JORGE A. LEON
Senior Staff Counsel
901 P Street
Sacramento, CA
Counsel for Regional Board

XAVIER SWAMIKANNU
Regional Board Staff
320 W. 4th Street, Suite 200
Los Angeles, CA

BEFORE THE

STATE WATER RESOURCES CONTROL BOARD

THE CITIES OF BELLFLOWER, BURBANK, CERRITOS, COMMERCE, DIAMOND BAR, DOWNEY, IRWINDALE, LA-CANADA FLINTRIDGE, LA MIRADA, LA VERNE, LAKEWOOD, LAWNDALE, MONROVIA, PALOS VERDES ESTATES, PICO RIVERA, POMONA, RANCHO PALOS VERDES, SANTA FE SPRINGS, SIGNAL HILL, SOUTH GATE, VERNON, WALNUT, AND WHITTIER, municipal corporations; and THE BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, a Non-Profit Mutual Benefit Corporation, and THE BUILDING INDUSTY LEGAL DEFENSE FOUNDATION, a Non-Profit Mutual Benefit Corporation, AND THE CITY OF ARCADIA, a municipal corporation AND WESTERN STATES PETROLEUM ASSOCIATION , a Trade Association Petitioners, v. CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, and DENNIS DICKERSON, Executive Officer, Los Angeles Regional Water Quality Control Board. Respondents,	File Nos.: A-1280; A-1280(a); A-1280 (b) **REGIONAL BOARD COMMENT ON PROPOSED ORDER**

I. INTRODUCTION

The State Water Resources Control Board (State Board) conducted a hearing on the above matter in Torrance, California, on June 7 and June 8, 2000. On July 12, the State Board invited the designated parties to respond to four questions in a Post-hearing Brief which was to be submitted no later than July 7. The Regional Board submitted its Post-hearing Brief on July 7. On August 28, the State Board issued a Proposed Order on the matter, and invited the designated parties to comment on or before September 28. The Regional Board's response follows.

II. COMMENT ON THE PROPOSED ORDER

The Regional Board supports the State Board's decision to uphold the authority of Regional Boards to establish numerical water quality design criteria for Best Management Practices (BMPs) "to reduce pollutants in municipal storm water discharges to the maximum extent practicable" (MEP) as required by federal law. This decision resolves what constitutes the fundamental challenge by Petitioners of the Board approved Standard Urban Storm Water Mitigation Plan (Final SUSMP).

The Regional Board respectfully disagrees with the State Board on the following issues that limit the applicability of the Final SUSMP, and requests that the State Board modify its final decision appropriately. Specifically, the Regional Board contends that, (i) Retail Gasoline Outlets (RGOs) should not be categorically exempt from BMP design standards; (ii) Projects in Environmentally Sensitive Areas (ESAs) should be subject to SUSMP requirements; (iii) SUSMP requirements should apply to enumerated projects irrespective of whether they are considered "Discretionary" or "Ministerial" as interpreted under the California Environmental Quality Act (CEQA); and (iv) Impracticability waiver beneficiaries should be required to transfer funds to regional mitigation projects, since regional funds and projects have already been established.

In addition the Regional Board recommends that the State Board, (i) amend its definition of "redevelopment", for purposes of clarity, as suggested by the Regional Board herein; and (ii) correct, to reflect the record, the statement that the Regional Board did not give interested persons and Permittees adequate time to review late revisions to the Final SUSMP or provide comment.

Regional Board Recommended Changes

A. Retail Gasoline Outlets Do Not Merit An Exemption

The State Board's conclusion to exempt RGOs from the numerical mitigation standard is not supported by the evidence in the Administrative Record (AR) and is contrary to State and federal law. Presumably, RGOs are being exempted because they are, (i) heavily regulated; (ii) limited in their ability to construct infiltration BMPs; (iii) generally small in size; and (iv) storm water treatment may not be feasible or safe.[1]

RGOs are a well identified source of urban storm water pollutants that impair receiving waters.[2] The State Board appears to accept the evidence in the record that RGOs are appropriately identified by the Regional Board as being subject to SUSMP requirements because they discharge significant quantities of pollutants of concern.[3] Also, Petitioner Western States Petroleum Association (WSPA) acknowledges that storm water discharges from even "normally operated and maintained" RGOs are at least as bad

[1] Respondents note that the issue of numerical design criteria application to RGOs was not among the four questions that designated parties were asked to address in the Post-hearing Brief.

