

**STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL  
DECEMBER 13, 2006**

**ITEM 11**

**SUBJECT**

IN THE MATTER OF THE PETITION OF BOEING COMPANY (WASTE DISCHARGE REQUIREMENT ORDERS R4-2004-0111, R4-2006-0008, AND R4-2006-0036 FOR THE SANTA SUSANA FIELD LABORATORY). SWRCB/OCC FILES **A-1653 and A-1737**

**DISCUSSION**

The Los Angeles Water Board issued an NPDES permit to Boeing Company for its Santa Susana Field Laboratory (SSFL) in 2004, and amended the permit in 2006. Boeing challenges monitoring requirements and numeric effluent limitations that are more stringent, or include different analytic methods, than in Boeing's 1998 permit. Boeing claims that its permit, which regulates discharges of commingled process wastewater and storm water, should not include numeric effluent limitations. Boeing also claims that the Los Angeles Water Board erred in not issuing a compliance schedule.

In this draft order, the State Water Board concludes that the SSFL warrants numeric effluent limitations and extensive monitoring requirements. The draft order does conclude that two compliance points are redundant and should not have identical numeric effluent limitations to two other outfalls. The draft order also concludes that, if Boeing ceases all discharges except storm water runoff, then it would be appropriate to revise the permit so that numeric effluent limitations continue to apply to all outfalls that surround the perimeter of the site, but to regulate interior outfalls by "best management practices," action levels, and monitoring requirements. Finally, the draft order concludes that the catastrophic fire that occurred in the fall of 2005 justified an enforcement order with a time schedule.

**POLICY ISSUE**

Should the State Water Board adopt the draft order generally upholding the permit's numeric effluent limitations and requiring an enforcement order with a time schedule?

**FISCAL IMPACT**

None

**REGIONAL BOARD IMPACT**

Yes – Los Angeles Regional Board

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**ORDER WQ 2006-**

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In the Matter of the Petition of

**BOEING COMPANY**

For Review of Waste Discharge Requirements (WDR) Orders  
R4-2004-0111, R4-2006-0008, and R4-2006-0036 for the  
Santa Susana Field Laboratory

Issued by the  
California Regional Water Quality Control Board,  
Los Angeles Region

***SWRCB/OCC FILES A-1653 AND A-1737***

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**BY THE BOARD:**

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

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

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

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

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

On January 19, 2006, the Los Angeles Water Board modified the 2004 Permit, adding and revising the outfalls listed and the effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0008; January 2006 Permit.) On February 21, 2006, Boeing filed a petition challenging the January 2006 Permit and the failure of the Los Angeles Water Board to adopt a Cease and Desist Order with a compliance schedule and interim effluent limitations. (Our File No. A-1737.) Boeing also asked the State Water Board to activate its 2004 petition, File No. A-1635. On March 9, 2006, the Los Angeles Water Board again revised Boeing's permit, this time adding additional effluent limitations. (Waste Discharge Requirements Order No. R4-2006-0036; March 2006 Permit.) On March 16, 2006, Boeing filed a petition challenging the March 2006 Permit.<sup>5</sup> Boeing also requested a stay of various effluent limitations. The State Water Board denied the stay request in Order WQ 2006-0007.<sup>6</sup>

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

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

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

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

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

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

In this Order, the State Water Board upholds the Permit in most respects. We conclude that the Los Angeles Water Board acted properly in issuing the Permit and in including requirements more akin to a typical individual NPDES permit than the General Permit for Industrial Activities.<sup>7</sup> We also conclude that the Permit includes appropriate monitoring requirements and sites. Moreover, we conclude that until Boeing submits a report of waste discharge describing its changed discharge, the Permit must continue to regulate many of the discharges from SSFL as commingled wastewater, rather than as storm water discharges. If the Permit is revised to reflect discharges of storm water only, then some of the outfalls should be regulated by alternative requirements such as best management practice (BMP), action levels, and monitoring requirements, rather than by numeric effluent limitations. This conclusion is limited to “interior” outfalls, and not those outfalls surrounding the “perimeter” of SSFL. We also conclude that four of the major outfalls are duplicative and that only two of these should be considered compliance points. The numeric effluent limitations contained in the Permit were properly calculated and were properly based on the “reasonable potential” for discharges from SSFL to cause or contribute to exceedances of water quality standards and, for the outfalls along the perimeter of the SSFL, it is appropriate and proper for the Permit to retain these numeric effluent limitations. Finally, we conclude that the Los Angeles Water Board erred in failing to issue a compliance schedule with interim effluent limitations following a catastrophic fire at SSFL in September 2005. We will remand the Permit to the Los Angeles Water Board to make revisions consistent with this Order. The compliance schedule shall apply retroactively to the adoption of the January 2006 Permit.<sup>8</sup>

## **I. BACKGROUND**

Boeing’s SSFL is located at the top of Woolsey Canyon Road in Simi Hills. The site includes approximately 1500 acres of developed land and 1200 acres of undeveloped land. Industrial activities have occurred at the site for more than 50 years. These activities have included research, development, assembly, disassembly, and testing of rocket engines, missile components, and chemical lasers. There have also been nuclear reactors

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<sup>7</sup> General Permit for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities (WQO No. 97-03-DWQ).

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

at SSFL, and the administrative record shows evidence of accidents with these reactors. As of the time the Permit was issued, Boeing activities that contributed to discharges, include rocket engine testing, fire suppression, pressure-testing of equipment to support rocket engine testing, domestic wastewater treatment, and contaminated groundwater treatment.

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

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

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

<sup>10</sup> 42 United States Code Annotated (U.S.C.A.) §§ 6901 et seq.

the catchment, implemented BMPs to treat the runoff. If the cover were compromised, discharges from the site could enter surface waters. There are also constituents that have been detected in runoff from the site that are associated with historic activities. For example, perchlorate, a chemical associated with rocket propellant testing, has been detected at an outfall near the rocket propellant testing area.

SSFL is situated in the Simi Hills. Because of its location and topography, and the large size of the facility, there is runoff from the site to several watersheds. Most of the runoff flows to Bell Creek, which is tributary to the Los Angeles River. There is also runoff into various drainages of Arroyo Simi and to Runkel, Dayton, and Woolsey Canyons. The Permit establishes eighteen outfalls.<sup>11</sup> Outfalls 001 and 002 are at the southerly perimeter of the SSFL, and approximately sixty percent of the runoff from the facility discharges through these two outfalls, which lead to Bell Creek, and then to the Los Angeles River. Outfall 008 discharges to Happy Valley, and ultimately to Bell Creek and the Los Angeles River. Discharges through Outfalls 003, 004, 005, 006, 007, 009, and 010 flow to small watersheds to the northwest of SSFL. These are not tributary to the Los Angeles River. Outfalls 011, 012, 013, 014, 015, 016, 017, and 018 each are sited near areas of specific activities on SSFL, including the two domestic sewage treatment plants, the groundwater treatment plant, and the rocket engine test stand. Outfalls 012-017 each discharge to waters that flow through Outfalls 011 or 018, which in turn flow through Outfalls 001 and 002, respectively. There are several points that are important to our deliberations regarding these outfalls: (1) Outfalls 001-010 are each situated along the perimeter of SSFL, while Outfalls 011-018 are situated in the interior of the site and discharge through perimeter outfalls; (2) Outfalls 001, 002, and 011-018 are authorized to discharge commingled storm water, industrial process water (from groundwater treatment and rocket engine testing) and domestic wastewater (from the sewage treatment plants); and (3) Outfalls 003-010 are the only outfalls designated in the Permit as discharging only storm water runoff.

