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November 13, 2012

VIA EMAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

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

Re: Comments on the Issue Paper—State Board Workshop on Receiving Water Limitations

Dear Ms. Townsend:

This office serves as City Attorney for the City of Santee in San Diego County. Along with the many other Phase I and Phase II MS4 dischargers throughout California, Santee has a vital interest in the State Board's upcoming workshop to consider the receiving water limitations language for MS4 permits. We thank the State Board for addressing this important matter, and we appreciate the efforts of State Board staff in scheduling the workshop.

State Board staff has prepared an Issue Paper that seeks to frame the issue to be heard at the workshop and to provide relevant background information. The Issue Paper does a good job of discussing many of the key cases and precedential State Board decisions. However, we believe that certain aspects of the Issue Paper require refinement and further elaboration to provide the State Board with a complete perspective and to allow for meaningful consideration of all sides of the issue. In an effort to help the State Board focus its consideration on what we view as the fundamental issue, we submit the following comments on the Issue Paper.

1. Reframing the Issue

The key issue before the State Board, in our view, is whether the Board's receiving water limitations language, as set forth in State Board Order WQ 99-05, needs to be realigned in light of the 9th Circuit's recent decision[1] that interprets the Board's language to require strict and immediate compliance with water quality standards. Because the State Board's express policy[2] is that compliance with water quality standards is to be achieved over time through an iterative

[1] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880.
[2] State Board Order WQ 2001-15.

approach involving improved BMPs, realignment of the Board's language is required to link the permit language to the adopted policy.

We believe that the Issue Paper's framing of the matter does not fully reflect the question at hand. The question before the State Board is *not* whether to grant an "exemption from enforcement" or a "safe harbor." As with all parts of an NPDES permit, the receiving water limitation language is enforceable.[3] The real question is whether *compliance* with this enforceable requirement is to be *achieved* through implementation of an adaptive management process. The 9th Circuit decision interprets the State Board's language in a manner that undermines the adaptive management approach and requires strict and immediate compliance with water quality standards.

We urge the State Board to approach the workshop using this reframed issue statement. We believe that this reframed question more fully presents the issue of concern to dischargers.

2. Elaboration on the Legal Background and Need for the Workshop

The Issue Paper provides a brief discussion of the legal background and seeks for explain why dischargers have asked the State Board to address the issue. We ask the State Board to consider the following key elaborations on the discussion in the Issue Paper.

A. Congress Intentionally Exempted MS4 Discharges from the Requirement to Strictly Comply with Water Quality Standards

The Issue Paper states on page 1 that, with regard to MS4 permits, "the Clean Water Act does not reference the requirement to meet water quality standards." This is an accurate statement, but it significantly understates the importance of Congress's affirmative decision to treat MS4 discharges differently than other NPDES discharges due to the unique nature of storm water and MS4s. Although this may seem to be an overly nuanced point, the manner in which Congress approached MS4 discharges has crucial implications for the question of how compliance with the receiving water limitations language can and should be measured.

Rather than simply failing to reference the requirement to meet water quality standards, the Clean Water Act is designed to apply a fundamentally different regulatory approach to MS4 discharges. Congress affirmatively chose not to require MS4 discharges to strictly comply with water quality standards. By intentionally creating a different standard, Congress unambiguously demonstrated its intent that MS4 discharges did not need to comply strictly with water quality standards.

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[3] *Nw. Envtl. Advocates v. City of Portland* (9th Cir. 1995) 56 F.3d 979, 986

The importance of Congress's choice of words is illustrated in *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, the seminal case on the issue. In *Browner*, the 9th Circuit held that NPDES permits issued by U.S. EPA to five municipalities in Arizona were consistent with the Clean Water Act even though the permits did not require strict compliance with water quality standards. Rather than requiring strict compliance with water quality standards, the permits required implementation of a storm water management program designed to achieve compliance with water quality standards over time.

The 9th Circuit held that U.S. EPA's approach was consistent with the unambiguous requirements of the Clean Water Act. The Court held that the Clean Water Act "unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)." Instead, Congress replaced the requirements of Section 301 of the Act (found at 33 U.S.C. § 1311) with the unique provisions of Section 402(p)(3)(B)(iii) of the Act. Because of its importance, we have attached a fully copy of the *Browner* decision to this letter.

