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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) **RESPONSE IN OPPOSITION TO ISSUES IN PETITION BY PETITIONERS ON ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, AND ITS EXECUTIVE OFFICER, DENNIS DICKERSON, PURSUANT TO BOARD ORDER NO. 96-054 (NPDES No. CAS614001) AND POINTS AND AUTHORITIES**

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City of Sacramento v. State of California (1990) 50 Cal.3d. 51

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Natural Resources Defense Council v. U.S. EPA(9th Cir. 1992) 966 F.2d 1292

Natural Resources Defense Council v. Costle, (D.C. Cir. 1977) 568 F.2d 1369

Tonry v. Security Experts Inc., (9th Cir. 1994) 20 F.3d 967

United States v. State Water Resources Control Board(1986) 182 Cal.App.3d 82

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Defenders of Wildlife v. Browner (9th Cir. 1999) Case No. 98-71080

Arkansas v. Oklahoma, 503 U.S. 91.

Mathews v. Eldridge (1976) 424 U.S. 319

I. INTRODUCTION

Petitioners who include municipalities and trade associations for the building industry and petroleum distributors, challenge the actions of the Regional Board and the Regional Board Executive Officer in adopting requirements for new development and significant redevelopment to control post-construction storm water pollution. Petitioners object to the requirements for various substantive and procedural reasons. In essence, Petitioners contend that the Regional Board has no basis in law or fact to adopt requirements for new development and significant redevelopment, unless these requirements are the same as those presented by Petitioner Permittees under the provisions of the Los Angeles County municipal separate storm sewer system Permit (hereafter, the "LA County MS4 Permit"). Petitioners also contend that they were denied due process because they were not provided additional notice and allowed more time to review the action of the Regional Board.

Petitioners misunderstand the very nature of the regulatory process and thereby invert the burden of proof in this case. Because they misunderstand the burden of proof, petitioners misconstrue what evidence is needed to support the requirements. This is not an enforcement action in which the Regional Board must show harm or violation. Rather, the starting place for analysis is that storm water discharges from large municipal separate storm sewer systems, to waters of the United States without permits are illegal. Once such discharges are regulated under an MS4 NPDES permit, the Permittees must implement a comprehensive storm water management program to reduce pollutants in storm water to the maximum extent practicable. The Regional Board need not demonstrate with empirical evidence that Petitioners are actually harming surface waters or conduct a cost-benefit analysis in order to ensure compliance with regulations, as Petitioners assert. Rather, the Regional Board must follow the requirements of the federal and state law and exercise best professional judgment in adopting and enforcing protective measures. The Regional Board, as the permit issuance and enforcement authority, is fully granted the charge to enumerate objective measures of compliance, including numerical mitigation criteria, to ensure enforceability of permit requirements.

The question therefore before the State Water Resources Control Board (hereafter "State Board") in this Petition is not whether the Regional Board carried its burden of evidence but rather did it properly execute its legal duties. A careful review of the entire record shows the Regional Board did so.

II. BACKGROUND

A. LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT HISTORY

On June 18, 1990, the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Regional Board) adopted the first NPDES permit for Stormwater/Urban Runoff Discharged in Los Angeles County (Order No. 90-079). This Permit was issued on a system-wide basis for all the cities in Los Angeles County and the County of Los Angeles. The 1990 permit was challenged regarding its alleged failure to include specific water quality objectives and was upheld on May 16, 1991 in a decision issued by the State Water Resources Control Board (Order No. WQ 91-04; See also, WQ 91-03)

The LA County MS4 Permit was reissued on July 15, 1996, and made consistent with Federal Regulations for MS4s issued November 16, 1990. [55 Fed. Reg. 48073, Appendix F; 55 Fed. Reg. 48072)]. On June 10, 1997, the State Board dismissed a Petition filed by the City of Long Beach." On July 9, 1997, the City of Long Beach filed a Petition for Writ of Mandate/Complaint for Declaratory and Injunctive Relief before Superior Court. The court case was settled in May 1999, and under the terms of the settlement agreement the City of Long Beach was issued a separate MS4 Permit ("LB MS4 Permit") on June 30, 1999. The LB MS4 Permit contains similar requirements to the LA County MS4 Permit including requirements for Development Planning and Standard Urban Storm Water Mitigation Plans (SUSMPs).

B. NEW DEVELOPMENT REQUIREMENTS

The Los Angeles County MS4 Permit and the Long Beach MS4 Permit contain requirements that Standard Urban Storm Water Mitigation Plans (SUSMPs) be prepared for priority planning projects and that they include appropriate Best Management Practices (BMPs) and guidelines to reduce pollutants in storm water to the maximum extent practicable (Permit Pt. 2. III.A.)

On April 22, 1999, the Regional Board approved a List of BMPs for MS4 Permittees to select from and require implementation of the most effective BMPs in their Development Planning and Development Construction programs (Board Resolution No. 99-03)(A.R. xx) The Regional Board at that time also requested that the SUSMPs for Priority Planning Project categories, which incorporate the BMPs, be brought before it for discussion.1

Los Angeles County Department of Public Works (LACDPW), on behalf of the Permittees, submitted SUSMPs for Regional Board Executive Officer approval on July 22, 1999. These SUSMPs were revised and resubmitted on August 12, 1999, after a joint SUSMP workshop held on August 10, 1999, to clarify the meaning of some text. SUSMPs were submitted for: (i) 100+ home subdivisions; (ii) 10-99 home subdivisions; (iii) 100+ square-foot commercial developments; (iv) automotive repair facilities; (v) retail gasoline outlets; (vi) restaurants; and (vii) hillside located single-family dwellings. Prior to submittal to the Regional Board, draft versions of the SUSMPs were distributed to environmental groups, contractors, developers, consultants and trade industry groups for review and comment.

The Regional Board provided a Public Notice on August 16, 1999, that SUSMP requirements will be discussed before it on September 16, 1999, and invited comments from interested parties. Comments were received from municipalities, environmental groups,

1 Transcript of Proceedings, April 22, 1999. at

businesses, environmental consultants, and the building industry. Before the conclusion of the Hearing, the Regional Board Executive Officer requested that he be given more time to fully consider the issue and hold discussions with all interested parties to hear their concerns. The Regional Board authorized the Regional Board Executive Officer to proceed but directed him to bring the issue back to the Regional Board because of the broad interest in the community that the SUSMP requirements had generated.

On December 7, 1999, staff released a revised SUSMP (hereafter "Board SUSMP") for public review and comment. A "Summary of Comments and Responses" and a "Tentative Board Resolution" were included in the package mailed out with the Public Notice of Proposed Action at a special hearing scheduled for January 6, 2000. The Hearing was rescheduled to January 26, 2000, in deference to numerous requests from local government officials, building industry representatives, and others that it be postponed because of the intervening holiday season.

The Board SUSMP retained much of the language of the original SUSMPs submitted by Permittees, eliminated redundant language, consolidated similar requirements, and added some terms to ensure enforceability. As before the Board SUSMP included numerical design criteria for BMPs. In addition two new categories of designated priority planning projects were listed: (i) projects located adjacent to or discharging to environmentally sensitive areas, and (ii) parking lots with 25 or more parking spaces.

