State Water Resources Control Board

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TO: Dennis Dickerson
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FROM: Michael A.M. Lauffer
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DATE: November 9, 2001

SUBJECT: LEGAL ISSUES CONCERNING RENEWAL OF ORDER NO. 96-054, AS REFLECTED IN TENTATIVE WASTE DISCHARGE REQUIREMENTS DATED OCTOBER 11, 2001

INTRODUCTION

This memorandum addresses some of the more notable legal issues raised by commenters during the development of a revised municipal separate storm sewer system (MS4) permit for Los Angeles County. The memorandum broadly follows an outline of legal issues raised by Rutan & Tucker in a May 15, 2001, letter to Dr. Xavier Swamikannu, with additional legal issues raised by other commenters. As the permit has evolved through multiple drafts, certain legal issues have been resolved. Except as noted, resolved issues are not the subject of this memorandum.

DISCUSSION

The Regional Board staff has followed applicable law and precedent in developing the October 11, 2001 tentative draft MS4 (draft MS4 permit). Many of the legal issues raised by commenters have been the subject of prior challenges to the State Water Resources Control Board (State Board) and have been resolved in a manner consistent with the draft MS4 permit's approach. To the extent the draft MS4 permit expands upon prior permit conditions and State Board precedential orders, the permit does so based on solid findings and in conformance with the iterative approach underlying storm water permitting.

A. THE DRAFT MS4 PERMIT'S REQUIREMENTS FOR INSPECTION, ENFORCEMENT, MONITORING, AND REPORTING FOR CERTAIN INDUSTRIAL/COMMERCIAL FACILITIES ARE CONSISTENT WITH THE CLEAN WATER ACT AND AUTHORIZED BY LAW.

The Clean Water Act and implementing MS4 regulations afford the Regional Board adequate legal authority to establish a permit condition, in the Regional Board's judgment, that requires inspections of facilities contributing pollutants to the MS4. The Clean Water Act vests the Regional Board with substantial authority in developing MS4 permit requirements. Section 402(p)(3)(B) states that permits for MS4 discharges:

> (i) may be issued on a system- or jurisdiction-wide basis;
> (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 Administrator or the State determines appropriate for the control of such pollutants.

(33 U.S.C. § 1342(p)(3)(B)(i)-(iii).) Congress created the "maximum extent practicable" (MEP) standard and the requirement to "effectively prohibit non-stormwater discharges" into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges. (132 Cong.Rec. S16,424 (Oct. 16, 1986), *reprinted in* 2 Environment and Natural Resources Policy Division, Library of Congress, *A Legislative History of the Water Quality Act of 1987* 646 (1988); House Committee on Public Works and Transportation, Section-by-Section Analysis (100th Sess. 1987), *reprinted in* 1987 U.S.C.C.A.N. (101 Stat. 7) 5, 38-39; *see also* 55 Fed.Reg. 47990, 48,038 (Nov. 16, 1990).) The flexibility includes the ability direct permit requirements at the sources of pollution, and not simply the MS4 discharge points. (55 Fed.Reg. at 48,038 (Nov. 16, 1990).)

In developing regulations to implement the MS4 requirements, the United States Environmental Protection Agency (USEPA) identified specific program elements that a municipal discharger had to identify as part of the MS4 permit application. (40 C.F.R. § 122.26(d).) Again, these were application requirements that in many instances identified the minimal authority that the municipal discharger must demonstrate as part of an application. (See, e.g., 40 C.F.R. § 122.26(d)(2)(iv).) Nothing in the regulations erodes the Regional Board's authority to establish provisions it deems "appropriate for the control of [] pollutants" in the MS4. (33 U.S.C. § 1342(p)(3)(B)(iii); see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167 (discussing permitting authorities' authority to establish appropriate requirements in storm water permitting approach).) In fact, the USEPA contended during the rulemaking that:

> Proposed management programs will then be evaluated in the development of permit conditions. * * * EPA anticipates that storm water management programs will evolve and mature over time. The permits for discharges from municipal separate storm sewer systems will be written to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality.

(55 Fed.Reg. 47990, 48052 (Nov. 16, 1990).)

As part of the MS4 application, the permittee needs to develop a proposed management program that encompasses commercial and residential areas, illicit discharges, and discharges of storm water associated with industrial activities. (40 C.F.R. § 122.26(d)(2)(iv).) For commercial and residential areas, the application must describe "structural and source control measures to reduce pollutants." (40 C.F.R. § 122.26(d)(2)(iv)(A).) For illicit discharges and discharges associated with industrial activities, the program description must include a program of inspections. (40 C.F.R. § 122.26(d)(2)(iv)(B),(C).)

As part of work under its existing permit, the permittees identified certain commercial facilities that contributed substantial pollutants to the MS4. In particular, Retail Gasoline Outlets (RGOs) and restaurants contribute significant pollutants. (Findings B.8-9 and C.5-6.) At restaurants, pretreatment records indicated that grease traps often backed up from the sanitary sewer system into the MS4. In addition, there was a prevalence of illicit discharges into the MS4 from improper washdown operations. At RGOs, the significant volumes of pollutants had the ability to introduce pollutants via non-storm water discharges to the MS4. The permittee and the Regional Board have evaluated this evidence, and Regional Board staff has determined that more in-depth inspection is appropriate at these facilities.

The draft MS4 permit's requirement for inspections is appropriate within the meaning of section 402(p)(3)(B). First, the discharger has identified the subject facilities as significant contributors to the MS4 system. To have any meaning, the reduction of pollutants to the maximum extent practicable must include responding to pollutant concerns identified as part of the permit program. The current permit regime appears to be inadequate, so additional enforcement (through inspections to identify problems) is an appropriate response. Second, the pollutants are reaching the MS4 apparently as the result of illicit discharges and/or illicit connections to the MS4 and the inadequate implementation of storm water controls. To this extent, the USEPA's Part 2 MS4 application regulation explicitly requires the permittee to identify inspection authority. Following through with an actual inspection program is necessary to effect the regulatory provisions and reduce pollutants to the maximum extent practicable. The inspection requirement is a reasonable and appropriate application of the Regional Board's permitting authority.