It should be noted that, prior to *Browner*, there appears to have been some confusion in California from both the State Board and U.S. EPA representatives regarding whether MS4 discharges had to strictly comply with water quality standards. Earlier decisions of the State Board, based upon comments from U.S. EPA representatives, had erroneously applied Section 301 of the Clean Water Act to MS4 discharges.[4] This misinterpretation of the Act was based, at least in part, on what was perceived to be an ambiguity created by Section 402(p)(3)(B)'s failure to reference water quality standards. To avoid similar confusion of the issue during this workshop process, it is important to recognize that the Act does significantly more than just fail to "reference the requirement to meet water quality standards." As *Browner* makes clear, the Act unambiguously *excludes* MS4 discharges from Section 301 of the Act and its requirement to strictly comply with water quality standards. This affirmative decision by Congress is crucial to the State Board's consideration of the issue.

B. The State Board has Interpreted its Receiving Water Limitations Language in a Manner Consistent with Browner

The Issue Paper suggests that the State Board's prior precedential decisions have always separated the iterative process from the means of compliance with the receiving water limitations language.[5] This suggestion appears fundamentally at odds with the State Board's

[4] See State Board Orders WQ 91-03, 91-04 and 98-01.

[5] The Issue Paper suggests on page 2 that the Board's previous decisions mean that "when a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the relevant discharge prohibitions and receiving water limitations of the permit and potentially subject to enforcement by the

Order WQ 2001-15, which interprets the receiving water limitations language in light of *Browner*. Due to its importance, we have attached a copy of State Board Order WQ 2001-15 to this letter.

In State Board Order WQ 2001-15, the Board interpreted the receiving water limitations language of Order WQ 99-05 in light of *Browner*. The Board reasoned 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*." (Emphasis added.) Rather, "compliance is to be achieved over time, through an iterative approach requiring improved BMPs." Far from suggesting that the iterative process is separate from compliance, the State Board's decision emphasizes that the iterative process is the *mechanism for* compliance. This is reflected in the State Board's command in Order WQ 2001-15 that "[t]he permit must be clarified so that 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." (Emphasis added.)

C. Before the 9th Circuit Decision, the Courts had not Expressly Interpreted the State Board's Language

The Issue Paper states that the "Water Boards' decisions to decline to include a safe harbor in MS4 permits have been upheld by courts of appeal." While accurate to some extent, this statement might be read to suggest that prior to the 9th Circuit decision other courts had already interpreted the Board's language to require strict and immediate compliance with water quality standards, regardless of the iterative process. The cases cited in the Issue Paper should not be read in that manner.

The Issue Paper cites to *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866 and *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377 to support its statement. Neither of these cases reached the issued addressed by the 9th Circuit. For example, in *Building Industry Assn. of San Diego County*, the key question before the court was whether the receiving water limitations language in the 2001 San Diego County MS4 permit violated federal law because it exceeded the MEP standard. The court rejected this contention. The court did not, however, expressly interpret the receiving water limitations language in a way that separated compliance from the iterative process. In fact, the court' decision was based upon the premise that, despite unique language in the San Diego permit, "the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water

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Water Boards or through a citizen suit, *even if the discharger is actively engaged in the iterative process.*" (Emphasis added.)

quality standards." (*BIA*, 124 Cal.App.4th at 890.) Notably, the Court further stated that "it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process." (*Id.* at 891.)

Similarly, the court in *City of Rancho Cucamonga* did not interpret the receiving water limitations language to require strict and immediate compliance with water quality standards. As relevant here, the court merely noted that the Clean Water Act already provides that compliance with the terms of a permit constitute compliance with the Act. The court stated that "[t]his seems like much ado about nothing because 33 U.S.C. § 1342, subdivision (k), already affords Rancho Cucamonga the protection it seeks . . . ." (*City of Rancho Cucamonga*, 135 Cal.App.4th at 1388.) The case can thus be read to support, not undermine, the proposition that the iterative process can and should form the basis of compliance with the permit and thereby compliance with the Act.

While reasonable minds may differ on the interpretation of these two cases, the cases did not expressly interpret the receiving water limitations language in the manner presented in the 9th Circuit decision.

D. The 9th Circuit Decision Interprets the State Board's Language in a Manner that is Inconsistent with the State Board's Interpretation

The Issue Paper states on page 2 that the 9th Circuit decision "confirmed that, as the receiving water limitations of the Water Boards' MS4 permits are currently drafted, engagement in the iterative process does not excuse liability for violations of water quality standards." Rather than "confirming" a preexisting policy, the 9th Circuit decision should be viewed as an interpretive departure from the State Board's own reading of its receiving water limitations language.