A week prior to January 26, 2000, Regional Board staff made available:(i) a Tentative Change Sheet to the December 7, 2000, Tentative SUSMP Draft, and (ii) the "Staff Report and Record of Decision" (A.R. Vol. 02). On January 26, 2000, the Regional Board held a nine-hour hearing and provided the opportunity for all parties to provide comments. All the same interested parties again submitted comments as before. At the conclusion of the public comment period, the Regional Board members discussed the issues, asked questions of staff, and provided direction to the Regional Board Executive Officer to approve the SUSMP with the Regional Board directed changes and staff proposed changes in the Change Sheet. At the same time, the Regional Board

adopted a Resolution to state that the SUSMP requirements are applicable to the City of Long Beach (except as noted) and that the numerical mitigation criteria establishes the standard for review in the Los Angeles Region for post-construction BMPs under the State General Construction Storm Water Permit (Order 99-08-DWQ

The Regional Board Executive Officer issued the Final Board SUSMP on March 8, 2000, together with a "Staff Report and Record of Decision – Supplement" and "Board Resolution" (No. R-00-02) (A.R. Vol. 14). On or after February 24, 2000, Petitioners filed a petition with the State Board requesting administrative review, challenging the actions of the Regional Board, and the actions of the Regional Board Executive Officer in issuing the Board SUSMP.

C. WATER QUALITY AND STORM WATER IN THE LOS ANGELES REGION

The water quality impacts of urbanization and urban storm water discharges have been summarized by several recent USEPA reports.2 Urbanization causes changes in hydrology and increases pollutant loads which adversely impact water quality and impair the beneficial uses of receiving waters. Increases in population density and imperviousness result in changes to stream hydrology including:

(i) increased peak discharges compared to predevelopment levels;

(ii) increased volume of storm water runoff with each storm compared to pre-development levels;

(iii) decreased travel time to reach receiving water; (iv) increased frequency and severity of floods;

(iv) reduced stream flow during prolonged periods of dry weather due to reduced level of infiltration;

2 *Storm Water Phase II Report to Congress* (USEPA 1995); *Report to Congress on the Phase II Storm Water Regulations* (USEPA1999); *Coastal Zone Management Measures Guidance* (USEPA 1992)

(v) increased runoff velocity during storms due to a combination of effects of higher discharge peaks, rapid time of concentration, and smoother hydraulic surfaces from chanellization, and

(vi) decreased infiltration and diminish groundwater recharge.

The LA County MS4 program conducts monitoring to:

(i) quantify mass emissions for pollutants,

(ii) identify critical sources for pollutants of concern in storm water;

(iii) evaluate BMP effectiveness, and

(iv) evaluate receiving water impacts.

The monitoring indicates that instream concentrations of pathogen indicators (fecal coliform and streptococcus), heavy metals (such as Pb, Cu, Zn,) and pesticides (such as diazinon) exceed state and federal water quality criteria.3 The mass emissions of pollutants to the ocean are significant from the urban Watershed Management Areas (WMAs) such as the Los Angeles River WMA, Ballona Creek WMA, and Coyote Creek WMA with the Los Angeles River WMA providing more than seventy percent of the loadings. Critical sources data for facilities (such as auto-salvage yards, primary metal facilities, and automotive repair shops) showed that total and dissolved heavy metals (Pb, Cu, Zn, and Cd), and total suspended solids (TSS) exceeded state and federal water quality criteria by as much as a hundred times. The results are consistent with a limited term study conducted by the Regional Board to characterize storm water runoff in the Los Angeles region before the issuance of MS4 permits.4 Storm water runoff data from predominant landuses showed similar patterns. Light-industrial, commercial and transportation landuses showed the highest range of exceedances. A pesticide (diazinon) showed higher ranges from residential landuse. The data for polycyclic aromatic hydrocarbons (PAHs), a known

3 Los Angeles County 1998-1999 Stormwater Monitoring Report, Los Angeles County Department of Public Works (1999). Data summarizes results of storm water monitoring for the most recent year and the past five years.

4 *Storm Water Runoff in Los Angeles and Ventura Counties, Final Report* (1988), California Regional Water Quality Control Board, Los Angeles, SCCWRP Contribution C292. This study found the highest mean concentrations of pollutants of concern such as heavy metals in the urban watershed rivers and that they contributed significant loads to the ocean.

pollutant of concern in urban storm water runoff, is inconclusive but improved analytical methods may yield more definitive results next year. Receiving water impacts studies found that storm water discharges from urban watersheds exhibit toxicity that are attributable to heavy metals. Biosurveys of the sea-bottom showed bioaccumulation of toxicants. Sediment analysis showed higher concentrations of pollutants such as Pb and PAHs than rural watersheds (2 to 4 times higher). In addition, toxicity of dry weather flows was observed with the cause of toxicity undetermined.5 Previous studies have found chemical concentration of pollutants that exceed state and federal water quality criteria in storm drains flowing to the ocean,6 and that there are adverse health impacts from swimming near them.7

Treatment BMP requirements on new development and redevelopment offer the most cost effective strategy to reduce pollutant loads to surface waters. Retrofit of existing development will be expensive and may be considered on a targeted basis. Studies on the economic impacts of watershed protection indicate that storm water quality management has a positive or at least neutral economic effect while greatly improving the quality of surface waters.8

D. APPLICABLE FEDERAL AND STATE AUTHORITY

1. Federal Authority

The Federal Water Pollution Control Act was adopted in 1948, amended in 1972, and amended in 1977 as the Clean Water Act of 1977 ("Clean Water Act"). Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nations's waters." 33 U.S.C. § 1251(a). The Clean Water Act established the National Pollutant

5 *Toxicity of Dry Weather Flow from the Santa Monica Bay Watershed*, Bay, S. et al (1996), Bull. Southern California Acad. Sci. 5(1), pp. 33-45. The paper describes preliminary results on dry weather toxicity which have been confirmed by the MS4 monitoring program.

6 *Chemical Contaminant Release into Santa Monica Bay, Final Report*, American Oceans Campaign , Santa Monica (1993)

7 *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Haile, R.W. et al. (1999), Epidemiology 10: 355-363). The study found higher risks of respiratory and gastrointestinal symptoms from swimmers.

8 *The Economics of Watershed Protection*, T. Schuler (1999), Center for Watershed Protection, Endicott, MD. The article summarizes nationwide studies to support the statement that watershed planning and storm water management provide positive economic benefits.

Discharge Elimination System (NPDES) that required permits for any discharge of pollutants from a point source pursuant to section 402 of the Clean Water Act. 33 U.S.C. § 1342. The Clean Water Act authorizes EPA or an authorized State to implement an NPDES permit program. 33 U.S.C. § 1342(a)(1) and (b). In 1987, recognizing the threat from stormwater runoff, Section 402 of the Clean Water Act was amended to add subsection 402(p) which established a statutory scheme for storm water runoff through NPDES permit requirements for municipal storm water discharges from Municipal Separate Storm Sewer Systems ("MS4s"). 33 U.S.C. §§ 1342(p). That section "established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. "Natural Resources Defense Council v. U.S. EPA, 966 F.2d 1292, 1296 (9th Cir. 1992). States may administer NPDES programs after they have submitted a description of the program, a statement from the Attorney General to the Environmental Protection Agency ("EPA") a Memorandum of Agreement with EPA, and the program is approved. (33 U.S.C.§ 1342(b); 40 C.F.R. § 123.21 et seq.) The Administrator shall approve State programs which conform to the applicable requirements. (40 C.F.R. § 123.1(c)).

