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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.	B150912 (Los Angeles County Super. Ct. No. BS060960)
CITY OF LOS ANGELES, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.	B151175, B152562 (Super. Ct. No. BS060957)

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 6 and 7 of the Discussion.

APPEALS from judgments and orders of the Superior Court of Los Angeles County, Dzintra I. Janavs, Judge. Judgments reversed with directions; appeals from orders dismissed.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Mary E. Hackenbracht, Senior Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

Dennis A. Barlow, City Attorney, Carolyn A. Barnes, Senior Assistant City Attorney; Downey, Brand, Seymour & Rohwer, Melissa A. Thorme, Nicole E. Bader-Granquist and Cassandra Ferrannini for Plaintiff and Appellant City of Burbank.

Rockard J. Delgadillo, City Attorney, Christopher M. Westhoff, Assistant City Attorney; Downey, Brand, Seymour & Rohwer, Melissa A. Thorme, Jeffrey S. Galvin, Nicole E. Bader-Granquist and Cassandra Ferrannini for Plaintiff and Appellant City of Los Angeles.

In two separate actions, City of Burbank and City of Los Angeles challenged effluent limitations in wastewater discharge permits issued by California Regional Water Quality Control Board for the Los Angeles Region (Regional Board). The trial court set aside the permits and directed Regional Board to issue new permits in accordance with certain instructions. Regional Board and State Water Resources Control Board (State Board) (collectively Water Boards) appeal the judgments, contending that some of the instructions do not comply with the federal Clean Water Act or the state Porter-Cologne Water Quality Control Act.

We conclude that effluent limitations in the permits must ensure compliance with state water quality standards, and that in establishing permit effluent limitations Regional

Board need not consider the economic burden imposed on the discharger or weigh the cost of compliance against the environmental benefits. We find that title 33 United States Code section 1311(b)(1)(C) did not sunset in 1977 and continues to be good law. We also conclude that some of the other requirements imposed by the trial court are erroneous.

Burbank and Los Angeles appeal postjudgment orders denying their motions for attorney fees under Code of Civil Procedure section 1021.5. We dismiss the appeals as moot. In the interest of judicial economy and to guide the trial court on remand, however, we address the principal legal issue presented in the appeals. We conclude that a public entity can recover attorney fees under the statute only if the public entity's litigation costs are disproportionate to the public entity's interests at stake.

FACTUAL AND PROCEDURAL BACKGROUND

Burbank owns and operates a publicly owned treatment works called the Burbank Water Reclamation Plant, which treats wastewater from municipal sources. Some of the treated wastewater is discharged to the Burbank Western Wash, which drains into the Los Angeles River, a water of the United States.

Los Angeles owns and operates a publicly owned treatment works called the Donald C. Tillman Water Reclamation Plant and jointly owns, together with City of Glendale, a publicly owned treatment works called the Los Angeles-Glendale Water Reclamation Plant. Both plants treat wastewater from municipal sources and discharge some of the treated wastewater into the Los Angeles River.

Regional Board issued a permit in July 1998 governing wastewater discharge from the Burbank plant. The permit, designated Order 98-052 and NPDES Permit CA0055531, imposes numerical effluent limitations on the discharge of certain pollutants, in addition to other restrictions. Regional Board issued a separate Time Schedule Order in September 1998 allowing delayed compliance with certain effluent limitations and establishing interim limitations.

Regional Board also issued permits in July 1998 governing wastewater discharge from the two Los Angeles plants. The permits, designated Orders 98-047 and 98-046 and NPDES Permits CA0056227 and CA0053953, impose numerical effluent limitations on the discharge of certain pollutants, in addition to other restrictions. Regional Board issued separate Time Schedule Orders in September 1998 allowing delayed compliance with certain effluent limitations and establishing interim limitations.

Burbank and Los Angeles both appealed to State Board to review the permits and Time Schedule Orders. State Board declined review.

Burbank filed a petition for writ of mandate in the superior court in December 1999 challenging certain permit provisions, and filed an amended petition in March 2000. Los Angeles filed a petition for writ of mandate in the superior court in December 1999 and filed an amended petition in January 2000. The superior court granted the petitions and entered judgments setting aside the permits and directing Regional Board to issue new permits in accordance with the court's statements of decision.

The superior court stated in the statements of decision that in establishing effluent limitations for a permit, Regional Board must consider the economic cost of compliance with those limitations. The superior court stated further that the cost of compliance must be reasonable in light of the environmental benefit. The superior court concluded that in establishing effluent limitations, Regional Board must consider "potential environmental impacts, alternatives to the proposed requirements, and mitigation measures for any requirements adopted"; that the schedule of compliance must be part of the permit rather than a separate order; and that the narrative toxicity objective of Regional Board's water quality control plan provides insufficient information as to how Regional Board will regulate discharges based on the narrative criteria, and therefore violates a federal regulation (40 CFR § 131.11(a)(2)). The superior court also concluded that Regional Board must comply with rulemaking requirements of the Administrative Procedures Act (Gov. Code, § 11340 et seq.) when imposing permit conditions to implement the narrative toxicity objective.

The trial court also sustained the petitions on the grounds that Regional Board failed to adequately show how numerical permit effluent limitations were derived from the narrative criteria; that adequate findings and evidence in the administrative record do not support the effluent limitations ; that the permits improperly impose daily maximum limits rather than average weekly and average monthly limits; and that the permits improperly specify the manner of compliance. Water Boards do not challenge this latter group of rulings on appeal and acknowledge that they must issue new permits in compliance with these rulings.

Burbank and Los Angeles each moved for an award of attorney fees under Code of Civil Procedure section 1021.5. The trial court denied the motions on the ground that the cities' litigation costs were not disproportionate to the cities' pecuniary interests at stake, and on other grounds.

We have consolidated for oral argument and consideration in one opinion Water Board's appeals from the two judgments and Burbank's and Los Angeles's appeals from the orders denying attorney fees.