[2] AR Vol. 10, Item 16 Ref #113 at p 30. This study funded by the USEPA and conducted by Sacramento County identified heavy metals such as lead, copper, and zinc in significant concentrations in storm water runoff from gas stations. Volatile Organic Compounds (VOCs) from fueling areas were rarely detected because of their volatility. Data on Polycyclic Aromatic Hydrocarbons (PAHs) was inconclusive because analytical detection limits used were higher than regulatory action levels. See also AR Vol. 10, Item 16 Ref # 29 generally for a national view.

[3] State Board Proposed Order at 18, admits that the evidence [in the record] "shows that each listed category can be a significant source of pollutants..."

as discharges from commercial parking lots and diffuse urban runoff.[4] The obvious reason that "normally operated and maintained" RGOs do not demonstrate any improvement in storm water discharge quality is because existing BMPs do not address pollutants generated by motor-vehicle traffic.[5] Heavy metals, significant concentrations of which occur in storm water discharges from RGOs, have been demonstrated to be the main cause of toxicity in Santa Monica Bay during wet weather.[6]

The State Board surmises that RGOs merit a categorical exemption because they are over-regulated, yet does not enumerate what these regulations are, and if any are protective of surface water quality.[7] Under State law, the State Board is the primary authority for implementation of the federal Clean Water Act (CWA), and for matters related to water quality within the State.[8] The Regional Board is unaware of any basis in federal or State statute that permits the State Board or Regional Boards to abdicate their water quality authority because discharges from facilities that impact water quality are already regulated for other purposes. Attainment and maintenance of receiving water objectives and the protection of beneficial uses should be the paramount considerations.

---

[4] AR Vol. 10, Item 16, Ref #173 at p 13. The WSPA sponsored study concludes that pollutant concentrations in storm water discharges from RGOs are similar to concentrations from commercial parking lots and diffuse urban runoff. The Proposed Order correctly does not exempt commercial parking lots, restaurants, and residential/ commercial development from the numerical mitigation criteria, yet RGOs are exempted. See also June 7 State Board Hearing Transcript at p 231; comment by WSPA witness, that "concentrations of metals, hydrocarbons, and solids were no higher than…. roads and parking lots".

[5] See June 8 State Board Hearing Transcript at p 136, Regional Board staff testimony that current BMPs at RGOs do not address pollution associated with vehicular traffic.

[6] See Evidence and Exhibit Supplement submitted by Respondent Regional Board on May 3, – "Study of the Impact of Storm Water Discharge on Santa Monica Bay – Executive Summary", Los Angeles County Department of Public Works (1999), which identifies Zn and Cu as principal pollutants that cause storm water toxicity.

[7] The Regional Board's review of regulations that affect RGOs identified, (i) business license for business operation, (ii) Fire Department for tank/ piping integrity and gasoline storage; (iii) County Public Works for underground storage of hazardous chemicals; (iv) Air Quality Management District for VOC emissions; (v) Sanitation District for any sanitary sewer discharges; (vi) County Weights and Measures for sale of gasoline; (vi) Department of Toxics Substance Control for waste motor oil disposal; (vii) County Health for food and beverage sale; and (viii) Regional Board for regulation of leaking tanks to protect groundwater.

[8] Cal. Wat. Code § 13160 states that, "the State Board is designated as the state water pollution control authority for all purposes…. in federal act." Cal. Pub. Res. Code § 30412 states that, "other State agencies shall not modify, adopt conditions, or take any action in conflict with any determination by the State Board in matters relating to water quality".

Second the State Board finds that RGOs are limited in their ability to construct infiltration BMPs, but does not discuss what the compelling limitations are. Infiltration is but one form of mitigation. The SUSMP clearly does not mandate infiltration BMPs. Other options exist such as the installation of fabricated treatment BMPs to remove storm water runoff pollutants using physical, biological, or chemical processes.[9] Petitioner WSPA in its challenge and oral arguments did not present any coherent or convincing basis to validate the claim of limited ability.

