BEFORE THE STATE WATER RESOURCES CONTROL BOARD

RESPONSE IN OPPOSITION TO PETITIONS FOR REVIEW OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION ORDER NO. 2001-01 - NPDES PERMIT NO. CAS0108758 (SAN DIEGO MUNICIPAL STORM WATER PERMIT)

SWRCB/OCC FILES A-1362 and A-1362(a)

Submitted by
California Regional Water Quality Control Board
San Diego Region
June 11, 2001

I. INTRODUCTION

Petitioners (the Building Industry Association of San Diego County (BIA) and Western States Petroleum Association (WSPA)) have challenged the actions of the San Diego Regional Water Quality Control Board (SDRWQCB) in adopting Order No. 2001-01, the San Diego Municipal Storm Water Permit (Permit). Petitioners are alone in this appeal of the Permit. The municipalities which are directly regulated under the Permit (Copermittees) did not choose to join Petitioners in their appeal. This fact exhibits the general agreement within the region that strict measures are needed to adequately address the significant water quality problem posed by urban runoff. This general agreement exists despite Petitioners' reluctance to join in the effort to adequately address their contributions to the problem.

In their isolated appeal of the Permit, Petitioners employ a misguided across-the-board approach in challenging the Permit's requirements. These arguments fail on many fronts. A preponderance of Petitioners' arguments have previously and repeatedly been heard and denied by the State Water Resources Control Board (SWRCB) (during the SWRCB's hearing on the Los Angeles Regional Water Quality Control Board (LARWQCB) Standard Urban Storm Water Mitigation Plan (SUSMP) in particular). Other arguments cover issues typically addressed during the re-issuance of the Water Quality Control Plan - San Diego Basin (Basin Plan), not storm water permits. Moreover, many arguments rely on Petitioners' apparently purposeful misrepresentation of the Permit's requirements. Petitioners' arguments also heavily depend on an inverted burden of proof, attempting to place requirements on the SDRWQCB in adopting the Permit which do not exist.

For these reasons and many others (all discussed in more detail below), Petitioners' appeals are without merit and should be denied.

II. ARGUMENTS

A. The SDRWQCB Followed Proper Administrative Procedure in Adopting the Permit

1. <u>The Public Hearing for the Permit Followed Necessary Procedure and was Adequate</u>

Petitioners claim that the SDRWQCB did not conduct a proper adjudicative hearing on the Permit. However, the SDRWQCB followed the standard public hearing procedure of which it is required under Division 3 of Title 23 of the California Code of Regulations (CCR). The SDRWQCB is not required to expand upon this standard public hearing procedure, since it provides all interested parties due process and sufficient opportunity for comment. Furthermore, expansion of this public hearing procedure was not requested by interested parties. Nor was expansion of the public hearing procedure necessary, due to the extensive public participation process undertaken by the SDRWQCB in the years

and months preceding the December 13, 2000 public hearing on the Permit.[1] Due to its thoroughness, this public participation process effort by the SDRWQCB ensured that the standard public hearing process was adequate.

For example, various versions of the Permit were available for review and comment for over five years prior to the public hearing. Drafts of the Permit were previously issued to the County of San Diego, the incorporated Cities of San Diego County, and the San Diego Unified Port District (Copermittees) in both 1995 and 1998.[2] Each subsequent version of the Permit has incorporated changes based on written and oral comments received on previous drafts. The Permit before the Board on December 13, 2000 therefore reflected over five years of development fully within the public process.

Furthermore, in the months preceding the public hearing, the SDRWQCB held no less than five public workshops on the Permit's requirements.[3] Two of these workshops focused on the SUSMP requirements specifically, including one SUSMP workshop which was held before the Board on March 8, 2000. This SUSMP workshop provided the public the opportunity for comment before the Board. The other three workshops on the Permit's requirements were held by SDRWQCB staff in the months of October and November of 2000, directly prior to the public hearing. Every comment received during these public workshops was responded to, often with revisions to the draft Permit being the end result. It is worth noting that two of these three workshops (one of which one of the Petitioners attended)[4] ended early, due to the lack of public comments and questions on the Permit. Clearly, every opportunity for vocal input on the requirements of the Permit was provided at these workshops, to the point that interested parties did not have further comments (including the Petitioner BIA).

As Petitioners note, over 1,500 comments on the Permit were received. Approximately 51 days were provided to the public after the draft Permit's release for these written comments,[5] which were comprehensive in their scope. In addition, approximately 60% of the comments were duplicate comments, or comments which reiterated the same concern.[6] Due to this comprehensiveness and redundancy, it is doubtful that interested parties had new information to provide to the Board which could not be covered in the 3 minutes provided for oral comment during the hearing. Indeed, a review of the public hearing transcript shows that little, if any, new comments were provided to the Board which had not been previously provided as written comments. The vast majority of the

[1] SDRWQCB, 2000. Summary and Statistics of Public Workshops for Tentative Order No. 2001-01. Includes detailed descriptions of SDRWQCB workshops on Tentative Order No. 2001-01. A.R. Vol. 1-26. Also: SDRWQCB, 2000. Chronology of the San Diego Municipal Storm Water Permit. Describes public outreach by SDRWQCB on Tentative Order No. 2001-01 and previous drafts.
[2] Tentative Order No. 95-76 and Tentative Order No. 99-01. A.R. Vol. 1-39 and 1-40.
[3] SUSMP workshops were held on March 8, 2000 and April 13, 2000. Permit workshops were held October 19, 2000, November 2, 2000, and November 16, 2000.
[4] Matt Adams of BIA attended the November 16, 2000 Permit workshop. A.R. Vol. 1-41.
[5] SDRWQCB, 2000. Proposed Adoption Schedule. A.R. Vol. 1-19. The Permit was released for public review on October 10, 2000 and written comments were accepted until November 30, 2000.
[6] SDRWQCB, 2001. Draft Response to Comments (Introduction). A.R. Vol. 1-14.

comments at the public hearing were merely a reiteration of comments which the Board had previously received in a written format.

2. Revisions Made to the Permit Did Not Require Reopening of the Public Hearing

In addition, Petitioners claim that the SDRWQCB materially revised the Permit without reopening the public hearing. It is worth noting that in making this argument, Petitioners provide no support as to why the minor revisions made to the Permit would require reopening of the public hearing. However, due to the insignificant nature of the revisions to the Permit following the public hearing, a reopening of the hearing was simply not necessary. The administrative record is replete with evidence of findings that the revisions made to the Permit after the public hearing were insignificant and minor in nature.[7] In fact, virtually all of the changes made to the Permit were made directly in response to comments from interested parties. As such, all of these changes were reasonably foreseeable and were a logical outgrowth of the Permit adoption process. Furthermore, the revisions essentially did not result in any additions or deletions of Permit requirements. Instead, the revisions were made in order to clarify the intent or improve the implementation of the Permit. In sum, the revisions only provided more discretion to the Copermittees in their Permit implementation, while the basic requirements of the Permit remained the same and were not fundamentally altered.

An example of this type of change is exhibited in the Permit's requirement for peak flow rates and velocities of urban runoff from new development to be controlled as necessary to maintain pre-development downstream erosion. Petitioners specifically claim that changes to this requirement constituted significant changes which necessitated further public comment in the public hearing process. However, review of the administrative record exhibits that the final version of this requirement was reasonably foreseeable based on previous versions of the requirement, SDRWQCB guidance regarding the requirement, and interested party comments pertaining to the previous versions of the requirement.

As publicly issued in the October 11, 2000 draft of Tentative Order No. 2001-01, the requirement stated "post development runoff which is greater in peak rate or velocity than pre-development runoff from the same site is prohibited" (Tentative Order No. 2001-01 section A.4).[8] This requirement applied to **all** new development and significant redevelopment, not just development occurring under the SUSMP priority development project categories. As discussed in the Draft Fact Sheet/Technical Report (issued to the public at the same time as Tentative Order No. 2001-01),[9] one purpose of this requirement was to control downstream erosion to protect water quality. Based on comments received by the SDRWQCB, the final version of the requirement was changed

[7] See SDRWQCB Staff Presentation to Board Members, February 21, 2001. A.R. Vol. 1-3. See also SDRWQCB Minutes of Meeting, February 21, 2001, pg. 5, A.R. Vol. 1-42, which states "Mr. Minan made a motion to adopt staff's characterization that the changes to the permit were insignificant therefore sending the revised permit to the public for comment was **not** necessary. The motion was seconded by Ms. Black and approved by unanimous vote."

[8] SDRWQCB, 2000. Tentative Order No. 2001-01. Pg. 8. A.R. Vol. 1-24.

[9] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 67-68. A.R. Vol. 1-25.

to only apply to new development and significant redevelopment falling under the SUSMP priority development project categories, in order to ease implementation and ensure application to significant projects only.[10] Furthermore, again in response to comments from **BIA of Southern California** and others,[11] the requirement was changed to require control of peak flow rates and velocities **as necessary** to maintain downstream erosion.[12] Therefore, the SDRWQCB increased the flexibility with which the requirement could be implemented in the final version, but in doing so had to include the purpose of the requirement (to protect against downstream erosion) in the Permit to ensure effectiveness. This in effect did not change the requirement, but rather only added clarification and flexibility. Since these changes were made either in response to comments or to clarify intent already discussed in the Draft Fact Sheet/Technical Report, they were a logical outgrowth of the permit adoption process and did not require further public comment or reopening of the public hearing process.

Moreover, the final language in the Permit regarding this issue was based directly on the LARWQCB SUSMP language, which was provided by the SDRWQCB to interested parties as a guidance document attached to the SDRWQCB's SUSMP staff report.[13] This further exhibits how the final requirement in the Permit was reasonably foreseeable, in that it had previously appeared in an attachment to a SDRWQCB document directly addressing the matter.

B. Inclusion of Prohibitions and Receiving Water Limits in the Permit Does Not Violate the Maximum Extent Practicable (MEP) Standard

1. <u>The Permit Does Not Require "Strict Compliance" with Water Quality Objectives through the Application of Numeric Effluent Limits</u>

Petitioners assert that the Permit violates MEP by inappropriately requiring discharges of urban runoff from municipal separate storm sewer systems (MS4s) to "strictly comply" with receiving water quality objectives through the application of numeric effluent limits on MS4 discharges. This assertion is based on Petitioners' misguided interpretation of the Permit and their misunderstanding of the MEP standard. While nothing precludes the SDRWQCB from requiring "strict compliance" with receiving water quality objectives through application of numeric effluent limits, the SDRWQCB has not done so. The Permit's approach to compliance with water quality standards is outlined in the receiving water limitations language of section C. of the Permit. This approach is also further discussed in the Draft Fact Sheet/Technical Report.[14] Rather that require "strict compliance" with water quality standards through application of numeric effluent limits, this section requires that discharges from MS4s do not cause or contribute to violations of

[10] SDRWQCB, 2001. Draft Response to Comments. Pg. 103. A.R. Vol. 1-14.
[11] Building Industry Association of Southern California, 2000. Comments on Municipal Storm Water Permit for San Diego County and Cities. Pg. 15. A.R. Vol. 1-31-D. States "this requirement should only apply where there is the potential for downstream erosion."
[12] SDRWQCB, 2001. Draft Response to Comments. Pg. 192-193. A.R. Vol. 1-14.
[13] SDRWQCB, 2000. Staff Report for Stand Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices. Attachment A. A.R. Vol. 1-36.
[14] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 24-26. A.R. Vol. 1-25.

water quality standards. Furthermore, section C. provides for the implementation of an iterative best management practice (BMP) process in order to achieve compliance with water quality standards. Allowance for such a process hardly constitutes application of numeric effluent limits or a "strict compliance" approach.