CONTENTIONS

Water Boards contend that (1) effluent limitations imposed in the permits must be designed to attain water quality standards without regard to the economic cost of permit compliance, and Regional Board need not perform an individualized cost/benefit analysis to justify permit effluent limitations; (2) Regional Board need not consider "potential environmental impacts, alternatives to the proposed requirements, and mitigation measures for any requirements adopted" in establishing permit effluent limitations; (3) the permits cannot allow delayed compliance with effluent limitations for certain pollutants; (4) the narrative toxicity objective of Regional Board's water quality control plan provides sufficient information as to how Regional Board will regulate discharges based on the narrative criteria; and that (5) Regional Board need not comply with rulemaking requirements of the Administrative Procedures Act when imposing permit conditions to implement the narrative toxicity objective.

Burbank and Los Angeles dispute these contentions and contend that a public entity need not show that its litigation costs are disproportionate to its interests at stake in order to recover attorney fees under Code of Civil Procedure section 1021.5.

DISCUSSION

1. *Clean Water Act*

The United States Congress enacted the Clean Water Act in 1972 as amendments to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.). (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816.) The Federal Water Pollution Control Act now is commonly known as the Clean Water Act. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) To achieve this objective, the act establishes "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." (*Id*., § 1251(a)(1).)

The Clean Water Act requires individual polluters to minimize effluent discharge. "Point sources," meaning pipes and other discrete conveyances from which pollutants may be discharged, are subject to "effluent limitations," meaning restrictions on the discharge of pollutants. (33 U.S.C. § 1362(11), (14).)

The Clean Water Act establishes technology-based standards for effluent limitations and authorizes the Environmental Protection Agency (EPA) to establish uniform effluent limitations consistent with the statutory standards for categories and classes of point sources. (*E. I. du Pont de Nemours & Co. v. Train* (1977) 430 U.S. 112, 129; *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 204.) The 1972 amendments stated that by July 1, 1977, effluent limitations must be set for point sources, other than publicly owned treatment works, that require "application of the best practicable control technology currently available." (33 U.S.C. § 1311(b)(1)(A).) By the same date, effluent limitations for discharge into a publicly owned treatment works then in existence must comply with pretreatment requirements (*ibid*.), and effluent limitations

for discharge by publicly owned treatment works then in existence must be based on secondary treatment (*id*. § 1311(b)(1)(B)).[1]

The statute also states that by July 1, 1977, "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations (under authority preserved by Section 1370 of this title) or any other Federal law or regulation," shall be achieved.[2] (33 U.S.C. § 1311(b)(1)(C).) Water quality standards generally state the permissible amounts of pollutants in a defined water

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[1] Pretreatment is treatment of wastewater at the source before it enters a publicly owned treatment works. (33 U.S.C. § 1317(b).) Primary treatment generally refers to removal of settleable solids. (*Maier v. U.S. E.P.A.* (10th Cir. 1997) 114 F.3d 1032, 1042.) EPA regulations define "secondary treatment" by reference to levels of biochemical oxygen demand, suspended solids, and acidity. (40 C.F.R. §§ 133.102 (2002).) Publicly owned treatment works refers to a publicly owned facility for the treatment of wastewater. (33 U.S.C. § 1292(2)(A).)

[2] "**(b) Timetable for achievement of objectives**

"In order to carry out the objective of this chapter there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

"(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

"(C) not later than July 1, 1977, 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) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter." (33 U.S.C. § 1311(b).)

segment. (2 Rodgers, Environmental Law: Air and Water (1986) § 4.16, p. 243.) Water quality standards "supplement [technology-based] effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' [Citation.]" (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101.) Section 1311(b)(1)(C) "expressly identifies the achievement of state water quality standards as one of the Act's central objectives." (*Arkansas v. Oklahoma*, at p. 106.)

The 1972 amendments also provided that water quality standards that were adopted by the states and approved by EPA as required under the Federal Water Pollution Control Act before the 1972 amendments continued to remain in effect. (33 U.S.C. § 1313(a).) States must revise those water quality standards and submit them to EPA for approval every three years. (*Id*., § 1313(c)(1).) Revised water quality standards must designate water uses and establish "water quality criteria" designed to protect those uses. (*Id*., § 1313(c)(2)(A).) States must engage in a "continuing planning process" to implement the Clean Water Act and revise water quality standards. (*Id*., § 1313(e).) States continue to have authority to adopt and enforce their own effluent limitations and water quality standards, provided that the state limitation or standard is no less stringent than the federal limitation or standard under the Clean Water Act. (*Id*., § 1370; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705.)

The Clean Water Act also established the National Pollutant Discharge Elimination System (NPDES). Waste dischargers must obtain an NPDES permit to discharge a pollutant. (33 U.S.C. §§ 1311(a), 1342(a)(1).) EPA, or a state authorized by EPA to administer its own permit program, issues the permit. (*Id*., § 1342(a), (b).) The permit must require compliance with effluent limitations established under, inter alia, title 33 United States Code section 1311. (*Id*., § 1342(a)(1), (3); *E. I. du Pont de Nemours & Co. v. Train*, *supra*, 430 U.S. at p. 121.) Effluent limitations established under title 33 United States Code section 1311(b)(1)(C) include limitations necessary to ensure compliance with water quality standards established under title 33 United States Code

section 1313. (*PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, *supra*, 511 U.S. at p. 713.) A permit "serves to transform generally applicable effluent limitations . . . into the obligations (including a timetable for compliance) of the individual discharger." (*EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 205.)

2. *Porter-Cologne Water Quality Control Act*

The California Legislature enacted the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) in 1969 (Stats. 1969, ch. 482, § 18, p. 1051), stating, "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000.)

The Porter-Cologne Act states that State Board and regional water quality control boards have the primary responsibility for water quality control. (Wat. Code, § 13001.) State Board formulates statewide policy for water quality control. (*Id*., §§ 13140, 13142.) Regional boards formulate water quality control plans for waters within each region. (*Id*., § 13240.) Regional water quality control plans must be approved by State Board. (*Id*., § 13245.)

