

EXHIBIT “35”

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 98-01

Own Motion Review of the Petition of
ENVIRONMENTAL HEALTH COALITION
to Review Waste Discharge Requirements Order 96-03,
NPDES Permit No. CAS0108740,
for Storm Water and Urban Runoff from the
Orange County Flood Control District
and the
Incorporated Cities of Orange County
Within the San Diego Region,
Issued by the
California Regional Water Quality Control Board,
San Diego Region.

SWRCB/OCC File A-1041

BY THE BOARD:

On August 8, 1996, the Regional Water Quality Control Board, San Diego Region (Regional Water Board), adopted Waste Discharge Requirements Order 96-03, NPDES No. CAS0108740, for storm water discharge from municipal separate sewer systems for the incorporated cities of Orange County within the San Diego Regional Water Board's boundaries (Orange County permit).¹ The waste discharge requirements constitute a national pollutant discharge elimination system (NPDES) permit pursuant to section 402(p) of the federal Clean Water Act (CWA).

¹ On March 8, 1996, the Regional Water Quality Control Board, Santa Ana Region, issued waste discharge requirements for storm water discharge to the incorporated cities of Orange County within the Santa Ana Regional Water Board's boundaries that are essentially identical to the permit adopted by the San Diego Regional Water Board.

On September 6, 1996, the State Water Resources Control Board (SWRCB) received a petition from the Environmental Health Coalition (petitioner) contesting certain provisions of the NPDES permit.² The SWRCB did not take formal action on the petition within the 270 days specified in Title 23, California Code of Regulations, section 2052(d). The SWRCB will, on its own motion, review the Regional Water Board's action as authorized by California Water Code section 13320(a).

1. BACKGROUND

The primary issue raised by petitioner concerns the Regional Water Board's implementation of the CWA requirement that all NPDES permits must include technology-based effluent limitations and any more stringent limitation necessary to meet water quality standards. Federal and state requirements relevant to the issues raised in the petition are discussed below.³

CWA section 301(a) prohibits the discharge of any pollutant unless pursuant to an NPDES permit. (33 U.S.C. § 1311(a).) Section 301(b)(1)(A) requires compliance with effluent limitations necessary to achieve compliance with technology-based standards (e.g., best practicable control technology currently available or secondary treatment). Section 301(b)(1)(C) also requires compliance with any more stringent effluent limitation "necessary to meet water quality standards." (33 U.S.C.

² This order is based on the record before the Regional Water Board. The Regional Water Board also issued an NPDES permit to the Department of Transportation and a petition was filed challenging that permit. In preparing this order, we have reviewed the record for the petition challenging that permit and other documents noted in this Order.

³ See State Water Resources Control Board Order WQ 91-03 (*Citizens For a Better Environment, et al.*) for an extensive discussion of the regulatory framework for municipal separate storm sewer systems.

§ 1311(b)(1)(c).) CWA section 402 establishes requirements for NPDES permits. (33 U.S.C. § 1342.) NPDES permits must comply with section 301. Section 402(p) establishes specific NPDES permit requirements for municipal storm water discharges and for storm water discharges associated with industrial activities. Section 402(p) includes a technology-based standard for storm water permits issued to municipal separate storm sewer systems. Such permits must require:

“... controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (33 U.S.C. § 1342(p)(3)(B)(iii).)

To comply with CWA sections 301 and 402 for municipal separate storm water discharges, a municipal storm water NPDES permit must include effluent limitations to meet the technology-based standard to reduce pollutants to the “maximum extent practicable” and any more stringent effluent limitations necessary to meet water quality standards. The United States Environmental Protection Agency (EPA) has promulgated regulations to implement NPDES requirements in CWA section 402, including storm water requirements of CWA section 402(p).⁴ (See 40 C.F.R. Part 122.26.)

⁴ CWA Section 402(p) specifies that permits for industrial discharges are required to comply with all technology-based and water quality-based requirements. (Section 402(p)(3)(A).) In contrast, CWA Section 402(p) specifies that permits for municipal separate storm water discharges shall require controls to comply with technology-based requirements but does not specifically state that municipal permits must require controls to comply with water quality-based requirements. (Section 402(p)(3)(B).) EPA, however, has interpreted the Clean Water Act to require permits for municipal separate storm water discharges to include requirements to achieve compliance with water quality standards. See memorandum “Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems” from E. Donald Elliott, General Counsel, EPA, to Nancy J. Marvel, Regional Counsel, EPA Region 9 (January 9, 1991).