B. THE DEVELOPMENT PLANNING (SUSMP) REQUIREMENTS IN THE DRAFT MS4 PERMIT ARE CONSISTENT WITH APPLICABLE LAW AND LAWFULLY EXPAND BEYOND THE STATE BOARD'S ORDER WQ NO. 2000-11 (SUSMP ORDER).

1. The .75-inch standard is appropriate.

A comment argues that the .75-inch standard is not based on "quantitative data," source identification," and "source characterization, " as assertedly required by the Federal storm water regulations. The Regional Board's existing SUSMP order contains the same .75-inch standard as a measure of performance. The party submitting this comment represented petitioners in a petition to the State Board challenging the Regional Board's SUSMP order. Following two days of hearing by the State Board and extensive analysis, the State Board issued its SUSMP Order. There, the State Board upheld the .75-inch standard. This argument has no merit. The proposed action merely incorporates the already-approved standard into the proposed permit.

2. Staff gave appropriate consideration to Water Code Section 13263 and 13241.

In large part, the proposed permit would incorporate into the permit renewal provisions that have already been found to be lawful and appropriate by the State Board. The comment asserts that re-adoption of the .75-inch standard fails to address "economic considerations" and "the need for developing housing within the Region." The draft MS4 permit includes a Fact Sheet that discusses economic and housing considerations. The staff has prepared two technical reports, which address these issues. (See "Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts," Radulescu, Swamikannu, and Hammer, 2001, and "Storm Water Mitigation Requirements for Priority Planning Projects for the Protection of Water Quality," Fisher and Swamikannu, 2001.) The Regional Board staff has adequately considered factors required under Water Code section 13263, subdivision (a), and these factors will again be considered by the Regional Board in adopting the permit.

3. The Regional Board may regulate Environmentally Sensitive Areas.

Citing the State Board's observation in the SUSMP Order that Environmentally Sensitive Areas (ESAs) are already subject to extensive regulation under other regulatory programs, a comment asserts that it is inappropriate for the Regional Board to include regulation of ESAs within the proposed permit.[1] The State Board's Order does not, as the comment suggests, foreclose inclusion of ESAs as a development category. The State Board stated:

[1] Letter from Richard Montevideo (Rutan & Tucker) to Dr. Xavier Swamikannu (May 15, 2001) (Montevideo Letter), p. 7. The comment erroneously states that the State Board "invalidated the prior SUSMP." Actually, the State Board did not invalidate the entire SUSMP, but rather, determined that the record failed to support ESAs as a properly- included category within the SUSMP.

> While it may be appropriate to include more stringent controls for developments in ESAs, we also note that such developments are already subject to extensive regulation under other regulatory programs. Moreover, in light of the permit language limiting the SUSMPs to development categories, ESAs are not an appropriate category within the SUSMPs. The Regional Water Board may choose to consider the issue further when it reissues the permit.

(SUSMP Order, p. 25.)

As is clear from the foregoing passage, the State Board left the issue open for the Regional Board to develop further. The Fact Sheet for the draft MS4 permit includes a technical report prepared by staff entitled, "Mitigation of Storm Water Impacts from New Development in Environmentally Sensitive Areas," Yeager and Swamikannu, 2001, which supports inclusion of ESAs within the development categories covered by the permit. The report demonstrates the need to afford ESAs additional protection from urban runoff through the extension of SUSMPs to projects in ESAs.

4. The term "Redevelopment" has been revised to limit its application.

A comment suggests that the term will make SUSMP requirements applicable to unintended projects, such as replacement of existing structures, rather than expansion or installation of a new structure. The comment has been considered by staff and revised definitions of "new development" and "redevelopment" have been incorporated into the tentative permit and the glossary. The revised definitions adequately address the concerns presented by the comment.

5. The SUSMP permissibly covers nondiscretionary projects.

The Regional Board staff has prepared a detailed report that provides the justification for extending the SUSMP requirements to nondiscretionary projects in order to improve the quality of storm water discharges. One comment suggests that the extension of SUSMPs to nondiscretionary projects is in violation of the SUSMP Order.[2] The comment grossly distorts the State Board's SUSMP Order.

[2] Montevideo Letter, p. 9. The comment also implies that, through a finding concerning nondiscretionary projects, the Regional Board is somehow attempting "to modify the regulations to CEQA." (*Ibid.*) The finding language does not attempt to alter CEQA, but simply reflects a correct statement of law: if local ordinances impose conditions to create decision-making discretion in approving a project, then the subsequent project action may be discretionary within the meaning of CEQA. The finding does not require the permittees to undertake any particular course of action. However, the finding does continue by observing that the Regional Board considers all new development and specified redevelopment to be subject to the SUSMP requirements.

In the SUSMP Order, the State Board was addressing the narrow issue of whether the existing MS4 permit, for which SUSMPs were being developed, could be construed to cover nondiscretionary projects. The State Board was analyzing, in pertinent part, whether "the inclusion of non-discretionary, or ministerial, projects is inconsistent with the terms of the permit." (SUSMP Order, p. 25.) In answering this question, the State Board concluded that existing permit provisions appeared "to link the development requirements for SUSMPs to developments that receive discretionary approval." (*Id.*, p. 26.) Because the SUSMPs were an implementation tool for the existing MS4 permit, the State Board concluded that the SUSMPs "must be consistent with the permit." (*Ibid.*)

Simply put, the State Board's decision in no way limited the Regional Board's authority to include nondiscretionary projects in the revised MS4 permit. After concluding that applying SUSMPs to nondiscretionary projects exceeded the scope of the existing permit, the State Board observed that "the limitation of the SUSMPs to discretionary projects may not be sufficiently broad for an effective storm water control program." (*Ibid.*) The State Board further stated that "The Regional Water Board may consider expanding the development controls beyond [California Environmental Quality Act (CEQA)] discretionary projects when it reissues the permit." (*Ibid.*)

Staff has revisited the issue of nondiscretionary projects, and has found adequate justification to expand the SUSMP provisions to nondiscretionary projects. The draft MS4 permit is accompanied by a lengthy report identifying the need for SUSMPs to cover nondiscretionary projects. (See Storm Water Mitigation Requirements for Priority Planning Projects for the Protection of Water Quality," Fisher and Swamikannu, 2001.) The draft MS4 permit removes the "discretionary" limitation that appeared in the prior permit, and if approved by the Regional Board will extend SUSMP requirements to nondiscretionary projects.