2. The California NPDES Permitting Authority

a. *NPDES Memorandum between EPA and the State*

The State of California is one of forty states with an approved State NPDES Program. This program has been in effect since 1973. The latest NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency and The California State Water Resources Control Board approved by EPA on September 22, 1989 states as follows:

> "*The Chairman of the State Board and the Regional Administrator of the EPA, Region 9 hereby affirm that the State Board and the Regional Boards have primary authority for the issuance, compliance monitoring, and enforcement of all NPDES permits in California including NPDES general permits and permits for federal facilities; and ...permits to dischargers for which EPA has assumed direct responsibility pursuant to 40 C.F.R. 123.44..."*

b. *Attorney General's Statement for the State National Pollutant Discharge Elimination System Program*

In May 1987, the Attorney General of the State of California submitted its Statement of legal authority to implement a State National Pollutant Discharge elimination system program. Chapter 5.5 of the Water Code, Sections 13370 et seq., sets forth the specific sections relating to the NPDES program in California. Those sections were added to assure consistency with the Clean Water Act. U.S. EPA has certified California's NPDES programs and the Regional Board's authority to issue permits as part of the approved program. Water Code § 13377 specifically authorizes the Regional Board to issue NPDES permits:9 The EPA has approved the entire regulatory scheme set forth in the Porter Cologne Act that establishes a comprehensive statewide program for water quality administered regionally, through the State Water Resources Control Board and the nine regional boards, within a framework of statewide coordination and policy. (Water Code § 13000 *et. seq*)

c. *Summary of Applicable California Regulatory Program*

To obtain approval, a state must have adequate authority to implement requirements enumerated in the Clean Water Act. 33 U.S.C. § 1342(b). The Porter Cologne Water Quality Act is the controlling water quality law for California. The State Board and the nine Regional Boards implement the Act. (Water Code §§ 174, 13200). The Porter Cologne Act and its regulations include both general and specific sections for implementing the Clean Water Act Programs. (See Water Code § 13370 *et seq*). The Regional Boards adopt Regional Water Quality Control Plans ("Basin Plans") for each region. (Water Code § 13240). The Basin Plan covering the area of this Permit, was adopted by the Regional Board on June 13, 1994, was approved by the State Water Resources Control Board on November 17, 1994 and is a public document

9 "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 ...which apply and insure compliance with all applicable provisions of the act and acts amendatory thereof or supplemental 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." Water Code § 13374 states: "The term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act, as amended."

generally available. The Basin Plan specifically discusses the NPDES permit program that regulates storm water runoff from land surfaces that flow into storm drains or directly into natural waterbodies during rainfall. The principal means of regulating activities, which may affect water quality and the principal means of implementing water quality control plans, is through issuance of waste discharge requirements.

Water Code § 13376 sets forth the Permittees duties to obtain waste discharge requirements.10 Section 13376 is modeled on the provisions of the Clean Water Act. (Compare § 13376, with Clean Water Act sections 301, 402, 33 U.S.C. §§ 1311, 1342) By prohibiting the "discharge of pollutants" except as in accordance with a state permit, in the form of waste discharge requirements, section 13376 requires waste discharge requirements for all discharges for which the Clean Water Act requires an NPDES permit.11

State Board regulations provide that a report of waste discharge is the equivalent of an NPDES Permit Application, and that reports of waste discharge for point source discharges

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10 . Section 13376 provides, in pertinent part: "Any person discharging pollutants or proposing to discharge pollutants to the navigable waters of the United States within this state...shall file a report of such discharge in accordance with he procedures set forth in section 13260....The discharge of pollutants...by any person except as authorized pursuant to waste discharge requirements....is prohibited...." § 13376. The terms"discharge," pollutants," and "navigable waters," as used in section 13376 and other provisions of Chapter 5.5 of the Porter-Cologne Act, have the same meaning as in the Clean Water Act. § 13373. The term "waste Discharge requirements," as used in Chapter 5.5. of the Porter-Cologne Act, is the equivalent of the term "permits," as used in the Clean Water Act § 13374.

11 Any person discharging waste or proposing to discharge waste that could affect the quality of waters of the state, must submit a *report of waste discharge* to the board. Water Code § 13260. A "discharge of waste", as used in the Porter-Cologne Act provisions on waste discharge requirements, includes, but is not limited to , any "discharge or runoff of a pollutant", within the meaning of the Clean Water Act. (33 U.S.C. § 1323, 1362). Specific authority for Clean Water Act Programs in the Porter Cologne Act include the issuance and enforcement of waste discharge requirements for both point and non-point sources. Waste discharge requirements may establish more stringent requirements than those required or authorized by the Clean Water Act. Water Code § 13377.

Where other provisions of the Porter-Cologne Act are inconsistent with Chapter 5.5, the provisions of Chapter 5.5 prevail to the extent of any inconsistency. Water Code § 13372. See State Water Resources Control Board No. WQ-80-19, State Board rejected an argument that Water Code § 13360 limits the authority of the state and regional boards to specify the manner of compliance with an NPDES permit. (See 33 U.S.C. § 1342(a)(1); see *NRDC, Inc. v. Costle*, 568 F. 2d 1369 (D.C. Cir. 1977)) In addition, EPA regulations adopted under the Clean Water Act authorize conditions in NPDES permits setting "best management practices" where numeric effluent limitations are infeasible or where reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Act. 40 C.F.R. § 122.62K. "Best Management Practices" are defined to include, for NPDES permits, 'treatment requirement, operating procedures, and practices to control...sludge or waste disposal...' 40 C.F.R. § 122.2. Consequently, since the Clean Water Act authorizes the imposition of conditions including best management practices, in NPDES permits where limitations and standards have not been promulgated, the Porter-Cologne Act gives the State and Regional Boards the same authority. To the *extent that this authorization is inconsistent with the provisions of water code section 13360, the authority of the State and Regional Boards to implement the provisions of the Clean Water Act under Water Code Section 13377 must prevail. See Water Code Section 13372."* (State Board Order No. WQ 80-19 at pgs. 19-21.)

to surface waters shall be filed and processed in compliance with U.S.EPA's NPDES program regulations. (22 Cal. Admin. Code §§ 2235(b), 2235.1, 2235.2) Thus, the Porter Cologne Act and state board regulations have incorporated by reference all EPA NPDES regulations applicable to the States. (40 C.F.R. § 122, 123, and 124)

d. *No requirement of specific water quality impact for permit issuance*

There is no requirement in state or federal law that either EPA or the State is required to obtain information on the impacts to water quality of the discharges of pollutants or waste prior to the issuance of a permit to that discharger. Any city with a population exceeding 100,000 that owns or operates a municipal separate storm sewer system pursuant to EPA regulations implementing Clean Water Act Section 402(p) is required to have a permit. The Clean Water Act requires U.S.EPA and the States to regulate, through the issuance of NPDES permits, all discharges of pollutants to the nation's waters. CWA § 402; *NRDC v. Costle,* 568 F. 2d 1369 (D.C. Cir. 1977). "A permit is required where the population figures are net or exceeded; issuance is not conditioned on proving actual impacts to water quality." (Order No WQ 95-2, May 17, 1995; 55 Fed. Reg. 222 at 48038.

The initial storm water regulations were based upon extensive studies, which documented impacts on water quality from large and medium urban areas. (*See Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292 (9th Cir. 1992) *In Natural Resources Defense Council v. U.S. EPA,* the court rejected an exemption in the CWA for oil and gas facilities where storm water was uncontaminated. *Id*., at p. 1305. The Court noted: "...by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme...no other classes of industrial activities are subject to the more lenient "actual exposure" test. *To require actual exposure entirely shifts the burden in the permitting scheme. Most industrial facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs...The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is*

occurring...[T]he regulations appear to contemplate neither..." Id., at p. 1305. To condition a permit on proving actual impacts to water quality alters the statutory scheme and wrongly places the burden on the permitting agency instead of forcing a facility to prove that they are in compliance.12

IV. STANDARD OF REVIEW

The standard of review for this type of permit is statutory and is not based upon the denial of a fundamental vested right. Water Code section 13263(g) states that the discharge of waste into the waters of the State is a privilege, not a right.