A water quality control plan consists of "water quality objectives" designed to protect designated beneficial water uses and a program to achieve those objectives. (Wat. Code, §§ 13050, subd. (j), 13241, 13242.) "Water quality objectives" are standards that limit the levels of water quality constituents or characteristics. (Wat. Code, § 13050, subd. (h).) Water quality objectives must be designed to "ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." In establishing water quality objectives, a regional board must consider not only beneficial uses but also economic considerations, housing needs, and other factors. (Wat. Code, § 13241.)

Regional boards issue "waste discharge requirements," or permits, governing the discharge of waste. The permits must require compliance with the water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13374.)

The Legislature amended the Porter-Cologne Act in 1972 to ensure consistency with the Clean Water Act and to provide for California to administer the NPDES permit program as contemplated by the Clean Water Act. (Wat. Code, §§ 13370, 13372; Stats. 1972, ch. 1256, § 1, p. 2485; see 33 U.S.C. § 1342(b).) "Water quality objectives" and beneficial uses adopted and designated by regional boards in water quality control plans constitute water quality standards under the Clean Water Act, and therefore must comply with the Clean Water Act and be approved by EPA. (See Wat. Code, § 13241; 33 U.S.C. § 1313(c)(2)(A), (3).) Permits issued by regional boards must ensure compliance with the Clean Water Act "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protections of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377; accord, 33 U.S.C. § 1311(b)(1)(C).) Water Code section 13372 states that Water Code sections 13370 to 13389 prevail over any inconsistent provisions of the Porter-Cologne Act.

3. *Regional Board Must Consider Economic Costs When It Establishes Water Quality Standards But Need Not Consider Economic Costs When It Establishes Effluent Limitations in a Permit*

a. *Contentions*

The trial court concluded that Regional Board must consider the economic cost of compliance with effluent limitations when establishing effluent limitations in a permit, and that the cost of compliance must be reasonable in light of the environmental benefit. Water Boards contend permit effluent limitations must be designed to attain water quality standards without regard to the economic cost of permit compliance, citing title 33 United States Code section 1311(b)(1)(C), part 122.44(d)(1) of the EPA regulations (40 C.F.R. § 122.44(d)(1)), and Water Code section 13377.

Burbank and Los Angeles contend that (1) title 33 United States Code section 1311(b)(1)(C) required publicly owned treatment works to achieve effluent limitations based on water quality standards by July 1, 1977, but the statute does not apply after that date; (2) 40 Code of Federal Regulations part 122.44(d)(1) does not apply to publicly owned treatment works because publicly owned treatment works are not subject to effluent limitations guidelines or standards under the Clean Water Act; (3) construing section 1311(b)(1)(C) to provide "all-encompassing and unrestrained authority" to impose more stringent effluent limitations conflicts with other Clean Water Act provisions that provide for more stringent effluent limitations; (4) section 1311(b)(1)(C) is preceded by an "or" in section 1311(b)(1)(B), so section 1311(b)(1)(C) does not apply if effluent limitations comply with secondary treatment requirements under section 1311(b)(1)(B); (5) Congress intended for publicly owned treatment works to comply with pretreatment requirements rather than comply with stringent effluent limitations; (6) Regional Board was required to consider the economic impact of the area-wide waste treatment plan (33 U.S.C. § 1288(b)(2)(E)), and State Board was required to report to EPA concerning the economic impact of California's compliance with the Clean Water Act (33 U.S.C. § 1315(b)(1)(D)), but they failed to do so, so Regional Board should consider the economic impact of effluent limitations imposed in the permit; (7) other Clean Water Act provisions (33 U.S.C. §§ 1298, 1315(b)) also require consideration of economic costs; and (8) Water Code sections 13000, 13241, and 13263 require Regional Board to consider the economic costs of permit compliance when establishing effluent limitations in the permit.

b. *Statutory and Regulatory Framework*

Title 33 United States Code section 1311(b)(1)(B) states that publicly owned treatment works are subject to effluent limitations based on secondary treatment as defined by EPA. Section 1311(b) and (b)(1)(C) also states, "In order to carry out the objective of this chapter there shall be achieved— [¶] … [¶] (C) not later than July 1, 1977, 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) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter."

Thus, title 33 United States Code section 1311(b)(1)(C) provides that effluent limitations for publicly owned treatment works such as those at issue here must comply with water quality standards established under state or federal law and must do so "not later than July 1, 1977." Title 33 United States Code section 1342(a)(1) and (3) states that an NPDES permit issued by either EPA or a state authorized to administer the permit program must ensure compliance with section 1311 and other Clean Water Act provisions. Neither section 1311, section 1342(a)(1), nor any of the other provisions referenced in section 1342(a)(1) states that the permitting authority can consider the economic cost of permit compliance when establishing effluent limitations in a permit or that a permit need not ensure compliance with water quality standards if compliance would cause an economic burden on the discharger.

Part 122.44(d)(1) of the EPA regulations implementing the Clean Water Act (40 C.F.R. § 122.44(d)(1) (2002)) states that an NDPES permit must ensure compliance with "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA [33 U.S.C. §§ 1311, 1314, 1316, 1317, 1328 & 1345] necessary to: [¶] (1) Achieve water quality standards established under section 303 of the CWA [33 U.S.C. § 1313], including State narrative criteria for water quality." Thus, EPA construes the Clean Water Act to require effluent limitations in an NDPES permit to ensure compliance with water quality standards established by a state under title 33 United States Code section 1313. The regulations do not state that the permitting authority can impose less stringent effluent limitations if effluent limitations that ensure compliance with water quality standards would cause an economic burden on the discharger. EPA's construction of a statutory scheme that it is entrusted to administer, expressed in EPA's quasi-legislative

rule, is entitled to considerable deference. (*Chevron U. S. A. v. Natural Res. Def. Council* (1984) 467 U.S. 837, 844-845.)