Nor does the Permit's application of Basin Plan prohibition 5 (at Permit Attachment A) to discharges from MS4s change this approach, as Petitioners assert. Prohibition 5 states:

> The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. **Allowances for dilution** may be made at the discretion of the Regional Board. (emphasis added)

The prohibition 5 provision for 'allowance for dilution' when considering compliance with receiving water quality objectives is analogous to the Permit's requirement that MS4 discharges do not cause or contribute to a violation of receiving water quality standards. The requirement that MS4 discharges not cause or contribute to violations of receiving water quality standards allows for the concentration of pollutants in MS4 effluent to exceed receiving water quality objectives, provided that the receiving water can assimilate the pollutants and not exceed its water quality objectives. In other words, as long as the receiving water's water quality objectives are maintained, an allowance for dilution of MS4 effluent is provided for by section C of the Permit. This is essentially the same approach dictated by prohibition 5, which allows for dilution of discharges for compliance with receiving water quality objectives. Therefore, Basin Plan prohibition 5 conforms with the Permit's receiving water limitations approach. As noted above, section C. of the Permit dictates receiving water limits through an iterative BMP implementation process, and not "strict compliance" with receiving water quality objectives through application of numeric effluent limits.

Since the Permit does not include require "strict compliance" with receiving water quality objectives through application of numeric effluent limits, Petitioners' arguments that "strict compliance" with receiving water quality objectives violates MEP are without merit. Furthermore, the Permit does not go against SWRCB and United States Environmental Protection Agency (USEPA) guidance regarding numeric effluent limits in storm water permits. On the contrary, as discussed above, the Permit's receiving water limitations and iterative BMP approach is directly in line with such guidance.

2. <u>The Permit Does Not Require "Zero Contribution" of Impairing Pollutants to Impaired Water Bodies</u>

Petitioners also assert that the Permit's requirement for "zero contribution" of impairing pollutants to impaired water bodies exceeds the MEP standard. However, there is no such provision in the Permit requiring "zero contribution" of impairing pollutants to impaired water bodies. Petitioners claim that the Permit's requirement that MS4 discharges do not cause or contribute to a violation of water quality standards constitutes a requirement for "zero contribution." A review of the administrative record proves this

interpretation of the Permit to be incorrect. The Draft Response to Comments document states:

> There may be circumstances where a slight increase in pollutant concentrations [to an impaired water body] from a newly developed area may not contribute to an exceedance of water quality standards. For example, if a discharge's pollutant concentration from a newly developed area is well below the water quality objective for the 303(d) listed receiving water, the discharge will most likely not contribute to the exceedance of the water quality objective.[15]

It is important to note that the language included in section C. of the Permit is essentially identical to the language developed by the SWRCB regarding receiving water limitations.[16] While there have been recent developments[17] covering the issue of whether the Clean Water Act (CWA) requires inclusion of receiving water limitations in municipal storm water permits, the Permit incorporates the most recent guidance distributed by the SWRCB on the issue.[18] The receiving water limitations language in the Permit has also been included in storm water permits throughout California, including storm water permits adopted by the SDRWQCB. There is no evidence that either the SWRCB, SDRWQCB, or any other Regional Board has ever interpreted this language as requiring "zero contribution" of impairing pollutants to impaired water bodies. Petitioners' misinterpretation of the implementation of this requirement does not constitute a violation of the MEP standard by the SDRWQCB.

3. The Permit's Receiving Water Limitations Language is Not Subject to the MEP Standard and Therefore Does Not Violate MEP

Finally, Petitioners assert that the section C. Receiving Water Limitations language, which the SWRCB has instructed regional boards to include in storm water permits,[19] exceeds MEP in and of itself. This assertion reflects Petitioners' fundamental misunderstanding of the requirements of the National Pollutant Discharge Elimination System (NPDES) storm water program.

The receiving water limitations requirements for BMPs to be implemented to achieve water quality standards is not guided by the MEP standard. In actuality, the opposite is correct; USEPA states that MEP must be guided by compliance with water quality standards. USEPA states:

> One commenter observed that MEP is not static and that if the six minimum control measures are not achieving the necessary water quality improvements, then an MS4 should be expected to revise, and if necessary, expand its program. This concept, it is argued, must be clearly part of the definition of MEP and thus

[15] SDRWQCB, 2001. Draft Response to Comments. Pg. 105. A.R. Vol. 1-14.
[16] SWRCB, 1999. SWRCB Order No. WQ 99-05.
[17] Defenders of Wildlife v. Browner, 191 F.3d 1159, 1164-66 (9th Cir. 1999).
[18] SWRCB, 1999. Memorandum on Receiving Water Limitations in Municipal Storm Water Permits.
[19] SWRCB, 1999. Memorandum on Receiving Water Limitations in Municipal Storm Water Permits.

> incorporated into the binding and operative aspects of the rule. […] EPA believes that it is. The iterative process […] is intended to be sensitive to water quality concerns. EPA believes that today's rule contains provisions to implement an approach that is consistent with this comment.[20]

Furthermore, achievement of water quality standards is a separate and distinct goal for the NPDES municipal storm water program. It is not a subset of the MEP requirement to be overridden by the MEP standard. This is exhibited when USEPA states:

> Today's rule specifies that the "compliance target" for the design and implementation of municipal storm water control programs is "to reduce pollutants to the maximum extent practicable (MEP), to protect water quality, **and** to satisfy the appropriate water quality requirements of the CWA.[21] (emphasis added)

In summary, the Permit's requirements that MS4 discharges do not cause or contribute to a violation of water quality standards are not subject to the MEP standard, and therefore do not exceed MEP.

C. The Permit's Receiving Water Limits Are Directly Based on the Most Recent SWRCB and USEPA Guidance

Petitioners claim that the Permit's requirements that MS4 discharges do not cause or contribute to a violation of water quality standards are preempted by recent controlling authority and agency guidance. In fact, the opposite is true; the Permit's requirements regarding exceedances of water quality standards are directly based on such guidance.

As noted above, the Receiving Water Limitations language in section C. of the Permit is taken directly from SWRCB Order No. WQ 99-05. This language requires that MS4 discharges do not violate water quality standards, and that an iterative BMP process must be implemented to correct any violations of water quality standards. Note that the language allows for an iterative BMP implementation approach for compliance with water quality standards, and is not the "strict compliance" approach which Petitioners assert. Oddly, Petitioners argue that these requirements are not consistent with the SWRCB Orders (WQ 98-01 and 99-05) even though the language for the requirements is taken essentially verbatim from Order No. WQ 99-05.

Petitioners proceed to argue that this receiving water limitations language is preempted by the Ninth Circuit Court of Appeals Defenders of Wildlife v. Browner, 191 F.3d 1159, 1164-66 (9th Cir. 1999) decision. However, the phase II USEPA storm water regulations exhibit this to be untrue. USEPA states:

> EPA believes this iterative approach [of BMP implementation to achieve water quality standards] is consistent with and implements section 301(b)(1)(C) [of the

[20] 64 FR 68754
[21] 64 FR 68753

> CWA], **notwithstanding the Ninth Circuit's interpretation**. As an alternative to basing these water quality-based requirements on section 301(b)(1)(C), however, EPA also believes the iterative approach toward attainment of water quality standards represents a reasonable interpretation of CWA section 402(p)(3)(B)(iii).[22] (emphasis added)

In addition, inclusion of the receiving water limitations language in the Permit is not only consistent with USEPA phase II storm water regulations, but is also based directly on guidance from the SWRCB. As discussed in the Draft Fact Sheet/Technical Report,[23] the SWRCB issued on October 14, 1999 a legal opinion on the federal appellate decision and provided advice to the Regional Boards on how to proceed in the future regarding the decision.[24] In the memorandum, the SWRCB concludes that the recent Ninth Circuit opinion upholds the discretion of USEPA and the State to (continue to) issue permits to MS4s that require compliance with water quality standards through iterative BMPs. Moreover, the memorandum states that "[…] because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As total maximum daily loads (TMDLs) are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions." In summary, the SWRCB concludes in the memorandum that the Regional Boards should continue to include the receiving water limitations language established in SWRCB Order WQ 99-05 in all future permits. Accordingly, the SDRWQCB has required in the Permit that discharges from MS4s do not cause or contribute to an violation of receiving water quality standards.

Petitioners further argue that the Permit's requirement that MS4 discharges do not cause or contribute to a violation of water quality standards is inconsistent with other USEPA guidance. They argue that USEPA guidance indicates that requirements for BMPs to be implemented to achieve water quality standards must be guided by the MEP standard. As discussed above in section B.3, this interpretation of the relationship between receiving water limitations and the MEP standard is incorrect. Achievement of water quality standards is a separate and distinct goal for the NPDES municipal storm water program. It is not a subset of the MEP requirement to be overridden by the MEP standard. In actuality, the opposite is correct; the MEP standard must be guided by compliance with water quality standards.

Petitioners also assert that the Permit's requirement that MS4 discharges do not cause or contribute to an exceedance of water quality standards violates USEPA's "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits." In actuality, both approaches are congruous. As USEPA describes, the interim approach "describes how permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality

[22] 64 FR 68753
[23] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 24-26. A.R. Vol. 1-25.
[24] SWRCB, 1999. Memorandum on Receiving Water Limitations in Municipal Storm Water Permits.

standards."[25] The Permit prescribes this same approach, describing a procedure for the iterative implementation of BMPs until compliance with water quality standards is achieved. Petitioners further argue that such a requirement for an iterative BMP process cannot be included in the permit because USEPA's "Interim Approach" requires the existence of "adequate information" for such a requirement to be developed. However, this guidance that "adequate information exists" refers only to development of "more specific conditions or limitations **to meet water quality standards**"[26] (emphasis added), not actual compliance with the water quality standards themselves, which is the issue at hand. In any event, "adequate information" exists showing the impact of urban runoff on receiving waters within the San Diego region,[27] exhibiting the need for enforcement of receiving water limitations regarding urban runoff discharges.

Finally, Petitioners argue that water quality-based requirements should be guided by "cost effectiveness, proportionate contribution of pollutants, and ability to reasonably achieve wasteload reductions."[28] However, this quote provided by Petitioners does not address the issue at hand. The quote more accurately addresses inclusion of numeric effluent limits or total maximum daily load (TMDL) provisions in storm water permits, as the language of the quote attests (e.g., "wasteload reductions"). Therefore, the quote does not apply to compliance with water quality standards through iterative BMP implementation, which is the current issue. See sections D.3, F, and G for further discussion of the SDRWQCB's ample consideration of factors such as cost, contribution of pollutants, ability to meet receiving water limitations, etc.

D. The SDRWQCB Is Not Required to Develop Special Wet-Weather Specific Water Quality Objectives for the Permit

1. Wet-Weather Specific Water Quality Objectives Are a Basin Plan Issue and Not a Storm Water Permit Issue

California Water Code (CWC) section 13377 requires that the Permit implement the Basin Plan and protect beneficial uses. The SWRCB has also instructed the Regional Boards to include receiving water limitations in municipal storm water permits.[29] Based on these requirements and guidance, the SDRWQCB included receiving water limitations in the Permit for the protection of receiving water quality objectives.

The above requirements and guidance require the inclusion of receiving water limitations in the Permit for the protection of receiving water quality objectives, irregardless of the basis of the water quality objectives. The issue of whether or not the SDRWQCB's water quality objectives are appropriate is not addressed during the determination to include receiving water limitations in a permit. An assessment of the appropriateness of the

[25] 64 FR 68753
[26] USEPA, 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. 61 FR 43761. Pg. 2.
[27] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 5-7, Attachment 2 (1998 Clean Water Act Section 303(d) Impaired Waterbody List). A.R. Vol. 1-25.
[28] 64 FR 68753
[29] SWRCB, 1999. Memorandum on Receiving Water Limitations in Municipal Storm Water Permits.

SDRWQCB's water quality objectives is conducted during the process of adoption and re-issuance of the Basin Plan, as well as during the Triennial Review of water quality standards that the SDRWQCB conducts pursuant to the Clean Water Act. Therefore, the issue of development of wet-weather specific water quality objectives is not an issue to be addressed during adoption of municipal storm water permits, but is rather a part of the Basin Plan's planning process.