The State Board's charge here in reviewing Regional Board actions is to determine whether the Regional Board has acted properly (Water Code § 13320). In exercising its independent judgment, however, the State Board must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden to prove that the administrative findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 815.) "Considerable weight should be given to the findings of experienced administrative bodies made after a full and formal

12 In *NRDC v. U.S. EPA*, the court explained: "This case involves runoff from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program.... One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. 55 Fed.Reg. at 47.991 " Id. at 1295. "The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1984 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. 55 Fed. Reg. at 47.991. A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id*., at p. 47, 992. Urban

hearing, especially in cases involving technical and scientific evidence. [Citation.]" (*Id*., p. 812.) The State Board should give proper consideration to the Regional Board's expertise in the field of storm water pollution and related areas for the Los Angeles region. (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 113.). Factual findings made by the Regional Board in the process of approving SUSMP requirements for new development should be reviewed under the clear error standard [*Tonry v. Security Experts Inc*., 20 F.3d 967 (9th Cir. 1994)]. In the absence of a clear error of judgement of the facts, the State Board should uphold the Regional Board action.

In addition the State Board should deny Petitioners request for a stay of the requirements. Petitioners make up a small subset of the eighty-six MS4 municipalities in Los Angeles County, A stay would penalize the good-faith efforts of the larger number of the Permittees who, rather than petitioning the Regional Board's determination, are moving toward conformance with state and federal law. The State Board should take notice that the challenge to the SUSMP requirements is not unanimous.

V. ARGUMENTS

A. THE REGIONAL BOARD AND ITS EXECUTIVE OFFICER'S APPROVAL OF REQUIREMENTS FOR NEW DEVELOPMENT AND REDEVELOPMENT ARE NOT ENFORCEMENT ACTIONS SUBJECT TO THE ADMINISTRATIVE REVIEW PROCESS SET FORTH IN ORDER NO 96-054

The Los Angeles MS4 Permit sets forth an Administrative Procedure to be followed by the Regional Board Executive Officer "for the review and acceptance of documents" and "to resolve any differences in compliance expectations between the Regional Board and Permittees, prior to ***initiating enforcement action***." Petitioners contend that the present process, by which the

Regional Board considered approval of the SUSMP requirements, violates this process as set out in the Permit. Petitioners are grossly mistaken. The LA County MS4 Permit requires that SUSMPs be submitted to the Regional Board Executive Officer for approval. The action by the Regional Board and the Regional Board Executive Officer to approve the SUSMP was not an enforcement action but rather one of document review. The Regional Board's express statement at the September 16, 1999, hearing that the SUSMPs be brought before it for discussion voided the 120 day response condition stated in the permit for Regional Board Executive Officer approval documents (A.R. Vol. 12).13

Even if the Administrative Review provisions are found to apply, Petitioners' arguments that the Administrative Review process was not followed relies heavily on a premise that the Permit process provides significant notice, review and meet-and-confer protections that will benefit the Permittees. Those provisions must be considered in their full context, including, harm to the interest protected, and significantly, the deadline set forth in the permit for implementation. That deadline (July 30, 1999) has come and gone. Permittees submitted a final SUSMP to the Regional Board on August 10, 1999, well past the deadline. Because of the lapse of the deadline, the lack of countywide implementation of an effective SUSMP, and the impending expiration of Order No. 96-054 itself, the Regional Board was well within its right to consider the process prescribed in the permit for approval of a program implementation component to be obsolete.

Further, the Regional Board's action did not harm Petitioners interest protected by the Administrative Review process (i.e., ensuring conference with Regional Board staff to help resolve differences prior to formal action). The Regional Board Executive Officer met numerous times with Petitioners between August 1999 and January 2000 to listen to their concerns and communicate Regional Board expectations. During these discussions, several proposals were

13 Transcript of Proceedings, September 16, 1999.

exchanged between the staff and the interested parties and the record in this matter now contains a substantial number of comments and responses. It is illustrative that Petitioners do not make the argument that actual prejudice derived from the Regional Board's failure to follow the process, but rather, seek to merely elevate form over substance.

The State Board should take note that the U.S. EPA, the federal agency with regulatory responsibility for implementation of the CWA in the U.S., endorsed the Regional Board Executive Officer's action in approving the SUSMP.14 The U.S. EPA also provided oral testimony at the January 26, 2000, hearing in support of changes directed by the Regional Board.15

Moreover, as a further consideration, the U.S. EPA's October, 1999 "NPDES Program Implementation Review" for the Los Angeles Region was critical of the process set forth in the Los Angeles County MS4 permit for model program approval because it had resulted in interminable delays.16

Given the circumstances of this matter, (i) the fact that the failure to follow the process has not deprive the Petitioners of any opportunity to discuss the SUSMP provisions and propose alternatives or any other protections, and (ii) the fact that the Regional Board's primary responsibility is to protect the water quality in the Region (Water Code Section 13000), the Board was well within its legal authority to approve the SUSMP presented by Regional Board staff with Board directed changes, rather than delay program implementation.

14 See Letter of January 13, 2000 to Dennis Dickerson, Executive Officer from Alexis Strauss, Director, Water Division, U.S. EPA.

15 See Transcript of Proceedings January 26, 2000. at p 161. Ms. Alexis Strauss', Director, Water Division, U.S. EPA Region IX, statement that the Regional Board consider removing certain exemptions.

16 See NPDES Program Implementation Review: California Regional Water Quality Control Board 4, Los Angeles Region. USEPA, Region 9, Final Report – October 1999., at page 10 of 45. The report notes at page 28 that the process was "…hindering overall progress towards achieving permit objectives".

For these reasons, the State Board should reject Petitioners' claim that the Regional Board acted unlawfully in not following the Administrative Review Process described in the permit.

B. THE REGIONAL BOARD HAS FULL AUTHORITY UNDER THE CLEAN WATER ACT (33 U.S.C S 1251 *et seq*.) AND THE PORTER COLOGNE ACT (CAL. WATER CODE S 13000 *et seq*.) TO ESTABLISH MINIMUM CRITERIA TO ENSURE COMPLIANCE

Petitioner's argue that the Regional Board lacks authority under State and Federal law to establish objective criteria to determine compliance (SUSMP requirements) where Permittees are implementing the requirements of the Los Angeles County MS4 permit. Nothing could be further from the truth. Permittees by their failure to have an approved program to control storm water runoff from new developments and significant redevelopment have presumptively failed the statutory standard for compliance, i.e "reduce pollutants to the maximum extent practicable"

Petitioner's also contend that the Regional Board must demonstrate that the Board SUSMP requirements, because they differ from those submitted by the Permittees, will "reduce pollutants to the maximum extent practicable".

Petitioners' arguments turn the CWA and the Porter-Cologne Act on their heads. In essence, Petitioners assume they have a right to discharge pollutants under a MS4 permit with little or no controls absent a showing by the Regional Board that their activities are harmful or are not "reducing pollutants to the maximum extent practicable". This assumption impermissibly alters the statutory scheme set forth in the CWA and Porter-Cologne Act. To require evidence of actual discharge or that Permittees are not reducing pollutants or showing of harm entirely shifts the burden in the permitting scheme. To condition implementation of

requirements in a permit on proving actual impacts to water quality or showing sub-par implementation alters the statutory scheme and wrongly places the burden on the permitting agency instead of forcing a discharger to prove it is in compliance with the law. (See e.g., *Natural Resources Defense Council* v. *U.S. EPA* (9th Cir. 1992) 966 F.2d 1292 [court rejects an exemption in the CWA for oil and gas facility where storm water was uncontaminated; court says by designating these industries as a group that need apply for permits only if actual exposure occurs, EPA impermissibly alters statutory scheme.].)

