

**EXHIBIT “34”**

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

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

ORDER NO. WQ 96-13

BY THE BOARD:

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

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

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

Silicon Valley Toxics Coalition (petitioners), contesting the issuance of the NPDES permit.<sup>2</sup>

I. BACKGROUND

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

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

## II. CONTENTIONS AND FINDINGS<sup>3</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

annual evaluation of the implementation and effectiveness of the control measures is a program that meets the MEP standard.<sup>5</sup>

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

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

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

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

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

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

Section 402(o) contains exceptions where

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

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

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

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

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

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

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<sup>8</sup> See, *City of Stockton*, Order No. WQ 96-09.

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

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

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

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

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

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

### III. CONCLUSIONS

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

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

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

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

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

NO: Marc Del Piero

ABSENT: None.

ABSTAIN: None.

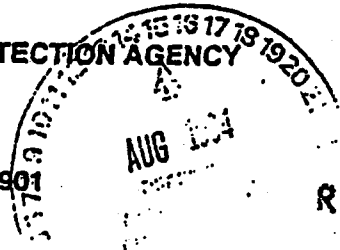
  
Maureen Marché  
Administrative Assistant to the Board



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901



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8/11 [Signature] EXECUTIVE OFF

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

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3. Return to [Signature]

re: Antibacksliding Related to Water Quality-Based Effluent  
Limitations

Dear Walt:

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

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

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

Sincerely,  
*Catherine Kuhlman*  
Catherine E. Kuhlman  
Chief  
Permits and Compliance Branch

cc: Regional Water Quality Control Boards

## ANTIBACKSLIDING EFFECT ON WATER QUALITY-BASED EFFLUENT LIMITATIONS

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

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

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

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

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

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

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

- a) There have been material and substantial alterations or additions to the permitted facility which justify the application of less stringent effluent limitations.
- b) Good cause exists due to events beyond the permittee's control and for which there is no reasonably available remedy.
- c) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but still has been unable to meet the effluent limitations (relaxation may only be allowed to the treatment levels actually achieved).
- d) New information (other than revised regulations, guidance, or test methods) justifies relaxation of water quality-based permit limitations. (This applies to water quality-based limitations only when revised limitations result in a net reduction in pollutant loadings and are not the result of another discharger's elimination or substantial reductions of its discharge for reasons unrelated to water quality, e.g., plant shutdown.)