6. The waiver fund is now an optional component.

A comment suggests that the proposed order fails to include information that the State Board specifically indicated was required in order to make the "waiver fund" supportable. Although finding the proposed waiver fund unworkable, the State Board specifically endorsed the potential benefits and flexibility that arise from a waiver fund or mitigation bank. (SUSMP Order, p. 27.) The mandatory fund provisions have been removed from the October 11, 2001 tentative permit, but the permittees still have the option of implementing their own mitigation banks.

7. Regional solutions have not been considered because the permittees have not proposed a regional solution in lieu of the SUSMP approach.

A comment asserts that the Regional Board has failed to adequately consider "regional solutions." To the extent the comment maintains that State Board's SUSMP Order encouraged regional solutions, the Regional Board staff concurs. Specifically, the State Board encouraged the permittees to develop such projects. However, there is no requirement that the Regional Board itself develop regional solutions. Nor is there any requirement that the Regional Board adopt proposed regional solutions, in place of SUSMP requirements. Rather, it is the burden of the permittees to develop and present workable, acceptable programs that meet or exceed the requirements of the draft MS4 permit. At this time, the permittees have not submitted any specific proposals for regional solutions or programs. The Regional Board itself maintains broad discretion to consider proposed programs in the future.

8. The draft MS4 permit lawfully covers retail gasoline outlets (RGOs) and establishes threshold criteria for the numeric design standards.

The SUSMP Order recognizes the Regional Board's authority to include RGOs in the SUSMP categories, provided there are adequate findings supporting RGOs as a category. (SUSMP Order, pp. 22-23.) Since the SUSMP Order, the Regional Board staff has extensively studied the issue of storm water from RGOs. (See "Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts," Radulescu, Swamikannu, and Hammer, 2001 (RGO Report).) The RGO Report documents the significant pollutant contribution from RGOs. (*Id.*, p. 4-5, 10-11.) In light of this substantial evidence, the draft MS4 permit includes provisions to extend SUSMP provisions to RGOs.

In extending SUSMPs to RGOs, staff analyzed and the draft MS4 permit establishes threshold criteria that trigger numeric design standards. (See RGO Report, pp. 8-9.) Staff considered the impervious surface area, the projected average daily traffic, and the projected volume of gasoline sales as criteria. (*Ibid.*) In analyzing the likelihood of the criteria to predict storm water pollutant loading, staff proposed a two-part threshold. First, the RGO must create 5,000 square feet of impervious surface. Second, the RGO must have a projected trip generation of 100 or more motor vehicles average daily traffic. (RGO Report, p. 9.) A RGO that meets both criteria would be subject to SUSMP numeric design standards. The criteria ensure that SUSMP design criteria are targeted at those RGOs that have the greatest potential to contribute pollutants to the MS4.

C. APPLICABLE LAWS DO NOT REQUIRE THE REGIONAL BOARD TO DEVELOP A COST-BENEFIT ANALYSIS IN DEVELOPING THE PERMIT.

The Regional Board staff considered economic considerations in developing elements of the draft MS4, but the Regional Board is not required to conduct a cost-benefit analysis. Comments concerning economic issues closely parallel arguments presented to the State Board as part of the petition that resulted in the SUSMP Order. The State Board rejected any contention that a Regional Board is required to conduct a cost-benefit analysis as part of developing an MS4 permit: "It is clear that cost should be considered in determining MEP; this does not mean that the Regional Water Board must demonstrate that the water quality benefits outweigh the economic costs." (SUSMP Order, pp. 19-20.)

The commenter has also asserted that various provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) similarly require a cost-benefit analysis. Although the commenter references several provisions purportedly requiring economic consideration, the commenter relies on Water Code section 13225, subdivision (c) for the proposition that a cost-benefit analysis is required.[3] Section 13225 does not govern the issuance of this permit. Section 13225 appears in Article 2 (General Provisions Relating to Powers and Duties of Regional Board) of Chapter 4 (Regional Water Quality Control) of the Porter-Cologne Act. Section 13225 empowers the Regional Board to require local agencies to report on "technical factors involved in water quality control." (Wat. Code, § 13225.) This authority is a general authority that the Regional Board can use outside the context of a specific investigation (Wat. Code, § 13267) or waste discharge requirements (Wat. Code, § 13263) as part of the Regional Board's responsibilities to assess water quality and to develop water quality control strategies for the region. The general authority does not trump the more specific authority the Regional Board has in the context of issuing waste discharge requirements. (Wat. Code, § 13263(a).) At most, the Regional Board is required to consider economic issues.

The State Board's SUSMP Order discussion was framed in the context of the Clean Water Act and Federal regulations governing the MEP standard. As a result, the SUSMP Order provides the relevant standard for the reissuance of the Los Angeles County MS4 permit. The Regional Board staff has invited comments on cost and other economic factors and the Regional Board has received ample testimony on economic factors. Some of the cost issues are in the administrative record supporting the development of SUSMPs. As the State Board noted, the Regional Board has already considered: "the costs of pilot mitigation projects, studies from similar programs in other states, and research studies[;]" and "the Regional Water Board found that the cost to include [best management practices (BMPs)] that will meet the mitigation criteria will be one to two percent of the total development cost." (SUSMP Order, p. 21.) Costs and other economic factors have been, are, and will be a component of the Regional Board's consideration of the

[3] The commenter also cites Water Code section 13165, which is not applicable because by its own terms section 13165 only applies to the State Board.

MS4 permit; however, there is no requirement in State or Federal law to demonstrate that the water quality benefits outweigh the economic costs.

D. THE PROPOSED PERMIT DOES NOT IMPOSE UNFUNDED MANDATES UPON THE MUNICIPALITIES IN VIOLATION OF THE CALIFORNIA CONSTITUTION.