Hence, there is no need to show with empirical evidence that Petitioners are required to implement specific storm water controls only where they are discharging pollutants or causing harm. Once the regulations require controls for storm water runoff from new development and significant development based on a general determination that pollutants could be discharged in storm water, a fact Petitioners never challenge, the Regional Board must interpret and enforce requirements in the permit as mandated by the Clean Water Act and Porter-Cologne sufficient to protect water quality. The only question, then, is whether the Regional Board followed the law in adopting the SUSMP requirements, and whether, in the exercise of its best professional judgment, the Regional Board properly exercised its authority to require definite criteria and other conditions for new development and significant redevelopment "to reduce pollutants in storm water to the maximum extent practicable"

The record establishes that urban stormwater runoff, from new development and redevelopment, poses a serious threat to surface waters because urbanization adds pollutants that are picked up from the ground and transported in storm water. (A.R. Vols. 09, 10). The record shows that scientific evidence justifies controls to mitigate runoff from 0.75 inch or equivalent of precipitation. Substantial deference should be accorded to a regulatory agency's reasonable and consistent held interpretation of its own regulations [*Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992)]. Federal courts have held that where an NPDES permit does not specify the manner in

which compliance is determined, the Regional Board's interpretation of the proper method to determine compliance should be given considerable deference, so long as it is reasonable [*Russian River Watershed Protection Committee v. City of Santa Rosa*, Case No. 97-15179, 9th Cir. (1998)]

It is revealing that Permittees initially included a numerical BMP design standard (0.6 inch) in an early SUSMP draft circulated among Permittees, but then had the numerical criteria removed (A.R. Vol. 10). It is not unreasonable to assume that Permittees did so in order to render the SUSMP unenforceable. Without an objective standard, there would be no definite design criteria to size BMPs for storm water quality. Developers and builders would then merely have to pay lip service to a vague and subjective standard that neither the Permittees could require compliance with nor the Regional Board could enforce.

Petitioners further claim that the List of BMPs approved by the Regional Board, pursuant to Board Resolution No. 99-03, by itself will ensure that Permittees have met the standard of compliance for new development and significant redevelopment. These statements are incorrect. The List of BMPs approved by the Regional Board constitutes a menu of BMPs considered by the Regional Board as appropriate for the control of pollutants from new development and significant redevelopment. However, "to reduce storm water pollutants to the maximum extent practicable" through structural and treatment controls for new development and significant redevelopment, three elements would be necessary, (i) best combinations of BMPs (ii) sized based on water quality equivalent design standards, and (iii) selected to reduce the pollutants of concern. Only the first element has been satisfied by Permittees when they incorporate the Board approved BMPs List into their program. The Permittees SUSMP failed because it lacked the second element. The third element does not come into play until the time when Permittees review development plans submitted by builders and developers. Permittees therefore can be presumed to have failed to comply with the requirements of the Clean Water Act.

Also, the Regional Board's action in setting definite criteria for the control of pollutants in storm water from new development and significant redevelopment is consistent with a recent State Board ruling, that storm water permits include clear requirements to achieve compliance. (Order WQ 98-01) 17

Thus, Petitioners' claim that the Regional Board lacks the authority to impose definitive requirements for new development and redevelopment must be rejected.

C. THE REGIONAL BOARD PROPERLY NOTICED THE ACTION, PROVIDED ADEQUATE TIME FOR PUBLIC REVIEW, AND CONDUCTED A FAIR HEARING

Petitioners contend that the Regional Board violated their due process rights by failing to provide Petitioners sufficient notice prior to the public hearing of their proposed actions and sufficient opportunity to be heard prior to taking action. At issue appears to be the Change Sheet dated January 25, 2000. The Change Sheet was provided for Regional Board consideration, in large part to make changes to the SUSMP considered reasonable, and requested by Permittees, through their comment letters (See A.R. Vol. 02). Petitioners also contend that the Regional Board made substantive changes to the SUSMP after the close of the public comment period on January 26, 2000.

The procedural history of the Regional Board action shows that Petitioners were given "first opportunity" to draft the SUSMP requirements and submit them through the LACDPW to the Regional Board Executive Officer for approval. Several versions of the SUSMP were circulated for almost six months before a final document was submitted to the Regional Board on July 21, 1999. This document was again revised and resubmitted on August 12, 1999. Regional Board staff conducted a technical workshop on August 10, 1999, with testimony from national experts to discuss the fundamental principles for the control of pollution from new

17 In Re: Environmental Health Coalition, Order WQ 98-01, at 11. The State Board upheld the MS4 permit issued by the San Diego Regional Board but found it necessary to state, "storm water permits [should] contain the strongest and clearest possible language to protect water quality"

development and redevelopment. (A.R. Vol. 10) Further, the Regional Board conducted an information workshop on September 9, 1999, to hear comments on staff recommended SUSMP requirements. Before the adoption of the SUSMP requirements on January 26, 2000, the Regional Board held two workshops, and Regional Board staff conducted several consultative meetings with various interests including Petitioners. Extensive testimony was allowed on the SUSMP requirements at all these times. Regional Board staff also made several appearances at local council of governments and regional planning agency meetings to discuss the requirements.

On December 8, 1999, the Regional Board circulated the tentative Board SUSMP along with a document entitled "Response to Comments" summarizing comments and responding to whether or not certain suggested revisions were accepted or declined and why. In addition, on January 18, 2000, the Regional Board released a “Supplemental Response to Comments” and “the Staff Report and Record of Decision”.(A.R. Vol. 02) The Regional Board approved the Final SUSMP on January 26, 2000, after nine hours of testimony and Board discussion. At that meeting, the Regional Board considered all testimony and directed that the Regional Board Executive Officer make certain revisions. (A.R. Vol. 12) Petitioners claim they were denied due process under the state and federal Constitutions because they were not allowed additional period for notice, review, and comment for the Board directed changes.

The Regional Board complied with the federal procedural requirements for adopting NPDES permits under section 124 of Title 40, Code of Federal Regulations and with Water Code Section 13377. The Regional Board circulated the tentative SUSMP for thirty days, held a hearing on the contested item, made revisions in response to comments, and prepared a document containing responses to those comments. The final revisions to the SUSMP made after the close of the public comment period were made in response to oral testimony.

Petitioners claim the revisions constituted significant changes, which required further comment. A close examination of the record, however, demonstrates that the Regional Board fully considered all material presented and made decisions consistent with their

responsibilities under the Water Code Section 13225(a). While the issues might have been significant, as illustrated by the considerable time and effort that the Regional Board invested in its consideration, the issues were not new issues. The record will indicate that the same concerns were communicated orally and in writing some months before, not just on January 26, 2000.

Petitioners specifically contend that application of the SUSMP requirements to all projects (not just "discretionary projects") and elimination of the "roof-top" exemption constitutes significant changes that require new notice. Both terms, as originally set forth prior to Board modification, convey limitations that had been proposed by Permittees in the development of the proposal presented to the Board in order to restrict the scope of the application of the SUSMP requirements. The Regional Board was well within its regulatory authority to find that the proposed limitations have no basis in permit, statute, or regulation and to eliminate them thus giving the SUSMP requirements the broadest application. Following Petitioners' argument about due process to its logical conclusion would mean that the Regional Board could never complete public deliberations and conclude permitting actions.18 There is simply no due process violation under the facts of this case.

Petitioner asserts that it was denied a fair hearing because: (1) Regional Board failed to provide Petitioner with adequate time to address its concerns with the SUSMP, and the opportunity to prepare evidence against requirements at the hearing on January 26, 2000; (2) Regional Board made significant changes to the SUSMP requirements after the close of public comment on the date of the hearing; (3) Regional Board did not provide Petitioner with adequate notice of the new SUSMP requirements before it was reviewed and approved;

Government Code Section 11125 requires that the public be provided 10 days notice of business to be transacted by a state body. The transmittal letter attached to the December 7, 1999 tentative SUSMP provided interested parties some 50 days of notice. Additionally,

18 Notably, these permits apply for only five years. (40 C.F.R. § 122.46.) If petitioners had their way, the Regional Board would never be able to require its implementation.

