

STORM WATER MITIGATION REQUIREMENTS FOR PRIORITY PLANNING PROJECTS FOR THE PROTECTION OF WATER QUALITY

Technical Report

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Problem Statement

The municipalities covered by the Los Angeles County Municipal Separate Storm Sewer (MS4) permit and the Building Industry Association of Southern California (BIA-SC) argue that the implementation of the development planning provisions required by the MS4 permit should be limited to the definition of "discretionary projects", as understood in the California Environmental Quality Act (CEQA). Such an interpretation limits the application of storm water management programs and is not supported by the federal Clean Water Act (CWA), U.S. EPA storm water regulations, the California Water Code (CWC), or the California Public Resources Code (Cal. Pub. Res. Code).

Introduction

On July 15, 1996, the California Water Quality Control Board, Los Angeles Region (LA Regional Board) issued a revised MS4 permit (Order No. 96-054) for the County of Los Angeles and all incorporated cities. The permit contains provisions for the regulation of discharges from development planning and construction. The development planning section requires Permittees to develop a checklist for determining priority and exempt projects¹. In the Order, priority projects are described as development and redevelopment projects requiring discretionary approval which may have a potential significant effect on storm water quality.² Although the permit refers to the term "discretionary" projects in a few places, the term was not defined in the permit, and there is no evidence of a "meeting of minds" or discussion about its meaning when the permit was adopted.³

¹ Permit, Part 2, III.A.1.a.

² *Ibid.*

³ Regional Board Comment on Proposed SUSMP Order, September 26, 2000

Under CEQA, a "discretionary project" is one which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular project, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.⁴ This limitation was never contemplated in the Order and was never adopted by the LA Regional Board.⁵ However, the use of the term "discretionary" resulted in unintentional and inappropriate limitations on the development planning requirements in this Order as understood by Permittees and interpreted by the State Board. Controversy regarding this issue arose during the development of Standard Urban Storm Water Mitigation Plans (SUSMPs), pursuant to the development planning provisions in the permit.⁶

The SUSMPs are plans that designate best management practices (BMPs) that must be used for specified categories of development projects. After LA County submitted the SUSMPs, the LA Regional Board made several revisions and issued the revised SUSMPs on March 8, 2000. The State Board received petitions for review of the SUSMP action from a coalition of municipalities and the BIA-SC. The Petitioners contended that the SUSMPs should only apply to projects that are considered "discretionary" within the meaning of CEQA. They argued that the inclusion of non-discretionary, or ministerial, projects is inconsistent with the terms of the permit.⁷

The State Board issued Order (WQ 2000-11) deciding the petition. The SUSMP decision included the State Board's determinations on the petitioners' issues and made certain revisions to the SUSMPs. Although the State Board realized that the limitation of SUSMPs to discretionary projects might not be sufficiently broad for an effective storm water control program, it found that it was inappropriate to include non-discretionary projects in the SUSMPs at that time because of a procedural defect.⁸ The State Board upheld the 'CEQA discretionary' limitation only because the term was undefined in the permit and its intended meaning was unclear in the SUSMP...not because it was sufficiently protective of water quality standards.⁹ The State Board authorized the LA Regional Board to consider expanding the new development planning controls beyond the CEQA definition when the LA County MS4 permit is reissued. On its part, the LA Regional Board has always held that the limiting interpretation of the term "discretionary" opened an "unintended loophole" in the development planning requirements.¹⁰

Presently, the LA Regional Board has removed all references to the term "discretionary" from the proposed permit. The proposed permit requires the application of new development requirements to all planning priority development and redevelopment projects, regardless of whether they are considered ministerial or

⁴ SUSMP Post-Hearing Brief, July 7, 2000

⁵ Regional Board Comment on Proposed SUSMP Order, September 26, 2000

⁶ Permit, Part 2, III.A.1.c.

⁷ SB Order WQ 2000-11

⁸ *Ibid.*

⁹ The State Board's SUSMP decision states, "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."

