as set forth in the prayer at paragraphs (1) – (7) as to water quality Standards and objectives of the Basin Plan as those Standards and objectives affect storm water discharges and urban runoff.

B. The prevailing parties are the Petitioners. They shall prepare the appropriate Writ and any Order for Court review and signature.

C. The Clerk shall give Notice.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CITY OF ARCADIA, et al. Plaintiff(s) v. STATE WATER RESOURCES CONTROL BOARD, et al. Defendant(s)	CASE NUMBER: 06CC02974 CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 3-13-08

I, ALAN SLATER, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 3-13-08, I served the Minute Order, dated 3-13-08, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

Peter J. Howell, Esq.
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626

Richard Montevideo, Esq.
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626

Jennifer Novak, Esq.
State of California, Dept. of Justice
Office of the Attorney General
300 South Spring Street, Suite 5000
Los Angeles, CA 90013

Michael W. Hughes, Esq.
State of California, Dept. of Justice
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Michael J. Levy, Esq.
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, CA 95814

ALAN SLATER,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 3-13-08

By: _____
P. Rief, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL

EXHIBIT 2

RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO (State Bar No. 116051)
PETER J. HOWELL (State Bar No. 227636)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1950
Telephone: 714-641-5100
Facsimile: 714-546-9035

Attorneys for Petitioners

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE , CENTRAL JUSTICE CENTER

THE CITIES OF ARCADIA, BELLFLOWER, CARSON, CERRITOS, CLAREMONT, COMMERCE, DOWNEY, DUARTE, GARDENA, GLENDORA, HAWAIIAN GARDENS, IRWINDALE, LAWNDALE, MONTEREY PARK, PARAMOUNT, SANTA FE SPRINGS, SIGNAL HILL, VERNON, WALNUT, WEST COVINA, and WHITTIER, municipal corporations, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a non-profit corporation,

Petitioners/Plaintiffs,

vs.

THE STATE WATER RESOURCES CONTROL BOARD; and THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION

Respondents/Defendants.

vs.

NATURAL RESOURCES DEFENSE COUNCIL; HEAL THE BAY; and SANTA MONICA BAYKEEPER,

Intervenors.

Case No. 06CC02974
Honorable Thierry Patrick Colaw
Dept: CX-104

~~[Proposed]~~ JUDGMENT

This matter came on regularly for hearing and trial at 10:00 a.m. on February 27, 2008, in Department CX-104 of the above entitled court, the Honorable Thierry Patrick Colaw, presiding. Richard Montevideo and Peter J. Howell of Rutan & Tucker, LLP appeared on behalf of Petitioners and Plaintiffs, the Cities of Arcadia, Bellflower, Carson, Cerritos, Claremont, Commerce, Downey, Duarte, Glendora, Hawaiian Gardens, Irwindale, Lawndale, Monterey Park, Paramount, Santa Fe Springs, Signal Hill, Vernon, and Whittier, and the Building Industry Legal Defense Foundation (collectively "Petitioners"). Jennifer F. Novak and Michael W. Hughes of the California Attorney General's Office appeared on behalf of Respondents and Defendants, the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region (collectively "Respondents"). The Petition/Complaint as filed also included as Petitioners and Plaintiffs the Cities of Gardena, Walnut and West Covina, but these cities had previously separately voluntarily dismissed their claims without prejudice. Intervenors, the Natural Resources Defense Council, Inc. ("NRDC"), Heal the Bay and the Santa Monica Baykeeper ("Intervenors") represented by David S. Beckman and Michelle S. Mehta of the NRDC, were permitted to intervene in this action on the side of the Respondents, by Order of this Court dated May 1, 2008.

The matter having been extensively briefed, and the Court having reviewed the administrative record of Respondents' proceedings in this matter, along with the pleadings, the briefs submitted by counsel and the judicially noticed materials, having considered the oral arguments of counsel and having issued its Notice of Ruling/Decision on March 13, 2008, and with the Court having previously signed judgments on July 2 and November 10, 2008, which were subsequently vacated,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment is hereby entered in favor of Petitioners and against Respondents and Intervenors on the Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief.

2. A Peremptory Writ of Mandate shall issue under the seal of this Court commanding the Respondents, and their board members, officers, agents, attorneys, employees, and persons and entities acting on behalf of, or through color of the authority of said Respondents, in accordance with each Respondent's respective obligations under the law:

(a) to void and set aside Los Angeles Regional Water Quality Control Board Resolution No. 2005-003, dated March 3, 2005, wherein the 2004 Triennial Review of the Water Quality Control Plan for the Los Angeles Region ("Basin Plan") was concluded;

(b) during the course of the reopened 2004 Triennial Review, or if Respondents determine not to reopen the 2004 Triennial Review, then during the course of the next scheduled triennial review: (i) to review and, where appropriate, revise the Water Quality Standards ("Standards")[1] in the Basin Plan, which apply or are to be applied to storm water and urban runoff (collectively "Stormwater"),[2] in light of the factors and requirements set forth under Water Code sections 13241 and 13000, including, but not limited to, the specific factors set forth under Water Code sections 13241(a) – (f), and the considerations provided under Water Code section 13000; (ii) to revise the Standards that apply or are to be applied to Stormwater, such that no "potential" use designations for such Standards remain in the Basin Plan; and (iii) to revise the Standards, as appropriate, during the Triennial Review process, after a full and fair public hearing or hearings, and before concluding the triennial review.

3. The Court hereby finds and declares that it is contrary to law to base

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[1] As referenced herein, the term "Water Quality Standards" or "Standards" shall mean the designated beneficial uses of the waters, as well as the water quality objectives established to achieve such designated beneficial uses.

[2] Federal law defines "storm water" to include urban runoff, *i.e.*, "surface runoff and drainage." (*See* 40 C.F.R. § 122.26(b)(13).)

Water Quality Standards on "potential" beneficial uses, as such a practice is contrary to the clear and specific requirement set forth in Water Code section 13241(a) (which requires the consideration of "probable future beneficial uses" when establishing Standards), and as such practice is inconsistent with Water Code section 13000 (which requires a consideration of the "demands being made and to be made" on state waters).

4. The Court, having reviewed the applicable provisions of State and federal law governing the triennial review process to be followed when reviewing and revising Standards (*see* 33 U.S.C. § 1313(c)(1) and Cal. Water Code §§ 13143 and 13240), hereby further declares that a public hearing is to be conducted as a part of the triennial review process, and that such public hearing is to be conducted for the express purpose of reviewing and, as appropriate, modifying the Standards or adopting new Standards. (*See* 33 U.S.C. § 1313(c)(1).) The Court declares that, under applicable State and federal law, the triennial review process is *not* to be concluded until such time as the need for appropriate modifications to the Standards has been considered, and until such time as actual modifications, where appropriate, have been made to the Standards or determined not to be made.

5. Petitioners are awarded their costs of suit incurred.

Dated: 26 November, 2008

The Honorable Thierry Patrick Colaw
Judge of the Superior Court of California

RESPECTFULLY SUBMITTED BY:

RUTAN & TUCKER, LLP

By:
Richard Montevideo
Attorney for Petitioners/Plaintiffs

PROOF OF SERVICE BY FIRST CLASS AND ELECTRONIC MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On November 21, 2008, I served on the interested parties in said action the following documents:

[Proposed] JUDGMENT

Jennifer F. Novak, Esq. — Attorneys for Respondents
Michael W. Hughes, Esq.
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
jennifer.novak@doj.ca.gov
michaelw.hughes@doj.ca.gov

David Beckman, Esq. — Attorney for Intervenors
Michelle Mehta
Natural Resources Defense Council, Inc.
1314 Second Street
Santa Monica, CA 90401
dbeckman@nrdc.org
mmehta@nrdc.org

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I also served a copy of the above-referenced document on the interested parties by electronic mail at their email address(es) listed below their mailing addresses as stated above. The transmission of the document(s) was reported as complete and without error.

Executed on November 21, 2008, at Costa Mesa, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cathryn L. Campbell
(Type or print name)

Cathryn L. Campbell
(Signature)

227/065121-0072
932660.01 a11/20/08

EXHIBIT 3

EDMUND G. BROWN JR., Attorney General
of the State of California
RICHARD MAGASIN,,
Supervising Deputy Attorney General
JENNIFER F. NOVAK (State Bar No. 183882)
MICHAEL W. HUGHES, (State Bar No. 242330)
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Attorneys for Respondents/Defendants
STATE WATER RESOURCES CONTROL BOARD
and CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD. LOS ANGELES REGION

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE CITIES OF ARCADIA, BELLFLOWER, CARSON, CERRITOS, CLAREMONT, COMMERCE, DOWNEY, DUARTE, GARDENA, GLENDORA, HAWAIIAN GARDENS, IRWINDALE, LAWNDALE, MONTEREY PARK, PARAMOUNT, SANTA FE SPRINGS, SIGNAL HILL, VERNON, WALNUT, WEST COVINA, and WHITTIER, municipal corporations, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a non-profit corporation,

Petitioners/Plaintiffs,

vs.

THE STATE WATER RESOURCES CONTROL BOARD; and THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, and DOES 1 through 50, inclusive,

Respondents/Defendants.

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.; HEAL THE BAY; and SANTA MONICA BAYKEEPER

Intervenors.

Case No. 06CC02974
Honorable Thierry Patrick Colaw
Dept: CX-104

[Proposed] PEREMPTORY WRIT OF MANDATE

TO RESPONDENTS STATE WATER RESOURCES CONTROL BOARD AND THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, AND TO THEIR BOARD MEMBERS, OFFICERS, AGENTS, ATTORNEYS, EMPLOYEES, AND TO ALL PERSONS ACTING ON THEIR BEHALF, OR THROUGH OR UNDER COLOR OF THEIR AUTHORITY:

Judgment having been entered in this action, ordering that a peremptory writ of mandate be issued from this Court,

YOU ARE HEREBY DIRECTED AND COMMANDED, UPON RECEIPT OF THIS WRIT, IN ACCORDANCE WITH YOUR RESPECTIVE OBLIGATIONS UNDER THE LAW:

(1) To void and set aside Los Angeles Regional Water Quality Control Board Resolution No. 2005-003, dated March 3, 2005, wherein the 2004 Triennial Review of the Water Quality Control Plan for the Los Angeles Region ("Basin Plan") was concluded;

(2) During the course of reopened 2004 Triennial Review, or if Respondents determine not to reopen the 2004 Triennial Review, then during the course of the next scheduled triennial review of the Water Quality Standards ("Standards")[1] in the Basin Plan:

(a) to review and, where appropriate, revise the Standards which apply or are to be applied to storm water and urban runoff (collectively "Stormwater"),[2] in light of the factors and requirements set forth under Water Code sections 13241 and 13000, including, but not limited to, the specific factors set forth under Water Code sections 13241(a) – (f), and the

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[1] As referenced herein, the term "Water Quality Standards" or "Standards" shall mean the designated beneficial uses of the waters, as well as the water quality objectives established to achieve such designated beneficial uses.

[2] Federal law defines "storm water" to include urban runoff, *i.e.*, "surface runoff and drainage." (*See* 40 C.F.R. § 122.26(b)(13).)

considerations provided under Water Code section 13000;

(b) to revise the Standards that apply or are to be applied to Stormwater, such that no "potential" use designations for such Standards remain in the Basin Plan; and

(c) to revise the Standards, as appropriate, during said triennial review process, consistent with subsections (a) and (b) above and State and federal law, after a full and fair public hearing or hearings, and before concluding the triennial review.

(3) To make and file a Return to this Writ within ninety (90) days from the date Respondents have taken all action necessary to comply with paragraphs (1) & (2), above.

WITNESS the Honorable Thierry Patrick Colaw, Judge of the Superior Court.

ATTEST my hand and the seal of this Court, this 10 day of NOVEMBER 2008.

ORANGE COUNTY SUPERIOR COURT
CLERK ALAN CARLSON

Dated: 11/10/08 By: _____

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

LET THE FOREGOING WRIT ISSUE.

Dated: 10 November 2008

_____
The Honorable Thierry Patrick Colaw
Judge of the Superior Court of California

RESPECTFULLY SUBMITTED BY:

By: _____
JENNIFER F. NOVAK
Attorney for Respondents/Defendants

EXHIBIT 4

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of NATURAL RESOURCES DEFENSE COUNCIL, INC. For Review of Waste Discharge Requirements Order No. 90-079 of the California Regional Water Quality Control Board, Los Angeles Region for Los Angeles County and Co-Permittees. NPDES Permit No. CA0061654. Our File No. A-693.	ORDER NO. WQ 91-04

BY THE BOARD:

On July 18, 1990, the State Water Resources Control Board (State Board) received a petition from Natural Resources Defense Council, Inc. (petitioner), seeking review of waste discharge requirements which the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) adopted in Order No. 90-079, regulating discharges of storm water from municipal separate storm sewers throughout Los Angeles County.

Many of the issues raised by the petitioner are discussed in great detail in Order No. WQ 91-03, which we are also issuing today, and which concerns a permit issued by the Regional Water Quality Control Board, San Francisco Bay Region (San Francisco Bay Regional Board) regulating discharges of storm water from municipalities in the Santa Clara Valley. Given the similarity of these issues, we will discuss most of the

petitioner's contentions in only a summary manner, and will refer to our determinations in Order No. WQ 91-03.[1] In adopting that Order, we did consider the petitioner's arguments, and also those of the Regional Board, the dischargers, and interested persons.

I. BACKGROUND

As we discussed in Order No. WQ 91-03, over the last twenty years, the Environmental Protection Agency (EPA), has developed a program to regulate discharges of storm water and urban runoff through the National Pollutant Discharge Elimination System (NPDES) of permits. The requirements for this program are contained in Clean Water Act Section 402(p). In this case, as in the case of the San Francisco Bay Regional Board, the Regional Board adopted its permit regulating discharges from municipal separate storm sewer systems prior to EPA's promulgation of regulations implementing Section 402(p).

As did the San Francisco Bay Regional Board, the Los Angeles Regional Board also proceeded to take earlier steps to study and control storm water discharges while EPA's program development was delayed. In 1975, the Regional Board adopted its Water Quality Control Plan (Basin Plan).[2] The Basin Plan characterized constituents commonly found in runoff and roughly estimated runoff wasteloads through the Los Angeles River and

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1 A major portion of our other Order involved discussion of Clean Water Act Section 304(l). That section does not apply here. However, the discussion concerning the regulations which EPA adopted to implement Section 304(l), i.e. 40 CFR Section 122.44(d), is also relevant to this matter.

2 Water Quality Plan Report, Santa Clara River Basin (4A) and Los Angeles River Basin (4B) (March 1975). The Basin Plan was approved by the State Board in Resolution No. 75-21.

Santa Clara River sub-basins.[3] The Basin Plan also compared local runoff data with the results of several investigations conducted elsewhere in the nation.

The Basin Plan identified beneficial uses of the surface waters within the region, established water quality objectives to protect and enhance these uses, and described a detailed "Implementation Plan" to achieve those objectives. The beneficial uses of the surfaces waters typically include ground water recharge (replenishment), contact and non-contact recreation and wildlife habitat.[4] A few creeks also support warm and cold water habitat, fish migration and fish spawning uses. Some reservoirs also provide municipal, industrial supply and industrial process water uses.[5] Rare and endangered habitat and agricultural supply were identified as existing beneficial uses of several surface waters also.[6] The Basin Plan listed marine habitat, contact and non-contact recreation, commercial and sport fishing, navigation, and shellfish harvesting as the beneficial uses of the Pacific Ocean.

The Basin Plan also established water quality objectives. First, it referred to several state policies for water quality control and statewide plans. These include the "Water Quality Control Policy for the Enclosed Bays and Estuaries

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3 *The 1975 Basin Plan divided its region into two sub-basins: the Santa Clara River Basin ("4A") and the Los Angeles River Basin ("4B").*

4 *1975 Basin Plan, Table 2-3.*

5 *Id.*

6 *Id.*

of California"[7] and the "Water Quality Control Plan for Ocean Waters of California".[8] The Basin Plan stated that the Ocean Plan and the Bays and Estuaries Policies established effluent quality requirements for certain discharges. "Land runoff", however, was specifically excluded from the effluent requirements.[9]

The receiving water quality objectives set forth in the Basin Plan included several general requirements and narrative objectives. For inland surface waters, enclosed bays, and estuaries in the Los Angeles River sub-basin, narrative receiving water quality objectives were specified for tastes and odors, floating material, suspended material, settleable material, oil and grease, sediment, turbidity, bacteria, and several other pollutants.[10] The narrative toxicity objective required that all waters be maintained free of "toxic substances in concentrations that are toxic to, or produce detrimental physiological responses in human, plant, animal, or aquatic life."[11] The Basin Plan

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7 The "Bays and Estuaries Policy", as this document is know, was adopted on May 16, 1974.

8 The State Board first adopted this plan, commonly known as the "Ocean Plan", on July 6, 1972. The State Board approved amendments to the Ocean Plan on March 22, 1990 by Resolution No. 90-27.

9 The 1975 Basin Plan states:

> *"This policy does not apply to wastes from vessels or land runoff except as specifically indicated for siltation and combined sewer flows." See page I-4-5.*

10 1975 Basin Plan, pages I-4-6 through I-4-8.

11 Ibid., at page I-4-8.

further specified "limiting concentrations" for inorganic chemical constituents (primarily heavy metals) in waters used as domestic and municipal supply.[12] It also prescribed "mean mineral quality objectives" for the Los Angeles River, the San Gabriel River and their "tributaries".[13]

The Basin Plan also contained an "Implementation Plan" to reduce wasteloads from various pollutant sources and their effects on the basin's waters. For urban runoff and storm water discharges, the Basin Plan indicated that the pollutants found in runoff discharges varied considerably and exhibited a seasonal nature. More specifically, the Plan stated that the "bulk of these mass emissions is normally experienced in only a few days of wet weather during the rainy season."[14] Although certain beneficial uses, such as groundwater recharge and recreational uses, may be temporarily impaired during storm flow conditions, the Basin Plan noted few traditional "end-of-pipe" controls existed for runoff flows. It explained:

> "...there is little, if anything, that can be done to mitigate the effects of such runoff except for improved air pollution control practices, improved urban housekeeping, and improved environmental levels of performance for automotive equipment."[15]

12 Ibid., at page I-4-9.

13 Ibid., at Table 4-1 and pages I-4-11 and I-4-12.

14 1975 Basin Plan, "Impact of Runoff Waste Loads", page II-15-94.

15 Id.

Although much runoff data was included in the Basin Plan, limited information about the significance or effects of runoff discharges on receiving water quality existed.

The Basin Plan specified requirements and controls for "traditional" point sources,[16] but storm water discharges were not covered, based on the difficulty of their regulation:

> "...no practical and economical means has yet been developed for containment and treatment of urban runoff wastes for reduction of pollutants prior to downstream release, nor are standards for such measures presently in existence or contemplated for the foreseeable future, at least on a widespread basis....There are presently no generally applicable effluent limits nor water pollution control facilities in connection with urban runoff that appear practical or economical. The emphasis for water quality control from this standpoint should be public education, public cooperation in improved (outdoor) housekeeping, and continued search of solutions to the air pollution problems."[17] (Emphasis added)

The Regional Board has not amended the portions of its Basin Plan relating to storm water and urban runoff since 1975. Therefore, we conclude that the Basin Plan does not address controls on such discharges, except for the few practices listed above. Clearly, the effluent limitations listed for other point sources are not meant to apply. In addition, there are no

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16 As was explained in Order No. WQ 91-03, throughout the years many documents have treated storm water discharge as a nonpoint source, even though it is legally a point source. This has led to some confusion in terminology. However, it is often obvious from statements in the document that decision makers have sought to exclude storm water from requirements otherwise applicable to point sources.

17 Ibid., at pages I-5-87 and I-5-88.

numeric water quality standards which have yet been developed.[18] On April 11, 1991, the State Board adopted the Water Quality Control Plan for Inland Surface Waters (Inland Plan) which is applicable here. The Inland Plan establishes numeric water quality objectives but allows dischargers of storm water a maximum of ten years to achieve compliance.

As was discussed in Order No. WQ 91-03, in 1987 the federal Clean Water Act was amended[19] to add provisions specifically requiring a regulatory program for storm water discharges. Section 402 of the Clean Water Act was amended to add subsection 402(p), which establishes NPDES permit application requirements for municipal storm water discharges and for storm water discharges associated with industrial activities.[20]

Section 402(p) includes the following requirements for municipal discharges of storm water:

> "Permits for discharges from municipal storm sewers--(i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added.)

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18 The petitioner contends that numerical objectives contained in the Ocean Plan apply to discharges of storm water. We shall discuss that contention infra.

19 The amendments are entitled, Water Quality Act of 1987, Public Law 100-4 (February 4, 1987).

20 Section 405(p) of the Water Quality Act of 1987.

The Water Quality Act of 1987 also added Section 320 to the Clean Water Act. This amendment created the National Estuaries Program, an effort to develop and implement comprehensive conservation and management plans for estuaries of national importance. In December 1987, a federal appropriations act formally included Santa Monica Bay in EPA's National Estuaries Program.[21] The State of California then organized the Santa Monica Bay Restoration Project to coordinate local, state, and federal activities to develop the required plan which would improve the condition of Santa Monica Bay. The nomination document for this project indicated that urban runoff and storm water discharges may contain heavy metals, organic constituents, pathogens, and other pollutants that threaten or may impair the beneficial uses of Santa Monica Bay.[22] As a part of this project, the Los Angeles Regional Board--and the numerous local and regional governments and environmental interest groups that also participate in the project--began a more thorough investigation of runoff discharges to Santa Monica Bay. Because existing runoff data was incomplete or inconsistent, the Santa Monica Bay Restoration Project initiated detailed monitoring studies to identify pollutants in runoff flow, especially pathogens, and to assess their effects on the bay. This monitoring work is now in progress.

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21 National Estuary Program, The Nomination of Santa Monica Bay, Environmental Affairs Agency, May 1988.

22 Ibid., see "Executive Summary", page viii, and "Storm Drains and Runoff", page 41.

The permit which we are reviewing here was the result of a cooperative effort of the "Storm Water Permit Work Group," which was established to fulfill part of the objectives of the Santa Monica Bay Restoration Project. The Work Group assisted in drafting the permit.

In order to implement the Basin Plan, the provisions of state law regarding adoption of waste discharge requirements,[23] and the Clean Water Act provisions regarding storm water permits, the Regional Board issued a draft NPDES permit to regulate urban runoff and storm water discharged throughout Los Angeles County. The revised draft permit designated the County of Los Angeles as the "Principal Permittee" and 16 cities as "Co-permittees" (the dischargers). A workshop was held by the Regional Board on April 23, 1990, and a public hearing was held on June 18, 1990, and on the latter date the Regional Board adopted the NPDES permit (NPDES permit CA-0061654; Regional Board Order No. 90-079). Subsequently, the petitioner filed a timely petition for review of the NPDES permit.

II. CONTENTIONS AND FINDINGS

The petition raises a number of contentions which all address whether the permit must include numeric, water quality-based effluent limitations. The petitioner argues that the Clean Water Act requires permits regulating municipal discharges of storm water to prescribe numeric effluent limitations for toxic pollutants. The petitioner also contends that the permit does

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23 California Water Code Section 13000 et seq.

not require controls which reduce pollutants to the "maximum extent practicable". Finally, the petitioner argues that the permit does not comply with the three-year time schedule required in Clean Water Act Section 402(p).

A. The Need for Numeric Effluent Limitations

The petitioners' arguments are based on the premise that the dischargers' municipal separate storm sewer system discharges pollutants to Santa Monica Bay, and that these discharges violate numeric water quality standards in the bay. The numeric standards which the petitioner relies upon are found in the Ocean Plan. As we shall explain, the petitioner's broad assertions vastly oversimplify the complex nature of the dischargers' flood control and drainage facilities, imply that the storm sewer system discharges only into Santa Monica Bay, and misconstrue ambient water quality criteria, receiving water quality standards and effluent limitations.

The County of Los Angeles, Department of Public Works' municipal separate storm sewer system serves a geographic area greater than 4,000 square miles[24] and includes more than 87 overlapping local governmental jurisdictions. This system, a vast network of catchments, street gutters, conduits, pipes, and channels that were designed for drainage and flood control purposes, collects urban runoff flows and storm water flows from throughout Los Angeles County. The County's Department of Public Works and 87 cities own, operate, or maintain this enormous

24 *See Regional Board's Response to Petition, page 10.*

municipal separate storm sewer system. More than 5,000 outfalls or "point sources" discharge these runoff flows into both constructed works and the natural streams, rivers, and other surface water bodies that comprise the Los Angeles River hydrologic unit.

As we discussed in Order No. WQ 91-03, the specific location at which the storm water outfall intersects receiving waters is where the "point source" discharge occurs. While the precise location of each of the several thousand outfalls in Los Angeles County is understandably omitted from the record, the substantial majority of these outfalls discharge urban runoff and storm water flows to surface waters--such as Ballona Creek, Coyote Creek, and San Antonia Creek, the Los Angeles River and the San Gabriel River, Rio Hondo, and other water bodies--throughout the hydrologic basin.[25]

Obviously, not all of the dischargers' 5,000 municipal separate storm sewer system outfalls actually discharge directly to Santa Monica Bay. Although the numerous natural water courses which receive storm water generally are ultimately tributary to Santa Monica Bay, they are the receiving waters. As such, these natural water courses cannot be considered elements of the dischargers' municipal separate storm sewer system. In fact, many of these surface waters are clearly identified in the Los Angeles Regional Board's Basin Plan.

25 The nomination document for the Santa Monica Bay Restoration Project stated that "over 60 storm drains" empty into the Bay.

In the Los Angeles Basin, the storm sewer outfalls generally discharge to the water courses upstream from Santa Monica Bay. Both Santa Monica Bay and the water courses which receive the storm water discharges have beneficial uses. However, the uses of the streams, creeks, reservoirs and rivers in the Los Angeles River Basin are not the same as the uses of Santa Monica Bay. The upstream waters support fresh water uses, while Santa Monica Bay sustains marine water uses.

As was described above, while the Basin Plan does include narrative water quality objectives for the upstream surface waters, the Regional Board has not yet developed numeric objectives for all of the pollutants the petitioner enumerates. Although the Inland Plan does contain numeric objectives, up to ten years is allowed for compliance. The Ocean Plan also includes numeric standards, but these do not apply to discharges of storm water.

The Ocean Plan states that all parts are applicable to point source discharges to the ocean. Narrative water quality objectives and toxic materials limitations (Table B) do apply to nonpoint sources, but compliance is determined by direct measurement in receiving waters. The petitioner requests that the storm water discharges be subject to Table B, and also to Table A (which is meant only to apply to publicly-owned treatment works).

While on its face, Table B may appear to apply to storm water discharges, it is clear from reading the Functional

Equivalent Document,[26] which was adopted by the State Board at the same time as the Ocean Plan, that neither Table A nor Table B are meant to apply to storm water discharges:

> "The attainability analysis did not include stormwater discharges because there are few data available on pollutant concentrations in stormdrains. EPA's proposed regulations for stormwater discharges do not use water quality-based effluent limits for stormdrains.[27] Instead, an approach based on Best Management Practices is proposed, following an initial period of characterization.
>
> "We do not propose to apply water quality-based effluent limits such as Table B to stormdrains at this time. Technology-based standards will not be based on Table A, but on Best Management Practices. Since the Table B objectives represent levels of pollutants that are protective of beneficial uses they may be applied to stormdrains at some future date. We do not anticipate that this would occur until adequate characterization data are available so that attainability can be assessed and implementation measures established."

Following the above statement, the Functional Equivalent Document states that the Plan explains how to apply Table B objectives to nonpoint sources. From this statement, it is clear that in drafting the Ocean Plan the State Board was viewing storm water discharges as nonpoint sources. This characterization is understandable. Storm water discharges,

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26 Functional Equivalent Document, Amendment of the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (March 1990), at pages 33 and 34.

27 It appears that the reference here was to numeric water quality-based limitations, since such limitations are required in Table B. As we explained in Order No. WQ 91-03, water quality-based limitations need not always be numeric.

while ultimately flowing through a point source to receiving waters, are by nature more akin to nonpoint sources as they flow from diffuse sources over land surfaces. This point is discussed in the Preamble to EPA's storm water regulations:

> "For the purpose of [national assessments of water quality], urban runoff was considered to be a diffuse source or nonpoint source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the [Clean Water Act]." 55 Federal Register 47991.

We therefore conclude that the petitioner has misinterpreted appropriate criteria and the applicability of Ocean Plan provisions to storm water. There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or in any statewide plan that apply to storm water discharges. This absence, however, will not in any way diminish the permit's enforceability or its ability to reduce pollutants in storm water discharges substantially. While numeric objectives are contained in the Inland Plan, these need not be achieved for up to ten years. In addition, the Plan endorses the application of "best management practices" rather than numeric limitations as a means of reducing the level of pollutants in storm water discharges.

The permit which the Regional Board adopted is very similar to that reviewed in Order No. WQ 91-03. The NPDES permit employs a two-fold strategy: It effectively prohibits non-storm

water discharges and illicit connections; and, it requires a comprehensive series of regulatory, governmental, and educational control measures.

As in the case of the permit issued by the San Francisco Bay Regional Board, the method by which the specific control activities will be implemented is that the dischargers must submit an Implementation Plan for approval by the Regional Board's Executive Officer, and then must implement the Plan. Thus, the permit lists some, but certainly not all of the management practices which will be undertaken. The remaining specific practices will be developed over a two-year period starting with adoption of the NPDES permit. In addition, the "co-participant" cities, which have not yet been added to the permit, are also being required to select appropriate control measures.

Although the permit does not make specific reference to violation of water quality standards, the permit will be read so as to require the implementation of practices which will achieve compliance with applicable standards. Such a requirement is implicit in the issuance of an NPDES permit, since that is a minimum requirement of a permit, as we discussed in Order No. WQ 91-03. The requirement is also a part of the California Water Code. Water Code Section 13263. The permit does provide that the Regional Board may, in the future adopt numeric water quality objectives and limitations.[28]

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28 Permit, Finding 19.

We concluded in Order No. WQ 91-03 that permits for municipal separate storm sewer systems issued pursuant to Clean Water Act Section 402(p) must contain effluent limitations based on water quality standards. In addition, the applicable water quality standards are those established for the receiving waters of the storm water discharges. We further concluded there that even if such effluent limitations are intended to require compliance with water quality standards, "best management practices" constitute legally acceptable effluent limitations. We find here, as we did in Order No. WQ 91-03, that the permit includes a comprehensive and stringent program for reducing pollutants in storm water discharge, and that it will implement the Basin Plan, including the protection of beneficial uses.

We note that the dischargers argued in their response that the fact that the permit was derived from a cooperative effort, prior to the promulgation of regulations by EPA, had relevance to its enforceability. While we are certainly pleased that the dischargers and the Regional Board have been able to work together in a cooperative and positive manner, the permit which was adopted is a lawfully adopted NPDES permit, and is fully enforceable as such. The fact that it was adopted prior to the deadline for adoption of such permits, and prior to promulgation of the regulations, has no relevance to its enforceability. The prohibitions and practices contained in the

permit must be obeyed, and those prohibitions and practices must result in compliance with any applicable water quality standards.

Just as in our review of the San Francisco Bay Regional Board's permit, we have reviewed the appropriateness and propriety of this permit. We find here also that the approach of the Regional Board, requiring the dischargers to implement a program of best management practices which will reduce pollutants in runoff, and prohibiting non-storm water discharges, is appropriate and proper. We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expense such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program. We feel compelled to note here our agreement with the Regional Board that this permit does truly represent a massive undertaking. No other permit in the State, and perhaps in the nation, will control the number of outfalls in a metropolitan area as this permit undertakes to regulate.

B. <u>The Maximum Extent Practicable Standard</u>

The petitioners contend that the permit must include specified management practices in order to comply with the requirement in Clean Water Act Section 402(p) of reducing pollutants in municipal separate storm sewer discharges to the maximum extent practicable (MEP). The petitioner states that MEP means, "what <u>can</u> be done now, <u>must</u> be done now." As we stated in

Order No. WQ 91-03, however, we find that the Regional Board's approach of requiring the dischargers to prepare a plan with proposed control measures for approval by the Regional Board is preferable to specifying all such measures in the permit. The petitioner gives as an example a requirement for catch basin cleaning, which it claims would reduce pollutants. However, an effective and cost-effective storm water program requires an analysis of the specific area subject to regulation, and should not involve a simple listing of practices that all municipalities must follow. As EPA stated in its Preamble to the draft storm water regulations:

> "A wide variety of control measures to reduce the discharge of pollutants from municipal storm sewer systems are currently available. The performance of appropriate control measures is highly dependent on site-specific factors. It is therefore not practicable to define one standard set of controls which will control all pollutants in all municipalities." 53 Federal Register 49456[29]

We also note that, while we share the petitioner's goal of rapid achievement of an effective practices program, the Clean Water Act does not require implementation of all measures now, but rather has set forth a three-year time schedule for compliance. We shall discuss this point further in the next section.

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29 This point was also made in the preamble to EPA's final regulations. 55 Fed. Reg. 48038. There a reference to the legislative history of Clean Water Act Section 402(p) makes clear that Congress' intent was not to dictate specific practices.

C. Time Schedule for Compliance

The petitioner contends that the permit violates the Clean Water Act by not requiring timely compliance with water quality standards. We addressed this point in Order No. WQ 91-03. Here, also, we find that the permit contains provisions requiring such compliance.