Respondent has not violated any regulations pertaining to a pre-hearing public comment period because no such regulations exist.

Section 648.3 of the Board regulations contains the procedural requirements that governed the January 26 hearing. (CCR § 648.3.) This section directs that all "adjudicatory proceedings be conducted in such 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." (CCR § 648.3(a).) The regulations do not require precise technical specificity with regard to procedure. Rather, they suggest a more common-sense approach to hearing procedure than is required in trial settings. (*See* CCR § 648.4(a) "The proceedings will not be conducted according to technical rules relating to evidence and witnesses.") *The regulations give no indication of the length of time that should be allotted to each speaker*. The regulations give no guidance as to what documents must constitute the administrative record. The regulations simply conclude that "[a]ny final decision made pursuant to evidence introduced at an adjudicatory hearing shall be based on the record and shall include a statement of the reasons for the decision, and where appropriate, findings and conclusions." (CCR § 648.7.)

The procedural requirements of the federal Clean Water Act (CWA) provide a source of reference for state permit programs. The federal regulations promulgated under the CWA provide specific procedures for issuing, modifying, revoking, and reissuing NPDES permits. (40 C.F.R. § 124 et seq.) The regulations list the provisions of the CWA that may be implemented by state programs. (40 C.F.R. § 123.25.) According to the regulations, "[s]tates need not implement provisions identical to the listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions." (*Id*.)

The section pertaining to public notice and comment provides that a single notice may be used by the Regional Board to provide public notice of both the proposed permit action and the scheduled hearing. (40 C.F.R. § 124.10(b)(2).) The notice must be given at least 30 days before

the public hearing and it must allow at least 30 days for public comment. (40 C.F.R. § 124.10(b)(1), (2).). 19

In each of the cases that Petitioners cite to support the argument that it was denied a fair trial, the hearings involved therein affected vested, fundamental rights such as a public employee's right to continued permanent employment, (*English v. Long Beach*, (1950) 35 Cal.2d 155), and the right to pursue an occupation (*Bank of America v. Long Beach*, (1975) 50 Cal.App.3d 882). Both of these cases involve rights that were already possessed by the individual and which therefore are fundamental and vested. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 146.) Accordingly, the procedural protections required in these cases are not germane to the instant proceeding, which did not affect a vested right. The California Water Code specifically indicates that a discharge of waste into state waters via an NPDES permit is a privilege, *not a vested right*. (Water Code § 13263(g) (emphasis added).) An administrative proceeding that does not affect a vested interest does not implicate the procedural protections of the due process clause. (*Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1178. (1996))

Petitioners cite no cases that involve the type of administrative permit proceeding that is at issue here. Moreover, each of the cases cited by Petitioner involved egregious abuses of discretion by the City of Long Beach that resulted in the court finding a prejudicial denial of a fair hearing. No such egregious actions are present in this matter. Even assuming that Petitioner does have a protected interest, the procedures used by Respondent at the January 26, 2000, hearing are consistent with the flexible requirements of procedural due process and should be accorded great weight.

19 The federal regulations governing adjudicatory hearing procedures and format do not apply to state-operated NPDES programs, and are only applicable to EPA-issued permits. (40 C.F.R. § 124.71.)

"[T]here 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 ... [w]hat must be afforded is a reasonable opportunity to be heard." (*Saleeby v. State Bar*, (1985) 39 Cal.3d 547, 565.)[20]

In *Mohilef v. Janovici*, (1996) 51 Cal.App.4th 267, the Court held that due process is satisfied as long as the petitioner is given a meaningful opportunity to respond to the charges against him and recognized that substantial weight must be given to the agency's judgment and procedures:

"[D]ifferences in the origin and function of administrative agencies preclude the wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts....In assessing what process is due..., substantial weight must be given to the good-faith judgments of the [agency] that [its] procedures ... assure fair consideration of the ... claims of the individuals." (*Mohilef*, 51 Cal.App.4th at 288-289 (quoting *Mathews v. Eldridge*, (1976) 424 U.S. 319, 348-349).)

The Supreme Court later reiterated this principle in *Vermont Yankee Nuclear Power Corp. v. NRDC* (1978) 435 U.S. 519 by noting that:

"[A]dministrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (*Id*. at 543.)

20 In *Saleeby*, the Court concluded that the State Bar was not required to provide petitioner with a formal hearing so long as petitioner was afforded a "reasonable opportunity to raise objections to the particular application the bar desires to take." (*Id.* at 566.) Like the respondent in *Saleeby*, the Respondent in the instant case did not offend due process because Petitioner was given ample opportunity to raise objections and comment on the draft permit, and it availed itself of these opportunities both prior to and during the hearing. In *CEEED v. California Coastal Zone Conserv. Comm'n, (*1974) 43 Cal.App.3d 306, the Court held that the system for coastal zone permits under Coastal Conservation Act of 1972 fully guaranteed procedural due process to permit

In light of the comprehensive public comment history of the proposed permit and the significant degree of deference that is accorded administrative agencies, Respondent clearly provided Petitioner with a meaningful opportunity to present its concerns and comments, and thus Petitioner was provided with a fair hearing.

For the reasons enumerated, Petitioners arguments that they were not provided adequate notice and were denied a fair hearing must be set aside.

D. THE ACTIONS OF THE REGIONAL BOARD TO APPLY OBJECTIVE AND ENFORCEABLE REQUIREMENTS ARE CONSISTENT WITH THE AUTHORITY GIVEN IT BY THE CLEAN WATER ACT AND THE PORTER COLOGNE ACT.

Petitioners argue that the SUSMP requirements, including numerical mitigation standards, approved by the Regional Board impose new requirements in excess of those set forth in the permit, and the action procedurally and substantively modifies the permit.

The LA County MS4 permit set up a process for Petitioners' to develop conditions for new development and significant redevelopment to control storm water pollution. The requirement in the permit that the Regional Board Executive Officer approve the conditions was to ensure that the final SUSMP, is sufficient and enforceable under state and federal law. The record is clear and convincing that the SUSMPs proposed by Permittees fell short of the legal standard for adequacy. Further, the interminable delay that ensued with the back and forth submittal and review of other model programs clearly indicated that the administrative approval process followed by the Respondent was hampering its regulatory obligation to ensure that Permittees comply with the Clean Water Act, a deficiency also identified by the U.S. EPA in its Report (A.R. Vo. 8).

Because there is no express national standard for the control of storm water pollutants from new developments, one must defer to statements of policy and intent made by the U.S.EPA. The U.S.EPA under Phase I regulations did not fully describe the expectations for MS4 Permittees in controlling post construction storm water discharges from new development and significant redevelopment except that "a comprehensive master plan" was required [55 Fed Reg. 48054]. For a better understanding, we look to the Final Rule for Phase II storm water regulations. Therein, the U.S.EPA notes that "prior planning and designing for the minimization of pollutants in storm water is the most cost-effective approach to storm water quality management" [64 Fed Reg. 68759], and identifies four essential elements to control storm water from new development and redevelopment. These are, (i) to develop and implement strategies that include a combination of structural and non-structural BMPs; (ii) adopt an ordinance to address post construction runoff; (iii) ensure long term operation and maintenance of the BMPs; and (iv) ensure that controls are in place that will *minimize* water quality impacts. [Emphasis added] EPA goes on to say:

> "The requirements …..[are] consistent with the permit application requirements for large MS4s for post-construction controls for new development and redevelopment."

