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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of: The California Regional Water Quality Control Board, Los Angeles Region's Adoption of Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges Within The Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4, Order No. R4-2012-0175, NPDES No. CAS004001	THE CITIES OF DUARTE AND HUNTINGTON PARK'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL'S PETITION FOR REVIEW OF THE LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R4-2012-0175 [Water Code § 13320 *et seq.* and Title 23, CCR § 2050, *et seq.*]

The Cities of Duarte and Huntington Park ("Cities") submit this brief in opposition to the Administrative Petition ("Petition") of the Natural Resources Defense Council, Inc., the Los Angeles Water Keeper and Heal the Bay (collectively, "NRDC" or "Petitioner") challenging the Los Angeles Regional Water Quality Control Board's ("Regional Board") Action Adopting Order No. No. R4-2012-0175 ("2012 Permit").

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I. INTRODUCTION

The NRDC's Petition is based on a false premise, *i.e.,* that all terms of the Clean Water Act ("CWA" or "Act") apply equally to all types of dischargers, irrespective of whether the discharger is a municipal separate storm sewer system ("MS4") discharger (governed by section 1342(p)(3)(B) of the CWA), or an industrial waste discharger (governed by section 1311(b)(1)(C) of the Act). As a result of this flawed assumption and the desire of the NRDC to have municipal permittees treated in the same fashion as industrial waste permittees, NRDC wrongly argues that the 2012 Permit (1) violates the anti-backsliding requirements under the CWA; (2) violates the "anti-degradation" requirements of the Act; and (3) violates the requirements for incorporation of Total Maximum Daily Loads ("TMDLs") into a National Pollutant Discharge Elimination System ("NPDES") Permit under the Act. Finally, NRDC mischaracterizes the Receiving Water Limitation ("RWL") provisions of the Permit (along with the TMDL requirements in the Permit), as providing a "safe harbor," and thereby incorrectly asserts that findings are needed to support the "safe harbor" it claims is created by the 2012 Permit. NRDC's arguments are entirely misguided and should be rejected as being inconsistent with the language of the Act, controlling case authority, and the requirements of State law, namely California Water Code ("CWC") sections 13000, 13241 and 13263.

In addition, in its Petition NRDC infers, and subsequently in its Response to the State Board's Request for Comments on the RWL Policy ("NRDC Response") argues, that the various City petitions challenging the 2012 Permit, including the Petition of the Cities of Duarte and Huntington Park, cannot be pursued because said Petitioners are allegedly "collaterally estopped" from raising any of their challenges to the RWL language in the 2012 Permit, purportedly based on prior challenges by various cities (not including Duarte and Huntington Park) to the 2001 MS4 NPDES Permit for Los Angeles County ("2001 Permit"). Yet, NRDC misstates and misrepresents the arguments asserted by the Cities in their challenge to the 2012 Permit, and further woefully misapplies the doctrine of collateral estoppel to the issues in the Permittee petitions. The doctrine has no application

to the legal and factual issues involved in the Permittees' petitions, given that such challenges to the 2012 Permit involve different legal issues, different factual questions, different administrative decisions, different administrative records, different permit terms and different parties, from those involved with 2001 Permit. NDRC's reliance on the doctrine of collateral estoppel is frivolous.

II. THE NRDC's ARGUMENTS BASED ON ANTI-BACKSLIDING, ANTI-DEGRADATION AND IMPROPER INCORPORATION OF TMDL PROVISIONS ARE ALL BASED ON A FALSE PREMISE.

As discussed in the Cities' Administrative Petition to the State Board, it is well settled that when Congress amended the Act in 1987, it intentionally imposed a different standard of compliance on MS4 dischargers versus industrial waste dischargers. In particular, as the Ninth Circuit Court of Appeal held in *Defenders of Wild Life v. Browner* (*"Defenders"*) (9th Cir. 1999) 191 F.3rd 1159, 1165: "Industrial dischargers must strictly comply with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges."

According to the Ninth Circuit, "33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal dischargers must comply with 33 U.S.C. § 1311," but instead "***replaces*** the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to **the *maximum extent practicable*.**'" (*Id.* at 1165, emphasis added.) The Court thus concluded that the Act "unambiguously demonstrates that Congress did not require municipal storm-water dischargers to strictly comply with 33 U.S.C. § 1311(b)(1)(C)." (*Id.*)

Similarly, in the California Court of Appeals decision in *Divers' Environmental Conservation Organization v. State Water Resources Control Board ("Divers")* (2006) 145 Cal.App.4th 246, the Court there found that: "In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs rather than by way of imposing either technology-based or water quality-based numerical limitations." The *Divers* Court went on to hold that, ***"it is now clear that in implementing numeric***

water quality standards, such as those set forth in CTR [the California Toxics Rule], permittee agencies ***are not required to do so solely by means of a corresponding numeric WQBEL*** [water quality based effluent limit]." (*Id.* at 262, emphasis added.)

In *BIA of San Diego County v. State Board* (2004) 124 Cal.App.4th 866, 874, the Court of Appeal acknowledged that the Clean Water Act is to be applied differently to municipal stormwater dischargers than to industrial stormwater dischargers, finding:

> In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to *municipal* storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards **without specific numeric effluent limits** and instead to impose "controls to reduce the discharge of pollutants to the **maximum extent practicable.**

(*Id.*, citing 33 USC § 1342(p)(3)(B)(iii) and *Defenders, supra,* 191 F.3d 1159, 1163; bolding and underlining added, italics in original.)

Incredibly, nowhere in the NRDC's Petition does it even acknowledge this fundamentally different treatment of municipal stormwater dischargers versus industrial dischargers, or that the CWA, for municipal dischargers, "**replaces** the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduced the discharge of pollutants to the maximum extent practicable ('MEP')." The NRDC's conscious refusal to address this critical distinction undermines all of its CWA arguments.

Similarly, because of its turning a blind eye to the different treatment afforded to MS4 permittees under the CWA, the NRDC wrongly characterizes the alternate compliance language in the 2012 Permit (and presumably any other alternative compliance with either the RWL requirements or other numeric requirements, *e.g.* BMP performance based approach), as a "safe harbor." In effect, the NRDC wrongly uses the phrase "safe harbor" in a pejorative fashion to imply MS4 Permittees are in violation of the RWL terms of the Permit, but may otherwise be shielded from enforcement actions (and third party citizen suits) so long as they remain in their "safe harbor."

In truth, because the CWA does not require MS4 permittees, such as the Cities herein, to strictly comply with numeric effluent limits, and instead allows for a BMP based approach (as proposed by the Cities in their Comment Letter to the State Board on the RWL policy), such an alternative compliance approach is not a "safe harbor" at all, but rather an alternative method of complying with the Permit terms. In sum, the NRDC's claim that the Permit provides a series of "safe harbors" to the Permittees, is a misnomer, in light of the fact that compliance with strict numeric limits has never been, and is not now, required of municipal permittees under the Act.

Furthermore, the Regional Board's decision to allow compliance with the RWL requirements through the use of watershed management programs (WMPs) or enhanced watershed management programs (EWMPs), does not implicate the anti-backsliding or anti-degradation requirements of the Act, as the NRDC suggests. Indeed, the RWL language is not an "effluent limitation" that was developed in accordance with the specific sections listed in 33 U.S.C. § 402(o), and, thus, is not subject to the anti-backsliding requirements at all. Moreover, the Regional Board has properly concluded that all "effluent limitations" and other conditions in this 2012 Permit are at least as stringent as the effluent limitations in the previous 2001 Permit, and thus do not raise any anti-backsliding requirements. In addition, the RWL language in the 2012 Permit is statutorily exempt from any anti-backsliding requirements because discharges into storm water drainage involve "events over which the permittee has no control and for which there is no reasonably available remedy." (33 U.S.C. § 1342(o)(2)(C).)

Finally, the approach presented in the 2012 Permit will result in greater water quality benefits, not fewer, and thus, the claim that somehow the 2012 Permit implicates the Act's anti-degradation policy is baseless.

A. The Anti-Backsliding Requirements Do Not Apply To MS4 Permits.

In its Petition, the NRDC asserts that the anti-backsliding provisions of the Act (33 U.S.C. § 1342(o) ["Section 1342(o)"] and federal regulations (40 C.F.R. § 122.44(1), preclude any changes to the RWL language from the 2001 Permit to the 2012 Permit. A

review of the Act and the regulations hereunder, however, demonstrates that the 2012 Permit does not implicate the CWA's anti-backsliding requirements in this case.

Section 1342(o)(1) of the Act provides as follows:

> In the case of **effluent limitations** established **on the basis of subsection (a)(1)(B)** of this section, a permit may not be renewed, reissued, or modified **on the basis of effluent guidelines promulgated under section 1314(b)** of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable **effluent limitations** in the previous permit. In the case of effluent limitations established **on the basis of section 1311(b)(1)(C) or section 1313(d) or (e)** of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(§1342(o)(1), emphasis added.)

There are several grounds for rejecting the NRDC's reliance on section 1342(o) in this case. First, the anti-backsliding argument is not applicable to the 2012 Permit simply because no "efficient limitations" were developed based on the water quality standards (or otherwise) and thereafter included in either the 2001 or 2012 Permits. In short, the water quality standards are not themselves "effluent limitations," as they do not act to limit the permittees' "effluent," but instead regulate the overall quality of the receiving water in issue. As such, section 1342(o) of the Act has no application.

Second, sections 1342(o) of the Act has no application since the water quality standards included in the 2012 Permit, *i.e.,* according to the NRDC, the "effluent limitations" in issue, have not been changed from the 2001 Permit. That is, the specific so-called "effluent limitations" in the 2012 Permit are no different than the specific so-called "effluent limitations" included in the 2001 Permit. In short, the "effluent limitations" the NRDC claims exist in the 2012 Permit are the "water quality standards" in the Basin Plan; yet, those standards have not been relaxed or otherwise modified in the 2012 Permit. To the contrary, the language in the 2012 Permit concerning the RWLs is nearly identical to the 2001 Permit, with the exception that the 2012 Permit provides an alternative means of complying with the same RWL requirements. The 2012 Permit does not, however, contain

any relaxation of the claimed "effluent limitations," *i.e.*, the water quality standards have not been relaxed for purposes of the 2012 Permit.

Third, the RWL Language in the 2012 Permit was clearly not developed based on "effluent guidelines promulgated under section 1314(b) [entitled Effluent Limitations Guidelines]" of the Act, as required by section 1342(o)(1), and NRDC cannot honestly argue otherwise. Moreover, no aspect of the RWL language in the 2012 Permit (or the 2001 Permit) is based on "section 1311(b)(1)(C) or section 1313(d) or (e)" of the Act. In fact, as the Court in *Defenders, supra,* 191 F.3d 1159 held, ***section 1311(b)(1)(c) does not apply to MS4 permits***. (*Id.* at 1165.) Accordingly, on the face of section 1342(o)(1), because the RWL requirements in the 2012 Permit were not revised "on the basis of effluent guidelines promulgated under section 1314(b)," and were not established "on the basis of Section 1311(b)(1)(C) or Section 1313(d) or (e)," the anti-backsliding requirements do not apply.

Finally, it is clear that the federal regulations involving anti-backsliding have no application to the 2012 Permit terms. (40 CFR § 122.44(1).) According to the regulations, anti-backsliding requirements are addressed in NPDES permits "when applicable." Due to the distinctive nature of MS4s and the separate standard Congress has created in section 1342(p)(3)(B) for MS4 dischargers, and the fact that MS4 dischargers are not required to meet "technology based or water-quantity based numerical limitations (*see Divers, supra*, 145 Cal. App. 246, 262), as well as for the reasons discussed above, the anti-backsliding regulations are not applicable to the RWL language in issue.

Further, it is axiomatic that the language of a statute, here section 1342(o) of the Act, controls over the federal regulation, particularly, where, as is the case with section 1342(o), the statute was adopted ***after*** the regulation in issue was in place. (*See* EPA Interim Guidance on Implementation of Section 402(o) Anti-backsliding Rules For Water Quality-Based Permits (1989), p. 2, emphasis added ["***The statutory anti-backsliding provisions found at §402(o) take precedence over EPA's existing regulations governing backsliding, found at §122.44(1)(1). Therefore, the Regions and States must now apply***

the statute itself, instead of these regulations, when questions arise regarding backsliding from limitations based on State treatment or water quality standards.].) The federal regulation referenced by NRDC on anti-backsliding has no relevance to this case.

B. The 2012 Permit RWL Conditions Are At Least As Stringent As The Effluent Limitations/Provisions In The Previous Permit And Are Consistent With Any Applicable Anti-Backsliding Requirements.

The NRDC's argument that the so called "effluent limitations" changed from the 2001 Permit to the 2012 Permit is baseless, in light of the fact that the alleged "effluent limitations" in the 2001 Permit are identical to the "effluent limitations" within the RWL requirements set forth in the 2012 Permit. That is, the numeric "effluent limitations" the NRDC seeks to manufacture out of whole cloth from the water quality standard requirements within the RWL language, are no less stringent in the 2012 Permit than they were in the 2001 Permit. Accordingly, on its face, the claim that the alleged "effluent limitations" in the 2012 Permit, are somehow less stringent than those set forth in the 2001 Permit, is inaccurate. The actual "effluent limitations" are the same, if not more stringent than in the 2001 Permit (due to changes in the water quality standards), and the NRDC offers no evidence of any relaxing of any specific purported "effluent limitation" in the 2012 Permit, *i.e.*, water quality standard, as compared to an "effluent limitation" in the 2001 Permit.

The thrust of NRDC's argument appears to be that the alternative means of complying with the RWL requirements in the 2012 Permit, *i.e.,* the ability of a permittee to rely upon a WMP or an EWMP as a means of complying with the RWL language, is, per se, a relaxing of every single water quality standards in the basin plan, and thus, a relaxing of every alleged "effluent limitation" that the NRDC claims is being derived from the water quality standards. Yet, as discussed above, no "effluent limitations' were derived or included in the 2001 Permit or the 2012 Permit based on the water quality standards. In addition, including an alternative means of meeting a water quality standard does not constitute a change in the water quality standard; rather, it is a change in the means of

complying with the standard.

Moreover, as discussed above, an alternative means of complying with water quality standards is precisely what was envisioned by Congress with the CWA, and what has been envisioned by the State Board since the inception of the very first NPDES Permit for Los Angeles County. (*See, e.g.*, State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives*** or ***numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; State Board Order No. 98-01, p. 12 ["Stormwater 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***."]; State Board Order No. 2000-11, p. 3 [***"In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."***]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; State Board Order No. 2006-12, p. 17 [***"Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 [***"It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 [***"Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"].)

In its findings in the 2012 Permit, the regional board determined as follows:

> **Anti-Backsliding Requirements.** Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued

> permit to be as stringent **as those in the previous permit**, with some exceptions where limitations may be relaxed. **All effluent limitations and other conditions in this Order are at least as stringent as the effluent limitations in the previous permit.**

(2012 Permit, pp. 24-24, emph. added.) In response to the NRDC's comment to the 2012 Permit, that the RWL language in the 2012 Permit would somehow violate the anti-backsliding requirements, the Regional Board similarly responded as follows:

> **The RWL provisions in Part V.A. of the order are nearly identical to those adopted by the Board in the 2001 Permit**, including both the prohibition on discharges from the MS4 that cause or contribute to violations of receiving water limitations and the process for addressing discharges from the MS4 that have caused or contributed to violations of receiving water limitations. Consistent with the Board's prior interpretations, which have withstood legal challenges, Part V.A. does not contain a "safe harbor."
>
> In this permit, however, the Board has found it appropriate to allow permittees to submit a Watershed Management Plan. If a permittee chooses to submit a Watershed Management Plan, RWL exceedances for pollutants addressed by TMDLs will be addressed per TMDL specific compliance schedules, which are consistent with Board-adopted and fully approved TMDL implementation schedules. These TMDL implementation schedules were developed to accommodate Permittees' efforts to achieve compliance with standards over time. Further, for waterbody-pollutant combinations not addressed by a TMDL, the permit has been revised to allow Permittees to develop and implement a Watershed Management Program to address receiving water limitations not otherwise addressed by a TMDL. The Watershed Management Program must include, at the outset, a reasonable assurance analysis for the water body-pollutant combination(s) addressed by the program that demonstrates that the watershed control measures proposed in the program will be sufficient to control MS4 discharges such that they do not cause or contribute to an exceedance of the applicable receiving water limitation(s). It is unclear whether the anti-backsliding provisions apply to receiving water limitations. However, to the extent that the anti-backsliding provisions do apply, **the RWLs provisions and the Watershed Management Program do not violate the anti-backsliding provisions. Permittees are still required to comply with water quality standards, although the Board, consistent with federal law, has provided permittees the flexibility on how to demonstrate such compliance.** This permit incorporates **new provisions** implementing 32 TMDLs adopted by the Board and/or USEPA. The purpose of the Watershed Management Program is to provide permittees the flexibility to implement permit requirements in an integrated and collaborative fashion to address water quality priorities, such as TMDLs. This allows permittees to schedule implementation of control measures in consideration of

> all water quality priorities to achieve compliance with water quality standards as soon as possible.

(Regional Board's Response to Comments on Tentative Order (2012 Permit), Receiving Water Limitation Matrix, p. B-2.)

Here, with the language in the 2012 Permit, permittees must continue to comply with water quality standards; the only difference with the 2012 Permit is that now, consistent with federal law, the Regional Board has provided the MS4 Permittees with an alternative means of compliance, through the use of WMPs or EWMPs.

C. The Exceptions To The Anti-Backsliding Rule Would Apply Even If CWA Section 1342(o) Had Any Application.

Section 1342(o)(2) lists a series of exceptions to the anti-backsliding requirements, including the following:

> (A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;
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> (B) (i) **information is available which was not available at the time of permit issuance** (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or
>
> (ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);
>
> (C) a less stringent effluent limitation is necessary **because of events over which the permittee has no control and for which there is no reasonably available remedy**;
>
> (D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or
>
> (E) 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 has nevertheless been unable to achieve the previous effluent limitations

Given the variability of the potential sources of pollutants in urban runoff, as well as the unpredictability of the climate in Southern California, ***discharges into storm drain systems involve "events over which the permittee has no control and for which there is***

no reasonably available remedy". (33 U.S.C. § 1342(o)(2)(C).) Accordingly, strict compliance with the numeric receiving water limits and, in effect, the water quality standards, is, therefore, not achievable through any "permissibly available remedy" at this time. Thus, to the extent the anti-backsliding rule has any application to the subject Permit, the RWL language in the Permit would be exempt from the rule. (*See* the Stormwater Quality Panel Recommendations to the California State Water Resources Control Board, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p.8 [***"It is not feasible at this time to set enforceable effluent criteria for municipal BMPs and in particular urban dischargers."***]; *also see Divers, supra*, 145 Cal. App. 4th 246, 258 ["EPA has repeatedly noted, storm water consists of a variable stew of pollutants, including toxic pollutants, from am variety of sources which impact the receiving body on a basis which is only as predictable as the weather"].)

Moreover, as argued in the Cities' Petition, as a matter of law the Clean Water Act does not require permittees to achieve the impossible. In *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.,* 519 U.S. 993 (1996), the plaintiff sued JMS Development Corporation ("JMS") for failing to obtain a storm water permit that would authorize the discharge of storm water from its construction project. The plaintiff argued JMS had no authority to discharge any quantity or type of storm water from the project, i.e. a "zero discharge standard," until JMS had first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was being discharged from its property and that it had not obtained an NPDES permit, but claimed it was not in violation of the Clean Water Act (even though the Act required the permit) because the Georgia Environmental Protection Division, the agency responsible for issuing the permit, was not yet prepared to issue such permits. As a result, it was impossible for JMS to comply. (*Id.*)

The Eleventh Circuit Court of Appeal held that the CWA does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (*Id.* at 1529.) The Court then found that:

> In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge.

(*Id.* at 1530.) The Court concluded, "*Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities." (*Id.*) The same rule applies here.

The CWA does not require municipal permittees to do the impossible and comply with unachievable numeric limits whether effluent limits, or otherwise. Because municipal permittees are involuntary permittees, that is, because they have no choice but to obtain a municipal storm water permit, the 2012 Permit, as a matter of law, cannot impose terms that are unobtainable. (*Id.*)

In this case, strictly complying with the various numeric receiving water limits (*i.e.*,, water quality standards), is not achievable by the Permittees, given the variability of the potential sources of pollutants in urban runoff, as well as the unpredictability of the climate in Southern California. In fact, as discussed above in *Divers*, *supra*, 145 Cal.App.4th 246: "In regulating storm water permits the EPA has repeatedly expressed the preference for doing so by way of BMPs, rather than by way of imposing either technology-based or water quality-based numeric limitations." (*Id.* at 256.)

For many of the numeric limits, they are simply not "technically" and "economically" feasible, and as such, requiring strict compliance with such limits is going beyond "the limits of practicability." (*Defenders of Wildlife v. Browner*, *supra*, 191 F.3d at 1162. Accordingly, the imposition of the various numeric limits as strict water quality-based effluent limits and/or receiving water limits, is not only an attempt to impose an obligation that goes beyond the requirements of federal law, but equally important, represents an attempt to impose provisions that go beyond what is "practicable," and in this case, beyond what is "feasible."

Finally, as the NRDC points out, section 1342(o)(3) prohibits the relaxation of effluent limitations in all cases if the revised effluent limitation would result in a violation

of applicable effluent guidelines and water quality standards. Thus, even if one or more of the backsliding exceptions outlined in the statute is applicable and met, section 1342(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed. However, what the NRDC fails to acknowledge is that the "safety clause" found in section 1342(o)(3) has no application here, where the 2012 Permit expressly requires the Permittees to comply with water quality standards (*i.e.,* the floor is the standard set forth in the 2012 Permit). Those standards are not being relaxed. Instead, consistent with the CWA, the Regional Board has provided MS4 permittees with an alternative means of complying with the water quality standards, from having to strictly comply with numeric limits contained in such standards. The anti-backsliding requirements under the Act have no application here. (*See Defenders, supra,* 191 F.3d 1159, 1165 ["Industrial Dischargers must strictly comply with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer dischargers."].)

III. THE 2012 PERMIT DOES NOT IMPLICATE THE CLEAN WATER ACT'S ANTIDEGRADATION POLICY

Under federal regulations, a state's water quality standards must contain an antidegradation policy that is consistent with the EPA antidegradation policy. (40 C.F.R. § 131.12.) The State Board has complied with the requirements of the EPA antidegradation policy by adopting Resolution No. 68-16, "Statement of Policy With Respect to Maintaining High Quality of Waters in California" as part of the State policy for water quality control. Resolution No. 68-16 has been adopted as a general water quality objective in all sixteen regional water board basin plans. Further, the State Board has issued guidance on its policy through Administrative Procedures Update ("APU") 90-004. As APU 90-004 makes clear, "if the Regional Board has no reason to believe that existing water quality will be reduced due to the proposed action, no antidegradation analysis is required." (APU 90-004, p. 2.)

Likewise, the State's anti-degradation policy does not require a complete anti-degradation analysis when a discharge "will not be adverse to the intent and purpose of the

state and federal anti-degradation policies." (*Ibid.*) There is no honest argument that can be made that the 2012 Permit will result in a degradation of water quality versus the 2001 Permit, and the NRDC has produced no evidence of such a degradation of water quality. Indeed, the 2012 Permit itself provides the following anti-degradation analysis:

> **Antidegradation Policy.** Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State until it is demonstrated that any change in quality will be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.
>
> The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p). Many of the waters within the area covered by this Order are impaired and listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.
>
> **The issuance of this Order does not authorize an increase in the amount of discharge of waste.** The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.

The NRDC cites no credible evidence that would in any way show that the 2012 Permit would result in the de-grading of the quality of the water of the United States. In fact, it is apparent from the extensive new terms of the 2012 Permit, that the exact opposite

is true, the NRDC's arguments notwithstanding.

IV. TMDLS CANNOT LAWFULLY BE INCORPORATED INTO MS4 PERMITS AS STRICT-NUMERIC LIMITS.

The NRDC asserts that the 2012 Permit terms incorporating thirty-three (33) TMDLs into the subject Permit "violate requirements from incorporation of TMDLs" into NPDES Permits. (NRDC Ps & As, pp. 1-2.) NRDC later explains that the waste load allocations ("WLAs") within the various thirty-three (33) TMDLs must be incorporated into the 2012 MS4 Permit as "numeric WQBELs [water-quality based effluent limits] consistent with those WLAs." (NRDC Ps & As, p. 26:6-8). For example, it cites to the San Gabriel River Metals and Selenium TMDL, and argues that the 2012 Permit should thus set numeric WQBELs, in light of the fact that such TMDL's WLAs are based on the California Toxics Rule ("CTR"). Again, the NRDC ignores the basic point that the 2012 Permit remains an "MS4" permit, and as such, WLAs are not required to be incorporated into the permit as a strict numeric limit. In fact, to do so would violate the requirements of State law, namely CWC sections 13000, 13263 and 13241.

Indeed, as discussed in case after case, and in the State Board Order upon State Board Order, numeric limits are simply not required to be included within an MS4 NPDES Permit, regardless of whether the numeric limits are based on a WLA from a TMDL or otherwise. (*See e.g.,* State Board Order No. 91-03 ["We ... conclude that numeric limits are not legally required. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the permit constitutes effluent limitations as required by law."]; State Board Order No. 98-01, p. 12 ["Stormwater 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."]; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; State Board Order No. 2006-12, p. 17 ["Federal regulations do not require numeric effluent

limitations for discharges of stormwater."].)

In fact, there is no evidence in the record to show that numeric limits in the 2012 Permit can feasibly be complied with, and the evidence in the record is clearly to the contrary. (*See* Stormwater Quality Panel Recommendations to the California State Water Resources Control Board – *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."].)

In *Divers, supra,* 145 Cal.App.4th 246, the plaintiff brought suit claiming that an NPDES permit issued to the United States Navy by the San Diego Regional Board which was contrary to law because it did not incorporate waste load allocations from a TMDL as a "numeric" effluent limit into the permit. After discussing the relevant requirements of the CWA, as well as governing case authority, the Court of Appeal found that in regulating stormwater permits, EPA "has repeatedly expressed their preference for doing so by way of BMPs, rather than by way of imposing either technology-based or water quality-based numeric limitations." (*Id.* at 256.) The Court concluded that it is "now clear that in implementing numeric water quality standards, such as those set forth in CTR, permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL's." (*Id.* at 262.)

In this case as well, with respect to the 2012 Permit in issue, because it is a stormwater permit involving MS4 discharges, there is simply no legitimate legal basis for the NRDC (or others) to argue that TMDLs are required to be incorporated into the subject Permit as strict numeric limits. To the contrary, both case law and State Board policy prove such is not the case. (*See, e.g.*, *American Farm Bureau v. EPA*, 2013 U.S. Dist. LEXIS 131075, *103-104 [U.S.D.C. M.D. Pa., Sept. 13, 2013] ["Second, as recognized by the TMDL and by the EPA Enforcement Appeals Board, 'WLAs are not permit limits *per se*; rather, they still require translation into permit limits .... [W]hile [40 C.F.R. § 122.44(d)(1)(vii)(B)] require[s] *consistency*, it does not require that permit limitations that

will finally be adopted by a final NPDES permit be *identical* to any of the WLAs that may be provided in the TMDL.' ... Accordingly, in some circumstances, a state may write a NPDES permit limit that is different from its WLA, provided that it is consistent with the operative assumptions underlying the WLA."].)

In addition, in EPA's November 22, 2002 Memorandum on TMDLs and WLAs therein, EPA expressly recognized that WLAs may be incorporated into an MS4 permit as best management practices or "BMPs." (*See* November 22, 2002 US EPA Memorandum entitled "*Establishing Total Maximum Daily Load ("TMDL") Waste Load Allocations ("WLAs") for Stormwater Sources as NPDES Permit Requirements Based on Those WLAs*," p. 4 ["EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water dischargers. ... Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs and that numeric limits will be used only in rare instances.].) (EPA November 22, 2002 Guidance Memo, p. 4.)

Moreover, as discussed in depth in the Cities' Points and Authorities in support of their own Petition challenging the 2012 Permit, the inclusion of the various WLAs from 33 TMDLs (and the other numeric limits included in the 2012 Permit) as strict numeric limits, is directly contrary to the requirements of State law. (*See* CWC §§ 13241, 13263 & 13000, which all, directly or indirectly, require Regional Board determinations (not made here) that each of the various numeric limits can "reasonably be achieved," along with a supportable "economic" analysis supporting the imposition of each numeric limit, as well as a balancing of the benefits of the numeric limits in issue, *e.g.*, "***the total values involved, beneficial and detrimental, economic and social, tangible and intangible***" (CWC § 13000), a consideration of the "***water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area***" (CWC § 13241), and the need to "take into consideration the beneficial uses to be

protected" and the "***water quality objectives reasonably required for that purpose***" (CWC § 13263(a).)