2. The SDRWQCB's Current Water Quality Objectives Are Adequate and Appropriate for the Permit

Despite the fact that development of water quality objectives is a Basin Plan issue, and therefore should not be addressed here, the SDRWQCB's water quality objectives are appropriate and adequate as the basis of the Permit's receiving water limitations language. The SDRWQCB is not required to include various water quality objectives for various seasons. The Federal Regulations (40 CFR 131.10(f)) clearly provide the SDRWQCB discretion in this respect: "States **may** adopt seasonal uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria" (emphasis added). In addition, California Water Code section 13241 only requires consideration of "past, present, and probable future beneficial uses of water." Any mention of seasonally varying beneficial uses is clearly missing from this directive, further exhibiting that wet-weather specific water quality objectives are not specifically required of the SDRWQCB.

Not only are wet-weather specific water quality objectives not required, they are not appropriate for the San Diego region at this time. The argument that wet-weather specific water quality objectives are needed assumes that beneficial uses of receiving waters change during wet weather. However, this assumption is frequently incorrect regarding the beneficial uses of receiving waters within the San Diego region. Due to the San Diego region's particularly mild climate, receiving waters within the region are used by residents and visitors year-round. It is common knowledge that beneficial uses such as surfing, kayaking, and fishing occur during winter. The San Diego Association of Governments (SANDAG) reports an average of approximately 31,504 beach visitors a day during winter within the region.[30] These beneficial uses do not cease to exist simply because of a few rain drops. Since most of the region's creeks discharge directly or indirectly to the ocean (particularly during storm events) this beneficial use must be considered in applying beneficial uses and water quality objectives not only to the ocean but to creeks as well. In addition, use of the region's creeks does not halt during wet weather. This is exhibited by the numbers of people frequently saved from creeks during flooding events.

Furthermore, Petitioners' proposed modification of water quality objectives during wet weather is an overly anthropocentric view. Aquatic habitat for wildlife is an important designated beneficial use of the San Diego region's receiving waters. Petitioners

[30] March 7, 2000 Fax from County of San Diego Department of Environmental Health to SDRWQCB. SANDAG beach use data. Beach use data based on 1989-1990 estimates from State and City Departments of Parks and Recreation. A.R. Vol. 1-43.

completely ignore this fact. Again, the region's creeks, lagoons, bays, and ocean do not cease to be used by wildlife as aquatic habitat simply because it is raining. Therefore, water quality objectives designed to protect the aquatic habitat beneficial use must be consistent during both dry and wet weather.

It is important to recognize that the impacts of wet-weather storm events extend into periods of dry weather as well. For example, the County of San Diego Department of Environmental Health advises people to refrain from entering the water for up to 72 hours following a rain event. In addition, fine sediment from construction sites discharged into creeks during wet weather can remain in the creeks for extended periods of time, clogging interstitial space in gravel banks needed for habitat and breeding, thereby causing long-term impacts. Provision for less stringent water quality objectives during wet weather, as Petitioners propose, would only worsen these unacceptable conditions. Indeed, the Federal Regulations prohibit such occurrences, requiring that any seasonal water quality objectives "shall not preclude the attainment and maintenance of a more protective use in another season" (40 CFR 131.10(f)). As such, wet-weather specific water quality objectives are not appropriate for urban runoff discharges in the San Diego region.

It is also worth noting that the Permit is not limited to wet weather conditions in its scope. A significant portion of the Permit directly addresses dry weather discharges; the Permit is a year round permit. The number of annual dry days within the region greatly exceed the number of annual wet weather days.[31] Therefore, the Permit actually applies to discharges occurring during dry weather approximately 88% of the time. Due to the preponderance of dry weather conditions in the San Diego region, a permit which includes receiving water limitations to protect dry weather beneficial uses is appropriate.

3. Compliance with Receiving Water Limitations Based on Current Water Quality Objectives is Achievable by the Copermittees

Petitioners also claim that the SDRWQCB's lack of wet weather specific water quality objectives violates CWC section 13241 because the SDRWQCB's current water quality objectives are unachievable for MS4 discharges during storm events. Firstly, this is a Basin Plan issue and not a storm water permit issue (see sections D.1 and G.1). It is also interesting to note that Petitioners do not explain why they cannot achieve compliance with water quality objectives during wet weather; they simply claim that it cannot be done. As discussed in section B.1, the Permit's receiving water limitations do not require strict compliance with water quality objectives through application of numeric effluent limits. On the contrary, the Permit's receiving water limitations require that MS4 discharges do not cause or contribute to a violation of receiving water quality objectives. This requirement is wholly achievable for MS4 discharges in both dry and wet weather,

[31] Earthinfo, 1994. Earthinfo SD West rainfall data from 01/1927 to 12/1994, provided by San Diego County Flood Control District. A.R. Vol. 1-44. Approximately 88% of the days at San Diego Lindbergh Field experience no or trace amounts of precipitation.

and is therefore in compliance with CWC section 13241, irregardless of whether adoption of the Permit is directly subject to CWC section 13241 or not.[32]

California Water Code section 13241 states that in establishing water quality objectives, regional boards must consider "(c) Water quality conditions that could reasonably be achieved through the **coordinated control of all factors** which affect water quality in the area" (emphasis added). The language "coordinated control of all factors" indicates the stringent standards to which water quality objectives are subject. Note that the language does not state "control of factors to the maximum extent practicable," as Petitioners appear to imply. Surely if the Copermittees were to commit to coordinated control of **all** factors affecting the quality of their urban runoff, they would be able to achieve compliance with the Permit's receiving water limitations requirements, even during storm events (as exhibited in the following paragraph). Furthermore, USEPA exhibits its belief that compliance with water quality standards for wet weather discharges is achievable when it states "EPA anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, **including water quality standards** […]"[33] (emphasis added).

In fact, the Copermittees' own monitoring data exhibits that compliance with water quality objectives can be achieved during wet weather. For example, the administrative record includes a summary of the Copermittees' "Wet Weather Water Quality Objective Exceedances by Percent of Samples Analyzed."[34] This summary exhibits that for the 1999/2000 wet weather monitoring effort, 36% of the coliform bacteria samples, 60% of the total dissolved solids samples, 80% of the dissolved zinc samples, and 93% of the dissolved copper samples collected were in compliance with water quality objectives. While these percentages still indicate significant exceedances of water quality objective concentrations, they also exhibit that compliance with water quality objectives has at times been achieved. That the Copermittees have occasionally achieved compliance with water quality objectives with their previous urban runoff management programs exhibits that the Permit's receiving water limitations can "reasonably be achieved." Therefore, Petitioners assertion that the water quality objectives which apply to the Permit are inappropriate because they cannot "reasonably be achieved" must be dismissed.

Nor does the contribution of pollutants to receiving waters from natural sources negate the Copermittees ability to achieve compliance with receiving water limitations. For example, while large storm events may result in significant natural erosion, causing a temporary natural exceedance of receiving water quality objectives for total suspended solids, the Permit clearly does not address pollutants from such sources. The Permit states "this Order is not meant to control background or naturally occurring pollutants and flows."[35] As such, the SDRWQCB will take such naturally occurring pollutants into account when assessing Copermittee compliance with the Permit's receiving water

[32] The applicability of CWC section 13241 to the adoption of the Permit is discussed further in section G.1.
[33] 64 FR 68753
[34] SDRWQCB, 2000. Draft Status of Copermittee Compliance. Pg. 8. A.R. Vol. 1-34.
[35] Finding 27

limitations. Therefore, natural pollutant sources do not make compliance with receiving water limitations unachievable.

4. Wet-Weather Specific Water Quality Objectives Are a New Issue Not Presented Previously to the SDRWQCB

It is important to note that Petitioners' arguments regarding wet-weather specific water quality objectives represent a new issue which was not presented before the SDRWQCB during consideration of adoption of the Permit. Since there is no reason these arguments could not have been raised before the SDRWQCB during the hearing process, Petitioners should be barred from raising this issue now.

E. Urban Runoff is a Waste as Defined in the California Water Code

Petitioners assert that the California Water Code definition of "waste" does not apply to urban runoff. This assertion is incorrect. The California Water Code defines "waste" as "sewage and **any and all other waste substances**, liquid, solid, gaseous, or radioactive, **associated with human habitation** […]" (emphasis added). The language of this definition clearly indicates the broad nature of its application. The inclusion of the terms "any and all" into the definition exhibits that the definition is not to be used to exclude certain substances from being defined as a waste, as Petitioners attempt to do with urban runoff. Rather, these terms provide for the definition to be all-encompassing. In addition, the use of the words "associated with human habitation" in the definition indicates that the waste need not be generated by human activity, but merely be related with human habitation.

Urban runoff certainly meets this broad definition. Urbanization (human habitation) unequivocally alters the characteristics of runoff which would otherwise leave undeveloped land in a natural condition. As discussed in the Permit's Findings and Draft Fact Sheet/Technical Report, urban development increases the pollutants load, volume, and velocity of runoff.[36] These changes to runoff indicate that the physical and chemical attributes of urban runoff are caused by urbanization, thereby exhibiting that urban runoff is "associated" with human habitation. In fact, the increase in volume of urban runoff caused by urbanization's impervious surfaces not only changes the characteristics of the runoff, but actually generates the urban runoff as well by increasing its volume.

Furthermore, the very fact that MS4s have been constructed with the sole purpose of disposing urban runoff exhibits that urban runoff is a waste. The MS4s are designed to dispose of the increased volumes of runoff generated by urbanization's impervious surfaces. The act of generating increased runoff, designing a system to collect the urban runoff, and discharging the urban runoff exhibits that urban runoff is a waste. MS4s would be unnecessary if urban runoff was not a waste and was not treated as such.

[36] Findings 3, 4, 5, 6, 7 and 9, and accompanying discussions in Draft Fact Sheet/Technical Report (pg. 35-41), A.R. Vol. 1-25.

Nor does Petitioners historical discussion of the development of the definition of "waste" refute the categorization of urban runoff as a "waste." Petitioners assert that since the development of the definition of "waste" did not include a discussion of urban runoff, the definition cannot be applied to urban runoff. However, no such restriction exists. In fact, Petitioners exhibit SWRCB's intention that waste be defined broadly when they cite the SWRCB as stating: "The proposed new definition of waste is intended to be as **all-inclusive** as the present definition of 'sewage' and 'other waste'" (emphasis added).[37] Rather than be a restriction on the types of discharges which can be identified as waste, such commentary indicates that the definition of waste was instead intended to be wide-ranging. The lack of information or knowledge on urban runoff and its impacts at the time the definition was developed in the late 1960s cannot be construed as intent on the part of the SWRCB to exclude any and all such discharges. Such an approach could severely limit any new types of discharges from being regulated under waste discharge requirements.

Moreover, the California Water Code provides that discharges permitted under the federal NPDES program (such as discharges from MS4s) are analogous with discharges of waste. Chapter 5.5 of the California Water Code consolidates the federal NPDES program with the State of California's waste discharge requirement program. Since the State of California is authorized by USEPA to issue NPDES permits in California, NPDES permits within California are also waste discharge requirements.[38] Section 13376 requires "any person discharging **pollutants**" (emphasis added) (such as under an NPDES MS4 permit) to file a report of the discharge in compliance with the procedures set forth in section 13260. Section 13260 then proceeds to apply waste discharge requirements on "any person discharging **waste**" (emphasis added). As can be seen, the California Water Code in these two sections equates the discharge of pollutants (as regulated under the NPDES program) with the discharge of waste. Since the California Water Code provides that discharges of pollutants are analogous to discharges of waste, and since discharges of urban runoff have been found to contain pollutants, the California Water Code finds discharges of urban runoff to be discharges of waste.