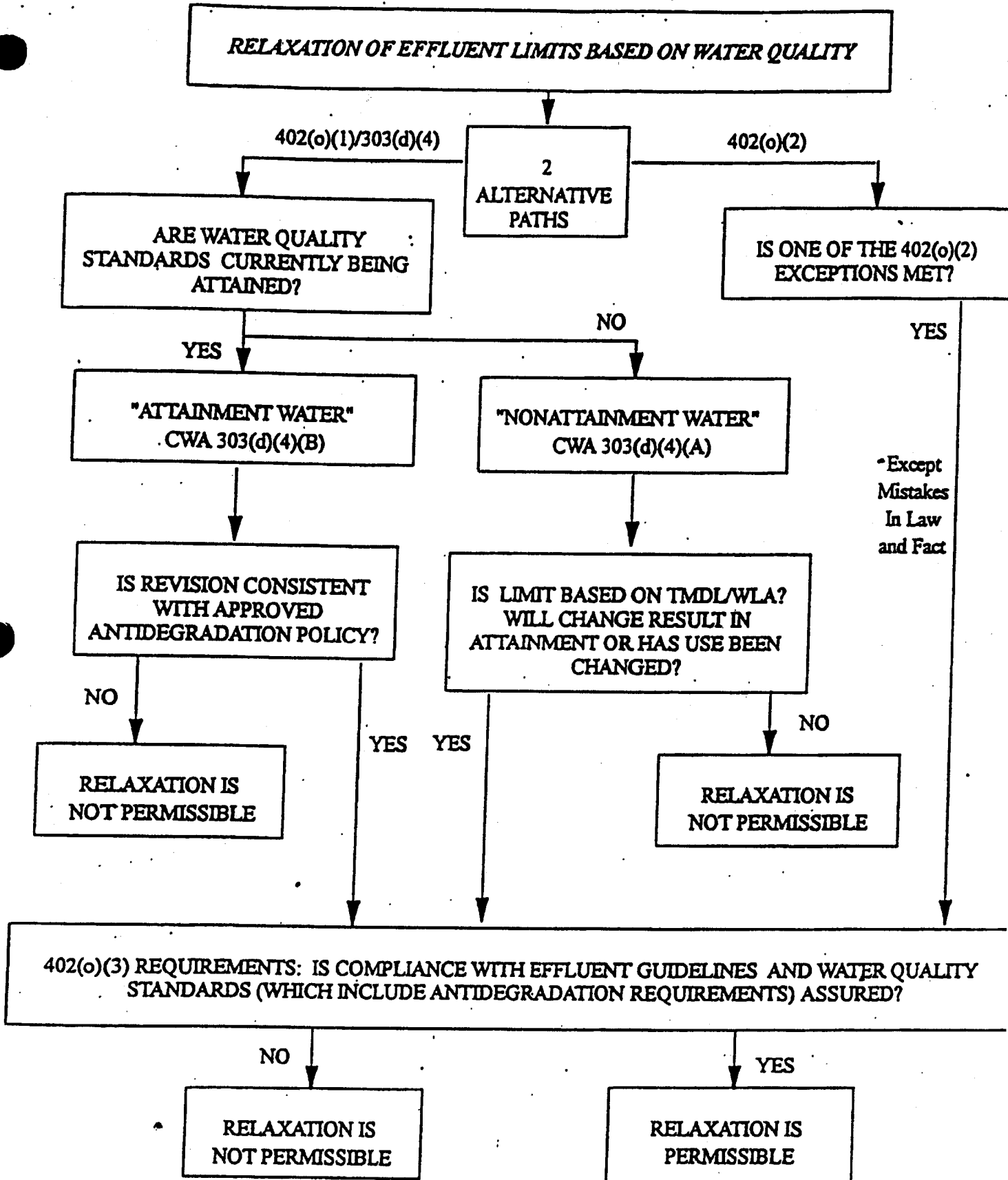
Anyone of the above section 402(o)(2) exceptions may be used as a basis to justify relaxation of water quality-based effluent limitations. Alternatively, the provisions of 303(d)(4) may be used to obtain such relief.

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

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

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

**FLOW CHART A  
ANTIBACKSLIDING**



**FLOW CHART B  
ANTIBACKSLIDING**

**RELAXATION OF EFFLUENT LIMITS BASED ON BPI TO REFLECT  
SUBSEQUENTLY PROMULGATED LESS STRINGENT EFFLUENT  
GUIDELINES OR BASED ON WATER QUALITY**

**IS ONE OF THE 402(o)(2)  
EXCEPTIONS MET?**

**NO**

**RELAXATION IS  
NOT PERMISSIBLE**

**YES**

**402(o)(3) REQUIREMENTS: IS COMPLIANCE WITH EFFLUENT  
GUIDELINES AND WATER QUALITY STANDARDS (WHICH INCLUDE  
ANTIDEGRADATION REQUIREMENTS) ASSURED?**