¹⁰ Regional Board Comment on Proposed Order, September 26, 2000

discretionary under CEQA. This approach is consistent with the development planning provisions in the Ventura County permit, issued on July 27, 2000. The LA County MS4 permittees contend that existing CEQA procedures must be used to implement the development planning provisions, and that reviewing all projects is inconsistent with their current procedures and is not feasible. However, local governments have several options for implementing the proposed requirements. These options are described later in this report in the section, "Options for Municipalities".

Urbanization and Storm Water Quality

Urbanization alters the natural infiltration capability of the land and generates a host of pollutants that are entrained in storm water and urban runoff. These pollutants such as heavy metals and petroleum hydrocarbons result from the activities of dense human populations. The overall impact is an increase in storm water runoff volumes and pollutant loading in storm water discharged to receiving water-bodies.¹¹

Urban development increases the amount of impervious surface in a watershed as farmland, forests, and meadowlands with natural infiltration characteristics are converted into buildings with rooftops, driveways, sidewalks, roads, and parking lots with virtually no ability to absorb storm water. Storm water and snow-melt runoff wash over these impervious areas, picking up pollutants along the way while gaining speed and volume because of their inability to disperse and filter into the ground. What results are storm water flows that are higher in volume, pollutants, and temperature than the flows in less impervious areas, which have more natural vegetation and soil to filter the runoff.¹² In addition to impervious areas increase, urban development brings with it proportionately high levels of car emissions, car maintenance waste, pet waste, litter, pesticides, and household hazardous wastes, which may be washed into receiving waters by storm water or dumped directly into storm drains designed to discharge to receiving waters.

Most organic compounds found in storm water are associated with various human-related activities, especially automobile use, or are associated with plastics.¹³ Heavy metals found in storm water also mostly originate from automobile use activities, including gasoline combustion, brake lining, fluids, undercoatings, and tire wear.¹⁴

¹¹ U.S. EPA (1992). *Environmental Impacts of Storm Water Discharges: A National Profile*. EPA 841-R-92-001. Office of Water. Washington, DC.

¹² U.S. EPA (1997). *Urbanization and Streams: Studies of Hydrological Impacts*. EPA 841-R-97-009. Office of Water. Washington, DC.

¹³ Field, Richard, James P. Heaney and Robert Pitt. (2000). *Innovative Urban Wet-Weather Flow Management Systems*. Technomic Publishing Co., Inc. Lancaster.

¹⁴ See, Durum, W.H. (1974), *Occurrence of some trace metals in surface waters and groundwaters*. In Proceeding of the Sixteenth Water Quality Conference. Am. Water Works Assoc., et al. Univ. of Illinois Bull. 71(108). Urbana, IL.; Koeppe, D.E. (1977). *Comp. Vol. IV: Soil-water-air-plant studies*. In: Environmental Contamination by Lead and Other Heavy Metals. G.L Rolfe and K.A. Peinbold, eds. Institute for Environmental Studies. Univ. of Illinois. Urbana-Champaign, IL. July.; Rubin, A.J., ed. (1976). *Aqueous-Environmental Chemistry of Metals*. Ann Arbor Science Publishers. Ann Arbor, MI; Shaheen, D.G. (1975). *Contributions of Urban Roadway Usage to Water Pollution*. 600/2-75-004. U.S. Environmental Protection Agency. Washington, DC.; Solomon, R.L. and D.F.S. Natusch. (1977). Vol. III: *Distribution and characterization of urban dists*. In: Environmental Contamination by Lead and Other heavy Metals. G.L. Rolfe and K.G. Reinbold, eds. Institute for Environmental Studies. Univ. Of Illinois. Urbana-Champaign, IL.; and Wilber, W.G. and J.V. Hunter. (1980). *The Influence of Urbanization on the Transport of Heavy Metals in New Jersey Streams*. Water Resources Research Institute. Rutgers University. New Brunswick, NJ.