The unfunded mandate argument has been made repeatedly and uniformly rejected by the State Board. The argument first appeared in the petition and lawsuit filed by the City of Long Beach contesting the validity of the Regional Board's adoption of Order No. 96-054, the existing MS4 permit for Los Angeles County. Next, the Regional Board saw the argument raised in connection with the SUSMP order adopted by the Regional Board pursuant to the existing MS4 permit. The argument now appears in connection with this tentative permit. The commenter argues that the draft order shifts responsibility for carrying out governmental functions to local entities. One commenter, in particular, asserts that the proposed order would shift to the municipalities the burden of carrying out "a state mandate."[4]

First, and most importantly, the draft MS4 permit does not purport to implement state law, but rather implements Federal law as provided in the Clean Water Act and the MS4 regulations promulgated thereunder.[5] Second, the State Board has already addressed the issue in its decision regarding this Region's SUSMP Order. In the SUSMP Order, the State Board indicated that its earlier decisions held that the constitutional provisions cited by the commenter have no application to the adoption of national pollutant discharge elimination system (NPDES) permits. The State Board cited its decision *In re San Diego Unified Port District*, State Board Order No. 90-3, for the proposition that the constitutional state mandate requirements do not apply to NPDES permits issued by Regional Board in that the NPDES permit program is a federally mandated program, rather than state-mandated. (*Id.*, p. 14.) The Regional Board's issuance of the MS4 permit does not violate the California constitutional prohibition on unfunded mandates because the MS4 permit implements Federal law.

E. THE DRAFT MS4 PERMIT DOES NOT IMPROPERLY TRANSFER THE BURDEN OF PROOF ON TO THE PERMITTEES IN ENFORCEMENT ACTIONS.

The definition of "pollutant" in early drafts of the permit improperly characterized a permittee's responsibility for demonstrating compliance with pollutant reductions to the maximum extent practicable. Staff has removed the provision at issue.

[4] Montevideo Letter, p. 13.
[5] 40 C.F.R. § 122.26.

F. THE DRAFT MS4 PERMIT DOES NOT IMPERMISSIBLY MANDATE CONTRACTUAL PROVISIONS IN PRIVATE PARTY AGREEMENTS GOVERNING BMP MAINTENANCE.

The draft MS4 permit identifies several options for permittees to use in ensuring that structural and treatment control BMPs are properly maintained. One comment contends that the draft MS4 permit, without legal support, imposes a requirement for permittees to verify written conditions in private sale and lease agreements. First, the Regional Board has established a maintenance requirement to ensure that structural and treatment control BMPs are functioning and can carry out there intended function. There can be no argument that proper, continuing maintenance of certain BMPs is required to ensure the BMPs' effectiveness. As a result, the draft MS4 permit includes a mechanism to ensure that such maintenance occurs.

Second, the Regional Board staff concluded that effective maintenance of certain BMPs required that there be a person with clear responsibility for maintaining the structural and treatment control BMPs. In attacking this provision, the comment mischaracterizes the draft MS4 permit's approach to this issue.

The draft MS4 permit provides four distinct options for the permittees to verify there is a person with maintenance authority. The commenter solely challenges Part 4.D.9.c which allows verification, by reviewing leases or sales agreements, that someone is responsible for BMP maintenance. However, a permittee may also accept responsibility itself (Part 4.D.9.b), establish a requirement that home owners associations assume responsibility (Part 4.D.9.d), or review "[a]ny other legally enforceable agreement that assigns responsibility for the maintenance of post-construction structural or treatment control BMPs" (Part 4.D.9.e). The draft MS4 permit affords the permittees flexibility in ensuring that there is some entity with the legal responsibility for maintaining structural and treatment control BMPs. The requirement is reasonable and necessary to effect the permit requirements.

G. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT CONTROL THE ISSUANCE OF THE DRAFT MS4 PERMIT.

A comment asserts that the issuance of the MS4 permit constitutes a "regulation" and is subject to the processes set forth in the Administrative Procedure Act (Govt. Code, § 11340, et seq.). This is not the case. In adopting the Administrative Procedure Act (APA), the Legislature specifically exempted the adoption of permits by the State Board and regional boards. Government Code section 11352 states very plainly: "The following actions are not subject to this chapter: *** (b) issuance, denial, or revocation of waste discharge requirements and permits pursuant to sections 13263 and 13377 of the Water Code. . . ." The adoption of the proposed NPDES permit is an action pursuant to Water Code section 13377.

The Legislature recognized that the adoption of permits is an action that applies solely to the named dischargers who are subject to the individual permit, and that the process that the boards follow to adopt a permit complies with notice, comment, and response requirements necessary under the Regional Board's permitting authority. Moreover, the State Board has previously dispensed with this same comment in its SUSMP Order.

The Regional Board tailored the permit requirements to the needs of the Los Angeles County MS4. Only the named permittees are governed by the permit, and they as well as any other interested persons have had ample opportunity to comment on the permit. The Regional Board's permitting of the MS4 is exempt from the APA.

H. THE DRAFT MS4 PERMIT'S RECEIVING WATER LIMITATIONS IS APPROPRIATE AND COMPORTS WITH APPLICABLE STATE BOARD PRECEDENTS.

The Regional Board has the authority to issue MS4 permits with receiving water limitations. While it is true that waste discharge requirements and an MS4 permit allow the discharge of storm water,[6] the discharge requirements must nonetheless meet specific requirements. The Porter-Cologne Act requires waste discharge requirements to "implement relevant water quality control plans . . . ." (Wat. Code, § 13263, subd (a).) The water quality control plan identifies the beneficial uses to be protected and specifies the "water quality objectives reasonably required" to protect those uses, along with "the need to prevent nuisance . . . ." (*Ibid.* and *id.*, § 13241.[7])

The various permit conditions and requirements to implement BMPs provide the minimum conditions for the discharge of waste in conformance with the permit. The conditions reflect the best professional judgment of Regional Board staff in reducing the Clean Water Act and the Porter-Cologne Act into effective permit conditions to protect beneficial uses. Ultimately, however, the MS4 permittee is responsible for the discharges from the MS4. Those discharges are required to conform to the permit, but are subject to the underlying restrictions of the Porter-Cologne Act. Namely, the discharges from the MS4 may not violate the water quality objectives in the water quality control plan or contribute to a condition of nuisance.