Third, the State Board concludes that the relative "small size" of RGOs provides a compelling basis to exempt RGOs from the requirement to treat storm water. It should be noted that presently restaurants are subject to the SUSMP numerical mitigation requirement, where the area of development or redevelopment is 5,000 square feet or more. Similarly, commercial parking lots 5,000 square feet or more are subject to the numerical mitigation criteria. In contrast, the typical modern gas station is between 15,000 and 30,000 square feet.[10] The rationale of size thus appears flawed. The State Board's Proposed Order upholds the application of the numerical mitigation criteria to a 5,000 square feet restaurant development and a 5,000 square feet parking lot but not to a 30,000 square feet RGO development, which may contribute higher concentrations and loadings of storm water pollutants

Further, while the size of RGOs may be a consideration to assess their significance as a source of pollutants, their prolific numbers should also be a factor to be taken into consideration. There are nearly 3,500 operating RGOs in Los Angeles County. [11]

---

[9] June 7/8 State Board Hearing Transcript at p 41 and p 134. Regional Board staff comment in response to questions and cross-examination on the feasibility of storm water treatment at RGOs. Other jurisdictions do not exempt RGOs from requiring storm water treatment. In fact "oil-water separators" fitted with a rain diversion valve were at one time commonly installed at RGOs because of local agency industrial waste regulations.

[10] See Footnote 2 *supra*. Gas stations in the study ranged in area from 18,358 to 30,423 square feet.

[11] The Regional Board database has a record of approximately 4,600 RGO sites with leaking underground tanks. There are an estimated 3,500 gas stations currently operational in Los Angeles County that are covered by the municipal site-visit/ inspection program under the permit.

Undoubtedly, RGOs in Los Angeles County are a significant source of storm water pollutants because of their sheer number even if each facility is relatively small in area. Moreover, the on-going redevelopment of gas station sites to retrofit underground storage tanks for groundwater protection provides Petitioner WSPA a unique opportunity to reconfigure facilities for surface water quality improvements as well.

Fourth, the State Board surmises that storm water treatment may not be feasible or safe at RGOs. The Regional Board is not aware of any basis in the record to substantiate such a determination. Fabricated treatment systems have been commonly used at RGOs to separate waste-oil before discharge to the sanitary sewer system. Safety or feasibility has not been an issue when sanitation districts required RGOs to install treatment systems in order to obtain connection permits to the sanitary sewer system. There is no evidence in the record to support Petitioner WSPA's argument that the requirement to treat storm water somehow introduces new and different safety and feasibility considerations, as when compared to wastewater treatment systems which RGOs have readily installed.

B. Environmentally Sensitive Areas Is An Appropriate SUSMP Category

The Regional Board disagrees with the State Board's Proposed Order to exclude ESAs from SUSMP requirements. Admittedly, the ESA category is "locational" rather than "developmental" and presents some difficulty in application. The State Board's Proposed Order states that ESAs were not discussed by interested persons during permit adoption and that ESAs are subject to extensive regulations under other regulatory programs, without enumerating what these are. Significantly, the Proposed Order also does not explain whether these unidentified regulations adequately protect impacts to surface water quality.

Contrary to the statement in the Proposed Order, ESAs were indeed discussed during the Los Angeles County MS4 permit adoption process. For example, the permit includes

requirements for new development and redevelopment that apply to ESAs.[12] Also, the Regional Board lists ESAs as a specific SUSMP category in the City of Long Beach MS4 permit adopted on June 15, 1999.[13] Similarly, ESAs are included as a category for the application of numerical mitigation standards in the Ventura County MS4 permit adopted by the Regional Board on July 27, 2000.