The Los Angeles Water Board initially adopted the Permit that Boeing now challenges in July 2004. It amended the Permit in January and March 2006, adding and revising effluent limitations each time. In January 2006, the Los Angeles Water Board refused to adopt a draft cease and desist order (CDO) that its staff had proposed, which would have included a time schedule and interim effluent limitations. Boeing filed a petition challenging the July 2004 Permit, but did not seek active review of its challenge to the

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<sup>11</sup> These are designated Outfalls 001 through 018.

Permit until February 21, 2006, when Boeing also challenged the January modification.<sup>12</sup> Boeing also challenged the failure to adopt the CDO.

In addition to the Permit modifications, which generally made the Permit more stringent, there was also a significant physical event at SSFL that impacted permit compliance. Beginning on September 28, 2005, the Topanga Fire swept through the site and burned approximately seventy percent of the site. The fire destroyed numerous plants that had served as vegetative cover to control runoff. At the time, BMPs Boeing employed to minimize pollutants in runoff were largely vegetative cover, and the fire destroyed most of this cover. The fire also resulted in ash deposition throughout the site, the result of burned material from both the site and adjacent areas, which contained contaminants regulated by the Permit. Since the fire, Boeing has been engaged in stabilizing and restoring vegetative cover and also in building new structural BMPs at the site.

**II. CONTENTIONS AND FINDINGS<sup>13</sup>**

Contention: Boeing contends that most, if not all, of its discharge is storm water runoff and that it should be regulated in a similar manner as the State Water Board's General Permit for Industrial Activities.

Finding: The discharges from SSFL are unusual in many respects. SSFL is a very large industrial site in a remote area, with no other industrial sites nearby. It occupies a large area on hillsides, with runoff flowing into a number of different watersheds. There are vast areas of historical contamination and development, and also large areas of open space and native vegetation. Calculations show that SSFL has the potential, in a 24-hour 10-year storm, to discharge an estimated 272 million gallons of storm water runoff. It is the subject of ongoing RCRA cleanup and groundwater remediation. While greatly reduced from its peak activity, there are still ongoing industrial activities occurring. While it originally was situated in a remote location, there are now many residential developments nearby SSFL. The Permit allows Boeing to discharge not only storm water runoff from the site, but also

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<sup>12</sup> It later challenged the March modification also.

<sup>13</sup> Boeing included various interrelated contentions in its 2004 Petition, its February 2006 Petition, and its March 2006 Petition. Each petition essentially restated and revised the grounds for the petition. Each petition also included a statement of points and authorities, which also stated the bases for the petition somewhat differently than the petition itself. The statement of contentions herein is an effort to summarize and articulate these various arguments, while not restating verbatim each of the contentions listed in the different documents.

industrial process water, wastewater from groundwater treatment facilities, and domestic wastewater from sewage treatment plants.

The conditions described above make SSFL a unique site, especially because of its size, the degree of historical contamination, and the site topography that results in large amounts of runoff during storm events. The Permit regulates both storm water-only and commingled storm water, domestic, and industrial process water discharges. As will be described below, the legal requirements for the regulation of storm water-only discharges vary from those for the regulation of process water discharges. Wastewater that commingles storm water and process water is subject to the legal requirements for industrial process water. The Permit was based on Boeing's request, through its report of waste discharge, for authorization to discharge process water and storm water from several outfalls at SSFL. In its papers and testimony, Boeing states that it is no longer discharging process water from these facilities. If that is so, in order for its permit to be revised accordingly, it must file a report of waste discharge describing this change in its discharge.<sup>14</sup>

Eight of the eighteen outfalls at SSFL are storm water-only outfalls:

Outfalls 003-010. These eight outfalls are all "perimeter" outfalls—flows through these outfalls leave SSFL through different watersheds. (The only other perimeter outfalls—Outfalls 001 and 002—receive all of the commingled flows and together discharge approximately sixty percent of the total flows from SSFL.) While these eight outfalls are designated as storm water-only, the record shows that they each have a significant potential to discharge water contaminated by the historical practices and remediation activities at SSFL. Each of these outfalls is associated with areas of the site with significant historical activities. Outfalls 003-007 receive runoff from past and existing radiological facilities: runoff to Outfall 003 is from the Radioactive Material Handling Facility, runoff to Outfall 004 is from the Sodium Reactor Experiment, runoff to Outfall 005 is from Sodium Burn Pit 1, runoff to Outfall 006 is from Sodium Burn Pit 2, and runoff to Outfall 007 is from Building 100. Outfall 008, which discharges to Happy Valley, is located near facilities that formerly used perchlorate, and that constituent has been found in the runoff. Outfall 009 receives WS-13 drainage and runoff to Outfall 010 is from Building 203, and these outfalls were

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<sup>14</sup> During the proceedings on the stay request, Boeing's attorney stated that the only process water currently discharged is well purge water, and that change in discharge would be raised to the Los Angeles Water Board when the Permit is modified or reissued. In any event, the Permit as adopted does regulate both process water and storm water, some of it commingled, and the evidence shows that Boeing requested such a permit.

added to the Permit based on monitoring in the areas.<sup>15</sup> There are numerous other operation areas at SSFL that do not have individual outfalls specifically assigned to them. Generally, the outfalls listed in the Permit are associated with operations over which the Los Angeles Water Board, rather than DTSC, is the lead agency.<sup>16</sup> The outfalls along the perimeter of SSFL, however, do capture all of the runoff that is known to have the potential to contain contaminants associated with industrial activities.

Boeing argues that its site is comparable to other sites regulated by the General Permit for Industrial Activities. It contends that the Los Angeles Water Board was required to follow the assumptions contained in that permit, including the absence of numeric effluent limitations therein. We disagree with this premise.