CWA section 303 requires states to adopt water quality standards for surface waters. (33 U.S.C. § 1313.) Water quality standards consist of the designated uses of waters and the water quality criteria for such waters that would support the designated uses. The Regional Water Board in its Water Quality Control Plan for the San Diego region has adopted water quality standards by designating the beneficial uses for waters in the region and establishing water quality objectives (i.e., water quality criteria) to protect those uses. See Water Quality Control Plan for the San Diego Basin (9), September 8, 1994, at Chapters 2 and 3. The SWRCB has also adopted water quality control plans and policies that specify water quality standards which are relevant to this permit (e.g., the SWRCB Ocean Plan). To comply with CWA section 301, municipal storm water permits must include effluent limitations where necessary to meet these water quality standards.

NPDES permits issued by the Regional Water Boards, including municipal storm water permits, typically include a requirement entitled "discharge limitations" or "effluent limitations" that specifies the technology-based effluent limitations and a requirement entitled "receiving water limitations" or "receiving water standards" that specifies the water quality objectives in the Water Quality Control Plan relevant to the discharge and limitations necessary to attain those objectives. The receiving water limitations provision is used to implement the requirement of CWA section 301(b)(1)(C) to include more stringent effluent limitations necessary to meet

water quality standards.⁵ The limitations necessary to meet water quality standards are also called the water quality-based effluent limitations. NPDES permits are generally required to include numeric effluent limitations to implement the technology-based standard and water quality-based effluent limitations to attain the water quality standards.⁶ (40 C.F.R. § 122.44.) However, the federal regulations allow the use of best management practices (BMPs) to control or abate the discharge of pollutants when numeric effluent limitations are infeasible. (40 C.F.R. § 122.44(k).) The SWRCB has determined that for municipal separate storm water permits, BMPs constitute valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements.⁷ See SWRCB Orders WQ 91-03 and WQ 91-04. In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water quality-based requirements of the CWA.

⁵ SWRCB Order WQ 91-03³ concluded that municipal permits must include effluent limitations necessary to achieve water quality standards. See Order WQ 91-03 at slip op. 36. Orange County and other interested persons have argued that section 402(p) does not require municipal permits to meet water quality standards. While disagreeing, it should be noted that section 402(p) contains explicit authority for states to require provisions in addition to the "maximum extent practical" controls.

⁶ See memorandum "Numeric Effluent Limitations in NPDES Permits" from Elizabeth Miller Jennings, Senior Staff Counsel, State Water Resources Control Board, to Central Valley Regional Water Quality Control Board (Aug. 1, 1997).

⁷ EPA has issued a national policy entitled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits," 61 Fed. Reg. 43761 (Aug. 26, 1996), that addresses issues related to the type of effluent limitations that are appropriate to provide for attainment of water quality standards. The policy applies only to EPA, but EPA has encouraged states to adopt similar policies for storm water permits. The policy states that storm water permits need not include numeric water quality-based effluent limitations. Rather, BMPs should be used to attain water quality-based effluent limitations, which should be expanded in later permits if necessary to provide for attainment of water quality standards.

II. CONTENTIONS AND FINDINGS⁸

The petitioner seeks review of the Orange County permit adopted by the Regional Water Board. The Orange County NPDES permit, adopted by the Regional Water Board, applies to the incorporated cities in Orange County within the boundaries of the San Diego region. The Santa Ana Regional Water Board, on March 8, 1996, adopted an NPDES permit for storm water discharges from the incorporated cities of Orange County within the boundaries of the Santa Ana region.⁹ Orange County had requested that the Santa Ana Regional Water Board adopt one permit for all of Orange County. The San Diego Regional Water Board preferred to retain jurisdiction but agreed to adopt a permit consistent with the permit adopted by the Santa Ana Regional Water Board. Both permits for Orange County are essentially identical and require the permittees to develop a plan establishing BMPs to control discharges to the "maximum extent practicable." The Orange County permittees adopted a plan called the "drainage area management plan" (DAMP) that was approved by the San Diego Regional Water Board on April 6, 1996.¹⁰ Both permits also contain the same provision addressing receiving water limitations, which, in relevant part, states:

- "1. Receiving water limitations have been established based on beneficial uses, water quality objectives, and water quality standards contained in the Basin Plan, and amendments thereto, and on ambient water quality. They are intended to protect the beneficial uses and attain the water quality objectives contained in the Basin Plan. The discharge of urban storm water, or non-storm water, from a municipal storm sewer system

⁸ All other contentions raised in the petition which are not discussed in this order are dismissed. (Cal. Code Regs., tit. 23, § 2052; *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349].)

⁹ No petition was filed challenging the permit issued by the Santa Ana Regional Water Board.

¹⁰ The DAMP was also approved by the Santa Ana Regional Water Board.

for which the permittees are responsible under the terms of this permit shall not cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives. The permittees will not be in violation of this provision so long as they are in compliance with the requirements set forth [in the following provision].”

“a. If the Executive Officer determines that a continuing or recurring impairment of beneficial uses or exceedances of water quality objectives has been caused by urban storm water discharges from the municipal storm sewer system, the following steps shall be taken. . . .”