In this case, the record, as lengthy as it is, is completely devoid of any evidence showing that compliance with the numeric limits in the Permit are "reasonably achievable," nor that the costs to attempt to comply with such numeric limits are affordable to the Permittees, or otherwise bear any reasonable relationship to the benefits involved from implementing best management practices (BMPs) to be designed to attempt to achieve compliance with the numeric limits. (*See e.g.,* Regional Board Administrative Record ["RB-AR"], Rutan & Tucker Comment Letter and Exhibits submitted on behalf the City of Signal Hill ["SH Comment Letter"], RB-AR 15265 et. seq., Exhibit "30" thereto [a study prepared in 2002, by the University of Southern California Study, entitled *"An Economic Impact Evaluation of Proposed Storm Water Treatment for Los Angeles County,"* concluding that the cost of treating urban runoff in Los Angeles County could reach as high as $283.9 billion over 20 years.]; *also see* Exhibit "31" to the SH Comment Letter ["Financial and Economic Impacts of Storm Water Treatment Los Angeles County NPDES Permit Area" presented to California Department of Transportation Environmental Program, Report I.D. #CTSWRT-98-72, November, 1998, by Stanley R. Hoffman Associates; Exhibit "32" to the SH Comment Letter ["Cost of Storm Water Treatment for the Los Angeles NPDES Permit Area," June 1998, by Brown & Caldwell, prepared for the California Department of Transportation, giving "conservatively low" estimates of the costs of treating Los Angeles Area Storm Water of $33-73 billion in capital costs, depending upon the level of treatment, with an additional $68-$199 million per year in operating and maintenance costs]; Exhibit "33" to the SH Comment Letter ["Cost of Storm Water Treatment for California Urbanized Areas," October, 1998, prepared for California Department of Transportation, by Brown & Caldwell, concluding that "Statewide stormwater collection and treatment costs range from $70.5 billion for Level 1 to $113.7 billion for Level 3. Annual operations and maintenance costs range from $145.2 million/year for Level 1 to $423.9 million/year for Level 3."];. and Exhibit "34" to the SH

Comment Letter [a copy of a Report entitled "*NPDES Stormwater Costs Survey*" by Brian K. Currier, Joseph M. Jones and Glen L. Moelle, California University, Sacramento dated January, 2005 along with Appendix H included therewith entitled "*Alternative Approaches to Stormwater Control*" prepared by the Center for Sustainable Cities University of Southern California.].)

In *Burbank v. State Board* (2005) 35 Cal.4th 613 ("*Burbank*"), the California Supreme Court found that a regional board must consider the factors set forth in sections 13263, 13241 and 13000 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (*Id.* at 627.) The *Burbank* Court went on to specifically hold that: ***"Section 13263 directs Regional Boards, when issuing waste discharge requirements, to take into account various factors including those set forth in Section 13241"*** (*id.* at 625, emphasis added), and that the State law requirement to consider "economics" includes the need to consider the ***"discharger's cost of compliance."*** (*Id.* at 618.)

In short, there is insubstantial evidence in the record that the numeric limits required to be complied with under the 2012 Permit "could reasonably be achieved," in light of the "environmental characteristics" of the various water bodies in issue, their "economic" impacts on the dischargers, or the impacts of having to comply with these numeric limits on "housing within the region." Nor is there any evidence in the record that the Regional Board otherwise complied with the CWC section 13000 and gave any consideration to "***the total values involved, beneficial and detrimental, economic and social, tangible and intangible***"

Not only is the expansive record in this case devoid of substantial evidence to show the numeric limits imposed by the 2012 Permit have been imposed in accordance with the Porter-Cologne Act, the record actually shows the exact opposite is true, *i.e.,* that compliance with the numeric limits in the 2012 Permit is simply not feasible at this time. (*See e.g.,*Transcript of October 5, 2012 Hearing, p. 221-222, RB-AR 18856-57. [**MS. GLICKFELD:** The other thing I wanted to ask is why is it that we BMP approach in

trash the [sic] and that we couldn't fashion that in a scientifically valid way for the other TMDLs that are actually numeric and appear to be numeric and it's not a BMP approach which the cities seemed to like a lot. *** Is it that that doesn't work as well for other kind of pollutants? Or we don't know the right BMPs? **MS. SMITH**: I'll take a stab at that. .... Those are going to be more complicated to develop, but our permit can accommodate if there's some sort of device that's -- that meets the water quality standard."].)

Of course no actual BMPs were ever discussed in answer to the question posed, nor were there any BMPs or other methods for a Permittee under the 2012 Permit to comply with the countless numeric limits in the Permit ever put forth or generally or specifically described or identified by any party to the proceeding, which the municipal permittees could implement and be considered in compliance with the numeric limits. (*See e.g.,* Exhibit "16" to SH Comment Letter, RB-AR 15265 [June 2006 Expert Storm Water Quality Numeric Effluent limits Panel Report, "*Storm Water Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated With Municipal, Industrial and Construction Activities*," p. 8, concluding, "***It is not feasible at this time to set enforcement numeric effluent criteria for municipal BMPs in particular for urban discharges.***"]; and Exhibit "37" to SH Comment Letter, RB-AR 15265 [a Report entitled "*A Guide to Consideration of Economics Under the California Porter-Cologne Act*," by David Sunding and David Ziberman, University of California, Berkeley, March 31, 2005, where the authors reviewed the requirements of the Porter-Cologne Act regarding the need to consider "economics" and the other factors under section 13241, and concluded as follows: "***While the requirement to consider economics under Porter-Cologne is absolute***, the legislature and the courts have done little to particularize it. ***This report is an attempt to fill the gap and provide the Board with guidance as to how economics can and should be considered as required by Porter-Cologne.*** (*Id.* at p. 8.).].)

Yet, the Regional Board failed to accept the guidance of Messrs. Sunding and Ziberman, and plainly failed to comply with State law when adopting the numeric limit provisions set forth in the 2012 Permit. (*Also see* RB-AR 1556 [*City of Downey: Numeric*

Standard for Real World?]; RB-AR 5930 [*Comment Letter from BIASC and CICWQ.*]; RB-AR 5968 [*Comment Letter from Building Industry Legal Defense (BILD) Foundation*]; RB-AR 5992 [*Comment Letter from Leighton Group.*]; and RB-AR 1535 [*Joint Presentation by Association of California Water Agencies, California-Nevada Section of the American Water Works Association, and California Water Association: Community Water System Discharges & The Los Angeles County MS4 Permit.*] .)

The NRDC's contention that WLAs ***must*** be incorporated into an MS4 NPDES Permit as strict numeric limits, is not only entirely unsupported by governing federal and State law, but in this case, the evidence in the record clearly shows that strict compliance with such numeric limits is simply not reasonably, economically or practically achievable at this time, and as such, that the numeric limitations in the 2012 Permit cannot lawfully remain.

V. NRDC's RELIANCE ON THE DOCTRINE OF COLLATERAL ESTOPPEL IN THIS PROCEEDING IS ENTIRELY WITHOUT MERIT.

NRDC intimates in its Legal Background discussion in its Petition, and later argues in its Response to the State Board's questions on RWL policy, that, in effect, the State Board should not entertain any of the MS4 Permittees' arguments opposing the RWL language, either in connection with their Petitions to the 2012 Permit, or in connection with the State Board's review of the RWL policy, based on the legal doctrine known as "collateral estoppel." NRDC's reliance on the doctrine of collateral estoppel is entirely misguided under the present circumstances, where the issues previously litigated are not "identical" to the issues in dispute here; have not previously been actually litigated or decided; involve different administrative decisions; concern substantially different facts and correspondingly vastly different administrative records; and involve different parties (*e.g.*, the Cities of Duarte and Huntington Park were not parties to the litigation involving the 2001 Permit).

Collateral estoppel requires: (1) the issue to be precluded is ***identical*** to the one previously decided; (2) the issue was ***actually litigated***; (3) the issue was ***necessarily***

decided; (4) the prior decision was final and on the merits; and (5) ***the defending party is the same as or in privity*** with the party to the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341 [emph. added].)

Further, "***[t]he party asserting collateral estoppel bears the burden of establishing these requirements.***" (*Ibid.* [emph. added]; *Santa Clara Valley Transportation Authority v. Rea* (2006) 140 Cal. App.4th 1303 ["we cannot tell to what extent the issue was actual litigated"].)

A. <u>The Legal Issues Litigated In Connection With the 2001 Permits are Different Than Those To Be Addressed In the Cities' Petition To The 2012 Permit.</u>

The NRDC glosses over significant differences between the issues raised in the challenge (by other permitees) to the 2001 Permit, versus those raised in connection with the challenges to the 2012 Permit by the Cities. Here, the Cities are making different legal arguments than were made previously. The principle argument made by the Cities in connection with the 2012 Permit language with respect to the RWL language is <u>not</u> that numeric limits cannot lawfully be imposed under the CWA (as was argued in connection with the 2001 Permit), but instead that doing so goes beyond the MEP standard, and thus, as a matter of law and fact, goes beyond the requirements of the Porter Cologne Act, namely Water Code sections 13000, 13263, and 13241.

In effect, here the Cities are contending that because requiring strict compliance with numeric limits is, by definition, a standard that is not applicable to MS4 Permittees, and thus is a standard that goes beyond what is required of MS4 permittees under the CWA, as a matter of law, the imposition of "impracticable" standards in the form of numeric limits on MS4 Permittees violates the "reasonably achievable," "economic" achievability and other factors required to be met under State law. (*See, e.g.*, CWC §§ 13000, 13263(a) and 13241.)

The term "MEP" is defined in a February 11, 1993 Memorandum issued by the State Board's Office of Chief Counsel (hereafter "Chief Counsel Memo") as involving a

consideration of the following factors, among others:

> Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?
>
> Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?

(Chief Counsel Memo, p. 2.) Moreover, as the California Supreme Court in *Burbank v. State Board* (2005) 35 Cal.4th 613 (*Burbank*) found, "Section 13263 directs Regional Boards, when issuing waste discharge requirements, to take into account various factors including those set forth in section 13241. (*Id.* at 612.) These factors, according to the Supreme Court, include the "dischargers' cost of compliance." (*Id.* at 618.) According to the *Burbank* Court: "The plain language of section 13263 and 13241 indicates the Legislature's intent in 1969, when these Statutes were enacted, that a regional board consider the costs of compliance when setting effluent limits in a waste water discharge permit." (*Id.* at 625.)

The Supreme Court in *Burbank* also recognized that the goals of the Porter Cologne Act, as provided for under 13000, are to "attain the highest water quality which is ***reasonable***, considering all demands being made and to be made on those waters and the ***total values involved***, beneficial and detrimental, ***economic*** and social, tangible and intangible." (*Id.*) Similar references to "reasonably achievable" requirements are set forth in CWC section 13263(a) [requiring the implementation of water quality objectives "reasonably required" in obtaining the beneficial uses to be protected], as well in section 13241 [requiring, among other things, the consideration of the "environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto," as well as the "water quality conditions that ***could reasonably be achieved*** through the coordinated control of all factors that affect water quality in the area," and "***economic considerations***."].)

As such, the prime argument made by the Cities herein in their Petition challenging

the 2012 Permit is that a permit term that requires strict compliance with a numeric limit, is a requirement that goes beyond the MEP standard, and as such, by definition, is a requirement that goes beyond the Regional Board's authority under sections 13000, 13263 and 13241 of the Porter-Cologne Act.

Yet, the argument made in connection with the 2001 Permit was significantly different. There, the argument was that as a matter of federal law, an MS4 Permit could not contain permit terms that went beyond the MEP standard under the CWA. (*See In re Los Angeles County Municipal Stormwater Permit Litigation*, the Superior Court Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, dated March 24, 2005 Exhibit "A" hereto, ["Phase I Statement of Decision"], 7:23-25 ["Further, Petitioners asserts that the Permit cannot go beyond the maximum extent practicable ('MEP') standard under the Clean Water Act and this Permit is inconsistent with the MEP standard. As noted, even if the Permit did exceed the MEP standard, the Regional Board was within its authority in requiring more stringent standards. However, the Court finds that the administrative record contains significant evidence showing that the terms of the Permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged Permit provisions."].)

Here, the argument is first and foremost that the inclusion of a numeric limitation in an MS4 Permit goes beyond the MEP standard, and as such, by definition, goes beyond the Regional Board's authority under the Porter-Cologne Act when issuing such an MS4 permit. Accordingly, the primary issue litigated in connection with the 2001 Permit was anything but "identical" to the primary issue to be litigated by the Cities herein in connection with the 2012 Permit.

Moreover, the NRDC has failed to advise the State Board that the Superior Court, in its various decisions in the *Los Angeles County Municipal Stormwater Permit Litigation,* based its findings on a fundamentally wrong legal conclusion: "The Court finds that California Porter-Cologne Act, as codified in the Water Code, ***did not require the Regional Board to consider economics when issuing the Permit*** because the Board considered

economics at an earlier stage in setting water quality objectives in the Los Angeles County Basin Plan." (*See* Exhibit "B" hereto, emphasis added, Statement of Decision from Phase II Trial on Petitions for Writ of Mandate in *In re Los Angeles Municipal Storm Water Permit Litigation* ("Phase II Statement of Decision"), 21:2-6; *also see*, Phase II Statement of Decision, 23:22-25, emphasis added, ["Petitioners allege that in adopting the permit, the Regional Board was required to consider the need for housing in Los Angeles County. They rely on Water Code section 13241. ***The Court disagrees that the statute applies to the Regional Board's actions in adopting the permit."***].)

Of course, after the Superior Court came to this incorrect conclusion, the Supreme Court in *Burbank v. State Board, supra,* 35 Cal.4th 613, 625, reached the exact opposite conclusion: "Section 13263 directs regional boards, when issuing waste discharge requirements, to take into account various factors including those set forth in section 13241." (*Id.* at 625.)

Accordingly, not only are the legal issues different from those raised in connection with the 2001 Permit, the Superior Court's fundamental legal findings in connection with the 2001 Permit litigation were clearly in error.

B. The Factual Issues And Administrative Record For The 2001 Permit Versus The 2012 Permit are Significantly Different.

In addition to the different legal issues, the factual issues are different. Here, not only does the language within the 2001 Permit differ from the language in the 2012 Permit, (*i.e.*, the 2012 Permit incorporates numeric limits from some 33 TMDLs that did not even exist at the time the 2001 Permit was adopted), importantly, the findings and the documentation within the Administrative Records for the two Permits in question are substantially different, with the parties having an additional 11 years of evidence and submissions involving the 2012 Permit that did not exist at the time of the adoption of the 2001 Permit.

In its Statement of Decision in connection with the 2001 Permit, Superior Court relied heavily upon the findings and documents within the Administrative Record to

support its conclusions, stating, in part as follows: "In short, there are numerous finding and documents in the Administrative Record demonstrating that Regional Board considered economics in testimony, comment letters, local studies, national studies, the EPA reports, and self-reported costs from the Petitioners." (Exhibit "B", Phase II Statement of Decision, 23:14-16.) Many more studies have been done, and much data generated, since the adoption of the 2001 Permit. (*See, e.g.*, the Stormwater Quality Panel Recommendations to the State Board dated June 19, 2006, p. 8 [finding numeric effluent limits are not feasible at this time for stormwater permits.].)

The doctrine of collateral estoppel is simply not available when the second action arises out of a different subject matter or transaction and does not involve the same facts. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 871-72 ["Where the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel"]; *People v. Horn* (1984) 158 Cal.App.3d 1014, 1033 ["the sanity issue decided in the Placer County prosecution is not identical to the issue posed in this case because proof of insanity on one day is not proof of insanity on another"]; *Interstate Marina Dev. Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 444 [different laws at issue]; *Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 942-43 [different airplane]; *Eichler Homes, Inc. v. Anderson* (1970) 9 Cal.App.3d 224 [different heating system].)

Where there is any question as to the identity of the facts and the issue, especially if there is a public interest in the decision, collateral estoppel will not be applied. (*Mountain Home Properties, Inc. v. Pine Mountain Lake Ass'n* (1982) 135 Cal.App.3d 959, 965-66.) The facts and Administrative Records involving the 2001 and 2012 Permits are clearly not "identical," which is obvious when one considers the fact that the Permits are different administrative decisions and are separated by an 11 year time span.

In short, the factual issues in dispute with the 2012 Permit are far different, given the significantly different administrative records and facts. For example, the Stormwater Quality Panel Recommendations to the California State Water Resources Contract Board

were not in existence at the time of the adoption of its 2001 Permit. Nor were any of the 33 TMDLs (and the accompanying TMDL Reports) or the resulting waste load allocations which have been incorporated into the 2012 Permit.

The NRDC's reliance on the doctrine of collateral estoppel is frivolous.

C. The Cities Of Duarte and Huntington Park Were Not Parties To The Petition Or Litigation Involving The 2001 Permit.

The Cities of Duarte and Huntington Park were not parties to the 2001 Administrative Petition process, nor to the litigation involving the 2001 Permit. Furthermore, the fact that they were identified as real parties in interest does not mean they were active in the litigation, or that they were required, simply because some other party named them as a real party in interest, to jump into a lengthy and expensive litigation.

The requirement that the person to be bound by the prior judgment has been a party or in privity with a party in the prior action arises from due process. (*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 874.) Contrary to NRDC's representations, the Cities of Duarte and Huntington Park are ***not*** deemed to be in privity with those parties involved in the 2001 Permit litigation, merely because they may have been interested in and affected by the outcome of the action:

> A person neither a party nor in privity is **not bound** by a judgment. It is **immaterial that he may have been vitally interested in and directly affected by the outcome of the action**; due process requires that he have his own day in court.

(*County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 347, emphasis added.)

The various permittee cities are wholly independent of each other and are not agents for one another. The NRDC's basic assumption that all cities in Los Angeles County think and do the same, and have the same legal interests and positions, is inaccurate and unsupportable. The Cities herein did not participate in the prior action, and the claims in the prior action were not the Cities' claims. When a prior action is not brought as a representative action, it cannot be treated as one to support a res judicata/collateral estoppel defense in a subsequent action. (*See. e.g. Jensen v. Civil Service Comm'n* (1935)

4 Cal.2d 334, 335.)

Further, the fact that the Cities could have been joined as a party in the prior action is of no significance when the Cities were not actually joined. (*Pancoast v. Russel* (1957) 148 Cal.App.2d 909.) The Cities of Duarte and Huntington Park are similarly not in privity with those cities who were involved in the 2001 Permit challenged just because their counsel represented other entities in the prior action. (*Rodgers v. Sergeant Controls & Aerospace* (2006) 136 Cal.App.4th 82, 93 ["That [Petitioners are] represented by the same counsel as were the plaintiffs in the prior action does not . . . suffice to extend the doctrine of privity in this case."].)

Duarte and Huntington Park's lack of involvement in the prior action shows that the cases cited by NRDC on this issue are distinguishable. (*See e.g., Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 719-720 [plaintiff "rigorously participated" in the prior action].)

D. The NRDC Collateral Estoppel Claim Cannot Be Based On A Trial Court Decision Affirmed Based on Different Reasoning On Appeal.

In a footnote, the NRDC acknowledges that the trial court's *L.A. County Mun. Stormwater* decision was affirmed on appeal. (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985.) Incredibly, however, the NRDC fails to mention that the Appellate Court affirmed the trial court's decision on the RWL language based on ***different reasoning*** than that relied upon by the trial court.

If a trial court relies on alternative grounds to support its decision, and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds ***actually relied*** upon by the appellate court can establish a basis for collateral estoppel. (See *Zevnick v. Superior Court*, *supra*, 159 Cal.App.4th 76, 79; Schwing, California Affirmative Defenses, vol 1 2013 Edition, § 15.6, p. 1042.) In *Zevnick*, the court concluded that the judgment entitled to collateral estoppel effect was the appellate judgment that incorporated the determinations made by the trial court in support of the court's stated ground of decision, but did not incorporate the determinations made by the

trial court in support of alternative grounds for the trial court decision that were not reviewed on appeal. "[A]fter review by an appellate court, ***the final decision and the issues 'necessarily decided' for purposes of collateral estoppel encompass only the grounds relied on by the appellate court.***" (*Zevnick, supra*, 159 Cal.App.4th at 84. The failure to review an alternative ground on appeal had the same effect as the absence of an opportunity for review and resulted in no collateral estoppel as to that alternative ground. (*Id.* at 85.)

In this case, in the unpublished portion of its decision in *County of Los Angeles v. State Board*, the Court of Appeal specifically addressed the various 2001 Permittees' arguments involving the RWL language therein, and made no findings or determinations that would in any way prevent the Petitioning cities here from challenging the 2012 Permit terms. (Exhibit "C" hereto is a copy of the complete Appellate Court Opinion, including the unpublished portion of the Opinion.) In fact, contrary to the trial court's decision on the 2001 Permit, the Appellate Court recognized that the factors set forth under CWC section 13241 are required to be considered when a regional board issues an NPDES permit. (*See, e.g.*, Exhibit "C", *County of Los Angeles v. State Board* decision, p. 31: "Water Code section 13241, subdivision (d) requires that the regional board consider the economic effect including the cost of compliance of the issuance of the permit.")

Moreover, a close review of the unpublished portion of the Court of Appeal's decision shows that the Appellate Court made its decision on the RWL issues primarily based on the evidence in the Administrative Record. (*See, e.g., County of Los Angeles v. State Board* Appellate Decision, Exhibit "C" hereto, p. 30 ["There is substantial evidence the permit imposes reasonable pollutant discharge requirements.... In footnote 6 of the trial court's March 24, 2005 statement of decision are 16 separate studies or analyses that evaluate the reasonableness of the restrictions at issue. Further, as described below, there was a vast array of reports and official papers that have addressed the reasonableness issues in varying context raging from economics to housing. Substantial evidence supports the trial court's finding that the permits restrictions on pollutant discharge are

reasonable."]; p. 31 ["We agree with the intervenors that there is insufficient facts to permit an evidentiary challenge of the type asserted by the county and the flood control district."]; p. 34 ["This constitutes substantial evidence the regional board considered the costs and benefits of the implementation of the permit."]; and p. 35 ["Thus, there is substantial evidence the regional board considered housing-related issues before it issued the permit."].)

Furthermore, a review of the Appellant Court decision shows that such Court's decision on the RWL language was based on various incoherent legal determinations, all of which are contained in the unpublished portion of the decision. (*See, County of Los Angeles v. State Board Decision*, Exhibit "C", p. 30 ["As can be noted, the regional board is permitted to take into account the maximum extent practicable limitation in setting the total maximum daily load. [Citation.] The regional board's total maximum daily load specification in this case was entirely consistent with federal water quality law. Nothing in the Water Code can circumvent the foregoing federally imposed requirements as to the calculation of the total maximum daily load. [Citation.] And the regional board's authority in setting the total maximum daily load extended to imposing requirements beyond the maximum extent practicable"].)

Here, the Court of Appeal did not rely upon the statements made by the trial court (and cited by the NRDC in its Comments in connection with the RWL Workshop) to reject the various permitees' arguments involving the 2001 Permit on the RWL language. In fact to the contrary, the Court of Appeal corrected the trial court's inaccurate legal conclusion that the section 13241 factors have no application to any NPDES permit, and beyond that, made a series of its own conclusions regarding the ability of the Regional Board to go beyond the MEP standard. (*See* Exhibit "C", p. 30.) Thus, because the NRDC does not rely upon any particular holding of the Court of Appeals' decision (be it in the published or unpublished portion of that decision), and because the NRDC cannot lawfully rely upon a trial court decision trial which was not the basis for the Court of Appeal's affirmation, the NRDC's reliance on the doctrine of collateral estoppel is baseless.

E. The Doctrine Of Collateral Estoppel Cannot Be Applied Here, Where Its Application Would Be Against The Public Interest.

The doctrine of collateral estoppel will not be applied when its application in a particular case would be against the public interest. (C*ity of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [conflicting claims of public entities to water resources], disapproved on other grounds in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1248; *Arcadia Unified School District v. State Dep't of Education*, *supra*, 2 Cal.4th 251, 257-59 ["when the issue is a question of law rather than of fact, the prior determination is not conclusive . . . if the public interest requires that reiteration not be foreclosed"]; *Chern v. Bank of America*, *supra*, 15 Cal.3d 866, 872.)

Thus, the doctrine will not be applied against the government when there is a sound public policy against its application. (*Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal. 2d 749; Schwing, California Affirmative Defenses, vol 1 2013 Edition, § 15.10, pp. 1058-59.)

In addition, the doctrine will not be applied to foreclose relitigation of an issue of law concerning a public entity's ongoing obligation to administer statutes enacted for the public benefit and affecting members of the public not before the court in the first litigation. (See e.g. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64-65 [class action by city on behalf of all local governments in California was not foreclosed by collateral estoppel despite prior action by city and county based on public interest exception]; *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1585-86 [even if different wording of two zoning ordinances did not require rejection of collateral estoppel, the public interest exception would].)

Ewing is instructive. There, a city enacted a zoning ordinance which prohibited the use of residential property for transient commercial purposes for less than 30 consecutive days. A decade before, the city enacted a series of ordinances by which it sought to similarly regulate transient rentals. (*Ewing*, *supra*, 234 Cal.App.3d at 1584.) Homeowners affected by the ordinance challenged the earlier ordinances. (*Id.*) The trial court

permanently enjoined enforcement of the prior ordinance. Some of the same homeowners maintained that the newer ordinance was barred by the doctrine of collateral estoppel.

Given the difference in wording of the two ordinances, the Court indicated that it was doubtful the doctrine of collateral estoppel applied, and concluded that the case came within the public interest exception to the application of the doctrine:

> [A] city and its residents have an abiding and continuing interest in zoning. And a zoning ordinance that does not pass muster today may -- due to changed circumstances, changed language, or changed goals -- pass muster only a decade later. We conclude that, even if the doctrine of collateral estoppel were otherwise applicable, the public interest exception to the doctrine permits a zoning authority to try again.

(*Id.* at 1586.)

Here, the public interest exception would apply as well. The Cities are local governments that have been aggrieved by the 2012 Permit because they are Permittees under the 2012 Permit, and are now being compelled to comply with its terms, terms that were not developed or adopted in accordance with State or federal law, are not supported by the evidence, were adopted in violation of basic tenants of due process, and/or are impossible to comply with. The burden of complying with these infeasible mandates ultimately falls on the public. Thus, it would be contrary to the public interest to apply the doctrine of "collateral estoppel" to bar any Permittee's claims.

F. The Relevant Portions Of The Appellate Decision Were Unpublished And A Court Has Discretion Not To Apply Collateral Estoppel To Those Unpublished Portions.

A court may decline to apply collateral estoppel based on a depublished decision against the same party when it finds the depublished decision unpersuasive. (*Diep v. California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205.) Because the decision on the RWL issues in *County of Los Angeles v. State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, was in the unpublished portion of the Opinion, it may not be cited as legal authority. Furthermore, there is a continuing and demonstrable uncertainty about how the CWA and State law are to be applied to MS4 dischargers, and public policy

dictates that these evolving disputes over important public issues be resolved.

For example, the trial court's decision in *L.A. County Mun. Stormwater* misstates the law and is unpersuasive, where it found that the "California's Porter-Cologne Act, as codified in the Water Code, did not require the Regional Board to Consider economics when issuing the Permit" pursuant to Water Code section 13241 (Statement of Decision From Phase II Trial, p. 21.) This conclusion is expressly contrary to the California Supreme Court's ruling in *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

To apply the doctrine of collateral estoppel in this case and refuse to review applicable law in reviewing the 2012 Permit, would be a miscarriage of justice.

G. The Doctrine of Collateral Estoppel Has No Application To An Administrative Agency's Policy Or Adjudicatory Decisions.

The NRDC asserts, in its Comments on the RWL Policy issues in connection with the Workshop before the State Board, that the doctrine of collateral estoppel, in effect, prevents the State Board from considering whether to change its policy on the RWL language to be included in MS4 Permits across the State. The NRDC is clearly attempting to prevent the State Board from reviewing applicable law, and thus, the Administrative Record when ruling on the various Permittee petitions. Yet, the doctrine of collateral estoppel is not binding on an administrative agency. (*See, e.g., Pacific Lumber Co. v. State* Board (2006) 37 Cal.4th 921, 944 ["We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting."].)

Moreover, the doctrine of collateral estoppel is an equitable defense that only applies to the re-adjudication of issues "actually litigated." It thus has no application to a state agency acting in a quasi legislative fashion, to determine whether it should modify a long established policy.

VI. CONCLUSION

The Regional Board's revisions to the 2012 Permit's RWL compliance

requirements do not implicate the anti-backsliding and anti-degradation requirements of the Act, as the NRDC suggests. Indeed, the RWL language is not an "effluent limitation" developed in accordance with the specific sections listed in 33 U.S.C. § 1342(o), and, therefore, cannot be subject to the anti-backsliding requirements. Moreover, the WMP/EWMP approach presented in the 2012 Permit is designed to improve water quality and will clearly result in greater water quality benefits, not fewer. Therefore, the 2012 Permit cannot implicate the Act's anti-degradation policy. Further, the incorporation of TMDLs into an MS4 Permit as strict numeric limits is clearly not required under the Clean Water Act, and therefore, violates the plain requirements under the Porter-Cologne Act to only include permit terms that are "reasonably achievable," considering the "economic" impacts on the Permittees, as well as the "total values involved, beneficial and detrimental, economic and social, tangible and intangible." (CWC §§ 13263, 13241 and 13000.)

Additionally, the doctrine of collateral estoppel clearly has no application to a subsequent proceeding involving different legal issues, different factual issues, different administrative decisions, different administrative records, different permits (11 years apart) and involving different parties. Even more, the trial court determinations relied upon by the NRDC to make its collateral estoppel argument were not embraced by the Court of Appeal.

The NRDC's Petition lacks merit and should be denied in its entirety.