The SUSMP requirements approved by the Regional Board achieve all four enumerated objectives for new development and redevelopment. Petitioners SUSMP failed to implement three of these four objectives.

Further, the Federal Court of Appeals has unequivocally stated that Congress intended for "the Administrator or a State to design [substantive] controls" for storm water discharges from MS4s but did not mandate a particular approach [*NRDC v. USEPA*, 966 F.2d 1292 (9th Cir. 1992)]. The court held that it is appropriate to defer to U.S.EPA [and the State] where the agency supplied a "reasoned explanation".

The record will show that the Regional Board has provided more than a "reasoned explanation" for its action. The establishment of definite criteria to evaluate compliance with requirements to control storm water pollution from new development and redevelopment does not constitute an amendment. Petitioners were provided the opportunity to develop one, and failed to do so. Thus, the Regional Board under due diligence had no option but to independently research and develop a standard that would ensure that BMPs are adequately designed to reduce pollutants in storm water runoff from new development. Nothing in State of Federal law prohibits such an act. In fact, failure by the Regional Board to affirmatively establish such a standard under the circumstances would have been a dereliction of responsibility under the Clean Water Act and the Porter Cologne Act.

E. THE REGIONAL BOARD'S REQUIREMENT OF NUMERICAL DESIGN STANDARDS FOR TREATMENT CONTROL AND STRUCTURAL BEST MANAGEMENT PRACTICES IS TECHNICALLY DEFENSIBLE, AND NOT ARBITRARY AND CAPRICIOUS

Petitioner's argue that the Regional Board's numerical design standard is arbitrary and capricious, yet provide no evidence in support of the claim. To the contrary, the technical basis for design standards for post-construction BMPs is discussed in detail in the "Staff Report and Record of Decision" and the calculations have been made part of the Administrative Record.

Similar standards for the design of post-construction BMPs have already been adopted by a number of municipalities subject to Phase I storm water regulations. These design standards are considered by these municipalities to meet the statutory standard for control of storm water discharges from new development and significant redevelopment.21 The State Board should note that some of the foremost national storm water experts have submitted letters in support of

21 .WEF Manual of Practice No. 23. The manual discusses the basis for the sizing of storm water quality BMPs and adds,.."the 80th percentile runoff event is now considered by municipalities …to be cost-effective…and the design that achieves MEP definition of the Clean Water Act."

the numerical design standard set by the Regional Board.22 (A.R. Vol. 7) In addition, several States, including Washington, Florida, and Maryland have imposed similar requirements on a statewide basis pursuant to their implementation of the Federal Phase I storm water regulations.

It is also relevant, from a burden consideration, that the numerical mitigation standard required by the Regional Board is less than categorical effluent limitations for storm water set by the U.S. EPA for combined animal feedlot operations or for sediment removal from construction sites or new development BMP design criteria applied in the Pacific Northwest. (A.R. Vol. 09).

Petitioners' claim that the requirements are arbitrary and capricious must therefore be set aside as a ploy to escape regulation.

F. THE REGIONAL BOARD IS NOT REQUIRED TO SEPARATELY PROVIDE EVIDENCE OF COST-EFFECTIVENESS OR PERFORM A COST-BENEFIT ANALYSIS WHEN IMPLEMENTING AND ENFORCING A FEDERAL REGULATORY REQUIREMENT

Petitioners contend that the Regional Board failed to conduct a cost-benefit analysis and consider the economic impacts of the SUSMP requirements. A separate economic analysis is not required when implementing a federal regulation. Nevertheless, Regional Board staff conducted an economic impact evaluation of the SUSMP requirements on an actual project, in the pipeline for approval at the City of Los Angeles. The analysis determined that the cost of compliance with the requirement amounted to less than one percent of the project cost. This analysis is discussed in the "Record of Decision and Staff Report" and the calculations have been made part of the Administrative Record. A relative comparison of the economic cost of the Board SUSMP standard with other similar standards indicate that the cost was a fraction of the cost of the other standards to manage storm water to reduce water quality impacts. [A.R. Vol. 09] 23

22 See A.R. Vol. 07. Letters submitted by Prof. M. Stenstrom- UCLA, Prof. R. Pitt- U. of Alabama, Prof. R Horner- U. of Washington, and Tom Schuler - Center for Watershed Protection.

23 Transcript of Proceedings, January 26, 2000. at 39

In contrast, Petitioners have provided no evidence to substantiate the claim that the numerical design standard is not cost-effective. Thus Petitioners argument that the Regional Board's requirements for new development are not cost-effective must be rejected.

G. THE REGIONAL BOARD IS AUTHORIZED BY THE CLEAN WATER ACT AND THE PORTER-COLOGNE ACT TO REQUIRE ALL MEASURES NECESSARY TO ENSURE THE PROTECTION OF RECEIVING WATER QUALITY

The Regional Board has the authority to adopt the Board SUSMP requirements and numerical mitigation standards for new development and significant redevelopment. The LA County MS4 permit requires that each of the Permittees develop an Urban Storm Water Mitigation Plan following the model approved by the Regional Board Executive Officer.24 The Regional Board action adopted the model, or Standard Storm Water Mitigation Plan for the Permittees to follow.

Although the LA County MS4 permit provides that the Regional Board Executive Officer has authority to approve the model program, as proposed, the Board SUSMP was submitted to the Board itself for review and endorsement at the January 26, 2000, meeting. Following consideration by the Board, the Regional Board Executive Officer approved the SUSMP for Los Angeles County Permittees. The Board approved SUSMP was released on March 8, 2000. In addition, the Board adopted a resolution that made the SUSMP applicable to the City of Long Beach. This was required because the City of Long Beach has a storm water permit (Order No. 99-060) separate from the one applicable to other cities in the County.

The Board approved SUSMP requires, *inter alia,* that (a) post-construction treatment control BMPs be required for nine categories of development and (b) the BMPs be designed to

24 Los Angeles Municipal Permit, (Part III.A., at Page 31.)

mitigate (treat or infiltrate) the runoff from all storms up to 0.75 inch of rainfall for 24-hour period or equivalent runoff volume. As discussed in detail in "Background", these requirements are based upon application of provisions of the Clean Water Act (CWA), section 402(p). The federal provisions require that a storm water program:

> "* * *
>
> (ii) Shall include a requirement to effectively prohibit non-storm water discharges into 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." [Section 402(p)(3)(B), USC Section 1342(p)(3)(B), emphasis added.]

The proposal is an effort to meet the Clean Water Act requirements. In a 1992 decision, the U.S. Court of Appeals for the Ninth Circuit (*NRDC v. U.S.EPA*, 966 F.2d 1292) interpreted the above language as providing the Administrator or the State with substantial authority:

> "[t]he language in (iii), above, requires the Administrator or the State to design controls. Congress did not mandate a minimum standards approach or specify that U.S. EPA develop minimal performance requirements…we must defer to U.S. EPA on matters such as this, where U.S. EPA has supplied a reasoned explanation of its choices."

The decision in essence holds that the U.S. EPA and the States are authorized to require implementation of storm water control programs that, upon "reasoned explanation," accomplish the goals of Section 402(p).

Moreover, in a very recent decision, the Ninth Circuit Court of Appeals reinforced the U.S. EPA's and the State's authority in this area. In *Defenders of Wildlife v. Browner* (1999) Case No. 98-71080, the Ninth Circuit Court of Appeals reviewed an action of the U.S. EPA to adopt a Storm Water Management Program in the State of Arizona. That program included best management practices such as storm water detention basins, retention basins, and infiltration ponds. The question was whether the U.S. EPA can require numeric limitations to ensure strict compliance with the state water-quality standards. The Court concluded that the CWA does not require strict compliance; however, citing the language of (iii), above, it stated: "[t]hat provision gives the U.S. EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC v. U.S. EPA*, 'Congress gave the administrator discretion to determine what controls are necessary…[cites omitted] (at page 11687).