F. The Permit's Prohibitions are Appropriate and Need Not Incorporate Consideration of Such Factors as Petitioners Assert

Petitioners argue that the SDRWQCB did not consider various factors relating to the MEP standard when including the Prohibitions of section A. in the Permit. First, the Permit is required to implement the Basin Plan, and thereby implement the Prohibitions, under California Water Code sections 13263 and 13377, irregardless of MEP. In addition, as discussed above in section B.3, MEP does not apply to the Permit's prohibitions regarding MS4 discharges which cause or contribute to conditions of pollution, contamination, nuisance, or violations of water quality standards. Compliance with receiving water limitations is an objective of the NPDES storm water program which is separate from the objective of compliance with MEP. Moreover, Petitioners' inaccurate

[37] BIA, 2001. Statement of Points and Authorities in Support of Petition for Review of California Regional Water Quality Control Board San Diego Region Order No. 2001-01 NPDES No. CAS0108758. Pg. 22.
[38] California Water Code section 13374

interpretations of the Permit's prohibitions (also discussed above, in sections B.1 and B.2) do not alter this fact.

Furthermore, even if the Permit's prohibitions were subject to the MEP standard, which they are not, the SDRWQCB is not required to consider the MEP factors which Petitioners find to be "requisite." The "requisite" factors listed by Petitioners, which are taken from the Preamble to the phase II NPDES storm water regulations, are actually factors to be considered by the **dischargers**, not the SDRWQCB.[39] In addition, the factors are not required, but rather are factors which **may** be considered by dischargers when contemplating MEP.[40]

Petitioners also assert that MEP factors discussed in the 1994 Clinton Clean Water Initiative must be considered by the SDRWQCB. In fact, the Initiative states that "MEP **allows** for the consideration of different factors" (emphasis added). Use of the word "allows" in the Initiative indicates that this is clearly not a binding directive. Furthermore, this language again refers to municipalities' assessments of MEP, and is not a limitation on regulatory agencies' MEP interpretations. In any event, the Clinton Clean Water Initiative is a proposal which is non-regulatory, and therefore does not contain requirements for the SDRWQCB.

Petitioners also claim that the SDRWQCB must demonstrate that the Permit's Prohibitions can be enforced in a fair and consistent manner. While the state's policy is that enforcement of permits must be fair and consistent, a burden on the SDRWQCB to demonstrate how this will be achieved **prior to adoption** of a permit does not exist. Nor do Petitioners exhibit where such a requirement exists in law or policy as a basis for their argument. In fact, rather than negate the Permit's Prohibitions, the SWRCB's draft enforcement policy directly supports the Prohibitions. It states:

> For storm water and/or authorized non-storm water discharges that cause or substantially contribute to an exceedance of an applicable water quality standard, significant violations include the failure to comply with the procedures to address exceedances required by the permit.[41]

This approach outlined in the draft enforcement policy is congruous with the approach provided in the Permit in sections A (Prohibitions) and C.

Petitioners discussion of the supposed unfeasibility of enforcing the Permit's Prohibitions is based on their apparently purposeful misrepresentation of the Prohibitions. As discussed in sections B.1 and B.2 above, the Prohibitions do not require "strict compliance" with water quality objectives through application of numeric effluent limits, nor do they require "zero contribution" of pollutants to impaired water bodies. Since Petitioners arguments regarding the unfeasibility of enforcing the Prohibitions are based on incorrect interpretations of the Prohibitions, they must be dismissed.

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[39] 64 FR 68754
[40] 64 FR 68754
[41] SWRCB, 2000. Draft Revised Policy – Water Quality Enforcement Policy. Pg. 8.

While the SDRWQCB is not required to demonstrate how the Permit will be enforced in a fair and consistent manner, the SDRWQCB has taken many steps to ensure that such enforcement occurs. For example, the Permit requires each Copermittee to develop and implement a separate and distinct urban runoff management program within its jurisdiction. This helps ensure that each Copermittee will be held accountable for its own actions within its jurisdiction. The Permit also requires bioassessment monitoring of receiving waters within each Copermittee's jurisdiction or watershed,[42] further ensuring that the SDRWQCB will assess the impacts of urban runoff from each Copermittee's jurisdiction on receiving waters.

G. The SDRWQCB Reasonably Considered Any Statutory Factors Required by the California Permit Program

1. Adoption of the Permit is Not Directly Subject to CWC Section 13241

Petitioners assert that the provisions of section 13241 of the CWC directly apply to the adoption of the Permit. While the provisions of section 13241 may apply to the Permit, they do not apply in the direct manner proposed by Petitioners. Section 13241 clearly applies to the development of water quality objectives. It includes a list of "factors to be considered by a regional board in establishing water quality objectives." Therefore, section 13241 may only apply to the Permit's application of the water quality objectives designated in the Basin Plan. These water quality objectives are developed during the Basin Plan's planning process, not during adoption of permits meant to implement the Basin Plan (see section D.1 for further discussion). As such, the provisions of 13241 are met by the SDRWQCB during the process of adoption and re-issuance of the Basin Plan, as well as during the Triennial Review of water quality standards the SDRWQCB conducts pursuant to the Clean Water Act. Because the permit implements the Basin Plan's water quality objectives, these efforts to meet the provisions of 13241 during the Basin Plan planning process also apply to the Permit. Therefore, the SDRWQCB has met the requirements of 13241 with respect to both the Basin Plan and the Permit.

2. The SDRWQCB Has Considered Reasonably Achievable Water Quality Conditions in Adopting the Permit

Petitioners assert that per CWC section 13241 the SDRWQCB must demonstrate that the Permit's requirements are reasonably achievable in light of economic considerations. Even if section 13241 applies directly to the Permit's requirements, and not its water quality objectives, this assertion is incorrect. Section 13241 requires the consideration of "(c) water quality conditions that could be reasonably achieved through the coordinated control of all factors which affect water quality in the area" **and** "(d) economic considerations." Contrary to Petitioners assertions, the standard for determination of reasonably achievable water quality conditions is "control of all factors which affect water quality in the area," and not "economic considerations." The requirement for

[42] Order No. 2001-01, Attachment B, section II.A., pg. B-2. A.R. Vol. 1-1.

"economic considerations" is a distinct requirement separate from the requirement for consideration of "water quality conditions that could reasonably be achieved."

Whether or not the SDRWQCB is required to consider "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area" during adoption of a permit, the SDRWQCB has performed this task on multiple levels. The first of which was during the process of development and adoption of the Basin Plan's water quality objectives by the SDRWQCB, SWRCB, and USEPA. As the Permit must implement the Basin Plan (per California Water Code section 13377), the process undergone to consider reasonably achievable water quality conditions during development of the Basin Plan's water quality objectives is applicable when considering the Permit. Furthermore, as discussed in section D.3, the administrative record for adoption of the Permit itself includes ample evidence that compliance with water quality objectives is achievable for MS4 discharges.

3. The SDRWQCB Has Included Economic Considerations in Adopting the Permit

Again, while the provisions of section 13241 do not directly apply to the adoption of the Permit, the SDRWQCB has also adequately included "economic considerations" into its decision to adopt the Permit. The Draft Fact Sheet/Technical Report for the Permit contains a four page discussion of economic issues regarding the regulation and management of urban runoff.[43] The Staff Report for Standard Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices also includes calculations for estimated costs for compliance with the Permit's SUSMP provisions.[44] Information regarding the costs and benefits of implementing the SUSMP provisions were also provided to the SDRWQCB during a March 8, 2000 SUSMP workshop.[45] In addition, the SDRWQCB received, reviewed, and responded to many comments regarding the cost of implementing the permit.[46] Furthermore, largely effective urban runoff management programs, such as by the City of Encinitas, have been implemented with some success and have not been found to be cost prohibitive.[47]

With regards to cost considerations, Petitioners specifically argue that costs were not adequately considered respective to the application of SUSMP requirements at retail gasoline outlets. While the cost calculations for SUSMP implementation noted above directly apply to retail gasoline outlets as well, the SDRWQCB also specifically addressed the cost of SUSMP implementation at retail gasoline outlets. For example, the Draft Responses to Comment document cites the USEPA funded Rouge River National Wet Weather Demonstration Project, which states regarding catch basin inserts that

[43] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 7-10. A.R. Vol. 1-25.
[44] SDRWQCB, 2000. Staff Report for Standard Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices. Attachment E. A.R. Vol. 1-36.
[45] Staff Presentation to Board Members, March 8, 2000. A.R. Vol. 1-45.
[46] SDRWQCB, 2001. Draft Response to Comments. A.R. Vol. 1-14.
[47] City of Encinitas, 2000. Municipal Stormwater Permit Compliance Report. A.R. Vol. 1-46. This report indicates that the City of Encinitas' proposed storm water budget for the 2000/2001 fiscal year is $960,027. The City of Encinitas has reported improved receiving water quality within its jurisdiction resulting from its program (see Draft Fact Sheet/Technical Report, pg. 6-7, A.R. Vol. 1-25).

"these devices are applicable for use in gas stations […] and they have a relatively low cost." The Draft Responses to Comments document continues to consider costs, when it states "practicability or practicality from a cost viewpoint is not exceeded. The typical costs for installation of a filtering unit is 400-800 dollars with yearly maintenance costs averaging about 240 dollars."[48] Moreover, control of urban runoff peak flow rates and velocities to protect against downstream erosion is also cost effective at retail gasoline outlets. Cisterns, a technology used for centuries, are applicable for such a use. Clearly, as indicated above, the SDRWQCB considered the cost of SUSMP implementation at retail gasoline outlets.

4. The SDRWQCB Has Considered the Need for Developing Housing in Adopting the Permit

Petitioners also argue that the SDRWQCB failed to consider the need for developing housing within the region when adopting the Permit. While the SDRWQCB is not strictly required to consider this issue in adopting permits, in actuality it has considered the Permit's potential for impacting housing costs. The SDRWQCB has estimated that implementation of the SUSMP requirements would constitute less than 1% of total project construction costs.[49] Moreover, the SWRCB has found that an increase in cost of 1-2% for new development (including housing) is reasonable.[50] In light of these cost calculations and SWRCB guidance, it is clear that the SDRWQCB considered the need for developing housing with the region.

5. The Permit Does Not Impede Reclaimed Water Use

Petitioners further claim that the Permit's requirements impair efforts to use reclaimed water. The Permit places no restrictions on the use of reclaimed water, and only indirectly applies to reclaimed water use to the extent that over-irrigation can result in reclaimed water entering an MS4. This cannot be considered an impact on reclaimed water use, for the Permit has no jurisdiction over correctly used reclaimed water, in that correctly used reclaimed water will never reach the MS4 in the first place. Irregardless, the foundation of Petitioners' argument regarding the Permit's impact on reclaimed water use is based on Petitioners' misunderstanding of the Permit's prohibitions. As discussed above in section B.2, the Permit does not require "zero contribution" of pollutants to impaired water bodies, contrary to Petitioners' assertions. Therefore, Petitioners' argument that the Permit prohibits all reclaimed water from entering waterbodies impaired for nutrients is misguided. Petitioners' arguments that the Basin Plan's water quality objectives should not be applied to reclaimed water discharges are also without merit, since as discussed in section D.1 above, the appropriateness of water quality objectives is a Basin Plan issue, and not a municipal storm water permit issue.

[48] SDRWQCB, 2001. Draft Response to Comments. Pg. 150. A.R. Vol. 1-14.
[49] Staff Presentation to Board Members, March 8, 2000 SUSMP Workshop. A.R. Vol. 1-45.
[50] SWRCB, 2000. Order No. WQ 2000-11. Pg. 21.

H. The Permit's BMP Requirements for Existing and New Development are Consistent with MEP

1. The Permit's BMP Requirements for Existing Development are Consistent with MEP

Petitioners make various claims regarding the Permit's requirements being inconsistent with MEP. They first argue that the Permit is inconsistent with the MEP standard because it does not adequately address urban runoff from existing sources. Even a cursory review of the Permit exhibits this argument to be false. The Permit requires extensive BMP implementation and Copermittee oversight for existing municipal, industrial, commercial, and residential land uses in sections F.3.a, F.3.b, F.3.c, and F.3.d. Each of these sections of the Permit requires source identification and prioritization, BMP implementation (including pollution prevention BMPs), and enforcement by the Copermittees, among other requirements. Rather than "virtually ignore" these existing sources of pollutants in urban runoff, the Permit directly regulates them.