The permit includes a very aggressive and comprehensive program of developing and implementing best management practices over a three-year period. The permit does require a program aimed at compliance with applicable water quality standards and all practices necessary to achieve such compliance must be in place within three years of adoption of the permit. Therefore, the permit complies with the time schedule requirements of the Clean Water Act. The permit also specifically provides that the Regional Board may include more stringent effluent limitations, including numeric effluent limitations if necessary.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, and in Order No. WQ 91-03, we conclude:

1. Impacts of storm water discharges on receiving waters and Santa Monica Bay are complicated, and at this time, it would be infeasible to establish numeric effluent limitations on

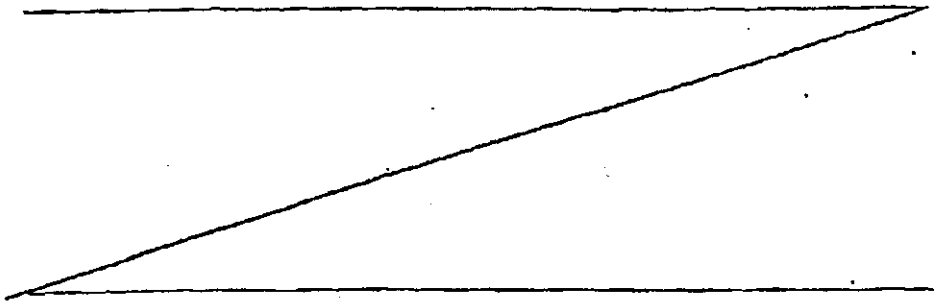
discharges to storm drains in the Los Angeles River Basin, which are validly associated with impacts in Santa Monica Bay.

2. The permit adopted by the Regional Board requires implementation of specific source control measures and effectively prohibits discharges of non-storm water and violation of water quality standards.

3. The provisions in the Clean Water Act regulating municipal storm water discharges require effluent limitations and achievement of water quality standards, but the limitations may consist of source control measures, rather than numeric effluent limitations.

4. It is appropriate and proper to issue a permit regulating municipal separate storm sewer systems which requires specific practices, rather than containing numeric effluent limitations.

5. The specific control measures requested by the petitioner should be considered by the Regional Board when approval of the dischargers' control plan is sought, rather than by this Board.



6. The permit complies with the time schedule requirements of the Clean Water Act.

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board

EXHIBIT 5

Case No. G041545

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE CITIES OF ARCADIA, et al.,
Plaintiffs and Appellants,

v.

STATE WATER RESOURCES CONTROL BOARD; et al.,
Defendants and Appellants,

and

NATURAL RESOURCES DEFENSE COUNCIL, et al.
Intervenors and Appellants.

Appeal from the Superior Court of Orange County
Honorable Thierry Patrick Colaw, Judge Presiding
Superior Court Case No. 06CC02974

APPELLANT WATER BOARDS' OPENING BRIEF ON APPEAL

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(*Pronsolino, supra*, 291 F.3d at p. 1127.) Thus, water quality standards protect water bodies, regardless of whether the pollution comes from a "point" or "non-point" source.[4] For purposes of the Act, water quality standards do not depend on whether the source of pollution is diffuse or difficult to regulate. The standards look to the overall condition of the water itself. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620 (*Burbank*); see also 33 U.S.C. § 1313.) Separate statutory provisions address the technological feasibility of each source's pollution control requirements. (See, e.g., 33 U.S.C. § 1311(b)(1)(A), (b)(1)(B), (b)(2), (b)(3), & § 1342(p)(3)(B)(iii).)

To achieve water quality standards, the Act prohibits discharges of pollutants from point sources to waters of the United States unless they meet federal requirements. (33 U.S.C. § 1311; *Burbank, supra*, 35 Cal.4th at p. 620.) Two such types of discharges are industrial and municipal urban storm water run-off,[5] one of the most significant sources of water pollution in the nation. (*Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 840-841.)

Congress amended the Act in 1987 to require NPDES permits for urban run-off. (See 33 U.S.C. § 1342(p)(3)(B).) The 1987 changes did not affect any designated uses, other components of the water quality standards, or the need to protect water quality. Neither Congress nor U.S. EPA required states to revise their water quality standards in response to the

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[4] Point sources of pollution come from a discrete conveyance, such as a pipe. Nonpoint sources are non-discrete sources, such as sediment run-off. (*Pronsolino, supra,* at p. 1125; 33 U.S.C.§ 1362(14).)

[5] "Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but storm water emanates from diffuse sources, including surface run-off following rain events (hence, "storm water") and urban run-off.

CONCLUSION

Appellant Water Boards request that this court overturn the judgment, vacate the writ of mandate and enter judgment in their favor.

Dated: June 11, 2009

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Senior Assistant Attorney General
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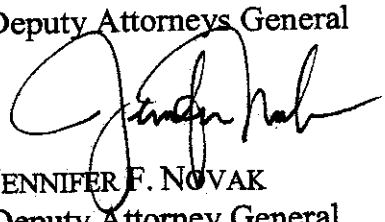

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SA2006600485

EXHIBIT 6

Case No. G041545

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE CITIES OF ARCADIA et al.,
Plaintiffs, Petitioners, and Cross-Appellants,

v.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION et al.,
Defendants, Respondents, and *Appellants,*

and

NATURAL RESOURCES DEFENSE COUNCIL et al.,
Intervenors, Respondents, and Appellants.

From the Judgment of the Orange County Superior Court,
The Hon. Thierry Patrick Colaw, Presiding,
Superior Court Case No. 06CC02794

Intervenors, Respondents, and Appellants' Opening Brief

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Sometimes the EPA establishes and issues water quality criteria. For instance, EPA set criteria for toxic pollutants for the State called the California Toxics Rule ("CTR"). The CTR regulates 126 pollutants, including arsenic, lead, mercury, cyanide, asbestos, benzene, dioxin, and PCBs. (40 C.F.R. § 131.36.) Aside from some specified instances, the CTR applies "without exception" to "[a]ll waters assigned any aquatic life or human health use classifications . . . ." (40 C.F.R. § 131.36(d)(10)(i).) Sometimes the Regional Board establishes and issues water quality criteria to meet the purposes of the Clean Water Act. As the California Supreme Court recognized, "EPA provides States with substantial guidance in the drafting of water quality standards." (*Burbank,* 35 Cal.4th at 621.) For instance, the Clean Water Act requires a set of baseline pathogen standards in coastal recreation waters, such as Santa Monica Bay. (33 U.S.C. § 1313(i)(1)(A).) Accordingly, the Regional Board established limits for enterococci in coastal recreation marine waters and E.coli in freshwater recreation waters that match the federally-required criteria. (Compare 40 C.F.R. § 131.41(c)(1)-(2), with AR 2002 BAC 236.)

Water bodies that do not meet water quality standards cause, among other things, documented public health impacts. For example, in 2000, swimming in water contaminated with pathogens caused beachgoers between 627,800 and 1,479,200 excess gastrointestinal illnesses in Los Angeles and Orange Counties alone. (8 AA 1719.) One of the largest sources of pollution contributing to these health impairments is urban runoff.[3] (8 AA 1729; AR 2004 TR 6161.) Urban runoff is a two-part

[3] For ease of reference, throughout this brief the terms "urban runoff" and "stormwater" are used interchangeably to refer generally to the discharges from the municipal Dischargers' storm sewer systems. The definition of stormwater includes "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).)

Water Act. (See *Abreu v. Svenhard's Swedish Bakery* (1989) 208 Cal.App.3d 1446, 1456 (court refused to apply a state law that would toll the statute of limitations, because doing so would "inevitably frustrate" federal national labor-management policy).)

Conclusion

For the foregoing reasons, the Environmental Groups respectively request that this Court reverse the trial court's judgment.

DATED: June 5, 2009

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL

Michelle S. Mehta

Attorney for Natural Resources Defense Council, Santa Monica Baykeeper, and Heal the Bay

EXHIBIT 7

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

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[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

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[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

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of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

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[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Clerk to the Board

EXHIBIT 8

Storm Water Panel Recommendations to the California State Water Resources Control Board

The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities

June 19, 2006

Panelists:

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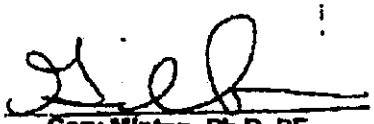

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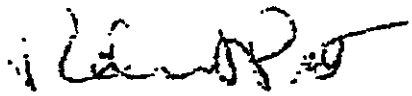

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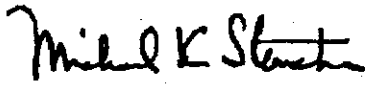

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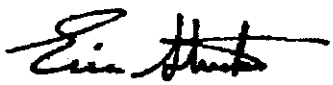
Los Angeles, California

"The opinions I express are my own and do not represent official US EPA policy."

Eric Strassler
Senior Policy Analyst, Office of Water,
US USEPA
Washington, District of Columbia



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Background

The NPDES storm water permit program came into being as a result of the 1987 amendments to the federal Clean Water Act and its implementing regulations. In California, the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards) implement the NPDES storm water program.

The Clean Water Act amendments, Section 402(p) require that discharges of storm water from large and medium municipal separate storm sewer systems (MS4s) and discharges of storm water associated with industrial activities be in compliance with NPDES permits. MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP). Discharges associated with industrial activities, were required to meet the technology based standards of best available technology economically achievable (BAT) or best conventional pollutant control technology (BCT), and to meet water quality standards.

In 1990, USEPA promulgated regulations (40 CFR Part 122.26) for the NPDES storm water program. These regulations clarified what industrial activities were subject to storm water permit. Construction that resulted in a land disturbance of five or more acres was included as an industrial activity subject to NPDES storm water permit. The regulations also delineated what was to be included in permit applications and the programmatic elements that were to be in a permit and storm water management program for MS4s or storm water pollution prevention plan for industrial activities.

California's Permits

In 1990, MS4 permits were issued to Santa Clara County by the San Francisco Bay Regional Water Board and to Los Angeles County by the Los Angeles Regional Water Board. These permits were appealed to the State Water Board. The primary basis of the appeals was the lack of numeric limits in the permits. The entities that brought the appeals argued that the permits needed to include numeric limits, as the discharges of pollutants must not only be reduced to the MEP, but they must also meet water quality standards. The State Water Board, in hearing these appeals, determined that it was not feasible at the time to develop numeric limits for MS4 permits, and that water quality standards could and should be achieved through the implementation of best management practices (BMPs). Since this ruling, the Regional Water Boards have typically not included numeric limits in storm water permits.

The State Water Board has adopted NPDES General Permits for the Discharge of Storm Water Associated with Industrial Activities and for the Discharge of Storm Water Associated with Construction Activities. Both of these permits contain language stating that developing numeric limitations is infeasible.

Court Decisions

In addition to these actions on MS4 permits at the State level, there have been a number of rulings from the federal courts regarding the NPDES Storm Water program.

One of the most significant is from the federal court, 9th District Court of Appeals from 1999. In its published opinion on Defenders of Wildlife vs. Browner, the Court held that MS4 permits need not require strict compliance with water quality standards. Rather, compliance was to be based upon the MEP standard. However, the permitting authority (the State Water Board/Regional Water Boards for California) could at their option require compliance with standards. The State Water Board through the permit and appeals process has in fact required that the discharges from MS4s meet water quality standards, but has stated that compliance with numeric standards can be achieved through the implementation of BMPs in an iterative fashion.

The Browner decision also found that discharges of storm water associated with industrial activities must be in strict compliance with water quality standards.

In 2004 the State Water Board conducted a public hearing on a draft General Industrial Storm Water permit. This draft permit met with significant opposition from non-government or non-industrial organizations (NGOs) due to the absence of numeric limits. Staff revised the draft permit to include the benchmarks contained in the USEPA multi-sector general permit. This change resulted in strong opposition from the regulated community.

The concerns that have been raised by the NGOs and the regulated community are similar, though they do not necessarily agree on the best way to address them. Both believe that permitting has become overly complex, and that it is extremely difficult, if not impossible to objectively determine if a facility, operation or municipality is in compliance with its permit requirements. The NGOs argue that requiring storm water permittees to comply with numeric effluent limits will result in an easier way to measure compliance. The regulated community agrees, to a degree, but they argue that it is not simply a matter of selecting a number that is suitable for a POTW or industrial waste discharge. Due to the unique nature of storm events and storm water discharges, any numeric limit that is placed in a storm water permit must take into consideration the episodic nature of storm events and be truly representative of storm water discharges. In addition, the regulated community has argued that there are going to be pollutants in storm water discharges that did not originate in the MS4 (run on) or that they do not have the means to control, and therefore should be given special consideration.

In response to these arguments, State Water Board directed staff to convene a panel of storm water experts to examine the feasibility of developing numeric

limits for storm water permits. Specifically, this panel of experts was asked to consider the following:

> "Is it technically feasible to establish numeric effluent limitations, or some other quantifiable limit, for inclusion in storm water permits? How would such limitations or criteria be established, and what information and data would be required?"
>
> "The answers should address industrial general permits, construction general permits, and area-wide municipal permits. The answers should also address both technology-based limitations or criteria and water quality-based limitations or criteria. In evaluating establishment of any objective criteria, the panel should address all of the following:
>
> (1) The ability of the State Water Board to establish appropriate objective limitations or criteria; (2) how compliance determinations would be made; (3) the ability of dischargers and inspectors to monitor for compliance; and (4) the technical and financial ability of dischargers to comply with the limitations or criteria."

Staff invited 10 individuals from the academic and scientific community to participate on the panel. Of the 10, eight agreed to participate. These eight met in a public session on September 14, 2005 and heard presentations from the regulated and NGO communities. They also heard comments from the public at large. They met again on September 15, 2005 to discuss the public comments and to begin to formulate a response. It was also decided at this meeting that they would form sub-committees to address municipal (MS4), industrial and construction discharges separately. These sub-committees worked on drafts statements for each of these, circulating them over the course of a number of months.

The panel met again in private session on April 3 and 4, 2006. The purpose of these meetings was to address unresolved issues and to develop the final response to the State Water Board. It was also decided to combine the three working statements into one Statement of Findings. The following discussion is the panel's findings and is broken into three program element areas: municipal, construction, and industrial.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Municipal Activities

Municipal Observations

1. The current practice for permitting, designing, and maintaining municipal stormwater treatment facilities (called BMPs herein) on the urban landscape does not lend itself to reliable and efficient performance of the BMPs because:

   - Permitting agencies, including EPA, States, and local governments, have rarely developed BMP design requirements that consider the pollutants and/or parameters of concern, the form(s) that the pollutants or parameters are in, the hydrologic and hydraulic nature of how they pollutants and flow arrive, and then the resulting unit processes (treatment and/or flow management processes) that would be required to address these pollutants or parameters.
   - The permitting agencies generally are not accountable for the performance of the BMP, and thus give much leeway to the developer with respect to the type of BMPs to be constructed, and to the details of the design, although some states do have detailed design standards and have conducted performance tests to identify acceptable devices for their area.
   - The developer is not responsible in most all cases for the performance of the BMP, so the treatment facilities are designed to minimize the cost and/or area of the facility and/or ease of permitting, not maximize the pollutant removal efficiency and/or flow management of the BMP
   - Because BMPs are not held to any, or very few, long-term performance criteria, they are typically not maintained except for aesthetic purposes. Very few stormwater agencies are responsible for BMP maintenance on private property, and public facilities are maintained mostly in response to clogging and/or resultant drainage or aesthetic problems. Even for stormwater agency facilities, maintenance is often limited.

2. The principal reasons for the failure of BMP performance is improper BMP selection, design and/or lack of maintenance.

   - The California BMP Handbooks and other local requirements leave too much of the BMP selection and design to the discretion of the designer, and thus do not address many if not all of the receiving water quality issues

- BMPs need to be *designed to facilitate maintenance*; this is rarely done because it costs the developer money and the BMP designer is rarely responsible for the maintenance.

- Given the amount of debris in urban runoff, and the fact that the hydraulic capacity of many BMPs may be exceeded several to many times per year, BMPs require more maintenance than other types of stormwater control facilities. Since urban BMP maintenance is generally left to untrained homeowner associations and maintenance personnel for commercial properties, inadequate maintenance is a near certainty. Even stormwater agencies often do not have and/or apply the resources necessary to maintain agency owned BMPs.

3. Improvements in the design of municipal BMPs, including residential and commercial as well as municipally owned facilities are necessary to ensure better performance (i.e. sizing, geometry, inlet and outlet design, etc.) and to specifically target receiving water quality issues.

The Problem with Existing Effluent Limit Approaches

Effluent limit approaches usually focus only on conventional water quality constituents that may not be solely or at all responsible for the receiving water beneficial use impairments in urban receiving waters. The important stressors that affect many use impairments can include one or more of the following and may vary in importance from system to system:

- The effect of increased flows and/or volumes (i.e. hydromodification) that can lead to stream channel erosion/sedimentation with resulting habitat destruction

- Sediment contamination (such as enrichment of urban stream sediments with fine-grained heavily polluted particulates; large organic debris masses causing low sediment DO; settled bacteria causing large bacteria gradients with sediment depth etc.)

- Impaired aesthetic value (caused by gross floatables, noxious sediments, etc.)

- Unsafe conditions (caused by dangerous debris, highly fluctuating stream flows and stages, etc.)

- Dissolved and suspended pollutants that are bioavailable in the water column and/or result in downstream sediment contamination

- Elevated temperatures from urban heating effects on runoff and on open conveyances and permanent pool BMPs

It is very difficult to determine specific causative agents or the level of control needed, for a specific beneficial use impairment in a receiving water body. The *Stormwater Effects Handbook: A Tool Box for Watershed Managers, Scientists, and Engineers* (Burton, G.A. Jr., and R. Pitt, ISBN 0-87371-924-7. CRC Press, Inc., Boca Raton, FL. 2002. 911 pages) was written to be used as a guide for stormwater managers to identify their local receiving water problems and to assist in identifying the causative factors. The methods described would need to be applied to a specific area or region to obtain an understanding of local conditions and problems. Although expensive, comprehensive investigations such as these should be considered an investment to help minimize wasteful expenditures due to the application of inappropriate control practices in a watershed.

Monitoring for enforcement of numeric effluent limits would also be challenging. While spot checks could be made at some of the many outfalls in an area, there is wide variation in stormwater quality from place to place, facility to facility, and storm to storm. Coefficients of variation approaching 1 or higher are not uncommon and there are few factors that can be used to significantly reduce this variation. Analysis of the National Stormwater Quality Database indicates that geographical location and land use are the most important factors affecting stormwater quality for most constituents. Some are also affected by the antecedent dry period before the rain and more highly developed watersheds (containing large fractions of impervious areas) often show elevated "first-flush" concentrations in the first portion of the storms for some, but not all pollutants. Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value. In a similar circumstance, there are a number of storms each year that are sufficiently large in volume and/or intensity, to exceed the design capacity volume or flow rates of most BMPs. Assessing compliance during these larger events represents yet another challenge to regulators and the regulated community.

Technical Issues

Even for conventional pollutants, there presently is no protocol that enables an engineer to design with certainty a BMP that will produce a desired outflow concentration for a constituent of concern. A possible exception is removal of Total Suspended Solids in extended detention basins, and some types of media filters. The typical approach for evaluating BMP pollutant removal efficiency has been *percent removal*, but observed removal efficiencies vary greatly from facility to facility and it has been demonstrated that percent removal varies directly with the inflow concentration.

Few, if any, BMPs are designed using the first principles laws of physics, chemistry and/or biology for pollutant removal and/or flow-duration control. It will

take a substantial research effort, including data gathering on well-designed BMPs, to develop design criteria for the removal of pollutants with confidence intervals that enable us to make reliable estimates of the median and variance of the effluent concentrations to be expected from the various types of BMPs. Until this is done, it will be very difficult to assign legally enforceable numerical effluent limitations to any particular BMP.

Drawing upon the body of knowledge that currently exists regarding pollutant removal efficiency, it is possible to estimate mean effluent concentrations and variances for a number of constituents for different types of BMPs, albeit not in a legally enforceable sense. Effluent concentration distributions for a number of BMPs are available in the International BMP Database (www.bmpdatabase.org) from more then 250 studies throughout the US. The following outlines key issues that have been identified regarding the technical feasibility of setting objective criteria for both existing areas and new or redeveloping areas:

- Effluent concentration estimates could be made for a given constituent and a particular BMP from a larger number of BMPs than available in the BMP Database using literature values of percent removal and local or national data on stormwater runoff EMC data. However, the results from this work would be significantly less reliable then the BMP Database data as it could be biased if the influent concentrations for the studied BMP types did not match general urban runoff.
- Designing the facility more rigorously with respect to the physical, chemical and biological processes (e.g. unit processes) that are active in the BMP would give confidence that the BMP would perform at least as well, if not better than the average performance determined from the literature. A WEF/ASCE task force is currently updating their Urban Runoff Quality Management Manual of Practice; design guidance of BMPS will make better use of the physical, chemical, and biologic processes taking place in the BMP before, during and after a storm event. This manual will build upon recent research efforts employing a unit process based approach for BMP design and selection. These research efforts were supported by the Water Environment Research Foundation (WERF) and the National Cooperative Highway Research Program (NCHRP).
- A BMP *designed* and *constructed* according to a set of criteria described above, could be ***presumed*** to deliver an effluent with a mean constituent concentration and variance similar to the performance numbers developed from the literature ***if it is properly maintained*** Enforcement would comprise periodic inspection of the facility using a checklist of items to be inspected. While not an effluent limit, this seems practical and quantifiable.

- Most all existing development rely on non-structural control measures, making it difficult, if not impossible to set numeric effluent limits for these areas because little is known about the quantity and quality performance of non-structural controls. However, certain development characteristics in some existing development areas that minimize the amounts of impervious areas in a drainage area have been shown to be quite effective in reducing adverse hydromodifications in the receiving waters, and should be encouraged.

Municipal Recommendations

It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. However, it is possible to select and design them much more rigorously with respect to the physical, chemical and/or biological processes that take place within them, providing more confidence that the estimated mean concentrations of constituents in the effluents will be close to the design target. Moreover, with this more rigorous design and an enforceable maintenance program, it can be presumed that these facilities will continue to deliver effluent qualities that are reasonably close to the design effluent concentrations over the life of the facility. And if proper maintenance is performed (enforced), the facilities can be expected to perform throughout their design life at the same or better efficiency as when newly constructed. Depending on the pollutants and parameters of concern and BMP choices, it is very likely that treatment trains of structural BMPs will be required in many cases.

For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible. However, the approach of setting an "upset" value, which is clearly above the normal observed variability, may be an interim approach that would allow "bad actor" catchments to receive additional attention. For the purposes of this document, we are calling this "upset" value an ***Action Level*** because the water quality discharged from such locations are enough of a concern that most all could agree that some action should be taken. Action Levels could be developed using at least three different approaches. These approaches include: 1) consensus based approach; 2) ranked percentile distributions; 3) statistically-based population parameters.

The consensus-based approach would be to agree upon effluent concentrations that all parties feel are not acceptable. For example, most parties would likely agree that an average concentration of dissolved copper above 100 ug/l from an urban catchment would not be acceptable. This would be an Action Level value that would trigger an appropriate management response. This approach may not directly address the issue of establishing numeric effluent criteria and achieving desired effluent quality, but the consensus-based approach would ensure that the "bad actor" watersheds received needed attention.

The ranked percentile approach (also a statistical approach) relies on the average cumulative distribution of water quality data for each constituent developed from many water quality samples taken for many events at many locations. The Action Level would then be defined as those concentrations that consistently exceed some percentage of all water quality events (i.e. the 90th percentile). In this case, action would be required at those locations that were consistently in the outer limit (i.e. uppermost 10th percentile) of the distribution of observed effluent qualities from urban runoff.

The statistically based population approach would once again rely on the average distribution of measured water quality values developed from many water quality samples taken for many events at many locations. In this case, however, the Action Level would be defined by the central tendency and variance estimates from the population of data. For example, the Action Level could be set as two standard deviations above the mean, i.e. if measured concentrations are consistently higher than two standard deviations above the mean, an Action situation would be triggered. Other population based estimators of central tendency could be used (i.e. geomean, median, etc.) or estimates of variance (i.e. prediction intervals, etc.). Regardless of which population-based estimators are used (or percentile from above), the idea would be to identify the [statistically-derived] point at which managers feel concentrations are significantly beyond the norm.

The ranked percentile and population-based estimators are highly dependent upon the data sets used to calculate them. There are a number of options that were considered by the Panel, but ultimately they were broken into two distinct categories. The first category was for new development/redevelopment and the second was for built out urban environments. For new development/redevelopment, the panel recommends using the data set associated with the international BMP database (www.bmpdatabase.org). This data set represents the variety of water quality from the most up to date, best conducted and reported BMP studies. The database effort does not limit itself to BMPs types or designs; it focuses on technically sound monitoring studies and reporting information. Therefore there could be some screening of studies to those thought to be well designed BMPs to then develop effluent quality distributions and statistics on performance. Certainly, there is no expectation that urban stormwater managers could improve water quality beyond what would be reported in this dataset.

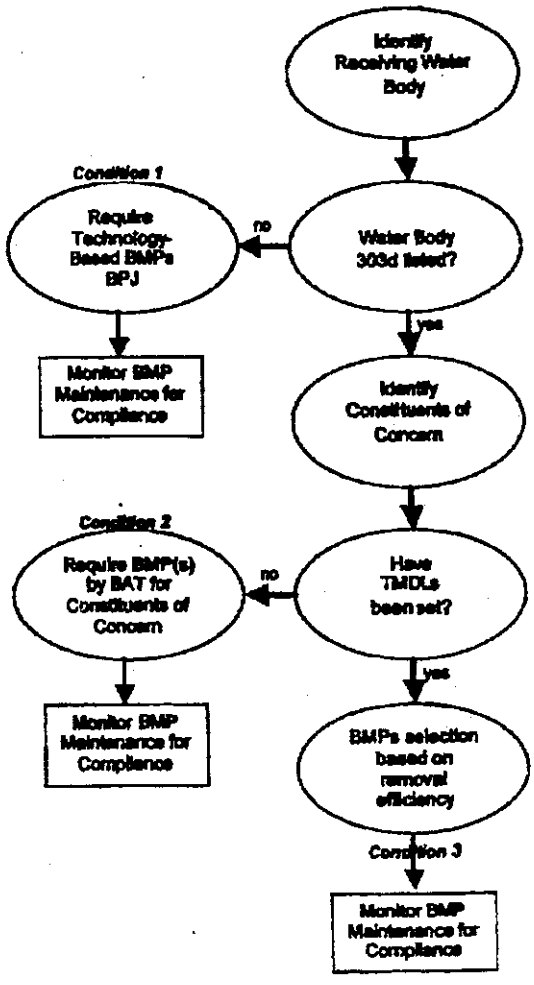
In built-out urbanized environments, there are greater opportunities to examine various data sets for setting Action Levels. For the Panel, these opportunities were a function of spatial scale. The first opportunity would be at the local scale. Some urban stormwater monitoring programs have been in existence for 10 years or longer. Examples include the Los Angeles County Department of Public Works, City of Sacramento, Orange County, San Diego County, amongst others. Using permit specific data sets may make sense if issues of climatic variability or

localized geomorphology are important. The next scale would be to combine these California municipal permit monitoring data sets, especially if lack of data for specific constituents of concern in any one location or region is an important issue. The largest scale would be the National Stormwater Quality Database (NSQD) from municipal monitoring programs across the nation (http://unix.eng.ua.edu/~rpitt/Research/ms4/Paper/Mainms4paper.html). This data set includes monitoring data from urban areas such as residential, commercial, industrial, freeway, institutional, and mixed use which is especially useful if small sample size limits the use of local data. One advantage of using smaller (and local), rather than larger, spatial scales is the ability to update data sets for revising Action Levels. The NSQD may not be updated for quite some time, but local data sets can be updated periodically (annual amendments, 10-year rolling averages, every permit cycle, etc). Ultimately, Action Levels would be expected to become lower as outliers are removed from data sets and as improved water quality data are collected through targeted management actions. It may be appropriate to eliminate older data sets as well over time.

One element to consider when comparing monitoring data to Action Levels is the concept of a design volume for water quality (also known as the Water Quality Capture Volume – WQCV, WEF #23 and ASCE publication #87, 1998) or a design flow rate. The WERF and NCHRP efforts mentioned above include recommendations regarding design sizing using continuous simulation techniques for both volume-based and rate-based BMPs. The Panel acknowledged that several to more times each year, the runoff volume or flow rate from a storm will exceed the design volume or rate capacity of the BMP. Stormwater agencies should not be held accountable for pollutant removal from storms beyond the size for which a BMP is designed.

A Technically Sound and Pragmatically Enforceable BMP Design and the Permit Process

The diagram below provides guidance for determining what BMPs are required in a newly developing watershed. Under ***Condition 1*** where the receiving water quality is not impaired, determination of the appropriate BMP would be by Best Professional Judgment (BPJ). Any of the "state approved" BMPs could be used. The permittee would be required to design the treatment facilities in accordance with the California BMP Handbook, ***which should be revised as a criteria manual***, rather than a guidance manual *and include more physiobiochemically based design criteria designed to address an agreed upon set of "Pollutants and Parameters of Concern" based upon knowledge of the pollutants and parameters that generally are of concern in urban runoff, with perhaps some differences on receiving water type.*



A detailed maintenance plan and schedule would be required that includes:

1. Actions to be taken and when,
2. Designation of the party legally accountable for the facility maintenance, and
3. A whole-life cost estimate for the facility that include maintenance.

Compliance with the design criteria and the maintenance plan and schedule would constitute achievement of the design effluent criteria. In the event of failure by the responsible party to perform the required maintenance and/or to perform it to the required level of quality, the whole-life cost schedule could be used to determine the consideration that the defaulting responsible party would pay to the new responsible party that takes over the maintenance.

Under *Condition 2* where water quality impairment exists but a TMDL has not yet been performed, BAT would be required, which means applying the BMPs that can practicably (to be defined) be employed to produce the lowest effluent concentrations (e.g. the lower grouping of BMP effluent quality) of the constituent(s) of concern. Several types of BMPs may fulfill the BAT standard if these BMPs have performance that is not statistically or practically differentiable. This case will allow flexibility in choosing among that sets of BMPs that demonstrate superior performance. As in the case of *Condition 1*, compliance with the maintenance plan and schedule would constitute compliance with the design effluent criteria.

Condition 3, which occurs when a TMDL has been specified for the BMP or for the tributary watershed, may (or may not be) actually be less stringent that *Condition 2* if the TMDL allows for a higher effluent concentration of the constituents of concern than that discharged by a BAT facility. The same requirements would apply for the design criteria, and the maintenance plan and schedule would constitute the guarantee of design effluent concentrations from the BMP.

Strategies for Stormwater Management to Protect Urban Water Environments

Stormwater effluent limits can become very complex if all the issues are to be directly addressed. If complex, they are not likely to be workable. However, too much simplification can also lead to ineffective programs. Therefore, a reasonable first step is needed, based on local data. Compliance monitoring (e.g. BMP inspections) is also needed to ensure that the goals are likely to be met. Most likely goals will have to be revised over time. The overall strategy should contain these objectives:

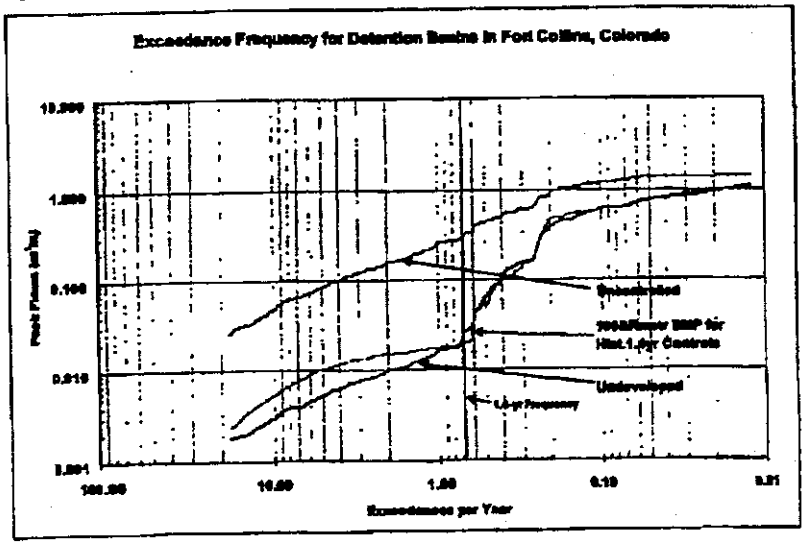
- Effectiveness
- Affordability
- Enforceability, and
- Flexibility

Table 1 - Effects of Urbanization on Hydrologic Regime in Colorado and Georgia

Location	Annual Precipitation	Mean Storm Depth*	Runoff Events per Year		Annual Runoff (mm)	
	Millimeters per Year	Millimeters	Undeveloped	Developed	Undeveloped	Developed
Fort Collins, CO	395	11	27	47	12	124
Atlanta, GA	1262	18	48	76	36	500
* Values obtained from Fig. 5.3 ASCE MOP (1998)						

Runoff volume and peak flows have been recognized as two of the most important stormwater factors needing control. Table 1 (Roesner and Nehrke) shows that urbanization dramatically changes the hydrologic regime of urban waterways. In both Atlanta (a higher rainfall area) and Fort Collins (a semiarid area), the number of runoff events per year on developed land increases by a factor of 2 times the number of runoff events that occur in the undeveloped state; and the runoff volume increases by a factor of ten! The peak flows also increase dramatically as shown in Figure 1 below, but as also seen on the figure, the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls. But while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils.

Figure 1 - Exceedance Frequencies for Detention Basins in Fort Collins, Colorado



Since many of the stormwater pollutants are strongly associated with particulates, stormwater particulate control is also often a component of stormwater control programs. Therefore, an effective stormwater control strategy that could be encouraged is a combination of several practices, listed below in the order of increasing events:

- On-site stormwater reuse, evapotranspiration and infiltration for the smallest storms and up to specific targeted events, depending on site limitations (soil characteristics and groundwater contamination potential) (usually by conservation design emphasizing infiltration, disconnecting paved areas, etc.)
- Treatment of excess runoff that cannot be infiltrated, again, up to a specific targeted runoff volume (usually by sedimentation or filtration) For pollutants of concern, it should be demonstrated that the BMP(s) need to include the physical, biological, and/or chemical treatment processes that address the typical pollutants of concern and/or specific pollutants in the case of 303D listed water bodies or those with established TMDLs.
- Control of energy discharges for the channel forming events (such as through storage-release, focusing on flow-duration analyses and peak flow frequency analyses). To be most effective, this should to be completed under a watershed management plan and not site-by-site.
- Provide safe drainage for damaging events (conventional drainage, plus secondary drainage systems)
- In watersheds that are already experiencing damaging flow impacts to streams, it could be in many circumstances much more cost-effective (and effective period) to develop through a watershed plan a natural stream stabilization approach that could address both the existing development and the remaining smaller infill or otherwise smaller new development. In these cases, requiring the remaining new development to implement flow-duration control would not solve the issue in a measurable way and resources would be better spent restoring the functions of the creek with instream enhancements.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Construction Activities

Construction Observations

Regarding the question of the technical feasibility of Numeric Limits for stormwater discharges from construction activities, the Panel bases its recommendations on the following observations.