More recently, studies reveal a connection between urban development and contamination of local waterbodies. Studies found the highest levels of organic contaminants, known as polycyclic aromatic hydrocarbons (PAHs) (products of combustion including fossil fuels combustion), in the reservoirs of urbanized watersheds.¹⁵ Studies also established a clear relationship between the adverse impact of urbanization and impairment of aquatic communities in receiving waterbodies.¹⁶

Federal Storm Water Regulations

Federal regulations require at a minimum that MS4 permittees develop, implement, and enforce storm water management programs designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.¹⁷ The regulations state that storm water management programs must include certain minimum control measures to meet the compliance standard of reducing pollutants to the "MEP". These minimum control measures include the development, implementation, and enforcement of a program to address storm water runoff from new development and redevelopment projects that disturb one or more acres of land, including projects less than one acre that are part of a larger common plan of development.¹⁸ MS4 programs must include requirements to address storm water during and after construction. Because there is no express national standard for the control of storm water pollutants from new developments, the permitting authority must defer to statements of policy and intent made by the U.S.EPA.

The U.S.EPA under Phase I regulations did not fully describe the expectations for MS4 Permittees in controlling post construction storm water discharges from new development and significant redevelopment except that "a comprehensive master plan" was required [55 *Fed Reg.* 48054]. For a better understanding of the regulatory expectation, we look to the Final Rule for Phase II storm water regulations. Therein, the U.S.EPA notes that "prior planning and designing for the minimization of pollutants in storm water is the most cost-effective approach to storm water quality management" [64 *Fed Reg.* 68759]. It goes on to state, "If potential adverse water quality impacts are considered from the beginning stages of a project, new development and redevelopment provides more opportunities for water quality protection". The Final Rule identifies four essential elements to control storm water from new development and redevelopment. These are, (i) to develop and implement strategies that include a combination of structural and non-structural BMPs; (ii) adopt an ordinance to address post construction runoff; (iii) ensure long term operation and maintenance of the BMPs; and (iv) ensure that controls are in place that will *minimize* water quality impacts. [Emphasis added] EPA goes on to say:

¹⁵ USGS (1998). *Research reveals link between development and contamination in urban watersheds*. USGS news release. USGS National Water-Quality Assessment Program.

¹⁶ USGS (2000). *Water Quality in the Long Island-New Jersey Coastal Drainages, New York and New Jersey, 1996-98*. USGS Circular 1201.

¹⁷ 40 CFR Part 122.23(a)

¹⁸ *Ibid.*

“The requirements[are] consistent with the permit application requirements for large MS4s for post-construction controls for new development and redevelopment.”

The permitting authority in order to comply with federal regulations must thus require the implementation of an MS4 program that will achieve all four enumerated objectives for new development and redevelopment. To aid in the implementation of an adequate program, EPA recommends that MS4 operators adopt a planning process that identifies the municipality's program goals, implementation strategies, operation and maintenance policies and procedures, and enforcement procedures.¹⁹ EPA also encourages MS4 operators to assess existing ordinances, policies, and programs while developing a post-construction storm water management program.²⁰

Further, the U.S. Court of Appeals has unequivocally stated that Congress intended for “the Administrator or a State to design [substantive] controls” for storm water discharges from MS4s but did not mandate a particular approach [*NRDC v. U.S.EPA*, 966 F.2d 1292 (9th Cir. 1992)]. The court held that it is appropriate to defer to U.S.EPA [and the State] where the agency supplied a “reasoned explanation”.

It should also be noted that the U.S.EPA is currently in the process of developing effluent guidelines for the construction and development industry, which will include controls for new development and significant redevelopment.²¹

Scope of California Environmental Quality Act

The California Environmental Quality Act, (Cal. Pub. Res. Code § 21000 *et seq.*) was enacted in 1970 as a system of checks and balances for land-use development and management decisions in California. CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible, and applies to projects that involve the exercise of discretionary powers by a public agency, which will result in a direct or reasonably foreseeable indirect physical change in the environment.²²

"Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.²³ A project is called "ministerial" if the law requires an agency to act on it a set way without allowing the agency to use its own judgment. Ministerial projects involve no special discretion or judgment in reaching a decision and are not subject to CEQA. Each public agency should, in its implementing regulations or

¹⁹ 40 CFR Part122.23(b)(5)(iii)

²⁰ *Ibid.*

²¹ See, Fact Sheet: Effluent Guidelines for the Construction and Development Industry, U.S.EPA, 1999, 3 pp.