2. The Permit's BMP Requirements for New Development are Consistent with MEP

While Petitioners assert that the Permit underestimates MEP regarding existing pollutant sources, they also assert that the Permit exceeds MEP regarding regulation of new pollutant sources, such as construction and new development. Specifically, Petitioners claim that the Permit's requirements for new development to "control peak storm water discharge rates and velocities to maintain or reduce pre-development downstream erosion" are impossible to achieve and therefore exceed MEP. Not only is this requirement very achievable, it is standard practice in many areas.[51] In fact, the Los Angeles SUSMP, which was largely upheld by the SWRCB, had nearly identical requirements.[52] Furthermore, the SWRCB found that these SUSMP requirements collectively constituted MEP, directly in refutation of Petitioners' argument.[53] Moreover, the administrative record is replete with examples of how this requirement can be achieved.[54] One simple means for meeting this requirement is implementation of detention basins, which can reduce peak runoff rates and velocities from new development areas. Calculations by the SDRWQCB find that such detention basins can constitute approximately 0.5-1.0% of total project costs,[55] a cost level which the SWRCB generally has found to be "reasonable" for post-construction BMPs.[56] Clearly, a

[51] Washington State Department of Ecology, 1999. Draft Storm Water Management in Washington State – Volume I, Minimum Technical Requirements. Pg. 41-45. A.R. Vol. 1-47. Maryland Department of the Environment, 1999. Draft 2000 Maryland Stormwater Design Manual – Volume I. Pg. 2.8. A.R. Vol. 1-48.
[52] LARWQCB, 2000. Standard Urban Storm Water Mitigation Plan for Los Angeles County and Cities in Los Angeles County. Pg. 6. States "Post-development peak storm water runoff rates shall not exceed the estimated pre-development rate for developments where the increased peak storm water discharge rate will result in increased potential for downstream erosion."
[53] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11: SUSMP. Pg. 1.
[54] SDRWQCB, 2001. Draft Response to Comments. Pg. 31-32. A.R. Vol. 1-14.
[55] Staff presentation to Board Members, March 8, 2000 SUSMP Workshop. A.R. Vol. 1-45. SDRWQCB, 2000. Staff Report for Standard Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices. Attachment E. A.R. Vol. 1-36.
[56] SWRCB, 2000. SWRCB WQ Order No. 2000-11. Pg. 21.

requirement which is implemented for a reasonable cost in many areas of the United States, including Southern California, does not exceed the MEP standard.

Petitioners also assert that requirements to "minimize storm water pollutants of concern in urban runoff" and "remove pollutants of concern in urban runoff" exceed MEP.[57] The requirement to "minimize storm water pollutants of concern in urban runoff" applies to source control BMPs. The word "minimize" is used in the requirement to convey the concept that source control BMPs are a preliminary first line of defense, meant to minimize the contact between urban runoff and pollutants. While Black's Law Dictionary does not define the word "minimize," the American Heritage College Dictionary includes the definition "to reduce" for the word "minimize." Surely a requirement which is analogous to reducing pollutants of concern in urban runoff does not exceed MEP.

The requirement to "remove pollutants of concern in urban runoff" applies to structural treatment BMPs. The word "remove" is used in the requirement to convey the function of structural treatment BMPs; namely, to remove pollutants from urban runoff. Notice the provision does not require the removal of **all** pollutants. Again, the requirement is analogous to a requirement to reduce pollutants of concern in urban runoff. Such a requirement is a foundation of the storm water program and does not exceed the MEP standard.

Petitioners further state that the requirement to "protect slopes and channels from eroding" exceeds the standard of MEP because it applies to a natural phenomenon. This interpretation of the requirement is incorrect. Finding 27 of the Permit states "this Order is not meant to control background or naturally occurring pollutants and flows." The Finding therefore negates the Petitioners' argument regarding this requirement. Furthermore, this requirement is nearly identical to a requirement found in the Los Angeles SUSMP, which was largely upheld by the SWRCB. The SWRCB found that the Los Angeles SUSMP requirements collectively constituted MEP for urban runoff from new development and redevelopment.[58]

I. The Permit's Volume and Flow-Based Structural Treatment BMP Requirements for New Development and Significant Redevelopment are Consistent with MEP and SWRCB Guidance

The issue regarding the appropriateness of numeric sizing criteria has already been addressed extensively by the SWRCB during its consideration of the appeal of the LARWQCB SUSMP requirements. The numeric sizing criteria included in the Permit are essentially the same as those included in the Los Angeles SUSMP; therefore, the findings of the SWRCB regarding the LARWQCB's numeric sizing criteria generally apply to the SDRWQCB's numeric sizing criteria as well. Indeed, in its 12/26/00 memo, the SWRCB finds its decision on the Los Angeles SUSMPs and numeric sizing criteria to be precedential. The memo directs the Regional Boards to include SUSMPs and numeric

[57] Order No. 2001-01 sections F.1.b.2.b.iii and F.1.b.2.b.iv. A.R. Vol. 1-1.
[58] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11: SUSMP. Pg. 1.

sizing criteria in municipal storm water permits, stating "several of the conclusions reached in the Order [WQ 2000-11] are likely to recur, and future municipal storm water permits must be consistent with the principles set forth therein." The memo further finds that the Los Angeles SUSMPs as a whole, and the numeric sizing criteria in particular, reflect MEP. Therefore, Petitioners' assertion that the "Permit's volume and flow-based structural treatment BMPs for new development and significant redevelopment are arbitrary, unreasonable and inconsistent with MEP" has already been resolved and refuted by the SWRCB. For this reason, Petitioners' appeal regarding the appropriateness of the Permit's numeric sizing criteria must be denied.

J. The Permit's Construction Site Inspection Schedule is Consistent with MEP

Petitioners argue that there has been no demonstration that the Permit's construction site inspection schedule is required by the MEP standard. Petitioners have not provided any argument as to why the SDRWQCB must demonstrate that the construction site inspection schedule is required by the MEP standard. The requirement for such a demonstration on the part of the SDRWQCB does not exist. Irregardless, the argument is incorrect, in that the administrative record is replete with references to the need for frequent construction site inspections.

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(3) clearly requires inspection of construction sites, stating the Copermittees' urban runoff management programs must include:

> a description of procedures for identifying priorities for inspecting [construction] sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.

USEPA's Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits provides the SDRWQCB discretion for detailed inspection frequencies when it states:

> the interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.[59]

The SDRWQCB has found the Permit's construction site inspection schedule to be necessary to attain water quality standards; an approach which is in concurrence with USEPA's interim permitting approach noted above. Sediment is one of the leading causes of receiving water impairment of the San Diego region's coastal lagoons, impairing four of these water bodies.[60] The SDRWQCB finds the contribution of

[59] USEPA, 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. 61 FR 43761. Pg. 2.
[60] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Attachment 2 – 1998 Clean Water Act Section 303(d) Impaired Waterbody List. A.R. Vol. 1-25.

sediment from construction sites to be significant, as is noted in Finding 19 of the Permit, as well as in the supporting Fact Sheet/Technical Report documentation for Finding 19. Furthermore, construction is expected to continue at a rapid pace within the region. The Fact Sheet/Technical Report for the Permit references San Diego Association of Governments estimate of 1 million more residents and 400,000 new homes within the region over the next 20 years.[61]

In order to help ensure that this rapid growth and construction does not further continue to degrade the region's coastal lagoons, an aggressive construction site inspection schedule is necessary. Finding 24 of the permit exhibits the importance of inspections at construction sites for being in compliance with the Permit's objectives. The Draft Fact Sheet/Technical Report further exhibits the importance of construction site inspections when it cites USEPA, which states "site inspections are expected to be the **primary** enforcement mechanism by which erosion and sediment controls are maintained" (emphasis added).[62] The Draft Fact Sheet/Technical Report also directly supports the Permit's construction site inspection frequency by stating:

> Weekly to monthly inspection of high threat sites is necessary due to the dynamic nature of construction activities. Medium and low threat construction sites can be inspected less frequently, due to their reduced risk of negatively impacting receiving waters.[63]

In addition, the Draft Response to Comments document also directly addresses the Permit's construction site inspection frequency by stating:

> Since USEPA places high priority on inspections, and since the majority of lagoons within the region are impaired for sediment, the Tentative Order has placed high priority on construction site inspections.[64]

Moreover, the administrative record exhibits that weekly or monthly inspections of high priority construction sites are indeed practicable. For example, the City of San Diego reported in 1999 that it inspected all construction sites within the Los Penasquitos watershed on a daily basis.[65] In its January 31, 2001 Compliance Report, the City of San Diego further states "for capital projects, construction management by the resident engineers/inspectors is done daily" and "for permits, the resident engineers/inspectors are called to the site once certain milestones in their work has occurred and inspection is necessary prior to moving forward. This can be a daily activity for fast moving projects, or weekly, etc."[66] The City of Santee also frequently inspects construction sites, stating in its January 31, 2001 Stormwater Permit Status Report that "the City's inspectors continue to monitor construction sites daily for compliance with the BMPs."[67] In

[61] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 10. A.R. Vol. 1-25.
[62] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 114. A.R. Vol. 1-25.
[63] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 114. A.R. Vol. 1-25.
[64] SDRWQCB, 2001. Draft Response to Comments. Pg. 245. A.R. Vol. 1-14.
[65] City of San Diego, 1999. Cleanup and Abatement Order No. 98-50 Status Report. A.R. Vol. 1-49.
[66] City of San Diego, 2001. City of San Diego Waste Discharge Compliance Report. A.R. Vol. 1-50.
[67] City of Santee, 2001. Stormwater Permit Status Report. A.R. Vol. 1-51.

addition, the City of Escondido finds that "on-site weekly inspections by the City's consultant have been instrumental in identifying potential problems and solutions to keep the projects in compliance."[68]

As the above examples exhibit, it appears that some of the Copermittees may already be in compliance with the Permit's construction site inspection requirements. The fact that several Copermittees already implement programs which may comply with the requirements exhibits that the requirements are indeed practicable. Clearly, measures that were already implemented by Copermittees under the flexible Order No. 90-42 cannot be found to exceed the maximum extent practicable standard.

K. The Permit Does Not Dictate the Manner in Which the Copermittees Must Comply with the Permit

1. The Permit's Numeric Sizing Criteria Requirements Do Not Violate Section 13360 of the California Water Code

Petitioners assert that the Permit's numeric sizing criteria requirements for post-construction BMPs violate Section 13360 of the California Water Code. This is another argument which has previously appeared before the SWRCB during the appeal of the Los Angeles SUSMP issue. As previously stated, the Permit's numeric sizing criteria are essentially identical to those in the Los Angeles SUSMP. Since the SWRCB upheld the Los Angeles numeric sizing criteria and found it to be in compliance with Section 13360, the SWRCB must reach the same conclusion regarding the Permit's numeric sizing criteria. Therefore, Petitioners appeal regarding this issue should be denied.

Irregardless of whether this issue has been previously resolved by the SWRCB, it is clear that the Permit's numeric sizing criteria requirements are in compliance with Section 13360. The numeric sizing criteria requirement simply ensures that BMPs are adequately sized so as to be effective. The necessity for adequate sizing of BMPs is strongly supported in the administrative record.[69] As such, the numeric sizing criteria is a component of the MEP standard, no different than a requirement for annual inspections of a facility or site. The numeric sizing criteria establishes an objective measure to evaluate compliance with the statutory criterion of MEP contained in federal and state law. Thus, the numeric design criteria is similar to technology standards such as Best Available Technology (BAT), as it is applied to traditional point source discharges.