Rather than being an "open ended" standard, the receiving water and nuisance permit language is a catchall provision ensuring that the underlying restrictions of the Porter-Cologne Act remain in force. The catchall standard is driven by water quality objectives and is, therefore, not an arbitrary or unknowable standard. The limitation simply reflects standards identified in the water quality control plan. Further, the limitation acknowledges the exigencies of permitting. The Regional Board may authorize the discharge of waste meeting certain requirements, but cannot provide blanket license for discharges of waste exceeding water quality objectives or creating a

[6] Montevideo Letter, p. 17.

[7] Compare Montevideo Letter, p. 17 (seemingly limiting waste discharge requirements to those "reasonably required" without regard to the beneficial uses protected or the need to prevent nuisance).

nuisance, and the permittee is not out of compliance so long as it timely implements the appropriate control measures.

The draft MS4 permit addresses many of the concerns raised by the commenter's letter by expressly demonstrating the nexus between timely implementation of measures in the SQMP and compliance with the receiving water limitations. To this extent, the revision affords the dischargers some measure of certainty that the timely implementation of controls consistent with the permit will satisfy the permit terms. In addition, the revision continues to uphold the underlying requirements of the Clean Water Act and the Porter-Cologne Act to implement the relevant water quality objectives and to protect against nuisance.

The authority for the Regional Board to incorporate receiving water limitations in an MS4 permit is discussed at length in State Board Order WQ 98-01 (as modified by State Board Order WQ 99-05). To the extent the commenter argues that the specific receiving water limitations and discharge prohibition for nuisance do not appear in State Board Order WQ 99-05, the argument is misplaced. The language in Order WQ 99-05 demonstrates the manner for compliance with the receiving water limitation and the discharge prohibition. The language in Order WQ 99-05 makes no sense absent underlying prohibitions and receiving water limitations: requirements emanating explicitly from the Porter-Cologne Act.

Further, the State Board issued Order WQ 99-05 as a precedential decision, which is explicitly authorized by the California Administrative Procedure Act. (Govt. Code, § 11425.60.) The order and its predecessor interpret the Federal Clean Water, the Porter-Cologne Act, and decisions by the USEPA, to identify a significant legal interpretation—namely, suitable language for compliance with the applicable MS4 permit requirements. Similarly, the State Board is poised to uphold similar receiving water language for the San Diego County storm water permit. (*In re Building Industry Association of San Diego County, et al.*, Draft Order WQ 2001-__ (November 2, 2001) at fn. 8, p. 3.) As such, the Regional Board may lawfully follow the State Board's precedential orders.

I. THE DRAFT MS4 PERMIT DOES NOT ATTEMPT TO AMEND STATUTORY AND REGULATORY REQUIREMENTS UNDER CEQA AND STATE GENERAL PLAN REQUIREMENTS.

The draft MS4 permit addresses many of the concerns voiced by commenters concerning CEQA and planning reviewing. As currently proposed, Part 4.D.12 makes clear that the permittees are not to revise the CEQA Guidelines. The current draft reflects staff's intent, all along, which is to include permit requirements that ensure the permittees consider storm water issues when reviewing CEQA documents.

Similarly, Part 4.D.13 has been modified so it does not require updating of the specified general plan elements until the elements are next updated by the permittees. The intent of the CEQA and planning procedure requirements is to ensure that permittees consider storm water issues during general planning and project planning, when opportunities to mitigate storm water impacts can best be devised. Neither provision conflicts with the statutory and regulatory requirements under CEQA or general planning law.

J. THE REGIONAL BOARD HAS AUTHORITY TO ISSUE NPDES PERMITS IN ACCORDANCE WITH THE CLEAN WATER ACT AND A MEMORANDUM OF UNDERSTANDING WITH USEPA.

The Regional Board has the authority to issue permits consistent with the Clean Water Act, the Porter-Cologne Act, and the USEPA's program approval. "On May 14, 1973, California became the first State to be approved by USEPA to administer the NPDES permit program." (54 Fed.Reg. 40,664 (Oct. 23, 1989).) The Porter-Cologne Act at the time of program approval authorized the regional boards to issue waste discharge requirements that would serve as Federal NPDES permits. (Wat. Code, §§ 13263 (regional water boards shall issue waste discharge requirements) and 13374 (waste discharge requirements equivalent to Federal permits under the Clean Water Act).) The regional boards' authority continues. Since 1973, California's approval to implement various Clean Water Act programs has expanded, and memoranda of agreement between the State Board and USEPA Region IX have authorized the issuance of NPDES permits by the regional boards. (See, 54 Fed.Reg. 40,664-40,665 (renewing and expanding California permitting authority under the Clean Water Act in 1989); see also, NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency and the California State Water Resources Control Board [hereafter USEPA/California MOA], Sep. 22, 1989, pp. 6-7.)

The Porter-Cologne Act and the USEPA/California MOA recognize the State Board as the state water pollution control agency for purposes of the Clean Water Act. The Legislature confirmed the State Board's role in the Porter-Cologne Act. (Wat. Code, § 13160). In carrying out the State Board's role, the State Board entered into the USEPA/California MOA which serves as a basis for California NPDES program approval. (USEPA/California MOA, pp. cover, 1, and 49; see also, 54 Fed.Reg. 40,664.) The USEPA/California MOA makes clear that the State Board administers California's NPDES program as meant by the Federal regulations. (See, e.g., *id.*, pp. 1 ("State Board has been authorized . . . to administer the National Pollutant Discharge Elimination System [] program in California"), 5 (state board to act "on its own as necessary to assure that the program is administered in conformance with Federal and State legislation, regulations, policy, this MOA, and the State annual 106 Workplan"), and 7 (USEPA to meet with regional board in coordination with State Board and only after notifying State Board).) In contrast, the regional boards do not administer the NPDES program, but do implement portions of the NPDES program through the issuance of permits as authorized by USEPA. (See, e.g., *id.*, p. 6 (regional board responsibility to "regulat[e] discharges subject to the NPDES and

pretreatment programs . . . in conformance with Federal and State law, regulations, and policy" and to "maintain[] an adequate public file at the appropriate Regional Board Office for each permittee").)