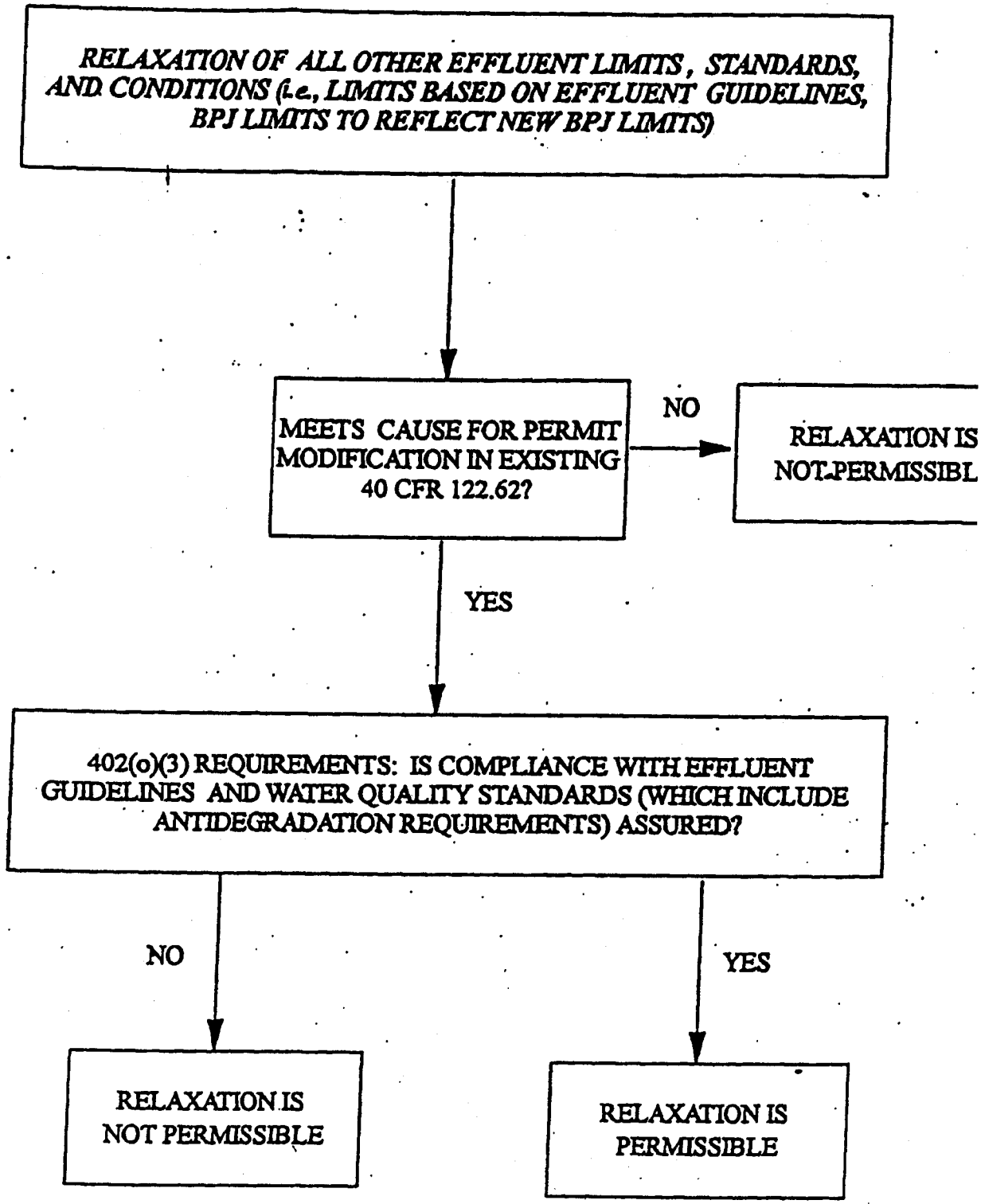
**NO**

**RELAXATION IS  
NOT PERMISSIBLE**

**YES**

**RELAXATION IS  
PERMISSIBLE**

**FLOW CHART C  
ANTIBACKSLIDING**



**RELAXATION OF ALL OTHER EFFLUENT LIMITS, STANDARDS, AND CONDITIONS (i.e., LIMITS BASED ON EFFLUENT GUIDELINES, BPJ LIMITS TO REFLECT NEW BPJ LIMITS)**

**MEETS CAUSE FOR PERMIT MODIFICATION IN EXISTING 40 CFR 122.62?**

NO

**RELAXATION IS NOT PERMISSIBL**

YES

**402(o)(3) REQUIREMENTS: IS COMPLIANCE WITH EFFLUENT GUIDELINES AND WATER QUALITY STANDARDS (WHICH INCLUDE ANTIDEGRADATION REQUIREMENTS) ASSURED?**

NO

**RELAXATION IS NOT PERMISSIBLE**

YES

**RELAXATION IS PERMISSIBLE**