Water Code section 13377 states that a permit issued by a regional water quality control board must ensure compliance with the Clean Water Act "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." Section 13377 does not state that a regional board can consider the economic cost of permit compliance when establishing effluent limitations in a permit or that a permit need not ensure compliance with water quality standards in a water quality control plan if compliance would cause an economic burden.

These authorities are consistent and compelling. These provisions do not contemplate relaxation of effluent limitations at the permit level. Rather, effluent limitations in a permit must comply with effluent limitations established by EPA and also must comply with any more stringent effluent limitations necessary to achieve water quality standards established by the state.

A regional water quality control board must consider economic costs and benefits and other factors when it establishes water quality standards. (Wat. Code, § 13241.)[3]

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[3] "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

"(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) Economic considerations.

Water quality standards therefore reflect economic considerations, including presumably whether the environmental benefits justify the costs of compliance. Once a regional board establishes water quality standards reflecting an appropriate balance of the various factors, the regional board is not required to revisit those same considerations each time it establishes effluent limits in a permit. Rather, a permit must implement and require compliance with the established, generally applicable state water quality standards; economic costs are not a valid consideration at the permit level. (*Ackels v. U.S.E.P.A.* (9th Cir. 1993) 7 F.3d 862, 865-866; see *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163, opn. mod. 197 F.3d 1035.)

c. *The Cities' Arguments Are Unpersuasive*

Title 33 Unites States Code section 1311(b)(1)(C) is an integral part of a permitting authority's continuing obligations under the Clean Water Act and has been recognized as such in numerous opinions. (See, e.g., *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, *supra*, 511 U.S. at pp. 705, 712-713 & fn. 3 ["The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. § 1311(b)(1)(C)"]; *Arkansas v. Oklahoma*, *supra*, 503 U.S. at pp. 106, 108; *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 220; *Ackels v. U.S.E.P.A.*, *supra*, 7 F.3d at pp. 865-866; *American Paper Institute, Inc. v. U.S. E.P.A.* (D.C. Cir. 1993) 996 F.2d 346, 349-350; see also 2 Rodgers, Environmental Law: Air and Water, *supra*, §§ 4.16, 4.24, pp. 252, 359.) The opinions cited by Burbank (*United States Steel Corp. v. Train* (7th Cir. 1977) 556 F.2d 822, 835; *State Water Control Bd. v. Train* (E.D. Va. 1976) 424 F.Supp. 146, 148, affd. (4th Cir. 1977) 559 F.2d 921) neither hold nor suggest that section 1311(b)(1)(C) is ineffective after July 1, 1977.

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Wat. Code, § 13241.)

We construe the reference in part 122.44(d)(1) of 40 Code of Federal Regulations to "effluent limitations guidelines or standards" to include not only "guidelines for effluent limitations" under title 33 United States Code section 1314(b) and "effluent standard[s]" under section 1317(a)(2), as Burbank and Los Angeles maintain, but also effluent limitations established under section 1311(b)(1)(C) that are necessary to achieve water quality standards established under section 1313. Part 122.44(d)(1) refers to "effluent limitations guidelines or standards" under sections 1311, 1314, 1316, 1317, 1328, and 1345, not only those under sections 1314 and 1317 as Burbank and Los Angeles construe the regulation. Accordingly, we reject the argument that part 122.44(d)(1) does not apply to publicly owned pretreatment works.

Contrary to Burbank's and Los Angeles's argument, the requirements that a state agency must consider economic costs in establishing both an areawide waste treatment management plan (33 U.S.C. § 1288(b)(2)(E)) and a waste treatment system (*id*., § 1298(a), (b)) and that each state must report to the United States Congress concerning the economic impact of achieving the objective of the Clean Water Act (*id*., § 1315(b)(1)(D)) do not indicate that the permitting authority must consider the cost of compliance with effluent limitations when establishing effluent limitations in a permit. Similarly, the requirement that a regional water quality control board must consider economic costs in establishing water quality standards of general application (Wat. Code, § 13241, subd. (d)) does not indicate that the regional board must consider the economic burden on each individual discharger when establishing effluent limitations in a permit.

Water Code section 13241 lists several factors that a regional water quality control board must consider in establishing water quality objectives (i.e., water quality standards), including "economic considerations." (*Id*., subd. (d).) Water Code section 13263, subdivision (a) states that a permit "shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

The trial court concluded that section 13263, subdivision (a) requires Regional Board, when establishing effluent limitations in the permits, to consider anew the factors under section 13241 and the reasonableness of costs imposed on Burbank and Los Angeles.

The trial court's construction of Water Code section 13263 would render water quality standards established under section 13241 illusory and would multiply the burden imposed on the regional boards, because each discharger would be entitled to an individualized consideration of the various factors in order to establish water quality standards appropriate for each individual discharger. We reject this construction. We construe section 13263, subdivision (a) to mean that permit requirements must implement established water quality standards and that in implementing water quality standards a regional board must consider the origin and purposes of those standards, that is, the factors previously considered under section 13241 in establishing the standards. Those considerations cannot mitigate or relieve a discharger from full compliance with water quality standards. To relieve a discharger from compliance with water quality standards would conflict with the state's obligation under the Clean Water Act to enforce water quality standards. (33 U.S.C. §§ 1311(b)(1)(C), 1342(a); Wat. Code, § 13377.)

Our conclusion that Regional Board need not consider anew the factors listed in Water Code section 13241 when establishing effluent limitations in the permits is consistent with the statutory construction consistently applied by State Board in administrative appeals. In these circumstances, an administrative agency's construction of a statute that it is charged with enforcing "is entitled to consideration and respect," although " '[t]he ultimate interpretation of a statute' " is a legal issue that we review de novo. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 14-15.)