The remainder of the provision requires the Executive Officer to evaluate the DAMP and if the Executive Officer determines that implementation of the DAMP will not have a reasonable likelihood of preventing future impairment of beneficial uses or exceedances of water quality objectives, the permittees would be required to submit a report evaluating impacts on water quality and proposing changes to implementation of the existing DAMP or proposing revisions to the DAMP. The permittees would then be required to implement the revised DAMP.

Petitioner contends that for several reasons, this receiving water limitations provision is inadequate under the CWA and its implementing regulations and under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). Petitioner points out that CWA section 402(b), and implementing regulations, require that NPDES permits issued by state agencies comply with the CWA. (33 U.S.C. 1342(b), 40 C.F.R. § 123.25.) The Porter-Cologne Act provides that permits issued subject to federal law must “ensure compliance with all applicable provisions of the [CWA and its implementing regulations], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of

beneficial uses, or to prevent nuisance.” (Cal. Water Code § 13377.) Petitioner contends that the receiving water limitations language fails to require attainment of water quality standards.

1. Contention: The receiving water limitations section fails to comply with the CWA and the Porter-Cologne Act because it does not prohibit discharges that “contribute to” as well as “cause” exceedances of water quality objectives as required by federal regulations.

Finding: The SWRCB agrees that the NPDES permit must prohibit discharges that “cause” or “contribute” to violations of water quality standards. Federal regulations specify requirements that must be included in each NPDES permit. (40 C.F.R. § 122.44.) Each NPDES permit must include limitations necessary to achieve water quality standards:

“Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” (40 C.F.R. § 122.44(d)(1)(i).)¹¹ (Emphasis added.)

The receiving water limitations language of the Orange County NPDES permit requires the permittees to be responsible for those discharges that “cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives.” To comply with the CWA, the phrase quoted in the immediately preceding sentence shall be interpreted so as to require permittees to control discharges that contribute to exceedances

¹¹ This provision applies to state programs. See 40 C.F.R. section 123.25.

of water quality objectives. Of course such contributions would have to be substantial (in more than a *de minimis* amount) contributions.

2. Contention: The petitioner contends that the receiving water limitations section in the permit violates the CWA and implementing regulations because it does not require compliance with water quality standards. The permit states that the permittees "will not be in violation of [receiving water limitations] so long as they are in compliance with the requirements" for evaluating the DAMP.

Finding: The SWRCB disagrees with petitioner's contention. In SWRCB Order WQ 96-13, the SWRCB reviewed and approved the storm water permit for certain permittees in the Santa Clara Valley issued by the San Francisco Bay Regional Water Board. The Santa Clara Valley permit contains a receiving water limitations section that specifically prohibits discharges that cause or contribute to a violation of water quality objectives, and states that the permittees "shall comply . . . through the timely implementation of control measures and other actions to reduce pollution in the discharge." (Emphasis added.) The receiving water limitations provision in the Orange County permit prohibits³ discharges that cause exceedances of water quality objectives, and states that the "permittees will not be in violation of this provision so long as they are in compliance with the requirements" for evaluating and improving the effectiveness of the DAMP. The Orange County permit receiving water limitations section is not, as a practical matter, different than the Santa Clara Valley permit approved by this SWRCB. In each case, compliance with the receiving water limitations is achieved by following a

procedure to evaluate and improve the BMPs where necessary to comply with water quality standards.

The SWRCB has already determined that the use of BMPs to achieve both the technology-based effluent limitations and the water quality-based effluent limitations complies with the CWA and the Porter-Cologne Act. See SWRCB Order WQ 91-03. Accordingly, the SWRCB agrees that use of the phrase that the "permittees will not be in violation of . . ." complies with the CWA and, in fact, used that same phrase in SWRCB Water Quality Order 97-03-DWQ (Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities, NPDES General Permit No. CAS000001) (the General Industrial Permit).

3. Contention: The petitioner contends that the receiving water limitations provision violates the CWA and implementing regulations because the mechanism for determining exceedances of receiving water limitations is unworkable and, therefore, would not result in achievement of water quality standards. The permittees are not considered to be in violation of receiving water limitations as long as the process for evaluating the DAMP are followed. This process, however, will not result in achievement of water quality standards because (1) it is very difficult to demonstrate that urban runoff has "caused" an exceedance of water quality objectives; (2) Regional Water Board staff stated at the Board hearing at which the permit was adopted that there were inadequate resources to oversee the storm water program; (3) the permit does not require submittal of information on the adequacy of the DAMP until after the Executive Officer determines that the plan will not result in achievement of water quality objectives;

and (4) the permit places no time schedule on review of the adequacy of the plan to meet water quality standards. The permit does not require any change to the DAMP until directed by the Executive Officer. Due to these limitations, water quality standards are not likely to be achieved.