The Federal regulations do not divest the Regional Board of authority to issue NPDES permits. The foundation for the commenter's argument is based on false premise: that the Regional Board must be the statewide agency that administers the NPDES program. The regulations merely require a statewide agency to *administer* California's NPDES program. (40 C.F.R. § 123.22.) In California, only the State Board administers the NPDES program under the terms of the Porter-Cologne Act and the USEPA/California MOA. However, this does not deprive the regional boards of the authority to issue permits and to carry out elements of the NPDES program.[8] The USEPA/California MOA acknowledges this reality and explicitly recognizes the State Board's authority to administer the program by modifying NPDES permits initially issued by regional boards. The Regional Board has lawful authority to issue NPDES permits, including the draft MS4 permit.

K. THE REGIONAL BOARD HAS APPROPRIATELY CONSIDERED THE CONDITIONS IN THE RECEIVING WATERS OR THE TYPES OF AND SOURCES OF POLLUTANTS IN DEVELOPING THE DRAFT MS4 PERMIT.

One comment suggests that the draft MS4 permit has not taken account of the receiving water conditions and the sources of pollutants. This contention is without merit. The draft order identifies the impairing characteristics of urban runoff discharged from the MS4, and for Los Angeles County's receiving waters particularly. (Findings B.1-9.) Moreover, the permit does not impose a one-size-fits-all approach to BMPs and storm water mitigation. Instead, the permit identifies specific sources that are high priority for control and targets enhanced storm water management requirements for such facilities. (See, e.g., Findings B.8-9, and Parts 4.C, 4.D (especially Parts 4.D.3.b, 4.D.5, and 4.D.6), and 4.E.) The Regional Board staff clearly considered the receiving waters and the sources in developing the draft MS4 permit.

[8] To the extent the commenter relies on section 123.2(g)(1) of the regulations to indicate that each regional board must submit its own approval application, that reliance is misplaced. First, section 123.2(g)(1) continues by saying that "each agency must make a submission meeting the requirements of section 123.21 before EPA will begin formal review." Here, USEPA has already accepted the State Board's application, begun formal review, completed formal review, and approved California's NPDES program. Second, the regulation did not exist at the time California's approval was granted and it is unclear what effect, if any, the regulation would have on California's NPDES program. Clearly, the USEPA believes there is no effect as it has authorized literally thousands of NPDES permits issued by regional boards and entered into an updated memorandum of agreement in 1989.

L. THE DRAFT MS4 PERMIT PROVIDES A NARROWLY TAILORED REQUIREMENT FOR PUBLIC AGENCIES TO CONTROL THEIR APPLICATION OF PESTICIDES, HERBICIDES, AND FERTILIZERS THAT MAY DISCHARGE FROM THE MS4.

The limited provisions of the draft MS4 permit in respect to pesticides, herbicides, and fertilizers (collectively pesticides) are not pre-empted by other laws. First, the draft MS4 permit does not impose or require the permittees to impose any restrictions on the use of these compounds by the general public. Instead, the permit requires the permittees to comply with applicable pesticide laws and to conform the permittees' use and storage of pesticides to practices that reduce the contribution of pesticides to the MS4. (Part 5.F.4.) These storm water-protection requirements do not conflict with applicable pesticide laws.

Moreover, the Ninth Circuit has recently recognized that Clean Water Act permitting requirements, which are specific to the point of use, are not pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act. (*Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526.) The MS4 permit does not frustrate the relevant pesticide laws, but instead provides specific elements for the permittees to develop and to follow when it comes to using pesticides. These elements are tailored to the permittees' manner of use and storage that will minimize pesticides reaching the MS4. As with the *Talent Irrigation District* case, the Clean Water Act requirements carried out through the MS4 permit are distinct from the pesticide laws, not in conflict with the pesticide laws, and will perform a function intended by Congress under the Clean Water Act.

M. THE ISSUANCE OF THE MS4 PERMIT IS EXEMPT FROM THE DOCUMENTARY REQUIREMENTS OF CEQA.

The Porter-Cologne Act exempts, in relevant part, the Regional Board's issuance of the MS4 permit from compliance with CEQA. Water Code section 13389 provides that regional boards shall not "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 requirements, except requirements for new sources as defined in the Federal Water Pollution Control Act . . . ." Under the Clean Water Act, "new sources" has a specialized and limited meaning. Specifically "new source" means any source, the construction of which is commenced *after the publication of proposed regulations prescribing a standard of performance* under [section 306] which will be applicable to such source, if such standard is thereafter promulgated in accordance with [section 306]." (33 U.S.C. § 1316(a)(2) (emphasis added); see also, 40 C.F.R. § 122.2.)

Clean Water Act section 306 governs the development of national standards of performance for certain categories of sources. (33 U.S.C. § 1316.) As such, Congress tailored section 306 to certain narrows sectors. The national standards of performance appear as effluent guidelines in Code of Federal Regulations, title 40, chapter 1, subchapter N (commencing with part 400). The

national performance standards must be applied to "new sources" that are to be issued an NPDES permit. (33 U.S.C § 1316(b)(1)(B).)

In crafting the CEQA exemption, the Legislature explicitly incorporated the Federal new source scheme. (Wat. Code, § 13389.) The CEQA exemption exists so long as regional board is not establishing waste discharge requirements for "new sources"—i.e., in relevant part, those new sources commenced after Federal regulations establishing a national performance standard for the type of source.

Here, the Regional Board is establishing waste discharge requirements for the MS4. The Los Angeles MS4 is not a "new source" for two reasons. First, there is no national performance standard for MS4s. Second, the Los Angeles MS4 is not new in any ordinary or legal sense. The permitting for the Los Angeles MS4 falls squarely within the exemption of Water Code section 13389. There is no "new source" with a national performance standard under section 306 of the Clean Water Act that unravels the CEQA exemption. The Regional Board does not need to comply with the documentary requirements of CEQA for the issuance of the Los Angeles County MS4 permit.