Respectfully submitted

RUTAN & TUCKER, LLP
RICHARD MONTEVIDEO
JOSEPH LARSEN

Dated: October 14, 2013

By: _____
Richard Montevideo
Attorneys for the Cities of Duarte and Huntington Park

Exhibit "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL CIVIL WEST COURTHOUSE

Lead Case No. **BS 080548**
Related Cases: BS 080753, BS 080758 BS 080791, BS 080792, and 080807
Judge: Hon. Victoria Gerrard Chaney

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LITIGATION

STATEMENT OF DECISION FROM PHASE I TRIAL ON PETITIONS FOR WRIT OF MANDATE

Statement of Decision from Phase I Trial
Hearing: January 7, 2005
Ruling: March 16, 2005
Department: 324-Central Civil West
Date Actions Filed: January 15 & 17, 2003

On May 19-20, 2004, trial was held on Phase I of this bifurcated action, known as *In the Matter of the Los Angeles County Municipal Stormwater Permit*, which involves five coordinated Petitions for Writ of Mandate filed by Petitioners County of Los Angeles and the Los Angeles County Flood Control District (County Petitioners); Petitioners the Cities of Arcadia, Baldwin Park, Bell Gardens, Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Irwindale, Lawndale, Montebello, Paramount, Pico Rivera, Pomona, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Temple City, Vernon, Walnut, West Covina, Whittier, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality

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(Arcadia Petitioners); Petitioners Cities of Monrovia, Norwalk, Rancho Palos Verdes, Artesia, Beverly Hills, Carson, La Mirada, Westlake Village, Agoura Hills, Hidden Hills, San Fernando, and San Marino (Monrovia Petitioners); Petitioner City of Alhambra (Alhambra); and Petitioners Los Angeles County Economic Development Corporation and the Cities of Industry, Lakewood, Santa Clarita and Torrance (LAEDC Petitioners) against the Regional Water Quality Control Board, Los Angeles Region (Regional Board). The Natural Resources Defense Council, Santa Monica Baykeeper, and Heal the Bay (Intervenors) intervened as Respondents in Intervention in support of the Permit.

After full briefing and oral argument, the Court, the Honorable Victoria Gerrard Chaney presiding, issues the following Statement of Decision on the Phase I issues. All parties were present and represented by counsel. Howard Gest appeared on behalf of the County Petitioners; Rufus C. Young and Amy Morgan appeared for the Alhambra and LAEDC Petitioners; Richard Montevideo and Peter Howell appeared for the Arcadia Petitioners; John J. Harris and Evan J. McGinley appeared for the Monrovia Petitioners; Jennifer Novak and Helen Arens, Deputy Attorneys General appeared for the Regional Board; David Beckman, Anjali Jaiswal and Leslie Mintz appeared for the Intervenors. This Statement of Decision applies only to the Phase I issues presented to this Court. All remaining issues are addressed in the Phase II Statement of Decision.

Phase I of this bifurcated proceeding involved the following issues, as framed in the Joint Statement Regarding Briefing and Hearing Schedule, filed on March 2, 2004:

1. Petitioners' allegations that Part 2 of the Permit ("Receiving Water Limitations") is ambiguous, arbitrary, unsupported by the Record, and contrary to the "good faith" safe harbor intentions of the Respondent and renders compliance with the Permit impossible and impracticable;

2. Petitioners' allegations that the Permit exceeds the Respondent's authority under the federal Clean Water Act and California's Porter-Cologne Water Quality Act by imposing requirements that go beyond the Clean Water Act's "maximum extent

practicable" ("MEP") standard and/or the Porter-Cologne Act's "reasonably achievable" standard;

3. Certain Petitioners' allegations that the Permit unlawfully regulates discharges "into", as opposed to only "from", the municipal separate storm sewer system contrary to the Clean Water Act and without authority under the Porter-Cologne Act;

4. Petitioners' allegations that Respondent acted without authority by adopting Permit terms that unlawfully direct Petitioners to modify their General Plans and/or their CEQA guidelines, and that unlawfully compel Petitioners to review development projects in a manner that is contrary to or different from the process provided for by the California Legislature, with Respondent violating the Separation of Powers doctrine under the California Constitution;

5. Certain Petitioners' allegations that the Permit unlawfully interferes with their land use authority; and

6. Petitioners' allegations that the Permit was adopted in violation of CEQA, as Respondent failed to comply with the environmental review requirements of CEQA. (To what extent was the Respondent required to comply with CEQA in adopting the Permit and did the Respondent so comply.)

Holding

With some caveats, the Court denies the petitions for writ of mandate as they relate to the Phase I issues.

To obtain a writ of mandate under Code of Civil Procedure section 1094.5, Petitioners must prove that Respondent, the Regional Board: 1) proceeded without or in excess of jurisdiction; 2) issued its Permit without first holding a fair hearing; or 3) prejudicially abused its discretion. Abuse of discretion is established if the Respondent: a) has not proceeded in a manner required by law; b) the Permit is not supported by findings; or c) the findings are not supported by the evidence.

Petitioners failed to demonstrate that Respondent exceeded its jurisdiction.

Petitioners do not appear to argue that the Permit was issued without a fair hearing. If this argument were made, 80,000 pages of the administrative record ("the Record") and approximately 50 meetings between Regional Board staff and interested parties would confute the argument.

Neither have Petitioners demonstrated that Respondent failed to proceed in a manner required by law, that the Permit is unsupported by the findings, or that the findings are unsupported by the evidence. Therefore, the Court finds no prejudicial abuse of discretion.

Permit Part 2: Receiving Water Limitations

Petitioners assert several arguments with respect to Part 2 of the Permit, Receiving Waters Limitations. In particular, Petitioners assert that subparts 2.1, 2.2, 2.3, and 2.4 of Part 2 create ambiguity, that Part 2 must include a "safe harbor" provision, and that the Permit, including Part 2, unlawfully exceeds the MEP standard.

The Permit cannot be read in a vacuum. In interpreting the Permit the Court looks to the content of Part 2, other language and provisions in the Permit, other related statutes and regulations, and the technical and specialized nature of NPDES permits together with the expertise of those who implement them. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1696; see also *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 982; *United States v. Weitzenhoff* (9th Cir. 1994) 35 F.3d 1275, 1289.)

The terms of the Permit are governed by 33 U.S.C. section 1342, subdivision (p)(3)(B) of the Clean Water Act, which includes the "requirement to effectively prohibit non-stormwater discharges into the storm sewers"; the Maximum Extent Practicable standard[1]; and the separate

[1] See Permit at 57 citing (*In the Matter of the Petitions of the Cities of Bellflower et al.* (Oct. 5, 2000) SWRCB WQ 2000-11 at 20 (R007511); see Memorandum from Elizabeth Miller Jennings, Senior Staff Counsel, SWRCB, *Definition of Maximum Extent Practicable* (Feb. 11, 1993) at 3 (R0028353); 40 C.F.R. §122.26(d)(2)(iv); *NRDC v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1375; *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1296, 1308; *Browner* 191 F.3d at

authority of the Regional Board to require "such other provisions" necessary to meet water quality standards. The Permit is governed also by the Porter-Cologne Act section 13263, to the extent it is not inconsistent with federal law; and Part 2 should be interpreted in light of the findings of experts, including the Regional Board,[2] precedential orders,[3] and related Clean Water Act provisions, such as those that provide for the adoption of TMDLs.[4]

Pursuant to these authorities and guides, the Court rejects Petitioners' assertion that the MEP standard is the sole standard that applies to municipal storm water discharges and their related contention that MEP is a substantive upper limit on requirements that can be imposed to meet water quality standards. In *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 (*Defenders of Wildlife*), the Ninth Circuit noted: "Under that discretionary provision [of Section 402(p)(3)(B)], the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards." (191 F.3d at p. 1166.) The Regional Board, which is authorized to enforce the Clean Water Act pursuant to Water Code

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1168-67 (permitting authority's broad discretion to specify BMPs and determine whether MEP is satisfied).

[2] See, e.g., Long Beach Municipal Stormwater Permit (Los Angeles RWQCB Order 99-060 at 6-7 (R0008599-600); Ventura County Municipal Stormwater Permit (Los Angeles RWQCB Order 00-108) at 9 (R0008753); Caltrans Stormwater Permit (State Board 99-06) at 10-11 (R0003225); Ltr from Alexis Strauss, Acting Director, Division of Water, EPA Region IX (Mar. 17, 1998) at 2 (R0008582); 61 Fed.Reg. 43,761 *EPA Interim Permitting Approach*; Memorandum from Michael A.M. Lauffer, Staff Counsel, SWRCB, *Legal Issues Concerning Renewal of Order 96-054* (Nov. 9, 2001) at 12 (R0007374); Memorandum from Regional Board Staff for Nov. 29, 2001 Meeting at A.9-A.10 (R0006796-97).

[3] See, e.g., *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 98-01 at 5 (R0001973) amended by *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 99-05 at 1-2 (R0001965-66) ("as a precedent decision, the following receiving water limitation language shall be included in future municipal storm water permits" without a safe harbor) (R0001965-66); *In the Matter of the Petitions of BIA*, SWRCB WQ 2001-15 at 5-7 (R0007530-32); see also *In the Matter of the Petition of Citizens for a Better Environment, et al.* SWRCB order 91-03 at 36 (R0066466).

[4] See Fact Sheet 14-15 (R0008047-48); 40 C.F.R. § 122.44(a)(1) (TMDL implementation in stormwater management plans), 40 C.F.R. § 130.6(c)(1); Cal. Water Code § 13263.

sections 13370 and 13377, can also require compliance with water quality standards. (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal. App. 4th 866 (*Building Industry Association*) [rejecting the claim that the MEP standard is the exclusive measure that may be applied to municipal storm sewer discharges].)

It seems clear that the Regional Board followed these principles when it established subparts 2.1 and 2.2 as the basic receiving water requirements for Los Angeles area waters and subparts 2.3 and 2.4 as the procedure the Board intends to implement to resolve any violations those requirements. (See *Building Industry Association*, *supra*, 124 Cal.App.4th at p. 890 ["Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards."]; see generally *Defenders of Wildlife*, *supra*, 191 F.3d 1159; *NRDC v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1375; *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1296, 1308.)

Under this process, the first step to correct water quality violations that occur, even if a permittees' SQMP has been designed to achieve standards and BMPs have been timely implemented, is set forth in subpart 2.3, the "iterative" process. Should that not be sufficient, the parties would move to subpart 2.4, Best Management Practices (BMP) requirements. The process requires cooperation from the Regional Board, State Board and local government entities and impliedly requires that all parties work together in good faith.

This reading is consistent with the requirements of the Clean Water Act generally and section 402 specifically, as well as the Porter-Cologne Act. (See 33 U.S.C. § 1342(p)(3)(B)(iii); 33 U.S.C. §§ 1341(a)(1)-(2), 1342(a)(2), 1342(p)(3)(B)(ii); 40 C.F.R. 122.4(d); Cal. Water Code §§ 13000, 13263(a).) It is also consistent with State Board orders WQ 2001-15 and WQ 99-05 and the Francine Diamond letter, found at Exhibit B to Petitioners' Request for Judicial Notice.

Reading the Receiving Waters Limitations language in this manner, there is no tension between the subparts and no ambiguity.

Petitioners assert that the Regional Board was required under the Porter-Cologne Act and CEQA to consider certain factors when issuing the Permit, including economics, reasonably achievable water quality conditions, potential and environmental impacts, alternatives to the proposed requirements and mitigation measures for any requirements adopted. In a later section of this Statement of Decision and in the Statement of Decision from Phase II of trial the Court rejects these arguments but finds that in any event the Regional Board met any such obligations by considering these factors in addressing the MEP standard. In addition, where applicable, the Total Maximum Daily Load (TMDL) procedures allow for correction of water quality problems in a graded manner over a period of years. The TMDL procedures provide some protection from unreasonable enforcement by the Regional Board.

In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a "safe harbor," whether or not compliance therewith requires efforts that exceed the "MEP" standard. *(Defenders of Wildlife*, supra, 191 F.3d 1159; *Building Industry Association* 124 Cal. App. 4th at p. 884.) In so concluding, the Court gives deference to State Board order 99-05, a precedential decision under Government Code section 11425.60, and notes the EPA's objection to specific safe harbor language. (See *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 99-05 at 1-2 (R0001965-66); see also Letter from Alexis Strauss, Acting Director, Division of Water, EPA Region IX (Mar. 17, 1998) at 2 (R0008582).) The Court emphasizes the importance of good faith on the part of all parties in implementing Part 2.

Maximum Extent Practicable Standard

Further, Petitioners assert that the Permit cannot go beyond the maximum extent practicable ("MEP") standard under the Clean Water Act and this Permit is inconsistent with the MEP standard. As noted, even if the Permit did exceed the MEP standard, the Regional Board was within its authority in requiring more stringent standards. However, the Court finds that the administrative record contains significant evidence showing that the terms of the Permit taken, as

a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged Permit provisions. There is significant evidence in the administrative record that the Regional Board looked to both other states and jurisdictions, and conducted its own independent studies regarding various methods for compliance with MEP.[5] This Court specifically finds that the Regional Board conducted considerable research and review to ensure that the best management practices ("BMPs") were available and reasonable.[6] For example, the administrative record contains *The Fundamentals of Urban Runoff Management: Technical and Institutional Issues*, which demonstrated an effective and available method for removing

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[5] See, e.g., Permit at 14 (development and redevelopment activities); Permit at 18 (implementation of all BMPs in SQMP); Final Fact Sheet/Staff Report (Dec. 13, 2001) ("Fact Sheet") at 15-17 (public education and participation) (R0008048-50); Fact Sheet at 19-25 (industrial/commercial program and inspections) (R0008052-58); Fact Sheet at 38-40 (public agency activity) (R0008071-73); Fact Sheet at 40-45 (development and redevelopment activity) (R0008073-78); Long Beach Municipal Stormwater Permit (Los Angeles RWQCB Order 99-060 (R0008599-600); Ventura County Municipal Stormwater Permit (Los Angeles RWQCB Order 00-108) (R0008753); Caltrans Stormwater Permit (State Board 99-06) at 10-11 (R0003225).Comparison of Permit with Orange County and Santa Clara Permit (R0031402); Orange County Permit Proposed Monitoring Program (R0054938); Riverside Permit (R0055287-88); Denver Urban Stormwater Drainage Manual (R0056744-46); San Francisco BMPs (R0057414); Watershed Ordinance for Austin, TX (R0058074); Orange County DAMP (R0058399); San Bernardino Permit (R0061460); Ventura Permit (R0061493); Fresno Permit (R0061511); Sacramento Permit (R0061585); San Francisco Bay Area Permit (R0061636); Santa Cruz Region Permit (R0061652); Sarasota Permit (R0061666); Tulsa Permit (R0061773); Anchorage Permit (R0061805) (New York State Stormwater Management Design Manual (R0009514); Virginia Stormwater Management Manual (R0009529).

[6] See, e.g., Allison, Robin, Effectiveness of Two Storm Water Trash Trapping Systems (R0068962-63); Leecaster, Molly K., Assessment of Efficient Sampling Designs for Urban Stormwater Monitoring (R0022854-60); Radulescu, Dan, Storm Water Quality Task Force BMP Guide for Retail Gasoline Outlets (Nov. 2001) (R0007546-50); Radulescu, Dan, Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts (Dec. 2001) (R0007598-607); Dallman, Suzanne, Storm Water: Asset not Liability (Dec. 3, 1999) (R0068878-913); Pitt, Robert, Illicit Discharge Detection and Elimination (May 2001) (R0011273); Swamikannu, Xavier, SUSMPs Presentation to the Regional Board (Jan. 26, 2000) (R0068726-40); Othmer, Edward F., Performance Evaluation of Structural BMPs: Drain Inlet Inserts (R0007566-78); Los Angeles County Requirements, Section Three (R0068875-77); Schueler, Thomas, R., Better Site Design: Changing Development Rules to Protect the Environment (1999) (R0068693-95); A Guide to Better Site Planning (R0068868-73); Urban Runoff: New Development Management Measure (R0068713-22); Ferguson, Bruce K., Stormwater Infiltration (R0068914-15); Horner, Richard R., Fundamentals of Urban Runoff Management: Technical and Institutional Issues (Aug. 1994) (R0068930-61); Ltr from NRDC to Regional Board re: SUSMPs (Jan. 14, 2000) (R0068840-61).

pollutants. (Horner, R., *Fundamentals of Urban Runoff Management: Technical and Institutional Issues* (Aug. 1994) (R0068930).) The administrative record also shows that the Regional Board considered State Board order 2000-11, which held that the Standard Urban Stormwater Mitigation Plans ("SUSMPs") "are consistent with MEP and therefore are federally mandated." (*In Re Cities of Bellflower, et al.* (2000) SWRCB Order 2000-11 (R0007506).) Additional challenges to the SUSMPs are rejected in the Statement of Decision from Phase II of trial in deciding Issue 6.

The Court finds that there was no issue of impossibility. The administrative record demonstrates that there are (1) BMPs available to meet the terms of the Permit consistent with the MEP standard, and (2) that those BMPs are reasonable. The administrative record supports the conclusion that the research and review were conducted by the Respondent.[7]

This Court finds based on the administrative record that the Regional Board made considerable findings regarding (1) the positive effects of storm water management and (2) the cost of potential programs and BMPs. (See e.g. Permit at 2-4, 8-10, 12-14; Fact Sheet at 3-7 (R0008036-40).) The Regional Board considered the history of implementation costs, both in prior permits for Petitioners and costs in other states.[8]

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[7] See *supra* notes 7 and 8; see also Addendum (consideration of EPA documents).

[8] See, e.g., Yamaguchi, Marianne, *Comparative Cost of the LA County Storm Water Management Program* (June 10, 1996) (R0031426-30; R0031431-44); Regional Board, Slide Presentation of MS4 Permit (Dec. 13, 2001) (R0007660); SUSMPs, *BMP Cost Estimates* (Nov. 30, 1999) (R0068731-33); Santa Monica Bay Tourism and Recreational Beach Use (1994) (R0031447); Los Angeles 1998 Economic and Demographic Info. (1998) (R0010984-85); Permit Costs, City of Manhattan Beach (June 17, 1996) (R0031445); U.S. EPA, *Economic Benefits of Runoff Controls* (Sept. 1995) (R0010711-12); U.S. EPA, *Data Summary of Urban Stormwater Best Management Practices* (Aug. 1999) (R0010735-36); *Cost and Benefits of Storm Water BMPs* (Sept. 14, 1998) (R0073087-135); U.S. EPA, *Economic Analysis of the Storm Water Phase II Rule* (Aug. 1, 1997) (R0010281-82); U.S. EPA, *Liquid Assets: A Summertime Perspective on the Importance of Clean Water to the Nation's Economy* (May 1996) (R0066961); The Role of Metropolitan Areas in the National Economy (R0011017); *The Benefits of Better Site Design in Commercial Development* (R0011499-508); Billingsley, Janice, *Study Nails Building Costs* (Sept. 4, 2000) (R0010703); U.S. Dept. of Commerce, *Economic Valuation of Natural Resources: A Handbook for Coastal Resource Policymakers* (June 1995)

CEQA Compliance

Several Petitioners assert that the Court should invalidate the action of the Regional Board on the grounds that the Regional Board failed to comply with the California Environmental Quality Act (CEQA), and failed to conduct the necessary environmental review required by CEQA. They acknowledge that in issuing a National Pollutant Discharge Elimination System (NPDES) permit, the Regional Board is exempt from complying with CEQA's requirement to prepare Environmental Impact Reports or negative declarations. (See Wat. Code, § 13389; Cal. Code of Regs., Title 14, § 15263; *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847, 862.) Petitioners allege that the Regional Board was to comply with the "policy" requirements of CEQA, pointing to Public Resources Code sections 21000 and 21001.

The Court rejects the argument that the Regional Board violated CEQA. The Court agrees with the Regional Board that the issuance of the subject Permit was exempt from all aspects of CEQA. The Court acknowledges the State Board's finding that complying with CEQA's "policy" provisions means that in adopting the Permit, the Regional Board should consider any environmental reports or similar documents submitted during the adoption process. (See State Board Orders WQ 75-8 & 84-7, attached to Petitioners' Request for Judicial Notice as Exhibits D & E.) This interpretation of CEQA is consistent with the Legislature's stated intent that the environmental review documents contain the discussion of any adverse environmental impacts, alternatives, mitigation possibilities, etc. (Pub. Resources Code, §§ 21002.1, 21003.1;

(R0042398); Griffin, Adrian, *Economic Issues in Water Quality Regulation* (R0010706-07); U.S. Conference of Mayors, *U.S. Metro Economies: The Engines of America's Growth* (July 2001) (R0010916, R0010918); Washington State Dept. of Transport. and Ecology, *Cost Analysis, Washington Dept. of Ecology Year 2001* (Aug. 30, 2001) (R0010780); Virginia Dept. of Conservation and Recreation, *The Economic Benefits of Protecting Virginia's Streams, Lakes, and Wetlands* (Oct. 2001) (R0010880-85; R0010909-11).

cf. Cal. Code of Regs., title 14, § 15063.) CEQA requires public agencies to generate sufficiently informative documents so that decisions are made with full consideration of the environmental consequences. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) This makes the environmental impact report the "heart" of CEQA, (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229 [citation omitted]). Petitioners' arguments cannot be accepted because they would render the Regional Board's exemption from this requirement illusory. Petitioners have not argued that the Regional Board failed to consider existing environmental documents as provided in State Board orders 75-8 and 84-7. The Court finds that the Regional Board had before it and considered the necessary information concerning the environment.

In addition, having found the Permit is consistent with the Clean Water Act with respect to the MEP standard and other Phase I issues, the Court respectfully disagrees with Petitioners' contention that the Permit goes "far beyond" the Clean Water Act's mandates. Also, a finding that the Permit's adoption was not bound by these CEQA reporting requirements is consistent with Congress' intent to streamline environmental regulation. (See 33 U.S.C. § 1371, subd. (c); *Pacific Legal Foundation v. Quarles* (C.D. Cal. 1977) 440 F.Supp 316, 320-21 & fn. 2.) Under the Porter-Cologne Act, a California-issued NPDES permit must be consistent with federal law and intent. (See Wat. Code, §§ 13370, 13372; *Pacific Water Conditioning v. City Council of Riverside* (1977) 73 Cal.App.3d 546, 556.)

The Court therefore finds that in adopting the Permit, the Regional Board did not act in a manner that was contrary to law, outside the scope of its authority or without the support of the weight of evidence in the record with respect to Petitioners' CEQA violation claim.

CEQA Amendment Claim

Turning next to Petitioners' claim that the Permit violates the separation of powers and unlawfully "amends" the CEQA process, the Court finds that Petitioners have not met their burden under section 1094.5. Petitioners' argument rests on the belief that CEQA occupies the field of environmental review. Petitioners present no authority to demonstrate this alleged legislative intent.

Public Resources Code section 21003 demonstrates that the Legislature intended CEQA to be *an* environmental review process, not the *only* one. When more than one review occurs, these should be coordinated as much as possible. The plain language of this statute supports this reading. Given the powers vested in the Regional Board to implement water quality control and coordination under the Porter-Cologne Act, the Regional Board can require additional environmental reviews consistent with this authority and it can specify and require actions to ameliorate the impacts of polluted runoff without offending CEQA. (See, e.g., Pub. Resources Code, § 21174; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.)

The Court also finds that the equitable doctrines of estoppel, laches and waiver apply here. When applying for their 1996 permit, the permittees advised the Regional Board that much of their storm water consideration could be "channeled" through the compliance effort of CEQA. (R0060482.) They proposed coordination with their existing CEQA processes, finding that the CEQA checklist to assess initial studies could also indirectly address potential impacts to storm water, with additions to the form. (R0060482, 0060555, 0060629.) The 1996 permit therefore included a requirement that permittees amend their CEQA review process to include storm water considerations. (R0008514.) Indeed, it imposed a deadline of 1998 to develop CEQA guidelines and 1999 to incorporate them into the permittees' internal procedures. (R008514, R008510.)

Yet none of these Petitioners availed themselves of the right to challenge this provision to the State Board under Porter-Cologne Act section 13320. At argument, Petitioners represented that they complied with the 1996 permit's requirements. In addition, when applying for the subject Permit, they proposed that this provision be added to the Permit. (R0000032.) This conduct is inconsistent with their current position. The equitable doctrines of waiver, laches and estoppel can apply to municipalities. (See, e.g., *City of Los Angeles v. County of Los Angeles* (1937) 9 Cal.2d 624, 628, 630; *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 820.) The Court is satisfied under these facts that those doctrines apply here to bar Petitioners' claims on this issue.

General Plan Amendment Claim

Along a similar vein, Petitioners argue that the Permit, specifically the sections on new development and redevelopment and General Plans, constitutes land use planning, infringing upon the municipalities' land use authority. The Court respectfully disagrees with the Alhambra and LAEDC Petitioners and follows *California Coastal Commission v. Granite Rock* (1987) 480 U.S. 572 [107 S.Ct. 1419] holding that an environmental regulation is not a land use regulation. The Court finds that these are environmental regulations that do not dictate the manner in which the permittees are to use the land. Instead, while there may be some limitations, this court finds these sections represent environmental regulations, not land use regulations. These regulations are clearly for the greater good. The Permit itself notes that the Regional Board did not intend the Permit to restrict or control local land use decision-making authority, but contemplated that while permittees exercised that authority, they fulfilled Clean Water Act requirements to reduce the discharge of pollutants from new development and redevelopment activities. (Permit, at p. 14.)

In addition, the cases which Petitioners cite regarding land use planning stand for the general proposition that land use planning falls within the authority of local governments and agencies. Yet even then, land use planning must be consistent with general laws. The California Constitution Article 11 section 7 states that a county or city may not enact laws that conflict with general laws. This position is further supported by the case of *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 532 for matters of statewide concern. The Porter-Cologne Act contains the Legislature's finding that water quality is a matter of statewide concern, requiring a statewide program administered at a regional level. (See, e.g., Wat. Code, § 13000; see also generally *Southern California Edison v. State Water Resources Control Board* (1981) 116 Cal.App.3d 751, 758.) 33 U.S.C. section 1251 has a companion policy statement in the Clean Water Act, where Congress found that water quality is a matter of federal concern.

In this connection, the Court disagrees with the Arcadia Petitioners that the Regional Board cannot act on behalf of the State Board. The Porter-Cologne Act sections 13001 and 13225 clearly authorize a regional board to act on behalf of the State Board. Additionally, it makes more sense to allow a regional board to act on behalf of the State Board because a regional board would be more aware of the specific problems in its area/region of the state as compared to the State Board. If permittees and other interested parties had to deal with one large board, as opposed to larger regional boards, then there would not necessarily be specialists in the particular problems of that region, such as clay soil, mountains or other unique features not occurring in different regions. (*e.g.* Northern California, the farming communities, Central California, and Los Angeles County metropolis are unique.) Allowing regional boards provides greater efficiency by processing the permits more expeditiously by specialists in specific areas.

Porter-Cologne Act section 13001 gives the Water Board primary responsibility to control and coordinate water quality, with a broad grant of authority. However, Porter-Cologne

Act section 13225 empowers the Regional Board with regional duties and obligations to prevent and abate problems and set water policies which deal with water pollution and nuisances. Porter-Cologne Act section 13240 allows for the adoption of plans by the Regional Board, which clearly gives the Regional Board authority to act in this instance, and Porter-Cologne Act section 13002 gives the Regional Board authority over local government entities.

The Court also finds that the equitable doctrines of waiver, laches and estoppel do apply to bar Petitioners' land use allegations. This finding is based on Petitioners' own actions and proposals, as well as the 1996 permit. As early as 1995, the permittees submitted an application for the 1996 permit in which they indicated that their General Plans were the legal "backbone" for the planning process and all development approvals must be consistent with the policies, objectives and principles set forth in the General Plan. They further offered: "Discussion of stormwater issues in the General Plan could greatly enhance the awareness of the issues and encourage full assessment of possible adverse impacts on stormwater quality as the result of new and redevelopment." (R0060556.) The 1996 permit, at section 3(b) included a requirement that each permittee include watershed and storm water management considerations whenever the relevant portions of its General Plan were amended. (R0008514.) None of the parties before the Court today challenged, either administratively or judicially, this requirement in the 1996 permit.

Petitioners argue that they were not required to challenge this provision in the 1996 permit but were entitled to simply tolerate it. However, as with the CEQA arguments, their current position regarding land use are contradicted by the fact that when applying for the current permit, they specifically requested inclusion of this provision. In their proposed permit, they included a requirement similar to the one found in the 1996 permit and virtually identical to the one that the Regional Board eventually included in the challenged Permit. (See R00000032, Permit at p. 41.) Respondent and Intervenors have noted that prior permits and the permittees'

application for a permit serve as the basis for drafting and adopting a subsequent permit. In drafting and adopting the subject Permit, the Regional Board considered and relied upon programs implemented and proposed by the permittees. This series of events and actions satisfy the Court that the equitable doctrines of waiver, estoppel and laches apply.

Discharges "Into" and "From" the Storm Drain System

The Court denies the petitions for writ of mandate with respect to the "into" versus "from" argument. First, Respondent and Intervenors have demonstrated that the Clean Water Act itself uses the words "in" or "into," not just "from." (See, e.g., 33 U.S.C. § 1342(p)(3)(B)(ii); 40 C.F.R. § 122.26(d)(1)(ii), 122.26(d)(1)(v)(B), 122.26(d)(2)(iv)(D), 122(d)(2)(iv)(B); 122.26(d)(1)(v), 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(iv)(A), 122.26(d)(2)(iv)(A)(2).)