²² CEQA Guidelines Section 15060

²³ CEQA Guidelines Section 15357

ordinance, provide a list of its projects and actions, which are deemed ministerial under the applicable laws and ordinances.²⁴ Projects that possess both ministerial and discretionary attributes are treated as discretionary.²⁵

Whether an agency has discretionary or ministerial control over a project depends on the authority granted by the law providing the controls over the activity²⁶ (the law or ordinance authorizing the particular permit). CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws, it does not grant an agency new powers independent of the powers granted by other laws.²⁷ Because ordinances vary, similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another.²⁸

No presumptions regarding decision-making discretion exist in CEQA, "unless the public entity retains *no* discretion whatsoever in approving an application for a permit".²⁹ Therefore, no project or type of project is assumed to be ministerial unless related local ordinances limit public officials' review to determining whether (a) the zoning allows the structure to be built in the requested location, (b) the structure would meet the strength requirements of the Uniform Building Code, and (c) the applicant has paid his fee.³⁰

Furthermore, CEQA includes many exemptions. Even if a public agency has discretionary control over a project, that project may still be exempt from CEQA. A project is exempt from CEQA if it meets one of the following conditions:³¹

1. The project is exempt by statute;
2. The project is exempt pursuant to a categorical exemption;
3. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment;
4. The project will be rejected or disapproved by a public agency (each agency should include a list of such projects in its implementation procedures).

Statutory exemptions are created by the Legislature. CEQA Guidelines §15282 summarizes existing statutory exemptions, but there is no exhaustive list. Some of these projects and activities are listed in the statute itself and some are included in many different sections of the Cal. Pub. Res. Code, while others are not even codified.³² A few notable statutory exemptions include:

²⁴ CEQA Guidelines Section 15268

²⁵ CEQA Guidelines Section 15268

²⁶ CEQA Guidelines Section 15002

²⁷ CEQA Guidelines Section 15040

²⁸ See discussion on p 10.

²⁹ Guide to CEQA, Part IV

³⁰ CEQA Guidelines Section 15369

³¹ CEQA Guidelines Section 15061

³² Guide to CEQA Part IV

1. Ministerial projects;
2. Any residential development project, including any subdivision, that is undertaken consistent with an existing plan for which an EIR has been certified after January 1, 1980;
3. Any development project consisting of the construction, conversion, or use of residential housing for agricultural employees;
4. Any development project consisting of the construction, conversion, or use of residential housing of not more than 100 units in an urbanized area that is affordable to lower income households;
5. The construction of housing or neighborhood facilities in an urbanized area pursuant to certain provisions.³³

Categorical exemptions are classes of projects which the Secretary of Resources Agency has determined not to have a significant effect on the environment and which are exempt from CEQA. If an agency determines that a project is subject to a categorical exemption, then no further environmental evaluation is required.³⁴ There are 32 classes of categorical exemptions, which are described in the CEQA Guidelines. A few examples are listed below.

1. Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alterations of existing structures. This includes additions to existing structures that will not result in an increase of more than 50 percent of the floor area, or 2,500 square feet, or 10,000 square feet if the project meets certain conditions.³⁵
2. Class 2 consists of replacement or reconstruction of existing structures where the new structure will be located on the same site and will have substantially the same purpose and capacity as the structure replaced.³⁶
3. Class 11 consists of construction, or placement of minor structures accessory to existing commercial, industrial, or institutional facilities, including but not limited to small parking lots.³⁷
4. Class 32 consists of projects characterized as in-fill development up to five acres that are consistent with all applicable zoning regulations, occur within city limits, and are substantially surrounded by urban uses.³⁸