1. Limited field studies indicate that traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge.
2. Site-to-site variability in runoff turbidity from undeveloped sites can also be quite large in many areas of California, particularly in more arid regions with less natural vegetative cover and steep slopes.
3. Active treatment technologies involving the use of polymers with relatively large storage systems now exist that can provide much more consistent and very low discharge turbidity. However, these technologies have as yet only been applied to larger construction sites, generally five acres or greater. Furthermore, toxicity has been observed at some locations, although at the vast majority of sites, toxicity has not occurred. There is also the potential for an accidental large release of such chemicals with their use
4. To date most of the construction permits have focused on TSS and turbidity, but have not addressed other, potentially significant pollutants such as phosphorus and an assortment of chemicals used at construction sites.
5. Currently, there is no required training or certification program for contractors, preparers of soil erosion and sediment control Stormwater Pollution Prevention Plans, or field inspectors.
6. The quality of stormwater discharges from construction sites that effectively employ BMPs likely varies due to site conditions such as climate, soil, and topography.
7. The States of Oregon and Washington have recently adopted similar concepts to the Action Levels described earlier.

Construction Recommendations

It is the consensus of the Panel that active treatment technologies make Numeric Limits technically feasible for pollutants commonly associated with stormwater discharges from construction sites (e.g. TSS and turbidity) for larger construction sites. Technical practicalities and cost-effectiveness may make these technologies less feasible for smaller sites, including small drainages within a larger site, as these technologies have seen limited use at small construction sites. If chemical addition is not permitted, then Numeric Limits are not likely feasible. Whether the use of Numeric Limits is prudent, practical or necessary to more effectively achieve nonpoint pollution control is a separate question that

needs to be answered, but is outside the scope of this Panel. However, Action Levels are likely to be more commonly feasible. For small sites or smaller drainages within larger sites, or where chemicals cannot be used, the Panel recommends that Action Levels be specified.

Advanced systems lend themselves to Numeric Limits because of historically reliable treatment, while non-active controls are less predictable. Advanced systems have been in use in some form since the mid-1990s. At this time, there are two general types of systems. With each general system the stormwater is retained on-site, treated, and released more slowly. One system employs polymer coagulation and sedimentation. The second system employs polymer coagulation with direct filtration. Both types of systems are considered reliable, and can consistently produce a discharge less than 10 NTU. These systems have been used successfully at many sites in several states since 1995 to reduce turbidity to very low levels. Non-active erosion and sediment control BMPs, while effective when applied and adequately maintained, produce more highly variable in effluent quality, making setting Numeric Limits difficult, if not impossible.

An important consideration in setting Numeric Limits or Action Levels is that in many locations in California the natural background turbidity and/or TSS levels in stormwater runoff are quite high. This is particularly true in semi-arid or arid regions, which tend to have less vegetative cover. For example, natural runoff concentrations in Emerald Creek, on the Newport Coast, above any developed areas have been over 5,000 mg/l during runoff events. The Los Angeles County Monitoring Data sets included an open land use watershed that also showed TSS levels significantly above other types of urban land uses. Therefore, it is important to consider natural background levels of turbidity or TSS in setting Numerical Limits or Action Levels for construction activities. The difficulty in determining natural background concentrations/levels for all areas of the state could make the setting of Numeric Limits or Action Levels impractical from an agency resource perspective.

While the Panel concludes that Numeric Limits or Action Levels are technically feasible, the Panel has several reservations and concerns.

1. The active treatment systems have generally been employed on sites five acres or larger. While the systems are technically feasible for sites of any size, including sites or drainages as small as an acre or less, the cost may be prohibitive. The cost-effectiveness of active treatment systems is greatly enhanced for large drainage areas, at which construction occurs for an extended period of time, over one or more wet season. There is also a more "passive" active system that is employed in New Zealand that uses captured rainfall to release the chemical into flows entering a detention system that requires less instrumentation and flow measurement infrastructure. Even more passive systems such as the use of polymer

logs and filter bags are currently under development for small sites. Regardless, the Panel recommends that the Board give particular attention to improving the application of cost-effective source controls to small construction sites.

2. In considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered. Consideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases.
3. Consideration should be given to the seasonality of applying Numerical Limits. There may be sites where summer only construction that complies with Action Levels may be preferred to year-round that sites that include winter construction that complies with Numeric Limits. In such cases, applying Numeric Limits to summer construction may be a disincentive to scheduling active grading during dry periods. Allowing summer only construction sites to comply with action levels would discourage winter construction activities.
4. Consideration should be given to whether Numeric Limits would apply to all construction sites or only those with significant disturbed soil areas (e.g. active grading, un-vegetated and/or un-stabilized soils). A site could meet certain conditions to be considered "Stabilized" for the runoff season.
5. Where Numeric Limits are not feasible or where they would not apply during designated seasons or site conditions, the Panel recommends that the Board consider the concept of Action Levels for sites where only traditional erosion and sediment controls are applied or construction sites that are considered "stabilized" for the runoff season. An Action Level indicates a failure of BMPs (within some storm size limits).
6. The Board should consider Numeric Limits or Action Levels for other pollutants of relevance to construction sites, but in particular pH. It is of particular concern where fresh concrete or wash water from cement mixers/equipment is exposed to stormwater.
7. The Board should consider the phased implementation of Numeric Limits and Action Levels, commensurate with the capacity of the dischargers and support industry to respond.
8. The Panel recommends that a Numeric Limit or Action Level should be compared to the average discharge concentration. The minimum number of individual samples required to represent the average discharge concentration for a storm will need to be defined.
9. The Board should set different Action Levels that consider the site's climate region, soil condition, and slopes, and natural background conditions (e.g. vegetative cover) as appropriate and as data is available. With active treatment systems, discharge quality is relatively independent of these conditions. In fact, active treatment systems could result in turbidity and TSS levels well below natural levels, which can also be a problem for receiving waters.

10. The Board should consider whether the Numeric Limits or Action Levels should differ between receiving waters that are water quality limited with respect to turbidity, sediment or other pollutants associated with construction, from those water bodies that are not water quality limited.
11. The Panel recommends that Numeric Limits and Action Levels not apply to storms of unusual event size and/or pattern (e.g. flood events). The determination of Water Quality Capture Volume should consider the differing climate regions to specify these events.
12. The Board should set Numeric Limits and Action Levels to encourage loading reductions as appropriate as opposed to only numeric concentrations. Examples include phased construction (e.g. limited exposed soil areas or their duration), infiltration, and spraying captured runoff in vegetated areas as means to reduce loading.
13. The Panel is concerned that the monitoring of discharges to meet either the Action Levels or Numeric Limits may be costly. The Panel recommends that the Board consider this aspect.

Panel's Findings on Feasibility of Numeric Effluent Limits Applicable to Industrial Activities

Industrial Observations

The Panel believes that Numeric Limits are feasible for some industrial categories. Industries have control over their facilities. They control access, construction practices, product substitution to affect pollution prevention and the types of treatment systems to be used to mitigate stormwater runoff. There are many treatment systems or prevention practices that have been in place for lengthy periods, extending back to the 1980s in many cases. For example, there is much known today about construction materials, such as roofing materials (roofing composition, gutters, paints and coatings, products that abrade or tend to create solids or litter, etc). Other examples include development of pervious surfaces, or infiltration methods.

The decision for the value of Numeric Limits should be made in one of two ways. When there is a TMDL that defines the permissible load for a watershed, the Numeric Limits should be set to meet the TMDL. Consideration must be given for both the pollutant concentration as well as the volume of runoff, since both contribute to the impacts that required the TMDL to be implemented.

When there is no TMDL, the Numeric Limits should be based upon sound and established practices for storm water pollution prevention and treatment, using an approach analogous to that used in the NPDES wastewater process in the 1970s. In this approach phased, Numeric Limits were first set that were based upon the use of best currently available technology, and permittees were given a defined period for compliance. Permits were established based upon industry types or categories, with the recognition that each industry has its own specific problems and financial viability.

To establish Numeric Limits for industrial sites requires a reliable database, describing current emissions by industry types or categories, and performance of existing BMPs. The current industrial permit has not produced such a database for most industrial categories because of inconsistencies in monitoring or compliance with monitoring requirements. The Board needs to reexamine the existing data sources, collect new data as required and for additional water quality parameters (the current permit requires only pH, conductivity, total suspended solids, and either total organic carbon or oil and grease) to establish practical and achievable Numeric Limits.

In cases where the industrial activity is similar to activities covered by the MS4 permit (roofs, parking lots, etc), the approach or limits for industries should be the same as for MS4 permittees. In cases where the industrial activity is similar to land disturbance activities (e.g. landfills, gravel mines, etc.), there exists data and design experience with runoff control, capture and advanced treatments systems (e.g. systems using polymer to enhance total suspended solids removal – see

the construction section) that may make Numeric Limits feasible for new facilities, and the approach and limits should be the same as for construction permittees. The same conditions and issues related to active treatment discussed in the construction section apply here.

In cases where there is less certainty in the data for both stormwater characterization or BMP performance to establish Numeric Limits, there maybe sufficient data to establish Action Levels. Action Levels set for industrial sites that discharge to MS4s should not exceed those set for MS4 permittees.

The Panel recognizes that existing and new facilities may have to be treated differently and recommends the approach in **Table 2.**

Table 2- Approach to Establish Numeric Limits or Action Levels at Existing or New Facilities

		Numeric Limits	Action Levels	Notes
Existing Facility	Indoor	No	Yes, similar to MS4	
	Outdoor	Yes if data are adequate for the specific industrial activity and BMP	Yes, using industrial database	Action Levels should approach MS4 action levels.
New Facility	Indoor	Yes – BMP Database		Technology based, similar to MS4 New Development
	Outdoor	No, unless sufficient data exist for the specific industrial activity and BMP	Yes when sufficient data are available	

Industrial Recommendations

The Panel has several reservations and concerns:

- The Panel recognizes the inadequacy of current monitoring data sets and recommends improved monitoring to collect data useful for establishing Numeric Limits and Action Levels.
- Required parameters for future monitoring should be consistent with the type of industrial activity instead of the current parameters (i.e., monitor for heavy metals when there is reasonable expectation that the industrial activity will cause greater heavy metals concentrations in the storm water).
- Insofar as possible, the Panel prefers the use of California data (or National data if it can be shown to be applicable to CA) in setting Numeric Limits and Action Levels.
- The Panel recognizes that economies of scale exist for large facilities and large groups of single facilities.
- Industrial facilities that do not discharge to MS4s should have to implement BMPs for their non-industrial exposure (e.g., parking lots, roof runoff) similar to commercial facilities in MS4 jurisdictions.
- Regardless of Action Levels or Numeric Limits, the permittees should implement a suite of minimum BMPs – good housekeeping, employee training, preventing materials from exposure to rain, etc.
- SIC categories are not a satisfactory way of identifying industrial activities at any given site. The Board should develop a better method of characterizing industrial activities that can impact storm water.
- The Panel recognizes this is a large task and recommends prioritizing the implementation of this approach to achieve the greatest reduction of pollutants statewide.
- Increasingly, a number of industries have moved industrial activities indoors, preventing storm water pollution. The Panel recognizes that these facilities should be granted some sort of regulatory relief from industrial Numeric Limits or action levels, but should still be required to comply with MS4 permit requirements.

The Panel recognizes the need to make progress in monitoring and reducing storm water discharge from industrial facilities, but urges the Board to consider the total economic impact and not unduly penalize California industries with respect to industries outside of California.

EXHIBIT 9

KCB

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 98-01

Own Motion Review of the Petition of
ENVIRONMENTAL HEALTH COALITION
to Review Waste Discharge Requirements Order 96-03,
NPDES Permit No. CAS0108740,
for Storm Water and Urban Runoff from the
Orange County Flood Control District
and the
Incorporated Cities of Orange County
Within the San Diego Region,
Issued by the
California Regional Water Quality Control Board,
San Diego Region.

SWRCB/OCC File A-1041

BY THE BOARD:

On August 8, 1996, the Regional Water Quality Control Board, San Diego Region (Regional Water Board), adopted Waste Discharge Requirements Order 96-03, NPDES No. CAS0108740, for storm water discharge from municipal separate sewer systems for the incorporated cities of Orange County within the San Diego Regional Water Board's boundaries (Orange County permit).[1] The waste discharge requirements constitute a national pollutant discharge elimination system (NPDES) permit pursuant to section 402(p) of the federal Clean Water Act (CWA).

[1] On March 8, 1996, the Regional Water Quality Control Board, Santa Ana Region, issued waste discharge requirements for storm water discharge to the incorporated cities of Orange County within the Santa Ana Regional Water Board's boundaries that are essentially identical to the permit adopted by the San Diego Regional Water Board.

On September 6, 1996, the State Water Resources Control Board (SWRCB) received a petition from the Environmental Health Coalition (petitioner) contesting certain provisions of the NPDES permit.[2] The SWRCB did not take formal action on the petition within the 270 days specified in Title 23, California Code of Regulations, section 2052(d). The SWRCB will, on its own motion, review the Regional Water Board's action as authorized by California Water Code section 13320(a).

I. BACKGROUND

The primary issue raised by petitioner concerns the Regional Water Board's implementation of the CWA requirement that all NPDES permits must include technology-based effluent limitations and any more stringent limitation necessary to meet water quality standards. Federal and state requirements relevant to the issues raised in the petition are discussed below.[3]

CWA section 301(a) prohibits the discharge of any pollutant unless pursuant to an NPDES permit. (33 U.S.C. § 1311(a).) Section 301(b)(1)(A) requires compliance with effluent limitations necessary to achieve compliance with technology-based standards (e.g., best practicable control technology currently available or secondary treatment). Section 301(b)(1)(C) also requires compliance with any more stringent effluent limitation "necessary to meet water quality standards." (33 U.S.C.

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[2] This order is based on the record before the Regional Water Board. The Regional Water Board also issued an NPDES permit to the Department of Transportation and a petition was filed challenging that permit. In preparing this order, we have reviewed the record for the petition challenging that permit and other documents noted in this Order.

[3] See State Water Resources Control Board Order WQ 91-03 (*Citizens For a Better Environment, et al.*) for an extensive discussion of the regulatory framework for municipal separate storm sewer systems.

§ 1311(b)(1)(c).) CWA section 402 establishes requirements for NPDES permits. (33 U.S.C. § 1342.) NPDES permits must comply with section 301. Section 402(p) establishes specific NPDES permit requirements for municipal storm water discharges and for storm water discharges associated with industrial activities. Section 402(p) includes a technology-based standard for storm water permits issued to municipal separate storm sewer systems. Such permits must require:

> ". . . controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(B)(iii).)

To comply with CWA sections 301 and 402 for municipal separate storm water discharges, a municipal storm water NPDES permit must include effluent limitations to meet the technology-based standard to reduce pollutants to the "maximum extent practicable" and any more stringent effluent limitations necessary to meet water quality standards. The United States Environmental Protection Agency (EPA) has promulgated regulations to implement NPDES requirements in CWA section 402, including storm water requirements of CWA section 402(p).[4] (See 40 C.F.R. Part 122.26.)

[4] CWA Section 402(p) specifies that permits for industrial discharges are required to comply with all technology-based and water quality-based requirements. (Section 402(p)(3)(A).) In contrast, CWA Section 402(p) specifies that permits for municipal separate storm water discharges shall require controls to comply with technology-based requirements but does not specifically state that municipal permits must require controls to comply with water quality-based requirements. (Section 402(p)(3)(B).) EPA, however, has interpreted the Clean Water Act to require permits for municipal separate storm water discharges to include requirements to achieve compliance with water quality standards. See memorandum "Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems" from E. Donald Elliott, General Counsel, EPA, to Nancy J. Marvel, Regional Counsel, EPA Region 9 (January 9, 1991).

CWA section 303 requires states to adopt water quality standards for surface waters. (33 U.S.C. § 1313.) Water quality standards consist of the designated uses of waters and the water quality criteria for such waters that would support the designated uses. The Regional Water Board in its Water Quality Control Plan for the San Diego region has adopted water quality standards by designating the beneficial uses for waters in the region and establishing water quality objectives (i.e., water quality criteria) to protect those uses. See Water Quality Control Plan for the San Diego Basin (9), September 8, 1994, at Chapters 2 and 3. The SWRCB has also adopted water quality control plans and policies that specify water quality standards which are relevant to this permit (e.g., the SWRCB Ocean Plan). To comply with CWA section 301, municipal storm water permits must include effluent limitations where necessary to meet these water quality standards.

NPDES permits issued by the Regional Water Boards, including municipal storm water permits, typically include a requirement entitled "discharge limitations" or "effluent limitations" that specifies the technology-based effluent limitations and a requirement entitled "receiving water limitations" or "receiving water standards" that specifies the water quality objectives in the Water Quality Control Plan relevant to the discharge and limitations necessary to attain those objectives. The receiving water limitations provision is used to implement the requirement of CWA section 301(b)(1)(C) to include more stringent effluent limitations necessary to meet

water quality standards.[5] The limitations necessary to meet water quality standards are also called the water quality-based effluent limitations. NPDES permits are generally required to include numeric effluent limitations to implement the technology-based standard and water quality-based effluent limitations to attain the water quality standards.[6] (40 C.F.R. § 122.44.) However, the federal regulations allow the use of best management practices (BMPs) to control or abate the discharge of pollutants when numeric effluent limitations are infeasible. (40 C.F.R. § 122.44(k).) The SWRCB has determined that for municipal separate storm water permits, BMPs constitute valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements.[7] See SWRCB Orders WQ 91-03 and WQ 91-04. In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA.

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[5] SWRCB Order WQ 91-03 concluded that municipal permits must include effluent limitations necessary to achieve water quality standards. See Order WQ 91-03 at slip op. 36. Orange County and other interested persons have argued that section 402(p) does not require municipal permits to meet water quality standards. While disagreeing, it should be noted that section 402(p) contains explicit authority for states to require provisions in addition to the "maximum extent practical" controls.

[6] See memorandum "Numeric Effluent Limitations in NPDES Permits" from Elizabeth Miller Jennings, Senior Staff Counsel, State Water Resources Control Board, to Central Valley Regional Water Quality Control Board (Aug. 1, 1997).

[7] EPA has issued a national policy entitled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits," 61 Fed. Reg. 43761 (Aug. 26, 1996), that addresses issues related to the type of effluent limitations that are appropriate to provide for attainment of water quality standards. The policy applies only to EPA, but EPA has encouraged states to adopt similar policies for storm water permits. The policy states that storm water permits need not include numeric water quality-based effluent limitations. Rather, BMPs should be used to attain water quality-based effluent limitations, which should be expanded in later permits if necessary to provide for attainment of water quality standards.

II. CONTENTIONS AND FINDINGS[8]

The petitioner seeks review of the Orange County permit adopted by the Regional Water Board. The Orange County NPDES permit, adopted by the Regional Water Board, applies to the incorporated cities in Orange County within the boundaries of the San Diego region. The Santa Ana Regional Water Board, on March 8, 1996, adopted an NPDES permit for storm water discharges from the incorporated cities of Orange County within the boundaries of the Santa Ana region.[9] Orange County had requested that the Santa Ana Regional Water Board adopt one permit for all of Orange County. The San Diego Regional Water Board preferred to retain jurisdiction but agreed to adopt a permit consistent with the permit adopted by the Santa Ana Regional Water Board. Both permits for Orange County are essentially identical and require the permittees to develop a plan establishing BMPs to control discharges to the "maximum extent practicable." The Orange County permittees adopted a plan called the "drainage area management plan" (DAMP) that was approved by the San Diego Regional Water Board on April 6, 1996.[10] Both permits also contain the same provision addressing receiving water limitations, which, in relevant part, states:

> "1. Receiving water limitations have been established based on beneficial uses, water quality objectives, and water quality standards contained in the Basin Plan, and amendments thereto, and on ambient water quality. They are intended to protect the beneficial uses and attain the water quality objectives contained in the Basin Plan. The discharge of urban storm water, or non-storm water, from a municipal storm sewer system

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[8] All other contentions raised in the petition which are not discussed in this order are dismissed. (Cal. Code Regs., tit. 23, § 2052; *People* v. *Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349].)

[9] No petition was filed challenging the permit issued by the Santa Ana Regional Water Board.

[10] The DAMP was also approved by the Santa Ana Regional Water Board.

for which the permittees are responsible under the terms of this permit shall not cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives. The permittees will not be in violation of this provision so long as they are in compliance with the requirements set forth [in the following provision]."

"a. If the Executive Officer determines that a continuing or recurring impairment of beneficial uses or exceedances of water quality objectives has been caused by urban storm water discharges from the municipal storm sewer system, the following steps shall be taken. . . ."

The remainder of the provision requires the Executive Officer to evaluate the DAMP and if the Executive Officer determines that implementation of the DAMP will not have a reasonable likelihood of preventing future impairment of beneficial uses or exceedances of water quality objectives, the permittees would be required to submit a report evaluating impacts on water quality and proposing changes to implementation of the existing DAMP or proposing revisions to the DAMP. The permittees would then be required to implement the revised DAMP.

Petitioner contends that for several reasons, this receiving water limitations provision is inadequate under the CWA and its implementing regulations and under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). Petitioner points out that CWA section 402(b), and implementing regulations, require that NPDES permits issued by state agencies comply with the CWA. (33 U.S.C. 1342(b), 40 C.F.R. § 123.25.) The Porter-Cologne Act provides that permits issued subject to federal law must "ensure compliance with all applicable provisions of the [CWA and its implementing regulations], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of

beneficial uses, or to prevent nuisance." (Cal. Water Code § 13377.) Petitioner contends that the receiving water limitations language fails to require attainment of water quality standards.

1. Contention: The receiving water limitations section fails to comply with the CWA and the Porter-Cologne Act because it does not prohibit discharges that "contribute to" as well as "cause" exceedances of water quality objectives as required by federal regulations.

Finding: The SWRCB agrees that the NPDES permit must prohibit discharges that "cause" or "contribute" to violations of water quality standards. Federal regulations specify requirements that must be included in each NPDES permit. (40 C.F.R. § 122.44.) Each NPDES permit must include limitations necessary to achieve water quality standards:

> "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." (40 C.F.R. § 122.44(d)(1)(i).)[11] (Emphasis added.)

The receiving water limitations language of the Orange County NPDES permit requires the permittees to be responsible for those discharges that "cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives." To comply with the CWA, the phrase quoted in the immediately preceding sentence shall be interpreted so as to require permittees to control discharges that contribute to exceedances

[11] This provision applies to state programs. See 40 C.F.R. section 123.25.

of water quality objectives. Of course such contributions would have to be substantial (in more than a *de minimis* amount) contributions.

2. Contention: The petitioner contends that the receiving water limitations section in the permit violates the CWA and implementing regulations because it does not require compliance with water quality standards. The permit states that the permittees "will not be in violation of [receiving water limitations] so long as they are in compliance with the requirements" for evaluating the DAMP.

Finding: The SWRCB disagrees with petitioner's contention. In SWRCB Order WQ 96-13, the SWRCB reviewed and approved the storm water permit for certain permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Water Board. The Santa Clara Valley permit contains a receiving water limitations section that specifically prohibits discharges that cause or contribute to a violation of water quality objectives, and states that the permittees "shall comply . . . through the timely implementation of control measures and other actions to reduce pollution in the discharge." (Emphasis added.) The receiving water limitations provision in the Orange County permit prohibits discharges that cause exceedances of water quality objectives, and states that the "permittees will not be in violation of this provision so long as they are in compliance with the requirements" for evaluating and improving the effectiveness of the DAMP. The Orange County permit receiving water limitations section is not, as a practical matter, different than the Santa Clara Valley permit approved by this SWRCB. In each case, compliance with the receiving water limitations is achieved by following a

procedure to evaluate and improve the BMPs where necessary to comply with water quality standards.

The SWRCB has already determined that the use of BMPs to achieve both the technology-based effluent limitations and the water quality-based effluent limitations complies with the CWA and the Porter-Cologne Act. See SWRCB Order WQ 91-03. Accordingly, the SWRCB agrees that use of the phrase that the "permittees will not be in violation of . . ." complies with the CWA and, in fact, used that same phrase in SWRCB Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS000001) (the General Industrial Permit).

3. Contention: The petitioner contends that the receiving water limitations provision violates the CWA and implementing regulations because the mechanism for determining exceedances of receiving water limitations is unworkable and, therefore, would not result in achievement of water quality standards. The permittees are not considered to be in violation of receiving water limitations as long as the process for evaluating the DAMP are followed. This process, however, will not result in achievement of water quality standards because (1) it is very difficult to demonstrate that urban runoff has "caused" an exceedance of water quality objectives; (2) Regional Water Board staff stated at the Board hearing at which the permit was adopted that there were inadequate resources to oversee the storm water program; (3) the permit does not require submittal of information on the adequacy of the DAMP until after the Executive Officer determines that the plan will not result in achievement of water quality objectives;

and (4) the permit places no time schedule on review of the adequacy of the plan to meet water quality standards. The permit does not require any change to the DAMP until directed by the Executive Officer. Due to these limitations, water quality standards are not likely to be achieved.

Finding: Petitioner has raised legitimate concerns. As discussed above, permittees will be required to control discharges that contribute to exceedances of water quality objectives. The SWRCB's charge under Water Code section 13320 is to determine whether the Regional Water Board has acted appropriately. In this case, the Regional Water Board has directed its Executive Officer to determine when receiving water limitations have been exceeded. In order for such determinations to be made the Executive Officer must devote sufficient resources to make such determinations in a timely manner. Provided this is the case, it can be concluded that the permit is adequate to achieve water quality standards. This conclusion to uphold the permit language is further predicated on the fact that to do otherwise would result in two inconsistent storm water permits for Orange County.

III. ADDITIONAL ISSUES

While upholding the permit as appropriate, the SWRCB has concerns that future storm water permits contain the strongest and clearest possible language to protect water quality. As evidenced by the discussion at the January 7, 1998 workshop review of this petition, there are serious disagreements as to how best to ensure such protection. A review of the record leads to the following conclusions:

- Future storm water permits should contain consistent requirements to ensure water quality protection.
- Such permits must comply with CWA and Porter-Cologne Water Quality Control Act requirements.
- Storm water permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations.
- Permittees must ultimately be responsible for evaluating and revising BMPs to achieve compliance with water quality standards.
- Permits should be written to clearly identify water quality standards and to clearly require that permittees, through the implementation of BMPs, shall not cause or contribute to exceedances of such water quality standards.
- Given the unique nature of the storm water discharges, it is reasonable that implementation take place, where appropriate, on a phased basis.
- Determinations that additional BMPs are necessary to achieve water quality standards should be based on findings by the permittees or the Regional Boards that storm water discharges are a substantial (in more than a *de minimis* amount) contributor to continuing or recurring exceedances of such standards.

Based upon these conclusions and as a precedent decision,[12] the following receiving water limitation language shall be included in future municipal storm water permits.

RECEIVING WATER LIMITATIONS

1. Storm water discharges and authorized non-storm water discharges to any surface or ground water shall not adversely impact human health or the environment.

2. The SWMP shall be designed and implemented, or shall be in the process of being revised in accordance with the procedures set forth below to ensure that discharges authorized by this permit shall not cause or substantially (in more than a *de minimis* amount) contribute to a continuing or recurring exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board's Basin Plan.

3. If the discharges cause or contribute to an exceedance of the applicable water quality standards, permittee shall take the following steps:

   a. Upon a determination by either the facility operator or the Regional Water Board that discharges are causing or contributing to an exceedance of an applicable water quality standard, the facility operator shall promptly notify and thereafter submit a report to the appropriate Regional Water Quality Control Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the annual update to the SWMP unless the Regional Water Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Water Quality Control Board may require modifications to the report;

   b. Submit any modifications to the report required by the Regional Board within 30 days of notification;

[12] In SWRCB Order WR 96-1, the SWRCB determined that water quality orders are precedent decisions. (See Gov. Code § 11425.60.)

c. Within 30 days following approval of the report described above by the Regional Water Quality Control Board, the facility operator shall revise its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;

d. Implement the revised SWMP and monitoring program in accordance with the approved schedule; and

e. Reduce pollutants in storm water discharges and authorized non-storm water discharges, following implementation of the SWMP revised in accordance with paragraph 3 above, to levels which shall not cause or contribute to an exceedance of any applicable water quality standards.

4. So long as permittees have complied with the procedures set forth in paragraph 3 above and are implementing the revised SWMP, they do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develope additional BMPs.

IV. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

1. The federal regulations implementing CWA section 402(p) require NPDES permits to prohibit discharges of pollutants that "cause or contribute" to exceedances of water quality standards and the permit will be so interpreted.

2. The specific portion of the receiving water limitations provision that states that "permittees will not be in violation of this provision so long as they are in compliance with the requirements" specifying the process for evaluating and improving the effectiveness of the DAMP complies with the CWA.

3. The Regional Water Board acted appropriately in adopting the permit.

4. Receiving water limitation provisions of future municipal storm water permits shall be consistent with this Order.

V. ORDER

IT IS ORDERED that Order 96-03 shall be interpreted as discussed above.

It is further ordered that in other respects, the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 1998.

AYE:	John Caffrey Marc Del Piero Mary Jane Forster John W. Brown
NO:	None
ABSENT:	James M. Stubchaer
ABSTAIN:	None

Maureen Marché
Administrative Assistant to the Board

EXHIBIT 10

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2000 - 11

In the Matter of the Petitions of
THE CITIES OF BELLFLOWER, ET AL., THE CITY OF ARCADIA, AND WESTERN STATES PETROLEUM ASSOCIATION
Review of January 26, 2000 Action of the Regional Board
and
Actions and Failures to Act
by both the
California Regional Water Quality Control Board,
Los Angeles Region and Its Executive Officer
Pursuant to Order No. 96-054,
Permit for Municipal Storm Water and Urban Run-Off Discharges Within
Los Angeles County
[NPDES NO. CAS614001]

SWRCB/OCC FILES A-1280, A-1280(a) and A-1280(b)

BY THE BOARD:

On July 15, 1996, the Los Angeles Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 96-054 (permit) to the 85 incorporated cities and the county within Los Angeles County (the County).[1] The permit covers storm water discharges from municipal separate storm sewer systems throughout the County.[2]

[1] This was the second storm water permit adopted for Los Angeles County and its cities. The first permit was the subject of an earlier Order. (In the Matter of Natural Resources Defense Council, Inc., Order WQ 91-04). In this permit, the County is designated as the Principal Permittee, and each city is designated as a permittee. The County is required to submit various documents on behalf of all of the permittees.
[2] The Regional Water Board has since issued a separate permit for one city, Long Beach. The relevant provisions of the Long Beach permit are similar to those in Order No. 96-054.

The permit contains provisions for the regulation of storm water discharges from development planning and construction.[3] Pursuant to these provisions, the County was required to submit Standard Urban Storm Water Mitigation Plans (SUSMPs).[4] The SUSMPs are plans that designate best management practices (BMPs) that must be used in specified categories of development projects. The County submitted SUSMPs, but the Regional Water Board approved the SUSMPs only after making revisions. The Executive Officer issued the revised SUSMPs on March 8, 2000.[5]

On February 25, 2000, the State Water Resources Control Board (State Water Board or Board) received a petition for review of the actions and failures to act regarding the SUSMPs from a number of cities, the Building Industry Association of Southern California and the Building Industry Legal Defense Foundation (jointly referred to as Cities). A second petition was received from the City of Arcadia. And a third petition was received from the Western States Petroleum Association (WSPA). On April 7, 2000, the petitioners filed amendments to their petitions, concerning the March 8, 2000 issuance of the SUSMPs. The Cities' amendment also revised the list of cities included in the petition. The Cities' petition now includes 32 cities. The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[6] The petitioners also requested a stay of the SUSMPs. This request was denied by letter, dated May 11, 2000.

[3] Permit, Part 2.III. These provisions focus more on post-construction impacts of development than on discharges from construction activities.
[4] Permit, Part 2.III.A.1.c.
[5] These are referred to herein as the Final SUSMPs. The Final SUSMPs also apply to Long Beach, even though it is subject to a separate permit.
[6] Cal. Code of Regs., tit. 23, section 2054.

On June 7 and 8, 2000, the Board held a hearing in Torrance. Several entities, including the petitioners, the Regional Water Board, and several environmental groups[7], were designated parties. The evidence from that hearing has been included in the record before the Board. The record for comments on the petition was kept open until the end of the hearing. The parties were allowed to submit post-hearing briefs.[8]

I. BACKGROUND

In prior Orders[9] this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations. The emphasis for preventing pollution from storm water discharges is still on the development and implementation of effective BMPs, but with the expectation that the level of effort will increase over time. In its Interim Permitting Approach[10], the United States Environmental Protection Agency (U.S. EPA) stated that first-round permits should include BMPs, and expanded or better-tailored BMPs in subsequent permits where necessary to attain water quality standards. Dischargers, consultants, and academic institutions in California and nationwide have conducted numerous studies on the effectiveness of BMPs and appropriate design standards. While many questions are still

[7] The environmental groups are Natural Resources Defense Council, Inc., Santa Monica BayKeeper, and Heal the Bay.

[8] There are several documents that were not timely received and, therefore, are not made a part of the record before the Board. The hearing notice specified that all evidence from parties must be received by May 31, 2000. The Regional Water Board submitted documents on June 6, 2000. The hearing notice specified that policy statements were due by the close of the hearing. Several comment letters were received June 12, 13, and 19, 2000. None of these submittals are a part of the record. The post-hearing briefs were subject to a 10-page limit. The environmental groups submitted objections to the post-hearing brief submitted by the Cities. First, the environmental groups challenge the length of the brief. All briefs were subject to a 10-page limit. The Cities submitted a 10-page brief, with a 22-page attachment showing extensive proposed revisions to the SUSMPs. This submittal violates the page limit, and only the brief is considered part of the record. Second, the environmental groups claim that an e-mail message referred to by the petitioners is subject to attorney-client privilege and should not have been used in this hearing. This e-mail message, from the Regional Water Board's counsel to one of its engineers, was placed in the Regional Water Board's administrative record and submitted to the State Water Board. Any privilege that may have attached to the message has been waived and no longer exists. Finally, the post-hearing brief from the City of Arcadia was received late and will not be considered. Documents submitted late for interim deadlines (such as the deadline for submitting responses to the petitions), have been included in the record.