Among other faults,[6] the 9th Circuit decision misinterprets the State Board's language in two importance ways. First, the 9th Circuit decision requires strict and immediate compliance with water quality standards. This holding directly conflicts with the State Board's decision 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." Second, the 9th Circuit decision uncouples the iterative process from permit compliance, thereby rendering the iterative process a meaningless appendage to the permit. This directly conflicts with the State Board's prior direction that "[t]he 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." (Emphasis added.)

[6] The United States Supreme Court has decided to review the 9th Circuit decision on other grounds.

Therefore, rather than "confirming" an existing interpretation, the 9th Circuit decision is a radical departure from the State Board's long-standing iterative approach to compliance.

E. The State Board should Realign its Language with its Policy

The discussion above brings the issue back to the purpose of the workshop and the nature of the requests that dischargers have made for the State Board to address the issue. Rather than asking for something new,[7] dischargers are asking the State Board to realign its language with its existing policy that compliance with water quality standards is to be achieved over time, through an iterative approach requiring improved BMPs. The request is not for a new exemption, but for clarity in the permit language to confirm that compliance is to be measured and achieved by engagement in the iterative process.

3. Conclusion

We thank the State Board for taking the time and effort to address this important issue, and we applaud staff for its willingness to engage on the matter, including through its development of the Issue Paper. We hope that our comments on the Issue Paper might assist the State Board in its consideration of the issue at the workshop.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP
City Attorney
City of Santee

[7] Because the State Board would not be developing a new approach to compliance, would not be modifying a numeric effluent limitation nor eliminating the receiving water limitations requirement, anti-backsliding and anti-degradation concepts have no application and are not a legal constraint on the Board's ability to address the issue.

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

No. 98-71080

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

191 F.3d 1159*; *1999 U.S. App. LEXIS 22212*; *99 Cal. Daily Op. Service 7618*; *99 Daily Journal DAR 9661*; *30 ELR 20116

August 11, 1999, Argued and Submitted, San Francisco, California
September 15, 1999, Filed

SUBSEQUENT HISTORY: [**1] As Amended December 7, 1999.

PRIOR HISTORY: Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

DISPOSITION: PETITION DENIED.

COUNSEL: Jennifer Anderson and David Baron, Arizona Center for Law in the Public Interest, Phoenix, Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

JUDGES: Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

OPINION BY: SUSAN P. GRABER

OPINION

[*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations [**2] to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title *26 U.S.C. § 1342(a)(1)* authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the [**3] permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as stormwater detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

> The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and [**4] requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

[**5] JURISDICTION

Title *33 U.S.C. § 1369(b)(1)(F)* authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under *section 1342* of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)* [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II, 966 F.2d at 1297* ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water [**6] contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under *Federal Rule of Civil Procedure 19*. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

DISCUSSION

A. *Standard of Review*

The Administrative Procedures Act (APA), *5 U.S.C. §§ 701-06*, provides our standard of review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA, 965 F.2d 759, 763 (9th Cir. 1992)*. Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*.

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. [**7] *See NRDC II, 966 F.2d at 1297* (so holding). In *Chevron, 467 U.S. at 842-44*, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996)* ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron, 467 U.S. at 843 n.9*. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id. at 842-43* (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id. at 843*. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id. at 844*.

[**8] [*1163] B. *Background*

The CWA generally prohibits the "discharge of any pollutant," *33 U.S.C. § 1311(a)*, from a "point source" into the navigable waters of the United States. *See 33 U.S.C. § 1362(12)(A)*. An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See 33 U.S.C. § 1342(a)(1)*.

Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See 33 U.S.C. § 1342(a)(1)* (incorporating effluent limitations found in *33 U.S.C. § 1311*). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." *33 U.S.C. § 1311(b)(1)(A)*. Second, a permit-holder "*shall . . . achieve . . . any more stringent limitation*, including those *necessary to meet water quality standards*, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." *33 U.S.C. § 1311* [**9] *(b)(1)(C)* (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA, 904 F.2d 1276, 1289 (9th Cir. 1990)*, the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA, 908 F.2d 595, 613 (10th Cir. 1990)* (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992)*. *See also Ackels v. EPA, 7 F.3d 862, 865-66 (9th Cir. 1993)* (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from [**10] the permit requirements of § 402 [*33 U.S.C. § 1342*]." *Natural Resources Defense Council, Inc. v. Costle, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977)*. "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress, 965 F.2d at 763*.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See NRDC II, 966 F.2d at 1296* ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994, [1] most entities discharging storm water did not need to obtain a permit. *See 33 U.S.C. § 1342(p)*.