Burbank's and Los Angeles's other arguments are essentially policy arguments as to why publicly owned treatment works should not be subject to effluent limitations based on state water quality standards where those effluent limitations are more stringent

than secondary treatment required by EPA. We reject those arguments as inconsistent with the Clean Water Act, as explained *ante*.

4. *Regional Board Is Exempt from the EIR Requirement and Need Not Consider Matters that Would Be Contained in an EIR as Required by the Trial Court*

a. *Trial Court's Ruling*

Burbank and Los Angeles alleged in their petitions for writ of mandate that permits issued by Regional Board did not comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) in two ways: by failing to adequately consider the potential environmental impacts of the wastewater treatment facilities that will be needed to comply with the effluent limitations and by failing to analyze alternatives to the effluent limitations and mitigation measures.

Addressing the CEQA count, the trial court stated that Water Code section 13389 exempts Regional Board from the requirement to prepare an environmental impact report (EIR) or negative declaration before issuing the permit, but Regional Board "must consider environmental factors in issuing waste discharge permits." Elsewhere in the statements of decision, discussing the factors listed in Water Code section 13241, the court stated, "The Regional Board was, thus, statutorily required to consider certain factors, including, economics, reasonably achievable water quality conditions, *potential environmental impacts, alternatives to the proposed requirements, and mitigation measures for any requirements adopted*. The administrative record does not contain any evidence demonstrating that the Regional Board took these factors into consideration when developing the contested effluent limits in the permits, or when adopting the water quality objectives upon which these effluent limits were based." (Italics added.)

Water Code section 13241 lists several factors that a regional water quality control board must consider in establishing water quality objectives to "ensure the reasonable protection of beneficial uses and the prevention of nuisance." (*Ante*, fn. 3.) "Potential environmental impacts, alternatives to the proposed requirements, and mitigation measures for any requirements adopted" are not among the factors listed in the statute.

By requiring Regional Board to consider these factors, the trial court incorporated CEQA requirements into the permit process.

b. *Contentions*

Water Boards contend Regional Board is exempt from CEQA compliance pursuant to Water Code section 13389. Burbank and Los Angeles contend section 13389 exempts Regional Board from compliance with only the requirement to prepare an EIR and related documents, but does not excuse Regional Board from compliance with CEQA's policy provisions, including the requirements to consider potential environmental impacts, alternatives to the proposed effluent limitations, and mitigation measures before issuing the permit.

c. *Water Code Section 13389*

Water Code section 13389 states, "Neither the state board nor the regional boards shall be required to comply with the provisions of Chapter 3 (commencing with Section 21100) of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act or acts amendatory thereof or supplementary thereto." Chapter 3 of division 13 of the Public Resources Code encompasses sections 21100 through 21108 governing preparation of an EIR for projects that state agencies propose to carry out or approve.

d. *CEQA Requirements*

CEQA declares several policies concerning environmental protection, including the policy that all public agencies responsible for regulating activities affecting the environment must give major consideration to preventing environmental damage. (Pub. Resources Code, §§ 21000-21006, 21000, subd. (g).) Public Resources Code section 21002 states, "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in

systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects."

Procedurally, CEQA implements this policy mainly by requiring preparation of an EIR. "In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division: [¶] (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Resources Code, § 21002.1.) A public agency shows that it has considered the environmental consequences of its actions by certifying that it reviewed and considered the information in the EIR before approving the project. (*Id*., § 21082.1, subd. (c); Guidelines, § 15090, subd. (a).[4])

In addition to CEQA's procedural requirements concerning preparation of an EIR and related documents, CEQA also imposes a "substantive mandate" that a public agency cannot approve a project if there are feasible alternatives or feasible mitigation measures that have not been adopted that would substantially lessen the significant environmental effects identified in the EIR. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, citing Pub. Resources Code, § 21081.) This substantive requirement depends on the contents of the EIR.

Public Resources Code section 21081 states that if significant environmental effects *identified in the EIR* cannot be avoided by project alterations, the public agency cannot approve the project unless it finds that the project alternatives and mitigation

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[4] All references to Guidelines are to the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.). "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.)

measures *identified in the EIR* are infeasible and that particular project benefits outweigh the adverse environmental effects. (*Id*., subds. (a)(3), (b); Guidelines, §§ 15091, subd. (a), 15092, subd. (b), 15093.) Public Resources Code section 21081 expressly states that these requirements are pursuant to the policy statement in Public Resources Code sections 21002 and 21002.1.

Thus, Public Resources Code sections 21002, 21002.1, and 21081 all rely on the EIR process in implementing the policy "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects" (*id*., § 21002). CEQA also relies on the EIR process in implementing the policy that public agencies responsible for regulating activities affecting the environment must give major consideration to preventing environmental damage, as discussed *ante*. (See *id*., §§ 21000, subd. (g), 21082.1, subd. (c); Guidelines, § 15090, subd. (a).) Apart from the EIR process and required findings relating to information disclosed in the EIR, CEQA provides no other procedural mechanism or substantive mandate to implement these policies.

Judicial review of a public agency's consideration of significant environmental effects, alternatives to the project, and mitigation measures would be meaningless without a record showing the environmental effects, alternatives, and mitigation measures that the agency considered. The EIR provides that record where an EIR is required. The trial court's conclusion that Regional Board failed to consider potential environmental impacts, alternatives to the proposed requirements, and mitigation measures is based on the absence of an EIR, which was not required. (Wat. Code, § 13389.)

We conclude that Water Code section 13389 not only relieves Regional Board of the requirement to prepare an EIR or cause an EIR to be prepared (Pub. Resources Code, § 21100, subd. (a)), but also relieves Regional Board of those CEQA obligations that ordinarily are satisfied through preparation and consideration of an EIR, including the obligation to consider potential environmental impacts, project alternatives, and

mitigation measures. Regional Board's obligation in issuing an NPDES permit is to ensure compliance with both secondary treatment requirements imposed by EPA and state water quality standards, as stated *ante*. CEQA imposes no additional procedural or substantive requirements in these circumstances.