[9] See, especially Orders WQ 91-03 (In the Matter of Citizens for a Better Environment et al.) and WQ 91-04.

[10] Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. (61 Federal Register 57425.)

outstanding, more is expected of municipal dischargers, and many are implementing more effective programs.

While storm water management plans are improving, our knowledge of the impacts is also growing. Urban runoff has been determined to be a significant contributor of impairment to waters throughout the state. In Los Angeles specifically, beach closures are sometimes associated with urban runoff. In adopting the SUSMPs, the Regional Water Board took note of the urgent need for preventing further pollution from urban runoff and storm water discharges.

It is important to emphasize the role of the SUSMPs within the totality of regulating storm water discharges, and the purpose of these particular control measures. The requirement to prepare SUSMPS was part of the development controls in the permit. In addition to development controls, the permit requires education, public outreach, programs to restrict illicit connections and discharges, and controls on public facilities. In the context of the entire effort required by the permit, the development controls can be seen as preventing the existing situation from becoming worse.

The Final SUSMPs include a list of mandatory BMPs for nine categories of development. There are provisions that are applicable to all categories and lists of BMPs for individual categories. Requirements applicable to all categories include provisions to limit erosion from new development and redevelopment, requirements to conserve natural areas, protection of slopes and channels, and storm drain stenciling. Examples of BMPs specific to categories of discharge include design of loading docks for commercial projects and design of fueling areas for retail gasoline outlets. In most respects, the Final SUSMPs were similar to those proposed by the County. The significant departures were the inclusion of a numeric design standard for structural or treatment control BMPs, and the inclusion of certain types of projects that were not

covered in the County's proposal. The design standard creates objective and measurable criteria for the amount of runoff that must be treated or infiltrated by BMPs.

The record indicates that the purpose of the development controls, including the SUSMPs, is not simply to prevent pollution associated with construction runoff. As the petitioners point out, construction discharges are already subject to this Board's Statewide Construction Permit. The development controls in the SUSMPs, on the other hand, focus on post-construction runoff. They are aimed at limiting not just the pollutants in runoff from the new development, but also the volume of runoff that enters the municipal storm sewer system. By limiting runoff from new development, the SUSMPs prevent increased impacts from urban runoff generally. There is adequate technical information in the record to show that by controlling the volume of runoff from new development, BMPs can be effective in reducing the discharge of pollutants in storm water runoff.

The Procedure for Adopting the SUSMPs

The permit requires a program for controls on Development Planning and Construction. It involved a number of submissions by the County in consultation with the Cities. The first step was submission of a checklist for determining priority projects and exempt projects. The checklist was due on January 30, 1998. A list of recommended BMPs for development projects was also due on that date. The SUSMPs were due within six months of approval of the BMP list, and were to incorporate BMPs for certain categories of development. Following approval of the SUSMPs, the cities and County were to implement development programs for priority projects, consistent with the BMP list and the SUSMPs.

The BMP list was not approved until April 22, 1999. Thereafter, the County submitted proposed SUSMPs on July 22, 1999. The Regional Water Board held a public workshop on

August 10, 1999. Following the workshop, the County submitted revisions to the SUSMPs on August 12, 1999. On August 16, 1999, the Regional water Board gave notice that it would discuss the SUSMPs in a public meeting on September 16, 1999. There was significant discussion at that meeting regarding the intent of the Executive Officer to approve the SUSMPs, but with revisions including a numeric design standard. At the conclusion of the meeting, the Regional Water Board members asked the Executive Officer to revise the SUSMPs and bring them back to another meeting. On December 7, 1999, the Executive Officer circulated revised SUSMPs for public review. This document incorporated a numeric design standard and made other revisions to the permittees' proposal. The Regional Water Board held a hearing on the SUSMPs on January 26, 2000. At that meeting, the Regional Water Board endorsed the SUSMPs revised by the Executive Officer, but directed him to make further changes. The Executive Officer issued the Final SUSMPs on March 8, 2000.

The Contents of the Final SUSMPs

The permit provides that the SUSMPs must incorporate the appropriate elements of the BMP list and, at a minimum, apply to seven development categories: 100-plus home subdivisions; 10-plus home subdivisions; 100,000-plus square foot commercial developments; automotive repair shops; retail gasoline outlets; restaurants; and hillside single-family dwellings.

The SUSMPs proposed by the County applied to these seven categories. Various BMPs applied to the different categories, and the SUSMPs contained narrative mitigation requirements for source control and treatment. The July proposals stated:

> "The development must be designed so as to mitigate (infiltrate and/or treat) the site runoff generated from impervious directly connected areas that may contribute pollutants of concern to the storm water conveyance system."

There were no numeric design criteria for mitigation. According to various participants, earlier County drafts had included design standards to mitigate flows from 0.6-inch storm events. But any numeric criteria had been removed from the version that was submitted.

In its revised SUSMPs, submitted on August 12, the County explained in its cover letter that the mitigation language did not mean that all runoff must be mitigated. Rather, the County's intent was to omit a numerical standard from the SUSMPs. The revised SUSMPs no longer referred to mitigation at all. Instead, the following language replaced the mitigation requirement:

> "The development must be designed so as to minimize, to the maximum extent practicable (MEP), the introduction of pollutants of concern that may result in significant impacts, generated from site runoff of directly connected impervious areas (DCIA), to the storm water conveyance system as approved by the building official."

The Final SUSMPs, as approved by the Executive Officer and the Regional Water Board, included several revisions from the County's submittal. The revision that is of greatest concern to the petitioners is the addition of Design Standards for Structural or Treatment Control BMPs.[11] The design standards require that developments subject to the SUSMPs shall be designed to mitigate storm water runoff (by treatment or infiltration) from one of the following:

> "1. The 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area..., or
> 2. The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment..., or
> 3. The volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system, or
> 4. The volume of runoff produced from a historical-record based reference 24-hour rainfall criterion for "treatment" (0.75 inch average for the Los Angeles County area) that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event."

[11] The Final SUSMPs also include the narrative language quoted from the County's August 22, 1999 proposal.

The Final SUSMPs also applied to two additional categories of development: parking lots over 5,000 square feet or with 25 or more spaces and exposed to storm water, and to developments in environmentally-sensitive areas. Other revisions included application to all projects in the categories instead of discretionary projects only and the definition of redevelopment.

II. CONTENTIONS AND FINDINGS[12]

Contention: The petitioners contend that the Regional Water Board erred in not complying with the Administrative Review Process within the permit, and acted arbitrarily and capriciously and in violation of the Clean Water Act and state law.

Finding: The permit required the County, in consultation with the cities subject to the permit, to submit SUSMPs. The permit includes some general minimum requirements for the SUSMPs.[13] The Executive Officer is granted authority to approve the SUSMPs.[14]

The permit also contains an administrative review process.[15] The permit states that the administrative review process "formalizes the procedure for review and acceptance of reports and documents" and "provides a method to resolve any differences in compliance expectations between the Regional Board and Permittees, prior to initiating enforcement action."[16] Following this introductory statement, the permit includes two procedures. The first is for review and approval or disapproval of reports and documents. The second is the dispute resolution section that must be followed prior to enforcement action.

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[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158, [239 Cal.Rptr. 349], Cal. Code Regs., tit. 3, § 052.)
[13] Permit, Part 2, III.A.1.c.
[14] Permit, Part 2, III.A.2.
[15] Permit, Part 2, I.G.
[16] *Id.*

The process for review of documents that are subject to the Executive Officer's approval is that the Executive Officer will notify the permittees of the results of the review and approval or disapproval within 120 days. If the Executive Officer does not do so, the permittees must notify the Regional Water Board of their intent to implement the documents without approval. The Executive Officer then has 10 days to respond, or the permittees may implement the program and the Executive Officer may not make modifications.

The dispute resolution procedure is to be used when the Executive Officer determines that a permittee's storm water program is insufficient to meet the permit's provisions. The Executive Officer must send a "Notice of Intent to Meet and Confer" with the permittee. A meet and confer period then ensues, resulting in a written "Storm Water Program Compliance Amendment (SWPCA)." The permittee is provided time to comply with the SWPCA. The Executive Officer is not allowed to take enforcement action against a permittee until the Executive Officer notifies the permittee in writing that the administrative review process has been exhausted and that a violation exists warranting enforcement.

The petitioners contend that the Executive Officer failed to notify the permittees that their SUSMPs were inadequate within 120 days of its submittal. The petitioners also argue that, by revising the SUSMPs without pursuing the dispute resolution process, the Regional Water Board "violated" the terms of the permit.

The provision for review of documents, which clearly includes the SUSMPs, requires that the Executive Officer notify the permittees of the results of the review and approval or disapproval within 120 days. The County submitted the revised SUSMPs on August 12, 1999. Within 120 days, the Regional Water Board held a workshop where staff expressed their concerns with the SUSMPs. Also within 120 days the Regional Water Board itself held a public

meeting where there was extensive discussion and concern by board members that the SUSMPs did not include a numeric standard. And, prior to any notification by the permittees that they would proceed with implementing their SUSMPs, the Regional Water Board held a hearing January 26, 2000, where it directed the Executive Officer to issue the SUSMPs with revisions. The Executive Officer did so on March 8, 2000.

It is clear from the record that the Executive Officer, and the Regional Water Board itself, did inform the permittees that the SUSMPs were inadequate. There was no requirement for a specific form for expressing disapproval of documents. The extensive discussion and meetings on the need for revisions to the SUSMPs, and the Executive Officer's approval of revised SUSMPs, plainly refutes the allegation that the Regional Water Board never notified the permittees of its disapproval of the County's proposed SUSMPs.

The permittees also claim that the Regional Water Board "violated" the permit by failing to institute the meet and confer process.[17] The dispute resolution process, which includes meet and confer, did not apply to the decision to disapprove the proposed SUSMPs. That process is only required when the Regional Water Board ultimately takes an enforcement action against a permittee. It is separate from the process for review and approval or disapproval of documents, and does not even appear to relate to possible enforcement actions for submission of inadequate documents. This is illustrated by the fact that the provision regarding documents refers to submittals from both the Principal Permittee and the individual permittees, while the dispute resolution provision refers only to the permittees. This distinction is relevant because the County is charged with submitting the documents, while the individual permittees are responsible for compliance. A fair reading of the entire section on the administrative review process is that the

[17] We note that permits are issued to permittees to allow discharges to waters of the state. It is only permittees, and not Regional Water Boards, who can be charged with violating permits.

review and approval or disapproval of documents applies to submission of documents by the County on behalf of the cities, while the dispute resolution process applies to enforcement actions against any permittees for failing to implement adequate programs.

Contention: The petitioners contend that the Regional Water Board was not authorized to revise the SUSMPs to add more stringent requirements.

Finding: The petitioners contend that the mitigation standards in the SUSMPs are more stringent than the requirement in the permit to reduce pollutants in storm water runoff to the maximum extent practicable (MEP)[18]. The issue of what level of protection constitutes MEP will be discussed *Infra*, in the discussion of the reasonableness of the numeric standards. But the petitioners also make certain procedural claims on this point. They argue that in approving the BMP list, the Regional Water Board determined that those BMPs constituted MEP and that the Board could not add additional BMPs in the SUSMPs. They also contend the Regional Water Board itself had no authority to "usurp" the Executive Officer's role in reviewing the SUSMPs.[19] Finally, the petitioners contend that the Regional Water Board was not authorized to mandate a program for the permittees without amending the permit.

The permit requires the County to submit a list of BMPs for approval. The Regional Water Board approved this list. Following approval of the list, the County was required to submit the SUSMPs, which must "incorporate the appropriate elements of the recommended BMPs list."[20] The petitioners contend that by approving the list, the Regional Water Board determined that those BMPs constituted MEP, and that under the terms of the permit the Regional Water Board could not require additional BMPs.

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[18] The technology-based standard for controls under municipal storm water permits is MEP. For a fuller discussion of this standard, see Order WQ 91-03.
[19] It is undisputed that, at its January 26, 2000 meeting, the Board directed the Executive Officer to make additional revisions to the SUSMPs.
[20] Permit, Part 2, III.A.1.c.

In addressing this contention, we face what appears to be a fundamental misunderstanding of the numeric design standards on the part of the petitioners. The design standards are objective criteria that developers must achieve in designing their BMPs. The design standards are not separate BMPs. The standards tell what magnitude of storm event the BMPs must be designed to treat or infiltrate. They do not specify the BMPs that must be employed.

The SUSMPs as submitted by the County specify BMPs for various categories of development. Many of these BMPs are designed to minimize the pollutants in storm water runoff, by reducing flow through infiltration or by treatment. Examples of BMPs proposed by the County include infiltration basins and trenches, oil/water separators, and media filtration. The County's proposed SUSMPs also included language requiring minimizing the introduction of pollutants to the storm water conveyance system. That language remains unchanged in the Final SUSMPs. The only significant difference between the two versions of the SUSMPs was that the Regional Water Board established numeric criteria for designing the BMPs.

In adopting the Final SUSMPs, the Regional Water Board based its decision on the MEP standard.[21] The Regional Water Board did not significantly revise the BMP list or specify further the actions that developers must take to comply with the SUSMPs. Thus, we find that the Regional Water Board did not inappropriately revise its determination of what constituted MEP.

The Regional Water Board is the political body responsible for water quality control in the Los Angeles region.[22] While the Regional Water Board may delegate specified powers and duties to its Executive Officer,[23] it can at any time act on its own behalf. The fact that the Board authorized its Executive Officer to approve the SUSMPs in the permit did not mean that the Board thereby denied itself the opportunity to provide direction to the Executive Officer in his

[21] Resolution R-00-02.
[22] Water Code sections 13200 and 13225.
[23] Water Code section 13223.

approval. Such an interpretation of its delegation authority would result in an improper failure of the Board to assume responsibility for water quality in the region.

We also find that the Regional Water Board was authorized to revise the SUSMPs to achieve compliance with the permit's requirements. The SUSMPs are a part of implementation of the permit. Because the permit regulates storm water discharges throughout the entire Los Angeles region and it is implemented by 85 cities and the County, it is obvious that the permit could not spell out every detail of the program for the five-year term of the permit. Instead, the implementation is through the submission, review and approval, and implementation of various programs, including the SUSMPs.[24] Where it receives a submission that it finds is not consistent with the requirements of the permit, it is reasonable for the Regional Water Board to be able to require revisions. The Regional Water Board is not required to amend the permit each time it approves a submittal or approves a submittal with revisions. On the other hand, if the Regional Water Board's action in requiring revisions is inconsistent with the terms of the permit, then the Board should not act without first amending the permit. While the Regional Water Board could have required the County to make the revisions rather than making them itself, we see no harm in the Regional Water Board's approach.

As will be discussed below, in most respects the Final SUSMPs are consistent with the permit. But there are some portions of the SUSMPs that are not consistent, and in those cases the SUSMPs provisions are further revised in this Order.

Contention: The petitioners make various procedural claims, including that they were denied due process, and that the Regional Water Board violated the Administrative Procedure

[24] A fuller discussion of the use of storm water management plans to incorporate a developing program is found in Order No. WQ 91-03.

Act, the California Environmental Quality Act (CEQA), and the California Constitution, Article XIII B, section 6 (regarding state mandates).

Finding: The petitioners point out that at the January 26, 2000 Regional Water Board hearing, there was some confusion over late changes to the SUSMPs and they contend they were not provided adequate opportunity to comment. There was significant discussion of the SUSMPs over several months. We do not agree with the petitioners that a program of this magnitude must necessarily take years to develop. But we are concerned that at the January 26, 2000 hearing, interested persons and permittees were not given adequate time to review late revisions or to comment on them. Given the intense interest in this issue, the Regional Water Board should have diverged from its strict rule limiting individual speakers to three minutes and conducted a more formal process. Such a process should provide adequate time for comment, including continuances where appropriate.[25] But to the extent the Regional Water Board's process caused any harm, this Board cured those harms. We held a two-day hearing in Los Angeles County, where all parties were allowed significant time to present their positions and testimony. In addition, we allowed the introduction of new evidence that had not been presented to the Regional Water Board. At this point, all parties have been afforded a full opportunity to review the Final SUSMPs, to present their positions and evidence, and to engage in cross-examination. The petitioners' due process rights have been protected.

The Board has already addressed the contentions regarding compliance with other laws in prior decisions. The Administrative Procedure Act exempts the adoption of permits from its requirements.[26] While the SUSMPs are not a permit, they are implementing documents for a

[25] For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et seq.

[26] Government Code section 11352; See, Order No. 95-4 (In the Matter of the City and County of San Francisco).

permit, and are therefore subject to the exemption. Moreover, they are relevant only to this permit, and are not a general rule of application. The constitutional provisions regarding state mandates also do not apply to NPDES permits.[27] As will be explained below, the SUSMPs as revised herein, are consistent with MEP and therefore are federally mandated. The provisions of CEQA requiring adoption of environmental documents also do not apply to NPDES permits.[28] Again, as an implementing document for the permit, there is no requirement for a separate CEQA analysis.[29]

Contention: The petitioners contend that the SUSMPs do not properly apply the maximum extent practicable standard.

Finding: The permit, consistent with Clean Water Act section 402(p)(3)(B)(iii), requires controls to reduce the discharge of pollutants to the maximum extent practicable, or MEP.[30] In approving the Final SUSMPs, the Regional Water Board acknowledged that one of the primary objectives of the municipal storm water program is the requirement to reduce the discharge of pollutants from storm water conveyance systems to the MEP.[31] While all parties appear to agree that the standard for the SUSMPs is MEP, they disagree about what level of effort is necessary to comply with that standard.

The petitioners approach this issue from two angles. First, they contend that the SUSMPs will not provide water quality benefits that reflect MEP. Second, they contend that there could be adverse impacts on groundwater quality that have not been adequately evaluated.

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[27] See, Order No. WQ 90-3 (In the Matter of San Diego Unified Port District).
[28] Water Code section 13389.
[29] We do note with interest the environmental groups' comment that if the permittees believed it was necessary to comply with the APA and CEQA prior to adoption of the SUSMPs, then they themselves would have violated those acts in their submissions of the proposed SUSMPs.
[30] Permit, Finding 13.
[31] Final SUSMPs, at page 2; Resolution No. R-00-02, at page 3.

Storm Water Design Standards as MEP

In adopting the Final SUSMPs, the Regional Water Board found that many rivers and streams in Los Angeles County are impaired for pollutants found in storm water and urban runoff, and that storm water runoff carries pollutants from nearly all types of developed properties.[32] Pollutant loading from the aggregate of development in the basin results in impairments from sediments, metals, complex organic compounds, oil and grease, nutrients, and pesticides.[33] The Final SUSMPs reflect two goals: to reduce the amounts of these pollutants in runoff and to reduce the ability of runoff to act as a conveyance system to deliver more pollutants to receiving waters. The Final SUSMPs, which include lists of BMPs and design standards requiring treatment or infiltration, address these two goals.

Clean Water Act section 402(p)(3)(B)(iii), which sets forth the requirements for establishing MEP in municipal storm water permits, provides that such permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." The United States Environmental Protection Agency (U.S. EPA), in a guidance document, explains that BMPs should be used in first-round storm water permits, and "expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."[34] The Clean Water Act, as interpreted by U.S. EPA, does require that, in a second-round permit,[35] expanded BMPs may be appropriate. In light of the number of water

[32] Resolution No. R-00-02.
[33] *Id.*
[34] Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Federal Register 57425 (1996).
[35] The original permit was issued in 1990. The 1996 permit is a second-round permit.

bodies impaired by runoff in Los Angeles County, it was appropriate to expand the scope of BMPs during the permit term.

The regulations implementing section 402(p) specifically require municipalities to have controls to reduce the discharge of pollutants from their storm sewer systems that "receive discharges from areas of new development and significant redevelopment," including post-construction discharges.[36] Clearly, it was appropriate for the Regional Water Board to require BMPs for new development and significant redevelopment. The permittees, who submitted their own version of SUSMPs with listed BMPs for categories of development, appear to have no real quarrel with this general mandate.

This Board has already endorsed requirements to limit the flow of the "first flush" of storm water, which may contain more significant pollutants.[37] The permittees' own version of the SUSMPs required mitigation of storm water runoff by treatment or infiltration, thus conceding the propriety of these two approaches to lessening the impact of storm water discharges. The crux of the disagreement is that the Regional Water Board added numeric design standards to establish the amount of runoff that must be treated or infiltrated, and required the mandatory application of these standards to categories of development.

The addition of measurable standards for designing the BMPs provides additional guidance to developers and establishes a clear target for the development of the BMPs. The U.S. EPA guidance manual suggests the use of design criteria and performance standards for post-construction BMPs.[38] The numeric criteria the Regional Water Board adopted essentially

[36] 40 CFR section 122.26(d)(2)(iv)(A)(2).
[37] In the Matter of National Steel and Shipbuilding Company, et al., Order WQ 98-07, at slip opinion 7.
[38] Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Strom Sewer Systems, at page 6-4 (November 1992).

requires that 85 percent of the runoff from the development be infiltrated or treated.[39] In adopting these standards, the Regional Water Board based its decision on a research review of standards in other states and a statistical analysis of the rainfall in the area. The standard was set to gain the maximum benefit in mitigation while imposing the least burden on developers.[40] In light of the evidence of the use of this or more stringent standards in other states, the expert testimony supporting this standard, the endorsement by U.S. EPA in its comments, and the cost-effectiveness of its implementation (discussed below), the Regional Water Board acted appropriately in determining that the standards reflect MEP.[41]

We also find that the Regional Water Board appropriately applied these standards to seven of the categories listed in the SUSMPs: single-family hillside residences, 100,000 square foot commercial developments, automotive repair shops, restaurants, home subdivisions with 10 to 99 housing units, home subdivisions with 100 or more housing units, and parking lots with 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff.[42] These categories, except for parking lots, were already targeted for special treatment in the permit. The evidence shows that each listed category can be a significant source of pollutants and/or runoff following development. It is appropriate that the design standards apply so that BMPs for these categories of development result in the infiltration or treatment of a significant about of the runoff.

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[39] Four different methods of calculation are permitted, so the percentage of capture may vary slightly.

[40] At the hearing in this matter, Regional Water Board staff explained that the standard was set at the bottom of the "knee" of the curve where the benefits of the mitigation requirements decrease and the cost increases. Other states have set the standard higher along this curve, requiring 90 to 95 percent mitigation.

[41] This conclusion in no way departs from our acceptance of BMPs in lieu of numeric effluent limitations in storm water permits. (See, e.g., Order WQ 91-03 and Order WQ 91-04.) The numeric standard is a design standard for BMPs. It does not quantify or limit the pollutants in the effluent. It also does not specify which of the listed BMPs must be employed.

[42] As discussed below, this Board is revising the SUSMPs to delete the application of the design standards to retail gasoline outlets and to locations within or directly adjacent to or discharging directly to environmentally-sensitive areas.

Potential Impacts on Ground Water

The petitioners contend that infiltration of runoff may lead to ground water pollution, and that the Regional Water Board did not properly consider such potential impacts. The mitigation standards provide for a waiver where there is a risk of ground water contamination because a known unconfined aquifer lies beneath the land surface or an existing or potential underground source of drinking water is less than ten feet from the soil surface.[43] The Final SUSMPs also include a discussion on how to use infiltration so that the risk of contamination of groundwater is reduced, and where infiltration is not appropriate.[44]

The Regional Water Board did consider the potential impacts to groundwater from infiltration, and included appropriate limitations and guidance on its use as a BMP. These provisions will ensure adequate protection of groundwater from any adverse impacts due to infiltration.

Contention: The petitioners contend the Regional Water Board failed to show that the SUSMPs as adopted are cost-effective and that the benefits to be obtained outweigh the costs.

Finding: The petitioners refer to the Preamble to the Phase II storm water regulations[45] as the basis for their economic argument. The quoted language, however, does not wholly support the petitioners' contention. The Preamble states that President Clinton's Clean Water Initiative clarifies "that the maximum extent practicable standard should be applied in a site-specific, flexible manner, taking into account cost considerations as well as water quality effects."[46] It is clear that cost should be considered in determining MEP; this does not mean that

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[43] Final SUSMP, page 14.
[44] *Id.*, at page 15.
[45] 64 Federal Register 68722 and following. These regulations do not apply to the permit, but the general language on MEP is relevant to EPA's interpretation of the standard.
[46] 64 Federal Register 68722, 68732 (December 8, 1999).

the Regional Water Board must demonstrate that the water quality benefits outweigh the economic costs.

While the standard of MEP is not defined in the storm water regulations or the Clean Water Act, the term has been defined in other federal rules. Probably the most comparable law that uses the term is the Superfund legislation, or CERCLA, at section 121(b). The legislative history of CERCLA indicates that the relevant factors, to determine whether MEP is met in choosing solutions and treatment technologies, include technical feasibility, cost, and state and public acceptance.[47] Another example of a definition of MEP is found in a regulation adopted by the Department of Transportation for onshore oil pipelines. MEP is defined as to "the limits of available technology and the practical and technical limits on a pipeline operator . . . ."[48]

These definitions focus mostly on technical feasibility, but cost is also a relevant factor. There must be a serious attempt to comply, and practical solutions may not be lightly rejected. If, from the list of BMPs, a permittee chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. Thus while cost is a factor, the Regional Water Board is not required to perform a cost-benefit analysis.

In reviewing the record, it is apparent that the Regional Water Board did evaluate the cost of the SUSMPs. While the petitioners claim there is no evidence in the record to show the

[47] 132 Cong. Rec. H 9561 (Oct. 8, 1986).
[48] 49 CFR section 194.5.

SUSMPs are necessary and cost effective, the opposite is true. The record is replete with documentation of costs of pilot mitigation projects, studies from similar programs in other states, and research studies. The Regional Water Board complied with the requirement to consider cost.

The Regional Water Board found that the cost to include BMPs that will meet the mitigation criteria will be one to two percent of the total development cost. This amount appears reasonable, especially in light of the amount of impervious surface already in Los Angeles County and the impacts on impaired water bodies. In considering the cost of compliance, it is also important to consider the costs of impairment. The beach closures in the Los Angeles region, well documented in the evidence, have reached critical proportions. These beach closures clearly have a financial impact on the area, and should be positively affected by the SUSMPs.

We do note that there could be further cost savings for developers if the permittees develop a regional solution for the problem. We recommend that the cities and the County, along with other interested agencies, work to develop regional solutions so that individual dischargers are not forced to create numerous small-scale projects. While the SUSMPs are an appropriate means of requiring mitigation of storm water discharges, we also encourage innovative regional approaches.[49]

Contention: The petitioners have raised contentions regarding details of the SUSMPs, including the amount of time allowed for inclusion of SUSMPs in local ordinances, and their application to both "discretionary" and "non-discretionary" projects. In addition, during the hearing certain ambiguities in the wording of the Final SUSMPs became apparent, including the provisions regarding redevelopment and environmentally-sensitive areas. In this portion of the

[49] We note that the SUSMPs as written do not in any way preclude the development of regional solutions approved by the Regional Water Board as a means to comply with the BMP and design standard requirements.

Order we address these issues and also the application of the design standards to retail gasoline outlets (RGOs) and the waiver funding requirements.

Finding: The testimony at the hearing in this matter revealed that there are specific provisions of the SUSMPs that create confusion as to the types of development projects subject to the mitigation design standards. The petitioners also contend that application of the standards to specific types of development either is unreasonable or is inconsistent with the terms of the permit. The specific requirements are discussed below.

Retail Gasoline Outlets

Petitioner WSPA contends that RGOs should be excluded from the SUSMPs. Its petition raised the same general contentions as the other petitioners, but at the hearing WSPA presented evidence specific to RGOs. In particular, WSPA raised questions about the propriety of applying the design standards for BMPs to RGOs. In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe. The mandatory BMPs that are included in the SUSMPs may be adequate to achieve MEP at RGOs, but the Regional Water Board should add additional mandatory BMPs, such as use of dry cleanup methods (e.g. sweeping) for removal of litter and debris, use of rags and absorbents for leaks and spills, restricting the practice of washing down hard surfaces unless the wash water is collected and disposed of properly, annual training of employees on proper spill cleanup and waste disposal methods, and the inclusion of BMPs to address trash receptacle areas and air/water supply

areas.[50] We conclude that because RGOs are already heavily regulated and may be limited in their ability to construct infiltration facilities or to perform treatment, they should not be subject to the BMP design standards at this time, and recommend that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. This Order should not be construed to preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

Redevelopment Projects

The SUSMPs were written to apply to new development and to some types of redevelopment in nine categories of projects. The definition of "redevelopment" reflected the intent of the Regional Water Board to define the scope of redevelopment projects subject to the requirements. That definition[51], however, was somewhat confusing, and it was apparent from testimony at the hearing that the parties had different understandings of the scope of redevelopment subject to the SUSMPs. In their post-hearing briefs, the various parties appeared to agree on the actual intent of the Regional Water Board in including redevelopment in the SUSMPs. This intent was to include redevelopment that adds or creates at least 5,000 square feet of impervious surface to the original development and, where the addition constitutes less than 50 percent of the original development, to limit the application of the BMP design standards to the addition.

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[50] These BMPs are from a list of BMPs in a publication of the California Storm Water Quality Task Force. (Best Management Practice Guide – Retail Gasoline Outlets. March 1997.) This publication includes BMPs in addition to those listed in the SUSMPs. All BMPs recommended in this publication should be mandated.

[51] The SUSMPs state: "Redevelopment" means, on an already developed site, the creation or addition of at least 5,000 square feet of impervious surfaces or the creation or addition of fifty percent or more of impervious surfaces or the making of improvements to fifty percent or more of the existing structure. Redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces.

While some parties requested further requirements for development, it appears that the Regional Water Board's original intent was relatively simple to apply and results in a fair and appropriate application of the SUSMPs' requirements to redevelopment. Therefore, we will revise the definition in the SUSMPs accordingly.

Environmentally-Sensitive Areas

The permit required that the SUSMPs address at least seven development categories.[52] The final SUSMPs added two more categories: parking lots of 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff; and location within or directly adjacent to an environmentally-sensitive area (ESA). The petitioners contend that the addition of ESAs was inappropriate because the permit refers only to "development categories"[53] and ESA is a location category.

Whether or not the Regional Water Board went beyond the permit's terms in including this category, we find a fundamental problem with the language of the SUSMPs regarding ESAs. All of the other categories are relatively simple to apply because they describe the types of development that fall within the category. For instance, the threshold for a commercial development is 100,000 square feet. If the development is smaller, it is not subject to the SUSMPs. But for developments within ESAs, the SUSMPs contain no threshold. This absence led to speculation by the petitioners that something as small as a new patio on a home in an ESA would make the SUSMPs applicable. The Regional Water Board, at the hearing and in its post-hearing brief, conceded that there should be some threshold. While the Regional Water Board

[52] The categories listed in the permit are: single-family hill residences, 100,000 square-foot commercial developments, automotive repair shops, retail gasoline outlets, restaurants, home subdivisions with 10 to 99 housing units, and home subdivisions with 100 or more housing units. Permit, Part 2, III.A.1.c.
[53] *Id.*

did recommend a specific threshold, we believe that it is inappropriate for this Board to add a threshold that has not been fully discussed by all interested persons.

While it may be appropriate to include more stringent controls for developments in ESAs, we also note that such developments are already subject to extensive regulation under other regulatory programs. Moreover, in light of the permit language limiting the SUSMPs to development categories, ESAs are not an appropriate category within the SUSMPs. The Regional Water Board may choose to consider the issue further when it reissues the permit.

Discretionary and Non-Discretionary, or Ministerial, Projects

The petitioners contend that the SUSMPs should apply only to projects that are considered "discretionary" within the meaning of California Environmental Quality Act (CEQA).[54] They argue that the inclusion of non-discretionary, or ministerial, projects is inconsistent with the terms of the permit.

The permit provisions on development projects do refer to "discretionary" projects in several places. The permittees are directed to develop a checklist for determining priority and exempt projects.[55] Priority projects are defined as development and redevelopment projects requiring discretionary approval, which may have a potential significant effect on storm water quality.[56] The permittees are also required to develop a BMP list.[57] In developing the SUSMPs, the permittees are required to incorporate appropriate elements of the BMP list.[58] Next, the permittees must develop a program on planning control measures for priority projects (which are limited to projects requiring discretionary approval), consistent with the list of BMPs and the

[54] Public Resources Code section 21000 *et seq.*
[55] Permit, Part 2, III.A.1.a.
[56] *Id.*
[57] Permit, Part 2, III.A.1.b.
[58] Permit, Part 2, III.A.1.c.

SUSMPs.[59] The permit further states that, in order to assure compliance with these requirements, the permittees must develop guidelines on preparing CEQA documents that link mitigation conditions to "local discretionary project approvals."[60]

Taken as a whole, the provisions of the permit appear to link the development requirements for SUSMPs to developments that receive discretionary approval by local governments, as defined in CEQA. The SUSMPs are an implementation tool for the permit and must be consistent with the permit. While the limitation of the SUSMPs to discretionary projects may not be sufficiently broad for an effective storm water control program, the Regional Water Board acted inappropriately in expanding the SUSMPs to include non-discretionary projects. The Regional Water Board may consider expanding the development controls beyond CEQA discretionary projects when it reissues the permit. But at this time, the SUSMPs must be revised so that they are limited to development projects requiring discretionary approval within the meaning of CEQA.[61]

Waiver Funding Requirement

Where a waiver is granted from the design standard requirements, the Final SUSMPs provide that the permittee must require the project proponent to transfer the cost savings to a storm water mitigation fund. The fund is to be operated by a public agency or a non-profit entity, to promote regional or alternative solutions for storm water pollution in the same storm watershed. The petitioners contend that the funding requirement will create an additional administrative burden.