Second, the Clean Water Act section 402(p)(3)(B)(ii) prohibits the discharge of non-stormwater "into" storm sewers. (33 U.S.C. 1342(p)(3)(B)(ii).) The administrative record also contains an admission by Petitioners that "the most effective way of dealing with stormwater runoff is to deal with it at the source before it becomes a problem"—before it goes into the system. (Ltr from Executive Advisory Committee (Aug. 6, 2001) (R0004878).) In addition, State Board 2001-15, discuses the "into" versus "from" issue, stating, "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control." (*In re Building Industry Association of San Diego County, et al.* (2001) SWRCB Order 2001-15 at 10 (R0007535).)

Third, although this Court recognizes that it may not always be possible to prevent something from going into the system, it probably is the cheapest method. If something does not go in, then there is no concern about it coming out the other end. If the contaminant does not enter the system, there is no need to process it at the end of the system. If the system is

overloaded at the final point by flood, for example, there are less toxic materials which could then enter the general water system.

Fourth, the Court does not look at the word "in" in quite as restrictive a manner as the Arcadia and Monrovia Petitioners. The Arcadia and Monrovia Petitioners argued that the word "in" only relates to the point of origin, and that this limits petitioner's ability to set regional controls. However, what constitutes "in" depends on at what point one looks at the storm drain system. Analogizing the storm drain system to a tree, any of the junctures between one little leaf, the first little branch, twig, or a slightly larger branch, could be either from or into a regional control or "from" that and "into" the larger system. The Court finds that the Permit's regulation of what goes "into" the storm drain does not take away from the Petitioners' rights and needs to control the process.

Finally, by regulating discharges into the storm drain system, Petitioners have the opportunity to try to deal with it at the source of the contamination, like the car wash example mentioned by the County Petitioners. It would allow Petitioners to review the car wash's activities and stop the point of the contamination, while still permitting Petitioners to deal with the regions. Petitioners could potentially control an area of five square miles at the source and also operate a larger detention basin or treatment facility, as the Arcadia Petitioners referred to as a regional approach. Regulating discharges "into" the storm drain system does not take away from the regional approach as argued by the Arcadia Petitioners. Thus, this Court resolves this issue in favor of the Regional Board and Intervenors.

IT IS SO ORDERED.

Dated: March ~~16~~ 24, 2005

VICTORIA GERRARD CHANEY
JUDGE OF THE SUPERIOR COURT

Addendum
Examples of Regional Board Consideration of US EPA Documents

US EPA, *Draft Data Summary for the Construction and Development Industry* (Feb. 2001) (R0020445)

US EPA, *Estuarine and Coastal Marine Waters: Bioassessment and Biocriteria Technical Guidance* (Dec. 2000) (R0022664)

US EPA, *National Conference on Tools for Urban Water Resource Management & Protection* – Proceedings, Chicago, IL. Feb. 7-10, 2000 (July 2000) (R0019356)

US EPA, *Storm Water Phase II Compliance Assistance Guide* (March 2000) (R0010593)

US EPA, *Report to Congress on the Phase II Storm Water Regulations* (Oct. 1999) (R0010418)

US EPA, *Storm Water O&M Fact Sheet: Catch Basin Cleaning* (September 1999) (R0022652)

US EPA, *Storm Water Technology Fact Sheet: Sand Filters* (Sept. 1999) (R0022645)

US EPA, *Storm Water Technology Fact Sheet: Water Quality Inlets* (Sept. 1999) (R0022639)

US EPA, *Storm Water Management Fact Sheet: Record Keeping* (Sept. 1999) (R0017615)

US EPA, *Storm Water Management Fact Sheet: Coverings* (Sept. 1999) (R0017612)

US EPA, *Preliminary Data Summary of Urban Storm Water Best Management Practices* (Aug. 1999) (R0017609)

US EPA, *National Conference on Retrofit Opportunities for Water Resource Protection in Urban Environments* – Proceedings, Chicago, IL, Feb. 9-12, 1998 (July 1999) (R0022320)

US EPA, *Guidance on Storm Water Drainage Wells* (Interim Final) (May 1998) (R0022206)

US EPA, *Economic Analysis of the Storm Water Phase II Proposed Rule: Initial Final Draft*, (Aug. 1, 1997) (R0010281)

US EPA, Seminar Publication: *National Conference on Environmental Problem-Solving with Geographic Information Systems*, Cincinnati, Ohio. Sept. 21-23, 1994 (September 1995) (R0021617)

US EPA, *Economic Benefits of Runoff Controls* (Sept. 1995) (R0010711)

US EPA, Seminar Publication: *National Conference on Urban Runoff Management: Enhancing Urban Watershed Management at the Local, County, and State Level* – March 30-April 2, 1993 – Chicago, IL. (April 1995) (R0015620)

US EPA, *Storm Water Discharges Potentially Addressed by Phase II of The National Pollutant Discharge Elimination System Storm Water Program* - Report to Congress (March 1995) (R0037330)

US EPA, *Storm Water Discharges Potentially Addressed By Phase II of the National Pollutant Discharge Elimination System Storm Water Program* – Report to Congress, (March 1995) (R0015026)

US EPA, *Changing the Course of California's Water* (1995) (R0033798)

US EPA, *NPDES Compliance Inspection Manual* (Sept. 1994) (R0014466)

US EPA, *A State and Local Government Guide to Environmental Program Funding Alternatives* (Jan. 1994) (R0038104)

US EPA, *Guidance Manual for Implementing Municipal Storm Water Management Programs* – Chapters 1-4 (Aug. 17, 1994) (R0013925)

US EPA, Pitt, Robert, Clark, Shirley, and Parmer, Keith, *Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration* (May 1994) (R0022959)

US EPA, *Overview of the Storm Water Program* (Oct. 1993) (R0010064 – 66)

US EPA, Handbook – *Urban Runoff Pollution Prevention and Control Planning* (September 1993) (R0009753 – 54)

US EPA, NPDES Storm Water Program: Question and Answer Document, Volume II (July 1993) (R0008386 – 87)

US EPA, *Coastal Nonpoint Pollution Control Program – Program Development and Approval Guidance* (Jan. 1993) (R0039770); US EPA, *Investigation of Inappropriate Pollutant Entries into Storm Drainage Systems – A User's Guide* (Jan. 1993) (R0022861)

US EPA, *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* (Nov. 1992) (R0009927, R0009930 – 33)

US EPA, *Report on The EPA Storm Water Management Program* (Oct. 1992) (R0009871, 73)

US EPA, *Storm Water Management for Industrial Activities -Developing Pollution Prevention Plans and Best Management Practice* (Sept. 1992) (R0043866)

US EPA, *Storm Water Management For Construction Activities – Developing Pollution Prevention Plans and Best Management Practices* (Sept. 1992) (R0043388)

US EPA, *NPDES Storm Water Sampling Guidance Document* (July 1992) (R0037924)

US EPA, *Guidance Manual for the Preparation of NPDES Permit Applications for Storm Water Discharges Associated with Industrial Activity* (April 1991) (R0043657)

US EPA, *Remedial Action, Treatment, and Disposal of Hazardous Waste* – Proceedings of the Sixteenth Annual RREL Hazardous Waste Research Symposium (August 1990) (R0042527)

US EPA, *Contributions of Urban Roadway Usage to Water Pollution* (March 1975) (R0027336)

US EPA, *Urban Runoff Management Information/Education Products* (R0036525)

Federal Register, Part II EPA – *Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities; Notice* (October 30, 2000) (R0019785)

Federal Register, Part III EPA – 40 CFR Part 131, *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Rule* (May 18, 2000) (R0019104)

Federal Register – Part II EPA – 40 CFR Parts 9, 122, 123, and 124, *National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule* (Dec. 8, 1999) (R0018093)

Federal Register – Part III EPA – 40 CFR Part 122, *Interpretative Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems; Final Rule* (Aug. 9, 1996) (R0008344 – 46)

Federal Register – Part XIV EPA – *Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities*; Notice (Sept. 29, 1995) (R0016080)

Federal Register – Part II EPA – *Water Pollution Control, NPDES General Permits and Fact Sheets: Storm Water Discharges from Industrial Activity; Notice* (Nov. 19, 1993) (R0008341 – 42)

Federal Register – Part II EPA – 40 CFR Parts 122, 123, and 124, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Final Rule* (Nov. 16, 1990) (R0008238 – 39)

Letter from Alexis Strauss, Director Water Division, US EPA Region IX to Dennis A. Dickerson, Executive Officer, California Regional Water Quality Control Board, Los Angeles Region (Dec. 19, 2000) (R0008828)

US EPA, *NPDES Program Implementation Review*, California Regional Water Quality Control Board 4, Los Angeles Region (Oct. 1999) (R0018019)

Letter from Alexis Strauss, USEPA Region IX, to Walt Pettit, Executive Director, California State Water Resources Control Board, (Mar. 17, 1998) (R0008581)

Comparison of Los Angeles County Draft Storm Water Permit with Similar Permits in Orange and Santa Clara Counties; EPA Region 9 (June 10, 1996) (R0031402)

Memorandum from Eugene Bromley, EPA Region 9, to Maryann Jones, Storm Water Section, California State Water Resources Control Board, re: Role of Municipalities in Implementation of State General NPDES Permits for Storm Water Associated with Industrial Activity (Dec. 1993) (R0008388)

Memorandum from E. Donald Elliott, USEPA, to Nancy J. Marvel, US EPA Region IX, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991) (R0008378)

US EPA, EPA Industry Sector Notebooks on Various Industries, totaling 34 Sector Notebooks, ((R0074054); (R0074257); (R0074442); (R0076608); (R0078502); (R0074609); (R0074743); (R0075090); (R0075259); (R0075769); (R0077054); (R0077213); (R0077805); (R0078059); (R0078280); (R0078820); (R0074847); (R0074938); (R0075397); (R0075526); (R0075641); (R0075930); (R0076085); (R0076222); (R0076369); (R0076508); (R0076775); (R0076909); (R0077411); (R0077524); (R0077661); (R0077944); (R0078209); (R0078378))

CERTIFICATE OF MAILING

Los Angeles Superior Court
Civil Division

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LITIGATION	Case no. **BS080548** Related cases: BS080753, BS080758, BS080791, BS080795 and BS080807

Document(s) served as follows:

STATEMENT OF DECISION FROM PHASE I TRIAL ON PETITIONS FOR WRIT OF MANDATE

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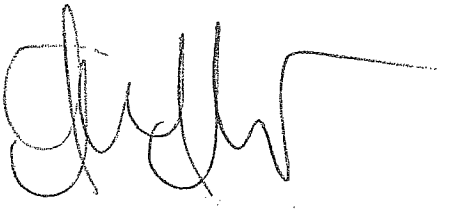
I am over the age of 18 years and not a party to the within action. I am familiar with the Los Angeles Superior Court practice for collection and processing of correspondence and know that such correspondence is deposited with postage prepaid with the United States Postal Service the same day it is delivered to the mail room in the Los Angeles Superior Court. I declare under penalty of perjury under the laws of the State of California that I delivered a true copy of the above notice to the party(ies) or his(their) attorney of record addressed and listed above by placing the copy in a sealed envelope to the mail room of this court.



Dated: March 24, 2005

Elmer Sabalburo, Judicial Assistant

Exhibit "B"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL CIVIL WEST COURTHOUSE

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LIGITATION

Lead Case No. **BS 080548**

Related Cases: BS 080753, BS 080758 BS 080791, BS 080792, and 080807

Judge: Hon. Victoria Gerrard Chaney-D. 324

STATEMENT OF DECISION FROM PHASE II TRIAL ON PETITIONS FOR WRIT OF MANDATE

Hearing: January 7, 2005
Time: 1:30 p.m.
Department: 324-Central Civil West
Date Actions Filed: January 15 & 17, 2003
Ruling: March 16, 2005

PROCEDURAL HISTORY

This case, known as *In the Matter of the Los Angeles County Municipal Stormwater Permit*, arises from six coordinated Petitions for Writ of Mandate filed in January 2003 by the *Arcadia* Petitioners, *County* Petitioners, *Alhambra*, *LAEDC* Petitioners, *Monrovia* Petitioners and the City of Los Angeles against the State Water Resources Control Board (State Board) and the Regional Water Quality Control Board, Los Angeles Region (Regional Board).

The Court sustained the State Board's Demurrer to the *Alhambra, LAEDC* and *County* Petitions for Writ of Mandate on all causes of action without leave to amend. As to the *Monrovia* Petition, the Court initially sustained without leave to amend as to all causes of action except the Fourth and Seventh, and later sustained without leave to amend the State Board's Demurrer to the *Monrovia* First Amended Petition on those causes of action. Accordingly, the Court will enter judgment in favor of the State Board as part of its decision on this matter.

The Cities of Los Angeles and El Segundo dismissed their petitions, without prejudice, in September 2003 and April 2004, respectively.

The Court struck the Cities of Monterey Park and South Gate as Petitioners in granting the Intervenors' Motion to Strike the First Amended Petition of the *Arcadia* Petitioners.

As referenced above, the Regional Board and Intervenors challenged all Petitions for Writs, as well as the Amended Petitions, by way of Demurrers and Motions to Strike. As a result, the Court sustained Demurrers to the Fourth, Eleventh and Thirteen Causes of Action of the *Alhambra* and *LAEDC* Petitioners, and struck references to Code of Civil Procedure section 1085 from both Petitions. The Court sustained Demurrers to the Second, Third, Fourth and Fifth Causes of Action of the *Arcadia* Petition, and struck references to the Administrative Procedures Act, Health & Safety Code section 57004, a study by the University of Southern California, an extra-record letter from Francine Diamond, prayers for permanent injunctive relief, unfunded mandates claims and the claim that the Regional Board lacked authority to issue the Permit. The Court sustained Demurrers to the Second, Third, Fifth and Sixth Causes of Action from the *County* Petition and struck references to Code of Civil Procedure section 1085. Finally, the Court sustained Demurrers to the First, Fourth, Sixth and Seventh Causes of Action of the *Monrovia* Petitioners, and struck references to Health & Safety Code section 57004, the Administrative Procedures Act, the federal Paperwork Reduction Act, the federal Regulatory Flexibility Act, unfunded mandates and Code of Civil Procedure section 1085.

On May 19, 2004 and May 20, 2004, this Court held trial on Phase I of this bifurcated proceeding. (The Court's ruling denying the petitions for writs of mandate on those issues is

included in a separate Statement of Decision.) Phase I involved the following issues, as framed in the Joint Statement Regarding Briefing and Hearing Schedule, filed on March 2, 2004:

1. Petitioners' allegations that Part 2 of the Permit ("Receiving Water Limitations"), as written, is ambiguous, is arbitrary and is not supported by the Record, and is contrary to the "good faith" safe harbor intentions of the Respondent and renders compliance with the Permit impossible and impracticable.

2. Petitioners' allegations that the Permit unlawfully exceeds the Respondent's authority under the federal Clean Water Act and California's Porter-Cologne Water Quality Act by unlawfully imposing requirements that go beyond the Clean Water Act's "maximum extent practicable" ("MEP") standard and/or the Porter-Cologne Act's "reasonably achievable" standard.

3. Certain Petitioners' allegations that the Permit unlawfully regulates discharges "into", as opposed to only "from", the municipal separate storm sewer system contrary to the Clean Water Act and without authority under the Porter-Cologne Act.

4. Petitioners' allegations that Respondent acted without authority by adopting Permit terms that unlawfully directs Petitioners to modify their General Plans and/or their CEQA guidelines, and that unlawfully compels Petitioners to review development projects in a manner that is contrary to or different from the process provided for by the California Legislature, with Respondent violating the Separation of Powers clause under the California Constitution.

5. Certain Petitioners' allegations that the Permit unlawfully interferes with Petitioners' land use authority as Petitioners contend Respondent's Permit improperly infringes on Petitioner's local land use authority, an area of authority that Petitioners maintain is within their exclusive purview.

6. Petitioners' allegations that the Permit was adopted in violation of CEQA, as Respondent failed to comply with the environmental review requirements of CEQA. (To

what extent was the Respondent required to comply with CEQA in adopting the Permit and did the Respondent so comply.)

THE PHASE II TRIAL

In the Schedule referenced above, the parties agreed that Petitioners would present all non-Phase I issues during a second phase of trial. In their joint opening trial brief, Petitioners identified the issues to resolved as Issues 1-14, outlined below. Although the *Monrovia* and *Arcadia* Petitioners alleged causes of action for Injunctive Relief in their Amended Petitions for Writ of Mandate (respectively, the Eighth and Sixth Causes of Action) and the *County* Petitioners prayed for Injunctive Relief (Amended Petition, at p. 24: 11-13), they did not present this issue for trial. Therefore, the Court hereby dismisses this cause of action, as well as all issues not presented at trial, for failure of proof.

Petitioners presented the following issues for trial on August 10 and 11, 2004:

1. Issue One: "The inspections and facility control program requirements under the Permit for industrial and commercial facilities, and for construction sites, are provisions that are outside of the authority of the Regional Board and are contrary to law, and their adoption constitutes an abuse of discretion;"
2. Issue Two: "The Regional Board failed to conduct the requisite cost/benefit analysis and failed to consider whether the burdens of the various portions of the Permit, including their costs, bear a reasonable relationship to the need for such provisions and the benefits to be obtained therefrom;"
3. Issue Three: "The Regional Board failed to fully and properly consider 'economics' as required under State law and the Clean Water Act, in adopting numerous provisions under the Permit;"
4. Issue Four: "The Regional Board failed to properly consider the need for developing housing within the region, including the need and importance of low or moderate-income housing, as required by State law;"

5. Issue Five: "The Regional Board adopted terms and provisions that are contrary to the Prohibition under Water Code section 13360, imposed upon Regional Boards, from adopting permit terms that 'specify the design, location, type of construction, or particular manner in which compliance may be had';"

6. Issue Six: "The Regional Board's adoption of the Development Planning Program requirements, also known as the Standard Urban Storm Water Mitigation Plan ('SUSMPs') provisions under Part 4.D of the Permit, was action in excess of the Regional Board's authority and constitutes an abuse of discretion;"

7. Issue Seven: "The Regional Board acted in excess of its authority and abused its discretion in imposing Permit terms that require the Permittees under the Permit to regulate and control the 'potential contribution' and the 'potential to discharge' pollutants in the storm water;"

8. Issue Eight: "Part 3.C of the Permit violates federal and state law in that it allows the Executive Officer to modify the Permit without notice or public hearing;"

9. Issue Nine: "The Regional Board exceeded its authority and abused its discretion in adopting part 4.e of the Permit entitled 'development construction program';"

10. Issue Ten: "The Regional Board acted contrary to law and abused its discretion in adopting the sanitary sewer maintenance overflow and spill prevention provisions of the Permit;"

11. Issue Eleven: "The Regional Board acted contrary to law and abused its discretion in failing to exempt certain discharges from the permit;"

12. Issue Twelve: "The Permit's requirement that Peak Flow is the parameter that should be controlled (Permit, Part 4.D.1) is not supported by evidence in the record;"

13. Issue Thirteen: "Requiring Permittees to initiate investigations of facilities within one business day (Permit, Part 4.C.3.D(3) is arbitrary, capricious and unsupported by evidence in the record;"

14. Issue Fourteen: "Respondent violated Permittees right to fair hearing and due process of law by making substantial material revisions to the permit without providing adequate notice and a right to be heard;"

Trial on Phase II began at 8:30 a.m., on August 10, 2004 in Department 324 of the Central Civil West branch of the Los Angeles Superior Court. The Honorable Judge Victoria Gerrard Chaney presided over this matter. All parties were present and represented by counsel. Howard Gest appeared on behalf of the *County* Petitioners; Rufus C. Young and Amy Morgan appeared for the *Alhambra* and *LAEDC* Petitioners; Richard Montevideo and Peter Howell appeared for the *Arcadia* Petitioners; John J. Harris and Evan J. McGinley appeared for the *Monrovia* Petitioners; Jennifer F. Novak and Helen G. Arens, Deputy Attorneys General and Michael Lauffer of the State Water Resources Control Board, Office of Chief Counsel, appeared for the Regional Board; David Beckman, Anjali Jaiswal, Dan Gildor and Leslie Mintz appeared for the Intervenors.

BACKGROUND

In addition to the Court's file in this matter, the Court received and reviewed volumes of briefs from all parties, in addition to Requests for Judicial Notice,[1] excerpts of Administrative Records Citations, Non-California Authorities, Declarations and other pleadings filed before the trial date, as well as the supplemental briefs requested by the Court following trial. The Court also received pleadings during the course of trial and has reviewed those as well. This Statement of Decision is based upon the Court's consideration of those documents, as well as the argument and presentations by counsel during numerous days of trial.

[1] The Court granted Petitioners' Requests for Judicial Notice, filed on June 14, July 30, August 11 and August 31, 2004 in support of their Phase II briefs and supplemental briefs. The Court granted the joint Requests for Judicial Notice submitted by Respondent Regional Board and Intervenors, filed on July 19 and September 21, 2004. The Court granted Intervenors' separate Request for Judicial Notice, filed July 19, 2004.

In reaching its decision, the Court has followed the guiding principles established by both our federal and state governments. Foremost among these is the Clean Water Act. Title 33 of the United States Code, section 1251, subdivision (a), entitled, "Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective," states:

> ¶ The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the nation's waters. In order to achieve this objective it is hereby declared that consistent with the provisions of this chapter-- ¶ (1) *it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985*[.]

(33 U.S.C. § 1251, subd. (a) [emphasis added].) The Court notes that the year is now 2004. Subpart (3) of section 1251, subdivision (a) states: "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited[.]" (*Id.* at subd. (a)(3).) There is a companion section in California's Porter-Cologne Act, Water Code section 13000, that reads, in part:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the *quality of the waters of the state shall be protected for use and enjoyment by the people of the state*. . .¶ The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all waters of the state; *that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state*[.]

(Wat. Code, § 13000 [emphasis added].) Also, Water Code section 13142.5 states, in part:

> In addition to any other policies established pursuant to this division, the policies of the state with respect to water quality as it relates to the coastal marine environment are that: ¶ Wastewater discharges shall be treated to protect present and future beneficial uses, and, *where feasible, to restore past beneficial uses of the receiving waters. Highest priority shall be given to improving or eliminating discharges* that adversely affect any of the following: ¶ (1) Wetlands, estuaries and other biologically-sensitive areas. ¶ (2) Areas important for water contact sports. . . ¶ (4) Ocean chemistry and mixing processes, marine life conditions, other present or proposed outfalls in the vicinity and relevant aspects of areawide waste treatment management plans and programs *but not of convenience to the discharger*[.]

(*Id.* at § 13142.5 [emphasis added].) That statute continues with: "Toxics and hard-to-treat substances should be pre-treated at the source if such substances would be incompatible with effective and economical treatment in municipal treatment plants." (*Ibid.*)

Given these legislative mandates, the evidence demonstrates that these goals have not been met under either the federal Clean Water Act or the State Porter-Cologne Act. (See, e.g., AR 64, 69, 4307, 7848, 12778, 26361, 26363.) The Court acknowledges the Petitioners' statement that they have made progress and efforts towards these goals. Unfortunately, however, in Los Angeles County, these goals are not yet being met. It is with this failure and these legislative goals in mind that the Court issues this Statement of Decision.

STANDARD OF REVIEW

As noted in Respondent's Phase I briefing, the Court is required to give some deference to an administrative agency. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812, 817; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1107.) The Court acknowledges that simply because an administrative agency takes an action does not automatically render it correct. The Court's duty here is to examine the agency's action in light of several guiding principles. The Court looks first to federal law, then California statutes and interpreting case law, then any applicable State Board precedential decisions and, finally, any municipal ordinances that may apply.

The Court also recognizes that administrative agencies generally, and the Regional Water Board in particular here, has significant expertise that trial courts do not have in specific areas. Therefore, it does give deference to the experts and the expertise of the staff members of the Regional Board and the actual members of both the State Board and Regional Board.

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CHALLENGES TO THE REGIONAL BOARD'S EVIDENCE

In briefing and at trial, Petitioners asked this Court to disregard the Administrative Record on the grounds that it was not formally introduced into evidence during the Permit's December 13, 2001 adoption hearing, that the Record was improperly compiled and that it contains irrelevant materials.

Looking to the issues involved with the Administrative Record, to resolve them, it is important to examine the history of the Permit's adoption. According to the Record, there were approximately 40 meetings held between Regional Board staff members and other interested parties. These included mediations with the Environmental Protection Agency of the U.S. Government, there was a public workshop, there was a full-day workshop for Regional Board members on July 26, 2001, and a public hearing before the Board members on December 13, 2001.

There were three drafts of the Permit, issued: on April 13, June 26 and October 11, 2001. For each draft, the Regional Board received written comments from up to 38 cities, three environmental groups, the County Department of Public Works, the Los Angeles City Fire Department, up to nine legal groups and other interested parties. Overall, the Permit process covered about an 11-month period. There were approximately 2,470 pages of comment letters from the permittees, many of whom are litigants in this matter, and other interested parties. (AR 2035, 2740, 4377-4973, 5431-6610.)

In August 2003, the Court considered Petitioners' Motion to Strike and Augment the Administrative Record. One ground for the Motion was that the Administrative Record allegedly contained irrelevant material (not the same allegedly irrelevant material challenged here). The Court denied the Motion. As part of the Court's decision, filed August 14, 2003, it cited *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, that held: "Generally, a party must

object to the admission of evidence at the administrative hearing; otherwise, the evidentiary objection will be waived." (66 Cal.App.3d at p. 613.) The Court found that the Petitioners' challenge was untimely, as they did not object to admission of the Administrative Record during the Permit's December 13, 2001 adoption hearing. The same reasoning bars the Petitioners' challenge here.

The entire Administrative Record was incorporated by reference at the time of the hearing, "All board files pertaining to the items on this agenda are hereby made a part of the record submitted to the Regional Board by staff for its consideration prior to action on the related items." (Respondent's Request for Judicial Notice, Exhibit 2.) The Petitioners never objected to incorporation of the record before or during the adoption hearing or in their later administrative challenges before the State Board. Therefore, they have waived the objection now.

Even if Petitioners' challenge to the Administrative Record was timely, the Court disagrees with Petitioners' contention that an agency must reference each specific item in a record during the hearing. Petitioners themselves acknowledged at the hearing that their prior comment letters were "already part of the administrative record." (See, e.g., AR 7828-7829.) Moreover, an agency has no affirmative obligation to reference every book, report, pamphlet, table, study, etc. that is in the administrative record. (*Ray v. Parker* (1940) 15 Cal.2d 275, 310.) Consequently, the Regional Board staff and board members did not have to, and do not have to, reference every document in the Administrative Record.

The entire Administrative Record is properly before this court. "[D]esignation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity." (*Bar MK Ranches v. Yuetter* (10th Cir. 1993) 994 F.2d 735, 740.) This is consistent with Evidence Code section 664, which states: "An agency is presumed to regularly perform its duty."

Bar MK defines the materials to include in an administrative record: "A complete administrative record consists of all documents and materials directly or *indirectly* considered by the agency." (994 F.2d at p. 739 [emphasis added].) The Court finds that it was reasonable for the Regional Board to rely on studies and findings nationally in assessing problems with the Los Angeles Basin. While not every page of every document may discuss the issues challenged here, certainly it is reasonable to look to matters in other states if they experience problems similar to problems suffered here. And if pages within a document discuss those common issues, the Court understands that the whole document will be part of the Record. The Court finds that the Regional Board did not "pad" the record, even though not every page of the Record is on point. In addition, under the federal regulations, a permitting agency must rely on information and experience gained during the prior permit term. (61 Fed. Reg. 41,698-41,699.) Therefore, it was appropriate for the Board to have reviewed the permits issued in 1990 and 1996, and the documents supporting them. There are also studies and other documents in the Record that contain information which may guide the Regional Board staff and the Regional Board. The Court cannot assume that simply because the Regional Board did not refer to every study or report, that the Regional Board did not rely on it directly or indirectly. (See, *Ray v. Parker*, *supra,* 15 Cal.2d at p. 310.)

It is enough that the Regional Board's staff reviewed, processed and culled down the documents within the record. In *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, the Court held: "An agency may also rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence." (181 Cal.App.3d at p. 866.) Here, it is clear that staff did present their recommendations, conclusions and research in the Fact Sheets/Staff Reports and the various hearings before the Regional Board

members. The Court finds, therefore, that the Regional Board members acted properly in carrying out their duties.

> The basic rights of procedural due process . . . are reasonable notice of a hearing, a reasonable opportunity to be heard, and these quasi-judicial proceedings [concerning special use permits] do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in quasi-judicial settings.

(*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 299.) The *Mohilef* Court also held that:

> However, there is no precise manner of hearing which must be afforded; rather, the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing with full rights of confrontation and cross-examination is not necessarily required.

(*Id.* at p. 286.) In *Governing Board of the Alum Rock Union Elementary School District v. Superior Court* (1985) 167 Cal.App.3d 1158, the petitioner argued that he was not seeking to probe the mental processes of a board, but rather to determine whether procedural requirements were met. In response, the court held:

> The administrative board should state findings. If it does, the rule of *United States v. Morgan, supra,* 313 U.S. 409, 422 . . . precludes inquiry outside the administrative record to determine what evidence was considered and reasoning employed by the administrators. . . Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.