The Board SUSMP meets the Clean Water Act Section 402(p) requirements and Regional Board staff has provided a "reasoned explanation of its choices" in the SUSMP "Record of Decision and Staff Report", the "Record of Decision and Staff Report - Supplement" and the accompanying materials. (A.R. Vol. 14) Accordingly, the Board SUSMP requirements are well within the Regional Board's authority to regulate MS4 discharges.

Petitioners' arguments must thus be rejected.

H. THE REGIONAL BOARD ACTION DOES NOT VIOLATE CALIFORNIA WATER CODE SECTION 13360

Petitioners contend that the Regional Board's action violates Water Code § 13360 because it prohibits the Regional Board from specifying the manner of compliance. In Part the Water Code Section reads,

"No waste discharge requirement or other order…shall specify the design, location, type of construction…. or particular manner in which compliance may be had"

The Board SUSMP requirements set a numerical design standard for the control of storm water pollutants from new development and significant redevelopment. Petitioners' challenge here focuses on this one issue, although it is not articulated in that manner.

The Board included a design standard in the SUSMPs in order to establish an objective measure to evaluate compliance with the statutory standard of MEP contained in federal and state law. Thus, the numerical design criteria in the SUSMP are more similar to technology standards, such as Best Available Technology (BAT), applied to traditional point source discharges. These standards have broad technical reach…and are not unique to any singular approach. Further, the Regional Board provided four equivalent methods to derive the volume of storm water to be treated to remove pollutants. The record establishes clear technical and regulatory bases to include the criteria. Note also that these are minimum standards and Petitioners can use stricter criteria. 25

Petitioners claim that the Regional Board action to include a numerical BMP design standard in the SUSMP for new development, in essence *specifies design and the manner of compliance* [emphasis added] is patently false, and must be rejected

I. THE REGIONAL BOARD ACTION DOES NOT VIOLATE THE UNFUNDED MANDATE PROVISION OF THE CALIFORNIA CONSTITUTION

Petitioners assert that the Regional Board by its action has imposed requirements in excess of the federal mandate, and therefore is in violation of the State Constitution prohibiting unfunded mandates. Petitioners' analysis of this issue is incorrect and misleading. Petitioner omitted the most important sections of the implementing state statutory language and omitted the

25 Transcript of Hearings, January 26, 2000. At 292, See Regional Counsel Leon's response to the non applicability of Water Code Section 13360 here

key language in the cases they cited. The California Constitution, Article XIII B, Section 6 states:

> "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service....(Cal. Const. Art. XIIIB, § 6). Government Code §§ 17500 through 17630 were enacted to implement Article XIII B, section 6.

This section was not intended to cover a *PERMIT OR ORDER OR REQUIREMENTS THEREIN* issued by a regulatory agency of state government imposing federal requirements upon parties prohibited from discharging waste into the waters of the State and the United States under both state and federal law. If Petitioners' analysis was correct, every Permittee could file a "Claim" for reimbursement to comply with regulatory actions, claiming that they require a "new program" or an "increased level of service." The Constitution addresses reimbursement for additional "services" mandated by the State upon local agencies, not regulatory requirements imposed upon all Permitees, including cities and counties. The intent of the constitutional section was not to require reimbursement for expenses incurred by local agencies complying with laws that apply to all state residents and entities. (See *City of Sacramento v. State of California*, 50 Cal.3d. 51 (1990) citing *County of Los Angeles v. State of California*, 43 Cal.3d. 46.

In addition, two exemptions exist. One exemption applies if "the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (Government Code § 17556(d). Government Code § 17556(c) exempts claims where "the statute ...implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute...mandates costs which exceed the mandate in that federal law or regulation."[emphasis added].26

26 Gov. Code § 17514 provides: "costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975,

which mandates a new program or higher level of service of an exsiting program within the meaning of Section 6 of Article XIII B of the California Constitution."

The Permit provisions to which Petitioners object are consistent with the Clean Water Act and federal regulations and are not more stringent than the federal requirements. Moreover, the permit does not create a state "program" to be administered by the local agency, transferring fiscal responsibility for "services" to be extended to the public. The requirements to control runoff from new development and redevelopment are federally imposed regulations on municipalities owning and/ or operating large or medium MS4s. All the cases cited by Petitioners are inapplicable to this situation27.

Petitioners claim is without merit and must be rejected.

J. THE REGIONAL BOARD ACTION DOES NOT VIOLATE THE CALIFORNIA ADMINISTRATIVE PROCEDURES ACT

Petitioners argue that the SUSMP requirements constitute rulemaking, in violation of the California Administrative Procedure Act, Government Code Section 11340 *et.seq*. Petitioners' argument is grossly incorrect. The APA requirements apply only to rulemaking activities. Contrary to the Petitioners' assertion, the action is not "rulemaking" in nature. Rather, it is the identification of further requirements set forth in the Los Angeles County MS4 permit. Under the APA itself, the issuance of such permits is not subject to the rulemaking requirements of the APA (Government Code Section 11352(b).

27 *County of Fresno v. State,* (1991) 53 Cal. App. 3d 482 involved a facial constitutional challenge by the County of Fresno to a statute establishing minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials and requiring local governments to implement its provisions. The Court found that a program was not a reimbursable state-mandated program under Govt. Code § 17556 (d) "if the agency has the authority to levy a charge or fee sufficient to pay for the program." Id. at 484. The court found that Article XIII B applies to taxation and "was not intended to reach beyond taxations." Id. 487. *Hayes v. Commission on State Mandates,* (1992) 11 Cal.App.4th 1564 addressed the exception set forth in Gov. Code § 17556(c). This case involved a decade long battle over claims by two county superintendents of schools for reimbursement for mandated special education programs. The court stated that the "costs mandated by the federal government are exempt from an agency's taxing and spending limits," and therefore exempt from reimbursement. Id. at 1580.

K. THE REGIONAL BOARD ACTION IS STATUTORILY EXEMPT FROM THE PROVISIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Petitioners' claim that the Regional Board is required to review potential significant environmental impacts before approving SUSMP requirements. The issuance of the LA County MS4 permit itself, and the requirements contained in the permit, is exempt from CEQA (Water Code Section 13389). Accordingly, no specific CEQA documentation has been prepared for this action. Nonetheless, Regional Board staff prepared preliminary cost-benefit analyses contained in the supporting material and these have been made part of the Administrative Record (A.R. Vol. 09)

VI. CONCLUSION

The SUSMP requirements approved by the California Regional Water Quality Board are necessary and authorized by state and federal statute. The Regional Board has the authority to require conditions to control storm water pollution from new development and redevelopment. The Regional Board action does not constitute a "regulation" requiring its filing before the Office of Administrative law. The Regional Board is accorded considerable deference to its determination that the SUSMP requirements will "reduce pollutants in storm water to the maximum extent practicable". The evidence supports the findings. All the terms of the SUSMP requirements are authorized under the Clean Water Act and State statutes. The Regional Board action does not impose unfunded mandates.

A review of the substance of the allegations in this Petition, rather than the hyperbole, as to the actual requirements of state and federal law reveals that the Regional Board acted based on the evidence presented before it and the rule of law.

Therefore, the Regional Board and the Regional Board Executive Officer respectfully ask the State Board to find Petitioners claim invalid, reject the request for a stay of the requirements, and deny the Petition

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