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[59] Permit, Part 2, III.a.2.
[60] Permit, Part 2, III.a.3.b.
[61] We note that the Final SUSMPs already include a definition of "discretionary project" consistent with the definition in the CEQA guidelines. Final SUSMPs at page 4 of 25; Title 14, California Code of Regulations, section 15357. Apparently this definition was inadvertently retained after the Regional Water Board decided to expand the SUSMPs beyond discretionary projects.

The concept of a mitigation fund or "bank" is a positive idea for obtaining regional solutions to storm water runoff. As a long-term strategy, municipal storm water dischargers should work to establish regional mitigation facilities, which may be more cost-effective and more technically effective than mitigation structures at individual developments. But at this point there are not sufficient resources in place to require all permittees to establish such funds or to find appropriate non-profit organizations. Before mandating funding, preliminary questions should be answered, including who will manage the fund, what types of projects it will be used for, what entities can legally operate such funds, and how permittees will determine the amount of the assessments. It would be appropriate for the County to consider developing a program with the appropriate flood control agency, or as a model for the separate cities to develop. There may be suitable agencies to administer such funds, but the development of programs may take some time. The Regional Water Board should consider adopting such a program when it reissues the permit, after consultation with the appropriate local agencies.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board complied with the procedural requirements of the permit, including the Administrative Review Process, in approving the Final SUSMPs.
2. The Regional Water Board was authorized to revise the SUSMPs by including more stringent requirements than the permittees had proposed.
3. The Regional Water Board complied with did not violate the Administrative Procedure Act, CEQA, or the Constitutional provisions on state mandates. The petitioners' due process rights have been protected
4. The Regional Water Board considered the costs of the SUSMPs, and acted reasonably in requiring these controls in light of the expected benefits to water quality.

5. The Final SUSMPs reflect a reasonable interpretation of development controls that achieve reduction of pollutants in storm water discharges to the maximum extent practicable.
6. The SUSMPs include adequate protections of groundwater quality from any impacts from infiltration.
7. The SUSMPs will be revised to clarify the intent of the Regional Water Board and to make them consistent with the permit. Specifically, retail gasoline outlets should not be subject to the BMP design standards because they are already heavily regulated and may be limited in their ability to construct infiltration facilities or to perform treatment. Redevelopment projects should be subject to the SUSMPs only if they result in creation or addition of 5,000 square feet of impervious surfaces. Environmentally-sensitive areas should not be listed as a category in the SUSMPs. The SUSMPs should only apply to discretionary projects. The requirement for funding by project proponents who receive waivers should be deleted. The SUSMPs will be amended as shown in the attachment to this Order.
8. In light of the revisions of the SUSMPs made by this Order, and to allow the permittees adequate time to adopt implementing ordinances, the deadline for adopting ordinances will be revised to January 15, 2001, and the effective date of the Final SUSMPs will be revised to February 15, 2001.

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IV. ORDER

IT IS HEREBY ORDERED that the Standard Urban Storm Water Mitigation Plans for Los Angeles County and Cities in Los Angeles County is revised consistent with the amendments attached hereto. In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 5, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Peter S. Silva

ABSTAIN: None

/s/
Maureen Marché
Administrative Assistant to the Board

AMENDMENTS TO SUSMPS

[These amendments are to the Final SUSMP, as published March 8, 2000]

Page 3 of 25

First full paragraph:

All **discretionary development and redevelopment** projects that fall into one of ~~seven~~ **the following** categories are ~~identified in the Los Angeles County MS4 Permit as requiring~~ **subject to these** SUSMPs. These categories are:

- Single-family Hillside Residences
- 100,000 Square Foot Commercial Developments
- Automotive Repair Shops
- Retail Gasoline Outlets
- Restaurants
- Home Subdivisions with 10 to 99 housing units
- Home Subdivisions with 100 or more housing units
- **Parking lots 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff**

Second full paragraph:

~~The Regional Board Executive Officer has designated two additional categories subject to SUSMP requirements for the Los Angeles County MS4 Permit. These categories are:~~

- ~~Location within or directly adjacent to or discharging directly to an environmentally sensitive area, and~~
- ~~Parking lots 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff~~

Fourth full paragraph:

Permittees shall amend codes, if necessary, not later than ~~September 8, 2000~~ **January 15, 2001**, to give legal effect to the SUSMP requirements. The SUSMP requirements for projects identified herein shall take effect not later than ~~October 8, 2000~~ **February 15, 2001**.

Page 4 of 25

Delete definition of "Environmentally Sensitive Area"

Revise Definition of "Redevelopment":

"Redevelopment" means, on an already developed site, the creation or addition of at least 5,000 square feet of impervious surfaces ~~or the creation or addition of fifty percent or more of impervious surfaces or the making of improvements to fifty percent or more of the existing structure~~. Redevelopment includes, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routing maintenance activity; and land disturbing activities related with structural or impervious surfaces. **Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to these SUSMPs, the Design Standards apply only to the addition, and not to the entire development.**

Page 10 of 25

Add to "Limited Exclusion": Retail Gasoline Outlets

Page 15 of 25

Delete the first full paragraph (storm water mitigation funding)

EXHIBIT 11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 22 2002

OFFICE OF WATER

MEMORANDUM

SUBJECT: Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs

FROM: Robert H. Wayland, III, Director
Office of Wetlands, Oceans and Watersheds

James A. Hanlon, Director
Office of Wastewater Management

TO: Water Division Directors
Regions 1 - 10

This memorandum clarifies existing EPA regulatory requirements for, and provides guidance on, establishing wasteload allocations (WLAs) for storm water discharges in total maximum daily loads (TMDLs) approved or established by EPA. It also addresses the establishment of water quality-based effluent limits (WQBELs) and conditions in National Pollutant Discharge Elimination System (NPDES) permits based on the WLAs for storm water discharges in TMDLs. The key points presented in this memorandum are as follows:

- NPDES-regulated storm water discharges must be addressed by the wasteload allocation component of a TMDL. See 40 C.F.R. § 130.2(h).

- NPDES-regulated storm water discharges may not be addressed by the load allocation (LA) component of a TMDL. See 40 C.F.R. § 130.2 (g) & (h).

- Storm water discharges from sources that are not currently subject to NPDES regulation may be addressed by the load allocation component of a TMDL. See 40 C.F.R. § 130.2(g).

- It may be reasonable to express allocations for NPDES-regulated storm water discharges from multiple point sources as a single categorical wasteload allocation when data and information are insufficient to assign each source or outfall individual WLAs. See 40 C.F.R. § 130.2(i). In cases where wasteload allocations

are developed for categories of discharges, these categories should be defined as narrowly as available information allows.

The WLAs and LAs are to be expressed in numeric form in the TMDL. See 40 C.F.R. § 130.2(h) & (i). EPA expects TMDL authorities to make separate allocations to NPDES- regulated storm water discharges (in the form of WLAs) and unregulated storm water (in the form of LAs). EPA recognizes that these allocations might be fairly rudimentary because of data limitations and variability in the system.

NPDES permit conditions must be consistent with the assumptions and requirements of available WLAs. See 40 C.F.R. § 122.44(d)(1)(vii)(B).

WQBELs for NPDES-regulated storm water discharges that implement WLAs in TMDLs may be expressed in the form of best management practices (BMPs) under specified circumstances. See 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.44(k)(2)&(3). If BMPs alone adequately implement the WLAs, then additional controls are not necessary.

EPA expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.

When a non-numeric water quality-based effluent limit is imposed, the permit's administrative record, including the fact sheet when one is required, needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL. See 40 C.F.R. §§ 124.8, 124.9 & 124.18.

The NPDES permit must also specify the monitoring necessary to determine compliance with effluent limitations. See 40 C.F.R. § 122.44(i). Where effluent limits are specified as BMPs, the permit should also specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved (e.g., BMP performance data).

The permit should also provide a mechanism to make adjustments to the required BMPs as necessary to ensure their adequate performance.

This memorandum is organized as follows:

(I). Regulatory basis for including NPDES-regulated storm water discharges in WLAs in TMDLs;

(II). Options for addressing storm water in TMDLs; and

(III). Determining effluent limits in NPDES permits for storm water discharges consistent with the WLA

(I). Regulatory Basis for Including NPDES-regulated Storm Water Discharges in WLAs in TMDLs

As part of the 1987 amendments to the CWA, Congress added Section 402(p) to the Act to cover discharges composed entirely of storm water. Section 402(p)(2) of the Act requires permit coverage for discharges associated with industrial activity and discharges from large and medium municipal separate storm sewer systems (MS4), i.e., systems serving a population over 250,000 or systems serving a population between 100,000 and 250,000, respectively. These discharges are referred to as Phase I MS4 discharges.

In addition, the Administrator was directed to study and issue regulations that designate additional storm water discharges, other than those regulated under Phase I, to be regulated in order to protect water quality. EPA issued regulations on December 8, 1999 (64 FR 68722), expanding the NPDES storm water program to include discharges from smaller MS4s (including all systems within "urbanized areas" and other systems serving populations less than 100,000) and storm water discharges from construction sites that disturb one to five acres, with opportunities for area-specific exclusions. This program expansion is referred to as Phase II.

Section 402(p) also specifies the levels of control to be incorporated into NPDES storm water permits depending on the source (industrial versus municipal storm water). Permits for storm water discharges associated with industrial activity are to require compliance with all applicable provisions of Sections 301 and 402 of the CWA, i.e., all technology-based and water quality-based requirements. See 33 U.S.C. §1342(p)(3)(A). Permits for discharges from MS4s, however, "shall require controls to reduce the discharge of pollutants to the maximum extent practicable ... and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." See 33 U.S.C. §1342(p)(3)(B)(iii).

Storm water discharges that are regulated under Phase I or Phase II of the NPDES storm water program are point sources that must be included in the WLA portion of a TMDL. See 40 C.F.R. § 130.2(h). Storm water discharges that are not currently subject to Phase I or Phase II of the NPDES storm water program are not required to obtain NPDES permits. 33 U.S.C. §1342(p)(1) & (p)(6). Therefore, for regulatory purposes, they are analogous to nonpoint sources and may be included in the LA portion of a TMDL. See 40 C.F.R. § 130.2(g).

(II). Options for Addressing Storm Water in TMDLs

Decisions about allocations of pollutant loads within a TMDL are driven by the quantity and quality of existing and readily available water quality data. The amount of storm water data available for a TMDL varies from location to location. Nevertheless, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated storm water discharges

(in the form of WLAs) and unregulated storm water (in the form of LAs). It may be reasonable to quantify the allocations through estimates or extrapolations, based either on knowledge of land use patterns and associated literature values for pollutant loadings or on actual, albeit limited, loading information. EPA recognizes that these allocations might be fairly rudimentary because of data limitations.

EPA also recognizes that the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis. In this situation, EPA recommends expressing the wasteload allocation in the TMDL as either a single number for all NPDES-regulated storm water discharges, or when information allows, as different WLAs for different identifiable categories, e.g., municipal storm water as distinguished from storm water discharges from construction sites or municipal storm water discharges from City A as distinguished from City B. These categories should be defined as narrowly as available information allows (e.g., for municipalities, separate WLAs for each municipality and for industrial sources, separate WLAs for different types of industrial storm water sources or dischargers).

(III). Determining Effluent Limits in NPDES Permits for Storm Water Discharges Consistent with the WLA

Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Effluent limitations to control the discharge of pollutants generally are expressed in numerical form. However, in light of 33 U.S.C. §1342(p)(3)(B)(iii), EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits. See *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761 (Aug. 26, 1996). The Interim Permitting Approach Policy recognizes the need for an iterative approach to control pollutants in storm water discharges. Specifically, the policy anticipates that a suite of BMPs will be used in the initial rounds of permits and that these BMPs will be tailored in subsequent rounds.

EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.

Under certain circumstances, BMPs are an appropriate form of effluent limits to control pollutants in storm water. See 40 CFR § 122.44(k)(2) & (3). If it is determined that a BMP approach (including an iterative BMP approach) is appropriate to meet the storm water component of the TMDL, EPA recommends that the TMDL reflect this.

EPA expects that the NPDES permitting authority will review the information provided by the TMDL, see 40 C.F.R. § 122.44(d)(1)(vii)(B), and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit. Where BMPs are used, EPA recommends that the permit provide a mechanism to require use of expanded or better-tailored BMPs when monitoring demonstrates they are necessary to implement the WLA and protect water quality.

Where the NPDES permitting authority allows for a choice of BMPs, a discussion of the BMP selection and assumptions needs to be included in the permit's administrative record, including the fact sheet when one is required. 40 C.F.R.§§ 124.8, 124.9 & 124.18. For general permits, this may be included in the storm water pollution prevention plan required by the permit. See 40 C.F.R. § 122.28. Permitting authorities may require the permittee to provide supporting information, such as how the permittee designed its management plan to address the WLA(s). See 40 C.F.R. § 122.28. The NPDES permit must require the monitoring necessary to assure compliance with permit limitations, although the permitting authority has the discretion under EPA's regulations to decide the frequency of such monitoring. See 40 CFR § 122.44(i). EPA recommends that such permits require collecting data on the actual performance of the BMPs. These additional data may provide a basis for revised management measures. The monitoring data are likely to have other uses as well. For example, the monitoring data might indicate if it is necessary to adjust the BMPs. Any monitoring for storm water required as part of the permit should be consistent with the state's overall assessment and monitoring strategy.

The policy outlined in this memorandum affirms the appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (e.g., a combination of structural and non-structural BMPs) that address storm water discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (i.e., more stringent controls or specific BMPs) as necessary to protect water quality. This approach is further supported by the recent report from the National Research Council (NRC), *Assessing the TMDL Approach to Water Quality Management* (National Academy Press, 2001). The NRC report recommends an approach that includes "adaptive implementation," i.e., "a cyclical process in which TMDL plans are periodically assessed for their achievement of water quality standards" . . . and adjustments made as necessary. *NRC Report* at ES-5.

This memorandum discusses existing requirements of the Clean Water Act (CWA) and codified in the TMDL and NPDES implementing regulations. Those CWA provisions and regulations contain legally binding requirements. This document describes these requirements; it does not substitute for those provisions or regulations. The recommendations in this memorandum are not binding; indeed, there may be other approaches that would be appropriate

in particular situations. When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by the applicable requirements of the CWA and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation. EPA may change this guidance in the future.

If you have any questions please feel free to contact us or Linda Boornazian, Director of the Water Permits Division or Charles Sutfin, Director of the Assessment and Watershed Protection Division.

cc:
Water Quality Branch Chiefs
Regions 1 - 10

Permit Branch Chiefs
Regions 1 - 10

EXHIBIT 12

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **Save San Francisco Bay Association, et al.,** for Review of Waste Discharge Requirements Order No. 95-180, NPDES Permit No. CAS029718, by the California Regional Water Quality Control Board, San Francisco Bay Region. File No. A-992.	ORDER NO. WQ 96-13

BY THE BOARD:

On August 23, 1995, the California Regional Water Quality Control Board, San Francisco Bay Region (SFBRWQCB) adopted waste discharge requirements for storm water discharges from municipal separate sewer systems throughout the Santa Clara Valley.[1] The waste discharge requirements constituted a national pollutant discharge elimination system (NPDES) permit pursuant to Section 402(p) of the federal Clean Water Act (CWA). The co-permittees include Santa Clara Valley Water District, County of Santa Clara, and thirteen cities (dischargers).

On September 25, 1995, the State Water Resources Control Board (SWRCB) received a petition from Save San Francisco Bay Association, San Francisco BayKeeper, Peninsula Conservation Center Foundation, Sierra Club Bay Chapter, Sierra Club Loma Prieta Chapter, Citizens Committee to Complete the Refuge, and

[1] For an extensive discussion of the system, see Order No. WQ 91-03 which concerned an earlier version of waste discharge requirements for the same discharges.

Silicon Valley Toxics Coalition (petitioners), contesting the issuance of the NPDES permit.[2]

I. BACKGROUND

The NPDES permit is a reissuance of a permit first issued in 1990 for discharges of storm water from municipal separate storm sewer systems (MS4s) throughout the Santa Clara Valley to creeks and streams tributary to South San Francisco Bay. The earlier permit (Order No. 90-094) was reviewed and upheld by the SWRCB in Order No. WQ 91-03. That order included extensive discussion of the federal statutory and regulatory requirements for storm water discharges from MS4s, which will not be repeated here.

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[2] This order is based on the record before the SFBRWQCB. In addition, the record is supplemented by the following documents: "Municipal Separate Storm Sewer System Permit Reapplication Policy," transmitted by "Interpretative Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems," U.S. Environmental Protection Agency (EPA), May 17, 1996 (hereafter, Reapplication Policy); Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," EPA, August 1, 1996 (hereafter Effluent Limitations Policy); "Antibacksliding: Effect on Water Quality-Based Effluent Limitations," EPA, August 8, 1994 (hereafter Antibacksliding Brief); and letter from Terry Oda, EPA Region 9, dated June 26, 1996, concerning the Orange County storm water permit (hereafter, letter from EPA Region 9). Following the close of the public comment period, several letters were received from interested persons. These are not part of the record, except for the comments received on the draft order from counsel for the parties.

II. CONTENTIONS AND FINDINGS[3]

The petition contends that the SFBRWQCB should not have issued the NPDES permit because the permit application was incomplete and that various aspects of the permit are inadequate or improper.

Contention: The NPDES permit should not have been reissued because the permit application was insufficient.

Findings: The petitioners contend that the permit application submitted by the dischargers was insufficient and that the SFBRWQCB was, therefore, prohibited from issuing the permit. The petitioners cite regulations adopted by the EPA.

The EPA set forth detailed permit application requirements for large and medium municipal separate storm sewer discharges, such as the discharges at issue here, in 40 CFR Section 122.26(d). These requirements include extensive information about the storm sewer system and the methods by which the municipal entities will regulate and monitor their discharges. A part of these application requirements is submission of a storm water management plan (SWMP) to reduce the discharge of pollutants to the maximum extent practicable (MEP). (40 CFR Section 122.26(d)(2)(iv).) The petitioners claim that the dischargers' SWMP does not contain adequate control measures. The petitioners also claim that other information required in Section 122.26(d) was missing, including source identification,

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[3] All other contentions raised in the petition which are not discussed in this order are dismissed. (23 Code of California Regulations (CCR) Section 2052; *People* v. *Barry* (1987) 194 Cal.App.3d 158.)

characterization data, and assessment of controls. The petitioners contend that the SFBRWQCB was precluded from issuing the NPDES permit by 40 CFR Section 122.21(e), which limits the issuance of NPDES permits where an application is incomplete.

It is not necessary to address the contention that Section 122.21(e) prevents the SFBRWQCB from issuing an NPDES permit if an application is incomplete since the EPA has issued a policy and interpretative memo clarifying that, while reapplication for a second-round permit is required, the permit application requirements in 40 CFR Section 122.26(d)(2) apply only to first-round permit applications for large and medium MS4s, and not to the second round of permits. Instead, the reapplication requirements are "flexible" and are based on the minimum application requirements for all NPDES permits contained in 40 CFR Section 122.21(f). (Reapplication Policy.) The EPA encourages the reapplication package to consist only of the dischargers' fourth annual report,[4] which would include the proposed SWMP. (Id.) As explained above, the NPDES permit is a second-round storm water permit and the EPA policy is, therefore, applicable. The dischargers' permit application was consistent with the Reapplication Policy.

Administrative agencies are generally accorded a high degree of deference in the areas of law which they regulate.

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[4] Annual reports are required components of all MS4 permits. Each permit operates for five years and use of the fourth annual report allows for timely preparation of a new permit.

(See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council* (1984) 467 U.S. 837.) In interpreting EPA's regulations, it is proper to accord significant deference to EPA's policy expressions. The SWRCB will therefore follow the Reapplication Policy, and other EPA policy statements discussed in this order, in determining compliance with the Clean Water Act and EPA's regulations promulgated thereunder.

Contention: The petitioners contend that the permit lacks control measures.

Finding: The petitioners contend that the permit improperly requires the dischargers to implement their SWMP, and instead should specify the control measures that dischargers must implement. The petitioners believe that control measures must be specified in the permit pursuant to CWA Section 402(p)(3)(B)(iii). The petitioners argue the SFBRWQCB should not have incorporated the SWMP requirements into the permit without circulating the SWMP as a part of the permit and that the permit should have specified further control measures.

CWA Section 402(p)(3)(B)(iii) states that permits for MS4s:

> "[S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants."

The petitioners have misconstrued this section to mean that the SFBRWQCB must dictate the specific controls that

dischargers must implement. Instead, the SWRCB interprets the section to mean that the permit must contain provisions that will require the dischargers to select and implement adequate controls. It is perfectly appropriate for the SFBRWQCB, as it did here, to implement this section by requiring the dischargers to comply with their own SWMP, and to make revisions to the SWMP in the areas where the document was found lacking. While the SFBRWQCB did incorporate the SWMP into the permit, it also provided for amendments to the SWMP as necessary to achieve MEP and water quality standards. The SWRCB interprets the incorporation not as applying to the SWMP as it existed on the date the permit was adopted, but as a continuing duty to comply with any current SWMP provisions. In other words, the permit requires continual improvements to the SWMP and compliance with the plan requirements. This approach is consistent with the federal law and is in concert with the approach favored by the EPA.

The permit requires the dischargers to implement control measures and BMPs to reduce pollutants in storm water discharges to the MEP, as provided by federal law. The federal law does not require the SFBRWQCB to dictate the specific controls. The permit recognizes the SWMP as a dynamic document which requires ever-changing revisions and improvements as monitoring and assessment of BMPs to provide new information. The annual report is the mechanism for such assessment, and the

permit anticipates that assessment will result in modification of the SWMP.

The SFBRWQCB's approach is supported by the EPA's policy documents. The Reapplication Policy transmitted by the EPA acknowledges that the best management practices (BMPs) that will be implemented are contained in the SWMP and explains that each annual report must include proposed revisions to the SWMP. (Reapplication Policy, at page 3; 40 CFR Section 122.42(c)(2).) The EPA encourages use of the fourth annual report as the basic application package. In other words, the EPA acknowledges the SWMP as a dynamic document which should be revised more frequently than the permit is reissued. The SFBRWQCB has appropriately accommodated the needed flexibility in the SWMP while also specifying the standards to be attained (MEP and compliance with water quality objectives) and the areas requiring improvement.

The SFBRWQCB found that the SWMP was generally adequate, although it required certain improvements to resolve deficiencies in some of the actions and the time frame. (NPDES Permit, finding 5.) Provision C of the permit includes specific requirements to improve and implement the SWMP. The permit requires implementation of BMPs stated in the SWMP, ensures coverage of all major source areas known to the SFBRWQCB, and mandates improvements where necessary. The implementation and effectiveness of the BMPs must be evaluated in the annual reports. This combination of extensive control measures and an

annual evaluation of the implementation and effectiveness of the control measures is a program that meets the MEP standard.[5]

Contention: The petitioners claim that the permit unlawfully "backslides" from the prior permit.

Findings: Section 402(o) of the CWA contains limitations on the ability of the permitting authority to reissue NPDES permits that contain effluent limitations less stringent than in a prior NPDES permit. The provisions of Section 402(o) are detailed and contain several exceptions. The petitioners claim that Section 402(o) was violated because the permit deleted some of the activities specifically listed in the earlier permit where these activities are covered by the SWMP. Further, the petitioners claim that the SWMP includes a time schedule and that the time schedule violates the EPA order *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5.

The SWRCB does not agree that Section 402(o) has been violated. First, as explained above, the SFBRWQCB appropriately ordered the dischargers to achieve MEP by complying with their SWMP and by making improvements where necessary. In revising the language from the first permit (which specified all areas the SWMP must cover) to the second permit (which instead ordered the dischargers to comply with the SWMP where it did adequately address those areas), the SFBRWQCB did not adopt a less stringent

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[5] While the permit does not require the dischargers to estimate the expected reduction of pollutant loads for each source control measure, the EPA has acknowledged that in most cases permitting authorities do not have the ability at this time to link directly the BMPs implemented with impacts on receiving waters. (Effluent Limitations Policy.)

permit. Second, as explained below, the SFBRWQCB has latitude to revise BMP requirements without violating Section 402(o).

The petitioners argue that CWA Section 402(o) prohibits the SFBRWQCB from eliminating any previous requirements for BMPs because the requirements were necessitated both to achieve MEP and to protect water quality, and that Section 402(o) prohibits the adoption of less stringent effluent limitation if the original limitation was adopted to protect water quality. While the SWRCB agrees that the NPDES permit requirements to implement BMPs are, in part, water-quality based effluent limitations,[6] the SWRCB does not read Section 402(o) to prohibit the SFBRWQCB from revising the BMP requirements, even if that may include eliminating the need for some previously implemented BMPs.[7]

Section 402(o) contains exceptions where

> ". . . information is available which was not available at the time of permit issuance . . . and which would have justified the application of a less stringent effluent limitation . . . ." (Section 402(o)(2)(B)(i).)

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[6] In Order No. WQ 91-03, the SWRCB addressed the contention that the requirement to implement BMPs did not constitute the water quality-based effluent limitations required by the Clean Water Act. There it was stated:

> "Our review of the relevant law reveals that the permit's scheme of prohibitions, source control measures and best management practices constitutes valid effluent limitations consistent with requirements of 'maximum extent practicable' controls and water quality standards."

[7] As stated above, there is, in fact, no evidence that the BMP requirements in this permit are less stringent or that any BMPs have been eliminated.

According to the EPA, in its Antibacksliding Brief, revisions to water quality-based effluent limitations based on new information are appropriate so long as there is a net reduction in pollutant loadings. Any revisions to BMPs incorporated into or anticipated by the permit clearly fall within this exception, since they will be the result of new information from monitoring or analysis of effectiveness, and the dischargers remain bound to the same standards of compliance. The EPA has also acknowledged that the process of developing the SWMP will result in revising BMPs as new information becomes available. (Reapplication Policy.) It is absurd to assume that such revisions would violate the antibacksliding prohibition.

The SWRCB also finds that the SFBRWQCB did not violate the EPA's rule in *Star-Kist Caribe* by allowing time for BMPs to work and be evaluated and implemented. While the SWRCB agrees that an NPDES permit cannot include a time schedule for compliance with water quality objectives established prior to July 1, 1977,[8] the SFBRWQCB has not established such a time schedule here. Under the provisions of the permit, the effluent limitations (i.e., the requirements to implement BMPs pursuant to a SWMP) are in place and effective immediately. The time schedule for assessment and improvements are meant to increase the ability of the SFBRWQCB and the dischargers to ensure that the dynamic nature of selecting, evaluating, and implementing BMPs occurs throughout the term of the permit.

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[8] See, *City of Stockton*, Order No. WQ 96-09.

Contention: The petitioners claim the permit does not provide for compliance with water quality standards.

Findings: Storm water permits for MS4s must achieve compliance with water quality objectives, but they may do so by requiring the implementation of BMPs. (Order No. WQ 91-03.) The petitioners claim that although the permit specifically prohibits discharges that cause violation of water quality objectives, that prohibition is "nullified" by stating that the dischargers "shall comply . . . through the timely implementation of control measures and other actions to reduce pollutants in the discharge." (Permit, Provision C.1.) Provision C.1. also authorizes the SFBRWQCB to reopen the permit if necessary to require further BMPs or revision of the SWMP. (Id.) Petitioners claim the lengthy process of reopening the permit would result in delays in achieving water quality objectives.

The petitioners' concerns are not warranted. The NPDES permit clearly requires the implementation of BMPs that will not cause a violation of water quality objectives. The method for achieving compliance is through implementation of a SWMP and BMPs which must, throughout the term of the permit, be evaluated, assessed, and improved. The reopener provision in C.1. simply provides that if, notwithstanding these processes, adverse impacts to receiving waters persist, the permit may be reopened.

The approach taken by the SFBRWQCB is consistent with statements from the EPA concerning the most effective regulation of MS4s. The Effluent Limitations Policy encourages a permitting

approach using "expanded or better-tailored" BMPs in second-round permits. The EPA states that most MS4 permits include "educational and programmatic BMPs," and describes this approach as one where dischargers are required to "adopt and implement adequate BMPs." In other words, the permitting approach, wherein the discharger is required to implement a SWMP with BMPs, has been found by the EPA to be the most effective way to ensure compliance with water quality standards, at least until more information is available definitively tying storm water discharges to impacts on receiving waters. Finally, a similar approach taken by the RWQCB for the Santa Ana Region, was sanctioned by the EPA as follows:

> "The Orange County storm water permit states that receiving water limitations may not exceeded [sic], but then provides that if there are exceedences, [sic] the permittees would not be in violation of the permit if they follow up with certain actions. We appreciate the concerns . . . regarding the way the permit seems to say that 'a violation is not a violation.' However, the net effect of this condition is to focus on BMP implementation for now, and this is consistent with the draft national policy." (Letter from EPA Region 9.)

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioners, and for the reasons discussed above, the SWRCB concludes that the Regional Water Quality Control Board, San Francisco Bay Region, acted appropriately and

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properly in adopting the NPDES permit for storm water discharges from municipal separate storm sewers in the Santa Clara Valley.

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted a meeting of the State Water Resources Control Board held on September 19, 1996.

AYE: John P. Caffrey
John W. Brown
James M. Stubchaer
Mary Jane Forster

NO: Marc Del Piero

ABSENT: None.

ABSTAIN: None.

Maureen Marché
Administrative Assistant to the Board

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

RECEIVED
AUG 11 1994
EXECUTIVE OFFICE

AUG 08 1994

Mr. Walt Pettit
Executive Director
California State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95812-0100

re: Antibacksliding Related to Water Quality-Based Effluent Limitations

Dear Walt:

The issue of antibacksliding has been at the forefront of discussions regarding water quality-based effluent limitations. Many dischargers are concerned with being bound to effluent limitations they may not be able to meet. As a result they have been reluctant to accept permits containing stringent water quality-based effluent limitations. This has resulted in delays in issuing some permits.

To allay those concerns we have prepared a brief on antibacksliding as it relates to water quality-based effluent limitations. The interpretation reflects the Agency's current thinking on this matter and relies on published documents. In summary we do not believe that antibacksliding is as onerous as some would believe. The statute provides sufficient exceptions to the prohibition against antibacksliding that allow for reasonable relaxation of effluent limitations. The brief is enclosed.

I hope this will be of assistance to the State and Regional Boards. I am taking the liberty to forward copies to the Regional Boards, CASA and Tri-TAC.

Sincerely,

Catherine Kuhlman

Catherine E. Kuhlman
Chief
Permits and Compliance Branch

cc: Regional Water Quality Control Boards
Mr. Stephen Hayashi, CASA
Mr. Robert Baker, Tri-TAC

ANTIBACKSLIDING
EFFECT ON WATER QUALITY-BASED EFFLUENT LIMITATIONS

Due to doubts about complying with effluent limitations based on stringent water quality criteria, the effect of antibacksliding (section 402(o) of the Clean Water Act) on modifications of effluent limitations has become an important issue. Dischargers are loath to accept permits with stringent water quality-based effluent limitations, even where the effectiveness of those effluent limitations are delayed through the use of compliance schedules. The concern is the fear of being forever bound to effluent limitations that can not be met.

To allay those concerns, two of the most prominent issues are addressed in this brief. The first issue is whether antibacksliding prohibits relaxation of water quality-based effluent limitations whose compliance date has not yet passed, i.e., the effective date of those limitations are delayed by a compliance schedule. The second issue is whether antibacksliding prohibits relaxation of water quality-based effluent limitations which a discharger has been unable to achieve.

The CWA prohibits reissuing or modifying a permit to include effluent limitations less stringent than comparable effluent limitations in the previous permit unless certain exceptions are met. Those exceptions are set forth in sections 303(d)(4) and 402(o)(2) of the CWA. These two sections of the CWA provide independent exceptions to the prohibition. Meeting any one of the exceptions of either section is sufficient basis for relaxing the effluent limitations. [see 40 FR, p. 20837, Vol. 58 No. 72, April 16, 1993, Proposed Great Lakes Initiative (GLI); and Technical Support Document for Water Quality-Based Toxics Control (TSD), p. 113, EPA/505/2-90-001, March 1991]

1) Effect on Water Quality-Based Effluent Limitations prior to the Compliance Date.

Antibacksliding does not apply to changes made to an effluent limitation prior to its compliance date. If a permit is issued with a compliance schedule delaying the effective date of a water quality-based effluent limitation, that limitation may be relaxed without concern for antibacksliding if the modification is made prior to the effective date of the limitation. (see GLI, pp. 20837, 20981 and 21045)

2) Effect on Water Quality-Based Effluent Limitations being Violated.

The exceptions to the prohibition set forth in section 402(o)(2) of the CWA applies to water quality-based and best professional judgement (BPJ) based effluent limitations. Water quality-based effluent limitations may be relaxed if any of the following is met (TSD, p. 113):

a) There have been material and substantial alterations or additions to the permitted facility which justify the application of less stringent effluent limitations.

b) Good cause exists due to events beyond the permittee's control and for which there is no reasonably available remedy.

c) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but still has been unable to meet the effluent limitations (relaxation may only be allowed to the treatment levels actually achieved).

d) New information (other than revised regulations, guidance, or test methods) justifies relaxation of water quality-based permit limitations. (This applies to water quality-based limitations only where revised limitations result in a net reduction in pollutant loadings and are not the result of another discharger's elimination or substantial reductions of its discharge for reason's unrelated to water quality, e.g., plant shutdown.)

Anyone of the above section 402(o)(2) exceptions may be used as a basis to justify relaxation of water quality-based effluent limitations. Alternatively, the provisions of 303(d)(4) may be used to obtain such relief.

Section 303(d)(4) allows establishment of less stringent water quality-based effluent limitations. The criteria for the exceptions varies for attainment and nonattainment waters:

a) Attainment Waters: In waters where the applicable water quality standard has been attained, a water quality-based effluent limitation may be relaxed to the extent that the less stringent limitation is consistent with the State's antidegradation policy.

b) Nonattainment Waters: In waters where the applicable water quality standard has not yet been attained, an effluent limitation based on a total maximum daily load (TMDL) or other waste load allocation may be made less stringent if the cumulative effect of all such revisions assures attainment of the water quality standard, or the designated use which is not being attained is removed in accordance with the applicable regulation (40 CFR 131.10).