In light of our conclusion, we need not consider other questions raised by Burbank's and Los Angeles's analysis, such as defining the project for CEQA purposes and whether a categorical exemption should apply. (See Pub. Resources Code, §§ 21065, 21084; Guidelines, §§ 15307, 15308, 15378.)

5. *The Permits Cannot Contain a Schedule of Compliance for a Pollutant Unless a State Law or Regulation So Authorizes*

The Clean Water Act defines a schedule of compliance as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." (33 U.S.C. § 1362(17).) A schedule of compliance may include interim effluent limitations designed to lead to compliance with long-term effluent limitations. (*Ibid*.; *id*., § 1362(11).)

The Clean Water Act authorizes states to adopt plans that provide for schedules of compliance as part of their continuing planning process. (33 U.S.C. § 1313(e)(3)(A), (F).) Thus, a water quality control plan may provide for schedules of compliance.

Title 33 United States Code section 1311(b)(1)(C) states that effluent limitations must ensure compliance with "water quality standards . . . or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation . . . ." Effluent limitations in a permit that implement a schedule of compliance therefore satisfy section 1311(b)(1)(C), provided that the schedule of compliance was established pursuant to state or federal law or regulations. Absent a schedule of compliance established pursuant to state or federal law or regulations, effluent limitations in a permit must ensure compliance with water quality standards and cannot permit delayed compliance. (*Ibid*.)

Our construction of the Clean Water Act is consistent with that of the EPA Administrator in *Star-Kist Caribe, Inc*. (Apr. 16, 1990) 3 E.A.D. 172, 1990 WL 324290. The Administrator concluded that a permit may authorize delayed compliance with effluent limitations that are necessary to achieve water quality standards only if the state water quality standards or implementing regulations provide for schedules of compliance. Although the matter involved a permit issued by EPA, the Administrator noted that EPA's permitting authority is the same as the states' permitting authority pursuant to title 33 United States Code section 1342(a)(3). "Thus, if a State lacks authority to establish schedules of compliance (for instance, if it elected not to include the necessary enabling [authority] language in its water quality standards), EPA would also lack that authority because of its derivative relationship to the State." (*Star-Kist Caribe, Inc*., 3 E.A.D. 172.)

EPA has consistently followed this construction of the Clean Water Act (see, e.g., *City of Ames, Iowa* (Apr. 4, 1996) 6 E.A.D. 674, 1996 WL 192959), and objected to preliminary drafts of the Burbank and Los Angeles permits that included schedules of compliance and interim effluent limitations on these grounds. EPA suggested that if Burbank and Los Angeles are unable to comply with the effluent limitations immediately upon issuance of the permit, Regional Board should issue enforcement orders allowing delayed compliance. (See 33 U.S.C. § 1319(a)(5)(A).) Regional Board heeded EPA's suggestion by issuing final permits without schedules of compliance and then issuing separate Time Schedule Orders allowing delayed compliance with certain effluent limitations.

EPA's consistent construction of a complex, technical statute that it is charged with enforcing is entitled to consideration and respect, although ultimately the interpretation of a statute is a legal issue that we review de novo. (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at pp. 7, 14-15.)

The water quality control plan here provides for schedules of compliance only for ammonia. It does not authorize delayed compliance with other effluent limitations that

are necessary to achieve water quality standards either in the water quality control plan, the implementing regulations, or in any other state or federal law or regulation.

EPA enacted water quality standards for certain toxic pollutants in May 2000 due to California's failure to comply with its obligation to do so. (California Toxics Rule, 40 C.F.R. § 131.38 (2002); 65 Fed.Reg. 31682, 31711 et seq. (May 18, 2000); see 33 U.S.C. § 1313(c)(4).) The California Toxics Rule provides for schedules of compliance where prompt compliance with a new or more restrictive effluent limitation is infeasible. (40 C.F.R. § 131.38(e)(3), (4).) State Board enacted a comprehensive policy to implement water quality standards established in the California Toxics Rule, water quality control plans, and other authority. (Cal. Code Regs., tit. 23, § 2914, summarizing the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California.) The implementation policy provides for schedules of compliance for toxic pollutants listed in the California Toxics Rule or National Toxics Rule (40 C.F.R. § 131.36(d)(10) (2002)). (See Cal. Code Regs., tit. 23, § 2914, subd. (b)(1), (2).) Water Boards acknowledge that the California Toxics Rule and State Board's implementing policy authorize schedules of compliance and interim effluent limitations for the pollutants covered therein, so the new permits can include schedules of compliance for those pollutants.

Based on the foregoing, we conclude that the permits cannot include schedules of compliance that allow delayed compliance with effluent limitations that are necessary to achieve water quality standards, excepting only the effluent limitations for ammonia and the pollutants covered by the California Toxics Rule and State Board's implementing policy.

The federal statutes and regulations cited by Burbank and Los Angeles authorize states to provide for schedules of compliance in their water quality standards (33 U.S.C. § 1313(e)(3)(A)) and to include schedules of compliance in a permit "when appropriate" (40 C.F.R. § 122.47(a) (2002); see 33 U.S.C. § 1362(11)), but do not authorize schedules of compliance in a permit where the water quality standards or implementation policy do

not provide for schedules of compliance. Similarly, Water Code section 13263, subdivision (c), stating that waste discharge requirements "may contain a time schedule," and the water quality control plan, stating that an NPDES permit "generally includes . . . time schedules and interim reporting deadlines for compliance" (italics omitted), do not expressly or impliedly authorize schedules of compliance that allow delayed compliance with effluent limitations necessary to achieve water quality standards where the state water quality standards or implementing regulations do not provide for schedules of compliance.