SSFL is a unique site warranting thorough and detailed regulation. It is not at all the same as a typical facility subject to the General Permit for Industrial Activities. Moreover, it is not permitted as a storm water-only site, regardless of whether the vast majority of the runoff is storm water, rather than process water. The federal Clean Water Act requires that all discharges of wastewater containing pollutants from industrial sites must comply with the technology-based requirements of best practicable control technology currently available (BCT) and best available technology economically achievable (BAT) and with any more stringent limitations necessary to meet water quality standards. (33 U.S.C.A. § 1311(b).)<sup>17</sup> These same standards apply to discharges of storm water associated with industrial activities. (CWA § 402(p)(3)(A).)<sup>18</sup> While the same legal standards in section 301(b) apply to both industrial process water and industrial storm water, the decision whether to include numeric water effluent limitations varies depending whether the permit regulates process water (even if mixed with storm water) or storm water only<sup>19</sup>. The separate rules for storm water discharges apply only to discharges “composed *entirely* of storm water.” (CWA § 402(p)(1) (emphasis added).) For this reason, the General Permit for Industrial Activities authorizes only storm water discharges. Only eight of the eighteen

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<sup>15</sup> The specific activities and runoff potential are described in detail, *infra*.

<sup>16</sup> The Fact Sheet to the Permit includes a thorough discussion of the location, operations, and constituents associated with each outfall.

<sup>17</sup> Clean Water Act (CWA) § 301(b). Hereafter, citations to the federal statute will refer only to the CWA citation.

<sup>18</sup> *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159.

<sup>19</sup> As discussed in detail below, process water permits must include numeric effluent limitations unless it is not “feasible” to include such limitations. Storm water-only permits are not required to include numeric effluent limitations, without the necessity of determining infeasibility.

outfalls at SSFL (Outfalls 003-010) are composed entirely of storm water. The other ten outfalls, whether or not they may be composed of “mostly” or “almost entirely” of storm water, as Boeing contends, are subject to the same regulatory requirements as any other industrial process water. Thus, Boeing does not qualify for coverage under the General Permit, unless it were to obtain coverage under both that permit and to hold a separate individual permit for the majority of its discharges.

Unless and until Boeing submits a new report of waste discharge clarifying that it no longer requests authority to discharge process water, the Permit must include appropriate requirements for both process water and storm water discharges. Boeing also contends that numeric effluent limitations are not appropriate for process water discharges from SSFL, pursuant to federal regulations.<sup>20</sup> We will discuss in detail the propriety of numeric effluent limitations for the various outfalls regulated in the Permit. In general, however, we reject Boeing’s contention that the Los Angeles Water Board was required to regulate the various discharges from SSFL in a similar manner to the General Permit for Industrial Activities.

Contention: Boeing contends that the monitoring and compliance points are inappropriate.

Finding: The Permit lists eighteen outfalls. Each outfall has numerous numeric effluent limitations for constituents for which the Los Angeles Water Board determined that discharges had the reasonable potential to cause or contribute to exceedances of water quality standards in surface waters. Boeing points out that prior permits for SSFL had fewer points where monitoring was required and where effluent limitations applied. A brief history of the Los Angeles Water Board’s permitting strategy is necessary in order to understand this contention.

Boeing challenges the 2004 Permit and modifications in January and March of 2006. The prior permit was adopted in 1998. (Waste Discharge Requirements Order No. 98-051; 1998 Permit.) The 1998 Permit regulated storm water runoff, industrial and domestic wastewater, and groundwater treatment discharges from SSFL. The 1998 Permit established as compliance points Outfalls 001 and 002, which are 6,000 feet south of the final retention ponds, and Outfalls 003-007 to the north.<sup>21</sup> The 1998 Permit also stated that

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<sup>20</sup> 40 Code of Federal Regulations (C.F.R.) § 122.44(k)(3).

<sup>21</sup> Thus, the 1998 Permit did not list as separate outfalls three of the perimeter outfalls listed in the 2004 Permit (008-010) and the eight interior outfalls that lead to 001 and 002 (011-018).

the storm water discharges were “covered by” the General Industrial Storm Water Permit and that “its requirements are incorporated in [the 1998 Permit] by reference.”<sup>22</sup> For Outfalls 001 and 002, the 1998 Permit listed numeric effluent limitations for 49 constituents. Outfalls 003-007 in the 1998 Permit have numeric effluent limitations for 25 constituents. Most effluent limitations were for daily maximum and not for monthly average.

The 2004 Permit added the three perimeter outfalls that were not listed in the 1998 Permit (Outfalls 008-010) and the eight interior outfalls (Outfalls 011-018). The 2004 Permit also discussed the reasonable potential for discharges through the various outfalls to cause or contribute to exceedance of criteria in the California Toxic Rule (CTR).<sup>23</sup> The 2004 Permit included numeric effluent limitations for 40 constituents for Outfalls 001 and 002, 19 numeric effluent limitations for Outfalls 003-007, 11 numeric effluent limitations for Outfalls 008-010, and 14 numeric effluent limitations for Outfalls 015-017. (There were no numeric effluent limitations assigned to Outfalls 011, 012, 013, 014, or 018.) A significant change from the 1998 Permit was that the 2004 Permit included maximum daily loads in addition to the maximum daily concentrations in the prior permit. In addition, some of the limitations were more stringent, reflecting the CTR criteria, and some constituents changed. Thus, the major changes from the 1988 Permit to the 2004 Permit were not the inclusion of numeric effluent limitations in the permit—these were already in the 1998 permit, including numeric effluent limitations for storm water-only discharges. The major changes were the addition of numeric effluent limitations for three perimeter outfalls and for three interior outfalls, tightening of some numeric effluent limitations to implement the CTR criteria, and the addition of maximum daily loading limitations.

In January of 2006, based on monitoring results in the interim, the Los Angeles Water Board modified the 2004 Permit, adding numeric effluent limitations for Outfalls 011 and 018<sup>24</sup> and for Outfalls 012, 013, and 014<sup>25</sup>. This permit modification occurred shortly

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<sup>22</sup> 1998 Permit, Finding 27. We find this regulatory approach confusing. If the separate storm water discharges from SSFL were to have been regulated by the General Permit, the 1998 Permit should not have repeated those requirements. Moreover, the result is confusing regarding the commingled discharges, since the General Permit does not apply to commingled discharges. Finally, the numeric effluent limitations in the permit specifically applied to storm water discharges even though the General Permit does not include such limitations.

<sup>23</sup> 40 C.F.R. title 131.36. In the CTR, the United States Environmental Protection Agency (U.S. EPA) adopted water quality standards for priority pollutants in California. The State Water Board adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Plan, or SIP) in order to implement the CTR in permits. The CTR and the SIP were each adopted in 2000.

<sup>24</sup> The numeric effluent limitations for Outfalls 001, 002, 011 and 018 are identical.

after the Topanga Fire. Finally, in March of 2006, the Los Angeles Water Board again modified the 2004 Permit, this time revising numeric effluent limitations to reflect two Total Maximum Daily Loads (TMDLs) the Board had adopted.<sup>26</sup> The result was more stringent and new numeric effluent limitations for outfalls with discharges ultimately flowing to the Los Angeles River: Outfalls 001, 002, 011, and 018.<sup>27</sup>

For each effluent limitation at each outfall, the 2004 Permit requires monitoring. Boeing challenges both the number of outfalls listed as compliance points and the breadth of the monitoring requirements. NPDES permits generally must require monitoring at each outfall for each constituent for which there are effluent limitations.<sup>28</sup> The federal regulations do not require analytical monitoring at facilities that discharge storm water associated with industrial activities,<sup>29</sup> but this relaxation of requirements is generally associated with the “nature of the permit conditions.”<sup>30</sup> Thus, where a permit regulating storm water discharges associated with industrial activity does contain numeric effluent limitations, “sampling requirements will be appropriate,”<sup>31</sup> while permits that include BMPs in lieu of numeric effluent limitations, may require inspections and BMP evaluation rather than sampling.<sup>32</sup> Therefore, to the extent that outfalls are properly listed as compliance points and that numeric effluent limitations are appropriate, then the monitoring requirements are appropriate. We turn then to the propriety of listing eighteen outfalls as compliance points.