N. THE DRAFT MS4 PERMIT DOES NOT VIOLATE THE PROHIBITION SET FORTH UNDER CALIFORNIA WATER CODE SECTION 13360.

The draft MS4 permit does not violate the restriction in Water Code section 13360 on the Regional Board identifying the "design" or "particular manner" in which a permittee shall comply with a permit. Water Code section 13360 restricts the Regional Board from specifying the manner of compliance with a permit. Specifically, the Regional Board may not specify the "design" or "particular manner in which compliance may be had." (Wat. Code, § 13360.) At the same time, Water Code Section 13377 provides that, notwithstanding section 13360, the Regional Board shall issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Clean Water Act]."

The commenters challenge the draft MS4 on two distinct levels. First, a commenter contends that the 0.75-inch volumetric standard is a design standard. In support of this contention, the commenter indicates that Water Code section 13360 precludes the Regional Board from "dictating the cure."[9] However, the 0.75-inch volumetric standard does not dictate the cure, it identifies the minimum level of protection that will prevent the harm, while affording the discharger a full range of options to meet the 0.75-inch standard. The *Tahoe Sierra* court explicitly permitted such an approach.

[9] Montevideo Letter, p. 22 (citing *Tahoe Sierra Preservation Council v. State Water Resources Control Board* (1989) 210 Cal.App.3d 1421, 1438).

In *Tahoe Sierra*, the Third Appellate District upheld a water quality control plan for the Lake Tahoe basin that placed impervious surface coverage limitations on land surrounding the lake. The plaintiffs challenged the plan on numerous grounds, including that the coverage standard created an impermissible design restriction under Water Code section 13360. The court quickly dispensed with the argument by noting that "The Plan sets a discharge prohibition – no greater discharge than would occur if the coverage standard were met." (*Tahoe Sierra*, *supra*, 210 Cal.App.3d at 1438.) The Court further observed that "Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants." (*Ibid.*). Like the coverage standard in *Tahoe Sierra*, the 0.75-inch standard leaves to the dischargers the ingenuity in determining the design and best way to meet the standard.

The second challenge under Water Code section 13360 is an open-ended statement to the effect that any provision of the draft MS4 permit requiring the permittee to do specific things (e.g., amend ordinances, adopt or approve certain business assistance programs, or incorporate certain lease language) impermissibly specifies a "particular manner."[10] First, this contention fails for the same reason as the commenter's design argument. The permittee is left to its own ingenuity in terms of how it remedies the identified problem or carries out the activity.

Second, inasmuch as the permit seeks to implement Clean Water Act requirements, it does not violate Section 13360 with respect to specified programs that must be implemented by the municipalities to carry out Clean Water Act MS4 requirements. Many of the elements evolved out of iterative BMP identification and evaluation and recommendations identified by the permittee in its efforts to reduce pollutants to the maximum extent practicable. Reliance on BMPs requires specification of those practices that are relied upon to reduce pollution. It would be illogical to not allow the Regional Board to incorporate those recommendations into subsequent permit revisions, especially if the permittee retains final control in how the objective is achieved and the particular manner of carrying out the requirement. The program elements do not impermissibly identify a particular manner of compliance with a Regional Board order.

O. THE PERMIT DOES NOT REQUIRE A FINDING OF CONSISTENCY WITH THE AREA-WIDE WASTE TREATMENT MANAGEMENT PLAN.

Section 208 of the Federal Clean Water Act does not limit or otherwise affect the issuance of this NPDES permit. The Section 208 planning process, which has largely been subsumed by other planning processes in the development of the Basin Plan, is primarily directed at plans to identify, coordinate, and improve the needs and facilities for publicly owned treatment works and nonpoint sources. (33 U.S.C. § 1288(b); see also Rodgers, Environmental Law: Air and Water (1986) §§ 4.9, 4.21 ("EPA administered the Section 303(e) [statewide planning] provisions with gusto, effectively using them to replace Section 208 areawide planning"),

[10] Montevideo Letter, p. 22.

pp. 129, 313-314.) In addition, to the extent they are approved, the Section 208 plans are incorporated into statewide planning provisions under Section 303. (2 Rodgers, *supra*, §§ 4.9, 4.21, pp. 129, 314 (noting that a common problem is that the regional planning agencies have never generated Section 208 plans or all the elements thereof).)

To the extent the Section 208 planning process may have a residual effect on this NPDES permit, the effect would only be if the draft MS4 permit was somehow in conflict with an approved Section 208 plan. The Regional Board staff is not aware of any such conflict and the discharger has not identified how the NPDES permit could be in conflict with an approved Section 208 plan, let alone indicated how it conflicts. The Regional Board staff developed the tentative permit by implementing the previously adopted state and Federal laws and regulations designed to protect water quality. There is no need for a specific finding on consistency with a Section 208 plan.

P. THE MS4 PERMIT CONSTITUTES IMPERMISSIBLE LAND USE PLANNING BY A STATE AGENCY.

The draft MS4 permit does not impermissibly infringe on the permittees' ability to carry out their land use planning authority and responsibilities. The Regional Board staff concedes that both the Clean Water Act and California law anticipate that local land use planning and zoning will be carried out on the municipal level. (See 33 U.S.C. § 1251(b) (preserving state's primary responsibilities and rights to plan development and use of land resources).) However, the Regional Board staff strongly disagrees that the draft MS4 permit amounts to land use planning. Like the ability of USEPA to approve total maximum daily loads (TMDLs) and to establish the regulatory framework in which subsequent land use decisions will be made, the draft MS4 is an appropriate regulatory function. (See, e.g., *Pronsolino v. Marcus* (N.D. Cal. 2000) 91 F.Supp.2d 1337, 1355-1356.)

The draft MS4 places no constraints on what land uses a municipality may authorize within its jurisdiction. Further, the draft MS4 permit does not dictate how a municipality may zone its jurisdiction. Simply put, there is no land use planning or zoning done by the Regional Board through the draft MS4 permit. At most, the draft MS4 permit could be construed to place certain conditions on various types of land uses (e.g., the provision that municipalities require residential developments exceeding ten units to undertake certain mitigation measures or require developments on hillsides to undertake certain mitigation measures (Draft MS4 permit Part 4.D.5)). These conditions were developed by the Regional Board and permittees to reduce pollutants from the MS4 to the maximum extent practicable. These provisions do not invade the fundamental, municipal choice to make land use decisions and zone accordingly. As with many other Federal or State permitting and regulatory functions, the draft MS4 simply provides contours around which the municipalities must carry out their land use and zoning responsibility.