Furthermore, the numeric sizing criteria have broad technical reach and are not unique to any singular approach. Seven equivalent methods are provided to calculate the numeric sizing criteria. The choice of using either runoff volume or flow rate as the basis for numeric sizing criteria calculations is provided. In addition, the criteria are minimum standards, allowing the Copermittees to use stricter criteria. Also, the numeric sizing criteria does not dictate which BMPs out of the myriad of choices are to be used. This

[68] City of Escondido. 2001. City of Escondido Program Progress Report. A.R. Vol. 1-52.
[69] SDRWQCB, 2000. Staff Report for Standard Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices. Pg. 1-8. A.R. Vol. 1-36.

choice is left wholly to the Copermittee or project proponent. A requirement such as the numeric sizing criteria requirement, which allows for a seemingly infinite number of ways to achieve compliance, does not "specify design or manner of compliance." Finally, the SWRCB has found that there is no violation of Section 13360 if an order allows a discharger to select from a number of permissible alternatives for achieving compliance with a standard.[70]

2. The Permit Adequately Provides for Regional Structural Treatment BMP Solutions in Accordance with Section 13360 of the California Water Code

Petitioners argue that the Copermittees should be given flexibility to implement "regional solutions" to the urban runoff impacts caused by new development. In fact, they have been given such flexibility. The Permit states "structural treatment BMPs may be shared by multiple new development projects." This allows proponents of multiple projects to cooperate in developing shared BMP systems which can be "regional" in their scope.

This apparently is not sufficient for Petitioners, who assert that "regional solutions" should be allowed to be placed within or downstream of receiving waters. Unfortunately, their proposed approach would not achieve the overriding goal of the Permit and the SDRWQCB, which is to protect receiving waters' beneficial uses. Indeed, such an approach would be in violation of the Clean Water Act for its failure to protect receiving waters. The Permit appropriately does not allow for receiving waters to be used by developers as conveyances or treatment systems for their untreated urban runoff. The creeks of the San Diego region are a valued natural resource, and the Permit treats them a such by rightfully providing that pollutants in urban runoff be reduced to the MEP **before** discharging to receiving waters, as required by the Clean Water Act.

L. MS4 Discharges with Increased Urban Runoff Peak Flow Rates and Velocities Resulting from New Development and Significant Redevelopment are Regulable Under the Permit

1. MS4 Discharges with Increased Urban Runoff Peak Flow Rates and Velocities Resulting from New Development and Significant Redevelopment are Regulable Under the NPDES Program

Petitioners assert that the Permit cannot regulate increased urban runoff flow volumes, rates, velocities, and durations as they are caused by new development and redevelopment. The basis for their argument is that urban runoff flow is not regulable under the NPDES program. In this argument, they are incorrect. As discussed in the Draft Fact Sheet/Technical Report,[71] NPDES permits must protect receiving water quality standards. Federal NPDES regulation 40 CFR 122.44(d)(1) **requires** municipal storm water permits to include any requirements necessary to "achieve water quality

[70] SWRCB, 1990. SWRCB Order No. 90-5. Finds that Cease and Desist Order did not violate Section 13360 because it allowed the dischargers to select the manner of compliance from permissible alternatives specified in the Order.
[71] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 21-22. A.R. Vol. (1-25).

standards established under section 303 of the CWA, including State narrative criteria for water quality." The administrative record includes ample evidence that altered flow regimes resulting from new development and significant redevelopment can negatively impact water quality standards.[72] As such, the Permit includes requirements for the management of flow in order to protect receiving water beneficial uses and water quality objectives, as it is required under the federal NPDES storm water regulations.

Indeed, the Permit's approach in this respect follows SWRCB guidance. The SWRCB states in Order WQ 98-01 "to comply with CWA section 301, municipal storm water permits must include effluent limitations where necessary to meet […] water quality standards" (at pg. 4). In fact, the municipal storm water receiving water limitations language, as drafted by the SWRCB,[73] requires MS4 discharges to be in compliance with water quality standards. This requirement stands irregardless of whether the MS4 discharge is causing or contributing to violations of water quality standards through altered flow regimes or pollutant discharges.

Furthermore, the Permit's language regarding regulation of urban runoff discharge peak flow rates and velocities is virtually identical to that of the LARWQCB's SUSMP. This SUSMP was predominantly upheld by the SWRCB in Order WQ 2000-11. The SWRCB has found that the LARWQCB SUSMP requirements collectively constitute MEP for urban runoff from new development and significant redevelopment.[74] Therefore, the SWRCB has found that requirements to control increases in peak flow rates and velocities resulting from new development and significant redevelopment are an appropriate provision of MEP for MS4 discharges. Moreover, the SWRCB has instructed that subsequent municipal storm water permits "must be consistent with the principles set forth [in Order WQ 2000-11]."[75] In order to be consistent with this SWRCB guidance, the SDRWQCB has included in the Permit regulation of urban runoff peak flow rates and velocities resulting from new development and significant redevelopment.

Petitioners specifically argue that increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment are not regulable under an NPDES permit because urban runoff flow does not meet the CWA definition of pollutant (CWA section 502(a)). In fact, the opposite is true. The CWA definition of pollutant includes "municipal waste." As discussed above in section E, the increased volumes and flows of urban runoff resulting from new development and significant redevelopment meet the definition of a municipal waste. New development and redevelopment, as approved by municipalities, generate increased urban runoff peak flow rates and velocities through the construction of impervious surfaces.[76] Municipalities then collect this increased urban runoff and discharge it to receiving waters by use of their MS4s. This generation, collection, and disposal of urban runoff by municipalities reflects urban runoff's condition as a municipal waste.

[72] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 21-22, 35-38. A.R. Vol. (1-25).
[73] SWRCB, 1999. Order WQ 99-05.
[74] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11. Pg. 1.
[75] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11. Pg. 1.
[76] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 5-7. A.R. Vol. 1-25.

Nor is the CWA definition of pollutant as limiting as Petitioners assert. The list of substances included in the CWA definition of pollutant cannot be construed to be exclusive. For example, the definition lists rock and sand as pollutants, but makes no mention of clay or silt (e.g., suspended solids). Surely suspended solids such as clay or silt can be found to be pollutants, even though they are not specifically designated as such in the CWA definition of pollutant. Indeed, they commonly are found to be pollutants. In a similar manner, simply because urban runoff increased flow rates and velocities are not specifically listed in the CWA definition of pollutant, they are not limited from being regulated as such in an NPDES permit.

Furthermore, the Permit's regulation of increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment is a direct attempt to control the discharge of conventional pollutants in urban runoff to the MEP. Typical BMPs which control urban runoff peak flow rates and velocities (such as detention basins and grass swales) can greatly reduce the amount of pollutants (suspended solids, nutrients, and metals) in urban runoff.[77] Control of these pollutants in such a manner is certainly within the purview of the NPDES program. USEPA supports this approach, stating "in many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into consideration in order to reduce the discharge of pollutants."[78]

In addition, the downstream erosion caused by increased urban runoff peak flow rates and velocities constitutes a discharge of pollutants to receiving waters which needs to be reduced to the MEP. The increased volume, flow rate, velocity, and duration of runoff resulting from new development and redevelopment can increase sediment transport, stream bed scouring, shoreline erosion, stream bank widening, and changes in stream morphology.[79] All of these impacts can negatively impact water quality through their discharge of sediment into receiving waters. Unnaturally elevated levels of sediment suspension and transport can cause extended violations of water quality objectives for turbidity, total suspended solids, color, and floating material. Moreover, since sediment is often a transport mechanism for other pollutants, discharge of such sediment can lead to introduction of pollutants into the water column, further impacting receiving water quality. Due to the increased discharge of pollutants to receiving waters resulting from the increased peak flow rate and velocity of MS4 urban runoff discharges, regulation of urban runoff peak flow rate and velocity is applicable for an NPDES permit. It constitutes reduction to the MEP of pollutant discharges to receiving waters.

It is also worth noting that Petitioners' exclusion of the NPDES program from the regulation of peak flow rates and velocities defeats the intent of the Clean Water Act.[80]

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[77] USEPA, 1999. Preliminary Data Summary of Urban Storm Water Best Management Practices. EPA-821-R-99-012. Pg. 5-54.
[78] 64 FR 68761
[79] USEPA, 1999. Preliminary Data Summary of Urban Storm Water Best Management Practices. EPA-821-R-99-012. Pg. 4-23 – 4-24.
[80] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 21-22. A.R. Vol. 1-25. Discusses the applicability of the CWA to the regulation of flow.

The NPDES storm water program for MS4 discharges is designed to implement the Clean Water Act, which has the primary purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. section 1251(a)). As exhibited in the administrative record, increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment can greatly impact receiving water quality.[81] As such, in order for the NPDES storm water program to adequately protect the chemical, physical, and biological integrity of receiving waters, as it was intended, it must address increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment.

Finally, control of runoff to prevent downstream erosion has previously been included in many NPDES storm water permits, both within the State of California and nationwide. For example, the SWRCB's Statewide General Construction Storm Water Permit (Order No. 99-08-DWQ) directly requires control of runoff velocity to prevent downstream erosion when it states "the outflow of a sediment basin that discharges into a natural drainage shall be provided with outlet protection to **prevent erosion and scour of the embankment and channel**" (emphasis added) (section A.8, pg. 15). The LARWQCB has also included requirements to control flow for erosion prevention in its SUSMP for the cities of Los Angeles County, as well as in its municipal storm water permit for Ventura County (Order No. 00-108). Moreover, states such as Washington and Maryland have similar NPDES storm water permit requirements.[82]

2. MS4 Discharges with Increased Urban Runoff Peak Flow Rates and Velocities Resulting from New Development and Significant Redevelopment are Regulable Under the California Water Code

While the Clean Water Act is not explicit regarding the regulation of peak flow rates and velocities, the CWC clearly provides the SDRWQCB discretion to regulate flow in order to protect beneficial uses. In fact, such regulation is not only allowed by the CWC, it is required. CWC section 13377 provides that the SDRWQCB issue waste discharge requirements as required by the Clean Water Act, "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."

Findings 4 and 9 discuss the impacts of MS4 discharges on beneficial uses resulting from altered flow regimes caused by new development and significant redevelopment. As discussed in section L.1 above, increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment can cause elevated levels of sediment in receiving waters through downstream erosion. This sediment can also introduce other pollutants into receiving waters as a transport mechanism. In order to protect beneficial uses against these water quality impacts resulting from downstream

[81] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 35-38. A.R. Vol. 1-25.
[82] Washington State Department of Ecology, 1999. Draft Storm Water Management in Washington State – Volume I, Minimum Technical Requirements. Pg. 41-45. A.R. Vol. 1-47. Maryland Department of the Environment, 1999. Draft 2000 Maryland Stormwater Design Manual – Volume I. Pg. 2.8. A.R. Vol. 1-48.

erosion caused by altered flow regimes, the Permit regulates urban runoff peak flow rates and velocities from new development and significant redevelopment, as required by CWC section 13377.

Since the Permit is a set of waste discharge requirements issued under the California Water Code (which happens to implement the NPDES program), the NPDES program is only a set of minimum standards for the Permit. The NPDES program requirements are not a limitation on the contents of the Permit, as it is a set of waste discharge requirements under the California Water Code.[83] Nor do the NPDES storm water regulations set a maximum limit on States' individual implementation of the NPDES program. As such, the State of California can include specific requirements in an NPDES permit which need not be specifically addressed in the NPDES storm water regulations. However, to the extent that inclusion of such requirements is meant to implement and clarify the NPDES storm water program to protect the region's receiving waters, such requirements do not exceed the NPDES program.

M. The Permit Does Not Impinge on Local Government Authority to Regulate Land Use

Petitioners claim that the Permit impinges on local government's land use authority. However, no evidence is provided by Petitioners which exhibits such as situation. Petitioners merely lists several requirements of the Permit, but provides no connection between each requirement and how the requirement encroaches on the Copermittees' land use authority.