In reviewing the specific locations for sampling and compliance, it is true that the number of outfalls has grown, from the 1998 permit, which listed seven outfalls, to the 2004 Permit, which lists 18 outfalls. Moreover, when the 2004 Permit was adopted, it listed 13 outfalls as compliance points, and when it was modified in 2006, it listed 18 outfalls as compliance points. The actual activities at the SSFL did not vary greatly from 1998 until

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<sup>25</sup> There are 19 numeric effluent limitations listed for Outfalls 012, 013, and 014.

<sup>26</sup> The TMDLs were for metals and for nutrient loading in the Los Angeles River. TMDLs are required by § 303 of the CWA. NPDES permits must be consistent with the assumptions and requirements of TMDLs. (40 C.F.R. § 122.44(d)(1)(vii).)

<sup>27</sup> Some interior outfalls ultimately flowing to the Los Angeles River also have TMDL-based effluent limitations.

<sup>28</sup> 40 C.F.R. § 122.44(i).

<sup>29</sup> 40 C.F.R. § 122.44(i)(2)(i)(4) and (5).

<sup>30</sup> Vol. 57 Federal Register 11394, 11402.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

2006, although the Los Angeles Water Board did obtain more detailed monitoring data over these years. The chief change in regulatory strategy that resulted in the addition of outfalls was the inclusion of “interior” outfalls as compliance points. There are seven outfalls that all drain to Outfalls 001 and 002.<sup>33</sup> In addition, the number of perimeter outfalls grew from seven to ten.<sup>34</sup> In reviewing the propriety of adding these outfalls as compliance points, we address the interior and perimeter outfalls separately.

We first consider the perimeter outfalls. The 2004 Permit added Outfalls 008, 009, and 010. Storm water runoff discharges from Outfalls 009 and 010 to Arroyo Simi to the north of SSFL. Storm water runoff at Outfall 008 discharges from Happy Valley to Dayton Canyon Creek, which ultimately flows to Bell Creek and then the Los Angeles River. Outfalls 001-007, which have all been compliance points with numeric effluent limitations since at least 1998, each discharge to different watersheds around the perimeter of the site.

The Fact Sheet to the 2004 Permit describes in detail each outfall, the locations of former and current industrial activities that are drained, and the constituents of concern. All of the perimeter outfalls are placed so that they would pick up pollutants associated with industrial activities. The industrial activities at the site, including the prior activities for which there are historic contaminants, are indeed potentially substantial contributors of pollutants to surface waters. Outfalls 001 and 002 receive the vast majority of the site’s runoff, including treated wastewater, water from the groundwater treatment systems, excess reclaimed water, water from the engine test stands, and storm water. While the other perimeter outfalls have much less runoff, and do not receive process wastewater, they each drain areas that may contain pollutants from the numerous industrial activities conducted at the site. For example, Outfall 010 drains Building 203, which is subject to significant remediation measures under the direction of DTSC. The building was used for repair and calibration of instruments containing mercury. Currently, the building houses operations related to laser research, including polishing fibers, hand wipe solvent, and chemical cleaning, assembly and testing of components.<sup>35</sup> Should BMPs fail, these contaminants would pose significant risks to surface waters. We conclude that each of these perimeter

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<sup>33</sup> Outfalls 011-018.

<sup>34</sup> Outfalls 008-010 were added.

<sup>35</sup> All wastes are currently placed in containers and transported off-site for disposal.

outfalls is properly situated as a compliance point.<sup>36</sup> We also conclude that the 2004 Permit properly requires monitoring at each of these outfalls.

The interior outfalls<sup>37</sup> raise different issues concerning their propriety. Each of these outfalls is authorized to receive commingled process and storm water. Flows through Outfalls 012, 013, 016 and 017 discharge through Outfall 018, and thence through Outfall 002. Flows through Outfalls 014 and 015 discharge through Outfall 011, and thence through Outfall 001. Each of the six outfalls that flow to Outfalls 011 and 012<sup>38</sup> is located near areas of significant past and present industrial activity. While the effluent limitations for 012-017 vary depending on the contaminants present at the specific areas drained, the effluent limitations for 001, 002, 011, and 018 are identical, reflecting that each drains large areas of SSFL and that 011 and 018 drain to 001 and 002, respectively. The Fact Sheet for the January 2006 Permit states: "Discharges from Outfalls 011 and 018 receive no additional treatment or additional discharges prior to exiting Outfalls 001 and 002."<sup>39</sup>

In considering the decision by the Los Angeles Water Board to list Outfalls 011-018 as separate outfalls, each with numeric effluent limitations, we again consider the uniqueness of the SSFL site—its large size, its hilltop location, the significant chemicals used in the past, and to a lesser extent, in the present. We also note Boeing's argument that it no longer intends to discharge non-storm water flows, although it has not yet submitted a report of waste discharge for a permit that would prohibit all discharges of industrial process and domestic wastewater. Since the Permit currently regulates process water discharges at each interior outfall, it is appropriate to apply numeric effluent limitations at each of these outfalls. U.S. EPA regulations require this approach:

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<sup>36</sup> We will discuss separately, *infra*, the propriety of the numeric effluent limitations assigned to these outfalls.

<sup>37</sup> Outfalls 011-018.

<sup>38</sup> Outfalls 012-017.

<sup>39</sup> Fact Sheet for January 2006 Permit, at p.35 accompanying Order No. R4-2006-0111. In its Response to Comments on the draft NPDES permit, the Los Angeles Water Board explains that the property between Outfalls 001 and 011 and between Outfalls 002 and 018 is undeveloped land where no industrial operations have occurred and that "staff will not oppose a decision to delete Outfalls 001 and 002 as compliance points or a decision to require monitoring only at these locations." (Fact Sheet, at p.34.)