Finding: Petitioner has raised legitimate concerns. As discussed above, permittees will be required to control discharges that contribute to exceedances of water quality objectives. The SWRCB's charge under Water Code section 13320 is to determine whether the Regional Water Board has acted appropriately. In this case, the Regional Water Board has directed its Executive Officer to determine when receiving water limitations have been exceeded. In order for such determinations to be made the Executive Officer must devote sufficient resources to make such determinations in a timely manner. Provided this is the case, it can be concluded that the permit is adequate to achieve water quality standards. This conclusion to uphold the permit language is further predicated on the fact that to do otherwise would result in two inconsistent storm water permits for Orange County.

III. ADDITIONAL ISSUES

While upholding the permit as appropriate, the SWRCB has concerns that future storm water permits contain the strongest and clearest possible language to protect water quality. As evidenced by the discussion at the January 7, 1998 workshop review of this petition, there are serious disagreements as to how best to ensure such protection. A review of the record leads to the following conclusions:

- ◆ Future storm water permits should contain consistent requirements to ensure water quality protection.
- ◆ Such permits must comply with CWA and Porter-Cologne Water Quality Control Act requirements.
- ◆ Storm water permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations.
- ◆ Permittees must ultimately be responsible for evaluating and revising BMPs to achieve compliance with water quality standards.
- ◆ Permits should be written to clearly identify water quality standards and to clearly require that permittees, through the implementation of BMPs, shall not cause or contribute to exceedances of such water quality standards.
- ◆ Given the unique nature of the storm water discharges, it is reasonable that implementation take place, where appropriate, on a phased basis.
- ◆ Determinations that additional BMPs are necessary to achieve water quality standards should be based on findings by the permittees or the Regional Boards that storm water discharges are a substantial (in more than a *de minimis* amount) contributor to continuing or recurring exceedances of such standards.

Based upon these conclusions and as a precedent decision,¹² the following receiving water limitation language shall be included in future municipal storm water permits.

RECEIVING WATER LIMITATIONS

1. Storm water discharges and authorized non-storm water discharges to any surface or ground water shall not adversely impact human health or the environment.
2. The SWMP shall be designed and implemented, or shall be in the process of being revised in accordance with the procedures set forth below to ensure that discharges authorized by this permit shall not cause or substantially (in more than a *de minimis* amount) contribute to a continuing or recurring exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board's Basin Plan:
3. If the discharges cause or contribute to an exceedance of the applicable water quality standards, permittee shall take the following steps:
 - a. Upon a determination by either the facility operator or the Regional Water Board that discharges are causing or contributing to an exceedance of an applicable water quality standard, the facility operator shall promptly notify and thereafter submit a report to the appropriate Regional Water Quality Control Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the annual update to the SWMP unless the Regional Water Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Water Quality Control Board may require modifications to the report;
 - b. Submit any modifications to the report required by the Regional Board within 30 days of notification;

¹² In SWRCB Order WR-96-1, the SWRCB determined that water quality orders are precedent decisions. (See Gov. Code § 11425.60.)

- c. Within 30 days following approval of the report described above by the Regional Water Quality Control Board, the facility operator shall revise its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;
 - d. Implement the revised SWMP and monitoring program in accordance with the approved schedule; and
 - e. Reduce pollutants in storm water discharges and authorized non-storm water discharges, following implementation of the SWMP revised in accordance with paragraph 3 above, to levels which shall not cause or contribute to an exceedance of any applicable water quality standards.
4. So long as permittees have complied with the procedures set forth in paragraph 3 above and are implementing the revised SWMP, they do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Water Board to develop additional BMPs.

IV. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

1. The federal regulations implementing CWA section 402(p) require NPDES permits to prohibit discharges of pollutants that "cause or contribute" to exceedances of water quality standards and the permit will be so interpreted.
2. The specific portion of the receiving water limitations provision that states that "permittees will not be in violation of this provision so long as they are in compliance with the requirements" specifying the process for evaluating and improving the effectiveness of the DAMP complies with the CWA.
3. The Regional Water Board acted appropriately in adopting the permit.

4. Receiving water limitation provisions of future municipal storm water permits shall be consistent with this Order.

V. ORDER

IT IS ORDERED that Order 96-03 shall be interpreted as discussed above.

It is further ordered that in other respects, the petition is denied.

CERTIFICATION

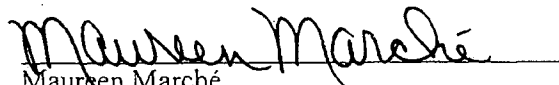
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 1998.

AYE: John Caffrey
Marc Del Piero
Mary Jane Forster
John W. Brown

NO: None

ABSENT: James M. Stubchaer

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