(167 Cal.App.3d at p. 1161.) Here, it is not within the province of this Court to examine the individual Board members' thought processes or question which specific documents they relied on in making their decision. The issue is whether the decision was correct. Therefore, this Court declines to hold the Regional Board to a standard of needing to specify every document upon which it relied in adopting various provisions of the Permit.

Next, the Court disagrees with Petitioners' argument that the Administrative Record violates federal regulations. Code of Federal Regulations, title 40, section 124.6, subdivision (e) reads: "Draft permits prepared by a State shall be accompanied by a fact

sheet if required under § 124.8." (40 C.F.R. § 124.6, subd. (e).) The federal regulations do not require that every document be referenced in the record. However, even if these regulations applied, and the Court finds they do not, the Record complies in this case with the standards set forth. Code of Federal Regulations, title 40, section 124.9, subdivision (b), sets forth the requirements for an administrative record. (*Id.* at § 124.9, subd. (b).) Based on the evidence presented, it appears that the Regional Board's Administrative Record meets these requirements. Moreover, subdivision (c) provides that certain documents need not be physically included in the Record. (*Id.* at subd. (c).) Therefore, this Court finds assembly of the Administrative Record did not run afoul of any federal regulations.

Finally, this Court finds that the staff accumulated the Administrative Record throughout the permit drafting process, revisions and adoptions, and has certified the record as correct. Again, "it is not within the province of the Court to inquire into what evidence was or was not examined or relied on by an agency member in reaching his or her decision." (See *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 553, 548.) "The mental processes of agency members is 'irrelevant' to the validity of their decision." (*City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 688.) Evidence Code section 664 states that an agency is presumed to regularly perform its duty. And in *Topanga Assn. for Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, the Court held, in part, that, an agency's "findings are to be liberally construed to support rather than defeat a decision under review." Again, these are more principles which guide this Court's decision.

Evidence in the Administrative Record supports the Board's Permit adoption. (See AR 7003, 7016, 70296.) The Permit, Regional Board Order 01-182, dated December 13, 2001, also contains numerous findings about sources of pollution, and the problems caused by development

and urbanization, which increase pollutant load volume and discharge velocity. The Court notes that increased volume and velocity and discharge duration accelerates downstream erosion and impairs stream habitat in natural drainages. (See, e.g. Findings No. B.3, B.4, B.5, B.6.) As a further example, Finding E.18 states:

> The Regional Board adopted and approved requirements for new development and significant redevelopment projects in Los Angeles County to control the discharge of storm water pollutants in post-construction storm water on January 26, 2000, in Board Resolution R-00-02. The Regional Board Executive Officer issued the approved Standard Urban Stormwater Mitigation Plans (SUSMPs)on March 8, 2000. The State Board in large part affirmed the Regional Board action and SUSMPs in State Board Order No. WQ 2000-11 issued on or about October 5, 2000.

The Permit also found:

> The objective of this order is to protect the beneficial uses of receiving waters in Los Angeles County. To meet this objective, this Order requires that the SQMP specify BMPs that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable. . . .The SQMP required in this Order builds upon the programs established in Order Nos. 90-079, and 96-054, consists of the components recommended in the USEPA guidance manual and was developed with the cooperation of representatives from the regulated community and environmental groups.

(Permit, at p. 13.) This finding underscores what the Court previously has noted, that it was appropriate to look at the earlier permits issued to the permittees in 1990 and 1996.

Although Petitioners contend that the Regional Board had to make specific findings, nothing in Water Code sections 13241 or 13263 required the Regional Board to make any specific findings. It is clear that the Legislature knows how to say something when it wants to do so. (See *City of Milwaukee v. Illinois and Michigan* (1981) 451 U.S. 304, 329 fn. 22.) This is seen in both in the Clean Water Act and the Porter-Cologne Act, as well: when the Legislature wanted something, they made it quite clear.

Petitioners specifically challenged the Permit's Finding E.25, which states in part that: "The Regional Board has considered the requirements of Section 13263 and 13241 and applicable plans, policies, rules and regulations in developing these waste discharge requirements." The Court finds this language to be sufficiently specific and not boilerplate. *Topanga Assn. for Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348 holds, in part:

> It would exact needless time, effort and ingenuity to require the board to paraphrase the provisions of Section 22.56.215(F) in making findings in support of its approval of a conditional use permit. We refuse to impose such a requirement which, in addition to causing wasted time and effort, likely would result in inadvertent omissions and misstatement of necessary facts.

(214 Cal.App.3d at p. 1364.) In addition, in *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970, the court found, in part: "Nor do we find the essential findings so conclusory" (the central finding here being E.25) "as to be legally insufficient; it is a finding of ultimate fact." (130 Cal.App.3d at p. 978.)

This Court disagrees with Petitioners' reading of *Topanga*. That case holds that an agency's findings must "bridge the gap" between raw evidence and its ultimate decision, and an agency should not "randomly leap from evidence to conclusions." (*Topanga Assn. for Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, 517.)

This Court finds that the Board did not "randomly leap" from point A to point Z in adopting the Permit. Moreover, an agency's findings come with a strong presumption of correctness. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 812.) With respect to the findings made by an administrative agency, contrary to Petitioners' assertions, they need not be as precise or formal as would be required in a court of law. (*McMillan v. American General Finance Corp.* (1976) 60 Cal.App.3d 175, 185.)

In summary, after reviewing the files, pleadings and hearing the arguments presented, this Court finds that the Administrative Record properly includes the Regional Board's file for drafting and adopting a permit. The Record contained documents that are clearly relevant to the Regional Board's drafting and adoption of the Permit. In compiling the Record, the Regional Board's staff met all applicable regulations. And, the Regional Board fully incorporated the Record into the record of the adoption hearing. By not objecting to inclusion of the Administrative Record by reference at the adoption hearing, Petitioners' challenge is untimely and was waived by their failure to object.

The Court further finds that the Regional Board did not leap randomly from evidence to determinations and the Petitioners have failed to sustain their burden to demonstrate otherwise.

ISSUE ONE

As stated above, the Court acknowledges the overriding principles guiding this Court: the clear legislative intent in both the Clean Water Act and the Porter-Cologne Act. While the permittees, including Petitioners, have done a very good job thus far of working on the problem, the evidence clearly showed that the storm water pollution problem is not corrected and needs more work. (AR 7777, 8055-8056.) The briefs and presentation of all parties at trial, referencing the Administrative Record, demonstrated that sources of pollution include industrial, commercial, construction sites and residential areas. (AR 9754.) Certain commercial and industrial sites can be responsible for a disproportionate contribution of some pollutants, such as grit, oils, grease, and toxic materials into the storm water drainage system. (*Ibid.*) The Fact Sheet/Staff Report accompanying the Permit states, in part:

> Critical source data for facilities such as auto salvage yards, primary metal facilities and automotive repair shops show that total and dissolved heavy metals and total suspended solids exceeded state and federal water quality criteria by as much as two orders of magnitude.

(AR 8038.) Interestingly, light industrial and commercial and transportation land uses show the highest range of exceedances. (*Ibid.*) This clearly shows that industrial and commercial activities need to be regulated and controlled and monitored more than they have been in the past.

The Court finds that the Permit contains reasonable inspection requirements for these types of facilities. (See Permit, at p. 31.) The Permit requires each permittee to confirm that operators of these facilities have a current waste discharge identification number and is effectively implementing Best Management Practices (BMPs) in compliance with County and municipal ordinances, Regional Board Resolution 98-08 and the Stormwater Quality Management Plans (SQMPs). (*Ibid.*) Addressing pollution after it has entered the storm sewer system is not working to meet legislative goals. More work is required at the source of pollution, and that is partially the basis on which this Court finds that the Permit's inspection requirements are reasonable, and not onerous and burdensome. The Court also notes that in including this requirement, the Regional Board looked at inspection programs across the country. (AR 3868, 7082, 8056.)

Federal law requires permittees to inspect dischargers. (40 C.F.R. § 122.26, subds. (d)(2)(i)(A) & (F), (d)(2)(iv)(C)(1).) Nothing in the regulations precludes the inspections of facilities with state-issued permits. (See *Allied Local and Regional Mfrs. Caucus v. EPA* (D.C. Cir. 2000) 215 F.3d 61, 78.) Certainly, no Petitioner has cited such a regulation to the Court.

The Court agrees with Respondent and Intervenors that the United States EPA considers obligations under state-issued general permits to be separate and distinct. Despite the similarity between the general permits and the local storm water ordinances, both must be enforced. (AR 1994 [letter from Alexis Strauss of EPA].) EPA requires permittees to conduct inspections of commercial and industrial facilities, as well as of construction sites. (AR 10011, 10017.) This

was stated as part of the testimony of Laura Gentile from EPA at the July 26, 2001 workshop before the Regional Board. (AR 4308.) This Court finds that the state-issued general permits do not preempt local enforcement of local storm water ordinances. (See State Board Order No. 99-08, General Construction Activities Storm Water Permit, at ¶¶ 3, 4.)

Therefore, this Court finds that requiring permittees to inspect commercial and industrial facilities and construction sites is authorized under the Clean Water Act, and both the Regional Board and the municipal permittees or the local government entities have concurrent roles in enforcing the industrial, construction and municipal permits. The Court finds that the Regional Board did not shift its inspection responsibilities to Petitioners.

The Court finds that the Permit requirements are reasonable, that the permittees are not being significantly burdened, and notes that during the drafting process, the Permit requirements that the Regional Board initially set forth were lessened. (See AR 7592, 7939-40; see also Permit at pp. 28-29.)

The Court further finds that inspection obligations were increased to meet legal obligations, namely, failure to meet the goals of the Clean Water Act and Porter-Cologne Act, contrary to Petitioners' speculation that the inspection obligations were increased or "ramped up" due to budgetary reasons. (AR 4308, 6790, 6651-6652, 7777, 8055-8056.)

The Court further notes that the Permit issued to local entities, who are Petitioners here, does not refer to any inspection obligations related to state-issued permits. (AR 8056, 8060.) There is no duplication of efforts and no shifting of inspection responsibility in derogation of the Regional Board's responsibility here. The Regional Board is not giving up its own responsibilities, and there is nothing arbitrary or capricious about the Permit's inspection provisions.

Therefore, as to Issue One, the Court finds that the Petitioners failed to carry their burden, and respectfully declines to grant the request for a writ.

ISSUE TWO

Petitioners challenge the Permit's monitoring and inspection requirements. The Court finds that the challenged requirements are substantially similar to what the permittees proposed in their application for the Permit, the Report of Waste Discharge (ROWD). As part of the ROWD, the permittees, including Petitioners, submitted a monitoring and reporting program. (AR 6, 55, 5341; Permit at p. T-3.) The Court finds that for those Petitioners who were part of the joint ROWD submission, the doctrines of estoppel and waiver apply.

In addition, the Clean Water Act requires monitoring and reporting in order to discharge pollutants into storm sewer systems. (See 33 U.S.C. § 1318, subd. (a).) Federal regulations mandate substantive requirements for all NPDES permits under Code of Federal Regulations, title 40, sections 122.48 and 122.41, subdivisions (j)-(l), which require recording and reporting of monitoring results. Section 122.26 of that title requires inspection and monitoring. (40 C.F.R. § 122.26.) At its subdivision (f), it requires, in part: "Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions." (40 C.F.R. § 122.26, subds. (d)(2)(i)(F) & (d)(2)(iii)(D).) Thus, the federal authority mandates that the Regional Board require a monitoring and reporting program, and the federal authority does not suggest or require an additional cost benefit analysis in imposing the monitoring and reporting program.

In California, the Porter-Cologne Act contains a special chapter, Chapter 5.5, that addresses Clean Water Act permits. As part of this Chapter, Water Code section 13383 governs monitoring and reporting requirements. Section 13383, like the federal Clean Water Act, does not mention or suggest or require that a cost benefit analysis be done in this setting.

The Court disagrees with Petitioners' interpretation of the Porter-Cologne Act, and finds Water Code sections 13225 and 13267 do not apply to the present situation. Instead, Water Code section 13383 governs the permitting process here. As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: "state law is still preempted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: "an obstacle to the accomplishment of the full purposes and objectives of [the federal law]." (*Ibid.*; see also Wat. Code, §§ 13370, 13377.) The Court refers to its prior citations, regarding the full purposes and objectives of the Clean Water Act and permits such as the one challenged here.

Even if the Regional Board was required to consider the costs and benefits of the Permit, there is substantial evidence in the Record of this consideration. (See, e.g., Permit p. 5; AR 1291, 1541, 1988, 1999, 2776, 2882, 6611 [documenting Regional Board meetings]; 8078, 8080 [discussion of effectiveness in Fact Sheet]; 2884, 2886, 2778, 20765, 32490, 45329, 47928, 48306.)

The Court finds that Petitioners' objections to the Permit's trash monitoring requirements to be without support. Trash monitoring was already developed and mandated under a separate Regional Board order. The Permit in this case attempts to be consistent with the trash TMDL. (AR 7973.) The Regional Board did examine the costs and compared the benefits for trash monitoring. For example, the Regional Board modified the monitoring requirement for unimpaired watersheds to eliminate trash sampling and requires only photographic evidence. (AR 79595.)

Therefore, as to Issue Two, the Court finds that the Petitioners failed to carry their burden, and respectfully declines to grant the request for a writ.

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ISSUE THREE

The Court finds that California's Porter-Cologne Act, as codified in the Water Code, did not require the Regional Board to consider economics when issuing the Permit because the Board considered economics at an earlier stage in setting water quality objectives in the Los Angeles County Basin Plan. (Wat. Code, § 13241.) The State Board has followed the practice that no consideration of Water Code section 13241 factors are required during the permitting process. (*Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 482; *In the Matter of the Petition of Pacific Water Conditioning Association, Inc.*, State Board Order No. WQ 77-16.)

The permitting scheme set forth in the Porter-Cologne Act requires the Regional Board to conduct a two-step process. Step one is to establish water quality objectives in the basin plan, and step two is to implement water quality objectives. Water Code section 13241 covers the establishment of water quality objectives in a basin plan. That statute reads, in part, that: "Factors to be considered by a regional board in establishing water quality objectives shall include but not necessarily be limited to," and then sets forth the factors to consider, including subdivision (d), "Economic considerations." (Wat. Code, § 13241, subd. (d); Los Angeles County has a Basin Plan; see AR 47540, 47552.) This Court is under the impression that when the Regional Board adopted the Basin Plan, it took economic considerations into account. (See Wat. Code, § 13241.)

Looking to step two of the statutory scheme, Water Code section 13263 implements water quality objectives in the Permit, after the Regional Board has considered economics as part of the Basin Plan adoption. Water Code section 13263 reads, in part:

> The requirements shall implement any relevant water quality control plans that have been adopted and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance and the provisions of Section 13241.

The plain meaning of these words is consistent with the *Hampson* decision. (*Hampson v. Superior Court, supra,* 67 Cal.App.3d at p. 482; see also Wat. Code, § 13241.)

The Court notes that where these statutes required "consideration" of economics, the requirement is just that: a consideration. Water Code section 13241 does not require a "cost-benefit analysis," as Petitioners suggest. Economics is merely a factor to be considered.

Moreover, although the Regional Board was not required to consider economics in its adoption of the Permit, as opposed to the Basin Plan, there are numerous findings and documents in the Administrative Record that show that there were economic considerations. First, the Permit contains findings on economics. For example, the Permit states findings that: "This permit is intended to develop, achieve, and implement a timely, comprehensive, cost-effective stormwater pollution control program" and is to "implement cost-effective measures." (Permit, at pp. 7, 13.) The Fact Sheet/Staff Report that accompanied the Permit also contained findings on issues of economics. (AR 8039, 8073.) The Permit also specifically states that: "The Regional Board has considered the requirements of Section 13263 and 13241 and applicable plans, policies, rules and regulations in developing these waste discharge requirements." (Permit, at p. 12.)

In addition, the Court previously has noted that the Regional Board looked to pollution control programs nationally. The extensive Administrative Record shows that the Regional Board did consider and use national studies from locations around the country, looking to what those locations and water boards found in terms of costs and benefits of various best management practices used in their permits. (AR 4163, 10739, 10735, 10757, 11676, 12200, 66969, 66966.) The Record also contains evidence of the permittees' self-reported local costs in their Permit application. (AR 7936-7937, 8048.) Turning to specific Permit requirements, there is evidence of economic consideration for Part 4.C, the Permit's industrial and commercial

facilities inspections programs. (See, e.g., AR 7604.) The same is true for Part 4.D, where the Regional Board considered economics in terms of the development planning program and the SUSMP programs. (See, e.g., AR 10736.) In the State Board's decision in *In the Matter of the Petitions of the Cities of Bellflower, et. al, the City of Arcadia and Western States Petroleum Association*, Order WQ 2000-11, it held that: "The Regional Water Board considered the costs of the SUSMPs, and acted reasonably in requiring these controls in light of the expected benefits to water quality." (AR 1862; see also 10739.) Economic consideration also was given to Part 4.E, the Development Construction Program. (See AR 20794, 58963, 72257, 72276.) Finally, economics was also considered in developing Permit Part 4.F.5 Storm Drain Management. (AR 32680-32681, 32634-32636, 73109-73110.) The Regional Board had some, albeit minimum, discussions of economics in various meetings with permittees and interested parties. (AR 7937-7938.) In short, there are numerous findings and documents in the Administrative Record demonstrating that Regional Board considered economics in testimony, comment letters, local studies, national studies, the EPA reports, and self-reported costs from the Petitioners. (See, e.g., AR 2108, 2129, 6066.)

Consequently, the Court finds that the Petitioners did not carry their burden as to Issue Three, and declines to grant the writ.

ISSUE FOUR

Similar to Issue Three, above, Petitioners alleged that in adopting the Permit, the Regional Board was required to consider the need for housing in Los Angeles County. They rely on Water Code section 13241. The Court disagrees that the statute applies to the Regional Board's actions in adopting the Permit. In *Hampson v. Superior Court, supra,* 67 Cal.App.3d 472, the Court found a water board must consider certain factors under Water Code section 13241 when it does not have a basin plan for the region. (67 Cal.App.3d at p. 482.) Here, the

Regional Board has adopted its Basin Plan for the region, therefore it was not necessary to consider the section 13241 factors, including the need for housing, in adopting the Permit.

Even if Water Code section 13241 applied and required the Regional Board to consider the need for housing in adopting the Permit, there is evidence in the Record that shows that the issues of housing was considered. (AR 2037 [comments of Building Industry Association], 7954-7955 [comments made during December 13, 2001 adoption hearing].) It is clear that the Regional Board considered such things as population and demographics. (AR 10984-10986, 20809-20810, 42545.) The Board also considered housing costs generally, including the Permit's impact on housing costs and low-income development. (AR 10691-10702, 10711-10724, 10735-10799, 10910-10915, 20778, 20781, 73087-73145.)

An administrative agency is presumed to have considered all documents in the record dealing with a particular decision. (*City of Santa Cruz v. Local Agency Formation Company* (1978) 76 Cal.App.3d 381, 392.) The Court finds that the Regional Board did consider issues relating to the Permit's impact on housing. Moreover, Finding E.25, as discussed above, states that the Regional Board considered section 13241 factors in adopting the Permit. (See Permit, at p. 12.)

Therefore, as to Issue Four, the Court finds that the Petitioners failed to carry their burden, and declines to issue a writ.

ISSUE FIVE

Petitioners contended that: "The Regional Board adopted terms and provisions that are contrary to the Prohibition under Water Code section 13360, imposed upon Regional Boards, from adopting permit terms that 'specify the design, location, type of construction, or particular manner in which compliance may be had.'"

The Court again notes the general principles in the Clean Water Act and Porter-Cologne Act, which are to clean up water that currently is in a sad condition. In addition, "Any limitation on a polluter forces him to modify his conduct and operations." (*NRDC v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1380.)

This Court finds that the Permit imposes no specific "fix" upon the local entities. Permits may include specific conditions and limitations and must include tailored controls to attain water quality standards. (See 132 Cong. Rec. S32381 (Oct. 16, 1986); 61 Fed. Reg. 43,761.)

The Court is guided by *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292), where the Ninth Circuit determined that the United States EPA's regulations should not set forth specific requirements for permits because individual MS4 permit writers would determine the requirements adequate for their specific situations. (966 F.2d at p. 1308.) The Court further is guided by the language in *NRDC v. Costle, supra,* which held that:

> The authority to prescribe limits consistent with the best practicable technology may be tantamount to prescribing that technology . . . But this ambitious statute is not hospitable to the concept that the appropriate response to a difficult problem is not to try at all.

(568 F.2d at p. 1380.) The Court finds that California's municipal NPDES permits must be consistent with federal law. Water Code section 13370, subdivision (c) holds, in part:

> It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act.

(Wat. Code, § 13370, subd. (c).)

This Court is aware from argument on Phase I's Receiving Waters Limitations issues, that in another California region, the federal government did take over local control of a storm water permit where U.S. EPA disagreed with the permit's provisions. This Court strongly believes that it is in the best interests of the local entities represented by Petitioners, as well as in the interest of the Regional Board, and in that of the State Board, to do

everything it can to keep control of local water pollution problems within California's boundaries, within the Regional Board's boundaries, and not to cede control to the federal government. This Court therefore is interpreting the Regional Board's Permit with these concepts in mind.

A municipal storm water permit must ensure compliance with the Clean Water Act. Water Code section 13372, subdivision (a) states, in part:

> This chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Pollution Control Act and acts amendatory thereof or supplementary thereto.

(Wat. Code, § 13372, subd. (a); see also *id.* at § 13377.)

The Court finds that specific programs required under the Clean Water Act must take precedence over any statutes within the Water Code. Water Code section 13360 is not part of the Porter-Cologne Act's Chapter 5.5, which authorizes issuance of permits under the Clean Water Act. Chapter 5.5 takes precedence over any conflicting statutes found elsewhere in the Water Code. Water Code section 13372 reads, in part: "The provisions of this chapter shall prevail over other provisions of this division to the extent of any inconsistency." (Wat. Code, § 13372.) If, as Petitioners suggest in their argument to the Court, Water Code section 13360 *prohibits* programs necessary to comply with the federal requirements, then as a matter of statutory construction and preemption, federal requirements must take precedence over Water Code section 13360.

However, the Court finds that even if Water Code section 13360 applied, the Permit does not violate that statute. Water Code section 13360, subdivision (a) states, in part:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner. However, the

> restrictions of this section shall not apply to waste discharge requirements or orders or decrees with respect to any of the following.

(Wat. Code, § 13360, subd. (a).) In addition, while Petitioners have challenged Permit requirements pertaining to "numeric design criteria," the Court finds the term to be an unfortunate use of words. Despite the use of the word "design," the criteria are guidelines or standards. They do not set forth a specific method or "fix" to address problems, but set forth general goals to be achieved or attained.

The Court also notes that it was Petitioners who suggested the manner of compliance developed under the 1996 permit, having proposed best management practices (BMPs) to implement for construction, development and industrial and commercial facilities. Under the 1996 permit, Petitioners proposed SUSMP requirements to control the pollutants coming from development and redevelopment activities. The permittees also proposed additional programs under their ROWD, which is certified under federal law. (See AR 30, 33, 793, 810.)

Notably, the Permit allows some flexibility in how permittees are to meet the requirements set forth. (See, e.g., Permit at pp. 14, 22, 24-25, 43.) For example, if a permittee believes that a requirement within the Permit is not cost effective or efficient, it can choose to implement another best management practice.

> This Order provides flexibility for Permittees to petition the Regional Board Executive Officer to substitute a BMP under the SQMP with an alternative BMP, if they can provide information and documentation on the effectiveness of the alternative, equal to or greater than the prescribed BMP in meeting the objectives of this Order.

(Permit, at p. 14, ¶ 7.) The Permit does require that Petitioners provide information and documentation on the effectiveness of the alternative BMP, equal to or greater than the prescribed BMP. So, the permittees may have to obtain approval of that best management practice from the Regional Board, but the Court finds that such an approval requirement is not

unreasonable. The Court believes that the Regional Board will carry out its obligations and act according to its duties, as presumed by Evidence Code section 664. This Court also believes that if the Regional Board is presented with a reasonable alternative, it will act reasonably. (See Permit at p. 23, Part 4.A.1.c & p. 14, ¶ 7.)

The Court again keeps in mind the goals of both the Clean Water Act and the Porter-Cologne Act in making these findings. As a general guideline, the Court further looks to *Tahoe-Sierra Preservation Council v.* SWRCB (1989) 210 Cal.App.3d 1421 in determining that the Permit does not impose impermissible controls on the permittees. *Tahoe-Sierra* held, in part, that: "Section 13360 is meant to 'preserve the freedom of persons who are subject to a discharge standard to elect between strategies to comply with that standard.'" (210 Cal.App.3d at p. 1438.) It continues: "Section 13360 is a shield against unwarranted interference with the ingenuity of the parties subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants." (*Ibid.*) This Court reads the Permit as setting forth guidelines or standards and not as absolutely mandating the method to comply. Therefore, it is consistent with *Tahoe-Sierra.*

Moreover, State Board precedential orders have held that MS4 permits must include specific programs and controls. In the *Bellflower* decision, the Board held: "The addition of measurable standards for designing the BMPs provides additional guidance to developers and establishes a clear target for the development of the BMPs." (AR 1852.) State Board Orders 91-03 and 91-04 state, in part: "It is appropriate and proper to issue a permit regulating municipal separate storm sewer systems which requires specific practices." (Respondents' Supplemental Authorities, Exhibits 64 & 63.)

Finally, the Court finds that Water Code section 13360 does not prohibit a permit from including programs and requirements designed to meet federal law, as the instant Permit does.

Adopting a permit that includes programs and requirements proposed by the Petitioners here, and required by law and necessary to meet water quality standards, is neither arbitrary, capricious, or a prejudicial abuse of discretion.

The Court finds that as to Issue Five, the Petitioners have not carried their burden, and the Court declines to grant the writ.

ISSUE SIX

This Court previously has found that the Administrative Record shows that the Regional Board considered State Board Order 2000-11, which held, in part, that: "The standard urban storm water mitigation plans, or SUSMPs, are consistent with the maximum extent practicable standards and are therefore federally mandated." (AR 7506.) This Court finds that the SUSMPs being challenged are substantially similar to the permittees' previous proposal, and notes that the permittees have suggested the standards in their ROWD. (See, e.g., AR 809 compared with Permit at pp. 36-37, § 3.A.1-3; AR 810 and 786 compared with Permit at p. 37, § 4C; AR 786 compared with Permit, at p. 38.) Given the similarities, this Court finds that the Petitioners cannot now complain of requirements that they themselves suggested. The Court finds that for those Petitioners who were part of the joint ROWD submission, the doctrines of estoppel and waiver apply.

The Court also finds that in setting forth the scope of the SUSMPs, the Regional Board followed the State Board's *Bellflower* decision in Water Quality Order No. 2000-11. (AR 8077-8078.) The Court further finds and agrees that the Permit amended the SUSMP requirements to clarify their implementation consistent with recent Regional Board actions, and where appropriate to correct procedural and other deficiencies identified by the State Board in *Bellflower*. (*Ibid.*) Under prior State Board orders, the Regional Board had discretion to include additional types of development in future Permits' SUSMP requirements. As the State Board's

Chief Counsel has stated, in interpreting *Bellflower*: "The Order allows broader discretion by the Regional Water Boards to decide whether to include additional types of development in future SUSMPs." (*Ibid.*; AR 1858-1861, 3337, 7531.) The Court finds that the SUSMP order allows the Regional Board more discretion than what Petitioners contend.

Next, the numeric standard referenced by Petitioners and Respondents is permissible under the *Bellflower* decision:

> The crux of the disagreement is that the Regional Water Board added numeric design standards to establish the amount of runoff that must be treated or infiltrated, and required the mandatory application of these standards to categories of development . . .The numeric criteria the Regional Board adopted essentially requires that 85 percent of the run-off from the development be infiltrated or treated . . . The State Board continued: "In adopting these standards, the Regional Water Board based its decision on a research review of standards in other states and a statistical analysis of rainfall in Los Angeles County. The standard was set to gain the maximum benefit in mitigation while imposing the *least* burden on developers. In light of the evidence of the use of this or more stringent standards in other states, the expert testimony supporting this standard, the endorsement by the U.S. EPA in its comments, and the cost effectiveness of its implementation, [] the Regional Water Board acted appropriately in determining that these standards reflect the MEP.

(AR 1852-1853 [emphasis added].) Consistent with its finding in Issue Five, this Court finds that the numeric design standards set forth at pages 36-37 of the Permit are standards or goals and do not set forth a "cure," in violation of Water Code section 13360. It is appropriate for a permit to have either a volumetric- or flow-based treatment control design standard to mitigate the volumetric treatment control of best management practices. (See AR 17674, 17682, 68930.) Therefore, a flow-based treatment control best management practice is an appropriate requirement.

The Court finds, consistent with its ruling in Issue Five, that the Permit provides flexibility for permittees to petition the Regional Board Executive Officer to substitute a best management practice under the SQMP with an alternative best management practice. (Permit, at

p. 14.) Again, this Court must presume that the Regional Board will act reasonably and carry out its required obligations. (See Evid. Code, § 664.)