The application of environmental regulations to new development and redevelopment based on category typing as "developmental" or "locational" is not treated under State law as being incompatible. For example, CEQA exempts certain "developmental" projects from its requirements but does not do so when the projects are "locational", i.e., when situated in ESAs.[14] In this respect, the State Board might wish to look at actions and interpretation of "development" in ESAs, as they pertain to water quality, by the California Coastal Commission, which administers the California Coastal Act.[15] This is pertinent because the State Board has entered into a Memorandum of Understanding (MOU) with the Coastal Commission to jointly promote the protection of water quality and natural resources from adverse impacts of non-point pollution including urban runoff.[16] At the California Commission's January 2000 Public Meeting, the Commission adopted the numerical mitigation criteria for post-construction BMPs for all development projects in the coastal zone without qualification. The Coastal Commission reaffirmed its

[12] See Board Order No. 96-054, Pt 2. III.A.3, p 36 requiring development planning guidelines to address riparian corridors, wetlands, and biological integrity of drainage systems.

[13] See Board Order No. 99-060, Pt 4. I.D.5, at p 17, admitted into the record, without objection, by Respondent Regional Board at the June 8 State Board Hearing.

[14] See Post-hearing Brief at footnote 25 citing 19 CCR 15301 which exempts certain categories except where they are located in ESAs.

[15] Cal. Pub. Res. Code § 30000 *et seq.* Specifically § 30231 requires that the Commission regulate land development to protect the coastal environment from adverse impacts of storm water runoff. The Commission has a special responsibility to protect ESAs in the coastal zone. Cal. Pub. Res. Code § 30107.5 defines ESAs and Cal. Pub. Res. Code § 30240 specifies the degree of protection that must be afforded.

[16] See "Memorandum of Understanding Between the State Water Resources Control Board and the California Coastal Commission, February 2, 2000, Plan for California's Nonpoint Source Pollution Control Program (2000)".

stance in regards to numerical mitigation criteria at its August 2000 Public Meeting.[17] In fact, an argument can be made that the State Board's interpretation of "development" projects subject to regulation for water quality within the coastal zone so long as it is inconsistent with the Coastal Commission's rule, violates Cal Pub. Res. Code § 30400.[18]

If the State Board's central concern is that ESAs were not adequately discussed during adoption of the Los Angeles County MS4, the Regional Board reaffirms its intent to add ESAs to the list of SUSMP categories when the permit is reissued in 2001. The State Board is requested to clarify that its ruling, if left unchanged from the Proposed Order, does not apply to the Regional Board adopted City of Long Beach MS4 permit (Board Order No. 99-060) and the Ventura County MS4 permit (Board Order No. 00-108). The ESA category was fully discussed during the adoption of these two MS4 permits. We note that the State Board rejected the Regional Board's recommendation to provide a development project area threshold for ESAs based on current State law, which would have cured any draconian interpretation of the rule as speculated by Petitioners.[19]

C. Include All Projects in SUSMP Categories

The Regional Board respectfully disagrees with the State Board's determination that the Regional Board acted "inappropriately in expanding the SUSMPs to include non-discretionary projects". We find that limiting the application of SUSMP requirements to "discretionary projects" is not supported by the federal CWA, EPA storm water regulations, the California Water Code, or the California Public Resources Code.[20]

---

[17] Regional Board Member Ms. Susan Cloke and Board staff member Dr. Swamikannu briefed the Commission, by invitation, on technical and policy issues related to SUSMPs at the meeting.

[18] Cal Pub. Res. Code § 30400 states that in the absence of specific authorization by law or agreement with the Coastal Commission, no agency shall exercise powers established by the California Coastal Act or the federal Coastal Zone Management Act.

[19] See Respondent Regional Board's Post-hearing Brief at footnote 25 citing, 19 CCR 15301. CEQA exempts projects in ESAs that disturb less than 2,500 square feet of area.

[20] Please see the Regional Board's comment herein at p 6 on exclusion of ESAs.