Petitioners first assert that the Permit's requirement that each Copermittee's General Plan include water quality and watershed protection principles improperly impinges on the Copermittees' land use authority. However, they fail to note the broad nature of the requirement, in that it does not specify the type or content of the principles to be included in the General Plan. All detail regarding the water quality and watershed principles to be included in the General Plan are left to the discretion of the Copermittees. A requirement which does not specify the contents of General Plan revisions does not encroach on land use authority. Furthermore, the requirement for the amendment of General Plans is directly specified in the federal NPDES regulations at 40 CFR 122.26(d)(2)(iv)(A)(2). They state that Copermittees' urban runoff programs shall include "planning procedures including a **comprehensive master plan** to develop, implement, and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment" (emphasis added). USEPA guidance for this regulation further states that Copermittees "must thoroughly describe how the municipality's comprehensive plan is compatible with the

[83] California Water Code section 13377 provides that waste discharge requirements can be more stringent than NPDES permits when it states "the state or the regional boards shall, as required under or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements or dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts 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**" (emphasis added).

storm water regulations."[84] Therefore, in order to be in compliance with the federal NPDES regulations, the Permit must include requirements for water quality provisions in the Copermittees' General Plans.

Petitioners further allege that compliance with the SUSMP requirements would impinge on the Copermittees' land use authority. Again, no discussion as to why the SUSMP requirements would encroach on the Copermittees' land use authority is provided. In truth, the SUSMP provisions do not place any limits on the type or location of any land use. The SUSMP provisions only seek to ensure that the development of an area does not negatively impact receiving water quality. The Copermittees are left to develop various land uses within their jurisdictions however they choose. The SUSMP provisions even include a waiver provision which allows projects to be waived from the SUSMP requirements if meeting the requirements is found to be infeasible. This waiver provision serves to further ensure that SUSMP implementation will not impact land use decisions. Furthermore, and most importantly, in its 12/26/00 memo the SWRCB states "that design standards for BMPs for new development and redevelopment [i.e., SUSMPs] are required [and] must be implemented." Therefore, the SWRCB has already determined that the SUSMP provisions are appropriate and do not impinge on local land use authority. For these reasons, Petitioners appeal regarding this matter must be denied.

Petitioners also state that the Permit's prohibitions of non-storm water discharges (driveway and patio washwater, lawn clippings, and pet waste) to the MS4 violate the Copermittees' land use authority. Once again, no discussion as to why the prohibitions would encroach on the Copermittees' land use authority is provided. There is no connection between the prohibition of these non-storm water discharges and land use. These non-storm water discharge prohibitions simply implement the Clean Water Act, which states that "permits for discharges from municipal storm sewers shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers" (CWA section 402(p)(3)(B)). Therefore, the Permit must include such prohibitions in order to be in compliance with the Clean Water Act. . For these reasons, Petitioners appeal regarding this matter must also be denied.

N. Issuance of the Permit Does Not Violate of the California Environmental Quality Act (CEQA)

Petitioners argue that the SDRWQCB is required to review potential significant environmental impacts before issuance of the Permit. Water Code 13389 relieves the SDRWQCB of any obligation to prepare environmental impact documentation under the California Environmental Quality Act (CEQA) prior to issuing waste discharge requirements (WDRs), such as the Permit. The "project" in this case which would purportedly be subject to CEQA is issuance of requirements for discharges in MS4s, an action required by the CWA and federal NPDES regulations. Therefore, California Water Code section 13389 applies to the issuance of the Permit. The SWRCB has agreed that NPDES permits do not require CEQA documentation in WQ Order 2000-11, stating

[84] USEPA, 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002. Pg. 6-4.

"the provisions of CEQA requiring adoption of environmental documents […] do not apply to NPDES permits."

Petitioners contend that the Permit contains provisions which are not specifically required by the CWA or federal NPDES regulations; however, all provisions are intended to implement or clarify specific requirements in applicable federal regulations to protect water quality of waters of the United States within the San Diego Region. The fact that some of the specific requirements of a regional board order may be more detailed than the nationwide minimum standards for MS4 regulation prescribed by the CWA and NPDES regulations in 40 CFR 122.26 does not abrogate this exception.

Specifically, Petitioners argue that the Permit's purported requirement for strict compliance with numeric effluent limits is not required by the Clean Water Act, and therefore is subject to CEQA. As discussed above, contrary to Petitioners' assertions, the Permit does not contain numeric effluent limits. Instead, the Permit requires that discharges from MS4s do not violate water quality standards. This requirement is found in the federal NPDES regulations at 40 CFR 122.44(d)(1) and is therefore required under the Clean Water Act (and subsequently exempt from CEQA).

Petitioners also misrepresent the import of Committee for a Progressive Gilroy v. State Water Resources Control Board, 192 Cal. App. 3d 847 (1987), by suggesting that reliance on the state statutory authority precludes reliance on the CEQA exemption in WC 13389. Gilroy is not applicable to the case at hand because the challenged orders in Gilroy were issued under the exclusive authority of the CWC, and not under the Clean Water Act, as the Permit was. Irregardless, all regulatory actions taken by the state to satisfy the requirements of the CWA rely on the state's independent authority to regulate activities affecting water quality. USEPA authorization for California to implement the NPDES program depends upon the state's demonstration of independent authority to accomplish under state law what would be required under the federal CWA and NPDES regulations; Chapter 5.5 of the Porter-Cologne Act ensures consistency between state and federal regulations for discharges subject to the Clean Water Act. Accordingly, California Water Code section 13389 provides exemption from environmental documentation under CEQA for any action that would be required for implementation of NPDES programs in California. Issuance of WDRs for MS4s is required for implementation of the CWA and NPDES program in California.

WSPA further argues that CEQA applies because the SUSMP provisions which apply to retail gasoline outlets are not federally mandated because they are impracticable, thereby exceeding the federal NPDES maximum extent practicable standard. In arguing this point, WSPA cites Defenders of Wildlife v. Browner. This case addressed the question of whether CWA section 402(p) requires the establishment of water quality-based numeric effluent limits for municipal storm water discharges. The SUSMP requirements are not numeric effluent limits, but rather a minimum performance level established to satisfy the MEP requirement. Thus, the Defenders of Wildlife case does not apply. Furthermore, as discussed in section R below, implementation of SUSMP requirements at retail gasoline outlets is practicable. Therefore, the SUSMP requirements are consistent

with the MEP standard, which is mandated by the Clean Water Act. Thus, the application of SUSMP requirements to retail gasoline outlets is the direct result of a CWA mandate, and it is exempt from the requirements of CEQA.

O. The Permit's SUSMP Requirements Are Not an Unfunded Mandate

Petitioners contend that the Permit contains SUSMP provisions which are not specifically required by the CWA or federal NPDES regulations and therefore constitute an unfunded mandate. However, all SUSMP provisions are intended to implement or clarify specific requirements in applicable federal regulations to protect water quality of waters of the United States within the San Diego Region. In fact, the SWRCB has found that the LARWQCB SUSMP provisions are consistent with MEP and are therefore federally mandated.[85] The SWRCB has found that the constitutional provisions regarding state mandates do not apply to federally mandated NPDES permits.[86] Since the SDRWQCB SUSMP provisions are fundamentally the same as the LARWQCB SUSMP provisions, the SWRCB findings regarding unfunded mandates apply in this case. Therefore, Petitioners appeal regarding this matter must be denied.

P. The Permit Does Not Violate the California Administrative Procedures Act

Petitioners contend that the SDRWQCB did not follow the requirements of the California Administrative Procedures Act (APA) in adopting the Permit. However, in actuality, adoption of the Permit is exempt from the APA. The APA explicitly excludes the "issuance of [WDRs] and permits pursuant to section 13263" from its ambit.[87] The SWRCB has found this to be true, stating "the Administrative Procedure Act exempts the adoption of permits from its requirements."[88]

Petitioners, citing California Government Code section 11342, go on to argue that the APA provides an exception to the exemption for cases in which a permit constitutes a "standard of general application." However, the section cited by Petitioners merely defines "regulation" to include standards of general application; it does not contradict the overarching restriction on the entire APA chapter at issue (i.e., that it does not apply to permits or waste discharge requirements).

Petitioners also argue that California Government Code section 11352(b) is inapplicable because it exempts only "required" waste discharge requirements and permits. However, the exemption provided by this statutory section is not so limited. Moreover, Petitioners provide no basis for its interpretation of the statute being so limited.

Irregardless, contrary to Petitioners assertions, the provisions of the Permit are required by the CWA and CWC, as is discussed in greater detail in section N. The CWA requires the discharge of pollutants from MS4s to be reduced to the maximum extent practicable.

[85] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11: SUSMP. Pg. 1.
[86] SWRCB, 1990. Order No. WQ 90-3.
[87] California Government Code section 11352(b).
[88] SWRCB, 2000. Order No. WQ 2000-11. Pg. 14.

The SDRWQCB has found that the requirements of the Permit constitute MEP. This determination has been made by the SDRWQCB in light of the continued degradation of the region's receiving waters due to the Copermittees' urban runoff discharges. The SDRWQCB's determination of MEP is consistent with SWRCB guidance, which states "the final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger."[89] Requirements in the Permit which are more detailed than those in the federal NPDES regulations are also consistent with USEPA's Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, which states "the interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."

Furthermore, the Permit's requirement that urban runoff discharges do not cause or contribute to an exceedance of water quality standards is required under both the federal NPDES regulations and CWC. Federal NPDES regulation 40 CFR 122.44(d)(1) requires NPDES permits to include any requirements necessary to "achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

Section 13377 of Porter-Cologne also states:

> the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, **together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance**. (emphasis added)

Therefore, the Permit's requirements are necessary to be in compliance with the CWA, the federal NPDES regulations, and CWC. For this reason, the Permit is exempt from the APA under California Government Code section 11352(b).

Q. The Provisions of the Permit Are Not Vague, Ambiguous, and Overbroad

1. The SUSMP's Application to Non-Discretionary Projects Is Not Overbroad

Petitioners' argument that the application of SUSMP requirements to non-discretionary projects is overbroad is superficial. No evidence as to why this would be the case is provided by Petitioners. Under the Permit, only non-discretionary projects which fall under the SUSMP Priority Development Project Categories will be subject to the SUSMP requirements. Application of the SUSMP requirements to only the ten development categories serves to focus their application; the opposite of an overbroad application.

[89] SWRCB, 1993. Memorandum: Definition of Maximum Extent Practicable.

Limitation of the SUSMP requirements to these categories ensures that the projects will not be applied to insignificant non-discretionary projects.

It is necessary for SUSMPs to apply to both discretionary and non-discretionary projects in order to adequately reduce pollutants in urban runoff discharges resulting from new development. Non-discretionary projects constitute a significant portion of new development projects. Their status as "non-discretionary projects" does not ensure that they will not generate pollutants or increase flows in their post-construction or "use" phase.

The SWRCB has noted the necessity of application of the SUSMP requirements to non-discretionary projects in Order WQ 2000-11 when it stated "the limitation of the SUSMPs to discretionary projects may not be sufficiently broad for an effective storm water control program […]" (at pg. 26). Regarding non-discretionary projects, the SWRCB has stated in its December 26, 2000 memo from Craig M. Wilson to the Regional Board Executive Officers that its Order WQ 2000-11 "allows broader discretion by the Regional Boards to decide whether to include additional types of development in future SUSMPs. These areas for potential future inclusion in SUSMPs include […] ministerial projects […]."

2. <u>The SUSMP Application of Numeric Sizing Criteria to Both Pervious and Impervious Areas Is Not Overbroad</u>

Petitioners assert that the SUSMP numeric sizing criteria should only apply to directly-connected impervious areas. No reason is provided for why this should be the case. In fact, urban runoff from developed pervious areas can have a significant impact on receiving waters. The condition of perviousness does not ensure that urban runoff from such areas will not leave these areas and enter MS4s. Such pervious areas can be significant sources of pollutants. Pesticides, herbicides, and fertilizers are frequently applied to such areas. Residential areas, which typically have relatively high levels of pervious areas, have been found to contain pollutants in their urban runoff at levels which exceed USEPA benchmark values.[90] Furthermore, runoff from developed pervious areas can increase in volume, rate, and velocity due to soil compaction. It is common for soil in developed areas to be compacted to 90-95% maximum density. Such compaction can greatly reduce infiltration, pointing to the need for measures to address resulting increased flow volumes, rates, and velocities, which may cause downstream erosion. Moreover, the SUSMP requirements mirror the requirements of the LARWQCB SUSMP, in that they apply to all developed areas, and not just directly connected impervious areas. The SWRCB has found this approach to constitute MEP;[91] therefore the SDRWQCB has followed this same approach. For these reasons, Petitioners' argument must be denied.