In addition, the Court finds that these provisions are federally required. (33 U.S.C. § 1342, subds. (a)(1) & (p)(3)(b)(iii); 40 C.F.R. § 122.44, subd. (k)(2).) Code of Federal Regulations, section 122.26 requires that permittees must control pollutants from industrial activities, through ordinance, permit, contract, order or similar means. (40 C.F.R. § 122.26, subds. (b)(5) & (b)(8), (d)(1)(i)(A)(2), (d)(2)(ii) & (d)(2)(i)(A).) Industrial activity is a significant source of pollutants. (Permit, at p. 4; AR 1853.) The Court notes that industrial activity SUSMPs are not limited to both commercial and residential areas. (See 40 C.F.R. § 122.26, subds. (d)(2)(iv)(A) & (d)(2)(iv)(D).) Therefore, these requirements prevail over any prohibition in Water Code section 13360. (Wat. Code, §§ 13370, 13372, 13377.)

This Court agrees with Respondent and Intervenors that the Clean Water Act represents minimum, not maximum, requirements. In *Warren v. U.S. EPA* (D.C. Cir. 1998) 159 F.3d 616, the Court rejected such a limited reading:

> Petitioners do not direct our attention to anything in the text or structure to indicate that Congress intended to preclude EPA from considering additional factors.

(159 F.3d at pp. 623-624.) Also, "the reasonable inference taken by the EPA is that while it must consider the five listed factors, it is not barred from considering additional ones." (*Allied Local Regional Manufacturers Caucus v. U.S. EPA* (D.C. Cir. 2000) 215 F.3d 61, 78.) Here, the same is true for the Regional Board. It made findings regarding industrial activities. (AR 6799-6801, 7948-7956, 8073-8078.) The Regional Board explicitly stated that: "The new permit amends the SUSMP requirements to clarify implementation, make it consistent with recent Regional Board actions, and where appropriate." (AR 8077-8078.) It clarified that "the 100,000 square feet commercial development definition includes heavy industrial development. The category is

designated 'industrial/commercial.'" (*Ibid.*) The Court notes that industrial and commercial activities are sources of pollution. (AR 6644, 8055, 11599.)

Turning to the issue of environmentally-sensitive areas (ESAs), the Court finds that the Regional Board's inclusion of ESAs in the Permit is justified. (AR 6800, 7071-7077, 7084, 72623-72624.) As the Record notes, the "Regional Board staff has proposed thresholds for ESAs to be responsive to the State Board decision in Order No. 2000-11." (AR 7077.) One of Petitioners' arguments is that responsibility for environmentally-sensitive areas lies with other agencies and laws and that the State Board and Regional Board should not interfere with that regulation. This Court, however, finds that it is appropriate for more than one agency to deal with an issue of such major importance as environmentally-sensitive areas, which are covered by multiple statutes, both state and federal. (See AR 6800, 7073-7074, 7084, 7542.) Sites that adjoin an environmentally-sensitive area can impact the sensitive area. Further, just because an area is environmentally sensitive does not mean that no development will occur there; therefore, an agency may still have concerns with how the area is developed and any adverse effects. (See AR 7073-7074.)

Among the many studies in the Administrative Record is a report titled "The Mitigation of Stormwater Impacts From New Development In Environmentally-Sensitive Areas." At one part, it reads:

> [Environmentally-sensitive areas] are inherently sensitive habitats containing unique, rare, threatened, or endangered species and/or assemblages of species. Their unique and sensitive nature merits a higher standard of environmental protection than more common areas with common and abundant species.

(AR 7074.) It also reads:

> Under the [Clean Water Act], the Regional Board is responsible for 'restoring and maintaining the chemical, physical and biological integrity of the Nation's waters.' Clearly, the [memorandum of understanding] contemplates cooperation

> and coordination of the Regional Board's regulatory programs to enhance the relationship between the [Clean Water Act] and [environmentally-sensitive areas].

(AR 7069.) For these areas, the Court finds there is no duplication of efforts, even though multiple agencies may be involved. Each agency may have a different focus. Notably, water coming from one area impacts others. The California Coastal Commission's policies support this findings. (AR 72623-72624.) An October 2, 2000 letter in the Administrative Record reads:

> The California Coastal Commission believes that the SUSMPs should be applied to all projects within or adjacent to environmentally-sensitive areas. Development activities in and around environmentally-sensitive areas can have a significant impact on the water quality.

(AR 72624, see also 7073.)

In summary, the Court finds that the numeric design standard, the industrial and commercial category and the environmentally-sensitive area category are consistent with the State Board's *Bellflower* decision, general statutory laws in California, federal statutory law and the evidence in the Administrative Record.

The federal regulations set forth requirements for municipalities to apply for a storm water discharge permit. One such requirement is that the permittees, including Petitioners, are required to prepare:

> A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls.

(40 C.F.R. § 122.26, subd. (d)(2)(iv)(a).) In reviewing the Permit application, and basing the Permit upon it, the Regional Board analyzed the effectiveness of the SUSMP program, and fulfilled any responsibility to assess the effectiveness of the SUSMP program. (See, e.g., AR 68961.)

With respect to the proper definition of "redevelopment," Petitioners argue that it should be defined as "one acre," as opposed to "5,000 square feet" as defined in the Permit. The Court finds that the Permit definition is appropriate where it defines "redevelopment" as: "Land-disturbing activity that results in the creation, addition, or replacement of 5,000 square feet more of impervious surface area on an already developed site." (Permit, at pp. 59-60.) This Court rejects the suggestion that "redevelopment" must be defined as "one acre."

First, the reality is that most parcels within the County of Los Angeles, at least in the urban areas, are clearly smaller than an acre. Also, the Court refers back to its acknowledgment that although the local governmental entities have conducted a Herculean effort and made significant headway with water problems, Los Angeles County still has a long way to go. If this Court accepted Petitioners' view, it would mean that no change need be made even though technical knowledge in 2004 is far advanced from where it was 50 or 60 or 70 years ago when some of the initial development occurred. Now, more is known about urbanization's effect on water pollution problems. (Permit, at pp. 2-3.) It is appropriate that when that initial development is redeveloped, society uses that opportunity to make an appropriate change. Adopting the one-acre standard is not workable in this urban area. The Court finds that the 5,000 square foot standard is appropriate given the nature of the problem, the goals of the Clean Water Act and the Porter-Cologne Act and the fact that Los Angeles County has a long way to go in meeting those goals.

Aside from the policy reasons for the definition, this Court finds evidence in support of the Regional Board's redevelopment definition. In its response to comments to the Permit's June 29, 2001 draft, the Regional Board stated:

> The intent of the Regional Board in adopting SUSMP requirements was expressly to ensure that when highly developed communities, such as those in Los Angeles

> County, replace themselves through generations, the opportunity to mitigate the adverse impacts of storm water pollution from urbanization is not lost.

(AR 7084.) As the Court found above, this is a reasonable goal. The Regional Board also explained its rationale for defining redevelopment as "5,000 square feet" of impervious surfaces, looking to other locations around the country. (AR 1863, 7595.)

The Court disagrees with Petitioners that federal regulations require a different definition. This is a Phase I permit, even if some municipalities in Los Angeles County would, standing alone, fit Phase II definitions. The one-acre definition comes from the regulations governing Phase II permits. Therefore, it does not apply. (Compare 40 C.F.R. §§ 122.30-122.37 with 40 C.F.R. § 122.26, subd. (d).) The Court finds that the Permit's definition of "redevelopment" is appropriate and permissible in this Phase I permit to achieve the goals of the Clean Water Act and Porter-Cologne Act.

In addition, this Permit does allow, contrary to Petitioners' arguments, for regional solutions. The permittees clearly have the responsibility to propose regional solutions themselves, as opposed to waiting for the Regional Board to so do. In its *Bellflower* decision, the State Board held:

> We recommend that the *cities and the County*, along with other interested agencies, *work to develop regional solutions* so that individual dischargers are not forced to create numerous small-scale projects. While the SUSMPs are an appropriate means of requiring mitigation of storm water discharges, we also encourage innovative regional approaches.

(AR 1856 [emphasis added].) This concept allows the permittees to make regional solutions. (See also AR 7369; Permit at p. 40.) The Court notes that the permittees have not submitted any specific regional proposals for regional solutions or programs. (AR 7369.) Certainly, they presented no evidence of such proposals at trial. The Court finds that the Permit provides sufficient flexibility for any regional solution proposed by the permittees.

Finally, looking again to the Bellflower decision, the State Board has held:

> The concept of a mitigation fund or "bank" is a positive idea for obtaining regional solutions to stormwater runoff. . . It would be appropriate for *the County to consider developing a program* with the appropriate flood control agency, or as a model for the separate cities to develop.

(AR 1862 [emphasis added].) In short, it appears that it is the County's, not the Regional Board's responsibility to develop such a fund. In Petitioners' Reply Brief, at page 53, lines 18-20, they argue that they specifically requested that the Regional Board build into the Permit the flexibility to allow the fund to be used for a full range of projects and programs. The Permit complied with this request, should the permittees propose such a fund or program. (Permit at p. 40.) The Court therefore finds that the Permit provides sufficient flexibility for a mitigation waiver fund. The Court further finds that an urban area like Los Angeles County must have a SUSMP program in place that will effectively deal with long-term stormwater control issues.

The Court finds that the Petitioners have not met their burden on Issue Six, and declines to grant the writ as to Issue Six.

ISSUE SEVEN

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Seven as follows:

As to Issue Seven, the Parties stipulate that in implementing the legal authority requirements under Permit Parts 3.G.2.c-d, the permittees may exercise their discretion to determine what is necessary to meet these provisions, including the determination of "potential contribution" and "potential to discharge." The Parties further stipulate that "potential contribution" and "potential to discharge," as used in Parts 3.G.2.c-d, means adequate legal authority to prevent an actual discharge of pollutants to the municipal separate storm sewer system.

ISSUE EIGHT

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Eight as follows:

As to Issue Eight, the Parties stipulate that Part 3.C of the Permit is interpreted to mean that revisions to the storm water quality management plan directed by the Executive Officer pursuant to Part 3.C are not elements of the Permit unless and until the Permit is modified to incorporate them pursuant to appropriate notice and hearing.

ISSUE NINE

As previously stated, this Court must be guided by the general mandates of the Clean Water Act and Porter-Cologne Act. In both, society has set forth its goal of clean water. Consistent with this principle, the Permit's Development Construction Program requires that each permittee must implement a program to control run-off from construction activity at all construction sites within its jurisdiction. Petitioners argue that these requirements, found in Part 4.E of the Permit, conflict with the Development Construction Program found in the State Water Resources Control Board's General Construction Stormwater Permit.

The Court finds first that the Permit is consistent with the General Construction Permit. The General Permit only covers construction sites of one acre or more. Part 4.E is intended in part to fill the gap between smaller sites not covered by the General Permit, and the General Permitted sites. As the Court will also discuss below, it finds that the Permit does not impose excessive restrictions on grading and that restrictions on construction-related materials is neither burdensome nor vague.

The federal regulations require the MS4 permits to include a program to reduce pollutants in run-off from construction sites. 40 Code of Federal Regulations, section 122.26, subdivision (d)(2)(iv)(D) states that permittees shall describe a "program to implement and maintain

structural and non-structural best management practices to reduce pollutants in storm water run-off from construction sites to the municipal storm sewer system." These permits are to include ways of dealing with construction sites. As previously noted, the Court finds that construction sites generally release significant amounts of pollution of various types. (See, e.g., AR 6801, 8059.) Even small construction sites cause significant amounts of pollution, especially after rain.

Under the Stormwater Phase II Compliance Assistance Guide, MS4 permits must include controls for construction activities, even if construction sites are regulated under a general permit. (AR 10667.) Because of inconsistent permitting of smaller construction sites, some permittees did not manage sediments until after they left the construction site. (AR 8059-8060.) The lack of a uniform permitting process is a legitimate basis to require consistent local control and supervision by municipalities of smaller construction sites not covered by the General Permit.

State Water Resources Control Board Order 99-08, the General Construction Permit, indicates that the General Permit does not preempt or supercede the authority of local storm water management agencies, such as the Regional Board, "to prohibit, restrict or control storm water discharges to separate storm sewer systems or other water courses within their jurisdiction as allowed by State and Federal law."

The General Construction Permit recognizes the permittees' and the petitioners' responsibility under the Clean Water Act to regulate run-off from construction sites. The Court believes that local government entities may be required to make the smaller construction sites meet Clean Water Act guidelines. There are management programs that have been developed to comply with any permits issued by the Regional Water Boards to local agencies under the Clean Water Act.

The Permit's Development Construction Program at Part 4.E is consistent with the General Construction Permit in that they regulate different entities and are not in conflict.

A local SWPPP may substitute for a state SWPPP if the local is at least as inclusive in controls and best management practices as the state SWPPP. Petitioners have failed to demonstrate that the Regional Board acted either arbitrarily or capriciously abused its discretion or exceeded its authority. The Development Construction Program at Part 4.E provides in part that each permittee must implement a program to control run-off from construction activity at all construction sites within its jurisdiction.

Petitioners argue that the program is excessive in part because Part 4.D prohibits grading during the wet season. They argue that this section is a hardship on the local grading subcontractors and is an economic hardship to the community. Given the mandate from the Clean Water Act and Porter-Cologne Act, this requirement is not excessive. Further, the limitation on grading in the wet season is only one suggestion among several in Part 4.D as to management of this significant source of pollution. Part 4.D gives Petitioners discretion, but that does not render it ambiguous. The best management practice of limiting grading during the wet season is contained in the Construction Handbook developed by municipalities and developers. (AR 34427.)

The Court finds, therefore, that the Regional Board did not abuse its discretion by specifying that grading be limited during the wet season. The Development Construction Program of Part 4.D provides that sediments generated on a project shall be retained using adequate treatment control or structural best management practices. Petitioners contend that this restriction on sediments is excessive and is really a way to adopt a Total Maximum Daily Load (TMDL).

The Court disagrees. Sediment from construction is a major source of pollution in the storm sewer systems. The Clean Water Act allows for limitations on such discharges. (33 U.S.C. section 1342, (p)(3)(B)(ii).) The limitation is consistent with a General Construction Permit prohibition of discharges of material other than storm water. This Court finds that the argument that the limitation is in effect a TMDL is incorrect; it is not a TMDL in disguise. The Court finds that Petitioners have failed to support their contentions with any legal support and therefore disregards these allegations and contentions. (See *Kim v. Sumitomo* (1993) 17 Cal.App.4th 974, 979.)

In addition, looking at the language of Part 4.E of the Permit, the Court finds that subpart d) is essentially the same as the permittees' Report of Waste Discharge. (AR 32.) Both state that construction-related materials, wastes, spills or residues shall be retained on the project site. The relevant language of the Development Construction Program provides:

1. Each permittee shall implement a program to control runoff from the construction activity at all construction sites within its jurisdiction. The program shall insure the following minimum requirements are effectively implemented at all construction sites:

    a) Sediments generated on the project site shall be retained using adequate treatment control or structural BMPs [Best Management Practices];

    b) Construction-related materials, waste, spills or residues shall be retained at the project site to avoid discharge to streets, drainage facilities, receiving waters or adjacent properties by wind or runoff;

    c) Non-storm water runoff from equipment and vehicle washing and any other activity shall be contained at the project site; and;

    d) Erosion from slopes and channels shall be controlled by implementing an effective combination of BMPs [Best Management Practices], (as approved in Regional Board Resolution No. 99-03), such as the limiting of grading scheduled during the wet season; inspecting graded areas during rain events;

planting and maintenance of vegetation on slopes; and covering erosion susceptible slopes.

(Permit, at Part 4.E.1, p. 42.) Subpart b) is similar to the permittees' Report of Waste Discharge (ROWD). Subpart d) is similar to the ROWD that states construction-related materials, wastes, spills or residues shall be retained on the project site. (AR 32.)

As to this section, the Court finds that no special understanding or knowledge is required to understand its meaning. It is clear and not ambiguous. Further, the Permit's terms are not vague for individuals knowledgeable in the field, where seemingly vague terms have meaning in the context of the EPA's regulatory scheme. (See *United States v. Weitzenhoff* (9th Cir. 1994) 35 F.3d 1275, 1289.)

Subpart b) of the Development Construction Program reads: "construction related materials spills or residues shall be retained at the project site to avoid discharge to streets, drainage facilities, receiving waters or adjacent properties by wind or run-off." Petitioners have questioned whether "construction related materials" includes sand, gravel or other natural material. The Court reads subpart B in the context of subpart A's requirement that sediments generated on a project site be retained using adequate treatment control or structural best management practices. Read together, there is no ambiguity and "construction related materials" does include sand, gravel or other natural materials.

Overall, the Court finds that Petitioners have failed to establish that the adoption of the Development Construction Program, Part 4.D. of the Permit, was improper. Petitioners' contentions are conclusory, without any relevant citation to statutes, regulations or case law. Under *Kim v. Sumitomo Bank*, the Court disregards these contentions and denies the writ as to Issue Nine as to the Petitioners.

ISSUE TEN

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Ten as follows:

As to Issue Ten, the Parties stipulate that on April 12, 2004, a letter issued from Dennis Dickerson, Executive Officer of the Regional Board, addressed to Rufus Young in response to a Request for Clarification as to Part 4.F.1, subdivision (a) of the Permit. The Court has previously incorporated that five-page letter into the record by reference, and it is attached as Exhibit "A" to the parties' stipulation and Court's order. The Parties agree that the letter sets forth how Part 4.F.1, subdivision (a) is to be construed.

ISSUE ELEVEN

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Eleven as follows:

As to Issue Eleven, the Regional Board and Petitioners stipulate that Part 3.E of the Permit should be read in light of Findings D.1 and D.2, so that a permittee is not responsible for discharges from facilities over which it has no legal jurisdiction, or for agricultural return flows which are not included under the Clean Water Act. For the purposes of the resolution of this case, Intervenors do not object to this clarification for purposes of the stipulation and entry of judgment.

ISSUE TWELVE

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Twelve as follows:

As to Issue Twelve, the Parties stipulate that Part 4.D.1 requires the principal permittee to conduct a study to develop numeric peak flow criteria for application in six areas. The County has indicated that its peak flow study is expected to be completed in December 2004. The Regional Board will consider the results of the County's study in evaluating the permittees' determination of appropriate numeric peak flow criteria for the natural drainage systems identified in Part 4.D.1. This stipulation shall not be construed as a waiver of the petitioners'

right to comment on and object to future basin plan amendments related to hydromodification or peak flow or the right to comment on and object to the hydromodification resolution pending before the Regional Board.

The Parties recognize that the stipulation set forth in Paragraph 15 does not resolve certain Petitioners' challenge to the Regional Board's legal authority to regulate peak flow through a municipal storm water permit, an issue the Court will address in its statement of decision on Phase II, Issue 6. This stipulation shall not be construed as a waiver or an estoppel, now or in the future, as to any Party's contentions, or rights to pursue those contentions, on other issues litigated in Phases I and II of this litigation.

ISSUE THIRTEEN

By a separate written stipulation, signed into order by the Court, the parties resolved Issue Thirteen as follows:

As to Issue Thirteen, the Parties stipulate that Part 4.C.3.d.3 is intended to apply only to critical sources and requires that permittees initiate an investigation at critical sources within one business day of referral by the Regional Board. The Permit provision identifies certain core components of an investigation, but it does not require that these components be completed within that one business day. Permittees can comply with the Permit by taking initial steps (such as logging, prioritizing, and tasking) to "initiate" the investigation within that one business day. However, the Regional Board would expect that the initial investigation, including a site visit, to occur within four business days. If the Regional Board identifies an emergency condition when referring a matter under Part 4.C.3.d.3, the Executive Officer would expect the permittee to respond appropriately.

The Parties' stipulation regarding Part 4.C.3.d.3 shall not preclude, in future municipal storm water permit revisions, any party from challenging a successor provision to Part 4.C.3.d.3 or revising this interpretation of Part 4.C.3.d.3.

ISSUE FOURTEEN

Issue Fourteen was Petitioners' allegation that the Regional Board violated their rights to a fair hearing and due process of law by making substantial material revisions to the Permit without providing adequate notice and the right to be heard.

This Court is mindful that administrative bodies and governmental agencies are presumed to conduct themselves in an appropriate manner and follow the law where it is clear and appropriate. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812, 817; *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 177 fn. 3; see also, Evid. Code § 664.) The Court notes that the Petitioners are not inexperienced in this field and are represented by experienced counsel. Therefore, while the Court believes the Regional Board's notice might have been better, it was adequate to put the Petitioners on notice as to the purpose and conduct of the hearing. Petitioners certainly knew what issues the Permit involved, after three drafts, 40 meetings, workshops, an EPA mediation, letter briefs, thousands of pages of written comments and an Administrative Record. Comments by Petitioners and other interested parties demonstrate that there clearly was an Administrative Record. Petitioners have put forth no evidence that they asked the Regional Board to specify the contents of the Record.

Although the Court is critical of the Regional Board's three-minute speaking limit in isolation, the Court finds that given the context of the entire Permit adoption process including the numerous meetings, workshops, comment letters, and letter briefs, the three-minute speaking limit was adequate. Given the federal and state demands for clean water and the alleged impact on the municipalities, the Court recognizes that these issues are significant. In the future, the Court believes that the Regional Board could avoid any alleged appearance of impropriety by working with the parties to determine how much time is fair for their comments. However, any

failure to do that here does not negate the Permit and is not sufficient for the Court to remand the Permit for re-hearing.

Finally, the Court finds that there was substantial compliance with the administrative hearing requirements and due process requirements. (See *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1011; *Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1327-1328; *Southern Pac. Transportation Co. v. State Bd. of Equalization* (1985) 175 Cal.App.3d 438, 442.) There was the opportunity for substantial written comment by the municipalities. Petitioners considered their comment letters and documents to be part of the Record and as an opportunity to comment in lieu of oral comment time before the Regional Board. (AR 7900, 7829, 7887-7888.)

The Court is not satisfied that, had the Regional Board provided better notice or more time for comment, that the outcome would have been different, despite numerous requests of this Court to the Petitioners in that regard. (See *NRDC* v. *USEPA* (9th Cir. 2002) 279 F.3d 1180, 1186; *Environmental Defense Center* v. *EPA* (9th Cir. 2003) 344 F.3d 832, 851.) In addition, at trial, counsel for the Regional Board presented various drafts of the Permit, which demonstrated that the requirements regarding TMDLs and the one-business day inspection were logical outgrowths of these previous drafts and, in some cases, arose in response to comments. (See, e.g. AR 5110-5127, 5143-5144, 6468, 6479-6480, 6508, 6568, 7285; Permit pp. 27-34, 48-49.) Therefore, the Court cannot find that there was prejudice to the Petitioners.

IT IS SO ORDERED.

Dated: March ~~16~~ 24, 2005

VICTORIA GERRARD CHANEY
JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF MAILING

Los Angeles Superior Court
Civil Division

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LITIGATION	Case no. **BS080548** Related cases: BS080753, BS080758, BS080791, BS080795 and BS080807

Document(s) served as follows:

STATEMENT OF DECISION FROM PHASE II TRIAL ON PETITIONS FOR WRIT OF MANDATE

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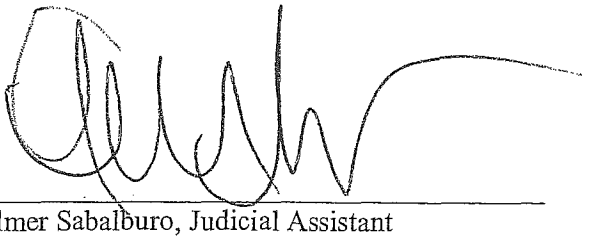
I am over the age of 18 years and not a party to the within action. I am familiar with the Los Angeles Superior Court practice for collection and processing of correspondence and know that such correspondence is deposited with postage prepaid with the United States Postal Service the same day it is delivered to the mail room in the Los Angeles Superior Court. I declare under penalty of perjury under the laws of the State of California that I delivered a true copy of the above notice to the party(ies) or his(their) attorney of record addressed and listed above by placing the copy in a sealed envelope to the mail room of this court.



Dated: March 24, 2005

Elmer Sabalburo, Judicial Assistant

Exhibit "C"

Filed 10/5/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents.	B184034 (Los Angeles County Super. Ct. No. BS080792)

APPEAL from an order of the Superior Court of Los Angeles County, Victoria G. Chaney, Judge. Affirmed in part; reversed in part with directions.

Raymond G. Fortner, Jr., Los Angeles County Counsel, Judith A. Fries, Principal Deputy County Counsel, and Burhenn & Gest, Howard Gest, and David W. Burhenn for Plaintiffs and Appellants County of Los Angeles and Los Angeles County Flood Control District.

Rutan & Tucker, Richard Montevideo, and Peter Howell, for Plaintiffs and Appellants The Cities of Arcadia et al.

Burke, Williams & Sorensen, Leland C. Dolley, Rufus C. Young, and Amy E. Morgan for Plaintiffs and Appellants City of Industry, City of Santa Clarita, and City of Torrance.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV (G)-(L).

Richards, Watson & Gershon, Lisa Bond, Matthew F. Cohen, and John J. Harris for Plaintiffs and Appellants The Cities of Monrovia, Norwalk, Rancho Palos Verdes, Artesia, Beverly Hills, Carson, La Mirada, and Westlake Village.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Richard Magasin, Helen G. Arons, and Jennifer Faye Novak, Deputy Attorneys General, for Defendants and Respondents California Regional Water Quality Control Board, Los Angeles Region and State Water Resources Control Board.

David Saul Beckman, Anjali I. Jaiswal, and Michelle S. Mehta, for Defendants and Respondents Natural Resources Defense Council, Santa Monica Baykeeper, and Heal the Bay.

I. INTRODUCTION

Plaintiffs, 32 cities,[1] the County of Los Angeles (the county), the Los Angeles County Flood Control District (the flood control district), the Building Industry Legal Defense Fund, and the Construction Industry Coalition on Water Quality, appeal from a March 24, 2005 judgment in favor of defendants, California Regional Water Quality Control Board, Los Angeles Region (the regional board) and the State Water Resources Control Board (the state board) and intervenors, Natural Resources Defense Council, Inc., Santa Monica Baykeeper, and Heal the Bay. Plaintiffs challenge the legality of the regional board's issuance of Order No. 01-182 adopting the National Pollutant Discharge Elimination System Permit No. CAS004001 (the permit) which is entitled, "Municipal

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1 The following cities have appealed Arcadia, Artesia, Bellflower, Beverly Hills, Carson, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Mirada, Lawndale, Monrovia, Norwalk, Paramount, Pico Rivera, Rancho Palos Verdes, Rosemead, Santa Clarita, Santa Fe Springs, Signal Hill, South Pasadena, Torrance, Vernon, Walnut, West Covina, Westlake Village, and Whittier.

Storm Water And Urban Runoff Discharges Within The County Of Los Angeles, And The Incorporated Cities Therein, Except The City Of Long Beach." The December 13, 2001 permit was issued to the county, the flood control district, and 84 incorporated cities in Los Angeles County.

We agree with plaintiffs the regional board was required to conduct environmental review pursuant to Public Resources Code section 21080.5. We disagree with every other contention raised by plaintiffs. Upon issuance of the remittitur, the trial court is to set aside its orders denying the administrative mandate petitions. The trial court is to order the regional board to conduct environmental review pursuant to Public Resources Code section 21080.5.

II. THE PERMIT

A. Overview

The permit was issued pursuant to the obligations imposed by the Clean Water Act which will be discussed in greater detail later in this opinion. The Clean Water Act was originally entitled the Federal Water Pollution Control Act. (62 Stat. 1115; 1948 U.S. Code Cong. & Admin. News at pp. 2215-2220.) For purposes of clarity and consistency, the federal applicable water pollution statutes will collectively be referred to as the Clean Water Act. The 72-page permit is divided into 6 parts. There is an overview and findings followed by: a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees. The findings and permit are as follows.

B. Findings

The permit found that the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems). These discharges were the subject of permits issued by the regional board in 1990 and 1996. The 1996 order served as the National Pollutant Discharge Elimination System permit for the discharge of municipal storm water.

The regional board found that storm drain systems in the county discharged cyanide, indicator bacteria, total dissolved solids, total suspended solids, turbidity, nutrients, total aluminum, dissolved cadmium, copper, lead, total mercury, nickel, zinc, bis(2-ethylhexyl)phthalate, polycyclic aromatic hydrocarbons, diazinon, and chlorpyrifos. According to the regional board, there were certain pollutants present in urban runoff which resulted from sources over which the permittees had no control. Among the runoff sources over which the permittees have no control are polycyclic aromatic hydrocarbons which are the products of internal combustion engines or copper from brake pad wear. Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region.

The regional board concluded that urbanization: increased the velocity, volume, and duration of water runoff; increased erosion; and adversely affected natural drainages. The regional board found: "The [county] has identified as the seven highest priority industrial and commercial critical source types, (i) wholesale trade (scrap recycling, auto dismantling); (ii) automotive repair/parking; (iii) fabricated metal products; (iv) motor freight; (v) chemical and allied products; (vi) automotive dealers/gas stations; [and] (vii) primary metal products." Also, the regional board concluded "auto repair facilities" contribute "significant concentrations of heavy metals" to storm waters. Moreover, paved surfaces such as those outside fast food establishments or parking lots "are

potential sources of pollutants" in storm water runoff. Further, storm water runoff from retail gas establishments "have concentrations" of heavy metals and hydrocarbons.