All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under §122.44(k) (BMPs where limitations are infeasible) . . . . (40 C.F.R. § 122.45(a).)<sup>40</sup>

At such time as Boeing does cease all discharges of process water and domestic wastewater to surface waters from the site, discharges from these interior outfalls will, in essence, be a part of the storm water management program of the entire site. For the reasons explained below, we find that if Boeing discharges only storm water runoff, the interior outfalls should be regulated with alternatives to numeric effluent limitations, such as action levels,<sup>41</sup> BMP requirements, and monitoring. Numeric effluent limitations should be retained for the perimeter outfalls. This is not to say that all surface waters within the site must not also be protected. All discharges of storm water associated with industrial activities to waters of the state and of the United States must achieve strict compliance with water quality standards,<sup>42</sup> whether the waters run through SSFL or are outside the property. Generally, however, facilities subject to NPDES permits for discharges comprised solely of storm water, are required to develop and implement facility-wide storm water management plans. The Permit does require Boeing to implement a Storm Water Pollution Prevention Plan and to employ BMPs.<sup>43</sup> If Boeing is subject to a permit authorizing discharges of storm water only, the interior outfalls that discharge ultimately to Outfalls 001 and 002 would provide adequate protection to beneficial uses of waters throughout if they are subject to appropriate requirements that are stated as BMPs and are monitored, along with any action levels the Los Angeles Water Board establishes as triggers for improvement of BMPs. If, on the other hand, all of the interior outfalls were to be retained as compliance points with numeric effluent limitations, Boeing would be liable for multiple violations of individual numeric effluent limitations for the same constituents whenever there was a failure of BMPs at an interior outfall, since both the interior and the perimeter outfalls would register violations. This revision will more properly reflect the proper management of a large storm

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<sup>40</sup> Thus, so long as numeric effluent limitations are appropriate, each outfall must be regulated as a compliance point. In the next Contention we discuss Boeing's contention that the Los Angeles Water Board erred in including numeric effluent limitations and that it should have instead used BMPs pursuant to 40 C.F.R. § 122.44(k).

<sup>41</sup> Action levels, or benchmarks, are numeric triggers that may require specific actions but their exceedance does not constitute a permit violation.

<sup>42</sup> *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159.

<sup>43</sup> Permit, Requirements II.A.

water facility permit, while also ensuring that monitoring occurs throughout the site. So long as the permit authorizes non-storm water discharges, however, it is appropriate for the interior Outfalls 012-017 to be regulated as separate compliance points, since each discharges industrial process wastewater to waters of the United States.

It is possible that, even if Boeing continues to discharge commingled runoff, some of the numeric effluent limitations in the interior and the perimeter may, in fact, count the same violation twice. In other words, if discharges are unchanged from an interior outfall to a perimeter outfall, and the same numeric effluent limitations are exceeded at each outfall, Boeing could be cited twice for the same violation. The ongoing monitoring results required by the Permit should disclose whether that is the case. Therefore, if Boeing does not submit a report of waste discharge limiting its discharges to storm water only, the Los Angeles Water Board must consider whether there is double counting for violations at more than one outfall and, if there is, avoid this. The Los Angeles Water Board should undertake this review when it reissues a permit.

Even before the Permit might be modified or reissued, we conclude that it was not appropriate for the 2006 Permit to establish compliance points at both Outfalls 001 and 011 and at both Outfalls 002 and 018. As is clear from the Fact Sheet and the Response to Comments, there is no evidence that there will be any change in pollutants discharged between Outfalls 011 and 001 or between Outfalls 018 and 002. According to the administrative record, there are no industrial operations or other potential contributors of pollutants between each of these points; the only rationale provided was that the decision was within the discretion of the Los Angeles Water Board. But in the exercise of discretion there must be rationale provided. Normally the State Water Board would not review the designation of specific outfall locations. In this case, because of the large number of effluent limitations and constituents regulated, adding Outfalls 011 and 018 will have the effect of doubling the number of any permit violations of effluent limitations at Outfalls 001 and 002 without any observable benefit to water quality. We conclude that the Permit should not have established effluent limitations for Outfalls 011 and 018.<sup>44</sup>

Contention: Boeing contends that the Permit inappropriately contains numeric effluent limitations for storm water-only discharges, that the numeric effluent limitations for commingled wastewater are improperly calculated, and that the Permit improperly

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<sup>44</sup> We will leave to the sound discretion of the Los Angeles Water Board whether to delete the effluent limitations from Outfalls 001 and 002 or from Outfalls 011 and 018. Pending that determination, this Order will stay the effect of the effluent limitations for Outfalls 011 and 018.

determines that Boeing's discharges have the reasonable potential to cause or contribute to many of the water quality standards cited in the Permit.

Finding: Before addressing these contentions, we will point out that there are only eight outfalls that are currently authorized to discharge storm water only. While the other ten outfalls may discharge mostly or, as Boeing claims, "almost entirely" storm water, the fact that the Permit authorizes the discharge of industrial process and domestic wastewater from these outfalls raises different issues in evaluating the propriety of the process the Los Angeles Water Board followed in determining "reasonable potential" and in establishing numeric effluent limitations.

For the commingled discharges—Outfalls 001, 002, and 011-018—the Los Angeles Water Board was required to adopt numeric effluent limitations unless it was infeasible to establish such limitations.<sup>45</sup> In adopting numeric effluent limitations, it was required to comply with the SIP for priority pollutants listed in the CTR. The SIP sets forth the methodology for determining which constituents exhibit "reasonable potential" and for calculating the numeric effluent limitations. In prior orders,<sup>46</sup> we have discussed in detail the requirements of the SIP and the required methodology for determining reasonable potential and calculating effluent limitations. We have reviewed the methodology employed by the Los Angeles Water Board and its explanation of its determinations and find these efforts to be exceptional.

We will address Boeing's contention that, in light of section 122.44(k)(3) allowing the use of BMPs in lieu of numeric effluent limitations where it is infeasible to establish numeric effluent limitations, the Los Angeles Water Board acted improperly or inappropriately in establishing numeric effluent limitations.<sup>47</sup> Boeing contends that it has proven that it cannot comply with numeric effluent limitations "immediately" and it claims that

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<sup>45</sup> For process water discharges, 40 C.F.R. § 122.44(k)(3) permits non-numeric effluent limitations, generally in the form of BMPs, where numeric effluent limitations are not feasible. (*Communities for a Better Environment v. State Water Board* (2003) 109 Cal.App.4th 1089, 1105.)

<sup>46</sup> See, e.g., *In the Matter of Yuba City*, State Water Board Order No. WQO 2004-0013 and *In the Matter of County Sanitation District No.2* Order No. WQO 2003-0009.

<sup>47</sup> It is, frankly, difficult to determine whether Boeing does, in fact, make this contention. Because of its emphasis on commingled discharges being mostly (or perhaps, all) storm water and its use of the term "infeasible" to refer to the time in which it can achieve compliance (discussed below), it is not entirely clear that Boeing is challenging the use of numeric effluent limitations to regulate the commingled wastewater. Nonetheless, because it seeks to "vacate any new numeric effluent limits added to the 2004 or 2006 Permits applicable to combined storm water and wastewater dischargers" (Petition, 2/21/06), we will address this contention.