In cases where CEQA applies, a public agency must then determine whether the project may have a significant effect on the environment. In making this determination, an agency must use careful judgement based to the extent possible on scientific and factual data.³⁹ If an agency determines that a significant effect on the environment may occur, an Environmental Impact Report (EIR) must be prepared. The EIR records the

³³ CEQA Guidelines Section 15282

³⁴ *Ibid.*

³⁵ CEQA Guidelines Section 15301

³⁶ CEQA Guidelines Section 15302

³⁷ CEQA Guidelines Section 15311

³⁸ CEQA Guidelines Section 15332

³⁹ CEQA Guidelines Section 15064

scope of the applicant's proposal and analyzes all its known environmental effects. The CEQA Guidelines define "a significant effect on the environment" as a substantial adverse change in the physical conditions, which exist in the area, affected by the proposed project.⁴⁰

CEQA encourages each public agency to develop and publish thresholds of significance that the agency uses in determining the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect.⁴¹ Thresholds of significance for use as part of an agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and supported by substantial evidence.⁴²

The CEQA Guidelines state that a public agency should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment⁴³. However, the Guidelines go on to say that "in determining whether and how a project should be approved, a public agency has an obligation to balance a variety of public objectives, including economic, environmental, and social factors and in particular the goal of providing a decent home and satisfying living environment for every Californian".⁴⁴ CEQA gives public agencies the flexibility to approve a project that will cause one or more significant effects on the environment, if they determine that other competing public objectives outweigh protection of the environment, or if there is no feasible way to lessen or avoid the significant effect.

"Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.⁴⁵

Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and the CEQA Guidelines for administering its responsibilities under CEQA.⁴⁶ Agencies have flexibility in adopting procedures to implement CEQA. An agency may adopt a complete set of procedures in one document, or it may adopt specific procedures and tailor them to the specific operations of the agency. "Local agencies must integrate the CEQA review process into the other planning and environmental review procedures they are legally or otherwise obligated to conduct."⁴⁷

⁴⁰ CEQA Guidelines Section 15382

⁴¹ CEQA Guidelines Section 15064.7

⁴² *Ibid.*

⁴³ CEQA Guidelines Section 15021

⁴⁴ *Ibid.*

⁴⁵ CEQA Guidelines Section 15364

⁴⁶ CEQA Guidelines Section 15022

⁴⁷ Guide to CEQA, Chapter II. 1999

Review of Applicability of CEQA to MS4 Permit Objectives

As described in the sections above, many fundamental differences exist between the scope and intent of CEQA and the intent of state and federal storm water regulations.

The first fundamental difference lies in the main objectives of each regulation. The purpose of CEQA is to avoid or minimize environmental damage where feasible. Prior to requiring mitigation or changes to a project, an agency must determine whether a significant effect on the environment may result from a particular project. The CEQA Guidelines define a "significant effect" as a substantial adverse change in the physical conditions, which exist in the area affected by the proposed project. The goal of controlling pollutants and other impacts from storm water runoff is not specifically mentioned in the CEQA Guidelines.

On the other hand, the purpose of the MS4 permit is to effectively prohibit non-storm water discharges to the MS4 and to require the implementation of controls to reduce the discharge of pollutants in storm water to the MEP and to meet water quality standards.⁴⁸ The ultimate goal of the CWA is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters. Wherever attainable, water quality control should provide for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water (i.e., fishable, swimmable). The criteria used to measure these goals are often chemical and biological in nature. Also, under the CWA, compliance with and effectiveness of MS4 permits are unequivocally based on meeting chemical and biological standards. In fact, exceedances of chemical water quality criteria and/or impacts to aquatic life and many other beneficial uses would not constitute a substantial change in the physical conditions under which exist in a project area. Under CEQA, causing or contributing to pollutants discharged in storm water would not meet the definition of "significant effect. It is a fair inference that CEQA was never intended to remedy impacts to surface water quality, but only that impacts be considered in public-decision making. For example, Cal. Pub. Res. Code § 21001 states that the policy of the State is to:

"Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criteria in public decisions."