The regional board further made findings concerning the background of the permit and its coverage area. The essential components of a Storm Water Management Program are: adequate legal authority; fiscal resources; the actual Storm Water Quality Management Program itself; and a monitoring program. A Storm Water Quality Management Program consists of: a Public Information and Participation Program; an Industrial/Commercial Facilities Program: a Development Planning Program; a Development Construction Program; a Public Agency Activities Program; and an Illicit Connection and Illicit Discharges Elimination Program. The permittees filed a Report of Waste Discharge dated January 31, 2001, which contained a proposed Storm Water Quality Management Program.

C. Prohibited And Allowable Discharges

In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-storm water discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-storm water emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the regional board; "uncontaminated ground water infiltrations" as defined by 40 Code of Federal Regulations, part 35.2005(b)(20) (1990); and waters from emergency fire fighting flows. Another category of permissible discharges were flows incidental to urban activities consisting of: reclaimed and potable landscape irrigation runoff; potable drinking water discharges which comply with the American Water Works Association guidelines for dechlorination and "suspended solids reduction practices"; drains for foundations, footings, and crawl spaces; air conditioning condensate; "dechlorinated/debrominated"

swimming pool discharges; dewatering of lakes and decorative fountains; non-commercial car washing by residents or non-profit organizations; and sidewalk rinsing.

The regional board's executive officer was granted authority to add or remove categories of non-storm water discharges. If one of the foregoing categories was determined to be "a source of pollutants" by the regional board's executive officer, the discharge was to be no longer exempt. The executive officer retained the authority to impose conditions on the city or county to ensure that the discharge was "not a source of pollutants." Also, the executive director was given the authority to impose additional "prohibitions on non-storm water discharges" after considering either of two factors. The first factor the regional board's executive officer could consider is anti-degradation policies. The second factor the regional board's executive officer could consider is the total maximum load an impaired water body can receive and still meet applicable water quality standards and protect beneficial uses. (33 U.S.C. § 1313(d)(1).)

D. Receiving Water Limitations

Receiving waters are defined thusly, "'Receiving waters' means all surface water bodies . . . ." Discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans were prohibited. Storm or non-storm water discharges from storm sewer systems which constitute a nuisance were also prohibited. The term nuisance is defined, "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." In order to comply with the receiving water limitations, the permittees were required to implement control measures in accordance with the

permit. If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee was required to: immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that described the best management practices that were currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes the foregoing changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board.

E. Storm Water Quality Management Program

The permittees were to implement the Storm Water Quality Management Program which meet the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduce the pollutants in storm waters to the maximum extent possible with the use of best management practices. Further, the permittees were required to revise the Storm Water Quality Management Program to comply with specified total daily maximum load allocations. If a permittee modified the countywide Storm Water Quality Management Program, it was required to implement a local management program. Each permittee was required by November 1, 2002, to adopt a storm water and urban runoff ordinance. By December 2, 2002, each permittee was required to certify that it had the requisite legal authority to comply with the permit through adoption of ordinances or municipal code modifications.

The county was designated as the "Principal Permittee" and was given coordination responsibilities of the Storm Water Quality Management Program. Among other things, the county was to convene Watershed Management Committees which were to meet at least four times per year. Each permittee was entitled to have a voting

representative on the committees. The committees were to coordinate and monitor implementation of the Storm Water Quality Management Program. Each permittee was required to designate a technically knowledgeable representative to the appropriate Watershed Management Committees. Each permittee was required to prepare a budget summary of moneys spent on the Storm Water Quality Management Program.

The permit granted each permittee the "necessary legal authority" to prohibit non-storm water discharges into the storm drain system. That authority extended to prohibiting discharges from: illicit connections of all kinds; wash waters from gas stations and automotive service facilities; runoff from mobile cleaning businesses; areas where oil, fluid, or antifreeze was dripping from machinery; storage areas containing hazardous substances; swimming pool waters; washing of toxic materials; and washing impervious surfaces in industrial and commercial areas. The authority also extended to the discharge of concrete and cement laden wash waters and prohibition of dumping of materials into storm drain systems. The legal authority extended to: requiring persons to comply with permittees' ordinances; holding dischargers to storm drain systems accountable; controlling pollutants and their potential contributors; inspecting, watching, and monitoring procedures to insure compliance with the permit including prohibition of illicit discharges into storm drain systems; and requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible.

F. Special Provisions

The regional board's executive officer had the power to alter a best management practice under specified circumstances. The county, as the principal permittee, was required to implement a public information and participation program. The program included: marking all storm drains with ""no dumping"" signs; instituting a county-wide hotline to report illicit discharges and other environmental hazards; public education;

every year, requiring 50 percent of all school children to be educated on storm water pollution; assessments of education; and other outreach programs.

Each permittee was required to maintain a database of entities that are "critical sources" of storm water pollution. Each permittee was required to inspect under specified circumstances critical facilities including: restaurants; automotive service businesses; retail gasoline outlets; and automotive dealerships. Further, each permittee was to evaluate best management practices and increase their severity if appropriate. Violations of the Storm Water Quality Management Program were to be investigated within specified time periods. By August 1, 2002, the permittees were to amend their ordinances or municipal codes to implement the standard urban storm water mitigation plans contained in the permit. Special requirements were imposed when discharges occur in environmentally sensitive areas.

Each permittee was required to consider storm water quality impacts as part of their California Environmental Quality Act assessments. Each permittee was required to update its general plan to include "considerations and policies" of watershed and storm water quality and quantity management. The permittees were required to educate employees involved in development planning regarding the permit's requirements.

G. Development Construction Program

The permittees were required to implement programs to "control" runoff from construction sites. Runoff from construction sites was prohibited. Non-storm water runoff from equipment washing on construction sites was to be contained on-site. Special requirements were imposed on construction sites of one acre or greater in area. Additional requirements were imposed on developments which were five acres or larger including securing a General Construction Activity Storm Water Permit. The permit imposed "Numerical Design Criteria" which required that post construction best management practices incorporate "either a volumetric or flow based treatment control

design standard, or both" under specified circumstances. If there is a violation of a General Construction Activity Storm Water Permit, the permittee may refer the violator to the state board.

H. Public Agency Activities Program

The permittees were required to minimize storm water pollution impacts. The requirements extended to: sewer systems; public construction; vehicle related facilities; landscape and recreational facilities; storm drain management; and street maintenance. The permittees were also required to participate in a study concerning possible dry weather discharges and the use of alternative treatment control best management practices.

I. Illicit Discharges And Connections

The permit states, "Permittees shall eliminate all illicit connections and . . . discharges to the storm drain system, and shall document, track, report all such cases . . . ." The elimination and reporting of such discharges required: development of an implementation program; by February 3, 2003, the municipalities provide the county with a list of all approved connections in the storm drain system; the county to conduct an annual evaluation of illicit discharges; and training of personnel in the identification and investigation of such discharges. The permittees were to complete the screening of illicit connections as follows: open channels, no later than February 3, 2003; underground pipes by February 1, 2005; and underground pipes with a diameter of 36 inches or greater by December 12, 2006. By December 12, 2006, the permittees were to complete a review of all "permitted connections" to the storm drain system to insure eliminating illicit discharges. Upon receipt of a report an illicit connection, an investigation was to be initiated within 21 days to determine the source and the

responsible party. Within 180 days, the permittees were required to "ensure termination of the connection" using appropriate enforcement authority. As to illicit discharges, a permittee was required within one business day to respond to a report and clean up a discharge. Illicit discharges were to be investigated as soon as possible and appropriate enforcement action was to be pursued.

III. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS, PROCEDURAL HISTORY, AND STANDARDS OF REVIEW

The present appeal arises from the issuance of the permit. The legal genesis of the National Pollutant Discharge Elimination System permits for the discharge of municipal storm water has previously been described in some detail in other decisions. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-621; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1380-1381.) In *City of Rancho Cucamonga*, our colleagues in the Division Two of the Fourth Appellate District summarized the complex federal and state relationship: '"Part of the Federal Clean Water Act [33 U.S.C. § 1251 et seq.] is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101.) The NPDES sets out the conditions under which the federal [Environmental Protection Agency] or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)' (*Burbank, supra,* 35 Cal.4th at p. 621.) [¶] California's Porter-Cologne Act (Wat. Code, § 13000 et seq.) establishes a statewide program for water quality control. Nine regional boards, overseen by the State Board, administer the program in their respective regions. (Wat. Code, §§ 13140, 13200 et seq., 13240, and 13301.) Water

Code sections 13374 and 13377 authorize the Regional Board to issue federal NPDES permits for five-year periods. (33 U.S.C. § 1342, subd. (b)(1)(B).)" (*City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th at pp. 1380-1381.)

After the board issued the aforementioned December 13, 2001 permit, on January 17, 2003, a series of legal challenges, consisting of the filing administrative mandate and mandate petitions and complaints, were instituted by plaintiffs. Judgments in favor of the regional and state boards were entered on March 24, 2005. After the judgments were entered, notices of appeal were filed on June 21 and 22, 2005. The parties stipulated to the maximum extensions of time to brief the matter as allowed by California Rules of Court, rule 15(b)(1). This court had no authority to deny the stipulated to extensions of time to file briefs. (Cal. Rules of Court, rule 15(b) ["The reviewing court may not shorten a stipulated extension"].) No extension of time request was ever granted by any member of this court. The final reply brief was filed on August 1, 2006. Oral argument was held on September 6, 2006.

There are varying standards of review. Many of the challenges to the content of the permit involve review of the denial of Code of Civil Procedure section 1094.5 administrative mandate petitions filed pursuant to Water Code section 13330, subdivision (b). We review the trial court's factual findings for substantial evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824; *Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 86.) Further, it is presumed the regional board considered the documents before it. (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 393-394.) All reasonable doubts are resolved in favor of upholding the regional board's decision. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674.) We (and trial courts) examine the regional board's interpretation of legal matters utilizing a de novo standard of review. But we defer to the regional board's expertise in

construing language which is not clearly defined in statutes involving pollutant discharge into storm drain sewer systems. (*Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7-8; *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th at p. 1384.) Finally, the trial court's denials of plaintiffs' new trial and to enter a new judgment motions and declaratory relief requests are reviewed for an abuse of discretion. (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 616 [new trial motion]; *Bess v. Park* (1955) 132 Cal.App.2d 49, 52 [declaratory relief].)

IV. DISCUSSION

A. The Jurisdiction of the Regional Board To Issue The Permit

Plaintiffs contend the regional board did not have jurisdiction to issue the permit. Plaintiffs rely on language appearing in the Code of Federal Regulations. For example, the permittees cite to 40 Code of Federal Regulations part 123.1(g)(1) (1998) which states, "NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges."[2] Further the permittees refer to the following language in 40 Code of Federal Regulations part 123.22(b) (1998), "If more than one agency is responsible for administration of a

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[2] 40 Code of Federal Regulations part 123.1(g)(1) (1998) states in its entirety: "(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of [Clean Water Act]. [National Pollutant Discharge Elimination System] authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before [the Environmental Protection

program, each agency must have statewide jurisdiction over a class of activities."[3] Moreover, 40 Code of Federal Regulations part 123.1(f) (1998) states, "Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part."

Plaintiffs reason that under state law, the regional board does not have statewide jurisdiction. Water Code section 13100 states that the state and regional boards are part of the California Environmental Protection Agency. Water Code section 13200 identifies the scope of jurisdiction of the nine regional boards. The regional board's limited jurisdiction is defined in Water Code section 13200, subdivision (d).[4] The powers of the

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Agency] will begin formal review. [¶] (2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the [Clean Water Act]."

[3] 40 Code of Federal Regulations part 123.22(b) (1998) states in its entirety: "A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a 'lead agency' to facilitate communications between [the Environmental Protection Agency] and the State agencies having program responsibility. If the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program. [¶] (1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program. [¶] (2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support. [¶] (3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding."

[4] Water Code section 13200, subdivision (d) states: "The state is divided, for the purpose of this division, into nine regions: [¶] Los Angeles region, which comprises all

regional boards are set forth in Water Code section 13225 with the caveat that the powers exist "with respect to its region."[5] Because the regional board is not a statewide agency, plaintiffs argue the permit is void.

This argument has no merit. Effective September 22, 1989, the authority to issue National Pollutant Discharge Elimination System permits was vested by the federal Environmental Protection Agency in the state board. (54 Fed. Reg. 40664, 40665 (Oct. 3, 1989); see *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875.) The state board is organized into nine regional boards which are part of the California Environmental Protection Agency. (Wat.

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basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages."

[5] Water Code section 13225 states in its entirety: "Each regional board, with respect to its region, shall: [¶] (a) Obtain coordinated action in water quality control, including the prevention and abatement of water pollution and nuisance. [¶] (b) Encourage and assist in self-policing waste disposal programs, and upon application of any person, advise the applicant of the condition to be maintained in any disposal area or receiving waters into which the waste is being discharged. [¶] (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom. [¶] (d) Request enforcement by appropriate federal, state and local agencies of their respective water quality control laws. [¶] (e) Recommend to the state board projects which the regional board considers eligible for any financial assistance which may be available through the state board. [¶] (f) Report to the state board and appropriate local health officer any case of suspected contamination in its region. [¶] (g) File with the state board, at its request, copies of the record of any official action. [¶] (h) Take into consideration the effect of its actions pursuant to this chapter on the California Water Plan adopted or revised pursuant to Division 6 (commencing with Section 10000) of this code and on any other general or coordinated governmental plan looking toward the development, utilization or conservation of the water resources of the state. [¶] (i) Encourage regional planning and action for water quality control."

Code, §§ 174 et seq. 13100; see *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1405.) The nine regional boards are authorized under this state's laws to issue National Pollutant Discharge Elimination System permits. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.4th at p. 875; Wat. Code, § 13374.) The federal Environmental Protection Agency memorandum of agreement with the state board complies with the statewide jurisdiction requirements imposed by the federal regulations. The fact the state board is organized into nine regional boards is legally irrelevant. The state board has statewide jurisdiction.

Further, we agree with the Attorney General that plaintiffs may not challenge the regional board's authority to issue a National Pollutant Elimination System permit in this proceeding. Such an indirect challenge to the board's authority is barred by the de facto officer doctrine. The Supreme Court has described the de facto officer doctrine, which bars a challenge to an agency's action based on a purported lack of legal authority to act, thusly: "[W]e conclude that under the 'de facto officer' doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge. As this court explained in *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 41-42: 'The de facto doctrine in sustaining official acts is well established. [Given the existence of] a de jure office, "[p]ersons claiming to be public officers while in possession of an office, ostensibly exercising their function lawfully and with the acquiescence of the public, are *de facto* officers. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." [Citations.]' (See also *Pickens v. Johnson* (1954) 42 Cal.2d 399, 410 ['There is no question but that . . . the status of a judge de facto attached to his action. The office to which he was assigned was a de jure office. By acting under regular assignment under a statute authorizing it he was acting under color of authority as provided by law. His conduct in trying the cases and rendering judgment

therein cannot here be questioned.'].)" (*Marine Forests Soc. v. California Coastal Com.* (2005) 36 Cal.4th 1, 54; original italics.) Here, plaintiffs are challenging the permit by attacking the regional board's authority. Under these circumstances, this they may not do in what amounts to a licensing proceeding. (*Ibid.*; *In re Redevelopment Plan for Bunker Hill, supra,* 61 Cal.2d at pp. 41-42.)

Finally there is no merit to the contention that because the regional board is not an elected body, it cannot make the financial decisions of the scope entailed by the permit. The board's powers exist because of: the Clean Water Act which was adopted and amended by elected members of Congress and signed into law by elected presidents; provisions of the Water Code which were enacted by elected legislators and approved by elected governors; and the members, who must have special competence, are appointed by an elected governor and confirmed by the elected State Senate. (Wat. Code, § 13201, subds. (a)-(b).) The democratic processes of government control every aspect of the creation of the board, its legal authority, and the selection of its members. Further, the decisions of regulatory institutions such as the regional board, are entitled by law to a presumption of competence and propriety. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra,* 135 Cal.App.4th at p. 1384; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1104.)

B. The Motions To Strike

Plaintiffs argue that the trial court erroneously granted the regional board's motions to strike portions of the petition. Plaintiffs contend: the motions to strike were in fact disguised summary adjudication motions; the orders granting the motions to strike did not resolve entire causes of action; and hence, the orders violated Code of Civil Procedure section 437c, subdivision (f)(1). This contention has no merit. Code of Civil Procedure section 436 allows a court to strike portions of a cause of action. (*City of*

Rancho Cucamonga v. Regional Water Quality Control Bd., *supra*, 135 Cal.App.4th at p. 1386; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

C. The State Board's Demurrer

Plaintiffs argue that the trial court erroneously sustained the state board's demurrer to the petitions. The state board contended it was not properly joined as a party to the litigation. A group of plaintiffs alleged the state board required the regional boards to adopt terms and conditions on National Pollutant Discharge Elimination System permits without complying with Government Code sections 11340.5, subdivision (a)[6] and 11352, subdivision (b) which are part of the Administrative Procedure Act. Plaintiffs had a duty to specifically allege every fact that would give rise to liability by the state board. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795.) The state board refused to assume jurisdiction over this case. There were thus no specific allegations as to the state board to hold it liable as it engaged in no independent activity. Hence, this contention has no merit and the demurrer was properly sustained. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at p. 1383; *People ex rel Cal. Regional Wat. Quality Control Bd. v. Barry* (1987) 194 Cal.App.3d 158, 177.)

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6 Government Code sections 11340.5, subdivision (a) states, "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

D. The Declaratory Relief Claims

The trial court sustained the regional board's demurrers to the declaratory relief claims. Plaintiffs argue they were entitled to declaratory relief as to whether: the permittees were required to "go beyond the [maximum extent practicable]" standard to comply with part 2 of the permit which relates to receiving water limitations; part 2 contained a "safe harbor" if the permittees were acting in good faith in implementing best management practices to control excessive discharge of pollutants and nuisance conditions; the requirement in part 4 of the permit that each permittee's general plan and California Environmental Quality Act review take into account storm water runoff is lawful; the regional board was required to consider the economic impact of the proposed permit and its effect on housing; and the regional board was required to perform a "cost/benefit analysis" of the monitoring and reporting program.

When a remedy has been designated by the Legislature to review an administrative action, declaratory relief is unavailable. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546.) Water Code section 13330, subdivision (b) provides that a regional board order may be reviewed by a Code of Civil Procedure section 1094.5 administrative mandate petition filed within 30 days after the state board denies review. Therefore, the demurrer was correctly sustained to the declaratory relief claims. (*Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 287; *Hostetter v. Alderson* (1952) 38 Cal.2d 499, 500.)

E. The Regional Board Has Not Unlawfully Interfered In Local General Plans And California Environmental Quality Act Review

The permit requires the permittees to update their general plans to include watershed and storm water runoff as considerations in the land use, housing, conservation, and open space planning. Further, the permittees were required to amend

their California Environmental Quality Act process to insure review of the effect of commercial and residential development on storm water runoff. Plaintiffs argue these aspects of the permit violate the separation of powers doctrine. This contention has no merit. As noted, the regional boards are part of a joint state and federal process to enforce the Clean Water Act. (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at pp. 619-620; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at pp. 1380-1381.) The general plan powers and duties of cities and counties are limited by statewide law. (Cal. Const., art. XI, § 7; Gov. Code, § 65030.1; *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 907-908; *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1118.) Further, the Clean Water Act supersedes all conflicting state and local pollution laws. (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101; *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 621.) The state and regional boards are vested with the primary responsibility of controlling water quality. (Wat. Code, § 13001; see *Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101; *Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 484.) Regional boards are explicitly granted the authority to issue orders for purposes of enforcing the federal Clean Water Act. (Wat. Code, § 13377.) Federal law requires that permits include controls to reduce pollutant discharge in areas of new development and significant redevelopment—the very area where regional board review occurs. (40 C.F.R. § 122.26(d)(2)(iv)(A)(2) (2006).) So long as the regional boards' decisions carry out federal and state water quality mandates resulting from express legislative action as the challenged orders in this case in fact do, no separation of powers issue is present. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-377; *Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 300.) Given the foregoing, we need not address the waiver, laches, and estoppel contentions of the regional and state boards and the intervenors.

F. Failure To Comply With the California Environmental Quality Act

Plaintiffs argue that the permit issuance process violates provisions of the California Environmental Quality Act. Plaintiffs rely on Water Code section 13389 which provides that chapter 3 of the California Environmental Quality Act does not apply to National Pollutant Discharge Elimination Systems permit proceedings: "Neither the state board nor the regional boards shall be required to comply with the provisions of Chapter 3 (commencing with Section 21100) of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act or acts amendatory thereof or supplementary thereto." California Code of Regulations, title 23, section 3733 also states, "Environmental documents are not required for adoption of waste discharge requirements under Chapter 5.5, Division 7 of the Water Code, except requirements for new sources as defined in the Federal Water Pollution Control Act. This exemption is in accordance with Water Code Section 13389 which does not apply to the policy provisions of Chapter 1 of CEQA." Plaintiffs argue that the California Environmental Quality Act applies to: the receiving water limitations; the revision of the Storm Water Quality Management Program; and the Development Planning Program. (See *City of Arcadia v. State Water Resources Control Bd., supra,* 135 Cal.App.4th at pp. 1420-1426; *Committee for Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 862.)

We agree that Water Code section 13389 explicitly excludes chapter 3 of the California Environmental Quality Act. But as plaintiffs argue, chapters 1 and 2.6 of the California Environmental Quality Act required the regional board to engage in specified environmental assessments. We agree with the analysis of our Fourth Appellate District, Division One colleagues set forth in *City of Arcadia v. State Water Resources Control Bd., supra,* 135 Cal.App.4th at pages 1420-1430 that regional board permits for basin plans which may have a significant impact on the environment are subject to limited

California Environmental Quality Act review. The Storm Water Quality Management Program portion of the permit imposes considerable requirements on development in residential and business settings including: development and redevelopment planning; conserving natural areas; protecting slopes and channels; altering surface flows of storm waters; and developing flow based treatment control designs to mitigate by infiltrating, filtering, or treating of storm water runoff. Such matters, which can involve significant construction, project development, and urban planning are commonly subject to California Environmental Quality Act review. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15378, subd. (a), 15382; *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 639 [removal of firing range]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1600-1607 [city approval of a subdivision]; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 899-907 [ordinance which could lead to future construction]; *Erven v. Board of Supervisors* (1975) 53 Cal.App.3d 1004, 1012-1014 [road]; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 802-806 [groundwater extraction project].)

But as in *City of Arcadia*, there is no requirement that a full environmental impact report be prepared as would be required for a project subject to chapter 3 of the California Environmental Quality Act. Rather, the regional board must prepare a certification pursuant to Public Resources Code section 21080.5. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 127-128; *City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at pp. 1421-1426.) Upon issuance of the remittitur, subject to our discussion below concerning potential mootness, the trial court is to direct the regional board to prepare a certification pursuant to Public Resources Code section 21080.5.

There is no merit to the regional board's argument that the permit is not subject to California Environmental Quality Act review. The exemptions to California Environmental Quality Act review authorized by Public Resources Code section 21084,

subdivision (a) and title 14 California Code of Regulations sections 15307 and 15308 are inapplicable.[7] The Legislature has clearly indicated in Water Code section 13389 that only chapter 3 of the California Environmental Quality Act does not apply to National Pollutant Discharge Elimination System permits. Insofar as title 14 California Code of Regulations sections 15307 and 15308 are in conflict with Water Code section 13389, they are unenforceable. (Gov. Code, § 11342.2 ["Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute"]; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206.) In *Wildlife Alive*, the Supreme Court explained the limited scope of the categorical exemption regulations: "Even if section 15107 was intended to cover the commission's hunting program, it is doubtful that such a categorical exemption is authorized under the statute. We have held that no regulation is valid if its issuance exceeds the scope of the enabling statute. (See Gov. Code, § 11374; *Whitcomb Hotel, Inc.* v. *Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757.) The secretary is

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[7] Public Resources Code section 21084 states: "The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from this division. In adopting the guidelines, the Secretary of the Resources Agency shall make a finding that the listed classes of projects referred to in this section do not have a significant effect on the environment." Title 14 California Code of Regulations section 15307 states: "Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption." Title 14 California Code of Regulations section 15308 provides: "Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption."

empowered to exempt only those activities which do not have a significant effect on the environment. (Pub. Resources Code, § 21084.) It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Wildlife Alive v. Chickering*, *supra,* 18 Cal.3d at pp. 205-206.) Here, the statutory and regulatory inconsistency is even more pronounced—Water Code section 13389 makes it clear only chapter 3 of the California Environmental Quality Act does not apply to the "adoption of any waste discharge requirement" which by its very terms would include the permit. To construe title 14 of the California Code of Regulations sections 15307 and 15308 to bar limited environmental review prior to issuance of a National Pollutant Discharge Elimination System permit would conflict with Water Code section 13389.

Further, there is nothing in federal law that excludes this case from California Environmental Quality Act coverage. None of the applicable forms of federal preemption principles apply to Water Code section 13389. There are three different ways a state statute can be preempted by a federal law: where Congress has made its intent known through explicit statutory language; where state law regulates conduct in a field that Congress intended the federal government to occupy exclusively; and where it is impossible for a party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full congressional purposes and objectives. (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) None of these factors are present. Congress has never explicitly addressed California's limited environmental review process in the context of National Pollutant Elimination System permit issuance procedures. The manner in which National Pollutant Elimination System permits are issued by state agencies such as the regional board is not a field occupied exclusively by the federal government—it is a partnership between federal and state governments. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101 *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 620.) There is no evidence in

this case limited environmental review conducted pursuant to chapter 2.6 of the California Environmental Quality Act will stand as an obstacle to the accomplishment of congressional objectives. If there is a case where the facts are that limited environmental review pursuant to chapter 2.6 of the California Environmental Quality Act will frustrate Congress's purposes and objectives, then certainly, federal preemption can potentially occur. But in the context of this case, we respectfully conclude that the arguments of the regional and state boards and the intervenors that requiring compliance with chapter 2.6 of the California Environmental Quality Act stands as an obstacle to the full accomplishment and execution of congressional purposes and objectives or that it is impossible to comply with both state and federal law are based on speculation. (*Solorzano v. Superior Court* (1992) 10 Cal.App.4th 1135, 1148 ["mere speculation about a hypothetical conflict is not the stuff of which preemption is made"]; *Consumer Justice Center v. Olympian Labs, Inc.* (2002) 99 Cal.App.4th 1056, 1062 ["preemption cannot be based on a belief in phantoms, i.e., speculation"].)

Finally, contrary to the regional board's contention, there is nothing in the National Environmental Policy Act that requires the permit be excluded from California Environmental Quality Act review. Neither title 33 United States Code section 1342(b) nor the federal regulations speak to California Environmental Quality Act review.

At oral argument we raised the question of whether by the time our remittitur issues, the present permit will have expired. If the present permit is no longer in effect, it would seem that it would be a moot point to require limited environmental review. It is unclear what will happen in the future. The best course of action is to leave this matter in the good hands of the trial court. It is entirely possible the present permit will have to be replaced by another permit by the time our remittitur issues. If so, the trial court is free to conclude it would be moot to require limited environmental review in connection with the present permit and may then deny the mandate petition. (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 657; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.)

[The portions of the opinion that follow, parts IV (G)-(L) are deleted from publication. See *post* at page 46, where publication is to resume.]

G. Sufficiency Of The Evidence Contentions

1. Overview

Many of plaintiffs' contentions are overtly stated or deftly disguised sufficiency of the evidence arguments. We agree with the intervenors that plaintiffs in making these assertions have failed in every respect to set forth all of the relevant evidence. As such, all evidence sufficiency contentions have been waived. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

2. The reasonableness of the permit requirements

Plaintiffs argue that the permit violates the statutory requirement it be reasonable. Plaintiffs contend that four parts of the permit exceed federal requirements which only require that a permit restrict pollutant discharges to the maximum extent possible. Plaintiffs identify three parts of the permit which exceed the federal maximum extent possible limit and reason as follows. Part 2.1 of the permit, which involves receiving water restrictions, prohibits all water discharges which violate water quality standards or objectives regardless of whether the best management practices are reasonable. Part 2.4, also part of the receiving water restrictions, permits the regional board to adopt best management practices without any reasonableness restriction. Part 3.C requires the permittees to revise their storm water quality management programs in order to

implement the total maximum daily loads for impaired water bodies. As a result, according to plaintiffs, parts 3.G and 4 authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. Because these four parts of the permit exceed federal requirements, plaintiffs argue the permit violates a state law requirement derived from Water Code sections 13000, 13241, and 13263, subdivision (a)[8] that restrictions on storm water system discharges be reasonable.

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[8] Water Code section 13000 states: "The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state. [¶] The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible. [¶] The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy." The portions of Water Code section 13241 upon which plaintiff rely state: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: [¶] . . . (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area. [¶] (d) Economic considerations. [¶] (e) The need for developing housing within the region. [¶] (f) The need to develop and use recycled water." Water Code section 13263, subdivision (a) states: "The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or

These contentions have no merit. To begin with, insofar as these contentions involve sufficiency of the evidence contentions, they are waived because of a failure to set forth all of the applicable evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881; *State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 749.) In any event, regardless of whether the permit imposed requirements beyond what plaintiffs contend is the maximum extent feasible, the regional board has the authority to impose additional restrictions. As the intervenors explain, title 33 United States Code section 1342(p)(3)(B) states in part: "Permits for discharges from municipal storm sewers— [¶] . . . (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and [¶] (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the . . . State determines appropriate for the control of such pollutants."