The main basis behind the determination appears to be the observation that the term "discretionary" appears in several parts of the permit (Board Order No. 96-054). However, the term "discretionary" was not defined in the permit even though the permit contains a section on Definitions.[21] Indeed, as the controversy indicates, there was no "meeting of the minds" as to its meaning when the permit was adopted. Thus, the Regional Board did not expand the scope of the SUSMPs at its January 26 Board Hearing. The "discretionary" limitation, as contemplated in CEQA, never existed in the permit and was never adopted by this Board. Rather, the Regional Board followed traditional rules of regulatory interpretation and deleted the "discretionary" limitation and definition in the SUSMP, articulated retrospectively by Permittees, when there is neither the basis in law nor any clue as to the Regional Board's intent when the permit was adopted in 1996. The CEQA definition of "discretionary" was a concept introduced much later by Petitioners in an attempt to limit applicability of the SUSMPs.[22]

If the permit is read as a whole, the Regional Board clearly intended that storm water controls on new development and redevelopment apply to all types of projects, not just 'discretionary' projects'. Specific language in the permit, in addition to the development of SUSMPs, requires the update of CEQA guidelines and General Plans to consider storm water impacts.[23] The State Board's Proposed Order opens up an unintended loophole.[24] If the State Board's determination remains unchanged, the Regional Board expresses its firm intent to close the loophole when the Los Angeles County MS4 permit is reissued in 2001. Recently, the Regional Board adopted the Ventura County MS4 permit (Board Order No. 00-108) without any reference to the term 'discretionary' therein.

[21] See Board Order No. 96-054, Attachment D, Glossary of Terms.

[22] The CEQA definition of "discretionary" that appears in the Final SUSMP is an inadvertent carry over from the Aug 12, 2000, SUSMP submitted by Permittees. There is no reference to the term in the main document.

[23] See Board Order No. 96-054, Pt 2. III.A.3, p 36 requiring the update of CEQA guidelines and General Plans.

[24] Case in point, in the City of Los Angeles in the past year there were 37,514 development project approvals, of which only 1,276 (3.4 percent) were in the "discretionary" category as defined under CEQA.

D. Retain the Requirement to Regionally Mitigate Where A Waiver is Granted

The Regional Board respectfully requests that the State Board reconsider its decision to eliminate the requirement to "mitigation fund" regional projects where an infeasibility waiver is granted from the requirement to treat storm water.[25] The Proposed Order calls it a "positive idea for obtaining regional solutions", yet deletes the requirement because Permittees are yet to establish a management and fund administration framework. Quite to the contrary the framework is already in place.

For example, the County of Los Angeles, as the Principal Permittee for the Los Angeles MS4 program, currently supports regional permit tasks such as public education/ outreach and MS4 monitoring using funds from a regional benefit assessment. Also, the Southern California Association of Governments (SCAG), the federal CWA § 205 (j) regional planning agency, expressed a definite interest, during the SUSMP hearings, in coordinating the development of regional solutions to storm water problems.[26] Sharing regional costs already occurs in SCAG's other program areas. Similarly, the TREEPeople, a non-profit environmental group, has been working with local agencies and school districts to implement solutions to mitigate runoff and promote water reuse.

Without doubt, there exists presently in the Los Angeles Region public and non-profit entities fully capable or already involved in developing and implementing regional solutions to storm water pollution. The purpose of the requirement in the Final SUSMP, besides consideration of equity, was to accelerate implementation and to support the efforts of such groups. The Regional Board's action was not contrary to state law or policy. Thus, the State Board may choose to defer to the Regional Board to make the judgement of reasonableness of the requirement to "mitigation bank".

[25] Respondents note that the issue of storm water mitigation funding was not among the four questions that designated parties were asked to address in the Post-hearing brief. See also Footnote 1 *supra.*

[26] See AR Vol. 6, Item 23, where SCAG proposes to lead and coordinate regional solutions.

E. Edit the Definition of "Redevelopment"

The Regional Board suggests that the State Board amend its definition of "redevelopment", which is derived from the Regional Board's Post-hearing Brief, to provide better clarity. We postulate that the first part of the definition should describe the kind of practices that constitute redevelopment. The second part should explain its application to SUSMP categories.

Our recommendation is as follows, - Redevelopment ~~includes~~ **means**, but is not limited to: the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of routine maintenance activity; and land disturbing activities related ~~with~~ **to** structural or impervious surfaces. **For the purposes of this rule**, redevelopment includes, on an already developed site, the ~~creation~~ **replacement** or addition of ~~at least~~ 5,000 square feet **or more** of impervious surfaces. Where redevelopment results in an increase of less than fifty percent of the impervious surface of a previously existing development, and the existing development was not subject to these SUSMP requirements, the design standards apply only to the addition and not to the entire development.[27]

F. Regional Board Provided Interested Persons and Permittees Adequate Time.

The State Board expresses a concern that the Regional Board did not provide interested persons and Permittees adequate time to review late revisions or to comment on them at the January 26 hearing. Suggestions include that the Regional Board should have deviated from its hearing procedure, and should have allowed groups to make joint presentations.