It should be noted that any relaxation of an effluent limitation can not be less stringent than the technology-based requirement set forth in the applicable effluent limitations guideline, or cause a violation of the applicable water quality standard. (see section 402(o)(3) of the CWA)

The processes discussed above are illustrated in the attached diagrams (Flow Charts A, B and C).

FLOW CHART A
ANTIBACKSLIDING

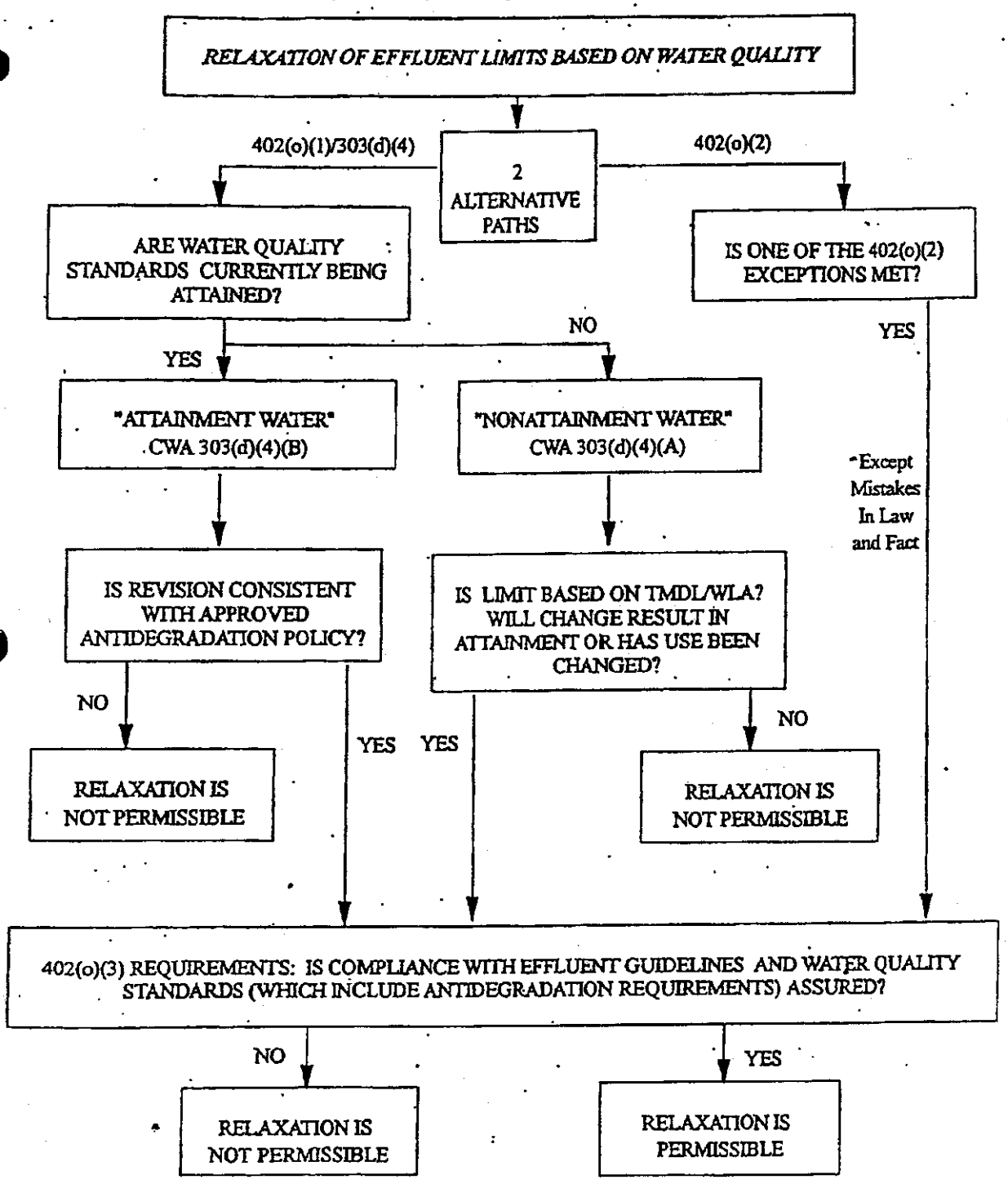

EXHIBIT 13

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2006-0012

In the Matter of the Petition of

BOEING COMPANY

For Review of Waste Discharge Requirements (WDR) Orders
R4-2004-0111, R4-2006-0008, and R4-2006-0036 for the
Santa Susana Field Laboratory
Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-1653 AND A-1737

BY THE BOARD:

The Boeing Company (Boeing) operates the Santa Susana Field Laboratory (SSFL) in Ventura County.[1] The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) has regulated wastewater discharges from SSFL to waters of the United States since at least 1992.[2] The regulated discharges include storm water runoff, discharges from groundwater remediation systems, industrial wastewater from ongoing operations such as engine test stands, and domestic wastewater from two sewage treatment plants.

On July 1, 2004, the Los Angeles Water Board re-issued a permit to Boeing for discharges from SSFL. (Waste Discharge Requirements Order No. R4-2004-0111 (2004 Permit).) On August 2, 2004, Boeing filed a petition with the State Water Resources Control

[1] Boeing owns SSFL with the National Aeronautical Space Agency (NASA). The United States Department of Energy (DOE) also owns several buildings at the site. NASA and DOE are not named in the permit reviewed herein, and their participation is not an issue before us.

[2] Waste Discharge Requirements Order No. 92-092, adopted December 7, 1992. The permit was reissued in 1998 (1998 Permit). Waste Discharge Requirements Order No. 98-051, adopted June 29, 1998. This is a national pollutant discharges elimination system (NPDES) permit, No. CA0001309.

Board (State Water Board) challenging the 2004 Permit.[3] (Our File No. A-1653.) Boeing requested that its petition be held in abeyance.[4]

On January 19, 2006, the Los Angeles Water Board modified the 2004 Permit, adding and revising the outfalls listed and the effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0008; January 2006 Permit.) On February 21, 2006, Boeing filed a petition challenging the January 2006 Permit and the failure of the Los Angeles Water Board to adopt a Cease and Desist Order with a compliance schedule and interim effluent limitations. (Our File No. A-1737.) Boeing also asked the State Water Board to activate its 2004 petition, File No. A-1635. On March 9, 2006, the Los Angeles Water Board again revised Boeing's permit, this time adding additional effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0036; March 2006 Permit.) On March 16, 2006, Boeing filed a petition challenging the March 2006 Permit.[5] Boeing also requested a stay of various effluent limitations. The State Water Board denied the stay request in Order WQ 2006-0007."

Many of Boeing's contentions concern the propriety and legality of numeric effluent limitations in the Permit. In particular, Boeing emphasizes that its discharges are largely storm water, and it points to the issues this Board faces as to whether to include numeric effluent limitations in storm water permits. As we will explain, the issues addressed in this Order are relevant only to a unique industrial operation subject to an individual NPDES permit. Our conclusions here do not apply to the issue of numeric effluent limitations for general permits

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[3] Committee to Bridge the Gap (CBG) also filed a petition challenging the permit. (Our File No. A-1653(a).) The State Water Board dismissed CBG's petition on February 14, 2005.

[4] The State Water Board's regulations allow a petitioner to request its petition be held in abeyance. (California Code of Regulations (Cal. Code Regs.), tit. 23, § 2050, subd. (d).) When a petition challenging a permit is held in abeyance, the State Water Board does not act upon the petition until it is activated and the challenged permit remains in full force and effect. (*Ibid.*)

[5] The March 16 petition was not assigned a separate file number, and instead is considered to be an amendment to File No. A-1737. All of the petitions filed by Boeing have been consolidated for purposes of review. (Cal. Code Regs., tit. 23, § 2054.) The 2004 Permit, as modified, is referred to as "the Permit." Where necessary, the different versions are referred to as the 2004 Permit, the January 2006 Permit, and the March 2006 Permit.

[6] The State Water Board received the administrative record and responses to the petitions on May 15, 2006. Part of the record was a report Boeing submitted to the Los Angeles Water Board for its February 2006 meeting. CBG asks this Board to limit the use of that report. All portions of the record were before the Los Angeles Water Board in its actions and are appropriately part of our administrative record. On October 13, 2006, Boeing submitted a new report to the State Water Board and asks that it be considered a part of our administrative record. We decline to do so. That report was received long after the Los Angeles Water Board acted and only two weeks before the State Water Board issued its draft order in this matter. Moreover, Boeing refused to place its petitions in abeyance, which would have allowed time for the State Water Board to review the report and for interested persons to respond to the permit. (See, Cal. Code Regs., tit. 23, § 2050.6.) Boeing's request is denied.

regulating discharges of storm water from thousands of entities engaged in construction and industrial activities.

In this Order, the State Water Board upholds the Permit in most respects. We conclude that the Los Angeles Water Board acted properly in issuing the Permit and in including requirements more akin to a typical individual NPDES permit than the General Permit for Industrial Activities.[7] We also conclude that the Permit includes appropriate monitoring requirements and sites. Moreover, we conclude that at least until Boeing submits a report of waste discharge describing its changed discharge, the Permit must continue to regulate many of the discharges from SSFL as commingled wastewater, rather than as storm water discharges. We also conclude Outfall 001 is duplicative with Outfall 011 and that Outfall 002 is duplicative with Outfall 018 for enforcement purposes. Only two of these outfalls should be regulated with numeric effluent limitations as compliance points. The numeric effluent limitations contained in the Permit were properly calculated and were properly based on the "reasonable potential" for discharges from SSFL to cause or contribute to exceedances of water quality standards and it is appropriate and proper for the Permit to retain these numeric effluent limitations. Finally, we conclude that the Los Angeles Water Board erred in failing to issue a cease and desist order (CDO), including a compliance schedule with interim effluent limitations, following a catastrophic fire at SSFL in September 2005. We will remand the Permit to the Los Angeles Water Board to make revisions consistent with this Order. The compliance schedule shall apply retroactively to the adoption of the January 2006 Permit.[8]

I. BACKGROUND

Boeing's SSFL is located at the top of Woolsey Canyon Road in Simi Hills. The site includes approximately 1500 acres of developed land and 1200 acres of undeveloped land. Industrial activities have occurred at the site for more than 50 years. These activities have included research, development, assembly, disassembly, and testing of rocket engines, missile components, and chemical lasers. There have also been nuclear reactors at SSFL, and the administrative record shows evidence of accidents with these reactors. As of the time the Permit was issued, Boeing activities that contributed to discharges, include rocket engine

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[7] General Permit for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities (WQO No. 97-03-DWQ).

[8] All contentions not discussed in this Order are not sufficiently substantial to warrant review. (See *People v. Barry* (1987) 194 Cal.App.3d 158; Cal. Code Regs., tit. 23, § 2052(a)(1).)

testing, fire suppression, pressure-testing of equipment to support rocket engine testing, domestic wastewater treatment, and contaminated groundwater treatment.

Boeing representatives have recently stated, including in testimony at the hearing on its stay request, that the only existing discharges from the site are storm water runoff. In particular, Boeing representatives state that it has stopped all rocket engine testing and will not resume testing, if at all, until it can remove all wastewater associated with testing from the site (presumably by trucking the wastewater offsite). In addition, they testified that the treatment plants (groundwater remediation and domestic sewage treatment) are no longer discharging at the site, but instead all wastewater is trucked away. There is nothing in the record to indicate that Boeing has submitted a report of waste discharge regarding these changes in its discharge or requested that the Permit be modified.[9]

Because of the historical activities at SSFL, the site is subject to remediation requirements pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA).[10] The lead agency for the RCRA cleanup is the California Department of Toxic Substances Control (DTSC). DTSC regulates nine closed surface impoundments. The site had radioactive waste that the United States Department of Energy (DOE) is responsible for decontaminating and decommissioning. Boeing still uses radioisotopes for calibrating radiation detectors and counting equipment, but there is no surface water discharge associated with these activities. There is surface runoff from throughout the site, including areas subject to RCRA cleanup. The record shows that there are instances where runoff from SSFL has been contaminated with, or has the potential to be contaminated with, constituents associated with the historical activities at the site and the RCRA remediation. For example, the catchment area of Outfall 004 is comprised of a landscape with surface soil contaminated with mercury and other constituents from the former Sodium Reactor Experiment site. Until the contaminated soil is removed (a likely final remediation solution for this area), Boeing has covered the soil with an impermeable cover and, at the bottom of the catchment, implemented BMPs to treat the runoff. If the cover were compromised, discharges from the site could enter surface waters. There are also constituents that have been detected in runoff from the site that are associated with historic

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[9] Dischargers must submit a report of waste discharge for any material change or proposed change in the character, location, or volume of their discharge. (Wat. Code, § 13260, subdivision (c).) The discharges characterized in the Permit generally occur only when there is wet weather runoff from the site. Thus, it is within Boeing's knowledge and control whether it will ensure that process water is not commingled with storm water in the future.

[10] 42 United States Code Annotated (U.S.C.A.) §§ 6901 et seq.

activities. For example, perchlorate, a chemical associated with rocket propellant testing, has been detected at an outfall near the rocket propellant testing area.

SSFL is situated in the Simi Hills. Because of its location and topography, and the large size of the facility, there is runoff from the site to several watersheds. Most of the runoff flows to Bell Creek, which is tributary to the Los Angeles River. There is also runoff into various drainages of Arroyo Simi and to Runkel, Dayton, and Woolsey Canyons. The Permit establishes eighteen outfalls.[11] Outfalls 001 and 002 are at the southerly perimeter of the SSFL, and approximately sixty percent of the runoff from the facility discharges through these two outfalls, which lead to Bell Creek, and then to the Los Angeles River. Outfall 008 discharges to Happy Valley, and ultimately to Bell Creek and the Los Angeles River. Discharges through Outfalls 003, 004, 005, 006, 007, 009, and 010 flow to small watersheds to the northwest of SSFL. These are not tributary to the Los Angeles River. Outfalls 011, 012, 013, 014, 015, 016, 017, and 018 each are sited near areas of specific activities on SSFL, including the two domestic sewage treatment plants, the groundwater treatment plant, and the rocket engine test stand. Outfalls 012-017 each discharge to waters that flow through Outfalls 011 or 018, which in turn flow through Outfalls 001 and 002, respectively. There are several points that are important to our deliberations regarding these outfalls: (1) Outfalls 001-010 are each situated along the perimeter of SSFL, while Outfalls 011-018 are situated in the interior of the site and discharge through perimeter outfalls; (2) Outfalls 001, 002, and 011-018 are authorized to discharge commingled storm water, industrial process water (from groundwater treatment and rocket engine testing) and domestic wastewater (from the sewage treatment plants); and (3) Outfalls 003-010 are the only outfalls designated in the Permit as discharging only storm water runoff.

The Los Angeles Water Board initially adopted the Permit that Boeing now challenges in July 2004. It amended the Permit in January and March 2006, adding and revising effluent limitations each time. In January 2006, the Los Angeles Water Board considered but refused to adopt a CDO, which would have included a time schedule and interim effluent limitations. Boeing filed a petition challenging the July 2004 Permit, but did not seek active review of its challenge to the Permit until February 21, 2006, when Boeing also challenged the January modification.[12] Boeing also challenged the failure to adopt the CDO.

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[11] These are designated Outfalls 001 through 018.

[12] It later challenged the March modification also.

In addition to the Permit modifications, which generally made the Permit more stringent, there was also a significant physical event at SSFL that impacted permit compliance. Beginning on September 28, 2005, the Topanga Fire swept through the site and burned approximately seventy percent of the site. The fire destroyed numerous plants that had served as vegetative cover to control runoff. At the time, BMPs Boeing employed to minimize pollutants in runoff were largely vegetative cover, and the fire destroyed most of this cover. The fire also resulted in ash deposition throughout the site, the result of burned material from both the site and adjacent areas, which contained contaminants regulated by the Permit. Since the fire, Boeing has been engaged in stabilizing and restoring vegetative cover and also in building new structural BMPs at the site.

II. CONTENTIONS AND FINDINGS[13]

Contention: Boeing contends that most, if not all, of its discharge is storm water runoff and that it should be regulated in a similar manner as the State Water Board's General Permit for Industrial Activities.

Finding: The discharges from SSFL are unusual in many respects. SSFL is a very large industrial site in a remote area, with no other industrial sites nearby. It occupies a large area on hillsides, with runoff flowing into a number of different watersheds. There are vast areas of historical contamination and development, and also large areas of open space and native vegetation. Calculations show that SSFL has the potential, in a 24-hour 10-year storm, to discharge an estimated 272 million gallons of storm water runoff. It is the subject of ongoing RCRA cleanup and groundwater remediation. While greatly reduced from its peak activity, there are still ongoing industrial activities occurring. While it originally was situated in a remote location, there are now many residential developments nearby SSFL. The Permit allows Boeing to discharge not only storm water runoff from the site, but also industrial process water, wastewater from groundwater treatment facilities, and domestic wastewater from sewage treatment plants.

The conditions described above make SSFL a unique site, especially because of its size, the degree of historical contamination, and the site topography that results in large

[13] Boeing included various interrelated contentions in its 2004 Petition, its February 2006 Petition, and its March 2006 Petition. Each petition essentially restated and revised the grounds for the petition. Each petition also included a statement of points and authorities, which also stated the bases for the petition somewhat differently than the petition itself. The statement of contentions herein is an effort to summarize and articulate these various arguments, while not restating verbatim each of the contentions listed in the different documents.

amounts of runoff during storm events. The Permit regulates both storm water-only and commingled storm water, domestic, and industrial process water discharges. As will be described below, the legal requirements for the regulation of storm water-only discharges vary from those for the regulation of process water discharges. Wastewater that commingles storm water and process water is subject to the legal requirements for industrial process water. The Permit was based on Boeing's request, through its report of waste discharge, for authorization to discharge process water and storm water from several outfalls at SSFL. In its papers and testimony, Boeing states that it is no longer discharging process water from these facilities. If that is so, in order for its permit to be revised accordingly, it must file a report of waste discharge describing this change in its discharge.[14]

Eight of the eighteen outfalls at SSFL are storm water-only outfalls: Outfalls 003-010. These eight outfalls are all "perimeter" outfalls—flows through these outfalls leave SSFL through different watersheds. (The only other perimeter outfalls—Outfalls 001 and 002—receive all of the commingled flows and together discharge approximately sixty percent of the total flows from SSFL.) While these eight outfalls are designated as storm water-only, the record shows that they each have a significant potential to discharge water contaminated by the historical practices and remediation activities at SSFL. Each of these outfalls is associated with areas of the site with significant historical activities. Outfalls 003-007 receive runoff from past and existing radiological facilities: runoff to Outfall 003 is from the Radioactive Material Handling Facility, runoff to Outfall 004 is from the Sodium Reactor Experiment, runoff to Outfall 005 is from Sodium Burn Pit 1, runoff to Outfall 006 is from Sodium Burn Pit 2, and runoff to Outfall 007 is from Building 100. Outfall 008, which discharges to Happy Valley, is located near facilities that formerly used perchlorate, and that constituent has been found in the runoff. Outfall 009 receives WS-13 drainage and runoff to Outfall 010 is from Building 203, and these outfalls were added to the Permit based on monitoring in the areas.[15] There are numerous other operation areas at SSFL that do not have individual outfalls specifically assigned to them. Generally, the outfalls listed in the Permit are associated with operations over which the

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[14] During the proceedings on the stay request, Boeing's attorney stated that the only process water currently discharged is well purge water, and that change in discharge would be raised to the Los Angeles Water Board when the Permit is modified or reissued. In any event, the Permit as adopted does regulate both process water and storm water, some of it commingled, and the evidence shows that Boeing requested such a permit.

[15] The specific activities and runoff potential are described in detail, *infra*.

Los Angeles Water Board, rather than DTSC, is the lead agency.[16] The outfalls along the perimeter of SSFL, however, do capture all of the runoff that is known to have the potential to contain contaminants associated with industrial activities.

Boeing argues that its site is comparable to other sites regulated by the General Permit for Industrial Activities. It contends that the Los Angeles Water Board was required to follow the assumptions contained in that permit, including the absence of numeric effluent limitations therein. We disagree with this premise.

SSFL is a unique site warranting thorough and detailed regulation. It is not at all the same as a typical facility subject to the General Permit for Industrial Activities. Moreover, it is not permitted as a storm water-only site, regardless of whether the vast majority of the runoff is storm water, rather than process water. The federal Clean Water Act requires that all discharges of wastewater containing pollutants from industrial sites must comply with the technology-based requirements of best practicable control technology currently available (BCT) and best available technology economically achievable (BAT) and with any more stringent limitations necessary to meet water quality standards. (33 U.S.C.A. § 1311(b).)[17] These same standards apply to discharges of storm water associated with industrial activities. (CWA § 402(p)(3)(A).)[18] While the same legal standards in section 301(b) apply to both industrial process water and industrial storm water, the decision whether to include numeric water effluent limitations varies depending whether the permit regulates process water (even if mixed with storm water) or storm water only[19]. The separate rules for storm water discharges apply only to discharges "composed *entirely* of storm water." (CWA § 402(p)(1) (emphasis added).) For this reason, the General Permit for Industrial Activities authorizes only storm water discharges. Only eight of the eighteen outfalls at SSFL (Outfalls 003-010) are composed entirely of storm water. The other ten outfalls, whether or not they may be composed of "mostly" or "almost entirely" of storm water, as Boeing contends, are subject to the same regulatory requirements as any other industrial process water. Thus, Boeing does not qualify for coverage under the General Permit.

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[16] The Fact Sheet to the Permit includes a thorough discussion of the location, operations, and constituents associated with each outfall.

[17] Clean Water Act (CWA) § 301(b). Hereafter, citations to the federal statute will refer only to the CWA citation.

[18] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

[19] As discussed in detail below, process water permits must include numeric effluent limitations unless it is not "feasible" to include such limitations. Storm water-only permits are not required to include numeric effluent limitations, without the necessity of determining infeasibility.

The Permit must include appropriate requirements for both process water and storm water discharges. Boeing also contends that numeric effluent limitations are not appropriate for process water discharges from SSFL, pursuant to federal regulations.[20] We will discuss in detail the propriety of numeric effluent limitations for the various outfalls regulated in the Permit. In general, however, we reject Boeing's contention that the Los Angeles Water Board was required to regulate the various discharges from SSFL in a similar manner to the General Permit for Industrial Activities.

Contention: Boeing contends that the monitoring and compliance points are inappropriate.

Finding: The Permit lists eighteen outfalls. Each outfall has numerous numeric effluent limitations for constituents for which the Los Angeles Water Board determined that discharges had the reasonable potential to cause or contribute to exceedances of water quality standards in surface waters. Boeing points out that prior permits for SSFL had fewer points where monitoring was required and where effluent limitations applied. A brief history of the Los Angeles Water Board's permitting strategy is necessary in order to understand this contention.

Boeing challenges the 2004 Permit and modifications in January and March of 2006. The prior permit was adopted in 1998. (Waste Discharge Requirements Order No. 98-051; 1998 Permit.) The 1998 Permit regulated storm water runoff, industrial and domestic wastewater, and groundwater treatment discharges from SSFL. The 1998 Permit established as compliance points Outfalls 001 and 002, which are 6,000 feet south of the final retention ponds, and Outfalls 003-007 to the north.[21] The 1998 Permit also stated that the storm water discharges were "covered by" the General Industrial Storm Water Permit and that "its requirements are incorporated in [the 1998 Permit] by reference."[22] For Outfalls 001 and 002, the 1998 Permit listed numeric effluent limitations for 49 constituents. Outfalls 003-007 in the 1998 Permit have numeric effluent limitations for 25 constituents. Most effluent limitations were for daily maximum and not for monthly average.

The 2004 Permit added the three perimeter outfalls that were not listed in the 1998 Permit (Outfalls 008-010) and the eight interior outfalls (Outfalls 011-018). The 2004

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[20] 40 Code of Federal Regulations (C.F.R.) § 122.44(k)(3).

[21] Thus, the 1998 Permit did not list as separate outfalls three of the perimeter outfalls listed in the 2004 Permit (008-010) and the eight interior outfalls that lead to 001 and 002 (011-018).

[22] 1998 Permit, Finding 27.

Permit also discussed the reasonable potential for discharges through the various outfalls to cause or contribute to exceedance of criteria in the California Toxic Rule (CTR).[23] The 2004 Permit included numeric effluent limitations for 40 constituents for Outfalls 001 and 002, 19 numeric effluent limitations for Outfalls 003-007, 11 numeric effluent limitations for Outfalls 008-010, and 14 numeric effluent limitations for Outfalls 015-017. (There were no numeric effluent limitations assigned to Outfalls 011, 012, 013, 014, or 018.) A significant change from the 1998 Permit was that the 2004 Permit included maximum daily loads in addition to the maximum daily concentrations in the prior permit. In addition, some of the limitations were more stringent, reflecting the CTR criteria, and some constituents changed. Thus, the major changes from the 1988 Permit to the 2004 Permit were not the inclusion of numeric effluent limitations in the permit—these were already in the 1998 permit, including numeric effluent limitations for storm water-only discharges. The major changes were the addition of numeric effluent limitations for three perimeter outfalls and for three interior outfalls, tightening of some numeric effluent limitations to implement the CTR criteria, and the addition of maximum daily loading limitations.

In January of 2006, based on monitoring results in the interim, the Los Angeles Water Board modified the 2004 Permit, adding numeric effluent limitations for Outfalls 011 and 018[24] and for Outfalls 012, 013, and 014[25]. This permit modification occurred shortly after the Topanga Fire. Finally, in March of 2006, the Los Angeles Water Board again modified the 2004 Permit, this time revising numeric effluent limitations to reflect two Total Maximum Daily Loads (TMDLs) the Board had adopted.[26] The result was more stringent and new numeric effluent limitations for outfalls with discharges ultimately flowing to the Los Angeles River: Outfalls 001, 002, 011, and 018.[27]

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[23] 40 C.F.R. title 131.36. In the CTR, the United States Environmental Protection Agency (U.S. EPA) adopted water quality standards for priority pollutants in California. The State Water Board adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Plan, or SIP) in order to implement the CTR in permits. The CTR and the SIP were each adopted in 2000.

[24] The numeric effluent limitations for Outfalls 001, 002, 011 and 018 are identical.

[25] There are 19 numeric effluent limitations listed for Outfalls 012, 013, and 014.

[26] The TMDLs were for metals and for nutrient loading in the Los Angeles River. TMDLs are required by § 303 of the CWA. NPDES permits must be consistent with the assumptions and requirements of TMDLs. (40 C.F.R. § 122.44(d)(1)(vii).)

[27] Some interior outfalls ultimately flowing to the Los Angeles River also have TMDL-based effluent limitations.

For each effluent limitation at each outfall, the 2004 Permit requires monitoring. Boeing challenges both the number of outfalls listed as compliance points and the breadth of the monitoring requirements. NPDES permits generally must require monitoring at each outfall for each constituent for which there are effluent limitations.[28] The federal regulations do not require analytical monitoring at facilities that discharge storm water associated with industrial activities,[29] but this relaxation of requirements is generally associated with the "nature of the permit conditions."[30] Thus, where a permit regulating storm water discharges associated with industrial activity does contain numeric effluent limitations, "sampling requirements will be appropriate,"[31] while permits that include BMPs in lieu of numeric effluent limitations, may require inspections and BMP evaluation rather than sampling.[32] Therefore, to the extent that outfalls are properly listed as compliance points and that numeric effluent limitations are appropriate, then the monitoring requirements are appropriate. We turn then to the propriety of listing eighteen outfalls as compliance points.

In reviewing the specific locations for sampling and compliance, it is true that the number of outfalls has grown, from the 1998 permit, which listed seven outfalls, to the 2004 Permit, which lists 18 outfalls. Moreover, when the 2004 Permit was adopted, it listed 13 outfalls as compliance points, and when it was modified in 2006, it listed 18 outfalls as compliance points. The actual activities at the SSFL did not vary greatly from 1998 until 2006, although the Los Angeles Water Board did obtain more detailed monitoring data over these years. The chief change in regulatory strategy that resulted in the addition of outfalls was the inclusion of "interior" outfalls as compliance points. There are seven outfalls that all drain to Outfalls 001 and 002.[33] In addition, the number of perimeter outfalls grew from seven to ten.[34] In reviewing the propriety of adding these outfalls as compliance points, we address the interior and perimeter outfalls separately.

We first consider the perimeter outfalls. The 2004 Permit added Outfalls 008, 009, and 010. Storm water runoff discharges from Outfalls 009 and 010 to Arroyo Simi to the

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[28] 40 C.F.R. § 122.44(i).

[29] 40 C.F.R. § 122.44(i)(2)(i)(4) and (5).

[30] Vol. 57 Federal Register 11394, 11402.

[31] *Ibid.*

[32] *Ibid.*

[33] Outfalls 011-018.

[34] Outfalls 008-010 were added.

north of SSFL. Storm water runoff at Outfall 008 discharges from Happy Valley to Dayton Canyon Creek, which ultimately flows to Bell Creek and then the Los Angeles River. Outfalls 001-007, which have all been compliance points with numeric effluent limitations since at least 1998, each discharge to different watersheds around the perimeter of the site.

The Fact Sheet to the 2004 Permit describes in detail each outfall, the locations of former and current industrial activities that are drained, and the constituents of concern. All of the perimeter outfalls are placed so that they would pick up pollutants associated with industrial activities. The industrial activities at the site, including the prior activities for which there are historic contaminants, are indeed potentially substantial contributors of pollutants to surface waters. Outfalls 001 and 002 receive the vast majority of the site's runoff, including treated wastewater, water from the groundwater treatment systems, excess reclaimed water, water from the engine test stands, and storm water. While the other perimeter outfalls have much less runoff, and do not receive process wastewater, they each drain areas that may contain pollutants from the numerous industrial activities conducted at the site. For example, Outfall 010 drains Building 203, which is subject to significant remediation measures under the direction of DTSC. The building was used for repair and calibration of instruments containing mercury. Currently, the building houses operations related to laser research, including polishing fibers, hand wipe solvent, and chemical cleaning, assembly and testing of components.[35] Should BMPs fail, these contaminants would pose significant risks to surface waters. We conclude that each of these perimeter outfalls is properly situated as a compliance point.[36] We also conclude that the 2004 Permit properly requires monitoring at each of these outfalls.

The interior outfalls[37] raise different issues concerning their propriety. Each of these outfalls is authorized to receive commingled process and storm water. Flows through Outfalls 012, 013, 016 and 017 discharge through Outfall 018, and thence through Outfall 002. Flows through Outfalls 014 and 015 discharge through Outfall 011, and thence through Outfall 001. Each of the six outfalls that flow to Outfalls 011 and 012[38] is located near areas of significant past and present industrial activity. While the effluent limitations for 012-017 vary depending on the contaminants present at the specific areas drained, the effluent limitations for 001, 002, 011, and 018 are identical, reflecting that each drains large areas of SSFL and that

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[35] All wastes are currently placed in containers and transported off-site for disposal.

[36] We will discuss separately, *infra*, the propriety of the numeric effluent limitations assigned to these outfalls.

[37] Outfalls 011-018.

011 and 018 drain to 001 and 002, respectively. The Fact Sheet for the January 2006 Permit states: "Discharges from Outfalls 011 and 018 receive no additional treatment or additional discharges prior to exiting Outfalls 001 and 002."[39]

In considering the decision by the Los Angeles Water Board to list Outfalls 011-018 as separate outfalls, each with numeric effluent limitations, we again consider the uniqueness of the SSFL site—its large size, its hilltop location, the significant chemicals used in the past, and to a lesser extent, in the present. We also note Boeing's argument that it no longer intends to discharge non-storm water flows, although it has not yet submitted a report of waste discharge for a permit that would prohibit all discharges of industrial process and domestic wastewater. Since the Permit currently regulates process water discharges at each interior outfall, it is appropriate to apply numeric effluent limitations at each of these outfalls. U.S. EPA regulations require this approach:

> All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under §122.44(k) (BMPs where limitations are infeasible) . . . . (40 C.F.R. § 122.45(a).)[40]

It is possible that, even if Boeing continues to discharge commingled runoff, some of the numeric effluent limitations in the interior and the perimeter may, in fact, count the same violation twice in such a manner as to treat a single violation as multiple violations. In other words, if discharges are unchanged from an interior outfall to a perimeter outfall, and the same numeric effluent limitations are exceeded at each outfall, Boeing could be cited twice for the same violation. The ongoing monitoring results required by the Permit should disclose whether that is the case. Therefore, if Boeing does not submit a report of waste discharge limiting its discharges to storm water only, the Los Angeles Water Board must consider whether there is double counting for violations at more than one outfall and, if there is, avoid this. The Los Angeles Water Board should undertake this review when it reissues a permit.

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[38] Outfalls 012-017.

[39] Fact Sheet for January 2006 Permit, at p.35 accompanying Order No. R4-2006-0111. In its Response to Comments on the draft NPDES permit, the Los Angeles Water Board explains that the property between Outfalls 001 and 011 and between Outfalls 002 and 018 is undeveloped land where no industrial operations have occurred and that "staff will not oppose a decision to delete Outfalls 001 and 002 as compliance points or a decision to require monitoring only at these locations." (Fact Sheet, at p.34.)

[40] Thus, so long as numeric effluent limitations are appropriate, each outfall must be regulated as a compliance point. In the next Contention we discuss Boeing's contention that the Los Angeles Water Board erred in including numeric effluent limitations and that it should have instead used BMPs pursuant to 40 C.F.R. § 122.44(k).

Even before the Permit might be modified or reissued, we conclude that it was not appropriate for the 2006 Permit to establish compliance points at both Outfalls 001 and 011 and at both Outfalls 002 and 018. As is clear from the Fact Sheet and the Response to Comments, there is no evidence that there will be any change in pollutants discharged between Outfalls 011 and 001 or between Outfalls 018 and 002. According to the administrative record, there are no industrial operations or other potential contributors of pollutants between each of these points; the only rationale provided was that the decision was within the discretion of the Los Angeles Water Board. But in the exercise of discretion there must be rationale provided. Normally the State Water Board would not review the designation of specific outfall locations. In this case, because of the large number of effluent limitations and constituents regulated, adding Outfalls 011 and 018 will have the effect of doubling the number of any permit violations of effluent limitations at Outfalls 001 and 002 without any observable benefit to water quality. We conclude that the Permit should not have established effluent limitations for Outfalls 011 and 018.[41]

Contention: Boeing contends that the Permit inappropriately contains numeric effluent limitations for storm water-only discharges, that the numeric effluent limitations for commingled wastewater are improperly calculated, and that the Permit improperly determines that Boeing's discharges have the reasonable potential to cause or contribute to many of the water quality standards cited in the Permit.