Los Angeles Water Board staff members concede “that Boeing cannot immediately comply” with the requirements.<sup>48</sup>

There is little precedent concerning the meaning of the term “infeasible” in section 122.44(k)(3). In *Communities for a Better Environment, Supra*, the court upheld the Boards’ conclusion “that a numeric WQBEL was not feasible (i.e., ‘not appropriate’) . . . .” We view the issue of determining whether a numeric effluent limitation is “feasible” as concerning the ability or propriety of establishing such a limit, rather than the ability of the discharger to comply. In *Communities*, the court addressed the feasibility of a numeric effluent where the limitation implemented a narrative water quality objective, there was a need for ongoing study of the constituent, and there was an upcoming TMDL for the particular constituent. (Numerous other constituents were subject to numeric effluent limitations for the mixed storm water and process water discharge in that case.<sup>49</sup>) We disagree with Boeing’s reading of the provision, i.e. that “feasibility” refers to its ability to comply with the limitations. Discharges of process wastewater from industrial sites (and storm water-only discharges associated with industrial activity) must comply with water quality standards.<sup>50</sup> Whether the permit limitations are written as BMPs or as numeric effluent limitations, the legal standard is the same. As we have stated before, programs of prohibitions, source control measures, and BMPs constitute effluent limitations and can be written to achieve compliance with water quality standards.<sup>51</sup>

In any event, Boeing does not clearly argue that, for its commingled wastewater discharges, it cannot achieve compliance with the numeric effluent limitations. Rather, it argues that it cannot achieve “immediate” compliance. Much of its argument refers to the impacts of the Topanga Fire and the need for time to come into compliance. This argument is relevant to the need for compliance schedules, rather than whether numeric effluent limitations should be employed. We are also cognizant that Boeing has been subject to numeric effluent limitations for discharges through 001 and 002, which drain all of the commingled wastewater outfalls, since at least 1998. Finally, the amount of toxic chemicals historically and currently used at the site, in addition to the site topography that results in large amounts of runoff, all lead to the conclusion that it is feasible, i.e. appropriate, to

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<sup>48</sup> Memorandum of Points and Authorities, 3/16/06, at p.23.

<sup>49</sup> See, also, *In the Matter of National Steel and Shipbuilding Company*, Order WQ 98-07 (approving numeric effluent limitations for facility discharging storm water along with some process water).

<sup>50</sup> CWA § 301(b).

establish numeric effluent limitations for the commingled runoff from the site. We conclude that the Los Angeles Water Board did not act inappropriately or improperly in refusing to find that numeric effluent limitations were infeasible pursuant to 40 C.F.R. section 122.44(k)(3).

Should Boeing stop discharging process water and submit a report of waste discharge describing storm water-only discharges, as we discussed above, the Los Angeles Water Board should treat the outfalls flowing through Outfalls 012-017 as part of a larger storm water management plan and replace the numeric effluent limitations for those outfalls with BMP-based limitations. Because these are “interior” outfalls, there will be adequate protection by way of the perimeter outfalls, which will all continue to be subject to numeric effluent limitations. In addition, the Los Angeles Water Board must modify (or reissue) the permit so that either Outfalls 001 and 002 or Outfalls 011 and 018 are subject to numeric effluent limitations, but not all four outfalls.

There are eight outfalls that are currently permitted to discharge only storm water runoff.<sup>52</sup> These outfalls, except for Outfall 008, discharge to the northeast of SSFL, into different watersheds than the major Outfalls 001 and 002. Outfall 008 discharges through Happy Valley and eventually to the Los Angeles River, but not through Outfalls 001 or 002. All of these outfalls, except for Outfall 008, have been regulated with numeric effluent limitations at least since the 1998 Permit. Each outfall is positioned so as to receive runoff from specific areas associated with historic or existing areas with contamination from industrial activities.

Federal regulations do not require numeric effluent limitations for discharges of storm water.<sup>53</sup> We have long held that storm water permits issued in California need not always include numeric effluent limitations.<sup>54</sup> This is not to say that numeric effluent limitations cannot be included in storm water permits. In adding subsection (2) to section 122.44(k), the U.S. EPA explained that it was employing the Interim Permitting

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<sup>51</sup> *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31.

<sup>52</sup> Outfalls 003-010.

<sup>53</sup> 40 C.F.R. § 122.44(k)(2).

<sup>54</sup> See, e.g., *In the Matter of Citizens for a Better Environment, et al.* Order WQ 91-3, at p.30-31. Note that prior to 1999, there was no separate exemption for storm water discharges apart from the general rule requiring numeric effluent limitations except where infeasible. Thus, our older decisions and general permits made determinations regarding feasibility. In 1999, § 122.44(k) was amended to add the subsection (2), which authorizes the permitting authority to include BMPs in lieu of numeric effluent limitations in storm water permits, without the necessity of making a determination of infeasibility. (Vol. 64 Fed. Reg. 68722, 68847.)

Policy for Water Quality-Based Effluent Limitations in Storm Water Permits (Interim Permitting Policy).<sup>55</sup> (Vol. 64 Fed. Reg. 68722, 86788-9.) The Interim Permitting Policy generally endorses narrative effluent limitations based on BMPs, but it also supports numeric effluent limitations where there is adequate information and the facility has long been subject to numeric effluent limitations:

“In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations.” (Vol. 61 Fed. Reg. 43761; repeated at Vol. 64 Fed. Reg. 68788.)

U.S. EPA explains that the Interim Permitting Policy does not explicitly apply to states and that states are encouraged to adopt similar policies. (*Ibid.*) As Boeing points out in its papers, the State Water Board is currently reviewing the issues concerning whether storm water permits should, as a general matter, contain numeric effluent limitations. To assist us in this task, we appointed a Blue Ribbon Panel and recently received their report and recommendations.<sup>56</sup> The Panel was asked to address the feasibility of numeric effluent limitations in general industrial permits, general construction permits, and area-wide municipal permits.<sup>57</sup> Thus, while the report will help the State Water Board and Regional Water Boards to design these new permits, the purpose of the Report was never specifically intended to address individual storm water permits.<sup>58</sup> The issues explored by the Panel are not directly applicable to this permit and our decision here does not reflect or presage our future actions and policies on the Panel report and the general question of numeric effluent limitations for storm water permits.

We conclude that the Boeing site is unique both from a physical standpoint—the immense area covered, the extensive past contamination, existing activities, and the amount

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<sup>55</sup> U.S. EPA issued the Interim Permitting Policy was issued on August 1, 1996. (Vol. 61 Fed. Reg. 43761.)

<sup>56</sup> The report is available at [http://www.waterboards.ca.gov/stormwtr/docs/numeric/swpanel\\_final\\_report.pdf](http://www.waterboards.ca.gov/stormwtr/docs/numeric/swpanel_final_report.pdf).