Justification that Review Must Not be Limited to "Discretionary" Projects

Another major discrepancy under CEQA is the project categories covered. Clearly the projects subject to CEQA and the CEQA review process do not encompass all development categories covered by the LA County MS4 permit. There is no question under U.S.EPA storm water regulations that minimum development planning control measures must be implemented for all projects one acre or greater in size. The CWA makes no distinction between projects that may be considered ministerial or discretionary under the local government project planning approval process.

⁴⁸ Clean Water Act, Section 402(p)

Consequently, there is no justifiable reason to limit storm water management requirements to "discretionary" projects when mitigating storm water impacts. The difference between a ministerial and a discretionary project varies between agencies, and it is based on their own specific ordinances that may not be related to the protection of water quality in any way. As discussed in the introduction, the LA Regional board never intended for the term "discretionary" to be defined as it is under CEQA. The examples described below are evidence that limiting the requirements in the permit to "discretionary" projects would allow many projects to escape storm water mitigation requirements, which are necessary to comply with federal regulations. Cities classify projects as discretionary based on other ordinances that are totally unrelated to water quality.

For example, the City of Santa Monica classifies proposals for restaurants as ministerial projects, so long as they do not serve alcohol. Therefore, all new restaurants not serving alcohol, which includes the majority of fast food chains, are only required to comply with zoning requirements and pay permit fees to begin construction. When the LA Regional Board issued the Final SUSMP, on March 8, 2000, restaurants were one of the categories that were made subject to development and significant redevelopment conditions in order to reduce pollutants in storm water runoff to the MEP. If a proposed restaurant in the City of Santa Monica plans to serve alcohol, it is considered "discretionary". The City can choose to deny these proposals, or approve them with conditions, such as storm water mitigation conditions. Whether or not a restaurant serves alcohol has no affect on the type or amount of pollutants generated at the site that may come in contact with storm water. The City's basis for classifying a proposed restaurant as discretionary or ministerial is clearly not related to the protection of water quality. A limiting interpretation based on alcohol sale would lead to noncompliance with the CWA and federal storm water regulations.⁴⁹

As another example, a retail gasoline outlet (RGO) that is proposed to be located in a commercial zone is considered ministerial.⁵⁰ Whereas an RGO proposed in a non-commercial zone requires discretionary approvals. RGOs have been determined to be a significant category subject to storm water mitigation requirements. They are a well-identified source of urban storm water pollutants that impair receiving waters.⁵¹ Yet under CEQA, municipalities may treat RGOs differently because of local government zoning criteria. Regardless of existing zoning practices, RGOs generate significant concentrations of hydrocarbons and heavy metals. This fact is further evidence that the municipal distinction between ministerial and discretionary is not related to water quality.

Municipal zoning plays a very significant role under CEQA as to the extent of environmental review that a development project undergoes. For example, if a commercial project, regardless of its size, is proposed for an area that is already zoned for commercial use, it does not require discretionary approval. Thus, if SUSMP requirements were only applied to the discretionary approval process as determined by CEQA, the result would be that large commercial developments that meet or exceed the thresholds in the SUSMP would not be required to implement storm water mitigation

⁴⁹ City of Santa Monica CEQA review procedures

⁵⁰ *Ibid.*

⁵¹ RGO Technical Report, Radulescu *et al.* (June 2000)

measures because they were built in zones considered conforming use. For example, just between January 1, 2000 and December 31, 2000, the City of Los Angeles issued building permits to 133 commercial developments greater than 100,000 square feet that would be considered ministerial under this criterion.⁵²

Similarly, the numerous statutory and categorical exemptions provided under CEQA clearly are not consistent with the statutory standard of reducing pollutants in storm water to the MEP. Many of the exemptions appear to have the intention of providing a decent home to Californians without considering possible impacts to water quality from storm water runoff. For example, all development projects consisting of the construction, conversion, or use of residential housing of not more than 100 units in an urbanized area that is affordable to lower income households are exempt by statute. Storm water monitoring and studies have documented that urban areas contribute significant pollutants to storm water, such as metals, hydrocarbons, and pesticides, irrespective of the affordability of the homes. The affordability of housing does not affect the generation of these pollutants from urban residential developments.