Finding: Before addressing these contentions, we will point out that there are only eight outfalls that are currently authorized to discharge storm water only. While the other ten outfalls may discharge mostly or, as Boeing claims, "almost entirely" storm water, the fact that the Permit authorizes the discharge of industrial process and domestic wastewater from these outfalls raises different issues in evaluating the propriety of the process the Los Angeles Water Board followed in determining "reasonable potential" and in establishing numeric effluent limitations.

For the commingled discharges—Outfalls 001, 002, and 011-018—the Los Angeles Water Board was required to adopt numeric effluent limitations unless it was infeasible to establish such limitations.[42] In adopting numeric effluent limitations, it was required

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[41] We will leave to the sound discretion of the Los Angeles Water Board whether to delete the effluent limitations from Outfalls 001 and 002 or from Outfalls 011 and 018. Pending that determination, this Order will stay the effect of the effluent limitations for Outfalls 011 and 018.

[42] For process water discharges, 40 C.F.R. § 122.44(k)(3) permits non-numeric effluent limitations, generally in the form of BMPs, where numeric effluent limitations are not feasible. (*Communities for a Better Environment v. State Water Board* (2003) 109 Cal.App.4th 1089, 1105.)

to comply with the SIP for priority pollutants listed in the CTR. The SIP sets forth the methodology for determining which constituents exhibit "reasonable potential" and for calculating the numeric effluent limitations. In prior orders,[43] we have discussed in detail the requirements of the SIP and the required methodology for determining reasonable potential and calculating effluent limitations. We have reviewed the methodology employed by the Los Angeles Water Board and its explanation of its determinations and find these efforts to be exceptional.

We will address Boeing's contention that, in light of section 122.44(k)(3) allowing the use of BMPs in lieu of numeric effluent limitations where it is infeasible to establish numeric effluent limitations, the Los Angeles Water Board acted improperly or inappropriately in establishing numeric effluent limitations.[44] Boeing contends that it has proven that it cannot comply with numeric effluent limitations "immediately" and it claims that Los Angeles Water Board staff members concede "that Boeing cannot immediately comply" with the requirements.[45]

There is little precedent concerning the meaning of the term "infeasible" in section 122.44(k)(3). In *Communities for a Better Environment, Supra*, the court upheld the Boards' conclusion "that a numeric WQBEL was not feasible (i.e., 'not appropriate') . . . ." We view the issue of determining whether a numeric effluent limitation is "feasible" as concerning the ability or propriety of establishing such a limit, rather than the ability of the discharger to comply. In *Communities*, the court addressed the feasibility of a numeric effluent where the limitation implemented a narrative water quality objective, there was a need for ongoing study of the constituent, and there was an upcoming TMDL for the particular constituent. (Numerous other constituents were subject to numeric effluent limitations for the mixed storm water and process water discharge in that case.[46]) We disagree with Boeing's reading of the provision, i.e. that "feasibility" refers to its ability to comply with the limitations. Discharges of process

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[43] See, e.g., *In the Matter of Yuba City*, State Water Board Order No. WQO 2004-0013 and *In the Matter of County Sanitation District No.2* Order No. WQO 2003-0009.

[44] It is, frankly, difficult to determine whether Boeing does, in fact, make this contention. Because of its emphasis on commingled discharges being mostly (or perhaps, all) storm water and its use of the term "infeasible" to refer to the time in which it can achieve compliance (discussed below), it is not entirely clear that Boeing is challenging the use of numeric effluent limitations to regulate the commingled wastewater. Nonetheless, because it seeks to "vacate any new numeric effluent limits added to the 2004 or 2006 Permits applicable to combined storm water and wastewater dischargers" (Petition, 2/21/06), we will address this contention.

[45] Memorandum of Points and Authorities, 3/16/06, at p.23.

[46] See, also, *In the Matter of National Steel and Shipbuilding Company*, Order WQ 98-07 (approving numeric effluent limitations for facility discharging storm water along with some process water).

wastewater from industrial sites (and storm water-only discharges associated with industrial activity) must comply with water quality standards.[47] Whether the permit limitations are written as BMPs or as numeric effluent limitations, the legal standard is the same. As we have stated before, programs of prohibitions, source control measures, and BMPs constitute effluent limitations and can be written to achieve compliance with water quality standards.[48]

In any event, Boeing does not clearly argue that, for its commingled wastewater discharges, it cannot achieve compliance with the numeric effluent limitations. Rather, it argues that it cannot achieve "immediate" compliance. Much of its argument refers to the impacts of the Topanga Fire and the need for time to come into compliance. This argument is relevant to the need for compliance schedules, rather than whether numeric effluent limitations should be employed. We are also cognizant that Boeing has been subject to numeric effluent limitations for discharges through 001 and 002, which drain all of the commingled wastewater outfalls, since at least 1998. Finally, the amount of toxic chemicals historically and currently used at the site, in addition to the site topography that results in large amounts of runoff, all lead to the conclusion that it is feasible, i.e. appropriate, to establish numeric effluent limitations for the commingled runoff from the site. We conclude that the Los Angeles Water Board did not act inappropriately or improperly in refusing to find that numeric effluent limitations were infeasible pursuant to 40 C.F.R. section 122.44(k)(3).

However, the Los Angeles Water Board must modify (or reissue) the permit so that either Outfalls 001 and 002 or Outfalls 011 and 018 are subject to numeric effluent limitations, but not all four outfalls.

There are eight outfalls that are currently permitted to discharge only storm water runoff.[49] These outfalls, except for Outfall 008, discharge to the northeast of SSFL, into different watersheds than the major Outfalls 001 and 002. Outfall 008 discharges through Happy Valley and eventually to the Los Angeles River, but not through Outfalls 001 or 002. All of these outfalls, except for Outfall 008, have been regulated with numeric effluent limitations at least since the 1998 Permit. Each outfall is positioned so as to receive runoff from specific areas associated with historic or existing areas with contamination from industrial activities.

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[47] CWA § 301(b).

[48] *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31.

[49] Outfalls 003-010.

Federal regulations do not require numeric effluent limitations for discharges of storm water.[50] The Water Boards can include numeric effluent limitations in individual storm water permits or can choose not to. The Water Boards are also not required to perform a reasonable potential analysis for each constituent.[51] We have long held that storm water permits issued in California need not always include numeric effluent limitations.[52] This is not to say that numeric effluent limitations cannot be included in storm water permits. In adding subsection (2) to section 122.44(k), the U.S. EPA explained that it was employing the Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits (Interim Permitting Policy).[53] (Vol. 64 Fed. Reg. 68722, 86788-9.) The Interim Permitting Policy generally endorses narrative effluent limitations based on BMPs, but it also supports numeric effluent limitations where either there is adequate information or the facility has long been subject to numeric effluent limitations:

> "In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations." (Vol. 61 Fed. Reg. 43761; repeated at Vol. 64 Fed. Reg. 68788.)

U.S. EPA explains that the Interim Permitting Policy does not explicitly apply to states and that states are encouraged to adopt similar policies. (*Ibid.*) As Boeing points out in its papers, the State Water Board is currently reviewing the issues concerning whether storm water permits should, as a general matter, contain numeric effluent limitations. To assist us in this task, we appointed a Blue Ribbon Panel and recently received their report and recommendations.[54] The Panel was asked to address the feasibility of numeric effluent

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[50] 40 C.F.R. § 122.44(k)(2).

[51] *Divers' Environmental Conservation Organization v State Water Resources Control Board* (2006) ___ Cal.Rptr.3d ___, 2006 WL 3423150.

[52] See, e.g., *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31. Note that prior to 1999, there was no separate exemption for storm water discharges apart from the general rule requiring numeric effluent limitations except where infeasible. Thus, our older decisions and general permits made determinations regarding feasibility. In 1999, § 122.44(k) was amended to add the subsection (2), which authorizes the permitting authority to include BMPs in lieu of numeric effluent limitations in storm water permits, without the necessity of making a determination of infeasibility. (Vol. 64 Fed. Reg. 68722, 68847.)

[53] U.S. EPA issued the Interim Permitting Policy was issued on August 1, 1996. (Vol. 61 Fed. Reg. 43761.)

[54] The report is available at http://www.waterboards.ca.gov/stormwtr/docs/numeric/swpanel_final_report.pdf.

limitations in general industrial permits, general construction permits, and area-wide municipal permits.[55] Thus, while the report will help the State Water Board and Regional Water Boards to design these new permits, the purpose of the Report was never specifically intended to address individual storm water permits.[56] The issues explored by the Panel are not directly applicable to this permit and our decision here does not reflect or presage our future actions and policies on the Panel report and the general question of numeric effluent limitations for storm water permits.

We conclude that the Boeing site is unique both from a physical standpoint–the immense area covered, the extensive past contamination, existing activities, and the amount of runoff from the steep terrain–and from a regulatory standpoint, since it has been subject to individual permits with numeric effluent limitations for storm water discharges for many years. The runoff from remediation areas has the potential to contain contaminants from the historic industrial activities. For example, the catchment area of Outfall 004 is comprised largely of a landscape whose surface soil is contaminated with mercury and other contaminants from the former Sodium Reactor Experiment site. Boeing is remediating this site and may ultimately remove the contaminated soil and dispose of it off-site. Until DTSC authorizes such a final solution, the contaminated soil is covered and Boeing uses BMPs at the bottom of the catchment to treat the runoff. It was appropriate and proper for the Los Angeles Water Board to continue to apply numeric effluent limitations at the storm water-only outfalls (including the addition of Outfall 008) in the 2004 Permit and in its modifications.

Boeing also contends that the Los Angeles Water Board was prohibited from applying the SIP when it decided to establish numeric effluent limitations for the storm water-only outfalls. We disagree. U.S. EPA adopted water quality criteria for priority pollutants in California in the CTR. (40 C.F.R. Part 131.36.) In 2000, the State Water Board adopted the SIP to implement the CTR. The SIP includes instructions on determining "reasonable potential" and in calculating numeric effluent limitations for priority pollutants. Thus, the SIP is legally applicable only to priority pollutants listed in the CTR.

The SIP is also not legally applicable to storm water discharges. In footnote 1 of the SIP, we stated: "This Policy does not apply to regulation of storm water discharges. The [State Water Board] has adopted precedential decisions addressing regulation of municipal

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[55] *Ibid.*

[56] It is, of course, possible that some of the policy decisions we will make regarding whether and how to use numeric effluent limitations in general and area-wide storm water permits could ultimately impact our review of individual permits, but we have not even acted upon the report's recommendations yet. Moreover, the permit at issue is an individual permit that is a reissuance of a permit that for almost 10 years has always included numeric effluent limitations for its storm water-only discharges.

storm water discharges in Orders WQ 91-03, 92-04, 96-13, 98-01, and 990-05. The [State Water Board] has also adopted two statewide general permits regulating the discharge of pollutants contained in storm water from industrial and construction activities." All of the references in this footnote refer to area-wide municipal permits and general permits that do not include numeric water quality-based numeric effluent limitations. Thus, by this footnote, we made clear our policy that such permits are not *required* to determine reasonable potential for each constituent or to include numeric effluent limitations.

While the SIP does not legally apply to storm water discharges, that is not to say that if, in an appropriate case, a storm water permit includes numeric effluent limitations, the SIP procedures cannot be employed to determine reasonable potential and to calculate effluent limitations. We have already addressed the use of the SIP for non-priority pollutants.[57] Where a regional water board makes determinations concerning "reasonable potential" and calculating numeric effluent limitations for constituents not subject to the CTR, the regional water board must articulate the bases for its determinations.[58] In *Yuba City*, we found that the regional board properly relied on both the SIP and U.S. EPA's Technical Support Document for Water Quality-Based Toxics Control (TSD) in establishing numeric effluent limitations for non-priority pollutants.[59] This is precisely what the Los Angeles Water Board did in this case. Just as the SIP can be used for non-priority pollutants, it can also be used for storm water discharges, so long as the methodology is explained and justified. We conclude that the Permit appropriately relied on the SIP, the TSD, and also the California Permit Writers Training Tool in developing the numeric effluent limitations. Because none of these documents are required by a formal Policy or a regulation to be used to determine "reasonable potential" and to calculate numeric effluent limitations for storm water discharge, the Los Angeles Water Board was required to explain fully its procedures.[60] We conclude that the Los Angeles Water Board met that burden.

Contention: Boeing claims that the Los Angeles Water Board erred in refusing to issue a cease and desist order with a four-year compliance schedule and interim effluent limitations in 2006.[61]

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[57] See, e.g. *In the Matter of Napa Sanitation District*, Order WQO 2001-16 and *In the Matter of Yuba City*, Order WQO 2004-0013.

[58] *Ibid.*

[59] EPA/505/2-90-001, March 1991.

[60] See requirements for calculating numeric effluent limitations in 40 C.F.R. title 122.44(d).

[61] Boeing refers to draft Order No. R4-2006-0YYY, which was prepared by staff from the Los Angeles Water Board.

Finding: The request for a CDO with a compliance schedule raises different issues than Boeing's claims that numeric effluent limitations were inappropriate because compliance with those limitations was "infeasible." As we discussed, above, the issue regarding feasibility for inclusion of numeric effluent limitations pursuant to 40 C.F.R. section 122.44(k)(3) concerns whether it is "appropriate", or feasible from a regulatory perspective, to establish numeric effluent limitations. In any event, the discharge is subject to the strict requirements of compliance with water quality standards. The propriety for an enforcement action that includes a time schedule to come into compliance with the permit's effluent limitations does turn on the specific discharger's ability to comply.[62]

The permitting history alone does not appear to justify the need for additional time to comply with the Permit. Permits for SSFL have included numeric effluent limitations since at least 1998. The vast majority of new and revised effluent limitations were added in July 2004. When Boeing filed a petition in August 2004, it asked that the petition remain in abeyance and it did not allege that it had been improperly denied a compliance schedule and interim limits. These issues were raised in its appeals of the 2006 Permit modifications. The 2006 modifications, however, were generally limited to adding effluent limitations to the interior Outfalls 012-014 and 015-017. Thus, on the face of the permitting actions alone, it is difficult to justify the need for a compliance schedule and interim limitations, especially Boeing's request that these revisions be retroactive to July 2004.

Boeing also points out, however, the devastating effects of the Topanga Fire as a basis for a compliance schedule and interim limits. The record includes ample evidence that the Topanga Fire, which destroyed vegetation through 70 percent of SSFL, was indeed a major incident that would significantly affect its ability to comply with the numeric effluent limitations in the Permit. The photographs and testimony in the record provide strong evidence that the BMPs in place prior to the September 2005 fire were substantially destroyed and that, in addition, ash from the fire likely contains additional contaminants regulated by the Permit. In light of the large size of SSFL and the fact that most of the volume of discharges are associated with storm water runoff,[63] the natural landscape has been used as the major component in the treatment system. Thus, vegetation is used to prevent and remove pollutants from moving off-

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[62] *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 965.

[63] While commingling of process water and storm water result in the legal treatment of the wastewater as process water, in reviewing the *factual* issues, such as whether a fire resulted in the need for a compliance schedule, it is relevant that the wastewater discharges are largely composed of storm water runoff.

site in storm water flows. Commenters including CBG contend that prior to the Topanga Fire Boeing's BMPs were inadequate and that a compliance schedule would, in effect, reward Boeing for past inadequacies. We do not find that argument persuasive. First, regardless of how effective the BMPs and treatment used prior to the fire, all would still be burned and unusable after the fire. Second, while we agree that some of the BMPs most recently installed do surpass the prior BMPs,[64] we find that these new systems are state of the art and their absence prior to the fire does not necessarily indicate that the prior BMPs were inadequate. As to the list of violations throughout the several years prior to the fire, while we do not in any way condone permit violations, the number of individual permit violations at a site the size and complexity of SSFL does not necessarily mean that the BMPs were wholly inadequate.

The record shows that on January 19, 2006, the Los Angeles Water Board considered whether to issue a cease and desist order. A CDO is an enforcement order. Water Code section 13301 provides that when a regional board finds that a discharge of waste is taking place, or threatening to take place, in violation of a permit, "the board may issue an order to cease and desist" and may issue an order requiring immediate compliance, compliance in accordance with a time schedule, and appropriate remedial activities. The State Water Board's Water Quality Enforcement Policy explains the use of cease and desist orders:

> "Cease and Desist Orders (CDOs) are adopted pursuant to California Water Code sections 13301-13303. CDOs may be issued to dischargers violating or threatening to violate WDRs or prohibitions prescribed by the RWQCB or the SWRCB. CDOs are often issued to dischargers with chronic non-compliance problems. These problems are rarely amenable to a short-term solution. Often, compliance involves extensive capital improvements or operational changes. The CDO will usually contain a compliance schedule, including interim deadlines (if appropriate), interim effluent limits (if appropriate), and a final compliance date. CDOs may also include restrictions on additional service connections to community sewer systems and combined stormwater/sewer systems."[65]

In light of the circumstances of the Topanga Fire, the nature of the site, including its topography, the fact that most of the discharges consist of runoff, the difficulty of ensuring compliance at numerous outfalls that receive discharges from many sources, and the ensuing impact on Boeing's ability to comply with the permit terms, we conclude that the Los Angeles

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[64] For example, at the stay hearing, Boeing presented evidence of a carbon filtration system now employed at some outfalls.

[65] Water Quality Enforcement Policy, at p.20.

Water Board acted inappropriately in refusing to issue an enforcement order with a compliance schedule and interim effluent limitations based on the impacts from the Topanga Fire.

We have stated above that the Permit appropriately required strict compliance with water quality standards through numeric effluent limitations. Our findings in this section do not take away from that conclusion. They address, instead, whether the Los Angeles Water Board acted inappropriately and improperly by refusing to issue an enforcement action with a time schedule where the site was subject to a fire that destroyed its control structures. We find that it was not justifiable to demand immediate compliance by Boeing. In view of the impacts of the fire, a time schedule was warranted based on the specific situation that Boeing faced. We note that, as an enforcement action, a CDO does not condone permit violations. Rather, it constitutes a finding of violation or impending violation of an order and it carries with it the potential for higher fines should it be violated.[66] On the other hand, there is no justification to make the compliance schedule retroactive to July 2004, before the fire and before Boeing even pressed its claim that it needed a compliance schedule. We will remand this issue to the Los Angeles Water Board to issue a CDO. Any CDO should include a compliance schedule that is as short as possible. The order should be retroactive to January 19, 2006, when the matter was considered.

III. CONCLUSIONS

1. The Boeing Permit is an individual permit for commingled storm water and industrial process water and should not be regulated the same as sites subject to the General Permit for storm water discharges associated with Industrial Activities.
2. The monitoring requirements in the Permit are appropriate.
3. Outfalls 001-010, which are situated on the perimeter of the property, are properly situated as compliance points.
4. Outfalls 012-017, which are situated in the interior of the property, are properly situated as compliance points, at least while Boeing is authorized to discharge industrial process water, treated groundwater, and domestic wastewater. But in any event, it is inappropriate to count the same violation twice in such a manner as to treat a single violation as multiple violations.
5. Outfalls 001 and 011 and Outfalls 002 and 018 are duplicative because Outfalls 011 and 018 flow directly to Outfalls 001 and 002, respectively, without any change in flows or discharge in the interim and with only open space between them. The Permit should

[66] Wat. Code, § 13385, subdivision (e) requires consideration of prior history of violations in establishing administrative liability for permit violations.

include only one set of these outfalls as compliance points subject to numeric effluent limitations.

6. The Permit appropriately contains numeric effluent limitations and these were properly calculated based on determinations of "reasonable potential" to cause or contribute to exceedance of water quality standards.
7. The Los Angeles Water Board properly used the SIP and federal guidance materials to calculate numeric effluent limitations for storm water discharges by explaining and justifying its methodology.
8. The Los Angeles Water Board acted inappropriately in refusing to issue Boeing a CDO, with a compliance schedule and interim effluent limitations, when it modified the Permit in 2006, based on the effects of the Topanga Fire.
9. Nothing in this Order prevents enforcement of the Permits, except insofar as the Los Angeles Water Board adds a compliance schedule in a CDO, which compliance schedule shall not be effective until January 19, 2006. Also, the CDO does not operate to excuse violations of any Permit.

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IV. ORDER

The Permit is remanded to the Los Angeles Water Board to revise the provisions concerning Outfalls 001, 002, 011, and 018, consistent with this Order. The effluent limitations from Outfalls 011 and 018 are stayed, pending a determination by the Los Angeles Water Board deleting either Outfalls 011 and 018 or Outfalls 001 and 002 as compliance points. The Los Angeles Water Board is also instructed to issue a CDO with the shortest possible compliance schedule, which shall be based on the impacts from the Topanga Fire, with interim effluent limitations, and which shall be effective January 19, 2006. The Los Angeles Water Board is instructed to review the Permit to ensure that numeric effluent limitations for different outfalls do not count the same violation twice in such a manner as to treat a single violation as multiple violations. In all other respects, the petitions are DENIED.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 13, 2006.

AYE: Tam M. Doduc
Arthur G. Baggett
Charles R. Hoppin
Gary Wolff, P.E., Ph.D.

NO: None

ABSENT: None

ABSTAIN: None

Song Her
Clerk to the Board

EXHIBIT 14

Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

April 18, 2008

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

The State Water Resources Control Board ("State Water Board") and the Los Angeles Regional Water Quality Control Board ("Los Angeles Water Board") jointly file this opposition to Test Claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. All of these test claims arise from a single permit that was issued by the Los Angeles Water Board as Order No. 01-182, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the Incorporated Cities therein, Except the City of Long Beach ("the Permit").[1] The requests for reimbursement in the test claims arise almost entirely from two requirements in the Permit and consolidation is therefore proper.

The Permit was issued by the Los Angeles Water Board pursuant to requirements in the federal Clean Water Act ("CWA").[2] The State Water Board and Los Angeles Water Board have been authorized by the United States Environmental Protection Agency ("U.S. EPA") to issue NPDES permits—which are mandated by the CWA—in lieu of issuance of these permits by U.S. EPA. The Permit regulates the discharge of storm water runoff from the municipal separate storm sewer system (MS4) of 84 cities and County of Los Angeles to rivers and the Santa Monica Bay.

The federal Clean Water Act mandates that municipalities must apply for and receive permits regulating discharges of pollutants from their MS4s to waters of the United States. Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management Practices (BMPs). These test claims, filed by 20 cities and the County, seek reimbursement by the State of California for expenses they incur in implementing two of the requirements of the Permit: (1) Inspections of commercial and industrial facilities; and (2) Placement of trash receptacles at transit sites.

[1] The Permit serves as National Pollutant Discharge Elimination System permit (NPDES) No. CAS004001. It was issued by the Los Angeles Water Board on December 13, 2001.

[2] Federal Water Pollution Control Act [FWPCA; 33 U.S.C.A. §§ 1251 et seq.] The federal Act is referred to herein by its popular name, the Clean Water Act ("CWA") and the code sections used are those for the CWA.

In order to obtain reimbursement, the claimants must show that the requirements constitute a new program or higher level of service. They must prove either: (1) the program must carry out a governmental function of providing services to the public, or (2) the requirements, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. The claimants must also prove that the costs are mandated on them by the state, rather than by federal law. Finally, they must prove that any additional costs beyond the federal mandate are substantial and not *de minimis*. The claimants do not meet any of these tests.

The Permit as a whole, and including the inspection and trash receptacle provisions, is mandated on the local governments by federal law. The federal mandate applies to many dischargers of storm water, both public and private, and is not unique to local governments. The federal mandate requires that the Permit be issued to the local governments; it is not a question of "shifting" the costs from the state to the local governments. The specific requirements challenged are consistent with the minimum requirements of federal law. Even if the Permit were to be interpreted as going beyond federal law, any additional state requirements are *de minimis*. Moreover, the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to comply with these requirements through charges and fees, and are not required to raise taxes. The U.S. EPA has submitted a letter to the State Water Board dated April 10, 2008, in agreement with this position.[3]

Description of the Test Claims

The test claims focus on two discrete requirements in the Permit: the requirement to inspect certain industrial and commercial facilities that discharge into the MS4 and the requirement for some of the permittees to place and maintain trash receptacles at transit stops.

Industrial and Commercial Facilities Control Program (Part 4.C.)

Test claims 03-TC-19, 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements to reduce pollutants from industrial and commercial facilities. Test claims 03-TC-19 and 03-TC-20 are limited to Part 4.C.2.a. and b., the requirements to inspect industrial and commercial facilities. Test Claim 03-TC-21 refers broadly to Part 4.C., the entire industrial and commercial facilities control program, but the costs discussed in the test claim are those associated with inspections. (See, Declaration of Richard Montevideo, No. 4.) Therefore, the Boards' analysis of the subvention claims for Part 4.C. is generally limited to the inspection requirements.

Part 4.C. of the Permit requires permittees to implement pollutant reduction and control measures at industrial and commercial facilities within their jurisdictions. Permittees may choose from various pollutant reduction and control measures, alone or in combination and

[3] Letter dated April 10, 2008, from Alexis Strauss, Director, Water Division, U.S. EPA to Tam M. Doduc, Chair, and Dorothy R. Rice, Executive Director, State Water Board, Attachment 3.

before, during, or after the activities that generate pollutants. The permittees are required to track, inspect, and ensure compliance at those facilities that are critical sources of pollutants in storm water.

Critical sources are specified commercial facilities (restaurants and automobile-related businesses), and industrial facilities that are required by federal regulations to obtain their own NPDES storm water permits.

Part 4.C.2.a. and b. contain inspection requirements, which are generally to conduct two inspections of facilities over a 5-year period. The Permit describes what the inspector must look at. (For example, inspectors at restaurants must see if operators pour grease into the street, and gas station inspectors must observe whether fuel-dispensing areas are swept.) The Permit states that for industrial sites, inspection requirements do not apply if the Los Angeles Water Board conducted an inspection of the site within two years.

Trash Receptacle Requirements (Part 4.F.5.c.3)

Test claims 03-TC-04, and 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements for some of the permittees to place trash receptacles at public transit stops. Claim 03-TC-21 states that it challenges the entirety of the storm drain operation and maintenance and streets and road maintenance requirements, but the only costs in these sections for which it seeks reimbursement are for the placement and maintenance of trash receptacles. The claims are limited to the trash receptacle requirements for those municipalities that are not subject to a separate federal requirement, the "trash TMDL."[4] The requirements are to place trash receptacles at all transit stops and to maintain these receptacles.

Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 appears to claim subvention for costs associated with Parts 1 and 2 of the Permit, which include general prohibitions and requirements to protect water quality. The claim itself fails to specify any particular costs associated with this claim, other than a general study that considers a hypothetical treatment plant. As discussed below, storm water permits are written with the assumption that there will be no treatment plant and the permit certainly does not require one. In any event, there are no signed declarations to support this claim and no estimate of costs to the specific claimants.

Background of Federal Law Requirements for Storm Water Permits

In order to understand the federal mandate that required this permit, some background of the federal law and of MS4s is necessary. In 1972, the federal Clean Water Act was extensively amended to implement a permitting system for all discharges of pollutants from "point sources"

[4] As will be explained below, the Los Angeles Water Board has also adopted a federally-mandated total maximum daily load ("TMDL") for the deposition of trash into rivers and the Bay. The claimants do not claim subvention for the trash receptacle requirements for those cities and portions of the County subject to the TMDL, presumably conceding that those requirements are not reimbursable.

to waters of the United States.[5] The permits are issued pursuant to the national pollutant discharge elimination system, and are known as "NPDES permits." The 1972 amendments allowed U.S. EPA to authorize states to issue these permits.[6] California was the first state in the nation to obtain such authorization. In order to obtain this authorization, the California Legislature amended the Water Code, finding that the state should implement the federal law in order to avoid direct regulation by the federal government.[7] The California legislature mandated that California's permit program must ensure consistency with federal law.[8] The Water Boards are the state agencies charged with implementing the federal program.[9] The State Water Board incorporates the U.S. EPA regulations for implementing the federal permit program.[10] Therefore, both the CWA and U.S. EPA regulations are applicable to the permit program in California.[11] In California, permits to allow discharges into state waters are termed "waste discharge requirements."[12] The term "waste discharge requirements" is equivalent to the term "permit" in the CWA, when the waste discharge requirements are issued to comply with the CWA.[13] Thus, waste discharge requirements that the Water Boards issue to comply with the CWA are NPDES permits under federal law. When the Los Angeles Water Board, a state agency, adopts an NPDES permit in lieu of U.S. EPA, it must adopt as stringent a permit as the federal agency would have.[14]

The discharge of pollutants from point sources to waters of the United States is illegal, except in compliance with an NPDES permit.[15] In 1973, U.S. EPA issued regulations that exempted certain types of discharges it determined were administratively infeasible to regulate, including storm water runoff. The reason that such regulation is difficult, as will be more fully explained below, is that storm water runoff generally is not subjected to any treatment. Instead, it simply runs off urban streets, into gutters and drainage ways, and flows directly into streams, lakes, and the ocean.[16] This exemption was overruled in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which held that the exemption was illegal, and ordered U.S. EPA

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[5] CWA §§ 301 and 402.

[6] CWA § 402(b).

[7] Wat. Code, § 13370 *et seq.*, adding Chapter 5.5 to the Porter-Cologne Water Quality Control Act.

[8] Wat. Code, § 13372.

[9] Wat. Code, § 13370.

[10] Cal. Code of Regs., tit. 23, (C.C.R.) § 2235.2.

[11] The permits *may* also include additional state requirements. (C.C.R., tit. 23, § 2235.3; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.)

[12] Wat. Code, § 13263.

[13] Wat. Code, § 13374.

[14] CWA § 402(b).

[15] CWA § 301(a). In general, "navigable waters" or "waters of the United States," includes all surface waters, such as rivers, lakes, bays and the ocean. (CWA § 502.)

[16] The chief traditional categories of discharges subject to NPDES permits are industrial process wastewater and sanitary sewer effluent. Both of these discharges are typically processed in a treatment plant before they are discharged to surface waters.

to require NPDES permits for storm water runoff. In *Costle*, the court suggested innovative methods for permitting, including using general permits for numerous sources and issuing permits that "proscribe industry practices that aggravate the problem of point source Pollution."[17] Where permits proscribe actions that dischargers must implement, these requirements are commonly called "best management practices" ("BMPs").

Despite the *Costle* decision, U.S. EPA had not adopted regulations implementing a permitting program for storm water runoff by 1987. That year, Congress amended the CWA, specifically requiring storm water permits for industrial and municipal storm water runoff.[18] The amendments require NPDES permits for "[a] discharge from a municipal separate storm sewer system ["MS4"] serving a population of 250,000 or more."[19] The CWA contains three provisions specific to permits for MS4s: (1) Permits may be issued on a system- or jurisdiction-wide basis; (2) Permits must include a requirement to effectively prohibit non-storm water discharges into storm sewers; and (3) Permits must require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP").[20] In describing the controls that permits must include, the statute states that the controls shall include: "management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants."[21] Thus, the federal law mandates that permits issued to MS4s must require management practices[22] that will result in reducing pollutants to the MEP. The state is required, by federal law, to select the BMPs.[23]

In 1990, U.S. EPA adopted regulations to implement section 402(p).[24] The regulations define which entities need to apply for permits and also the information they must include in permit applications. The regulations define "industrial activity" to include numerous categories of manufacturing, construction, and other typically private enterprises.[25] The regulations define MS4s as storm sewer systems operated by numerous public agencies, including cities, counties, states, and the federal government.[26] While both industrial activities and MS4s must

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[17] *Costle, supra*, at 1380.

[18] CWA § 402(p).

[19] CWA § 402(p)(2)(C). U.S. EPA defines municipal separate storm sewer systems (MS4s) that serve a population over 250,000 as "large" MS4s. The population of the County of Los Angeles is approximately 9.5 million. (Permit, D.1.)

[20] CWA § 402(p)(B).

[21] *Ibid.*

[22] These are commonly referred to as "best management practices," or "BMPs."

[23] *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292.

[24] Vol. 55, Federal Register (Fed.Reg.) 47990 and following.

[25] 40 C.F.R. § 122.26(b)(14).

[26] 40 C.F.R. § 122.26(b)(8).

obtain permits, the requirements in the industrial permits must be more stringent than in MS4 permits.[27]

In order to obtain coverage under an NPDES permit, as required by the CWA, entities seeking coverage file an application with the permitting authority and the permitting authority holds a public hearing on contested permits.[28] U.S. EPA regulations specify the information that applicants for MS4 permits must include in their applications.[29] For large and medium MS4s, the application requirements are extensive.[30] Some of the application requirements relevant to these Test Claims are: management programs including procedures to control pollution resulting from construction activities (at § 122.26(d)(1)(v)), legal authority to control the contribution of pollutants associated with industrial activity (at § 122.26(d)(2)(i)(A)), programs to control illicit discharges to the MS4 (at § 122.26(d)(1)(v)), and conducting inspections to determine compliance with permit conditions (at § 122.26(d)(2)(i)(F)). The permit applicants must propose management programs that the permitting authority will consider in adopting the permit.[31] The management programs must address oversight of discharges into the system from the general population and from industrial and construction activities within its jurisdiction, and also maintenance and control activities by the permittees.[32]

Most NPDES permits are largely comprised of numeric limitations for pollutants. Compliance is measured by sampling the treated effluent, which is discharged from a treatment plant into surface waters. These permits are written assuming that an engineered treatment plant can be built and operated to obtain a specified effluent. Storm water permits, on the other hand, usually require dischargers to implement BMPs that will result in lessening the pollutants in the runoff, since without a treatment plant the pollutants can flow directly into surface waters. Storm water permits apply to several types of entities—industries, construction, and municipalities—and all usually mandate BMPs. For municipalities that operate MS4s, the BMPs require the municipalities take actions that will lessen the incidence of pollutants *entering* storm drains by regulating the *behavior and practices* of the municipalities, their residents, and their businesses.[33]

U.S. EPA has issued regulations and guidance documents that discuss the types of BMPs that must be included in storm water permits in order to reduce the discharge of pollutants in storm

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[27] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3rd 1159. The differences between municipal and industrial permits are complicated, but are relevant to the question whether this permit addresses a uniquely governmental program, and are therefore discussed in more detail below.