Q. THE REGIONAL BOARD MAY IMPOSE PERMIT CONDITIONS TO LIMIT PEAK FLOWS.

The Clean Water Act and the Porter-Cologne Act allow the Regional Board to include peak flow limitations for storm water entering natural channels. Contrary to a commenter's arguments, Clean Water Act case law has not uniformly "found the definition of 'pollutant' to not include the release of water which causes downstream erosion."[11] First, the commenter's citation to *National Wildlife Fed'n v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156 is inapposite. *Gorsuch* involved the issue of whether USEPA's decision not to require an NPDES permit for all dams was reasonable. The D.C. Circuit upheld USEPA's determination because it found that there was no addition of pollutants by the point source, and hence, no need for an NPDES permit. The *Gorsuch* decision simply does not apply in the MS4 context for which an NPDES permit is clearly required under the Clean Water Act. (See 33 U.S.C. § 1342(p).)

Unlike dams, which simply confine water in its natural course and then release it, an MS4 collects storm water, which contains pollutants, from throughout a jurisdiction and discharges the storm water from point sources into waters of the United States. Often the storm water discharged from the MS4 is discharged to a location that is not the natural drainage point for urban runoff. In this respect, the MS4 is distinguishable from *Gorsuch* and its progeny and is more akin to the analysis adopted by the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited v. City of New York* (2d Cir. Oct. 23, 2001) ___ F.3d ___, 2001 WL 1267391, *9 (finding the addition of pollutants requiring an NPDES permit occurs when a tunnel conveys water and sediments from one water source to another). In conjunction with the express permitting requirements in the act, it is clear the NPDES permit is required and that there is an addition of pollutants from the MS4 that requires heightened regulation.

Moreover, the State Board has dismissed any contention that it is unlawful to establish peak flow controls designed to minimize erosion. Erosion limitations underlie many of the SUSMP provisions upheld by the State Board in 2000. (See SUSMP Order, p. 4.) Further, in a draft order on the San Diego County MS4, the State Board soundly rejects the argument that erosion cannot be the subject of an MS4 permit. The State Board states "It is absurd to contend that the [San Diego County MS4] permit should have ignored [the erosion] impact from urban runoff." (*In re Building Industry Association of San Diego County, et al.*, Draft Order WQ 2001-__ (November 2, 2001) at fn. 8, p. 3.)

The fundamental point that undermines the comment is that, while erosion may not trigger an NPDES requirement in certain circumstances, once an NPDES permit is required the NPDES permit provisions and California waste discharge requirements must protect beneficial uses. (33 U.S.C. § 1342(a); Wat. Code, § 13263, subd. (a).) The preamble to the USEPA Phase II storm water regulations states that for post-development, "[the] consideration of the increased flow

[11] Letter from Rufus Young (Burke, Williams & Sorensen) to Dennis Dickerson (Jul. 19, 2001), p. 14.

rate, velocity, and energy of storm water discharges must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality standards, and to prevent the degradation of receiving streams." (64 Fed.Reg. 68722, 68761 (Dec. 8, 1999).) Further, the Regional Board staff has identified several studies that demonstrate the nexus between pollutant discharges and increased flow from increases in impervious surface area. The draft MS4 permit has been crafted to reduce these increased flows in natural channels to protect aquatic ecosystems and other beneficial uses within the receiving waters. Peak flow limitations are an appropriate and lawful requirement of the MS4 permit.

R. THE REGIONAL BOARD CAN REISSUE THE NPDES PERMIT EVEN IF THE ORIGINAL PERMIT APPLICATION DID NOT CONTAIN ALL THE ELEMENTS REQUIRED IN SUBSEQUENTLY PROMULGATED APPLICATION REQUIREMENTS.

The Regional Board may reissue the MS4 permit even if the permittees have not fulfilled a Part 1 application requirement that arose subsequent to the issuance of the permittees' initial permit. The Regional Board issued its first MS4 permit to Los Angeles County in the summer of 1990. The Phase I storm water regulations identifying Part 1 application requirements for MS4s did not become effective until December 17, 1990. (55 Fed.Reg. 47990 (Nov. 16, 1990).) As a result, the application materials that resulted in the 1990 permit issuance may not have strictly conformed with the subsequently promulgated application requirements of Code of Regulations, title 40, section 122.26(d)(1). Further, there was no requirement for the permittees to resubmit a permit application upon promulgation of the regulation because the Regional Board had already issued a permit for the subject MS4 discharges. (40 C.F.R. § 122.26(e) ("[a]ny operator of a point source required to obtain a permit under [section 122.26] that *does not have an effective* NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines . . . .")

Before the Regional Board reissued the MS4 permit in 1996, Regional Board staff reviewed the reapplication and determined that it was consistent with USEPA's Reapplication Policy, which was then in draft form. The published Reapplication Policy (61 Fed.Reg. 41698 (Aug. 9, 1996)) indicates that the MS4 reapplication for a subsequent five-year permit term should contain certain basic information, information for proposed changes, and proposed improvements to the storm water management program and monitoring program. (*Id.* at 41698-41699.) The crux of the reapplication policy is on (1) developing information that will result in an improved storm water management program, and (2) obtaining information for the permitting authority that will assist it in determining what program elements need to be revised in light of changes that have occurred since initial permit development. (*Id.* at 41698.)

The draft MS4 permit includes requirements for additional information development. The Part 1 application requirements are a component of the additional information development, but the

post-permit promulgation of application requirements does not bar the reissuance of an updated NPDES permit for the Los Angeles County MS4.

CONCLUSION

The Regional Board staff has crafted a draft MS4 permit that is grounded in applicable laws, regulations, and State Board precedents. Where appropriate, the staff has revised the draft MS4 permit to incorporate the legally necessary changes proposed by the commenters. In other respects, the staff has demonstrated a need for the permit requirements, and the Regional Board has the requisite legal authority to require the permit conditions.

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