Furthermore, the Class 2 categorical exemption also allows for the replacement or reconstruction of existing structures where the new structure will be located on the same site and will have substantially the same purpose and capacity as the structure replaced. This exemption would negate the inclusion of many "redevelopment" projects in the development planning provisions of the permit. For the purposes of water quality protection, storm water mitigation requirements must be applied to all planning priority projects that undergo significant redevelopment in their respective categories.⁵³ As defined in the permit, significant redevelopment means land-disturbing activity that results in the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site, or an increase of more than fifty percent of impervious surfaces of a previously existing development.⁵⁴ The U.S.EPA affirms this requirement in its Phase II Final Rule, where it states that considering potential adverse water quality impacts from redevelopment projects provides more opportunities for water quality protection.⁵⁵

Options for Municipalities

The municipalities argue that their development planning programs and review procedures cannot be modified to include the review of ministerial projects. This statement is incorrect. The following options exist for municipalities to include all planning priority development and redevelopment projects in their environmental review processes.

The first option is for cities to make all planning priority project categories discretionary beyond statewide categories by adopting local ordinance provisions that

⁵² City of Los Angeles, Department of Building and Safety, New Commercial Building Permits Issued Between 1/1/2000 and 12/31/2000.

⁵³ Permit, Part 4.D.8

⁵⁴ *Ibid.*

⁵⁵ 64 Fed. Reg. 68759

create decision-making discretion. CEQA gives an agency a blanket authority to conduct environmental reviews of projects when other laws allow them any type of decision-making powers. “CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws, it does not grant an agency new powers independent of the powers granted by other laws.” Certainly, the MS4 permit can be viewed as one of these “other laws”, which requires cities to modify their local ordinances to protect water quality and implement control measures consistent with federal storm water regulations. The SUSMP requires that cities amend their codes and promulgate ordinances to give legal effect to the SUSMP requirements.⁵⁶ These requirements then become the part of each local ordinance that gives the city discretionary powers over priority development projects, deeming them “discretionary projects”.

The second option is for municipalities to administratively establish standards and objective criteria for storm water mitigation for ministerial projects and for planning priority development categories that are otherwise exempt from CEQA review. The City of Los Angeles currently uses this process and, in a letter dated July 25, 2001, did not oppose the LA Regional Board staff recommendation to retain the requirement to include all projects in the development planning program.⁵⁷ The County of Los Angeles utilizes a similar administrative process to ensure that priority-planning projects considered ministerial incorporate SUSMP requirements.⁵⁸ In the City of Santa Monica, all projects undergo urban runoff procedures regardless of whether they are discretionary or ministerial.⁵⁹

Conclusion

There is no technical or legal basis to limit the application of new development and redevelopment requirements to projects defined for environmental review by the limitations of CEQA. Restricting the application of storm water mitigation requirements to CEQA discretionary projects is not consistent with federal storm water regulations for the protection of water quality. The determinative consideration for the application of development planning provisions should be whether a particular category of development has been determined to cause or contribute to significant pollution of storm water. A procedural classification defined by CEQA should not matter, let alone be determinative.

⁵⁶ Final SUSMP, March 8, 2000

⁵⁷ See City of Los Angeles Policy memo from Chief Legislative Analyst to City Council Environmental Committee Chair (July 25, 2001), p 4, which supports the extension of new development planning requirements to administrative projects.

⁵⁸ LA County Department of Public Works (DPW), 'Announcement, NPDES- *Development Planning for Storm Water Management*, where review of new development requirements is shared among Land Development Division, Building and Safety Division, and Environmental Programs Division. http://ladpw.org/wmd/ust/npdes_susmp1.pdf

⁵⁹ The City of Santa Monica Ordinance (Municipal Code Chapter 7.10.01) requires all new development or redevelopment projects to implement the appropriate storm water mitigation measures.