In fact, the regional board had the duty to place limits on the release of pollutants into certain waters. Our colleagues in Division One of the Fourth Appellate District have explained: the Clean Water Act requires that states identify a level of permissible pollution, the "total maximum daily load"; the total maximum daily load must be established at a level to achieve certain water standards; and the National Pollutant Elimination System permits must be consistent with the amount of pollutants described in the state specified total maximum daily load. (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at p. 1404; 33 U.S.C. § 1313(d).) The federal Clean Water Act requires the following, "Except as in compliance with this section and

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material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

sections . . . [1312, 1316, 1317, 1328, 1342, and 1344] of this Act, the discharge of any pollutant by any person shall be unlawful." (33 U.S.C. § 1311(a).) In terms of the regional board's statutory duty in setting a total maximum daily load, the Clean Water Act requires: "Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section [1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards . . . ." (33 U.S.C. § 1313(d)(1)(C).) As can be noted, the regional board is permitted to take into account the maximum extent practicable limitation in setting the total maximum daily load. (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 136 Cal.App.4th at p. 1428.) The regional board's total maximum daily load specification in this case was entirely consistent with federal water quality law. Nothing in the Water Code can circumvent the foregoing federally imposed requirements as to the calculation of the total maximum daily load. (See *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at pp. 618, 626-627.) And the regional board's authority in setting the total maximum daily load extended to imposing requirements beyond the maximum extent practicable. (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at p. 1428; *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at pp. 885-886.)

There is substantial evidence the permit imposes reasonable pollutant discharge requirements. The regional board had before it the study entitled "Fundamentals of Urban Runoff Management" which detailed the feasibility of the restrictions at issue. In footnote 6 of the trial court's March 24, 2005 statement of decision are 16 separate studies or analyses that evaluate the reasonableness of the restrictions at issue. Further, as described below, there was a vast array of reports and official papers that addressed the reasonableness issue in varying contexts ranging from economics to housing. Substantial evidence supports the trial court's finding that the permit's restrictions on pollutant

discharge are reasonable. It is presumed the regional board examined these reports. (*City of Santa Cruz v. Local Agency Formation Com.*, *supra*, 76 Cal.App.3d at pp. 393-394; see *Laurel Heights Improvement Assn. v. Regents of the University of California*, *supra*, 47 Cal.3d at p. 393.)

There is likewise no merit to the factually unsupported theory of the county and the flood control district that they cannot comply with the permit. The county and the flood control district assert, without citation to any evidence in the record, they cannot comply with the permit thereby rendering it, as matter of law, unreasonable. We agree with the intervenors that there is insufficient facts to permit an evidentiary challenge of the type asserted by the county and the flood control district. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at p. 888; Cal. Rules of Court, rule 14(a)(1)(C).)

3. Failure to consider the economic effects of the permit and engage in a proper cost benefit analysis

Plaintiffs argue that the regional board failed to consider the economic impact of issuance of the permits. A regional board is authorized to issue a permit which imposes more protective restrictions on waste water discharge than required by the Clean Water Act. (Wat. Code, § 13377.[9]) As noted, Water Code section 13241, subdivision (d) requires that the regional board consider the economic effect including the cost of compliance of the issuance of the permit. (See fn. 6, *supra*.) Plaintiffs argue the permit

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9 Water Code section 13377 states, "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, 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."

imposes conditions more stringent than required by the federal Clean Water Act. Therefore, they reason that the regional board was required to consider the economic effect of the permit. (*City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th at p. 618 ["When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance" (orig. italics)]; *City of Arcadia v. State Water Resources Control Bd., supra*, 135 Cal.App.4th at pp. 1415-1418 [finding sufficient consideration of economic effect of total daily maximum loads for trash restriction imposed in 2001 permit].) Further, plaintiffs argue that the regional board failed to conduct a cost benefit analysis as required by Water Code sections 13165[10], 13225, subdivision (c)[11], 13267, subdivision (b)[12] before imposing monitoring and reporting obligations as part of the permit.

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10 Water Code section 13165 states, "The state board may require any state or local agency to investigate and report on any technical factors involved in water quality control; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom."

11 Water Code section 13225, subdivision (c) states: "Each regional board, with respect to its region, shall: [¶] (c) Require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom."

12 Water Code section 13267, subdivision (b)(1) states: "In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard

These contentions have no merit. To begin with, insofar as plaintiffs argue that the there was no substantial evidence these issues were considered, they have waived their opportunity to do so because they failed to set forth all of the documents considered by the regional board. Plaintiffs have failed to detail an extensive array of reports and analysis appearing in the administrative record. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881; *State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 749.)

Nonetheless this contention is without merit. The permit explicitly states it is intended to provide a cost-effective storm water pollution program to the maximum extent possible. The permit applies the same cost-effective analysis to efforts to reduce the flow of pollutants into receiving waters. Moreover, the regional board in its findings referred to a report specifying how the "maximum extent practicable" requirement includes considerations of costs and benefit. The regional board had before it: a study of costs prepared by the Maryland Department of Environment; a 58-page study prepared for Parsons Engineering Service on the costs and benefits of storm water best management practices; the extensive federal Environmental Protection Agency data summary of best management practices and their costs which include programs incorporated into the permit; a federal Environmental Protection Agency fact sheet showing the cost effectiveness of reductions in storm water run-off; a federal Environmental Protection Agency document detailing the economic benefits of run off controls; a 44-page federal Environmental Protection Agency document detailing cost analyses of various best management practices; a 99-page report entitled "Cost Analysis" on storm water programs in the state of Washington; a similar analysis prepared for the Commonwealth of Virginia; a federal Environmental Protection Agency analysis of the economic effects of clean water; a lengthy analysis prepared by the federal

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to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

Environmental Protection Agency on the effects of restrictions of runoff on housing values; and an 11-page study entitled, "The Economics of Watershed Protection." It is presumed the regional board examined these reports. (*City of Santa Cruz v. Local Agency Formation Com.*, *supra*, 76 Cal.App.3d at pp. 393-394; see *Laurel Heights Improvement Assn. v. Regents of the University of California*, *supra*, 47 Cal.3d at p. 393.) This constitutes substantial evidence the regional board considered the costs and benefits of implementation of the permit. Finally, for the foregoing reasons, the trial court did to abuse its discretion when it denied the posttrial motions which asserted the regional board did not consider the economic consequences of the permit.

4. Failure to consider the effect of the permit on housing

Plaintiffs argue that the regional board neglected to consider the effect of the permit on the need to develop housing as required by Water Code section 13241, subdivision (e). (See fn. 6, *supra*.) Plaintiffs argue that the Legislature has determined that all state agencies such as the regional board must "facilitate the improvement and development" of affordable housing. (Gov. Code, § 65580, subds. (c)-(d).) Plaintiffs argue: the permit is designed to impose new storm runoff limitations on future residential projects; the Standard Urban Water Mitigation Plan portion of the permit applies to both development and redevelopment projects; the permit requires that runoff mitigation occur on single family residences occupying one acre or more and 10-unit or more housing developments; among the mitigation requirements are retention of runoff and erosion from construction sites; transfers of property were subject to maintenance agreements; and the permit will require a significant amount of land to comply with treatment control best management practices.

Plaintiffs have failed to detail an extensive array of reports and analyses appearing in the administrative record. Thus, the issue of whether there is substantial evidence the regional board considered the effect of the permit on housing has been waived.

(*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881; *State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 749.) Nonetheless, there is substantial evidence the regional board considered housing issues prior to issuing the permit. The regional board had before it: the May 16, 2001 expression of concerns by the Building Industry Association; demographic analyses; a scholarly discussion of the effects of environmental regulation and housing availability; the federal Environmental Protection Agency analysis of the potential effects of restrictions of runoff on housing values; a technical analysis of runoff controls on housing design and planning; a National Association of Homebuilders guide for residential storm water runoff; an analysis of site design and watershed management in the context of residential subdivisions; the document entitled, "Storm Water Management in Washington" which discusses the technical requirements for small and large parcel developments; the regional board staff analysis; an analysis of the experiences in Virginia; and an article on additional housing costs resulting from storm water regulation. It is presumed the regional board examined these reports. (*City of Santa Cruz v. Local Agency Formation Com.*, *supra*, 76 Cal.App.3d at pp. 393-394; see *Laurel Heights Improvement Assn. v. Regents of the University of California*, *supra*, 47 Cal.3d at p. 393.) Thus, there is substantial evidence the regional board considered housing related issues before it issued the permit.

H. Improper Specifications Of Design Characteristics.

Plaintiffs argue that the regional board improperly specified the '"design or the particular manner'" as to how there was to be compliance with waste discharge requirements. Plaintiffs rely on Water Code section 13360, subdivision (a) which states: "No waste discharge requirement or other order of a regional board . . . issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." Plaintiffs

contend two provisions of the permit violate Water Code section 13360, subdivision (a). First, plaintiffs argue that the permit improperly imposes a series of specific design criteria for ""Volumetric Treatment Control"" and ""Flow based Treatment Control"" best management practices. Second, plaintiffs challenge the requirement that some of them place and maintain trash receptacles at transit stops.

Theses contentions have no merit. As held in *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at page 1389, the federal Clean Water Act authorizes National Pollutant Discharge Elimination Systems permits to set forth specific practices which will restrict polluted storm water runoff. (33 U.S.C. § 1342(a)(1), (p)(3)(B)(iii).) In *City of Rancho Cucamonga*, Associate Justice Barton C. Gaut explained: "Rancho Cucamonga's reliance on Water Code section 13360 is misplaced because that code section involves enforcement and implementation of state water quality law, (Wat. Code, § 13300 et seq.) not compliance with the Clean Water Act (Wat. Code, § 13370 et seq.) The federal law preempts the state law. (*Burbank*, *supra*, 35 Cal.4th at p. 618.) The Regional Board must comply with federal law requiring detailed conditions for NPDES permits." (*City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at p. 1389.) Thus, nothing in state law in general or Water Code section 13360 in particular is violated by the specific pollution control requirements imposed on the permittees. We need no address the parties' remaining contentions concerning trash receptacles.

I. Hearing Related And Due Process Arguments

1. Overview of arguments

Plaintiffs contend that the December 13, 2001 hearing failed to comply with due process requirements in the following particulars: the notice did not comply with the requirements for an adjudicative hearing specified in Government Code section 11425.10, subdivision (a)(2); no sworn testimony was presented nor any documentary evidence admitted into evidence; the permittees were not given the opportunity to present evidence, cross-examine witnesses, or present a rebuttal in accordance with Government Code section 11425.10, subdivision (a) and California Code of Regulations, title 23, sections 648.4 and 648.5; the permit was not based on evidence offered at the hearing in violation of Government Code section 11425.50, subdivision (c) and California Code of Regulations, title 23, sections 648.2 and 648.3; technical and scientific matter was relied upon without complying with California Code of Regulations, title 23, section 648.2; and substantive changes were made to the permit after the hearing was concluded without giving the permittees an opportunity to comment on the amendments; most of the administrative record was never set forth at the hearing and was not identified until four months after the December 13, 2001 hearing.

2. Adequacy of the hearing notice

Plaintiffs contend that they did not receive an adequate notice that an adjudicative hearing would be conducted. As to state law requirements, plaintiffs argue the notice never states an adjudicative hearing was going to be held. Plaintiffs argue: Government Code section 11440.20, subdivision (a)[13] requires that written notice be given of an

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13 Government Code section 11440.20, subdivision (a) states: "Service of a writing on, or giving of a notice to, a person in a procedure provided in this chapter is subject to

adjudicatory hearing; the "Notice Of Public Hearing" did not comply with Government Code section 11425.10, subdivision (a)(2);[14] the written notice does not state that what evidence would be relied upon; the notice does not state that there would a waiver of the formal regulatory hearing and evidentiary requirements as permitted by California Code of Regulations, title 23, section 648, subdivision (d)[15]; and the written notice did not indicate an informal hearing would be held as permitted by Government Code section 11445.20 et seq. and California Code of Regulations, title 23, section 648.7.[16]

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the following provisions: [¶] (a) The writing or notice shall be delivered personally or sent by mail or other means to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative. If a party is required by statute or regulation to maintain an address with an agency, the party's last known address is the address maintained with the agency."

14 Government Code section 11425.10, subdivision (a)(2) states: "(a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements: [¶] . . . (2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding."

15 California Code of Regulations title 23, section 648, subdivision (d) states: "(d) Waiver of Nonstatutory Requirements. The presiding officer may waive any requirements in these regulations pertaining to the conduct of adjudicative proceedings including but not limited to the introduction of evidence, the order of proceeding, the examination or cross-examination of witnesses, and the presentation of argument, so long as those requirements are not mandated by state or federal statute or by the state or federal constitutions."

16 California Code of Regulations, title 23, section 648.7 states: "Unless the hearing notice specifies otherwise, the presiding officer shall have the discretion to determine whether a matter will be heard pursuant to the informal hearing procedures set forth in article 10, commencing with section 11445.20, of chapter 4.5 of the Administrative Procedure Act. [¶] Among the factors that should be considered in making this determination are: [¶] The number of parties, [¶] The number and nature of the written comments received, [¶] The number of interested persons wishing to present oral comments at the hearing, [¶] The complexity and significance of the issues involved, and [¶] The need to create a record in the matter. [¶] An objection by a party, either in writing or at the time of the hearing, to the decision to hold an informal hearing shall be

We agree with the regional board that the December 13, 2001 hearing was an adjudicative, quasi-judicial, proceeding. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra*, 135 Cal.App.4th at p. 1385; see *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320.) As an adjudicative proceeding, a National Pollutant Discharge Elimination Systems permit hearing is exempt from the rulemaking procedures of the Administrative Procedures Act. (Gov. Code, § 11352, subd. (b)[17]; *City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra*, 135 Cal.App.4th at p. 1385.) Thus, Government Code sections 11400 through 11475.70 and 11513 apply to regional board permit issuance proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (b)[18]; *City of Rancho Cucamonga v. Regional Water Quality Bd., supra*, 135 Cal.App.4th at p. 1385.)

The permittees received a document entitled "Notice of Public Hearing" sent by the regional board on September 27, 2001. The notice stated: "The hearing will start at 9:00 a.m. Regional Board's staff will present an overview of the proposed permit. Interested persons are invited to attend and to testify in front of the Regional Board. For the accuracy of the record, comments should also be submitted in writing. The Regional Board may ask questions of staff and persons who testify prior to making a decision on

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resolved by the presiding officer before going ahead under the informal procedure. Failure to make a timely objection to the use of informal hearing procedures before those procedures are used will constitute consent to an informal hearing. A matter shall not be heard pursuant to an informal hearing procedure over timely objection by the person to whom agency action is directed unless an informal hearing is authorized under subdivision (a), (b), or (d) of section 11445.20 of the Government Code."

17 Government Code section 11352, subdivision (b) states: "The following actions are not subject to this chapter: [¶] (b) The issuance . . . of waste discharge requirements and permits pursuant to Sections 13263 and 13377 of the Water Code. . . ."

18 California Code of Regulations, title 23, section 648, subdivision (b) states: "(b) Incorporation of Applicable Statutes. Except as otherwise provided, all adjudicative proceedings before the State Board, the Regional Boards, or hearing officers or panels appointed by any of those Boards shall be governed by these regulations, chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code."

the adoption of the proposed." On October 11, 2001, the regional board sent a "Announcement of a Public Hearing and Transmittal of the Tentative Draft—County of Los Angeles Municipal Storm Water NPDES Permit" scheduling the hearing on the permit for November 29, 2001. The October 11, 2001 announcement stated: "Following the consideration of written comments and oral testimony, the Board may take action to adopt tentative Order No. 01-XXX during a public meeting on November 29, 2001. At its discretion, however, the Board may direct further investigation." The October 11, 2001 announcement: indicated a agenda would be posted on the regional board's website by November 19, 2001; stated the permittees were operating under a permit which expired on July 30, 2001; contained a summary of the principal changes to be made to the permit that expired on July 30, 2001; referred to an attached staff report; and requested comments to the tentative draft of the proposed permit. Attached to the announcement was the notice of hearing which: identified when and where the hearing would be held; explained where documents pertinent to the hearing could be located; and indicated interested persons could testify and submit comments in writing.

The November 29, 2001 regional board meeting was continued to December 13, 2001 after an unsuccessful effort at achieving settlement through mediation. On November 30, 2001, the regional board gave notice on its website of the December 13, 2001 hearing. The regional board's meeting agenda posted on its website on December 13, 2001, listed as item No. 10 under the heading "STORM WATER – NPDES PERMIT RENEWAL" (original bold and underscore): "Consideration of a proposed renewal of the municipal storm water permit for the County of Los Angeles and incorporated cities therein, except the City of Long Beach. (After a public hearing, the Board will consider renewal of the existing municipal permit for the County and 83 cities.) [¶] [Xavier Swamikannu, 576-6654] . . . Board [¶] Action" (Original italics.) Above the listing of the agenda items, the following appears, "All Board files pertaining to the items on this agenda are hereby made a part of the record submitted to the [regional board] by staff for its consideration prior to action on the related items." The regional board adopted the

permit at the December 13, 2001 hearing. Plaintiffs through their counsel appeared at the December 13, 2001 hearing.

There is no merit to the state law inadequate notice contention. There was no requirement that the notice state an adjudicative hearing would be held. As a matter of law, an adjudicative hearing would be held in connection with any renewal or issuance of a National Pollutant Discharge Elimination Systems permit. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at p. 1385.) Further, the notices complied with the requirements imposed by California Code of Regulations, title 23, section 647.2, subdivisions (a) through (c) and (e).[19]

Plaintiffs contend that the foregoing notice was deficient because it violates federal and state laws. Plaintiffs argue that the notice fails to comply with federal law. Plaintiffs rely on the following provisions of 40 Code of Federal Regulations part 124.8 (2001) which states: "(a) A fact sheet shall be prepared for every draft permit . . . . The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

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[19] California Code of Regulations, title 23, section 647.2, subdivisions (a) through (c) and (e) states: "(a) Purpose. Government Code Section 11125 requires state agencies to provide notice at least one week in advance of any meeting to any person who requests such notice in writing except that emergency meetings may be held with less than one week's notice when such meetings are necessary to discuss unforeseen emergency conditions as defined by published rule of the agency. The purpose of this section is to establish procedures for compliance with Government Code Section 11125 by the State Board and the Regional Boards. [¶] (b) Contents of Meeting Notice. The notice for all meetings of the State Board and Regional Boards shall specify the date, time and location of the meeting and include an agenda listing all items to be considered. The agenda shall include a description of each item, including any proposed action to be taken. [¶] (c) Time of Notice. Notice shall be given at least one week in advance of the meeting. When the notice is mailed, it shall be placed in the mail at least eight days in advance of the meeting. [¶] (e) Distribution. Notice shall be given to all persons directly affected by proceedings on the agenda and to all persons who request in writing such notice. Notice shall be given to any person known to be interested in proceedings on the agenda."

[¶] (b) The fact sheet shall include, when applicable: [¶] . . . (6) A description of the procedures for reaching a final decision on the draft permit including: [¶] . . . (ii) Procedures for requesting a hearing and the nature of that hearing . . . ." We agree with the Attorney General that these provisions doe not apply to a regional board National Pollutant Discharge Elimination Systems permit renewal and issuance proceedings.

Finally, in terms of the notice issues, plaintiffs argue the permittees' due process rights were violated. The state and federal due process provisions require that "some form of notice" be given. (*Sommerfield v. Helmick*, *supra*, 57 Cal.App.4th at p. 320; *B. C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 954.) The notices that were provided complied with all due process requirements applicable to an adjudicative hearing.

3. Adequacy of the hearing

Plaintiffs contend the proceedings before the regional board were not conducted as a proper adjudicative hearing. Plaintiffs argue they were denied the opportunity to present or rebut evidence. Government Code section 11425.10, subdivision (a)(1) states in part: "(a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements: [¶] (1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." The mode of presentation of evidence at adjudicatory hearing is spelled out in California Code of Regulations, title 23, sections 648.4, subdivision (a) and 648.5.[20] Because there was no evidence produced at

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20 California Code of Regulations, title 23, section 648.4, subdivision (a) provides: (a) It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits. [¶] (b) The hearing notice may require that all parties intending to present evidence at a hearing shall submit the following information to the Board prior to the hearing: the name of each witness whom the party intends to call at the hearing, the subject of each witness' proposed testimony, the estimated time required by the witness to present direct testimony, and the qualifications of each expert witness. The required information shall be submitted in accordance with the procedure specified in the

hearing notice. [¶] (c) The hearing notice may require that direct testimony be submitted in writing prior to the hearing. Copies of written testimony and exhibits shall be submitted to the Board and to other parties designated by the Board in accordance with provisions of the hearing notice or other written instructions provided by the Board. The hearing notice may require multiple copies of written testimony and other exhibits for use by the Board and Board staff. Copies of general vicinity maps or large, nontechnical photographs generally will not be required to be submitted prior to the hearing. [¶] (d) Any witness providing written testimony shall appear at the hearing and affirm that the written testimony is true and correct. Written testimony shall not be read into the record unless allowed by the presiding officer. [¶] (e) Where any of the provisions of this section have not been complied with, the presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and shall refuse to do so where there is a showing of prejudice to any party or the Board. This rule may be modified where a party demonstrates that compliance would create severe hardship. [¶] (f) Rebuttal testimony generally will not be required to be submitted in writing, nor will rebuttal testimony and exhibits be required to be submitted prior to the start of the hearing." California Code of Regulations, title 23, section 648.5 provides: "a) Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board. Adjudicative proceedings generally will be conducted in the following order except that the chairperson or presiding officer may modify the order for good cause: [¶] (1) An opening statement by the chairperson, presiding member, or hearing officer, summarizing the subject matter and purpose of the hearing; [¶] (2) Identification of all persons wishing to participate in the hearing; [¶] (3) Administration of oath to persons who intend to testify; [¶] (4) Presentation of any exhibits by staff of the State or Regional Board who are assisting the Board or presiding officer; [¶] (5) Presentation of evidence by the parties; [¶] (6) Cross-examination of parties' witnesses by other parties and by Board staff assisting the Board or presiding officer with the hearing; [¶] (7) Any permitted redirect and recross-examination; [¶] (b) Questions from Board members or Board counsel to any party or witness, and procedural motions by any party shall be in order at any time. Redirect and recross-examination may be permitted. [¶] (c) If the Board or the presiding officer has determined that policy statements may be presented during a particular adjudicative proceeding, the presiding officer shall determine an appropriate time for presentation of policy statements. [¶] (d) After conclusion of the presentation of evidence, all parties appearing at the hearing may be allowed to present a closing statement."

the hearing, the permittees argue the findings were inadequate. (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158; *Southern Cal. Edison Co. v. State Water Resources Control Bd.* (1981) 116 Cal.App.3d 751, 760.)

We have read the transcript of the hearing. Those who wished to address the regional board were placed under oath. Presentations were made by the county, the City of Los Angeles, the Coalition for Practical Regulation, and a council representing the interests of various cities. Other individuals were permitted to present their views. The permittees' counsel made no request to call witnesses or objected to the manner in which the hearing proceeded as is argued on appeal. The permittees' counsel were given an opportunity to be heard. Further, extensive written comments were made by the permittees and their counsel. In light of the extensive notice given to them, if the permittees' counsel had any objections akin to those raised on appeal, they should have asserted them. No due process, statutory, or regulatory violation occurred. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285-287; Cal. Code Regs., tit. 23, § 648, subd. (d).)

4. Belated findings

Plaintiffs contend that untimely findings were made by the regional board. The changes made without an opportunity and comment were: an amendment to the total daily maximum loads for trash; the insertion of a requirement that complaints referred by the regional board be investigated within one business day; and significant changes to the inspection program. We agree with the Attorney General that the modifications in the permit were not of such gravity that a due process or other violation occurred. The final permit was a logical outgrowth of the draft permit. Hence, there was no violation of any right to notice or a hearing. (See *Natural Resources Defense Council v. U.S. E.P.A.* (9th Cir. 2002) 279 F.3d 1180, 1186 [applying federal notice and hearing provisions inn the administrative context]; *Center for Biological Diversity v. Bureau of Land Management* (N.D. Cal. 2006) 422 F.Supp.2d 1115, 1155-1156 [same].)

J. Inspection Requirements

Plaintiffs argue the inspection requirements imposed in the permit are unlawful. The permit requires the permittees to inspect to insure there are no illicit discharges into the storm sewer system and critical sources of pollutants in runoff. We agree with the intervenors—no statute or regulation prohibited the regional board from imposing the inspection requirements. Further, there is federal regulatory authority that required the regional board consider imposing the inspection requirements. (40 C.F.R. 122.26(d), (g) (2000).) This contention has no merit.

K. Propriety Of The Regional Board Considering The Administrative Record In The Long Beach Case

Plaintiffs contend that the regional board should not have considered the administrative record in proceedings involving the 1996 issuance of a National Pollutant Discharge Elimination System permit to the City of Long Beach. According to plaintiffs, the administrative record was prepared in connection with the challenge by the City of Long Beach to the National Pollutant Discharge Elimination System Permit issued in 1996. Plaintiffs assert most of the administrative record in the Long Beach case is unrelated to the present case. Plaintiffs argue that consideration of the Long Beach records: are surprise evidence received in violation of title 23, California Code of Regulations, section 648.4, subdivision (a); violated the requirement that the regional board's presentation of exhibits be followed by the parties' presentation of evidence as required by title 23, California Code of Regulations, section 648.5, subdivisions (a)(4) and (5); and the process for admitting public records by reference pursuant to California Code of Regulations, section 648.3 was violated.

We disagree. The regional board certified the administrative record as including documents relevant to a National Pollutant Discharge Elimination System permit issued for the City of Long Beach. It is presumed the regional board considered the documents pertinent to the Long Beach National Pollutant Discharge Elimination System permit. (*Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1131; see *Bar MK Ranches v. Yuetter* (10th Cir. 1993) 994 F.2d 735, 740.) Admissibility of evidence is controlled by Government Code sections 11400 and 11513, subdivision (c). Government Code section 11513, subdivision (c) states: "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." What is unclear is the standard of judicial review of the regional board's decision to consider the Long Beach National Pollutant Discharge Elimination System permit. It would appear the standard of judicial review is that set forth in Code of Civil Procedure section 1094.5, subdivision (b) whether: the regional board's evidentiary ruling was in excess of jurisdiction; there was a fair trial; or there was any prejudicial abuse of discretion. Insofar as we are examining the trial court's ruling allowing the Long Beach evidence to be part of the record, as with any relevancy issue, we apply an abuse of discretion standard of review. (*People v. Panah* (2005) 35 Cal.4th 395, 474; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) Under any standard of review, the Long Beach evidence is relevant. The actions taken in imposing runoff conditions on the second largest city in the county are pertinent to what conditions to impose on the remainder of the county. Finally, there is insufficient evidence to support plaintiffs' surprise contention. There is no evidence that any of the permittees' attorneys were prohibited from examining the entire administrative record prior to the December 13, 2001 hearing.

L. The Trial Court Did Not Abuse Its Discretion In Refusing To Augment The Record

Plaintiffs contend the trial court improperly refused to augment the record to include petitions they had filed with state board. This issue is in essence an issue of relevance which is reviewed for an abuse of discretion. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, fn. 3; *People v. Panah, supra*, 35 Cal.4th at p. 474; *People v. Kipp, supra*, 26 Cal.4th at p. 1123.) The documents at issue were all prepared after the regional board issued the permit. Without abusing its discretion, the trial court could conclude that the post permit issuance papers were irrelevant. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 250, fn. 7; *People v. Rowland* (1992) 4 Cal.4th 238, 268.)

[The balance of the opinion is to be published.]

V. DISPOSITION

The judgment is reversed. Upon issuance of the remittitur, the trial court is to issue its writ of administrative mandate which solely directs defendant, California Regional Water Quality Control Board, Los Angeles Region, to set aside its permit and conduct limited California Environmental Quality Act review as discussed in the body of this opinion. In exercising its equitable discretion, if plaintiffs' environmental review contentions become moot either when the writ of mandate is issued or on a later date because another permit is issued, the trial court retains the authority to decline to order limited environmental review. All other aspects of the orders denying the administrative mandate petitions, dismissing the complaints, and denying the post trial motions are affirmed. Defendants, California Regional Water Quality Control Board, Los Angeles Region and the State Water Resources Board, are to recover their costs incurred on appeal jointly and severally from plaintiffs, the Cities of Arcadia, Artesia, Bellflower,

Beverly Hills, Carson, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Industry, Irwindale, La Mirada, Lawndale, Monrovia, Norwalk, Paramount, Pico Rivera, Rancho Palos Verdes, Rosemead, Santa Clarita, Santa Fe Springs, Signal Hill, South Pasadena, Torrance, Vernon, Walnut, West Covina, Westlake Village, and Whittier, and the County of Los Angeles, Los Angeles County Flood Control District, Building Industry Legal Defense Fund, and the Construction Industry Coalition on Water Quality.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

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THE CITIES OF DUARTE AND HUNTINGTON PARK'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL'S PETITION FOR REVIEW OF THE LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R4-2012-0175

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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