[27] Changes to the State Board's definition in the Proposed Order are indicated by bold and strikeouts. The phrase 'at least 5,000 square feet" does not make clear that the rule applies to projects above the threshold, only that it might. The phrase "5,000 square feet or more" leaves no room for doubt.

The Regional Board adopted revisions at the January 26 to resolve contested issues that were discussed over a period of several months. These were not new issues that would warrant the granting of additional time to conduct adequate review. Petitioners' argument for additional time was a strategic move to delay the process.[28] We submit that the State Board's comment on the argument inadvertently validates such a delaying strategy. Followed to its logical conclusion, neither the State Board nor the Regional Board would be able to conclude any matter, because changes made at Board hearings, in response to testimony on contested issues, would require postponing the decision.

Further, the Regional Board did not deviate from its established hearing procedure for the January 26 meeting for good reason. At the September 17, 1999, meeting on the same matter, Petitioners complained that the Regional Board was being prejudicial because it deviated from the hearing procedure by allowing the environmental community to make a joint presentation.[29] Consequently, both Permittees and the environmental community were allowed to make joint presentations at the January 26 meeting, each designated party being given a 30-minute block. Co-petitioner Building Industry of Southern California (BIA) was invited to become part of the Permittee group presentation, because BIA was not recognized as a separate designated party.[30] Thus, while the State Board may have cured any alleged harm by conducting a two day hearing on the matter, the Regional Board's process did not cause any harm that is evident from the record.

[28] See June 8 State Board Hearing Transcript at p 157 where Petitioners request setting up a statewide committee to discuss the matter further - continuing the pattern of procrastination. See also Petitioner Bellflower *et al*. Post-hearing Brief at p 3.

[29] See AR Vol. 12, September Regional Board Hearing Transcript at p. 203. BIA representative objects to the group presentation format allowed for the environmental community, and states, "if we are going to do this in the future,…. set the rules prior to the hearing".

[30] Respondent Regional Board notes that while BIA did not present comments jointly with the Permittee group at the January 26 Board Hearing, BIA is a Co-petitioner with municipalities in Complaint Bellflower *et al*. and not a separate Petitioner.

III. CONCLUSION

In conclusion, the Regional Board strongly supports the State Board's decision to uphold the authority of Regional Boards to establish numerical BMP water quality design criteria to regulate the discharge of pollutants in storm water from MS4s to meet the statutory standard of MEP.

The Regional Board requests that the State Board revise the Proposed Order to make the following changes:

(i) Correct the record to state that the Regional Board's hearing process did not cause Petitioners any harm that is evident from the record, notwithstanding the fact that the State Board's hearing process cured any alleged harm.

(ii) Edit the definition of "redevelopment" as suggested by the Regional Board herein for clarity.

(iii) Eliminate the categorical exemption from the numerical mitigation standard provided to RGOs, because it contradicts the application of the criteria to other similar SUSMP categories and is neither supported by the evidence in the record nor State and federal law.

(iv) Reinstate ESAs as a SUSMP category because the designation is consistent with the interpretation of "development" regulation by the Coastal Commission, with whom the State Board has an MOU to protect water quality and to reduce the adverse impact of urban runoff on natural resources.

(v) Delete the limitation imposed by the State Board on application of the SUSMP requirements to only "discretionary projects", as understood in CEQA, because the limitation in the same sense was not adopted by the Regional Board in 1996 and is not supported by State and federal law.

(vi) Reinstate the requirement to mitigation bank where an impracticability waiver is granted, because the infrastructure and the institutions are already in place to implement regional solutions.

Finally, the Regional Board thanks the State Board for fully considering and deliberating on the matter, conducting a two day hearing in Torrance, Los Angeles County, and holding a special meeting in Sacramento before issuing a decision.