<sup>57</sup> *Ibid.*

<sup>58</sup> It is, of course, possible that some of the policy decisions we will make regarding whether and how to use numeric effluent limitations in general and area-wide storm water permits could ultimately impact our review of individual permits, but we have not even acted upon the report's recommendations yet. Moreover, the permit at issue is an individual permit that is a reissuance of a permit that for almost 10 years has always included numeric effluent limitations for its storm water-only discharges.

of runoff from the steep terrain—and from a regulatory standpoint, since it has been subject to individual permits with numeric effluent limitations for storm water discharges for many years. The runoff from remediation areas has the potential to contain contaminants from the historic industrial activities. For example, the catchment area of Outfall 004 is comprised largely of a landscape whose surface soil is contaminated with mercury and other contaminants from the former Sodium Reactor Experiment site. Boeing is remediating this site and may ultimately remove the contaminated soil and dispose of it off-site. Until DTSC authorizes such a final solution, the contaminated soil is covered and Boeing uses BMPs at the bottom of the catchment to treat the runoff. It was appropriate and proper for the Los Angeles Water Board to continue to apply numeric effluent limitations at the storm water-only outfalls (including the addition of Outfall 008) in the 2004 Permit and in its modifications.

Boeing also contends that the Los Angeles Water Board was prohibited from applying the SIP when it decided to establish numeric effluent limitations for the storm water-only outfalls. We disagree. U.S. EPA adopted water quality criteria for priority pollutants in California in the CTR. (40 C.F.R. Part 131.36.) In 2000, the State Water Board adopted the SIP to implement the CTR. The SIP includes instructions on determining “reasonable potential” and in calculating numeric effluent limitations for priority pollutants. Thus, the SIP is legally applicable only to priority pollutants listed in the CTR.

The SIP is also not legally applicable to storm water discharges. In footnote 1 of the SIP, we stated: “This Policy does not apply to regulation of storm water discharges. The [State Water Board] has adopted precedential decisions addressing regulation of municipal storm water discharges in Orders WQ 91-03, 92-04, 96-13, 98-01, and 990-05. The [State Water Board] has also adopted two statewide general permits regulating the discharge of pollutants contained in storm water from industrial and construction activities.” All of the references in this footnote refer to area-wide municipal permits and general permits that do not include numeric water quality-based numeric effluent limitations. Thus, by this footnote, we made clear our policy that such permits are not *required* to determine reasonable potential for each constituent or to include numeric effluent limitations.

While the SIP does not legally apply to storm water discharges, that is not to say that if, in an appropriate case, a storm water permit includes numeric effluent limitations, the SIP procedures cannot be employed to determine reasonable potential and to calculate effluent limitations. We have already addressed the use of the SIP for non-priority

pollutants.<sup>59</sup> Where a regional water board makes determinations concerning “reasonable potential” and calculating numeric effluent limitations for constituents not subject to the CTR, the regional water board must articulate the bases for its determinations.<sup>60</sup> In *Yuba City*, we found that the regional board properly relied on both the SIP and U.S. EPA’s Technical Support Document for Water Quality-Based Toxics Control (TSD) in establishing numeric effluent limitations for non-priority pollutants.<sup>61</sup> This is precisely what the Los Angeles Water Board did in this case. Just as the SIP can be used for non-priority pollutants, it can also be used for storm water discharges, so long as the methodology is explained and justified. We conclude that the Permit appropriately relied on the SIP, the TSD, and also the California Permit Writers Training Tool in developing the numeric effluent limitations. Because none of these documents are required by a formal Policy or a regulation to be used to determine “reasonable potential” and to calculate numeric effluent limitations for storm water discharge, the Los Angeles Water Board was required to explain fully its procedures.<sup>62</sup> We conclude that the Los Angeles Water Board met that burden.

Contention: Boeing claims that the Los Angeles Water Board erred in refusing to issue a draft cease and desist order with a four-year compliance schedule and interim effluent limitations in 2006.<sup>63</sup>

Finding: The request for a CDO with a compliance schedule raises different issues than Boeing’s claims that numeric effluent limitations were inappropriate because compliance with those limitations was “infeasible.” As we discussed, above, the issue regarding feasibility for inclusion of numeric effluent limitations pursuant to 40 C.F.R. section 122.44(k)(3) concerns whether it is “appropriate”, or feasible from a regulatory perspective, to establish numeric effluent limitations. In any event, the discharge is subject to the strict requirements of compliance with water quality standards. The propriety for an enforcement action that includes a time schedule to come into compliance with the permit’s effluent limitations does turn on the specific discharger’s ability to comply.<sup>64</sup>

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<sup>59</sup> See, e.g. *In the Matter of Napa Sanitation District*, Order WQO 2001-16 and *In the Matter of Yuba City*, Order WQO 2004-0013.

<sup>60</sup> *Ibid.*

<sup>61</sup> EPA/505/2-90-001, March 1991.

<sup>62</sup> See requirements for calculating numeric effluent limitations in 40 C.F.R. title 122.44(d).

<sup>63</sup> Boeing refers to draft Order No. R4-2006-0YYY, which was prepared by staff from the Los Angeles Water Board.

<sup>64</sup> *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 965.

The permitting history alone does not appear to justify the need for additional time to comply with the Permit. Permits for SSFL have included numeric effluent limitations since at least 1998. The vast majority of new and revised effluent limitations were added in July 2004. When Boeing filed a petition in August 2004, it asked that the petition remain in abeyance and it did not allege that it had been improperly denied a compliance schedule and interim limits. These issues were raised in its appeals of the 2006 Permit modifications. The 2006 modifications, however, were generally limited to adding effluent limitations to the interior Outfalls 012-014 and 015-017. Thus, on the face of the permitting actions alone, it is difficult to justify the need for a compliance schedule and interim limitations, especially Boeing's request that these revisions be retroactive to July 2004.

Boeing also points out, however, the devastating effects of the Topanga Fire as a basis for a compliance schedule and interim limits. The record includes ample evidence that the Topanga Fire, which destroyed vegetation through 70 percent of SSFL, was indeed a major incident that would significantly affect its ability to comply with the numeric effluent limitations in the Permit. The photographs and testimony in the record provide strong evidence that the BMPs in place prior to the September 2005 fire were substantially destroyed and that, in addition, ash from the fire likely contains additional contaminants regulated by the Permit. In light of the large size of SSFL and the fact that most of the volume of discharges are associated with storm water runoff,<sup>65</sup> the natural landscape has been used as the major component in the treatment system. Thus, vegetation is used to prevent and remove pollutants from moving off-site in storm water flows. Commenters including CBG contend that prior to the Topanga Fire Boeing's BMPs were inadequate and that a compliance schedule would, in effect, reward Boeing for past inadequacies. We do not find that argument persuasive. First, regardless of how effective the BMPs and treatment used prior to the fire, all would still be burned and unusable after the fire. Second, while we agree that some of the BMPs most recently installed do surpass the prior BMPs,<sup>66</sup> we find that these new systems are state of the art and their absence prior to the fire does not necessarily indicate that the prior BMPs were inadequate. As to the list of violations throughout the several years prior to the fire, while we do not in any way condone permit

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<sup>65</sup> While commingling of process water and storm water result in the legal treatment of the wastewater as process water, in reviewing the *factual* issues, such as whether a fire resulted in the need for a compliance schedule, it is relevant that the wastewater discharges are largely composed of storm water runoff.