1 As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. *See* Pub. L. No. 102-580.

[**11] Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," *33 U.S.C. § 1342(p)(2)(A)*; discharges "associated with industrial activity," *33 U.S.C. § 1342(p)(2)(B)*; discharges from a "municipal separate sewer system serving a population of [100,000] or more," *33 U.S.C. § 1342(p)(2)(C) & (D)*; and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," *33 U.S.C. § 1342(p)(2)(E)*.

[*1164] When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

> (A) Industrial discharges
>
> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.
>
> (B) Municipal discharge
>
> Permits for discharges from municipal [**12] 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 Administrator . . . determines appropriate for the control of such pollutants.*

33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under *33 U.S.C. § 1311(b)(1)(C)*. Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. *See Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999)* ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or [**13] manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. *See, e.g., National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998)* ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*.") (emphasis in original); *Sierra Club v. EPA, 118 F.3d 1324, 1327 (9th Cir. 1997)* ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply [**14] strictly with *33 U.S.C. § 1311(b)(1)(C)*. That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron. NRDC II, 966 F.2d at 1297* (citation omitted). "Using our 'traditional tools of statutory construction,' *Chevron, 467 U.S. at 843 n.9, 104 S. Ct. 2778*, when interpreting a statute, we look first to the words that Congress used." *Zimmerman, 170 F.3d at 1173* (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of *33 U.S.C. § 1311. See 33 U.S.C. § 1342(p)(3)(A)* ("Permits for discharges associated with industrial activity *shall meet all applicable* [**15] *provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial [*1165] storm-water discharges "*shall . . . achieve . . . any more stringent limitation*, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." *33 U.S.C. § 1311(b)(1)(C)* (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further *singled out* industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [*33 U.S.C. § 1311*]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal [**16] storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "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 . . . determines appropriate for the control of such pollutants." *33 U.S.C. § 1342(p)(3)(B)(iii)*.

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)* (citation and internal quotation marks omitted); *see also United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999)* (stating the same principle), *petition for cert. filed*, No. 98-323 (Aug. 23, 1999). Applying that familiar [**17] and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with *33 U.S.C. § 1311*, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that *33 U.S.C. § 1342(p)(3)(B)(iii)* does not require municipal storm-sewer discharges to comply strictly with *33 U.S.C. § 1311(b)(1)(C)*.

Application of that principle is significantly strengthened here, 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*. Instead, *§ 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, 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." *33 U.S.C. § 1342(p)(3)(B)(iii)*. [**18] In the 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)*.

Indeed, the EPA's and Petitioners' interpretation of *33 U.S.C. § 1342(p)(3)(B)(iii)* would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 634 (9th Cir. 1999)* ("This court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999)*. *Section 1342(p)(3)(B)(iii)* creates a lesser standard than *§ 1311*. Thus, if *§ 1311* continues to apply to municipal storm-sewer discharges, [*1166] the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of *§ 1342(p)(3)(B)(iii)*, which we have described above. The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from [**19] *§ 1311*). For example, "the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." *33 U.S.C. § 1342(l)(1)*. Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See 33 U.S.C. § 1342(l)(2)*. Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with *§ 1311* is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of *§ 1342(p)(3)(B)(iii)* is supported by this court's decision in *NRDC II*. There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." *NRDC II, 966 F.2d at 1308*. This court disagreed with the petitioner's interpretation of the amendments:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the* [**20] *existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under *33 U.S.C. § 1342(p)(3)(B)(iii)*, "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether *§ 1342(p)(3)(B)(iii)* required strict compliance with state water-quality standards, *see 33 U.S.C. § 1311(b)(1)(C)*. Nonetheless, the court's holding applies equally in this action and further supports our reading of *33 U.S.C. § 1342(p)*.

In conclusion, the text of *33 U.S.C. § 1342(p)(3)(B)*, the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with *33 U.S.C. § 1311(b)(1)(C)*.

D. *Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality [**21] standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with *§ 1311(b)(1)(C)*, *§ 1342(p)(3)(B)(iii)* states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress gave the administrator discretion to determine what controls are necessary. . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." *966 F.2d at 1308.*

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide [**22] for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under *33 U.S.C. § 1342(p)(3)(B)(iii)*, the EPA's choice to include [*1167] either management practices or numeric limitations in the permits was within its discretion. *See NRDC II, 966 F.2d at 1308* ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenors.

PETITION DENIED.

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

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[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]

[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

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[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