6. *The Narrative Toxicity Objective Does Not Violate the Code of Federal Regulations*

a. *40 Code of Federal Regulations Part 131.11(a)(2)*

Water quality criteria under the Clean Water Act are either numerical or narrative. (40 C.F.R. § 131.11(b) (2002).) A numerical criterion generally states that the amount of a particular pollutant in a body of water cannot exceed a specified numerical value. (See 40 C.F.R. § 131.11(a)(2), (b)(1).) A narrative criterion is appropriate where a numerical criterion cannot be established or to supplement a numerical criterion. (40 C.F.R. § 131.11(b)(2).)

"Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 35)." (40 C.F.R. § 131.11(a)(2).)

b. *Narrative Objective for Toxicity*

Regional Board's water quality control plan includes a narrative toxicity criterion, or objective, governing toxic pollutants for which the plan does not provide numerical criteria. It states:

"All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in, human, plant, animal, or aquatic life. Compliance with this objective will be determined by use of indicator organisms, analyses of species diversity, population density, growth anomalies, bioassays of appropriate duration or other appropriate methods as specified by the State or Regional Board.

"The survival of aquatic life in surface waters, subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same waterbody in areas unaffected by the waste discharge or, when necessary, other control water.

"There shall be no acute toxicity in ambient waters, including mixing zones. The acute toxicity objective for discharges dictates that the average survival in undiluted effluent for any three consecutive 96-hour static or continuous flow bioassay tests shall be at least 90%, with no single test having less than 70% survival when using an established USEPA, State Board, or other protocol authorized by the Regional Board.

"There shall be no chronic toxicity in ambient waters outside mixing zones. To determine compliance with this objective, critical life stage tests for at least three species with approved testing protocols shall be used to screen for the most sensitive species. The test species used for screening shall include a vertebrate, an invertebrate, and an aquatic plant. The most sensitive species shall then be used for routine monitoring. Typical endpoints for chronic toxicity tests include hatchability, gross morphological abnormalities, survival, growth, and reproduction.

"Effluent limits for specific toxicants can be established by the Regional Board to control toxicity identified under Toxicity Identification Evaluations (TIEs)." (Italics omitted.)

c. *Trial Court's Rulings*

Effluent limitations in an NPDES permit must ensure compliance with state water quality standards, including both numerical and narrative criteria. (33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1), (3); 40 C.F.R. § 122.44(d)(1).) The permits here impose

numerical effluent limitations derived from the narrative toxicity objective for several toxic pollutants.

Burbank and Los Angeles challenged not only the effluent limitations in the permits but also argued that the narrative toxicity objective in the water quality control plan on which the permit effluent limitations are based violates part 131.11(a)(2) of 40 Code of Federal Regulations. The trial court concluded that, as applied to the Burbank and Los Angeles permits, the water quality control plan provides insufficient information as to how Regional Board intends to derive numerical effluent limitations from the narrative toxicity objective, and therefore violates part 131.11(a)(2). The trial court also concluded that Regional Board failed to make findings that show how it derived the specific effluent limitations in the permits at issue here and therefore failed to support the permit effluent limitations. On appeal, Water Boards challenge the ruling that the narrative toxicity objective violates part 131.11(a)(2), but do not challenge the latter ruling.

d. *Regulatory Developments, Prior Litigation, and EPA's Opinion*

The California Toxics Rule now provides numerical criteria for some, but not all, of the toxic pollutants here at issue. Water Boards acknowledge that the new permits should derive effluent limitations for toxic pollutants from numerical criteria in the California Toxics Rule rather than from narrative criteria in the water quality control plan.

Regional Board adopted the water quality control plan for the Los Angeles Region in 1994. EPA approved the plan in part and disapproved it in part in May 2000. Burbank, Los Angeles, and others challenged EPA's partial approval of the plan in United States District Court for the Central District of California (*City of Los Angeles v. U.S. E.P.A.* (No. CV 00-08919)). The district court granted summary judgment for the cities, concluding that EPA's partial approval and partial disapproval of the plan was an abuse of discretion, and ordered EPA to either approve or disapprove the plan in full. The district court also opined that the narrative objective for toxicity provides insufficient

information as to how Regional Board intends to regulate point source discharges based on the narrative criteria, in violation of part 131.11(a)(2) of 40 Code of Federal Regulations.

EPA approved the water quality control plan in full in a letter dated February 15, 2002, pursuant to the district court's order. EPA also evaluated the narrative objective for toxicity and concluded that it fully complies with part 131.11(a)(2) of 40 Code of Federal Regulations. EPA stated that the narrative objective for toxicity "contains detailed information" regarding implementation of the narrative toxicity criteria, particularly when viewed in conjunction with a federal regulation that explains how to establish effluent limitations based on narrative criteria (40 C.F.R. § 122.44(d)(1)(vi)).[5]

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[5] "(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

"(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

"(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA [33 U.S.C. § 1314(a)], supplemented where necessary by other relevant information; or

"(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

"(*1*) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

EPA's determination concerning Regional Board's compliance with EPA's own regulation, part of a technical and complex regulatory scheme, is entitled to careful consideration. (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at pp. 7, 14-15; *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 71.) Based on our independent review, we conclude that the narrative objective for toxicity provides sufficient information as to the method by which Regional Board intends to regulate point source discharges based on the narrative criteria, particularly when viewed together with part 122.44(d)(1)(vi) of 40 Code of Federal Regulations. The narrative objective for toxicity therefore complies with part 131.11(a)(2) of 40 Code of Federal Regulations.

Burbank and Los Angeles argue that EPA has not approved Regional Board's "current method of implementing the narrative toxicity objective." This argument misses the point. Water Boards challenge the trial court's ruling that the narrative objective for toxicity violates part 131.11(a)(2) of 40 Code of Federal Regulations, but do not challenge the trial court's ruling that Regional Board's implementation of the narrative objective for toxicity in the challenged permits was unsupported and therefore invalid.

Water Boards also argued in oral argument that Burbank's and Los Angeles's challenge to the narrative toxicity objective in the water quality control plan is untimely. Since we address the question on the merits, we need not decide the timeliness issue.