<sup>66</sup> For example, at the stay hearing, Boeing presented evidence of a carbon filtration system now employed at some outfalls.

violations, the number of individual permit violations at a site the size and complexity of SSFL does not necessarily mean that the BMPs were wholly inadequate.

The record contains a draft cease and desist order, circulated on December 19, 2005, which includes a thorough explanation of the need for a compliance schedule, interim limitations, and a final compliance date of February 1, 2009. This draft order assumed that it would take approximately four years to regrow the vegetation destroyed by the fire. This draft order appears to be a well-justified and supportable enforcement order.

A CDO is an enforcement order. Water Code section 13301 provides that when a regional board finds that a discharge of waste is taking place, or threatening to take place, in violation of a permit, "the board may issue an order to cease and desist" and may issue an order requiring immediate compliance, compliance in accordance with a time schedule, and appropriate remedial activities. The State Water Board's Water Quality Enforcement Policy explains the use of cease and desist orders:

"Cease and Desist Orders (CDOs) are adopted pursuant to California Water Code sections 13301-13303. CDOs may be issued to dischargers violating or threatening to violate WDRs or prohibitions prescribed by the RWQCB or the SWRCB. CDOs are often issued to dischargers with chronic non-compliance problems. These problems are rarely amenable to a short-term solution. Often, compliance involves extensive capital improvements or operational changes. The CDO will usually contain a compliance schedule, including interim deadlines (if appropriate), interim effluent limits (if appropriate), and a final compliance date. CDOs may also include restrictions on additional service connections to community sewer systems and combined stormwater/sewer systems."<sup>67</sup>

In light of the circumstances of the Topanga Fire, the nature of the site, including its topography, the fact that most of the discharges consist of runoff, the difficulty of ensuring compliance at numerous outfalls that receive discharges from many sources, and the ensuing impact on Boeing's ability to comply with the permit terms, we conclude that the Los Angeles Water Board acted inappropriately in refusing to issue an enforcement order with a compliance schedule and interim effluent limitations for an amount of time necessary to recover from the fire, including regrowth of vegetation. We also agree with Boeing that it should have been granted more time to comply with the effluent limitations in the March 2006 Permit modification. These modifications were intended to comply with the metals and nutrients TMDLs for the Los Angeles River. The TMDLs clearly anticipate four to five years for compliance with permits implementing the waste load allocations.

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<sup>67</sup> Water Quality Enforcement Policy, at p.20.

We have stated above that the Permit appropriately required strict compliance with water quality standards through numeric effluent limitations. Our findings in this section do not take away from that conclusion. They address, instead, whether the Los Angeles Water Board acted inappropriately and improperly by refusing to issue an enforcement action with a time schedule where the site was subject to a fire that destroyed its control structures and where it implemented a TMDL that allowed for such time schedules. We find that it was not justifiable to demand immediate compliance by Boeing. Rather, as described in the draft CDO and TMDL implementation plans, a time schedule was warranted based on the specific situation that Boeing faced. We note that, as an enforcement action, a CDO does not simply condone permit violations. Rather, it constitutes a finding of violation or impending violation of an order and it carries with it the potential for higher fines should it be violated.<sup>68</sup> On the other hand, there is no justification to make the compliance schedule retroactive to July 2004, before the fire and before Boeing even pressed its claim that it needed a compliance schedule. We will remand this issue to the Los Angeles Water Board to issue either the December 2005 draft CDO or a similar order. The order should be retroactive to January 19, 2006, when the matter was considered.

### **III. CONCLUSIONS**

1. The Boeing Permit is an individual permit for commingled storm water and industrial process water and should not be regulated the same as sites subject to the General Permit for storm water discharges associated with Industrial Activities.
2. The monitoring requirements in the Permit are appropriate.
3. Outfalls 001-010, which are situated on the perimeter of the property, are properly situated as compliance points.
4. Outfalls 012-017, which are situated in the interior of the property, are properly situated as compliance points, so long as Boeing is authorized to discharge industrial process water, treated groundwater, and domestic wastewater. Should Boeing seek a permit authorizing only storm water discharges, these outfalls should be subject to effluent limitations described as "best management practices," which may include action levels, rather than numeric effluent limitations. If Boeing continues to discharge commingled wastewater and storm water, the Los Angeles Water Board should review monitoring results to determine whether any of the effluent limitations for the interior and perimeter outfalls are duplicative

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<sup>68</sup> Wat. Code, § 13385, subdivision (e) requires consideration of prior history of violations in establishing administrative liability for permit violations.

because the discharge is unchanged from one outfall to the next, and make appropriate revisions in the next permit.

5. Outfalls 001 and 011 and Outfalls 002 and 018 are duplicative because Outfalls 011 and 018 flow directly to Outfalls 001 and 002, respectively, without any change in flows or discharge in the interim and with only open space between them. The Permit should include only one set of these outfalls as compliance points subject to numeric effluent limitations.
6. The Permit appropriately contains numeric effluent limitations and these were properly calculated based on determinations of "reasonable potential" to cause or contribute to exceedance of water quality standards.
7. The Los Angeles Water Board properly used the SIP and federal guidance materials to calculate numeric effluent limitations for storm water discharges by explaining and justifying its methodology.
8. The Los Angeles Water Board acted inappropriately in refusing to issue Boeing a compliance schedule with interim effluent limitations when it modified the Permit in 2006, based on the effects of the Topanga Fire and the assumptions in the TMDLs for the Los Angeles River.

**IV. ORDER**

The Permit is remanded to the Los Angeles Water Board to revise the provisions concerning Outfalls 001, 002, 011, and 018, consistent with this Order. The effluent limitations from Outfalls 011 and 018 are stayed, pending a determination by the Los Angeles Water Board deleting either Outfalls 011 and 018 or Outfalls 001 and 002 as compliance points. The Los Angeles Water Board is also instructed to issue a compliance schedule with interim effluent limitations that shall be effective January 19, 2006. Should Boeing submit a report of waste discharge proposing to discharge storm water only, the Los Angeles Water Board is instructed to modify or reissue the Permit making the interior outfalls subject to alternative requirements such as best management practices, monitoring, and action levels in lieu of numeric effluent limitations. If Boeing does not submit a report of waste discharge proposing to discharge storm

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water only, the Los Angeles Water Board is instructed to review monitoring results when it reissues the Permit to determine if effluent limitations for different outfalls are duplicative and to make appropriate revisions. In all other respects, the petition is DENIED.

**CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December \_\_\_\_, 2006.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

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Song Her  
Clerk to the Board

# DRAFT

November 7, 2006

BMJennings/gmdurio

11/7/06

i:\bashc\2-bmj\A-1653 and A-1737--[lyris][consolidated] boeing company  
\draft order& transmittal ltr for dec. 2006 meeting\draft order.doc