[28] CWA § 402(b)(3).

[29] 40 C.F.R. § 122.26(a)(4). The U.S. EPA regulations have varied requirements depending on the size of the population served by the MS4. A "large" MS4 serves a population of 250,000 or more. (40 C.F.R. § 122.26(b)(4).) Los Angeles County and the 84 cities regulated by this permit far exceed the minimum population for a large MS4.

[30] 40 C.F.R. § 122.26(d).

[31] 40 C.F.R. § 122.26(d)(2)(iv).

[32] *Ibid.*

[33] There may also be engineered solutions, and there are some in Los Angeles, but it is important to keep in mind that there is no single engineered storm sewer treatment plant as there is for sanitary sewage.

water to the "maximum extent practicable." Numerous guidance documents point to inspections of businesses and proper trash collection as important parts of an effective BMP program.[34] U.S. EPA has issued an MS4 Program Evaluation Guide, which includes a lengthy process for conducting inspections of businesses. This Guide makes clear that inspections of businesses are mandatory:

> Inspections
> Most effective industrial/commercial inspection programs maintain a complete facility inventory and group them according to priorities established by the permittee. An inspection frequency is determined based on priority, and a database is used to manage such information as inspection findings, enforcement actions, and required follow-up activities. Many permittees use and cross-train existing staff to perform industrial/commercial inspections, but some permittees may need to maintain an exclusive stormwater inspector due to a potentially large number of high-priority facilities. There should be an inspection standard operating procedure that has been formalized and documented. It should include a checklist to be used during the inspection and possibly a report format. Inspectors should be aware of federal, state, and local stormwater regulations that may apply to industrial/commercial facilities. Inspectors should be familiar with various types of BMPs commonly used at the types of facilities typically found in the permit area and should be able to educate facility operators about such BMPs. In addition, inspectors should understand and use the permittee's established enforcement escalation response plan to gain compliance as necessary. The inspection staff should be proficient in the enforcement escalation procedure and should properly document all enforcement actions accordingly. Inspections should be used not only to identify non-compliance issues, but as an opportunity to educate facility operators about proper stormwater BMPs.[35]

The Guide also states that MS4 programs must address trash and litter.[36]

Adoption of the Los Angeles MS4 Permit

Starting in 1990, pursuant to the CWA amendments of 1987, the Los Angeles Water Board issued storm water permits to the County of Los Angeles and to the cities therein.[37] Without such a permit, the cities would be discharging pollutants in violation of federal law.[38] The permit

[34] See, e.g., Guidance documents at http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=6&sort=name , including http://www.epa.gov/npdes/pubs/owm0233.pdf (citing examples from MS4 permits throughout the country).

[35] MS4 Program Evaluation Guidance, at pp. 77-78.

[36] *Id.* at 79.

[37] For reasons not relevant to this matter, one city—Long Beach—has a separate permit. The current permit covers 84 cities.

[38] CWA §§ 301(a), 402(p)(3)(B).

that is the subject of these test claims is the third such permit, and was adopted December 13, 2001.[39] It is largely comprised of requirements to implement BMPs, most of which were proposed by the permittees.[40] The County and thirty-two of the cities challenged numerous aspects of the permit and the process by which it was issued, culminating in a court of appeal decision upholding the permit in its entirety.[41]

On February 1, 2001, the County, on behalf of all permittees,[42] submitted a Report of Waste Discharge (permit application), including a Stormwater Quality Management Plan (SQMP). The SQMP constituted the permittees' proposal for the BMPs that would be required in the permit.[43] (Permit C.) The permit that was ultimately adopted was based on the SQMP, with some revisions and additions necessary to meet minimum federal requirements. (*Id.*) The SQMP prepared by the County included several proposed BMPs that relate to inspections of commercial and industrial facilities and placement and maintenance of trash receptacles:

> (1) Municipalities must conduct site visits to industrial and commercial facilities, including automotive service businesses and restaurants, which must include, "a site walk-through to verify for, at a minimum, evidence of BMP implementation," and shall revisit facilities and take enforcement where illicit discharges are found;[44]
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> (2) Municipalities will maintain a database of automotive and food service facilities, including whether they have "NPDES stormwater permit coverage;"[45] and
>
> (3) Municipalities must minimize trash from entering recreational water bodies,[46] remove trash from open channels;[47] and control litter and debris in streets.[48]

The SQMP included detailed requirements for municipalities to implement at construction sites, including inspections by the municipality.[49] The SQMP proposed that all municipalities be

[39] NPDES permits generally expire after 5 years, and must be reissued thereafter.

[40] A single permit applies to the County and 84 cities. Thus, while some entities may disagree with some provisions, other entities will agree and the entire group may propose permit terms that some cities oppose. The entire group submits a single proposed storm water management plan.

[41] *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985; referred to hereafter as *County of Los Angeles*.

[42] All permittees include the County and 84 cities. The County and the 21 cities that filed these Test Claims participated jointly with the application and permitting procedures with the remaining 63 cities who did not file Test Claims.

[43] The SQMP is several hundred pages. Relevant sections are attached; the entire SQMP is available should the Commission request it.

[44] SQMP, pp. 22-23 and 28.

[45] *Ibid.*

[46] SQMP, ES-6

[47] SQMP, ES-7

[48] *Ibid.*

[49] SQMP, pp. 24-26.

required to collect trash along open channels and encourage voluntary trash collection in natural stream channels.[50] The SQMP contains an Illicit Connection and Illicit Discharge Elimination Program, which includes education of inspectors employed by the permittees who will investigate businesses.[51]

Following adoption of the permit and a petition to the State Water Resources Control Board ("State Water Board"), the County, 32 cities,[52] the Los Angeles County Flood Control District and industry groups representing builders filed suit challenging numerous provisions in the Permit. The Superior Court upheld the Permit, and the Court of Appeal affirmed the judgment in its entirety.[53] First, the court held that the permit as a whole "imposes reasonable pollutant discharge requirements." Because the minimum federal requirement is that the permit require the municipalities to reduce pollutants to the maximum extent practicable, the court clearly determined that the permit's requirement are MEP. In its discussion of the consideration of costs to the municipalities, the court found that the permit did not exceed any federal requirements:

> "The permit explicitly states it is intended to provide a cost-effective storm water pollution program to the maximum extent possible. The permit applies the same cost-effective analysis to efforts to reduce the flow of pollutants into receiving waters. Moreover, the [Los Angeles Water Board] in its finding referred to a report specifying how the 'maximum extent practicable' requirement includes considerations of costs and benefits."[54]

The court also discussed various cost analysis reports and U.S. EPA Guidance. It rejected the claim that the permit's requirements exceeded the federal mandatory standard. The court specifically upheld the inspection requirements, stating: "there is federal regulatory authority that required [the Los Angeles Water Board] to consider imposing the inspection requirements."

Several of the permittees filed these test claims with the Commission on State Mandates. The Commission rejected the claims, basing its determination on Government Code section 17516, subdivision (c), which exempted Water Board permits from the requirements to reimburse state-mandated local funds. That action also resulted in a Court of Appeal decision finding that subdivision to be unconstitutional and remanding to the Commission to determine the test claims.[55] In its decision, the court stated that the Commission must address factual issues

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[50] SQMP, p. 28

[51] SQMP, App. D

[52] These include 18 of the cities that filed the Test Claims, and Bellflower, Claremont, Diamond Bar, Gardena, Hawaiian Gardens, Industry, Irwindale, La Mirada, Lawndale, Monrovia, Paramount, Rosemead, Santa Clarita, Santa Fe Springs, Torrance, Walnut, and Whittier.

[53] *County of Los Angeles, supra.* Some of the determinations of the appellate court discussed here were not published and thus cannot be cited as precedent in other cases. They are binding on the claimants. A copy of the entire decision is attached.

[54] Unpublished decision, at p. 20.

[55] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

regarding the requirements to conduct inspections and to place and maintain trash receptacles constitute state or federal mandates.

Following *Commission on State Mandates*, each of the four test claims was re-filed without any revisions.[56] All of the test claims are based upon requirements in the permit. Test Claim 03-TC-04 was filed by the County of Los Angeles, and challenges the requirement to place trash receptacles at transit stops.[57] Test Claim 03-TC-19 was filed by the County of Los Angeles, and challenges the requirements to inspect industrial and commercial businesses.[58] Test Claim 03-TC-20 was filed by nine cities[59] and challenges the requirements for trash receptacles and inspections, and the general requirements for a construction program.[60] Test Claim 03-TC-21 was re-filed by ten cities[61] and challenges the following permit requirements: discharge prohibitions, receiving water limitations, industrial program, construction program, storm drain program, and street and road maintenance[62]. While Test Claims 03-TC-20 and 03-TC-21 appear to assert broader requests for reimbursement, they address in detail only the requirements for inspections and trash receptacles, and these are the only requirements that the court in *Commission on State Mandates* stated were subject to the test claims.[63] In light of the absence of the necessary information for such claims and the court's remand, we assume that any claims additional to the inspections and trash receptacles are not valid claims.

In addition to the litigation over this permit, cities made similar arguments against an MS4 permit adopted by the Santa Ana Regional Water Quality Control Board. In a published decision, an appellate court in that case made additional findings applicable to the arguments in this matter[64]. It found that there was no evidence to support an argument that the permit "exceeded federal requirements." This finding is important because the cities in *Rancho Cucamonga* had argued that a ground for overturning that permit was that it used the same provisions as had

[56] The State Water Board and Los Angeles Water Board received several Notices of Complete Test Filing: a letter dated October 16, 2007, stated 03-TC-21 was complete; a letter dated October 29, 2007, stated that 03-TC-04 was complete; a letter dated October 29, 2007, stated that 03-TC-19 was complete; and a letter dated December 12, 2007, stated 03-TC-20 was complete. On December 21, 2007, the Commission extended time to respond to all four test claims until April 21, 2008.

[57] 03-TC-04 challenges Permit Part 4.F.5.c.3.

[58] 03-TC-19 challenges Permit Part 4.C.2.a. and b.

[59] The cities that filed the test claim are Artesia, Azusa, Beverly Hills, Carson, Commerce, Norwalk, Rancho Palos Verdes, Westlake Village, and Vernon.

[60] 03-TC-20 challenges Permit Part 4.C.2.a. and b., 4.E, and 4.F.5.C.3.

[61] The cities that filed the test claim are Arcadia, Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina.

[62] 03-TC-21 challenges Permit Parts 1, 2, 4.C, 4.E, 4.F.5 and 6. In a letter dated January 18, 2008, sent to the Commission from Howard Gest, he states that the cities he represents, which include five of the cities that filed the claim, "do not currently intend to pursue a claim" as to Parts 1 and 2, but that the limitation is "without prejudice." In light of the fact that Mr. Gest apparently does not represent all of the cities that filed the claim and the limited nature of this limitation, we will address Parts 1 and 2 and ask the Commission to determine that these parts do not create a reimbursable mandate.

[63] 150 Cal.App.4th 898, 903.

[64] *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal.App.4th 1377.

been crafted for other permittees, including the Los Angeles MS4 permit. The *Rancho Cucamonga* court specifically addressed inspection requirements, holding that federal law, either expressly or by implication, required NPDES permittees to perform inspections for illicit discharge prevention and detection, including inspection of industrial facilities and construction sites. Because the Los Angeles MS4 permit is based on BMPs and courts have determined that it is consistent with MEP, it is necessarily no more stringent than required by federal law.

State Mandate Law

Article XIIIB, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claims are not subject to subvention. Article XIIIB, Section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."

Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation (Govt. Code, § 17556(c)); or (2) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay (Govt. Code, § 17556(d)); or (3) the local agency proposed the mandate (Govt. Code, § 17556(a)). Each of these exceptions to subvention applies to these Test Claims. All of the mandates for which the Test Claims seek reimbursement are mandated by federal law or regulation. The County and cities can assess fees for all of the costs incurred. The claimants themselves, as part of the group of the County and 84 cities who applied for the permit, proposed most of the specific requirements challenged.

Numerous judicial decisions have further defined limitations on the requirements for subvention of funds. Specifically, subvention is only required if expenditure of tax monies is required, and not if the costs can be reallocated or paid for with fees.[85] In addition, reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention.[86] The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.[87]

[85] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.

[86] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[87] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

The Permit is not subject to subvention; it meets each of these exceptions. The requirements that are the subject of the claims are part of permits that meet, but do not exceed, the minimum federal requirements. The federal mandate is specifically directed at the municipalities and not at the state in general. The costs for the programs can be paid for by levying service charges, including charges to companies for conducting their businesses, fees for collection of refuse, fees for transit services, and fees especially enacted for storm water programs.[69] Compliance with NPDES permits, and specifically with storm water permits, is required by private industry also. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that operate MS4s, including state and federal facilities; local government is not singled out. The local agencies can assess fees to perform the required tasks; tax monies are not required. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not qualify.

In its remand, the court stated that the most significant issue is "whether the two obligations in question constitute federal or state mandates" and that these present factual issues for the Commission to decide.[69] The court pointed to four cases that the Commission stated would apply in making this determination.[70] Each case is discussed below:

City of Sacramento v. State of California (1990) 50 Cal.3d 51: The court held that application of unemployment insurance law to state and local agencies was not subject to subvention. In discussing whether the requirement was a federal mandate, the court held that the issue is whether compliance with the federal law was "mandatory" or "optional," which is based on the following factors: "A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal."[71]

Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564: The court considered claims for subvention for a special education mandate. It concluded that, although the program was a federal mandate, the state had freely chosen to shift the costs to local governments and that subvention was proper. The court held that the test for whether there is a federal mandate is whether compliance with federal requirements is "a matter of true choice," in other words whether participation in the federal program is "truly voluntary."[72] The court listed the significant factual determinations: "In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately

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[68] The claimants refer to limitations on assessing services fees under California law. The referenced law concerns only the percent of voters who must approve the assessment. In fact, the largest entity subject to the permit, the City of Los Angeles, has successfully adopted such an assessment.

[69] *Commission on State Mandates*, 150 Cal.App.4th 898, 918.

[70] *Id.*, at 919.

[71] 50 Cal.3d 51, 76.

[72] 11 Cal.App.4th 1584, 1582.

forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[73]

Long Beach Unified School District v. State of California (1990) 225 Cal.App.3rd 155: The court held that subvention does apply where actions are mandated by the state, which go beyond the federal constitution or case law. Because federal law clearly would not have required steps for de-segregation where there was no finding of segregation, subvention applied.

San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal.4th 859: A school district sought subvention of funds to conduct expulsion hearings. The federal law made expulsions discretionary, but where expulsions occurred, the federal law mandated certain hearing procedures. The state law mandated expulsions whenever firearms were involved, and made all other expulsions discretionary. It also mandated some hearing procedures in addition to the federal requirements. The Supreme Court held that for firearms expulsions, the state mandated a higher level of service, and that all hearing costs for these expulsions were reimbursable, even those attributable to procedures mandated by federal law. It also held that no hearing costs are reimbursable for expulsions that are discretionary under state law. Even if the hearing procedures are mandated by state law, the court found they are incidental to federal due process requirements and are *de minimis* and therefore not reimbursable. In determining that any additional state-mandated hearing costs were *de minimis*, the court found that the state reasonably set forth requirements that were intended to implement the federal hearing requirements: "challenged state rules or procedures that are intended to implement an applicable federal law-and whose costs are, in context, *de minimis*-should be treated as part and parcel of the underlying federal mandate."[74]

The Claims do not Qualify for Subvention

The Programs are Federal Mandates that Apply Directly to Local Governments; the State has not Shifted the Burden; and the Mandates do not Exceed Federal Law

The challenged provisions are mandated by federal law. Two appellate courts have determined that the provisions in this permit constitute MEP—the minimum requirements mandated by federal law. The court in *Los Angeles* has determined that the Permit is cost-effective and based on the MEP standard. The court in *Rancho Cucamonga* found that a very similar permit met the MEP standard and did not exceed the minimum federal standard. That case specifically stated that the requirement to conduct inspections reflected MEP. The federal law specifically requires that permits be issued to the local governments that operate MS4s and that permits must require programs and actions that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the maximum extent practicable. The permit is a federal mandate on the local governments. It is the local governments that must apply for and obtain a permit. Without the permit, the cities are discharging pollutants in violation of federal

[73] *Id.* at 1593-4.

[74] 33 Cal.4th 859, 889.

law.[75] If the Water Boards had not been authorized to issue the permit in lieu of U.S. EPA, that federal agency would have issued a similar permit directly to the local governments.

The claimants contend that the Los Angeles Water Board exercised discretion to impose requirements beyond those required by federal law because the Los Angeles Water Board had a choice in establishing the mandated programs and "[t]he [Water Boards] cannot point to any provisions of the Clean Water Act or related regulations that require the programs at issue in this claim."[76] The fact that some discretion is exercised in implementing a federal program does not mean that subvention is required. The court in *Heyes* explained that, where the state has some discretion in mandating the program but ultimately the factual situation requires some type of mandate, there is a federal mandate:

> "The remaining question is whether the state's participation in the federal program was a matter of "true choice" or was "truly voluntary." The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event. We conclude that so far as the state is concerned the Education of the Handicapped Act constitutes a federal mandate."[77]

The central issue before the Commission is whether the requirements to conduct inspections and to place trash receptacles at bus and train stops exceed the federal mandate for MS4 permits. As to the inspections, the claimants appear to concede that federal law specifically requires MS4s to conduct inspections of industrial facilities and construction sites, but claim that the Los Angeles Water Board could have conducted all of the inspections and instead exercised its discretion to "shift" the responsibility to the claimants. They base this contention on a permit issued by the State Water Board to industrial facilities[78] and contend that permit obligates the Regional Water Boards, including Los Angeles, to conduct inspections. Therefore, they claim, the Los Angeles Water Board has shifted that responsibility to the municipalities. They also contend that the federal law does not specify that restaurants and automobile-related businesses must be inspected. As to the trash receptacles, they claim that the federal law does not specify this particular BMP.

In order to evaluate these contentions, some more detailed discussion of the storm water permitting scheme established by U.S. EPA is necessary. Of particular importance are: the process of selecting BMPs that are included in MS4 permits; the obligation of MS4s to regulate discharges from businesses into their systems, including discharges that are simultaneously regulated by separate NPDES permits; the process for selecting which businesses to regulate; and the requirement for MS4s to conduct inspections.

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[75] CWA §§ 301(a), 402(p)(3)(B).

[76] Test Claim 03-TC-21, at page 10.

[77] 11 Cal.App.4th 1584, 1593.

[78] Order No. 97-03-DWQ; http://www.waterboards.ca.gov/stormwtr/docs/induspmt.pdf

The Process for Selecting BMPs

The chief argument regarding trash receptacles is that the federal law does not specify this particular BMP and that, therefore, it exceeds federal law. The claimants appear to rely on *Hayes* to argue that the exercise of any discretion in selecting requirements automatically results in a reimbursable state mandate. As discussed above, however, the federal law specifically requires that the Water Boards prescribe the BMPs that the MS4 must implement. This issue was addressed succinctly in *Rancho Cucamonga*:

> In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. [Cite to *NRDC, supra.*] The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." [Cite to CWA § 402(p)(3)(B)(iii).] The Act authorizes states to issue permits with conditions necessary to carry out its provisions. [Cite to § 402(a)(1).] The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. [Cite to *NRDC.*] That is what the Regional Board has created in the 2002 permit."[79]

Because the federal mandate requires the Water Boards to choose specific BMPs that are included in MS4 permits as requirements, the "discretion" exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a "free choice." The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP standard. "The [Water Board] must comply with federal law requiring detailed conditions for NPDES permits."[80] This is completely different from the state discretion exercised in *San Diego*, where the state law compelled expulsions for bringing firearms to school, while the federal law clearly did not mandate such expulsions. Therefore, it is clear that the mere exercise of discretion in selecting BMPs, does not create a reimbursable mandate.

It is conceivable that an MS4 permit issued in California could require practices that exceed the federal requirement of MEP. It is clear, however, that inspection requirements do not exceed MEP. That issue has been specifically ruled on by *Rancho Cucamonga* and there are federal regulations, discussed below, that require these inspections. The claimants allege, however, that there is no similar requirement for the placement of trash receptacles at transit stops. The trash receptacle requirements in the Permit are different for those cities subject to a "trash TMDL" than for other cities. The Los Angeles Water Board has adopted TMDLs for some of the water bodies that receive discharges from MS4s subject to the permit. As required by the TMDL and federal law, the permit contains specific provisions for permittees that are subject to the trash TMDLs. The claimants do not seek subvention for those requirements. For

[79] *Rancho Cucamonga, supra*, at 1389.

[80] *Ibid.*

permittees not subject to a trash TMDL, the permit requires they implement BMPs to reduce trash entering the MS4s, including placing trash receptacles at all transit stops that have shelters by August 1, 2002, and at all other transit stops by February 3, 2003, and that they maintain trash receptacles as necessary. (Permit, Part 4.F.5.c.3.)

The requirements regarding trash receptacles are found in the section of the Permit concerning public agency activities. (Part 4.F.) This section imposes BMPs concerning sewage treatment overflows, construction by public agencies, storm drain maintenance and operation, and municipal construction projects. In other words, these are BMPs concerning the municipalities' own activities, as opposed to its regulation of discharges into its system by others. U.S. EPA storm water regulations address BMP requirements for the MS4s' maintenance and operation of the storm sewer system. Specifically, the MS4s' plan must include maintenance activities and schedules, including a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems. . ."[81] As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to "increase cleaning frequency of and number of roadside trash receptacles in areas where needed."[82]

The requirements to control the release of trash into MS4s and surface waters are at the heart of the storm water program. "Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), *floatable trash*, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States."[83] In carrying out the federal mandate to select BMPs, the decision to require trash receptacles at transit stops is a reasonable, practicable, and cost-effective method to reduce trash in storm water runoff. The claimants have not, and cannot, explain how such a requirement exceeds the federal standard of actions that reflect the "maximum extent practicable." The Permit also allows individual permittees to substitute BMPs for specific requirements in the Permit.[84]

At bottom, the trash receptacle requirements reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs.

The Role of MS4s in Regulating Discharges from Industrial and Commercial Activities

The claimants allege that because the Water Boards have a role in directly regulating businesses within the jurisdiction of MS4s, and therefore conduct inspections at such sites, that the requirements in the Permit for the MS4s to conduct inspections reflect a decision to shift the costs of a federal mandate from the state to local government. The court in *Hayes* discussed

[81] 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

[82] Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

[83] *Environmental Defense Center v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 841; emphasis added.

[84] Permit, Part 4.A.1.

this issue. There, the mandate was to the state generally, and the state government decided to shift the cost for implementing special education to local school districts. Here, there is no general mandate addressed to the entire state. Instead, the federal law clearly required that municipalities that operate MS4s must obtain and comply with a permit. The state does not operate the MS4; the mandate is directed to the municipalities.

In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge storm water "associated with industrial activity."[85] As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits.[86] The State Water Board has issued permits for industrial and construction discharges of storm water, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review storm water practices, was specifically envisioned and required by U.S. EPA in adopting its storm water regulations.[87]

In promulgating its regulations for MS4s and industrial dischargers, U.S. EPA made clear its intent to require industrial facilities that discharge into municipal storm sewers to obtain their own NPDES permits and *also* to require MS4s to regulate and be liable for these same discharges. In 1990, U.S. EPA adopted the regulations that spell out the federal mandates for MS4s to develop and implement plans for regulation of industrial facilities. In its Preamble to the regulations, it explained that MS4 permits "are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system." It presented the rationale for this dual regulatory approach:

> "[U.S. EPA] believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. Under the CWA, large and medium municipalities are responsible for reducing pollutants in discharges from municipal separate storm sewers to the [MEP]. Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program."[88]

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[85] CWA § 402(p)(2)(B).

[86] CWA § 402(b).

[87] In fact, the Los Angeles Water Board acted to lessen any duplication of effort and costs to the municipal permittees by exempting them from inspection requirements if the same facility has been inspected by the Board.

[88] Vol. 55, Federal Register (Fed.Reg.), at 48009.

Thus, U.S. EPA specifically mandated that industrial facilities were to be subject to permits issued directly to them by the Water Boards and also through MS4 permits, where municipalities must regulate the facilities: "Dischargers of storm water associated with industrial activity through municipal separate storm sewer systems will be subject to municipal management programs that address such discharges as well as to an individual or general NPDES permit for those discharges."[89]

Requirements for MS4s to Conduct Inspections

The federal regulations also specifically require local storm water agencies, as part of their responsibilities under NPDES permits, to conduct inspections.[90] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent.[91] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers, they must conduct inspections. The Los Angeles Water Board is charged with administering and enforcing the permit. Its policing responsibilities may also include inspecting the facilities and waters it regulates, but that does not mean it is shifting its responsibilities when it properly mandates inspections by MS4s.

The Process of Selecting Which Businesses MS4s Must Regulate

The claimants contend that federally mandated inspections do not include restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Instead, they claim that the federal mandate is limited to municipal landfills, hazardous waste sites, industrial facilities listed under the federal Superfund law, and industrial facilities that the permittees themselves determined are contributing substantial pollutants to their systems.

They base this contention on the U.S. EPA's regulations for MS4 applications. The federal regulation states that the storm water management plan that MS4s must submit must address the municipalities' enforcement against pollutants from "municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of [the federal Superfund law], and *industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system.*"[92] The claim is essentially that, after MS4s submitted their first application for a permit, which was required by the U.S. EPA regulations in 1990,[93] and listed any industrial facilities they deemed to be contributors of substantial pollutant loading, the federal law did not mandate any further actions, regardless of whether new information or monitoring might reveal such

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[89] *Id.* at 48058.

[90] 40 C.F.R. § 122.26(d)(2)(iv)(C). While the U.S. EPA regulations are phrased as "application requirements," wherein the MS4 must propose the various BMPs that will achieve MEP, these requirements must be included in the mandatory storm water management program. (*Los Angeles, supra*, 143 Cal.App.4th 985, 993.)

[91] See, e.g. CWA § 402(b)(2)(B); 40 C.F.R. § 122.44(i).

[92] 40 C.F.R. § 122.26(d)(2)(iv)(C); emphasis added.

[93] Vol. 55, Fed.Reg. 47990.

contributors. This is not a reasonable reading of the federal regulation. In adopting this regulation, U.S. EPA acknowledged that this initial selection by MS4s was only a starting point and that the mandate was to follow where information and monitoring led:

> "The object of [the requirements in 122.26(d)(2)(iv)(C)] is initially to set priorities for monitoring requirements. Then, if the situation requires controls can be developed and instituted. . . . the selection of facilities is only a means of setting priorities for facilities for the development of municipal plans. ¶ EPA agrees. . . that there will be other facilities that are significant sources of pollutants and should be addressed by municipalities as soon as possible under management programs."

As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to implement facility inspections of "auto repair shops, auto body shops, auto parts and accessory shops, gasoline stations, and restaurants."[94] The letter noted that the BMPs listed therein constitute the minimum required for area-wide implementation, and that the list "is not an additional requirement, but incorporates BMPs already proposed by some permittees." Thus, it appears that the inspection requirements were, in fact, proposed by permittees.[95] In any event, MEP is not limited to the sources and controls proposed by the permittees. U.S. EPA Guidance documents make clear that MEP requires an iterative process, where municipalities assess sources, conduct investigations, and improve their programs.[96]

The Local Governments have the Authority to Levy Service Charges, Fees, or Assessments to Pay for the Programs

The County and cities need not spend tax monies to comply with the Permit. They can and do adopt fees from their residents and businesses that fund their storm water programs. The City of Los Angeles (the largest entity covered by the permit, and which has not filed any test claims) adopted a fee ordinance, based on property assessments, for implementation of the program. All of the municipalities have the ability to charge fees to businesses to cover inspection costs. The cities' trash collection responsibilities, which include placement of trash receptacles, are also paid for through existing fees. Moreover, the trash receptacle requirements that are the subject of the Test Claims are limited to public transit stops. Any additional costs associated with trash removal at these transit stops, a service cities already provide, could be borne by transit users through higher transit fees.

The cities and the County have failed to show that they must use tax monies to pay for these requirements. It is also clear that any "additional" costs that could conceivably be considered additional to the federal mandate would be *de minimis* and would not require payment from tax monies. For example, it is assumed that most cities routinely place trash receptacles at bus stops. In fact, the claimants make no allegation of any increased costs from this requirement;

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[94] Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

[95] The issue of proposals by the permittees is discussed below.

[96] See, e.g. U.S. EPA document on Evaluating the Effectiveness of Municipal Storm Water Programs.

instead, they conflate any costs by listing "estimated trash receptacles, catch basin, and/or other treatment devices – capital and installation costs."[97]

The Local Governments Applied for the Permit and Proposed the Programs

The County and cities bound by the permit requested the mandate and the Permit allows alternatives in the manner of compliance. The County and cities jointly applied for the permit and proposed a management plan that is consistent with many of the requirements in the permit. Relevant portions of the Report of Waste Discharge that the County submitted are attached. The entire Report of Waste Discharge is available upon request. It is clear from these attachments, which include not only proposed programs but a draft permit, that many of the programs subject to the claims—including regulation of industrial and commercial sites, and specifically restaurants and automobile-service businesses—were proposed in the permittees' original plan submitted in February 2001. For example, the permittees proposed that the permit prohibit discharge of wash waters from gas stations, auto repair garages, and other automotive service facilities.[98] In addition, the permittees proposed a requirement that they "visit" automotive service and food service facilities every two years, and that they "revisit" facilities and take enforcement action if there is evidence of continuing illicit discharges.[99] The permittees submitted a lengthy list of proposed BMPs that site inspectors should look for during site visits.[100] Whether the term is "site visit" or "inspection," it is clear that the permittees proposed the mandate. The permittees also proposed that the permit mandate trash collection alongside, or in improved open channels.[101]

The permit was issued upon the joint request of all of the petitioners, with the County acting as the lead. Where the County and 84 cities apply for a single area-wide permit, the permit writer obviously is not required to write separate requirements for each entity and the County may be presumed to speak for the whole.

The Programs are not Mandates Peculiar to Government

Finally, the NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. These permits, however, are more stringent than municipal permits because the federal law requires that they meet more stringent technology-based standards and that they attain strict compliance with water quality standards in receiving waters.[102] As such, the only difference between the municipal storm water program and other storm water requirements is that federal law provides separate, more lax requirements for the municipalities.

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[97] Claim 03-TC-21, at p.2.

[98] Report of Waste Discharge at R0000026.

[99] *Id.* at R0000031.

[100] *Id.* at R0000273 – R0000360.

[101] *Id.* at R0000036.

[102] *Defenders of Wildlife v. Browner, supra.*

The Water Boards' implementation of federal law reflects this dichotomy and the fact that the municipalities receive their own permit, as required by CWA section 402(p)(3)(B) does not change the fact that storm water permit requirements are not peculiar to local government.

It is the municipalities who operate MS4s and who discharge pollutants to surface waters. It is the municipalities who must obtain permits and comply with those permits. Similarly, industrial dischargers who discharge storm water runoff to waters of the United States must also obtain and comply with permits. The state is not the discharger (except in those situations where state agencies operate MS4s, such as the Department of Transportation, where they are themselves subject to permits), and the state is not uniquely shifting a new program or higher level of service onto municipalities.[103]

Discussion of Test Claims that were not Substantiated

Development Construction Program (Part 4.E)

Test claim 03-TC-21 claims subvention of costs for the development construction program. It did not, however, include any substantiation of this claim.

Public Agency Activities Program (Part 4.F.5 and 6)

Test claims 03-TC-04, 03-TC-20, and 03-TC-21 claim subvention for portions of the public agency activities program. Test claim 03-TC-21 claims subvention for the all requirements concerning storm drain operation and streets and roads maintenance, while test claims 03-TC-04 and 03-TC-20 are limited to the requirements to place trash receptacles at transit stops and to maintain these receptacles. Test claim 03-TC-21, however, did not include any substantiation of this claim, apart from the discussion of trash receptacles, above.

Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 challenges the discharges prohibitions and receiving water limitations in the Permit. Parts 1 and 2 contain the basic prohibitions and requirements for attaining compliance with water quality standards through an iterative process. The whole of the claim is that, "if enforced and read to literarily [*sic*] to require the City to prevent any and all exceedances from urban runoff of all water quality standards or water quality objectives" the costs would be excessive. The court in *County of Los Angeles, supra*, rejected this exaggeration of the permit's terms and found the requirements to be entirely reasonable. In addition, the *Rancho Cucamonga* and *Building Industry Association* both upheld identical provisions and found them to be reasonable and to be consistent with the minimum federal standard of MEP.

[103] The State Water Board issues a separate permit to the Department of Transportation, for both its municipal activities (roads and freeways) and its industrial facilities (construction and maintenance yards). The permit is available at http://www.waterboards.ca.gov/stormwtr/docs/caltrans/caltranspmt.pdf.

Conclusion

For all the reasons set forth above, the Test Claims must be dismissed. The Permit requirements have already been upheld by the courts as reflecting the federal Clean Water Act's requirements for municipal storm water permitting. The permit in its entirety, including the Test Claim provisions, reflects the federally mandated, federal minimum standard of reducing pollutants to the "maximum extent practicable." Further, the cities can pay for any costs associated with the requirements by levying service charges or fees. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not warrant subvention.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

Sincerely,

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Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Continued on next page

cc: (Continued)

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 11th Floor
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Michael J. Levy, Esq. [via email only]
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Ms. Dorothy Rice [via email only]
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Interested Persons List

PROOF OF SERVICE

I, JEANNETTE L. BASHAW, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within documents:

LETTER TO COMMISSION ON STATE MANDATES DATED APRIL 18, 2008, REGARDING STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	**BY HAND DELIVERY:** I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
X	**BY FIRST CLASS MAIL TO ALL PARTIES LISTED:** I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

By placing a true copy thereof in separate, sealed envelopes addressed to:

See Exhibit A attached hereto and made a part hereof.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

Jeannette L. Bashaw

JEANNETTE L. BASHAW

EXHIBIT A

(VIA HAND DELIVERY)
Paula Higashi, Executive Director
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