"(*2*) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

"(*3*) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

"(*4*) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards." (40 C.F.R. § 122.44(d)(1)(vi).)

7. *The Administrative Procedures Act Does Not Apply*

The trial court concluded that Regional Board relied on an invalid narrative toxicity objective that provides insufficient information as to how to derive effluent limitations from the narrative criteria, and relied on water quality criteria other than those expressly stated in the water quality control plan. The trial court concluded that Regional Board's actions amounted to ad hoc rulemaking in violation of the Administrative Procedures Act. The trial court acknowledged that the issuance of NPDES permits is not subject to the Administrative Procedures Act (Gov. Code, § 11352, subd. (b)), but concluded that in issuing the challenged permits Regional Board essentially amended the water quality control plan "by creating new numeric water quality objectives."

Our conclusion that the narrative objective for toxicity provides sufficient information as to how to derive numerical effluent limitations for the permits compels the conclusion that reliance on the narrative objective to establish permit effluent limitations does not constitute ad hoc rulemaking and is not subject to the Administrative Procedures Act. (Gov. Code, § 11352, subd. (b).)

8. *Attorney Fees*

Our reversal of the judgments renders moot the appeals from the orders denying attorney fees, because any grant or denial of attorney fees under Code of Civil Procedure section 1021.5 must follow the entry of judgments on remand and must be based on the results obtained in the new judgments.

The trial court denied Burbank's and Los Angeles's motions for attorney fees based primarily on its conclusion that the cities' burden of enforcement was not disproportionate to their pecuniary interests. Burbank and Los Angeles contend the trial court misconstrued Code of Civil Procedure section 1021.5 and applied an incorrect legal standard. Since the parties have briefed this legal question and presented it to this court for decision and since the same question may be presented to the trial court on remand if a party moves for attorney fees, we will decide the issue. (Code Civ. Proc., § 43.)

Statutory construction is a legal question that we review de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Our objective is to ascertain and effectuate the legislative intent. (Code Civ. Proc., § 1859; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775.) The words of the statute are the primary indicator of legislative intent, so we begin with the statutory language and interpret its plain meaning. (*Hughes*, at p. 775.) If the statutory language is unambiguous, the plain meaning governs and a court should look no further. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.)

Code of Civil Procedure section 1021.5 codifies the "private attorney general" doctrine. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) The statute states that a court may award attorney fees to a successful party in an action that has resulted in the enforcement of an important right affecting the public interest if, among other requirements, "(b) the necessity and financial burden of private enforcement*, or of enforcement by one public entity against another public entity,* are such as to make the award appropriate."[6] (Italics added.) The italicized language was added by an amendment enacted in 1993. (Stats. 1993, ch. 645, § 2, p. 3747.)

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6 "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefore, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefore under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

"Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 59." (Code Civ. Proc., § 1021.5.)

The meaning of the quoted language with respect to successful private parties is well settled. The necessity and financial burden of enforcement make an award appropriate if the financial cost of the litigation to the private party is out of proportion to the private party's personal interests at stake. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142; *Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 941.) Awarding attorney fees in those circumstances encourages private parties to pursue litigation affecting the public interest that they otherwise would have insufficient motivation to pursue. (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570.)

Burbank and Los Angeles contend we should construe the quoted language differently as applied to successful public entity litigants. They argue that the Legislature articulated a different standard for public entities by referring to "enforcement by one public entity against another public entity" (Code Civ. Proc., § 1021.5). According to their argument, "the necessity and financial burden of private enforcement" (*ibid.*) means something different from "the necessity and financial burden . . . of enforcement by one public entity against another public entity" (*ibid.*) in that the latter implies a comparison not of the cost of enforcement with the litigant's personal interests at stake, but of the successful public entity's "power and resources" with those of the opposing public entity.

We see no indication in the statutory language that the Legislature intended to apply a different standard to successful public entities than to successful private parties. The Legislature employed the same language, "the necessity and financial burden of . . . enforcement . . . are such as to make the award appropriate" (Code Civ. Proc., § 1021.5), to describe the substantive requirement for both private parties and public entities. The fact that the statutory phrase "enforcement by one public entity against another public entity" (*ibid.*) does not precisely parallel the statutory reference to "private enforcement" (*ibid.*) merely reflects the restriction stated elsewhere in the statute that fees are available

to a public entity only in litigation against another public entity; this does not alter the substantive requirement.[7]

A city's interests are the interests of the city as a public entity and the collective interests of its residents. (*City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1113; *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 90.) In an action between two public entities, the court in *City of Hawaiian Gardens* applied the same, well-established "necessity and financial burden" requirement under Code of Civil Procedure section 1021.5 that applies to private parties. (*City of Hawaiian Gardens*, at p. 1113; see also *County of Inyo*, at pp. 89-90.)

Burbank's and Los Angeles's argument that the Legislature intended to relieve public entities of the requirement that the successful party's litigation costs must be disproportionate to the party's interests finds no support in the statutory language. Code of Civil Procedure section 1021.5 clearly and unambiguously applies the same requirement in the same language to both private parties and public entities.

DISPOSITION

The judgments are reversed with directions to the superior court to enter new judgments consistent with this opinion granting the petitions for writ of mandate and directing Regional Board to comply with the statements of decision previously filed by the superior court with the exception of those sections of the statements of decision headed "Required Factor Analysis," "Narrative Toxicity Standards and Water Quality Criteria," "Compliance Schedules and Permit Modifications," and "Administrative Procedures Act," and also excepting the first sentence of the section headed "CEQA" and

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[7] "With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, . . . unless one or more successful parties and one or more opposing parties are public entities." (Code Civ. Proc., § 1021.5.)

that part of the section headed "Order" vacating the Time Schedule Orders and requiring compliance schedules in the permits. Burbank's and Los Angeles's appeals from the orders denying attorney fees are dismissed as moot. Water Boards are entitled to costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KITCHING, J.

We concur:

KLEIN, P.J.

ALDRICH, J.