[90] City of San Diego, 1999. 1998-99 City of San Diego and Co-Permittee NPDES Stormwater Monitoring Program Report. Pg. 5-23. A.R. Vol. 1-53. Reports that arithmetic mean pollutant concentrations of total suspended solids, nitrate + nitrite, and total zinc from residential land uses (86.1% pervious) exceed USEPA benchmark values for industrial storm water (as found at 65 FR 64767).
[91] SWRCB, 2000. Memorandum on State Water Board Order WQ 2000-11: SUSMP. Pg. 1.

3. The Language of the Permit's Findings Is Clear and Appropriate

a. Petitioners assert that the Permit's language that "urban runoff contains pollutants which threaten human health" is overbroad, vague, and ambiguous. This Permit language is supported in both the Permit at Finding 6, as well as in the corresponding section of the Draft Fact Sheet/Technical Report.[92] The Preamble to the phase II NPDES storm water regulations also strongly supports the Finding.[93] As such, the Finding is not "overbroad." The Permit and Draft Fact Sheet/Technical Report's supporting language also clarifies and expands on the statement, ensuring that there is no vagueness or ambiguity when the Finding is considered as a whole.

b. Petitioners assert that the Permit's language that "urban runoff causes beneficial use impairment" is "overbroad." This Permit language is supported in both the Permit at Finding 9, as well as in the corresponding section of the Draft Fact Sheet/Technical Report.[94] The Preamble to the phase II NPDES storm water regulations also strongly supports the Finding .[95] As such, it is not "overbroad."

c. Petitioners claim that the SDRWQCB has made no finding that siltation is a problem within the region. This is false. Finding 19 directly addresses this issue. The Draft Fact Sheet/Technical Report further supports this Finding, both in its discussion of the Finding and its inclusion of the region's Clean Water Act section 303(d) list of impaired waterbodies.[96] The 303(d) list exhibits that Agua Hedionda Lagoon, Buena Vista Lagoon, San Elijo Lagoon, and Los Penasquitos Lagoon are all impaired for sediment. The listing of four of the significant lagoons within the region as impaired for sediment clearly exhibits that there is a siltation/sedimentation problem within the region covered by the Permit.

d. Petitioners assert that use of the term "background" in Finding 27 is ambiguous. This Permit language is supported in both the Permit at Finding 27, as well as in the corresponding discussion of the Draft Fact Sheet/Technical Report.[97] As such, it is not ambiguous.

4. The Location of the Point of Discharge From MS4s Is Clear

Petitioners assert that since the Permit designates urban streams which are used to convey urban runoff as part of the MS4, it is unclear where the point of discharge is defined in such cases. The Permit states at Finding 8 that urban streams used by Copermittees to convey their urban runoff are part of their MS4. However, this does not stop such an urban stream from being a receiving water.[98] Therefore, the point of discharge from an

[92] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 38-39. A.R. Vol. 1-25.
[93] 64 FR 68727
[94] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 40-41. A.R. Vol. 1-25.
[95] 64 FR 68726
[96] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 49, Attachment 2. A.R. Vol. 1-25.
[97] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 54. A.R. Vol. 1-25.
[98] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 40. A.R. Vol. 1-25. States "urban streams can be both receiving waters and MS4s."

MS4 is the point where a discharge leaves an MS4 and enters a receiving water, irregardless of the receiving water's status as both an urban stream and an MS4.

Also, regarding the Permit's designation of some urban streams as MS4s, Petitioners assert that such a designation results in the Permit's requirements being placed on nonpoint sheet flow entering such urban streams. However, this is not the case. The Permit states that "historic and current development make use of natural drainage patterns and features as conveyances of urban runoff. Urban streams used in this manner are part of the municipalities MS4 […]" (emphasis added) (Finding 8). The Draft Response to Comments document elaborates on this Finding, clarifying that a municipality's use of an urban stream as an MS4:

> Depends upon the following two conditions: (1) The discharging development must be within the municipality's jurisdiction; and (2) the runoff must be channeled into the municipality's MS4. […] The key difference is whether or not the runoff is collected and channelized by the municipality, or if it just sheet flows off the property into a stream. We recognize the distinction between a housing development in a rural area where the runoff sheet flows off the properties directly into a creek (here the creek is not an MS4) verses when the runoff is channeled by the municipality and then discharged to the creek (here the creek is part of the MS4).[99]

As the Draft Response to Comments document exhibits, the Permit does not apply to nonpoint sheet flow entering urban streams. Therefore, Petitioners' assertion that the Permit is invalid and overbroad in this respect is without merit.

5. <u>The Permit's Prohibition of Illicit Discharges Is Clear and Appropriate</u>

a. Petitioners assert that various non-storm water or illicit discharges should be allowed to enter the MS4 if they contain pollutants at levels below those which would cause conditions of pollution or nuisance. However, the Clean Water Act (section 402(p)(3)(B)(ii)) clearly prohibits such illicit discharges. Therefore, no such allowance is provided for by the Permit.

b. Petitioners assert that the use of the term "chemicals" in the Permit at section D.1.b.7 is unclear. The use of the term "chemicals" in the Permit is consistent with its common definition found in dictionaries. For example, the American Heritage Dictionary of Science defines chemical as "any substance obtained by or used in a chemical process. Sulfuric acid, sodium bicarbonate, and borax are chemicals."

c. Petitioners argue that the Permit's prohibition against the discharge of construction-related wastes to the MS4 is in conflict with the statewide General Construction Storm Water Permit. No such conflict exists. While the General Construction Storm Water Permit may or may not permit the discharge of certain construction-related wastes, it does not authorize the discharge of such waste into MS4s. The Permit's

[99] SDRWQCB, 2001. Draft Response to Comments. Pg. 67. A.R. Vol. 1-14.

prohibition of the discharge of construction-related wastes to the MS4 is consistent with Clean Water Act section 402(p)(3)(B)(ii), which requires municipalities to "prohibit non-stormwater discharges into the storm sewers."

6. The Permit's Discussion of "Pollutants or Conditions of Concern" Is Clear and Appropriate

a. Petitioners claim that the Permit's discussion of pollutants of concern in section F.1.b.2.iii is vague and overbroad. However, this section of the permit does not define pollutants of concern; rather, it requires that the Copermittees' determinations of pollutants of concern shall include **consideration** of several factors. Identification of pollutants of concern is left to the Copermittees' discretion (see Permit section F.1.b.2.e). As such, the Permit's language regarding pollutants of concern is flexible to provide for this discretion.

b. Petitioners assert that the term "pollutants or conditions of concern" is vague, potentially overbroad, and unintelligible. However, in section F.1.e the Permit describes five factors which are to be considered by the Copermittees in their identification of pollutants or conditions of concern. The description of pollutants or conditions of concern these five factors provide removes any vagueness or ambiguity regarding the term.

7. The Permit's Reference to Beneficial Uses is Clear and Appropriate

Petitioners assert that the Permit's use of the term "supporting beneficial uses" is unclear. As with all references to beneficial uses in the Permit, the term refers to beneficial uses designated in the Basin Plan. The word "supporting" is used in the Permit to exhibit that designated beneficial uses apply to all receiving waters within a particular hydrologic unit, and not just the particular named receiving waters specifically identified in Table 2-2 of the Basin Plan.

8. The Permit's Reference to Downstream Erosion and Stream Habitat is Clear and Appropriate

Petitioners assert that the Permit's reference to downstream erosion is unclear in the respect that it does not indicate how far downstream erosion must be controlled. However, detail beyond what is included in the Permit is not necessary, because the requirement applies for the distance downstream as far as impacts may occur. Therefore, the Permit's language regarding this matter is clear and accurate. Petitioners further assert that the Permit's use of the term "protect stream habitat" is also unclear. However, the requirement containing this term is quite clear, since protection of beneficial uses such as stream habitat is a fundamental goal of the storm water program. Protection of stream habitat is achieved under the Permit if in-stream water quality resulting from MS4 discharges is adequate to protect the aquatic habitat beneficial use. Therefore, the Permit's requirement to protect stream habitat is essentially the same as the Permit's receiving water limitations language in its implementation and enforcement.

9. The SDRWQCB Need Not Define Every Word in the Permit

Petitioners complain that the Permit does not contain definitions of common words or terms, such as "seasonal restrictions," "phased grading," and "minimization." It is not feasible, nor is it required for the SDRWQCB, to provide definitions of every word contained in the Permit, particularly when definitions are available in common dictionaries. Furthermore, to the extent that Permit requirements include flexible language, this is to provide the Copermittees discretion in implementing the requirements; a common request of the Copermittees.

10. The Permit is Consistent with the Statewide General Construction Storm Water Permit

Petitioners argue that the Permit's requirement that categories of minimum BMPs be designated and implemented at sites is in conflict with the statewide General Construction Storm Water Permit requirement that BMPs be site specific. No such conflict exists. Nothing in the Permit precludes the designated BMPs from being implemented in a site specific manner. Moreover, the BMPs are **minimum** BMPs. If the General Construction Storm Water Permit requires additional or more specific BMPs, the Permit does not prohibit their implementation. In addition, the Permit contains language which helps ensure that site specific BMPs are implemented at construction sites: (1) the Permit states "if particular minimum BMPs are infeasible at any **specific site**, each Copermittee shall implement, or require implementation of, other equivalent BMPs" (emphasis added); and (2) the Permit states "each Copermittee shall also implement or require additional **site specific** BMPs as necessary to comply with this Order" (emphasis added).[100]

11. Use of the Word "Waste" in Permit Section F.3.a.5.c.i Is Clear and Appropriate

Petitioners also assert that use of the word "waste" in Permit section F.3.a.5.c.i is inappropriate. The intent of this requirement is that accumulated debris be removed from the MS4. This intent is clearly stated in the Permit, which states: "Inspection and removal of accumulated waste **(e.g. sediment, trash, debris, and other pollutants)**" (emphasis added). This clarification provided in the Permit alleviates any confusion use of the term "waste" in this situation may cause.

[100] Permit section F.2.f.2.

12. The Permit's Definition of Pollutant is Consistent with the CWC and CWA

Petitioners claim that the Permit's definition of pollutant does not follow the CWA or CWC. However, the Permit's definition is a consistent interpretation of definitions included in the CWA or CWC. Moreover, the Permit's definition is a reasonable one consistent with common definitions in dictionaries. Petitioners' application of the Administrative Procedures Act to the Permit's definition does not apply, since such permits are exempt, as discussed in section P.

R. Retail Gasoline Outlets are Pollutant Hot-Spots Which Need Structural Treatment BMPs to Reduce Pollutants to the MEP

1. The Permit's Requirements for Implementation of Structural Treatment BMPs at RGOs is Consistent with MEP

Petitioners assert that the Permit's application of SUSMP structural treatment BMP requirements to retail gasoline outlets exceeds the MEP standard. Their basis for this argument is that source control BMPs at retail gasoline outlets meet MEP, and therefore any requirements beyond source control BMPs are unnecessary.

However, due to the concentrated nature of pollutants at RGOs, source control BMPs alone are simply not adequate in addressing RGO runoff. Research studies have identified RGOs as hotspots that produce significantly greater loadings of hydrocarbons and trace metals than other urban areas. The Center for Watershed Protection states that:

> Gas stations were found to be an extremely significant hotspot for hydrocarbons. Composite priority pollutant scans at the gas station sites revealed the presence of 37 potentially toxic compounds in the sediment and 19 in the water column. Many compounds were polycyclic aromatic hydrocarbons (PAHs) that are thought to be harmful to both humans and aquatic organisms. Non-gas station sites, on the other hand recorded far fewer priority pollutants that had much lower concentrations.[101]

While source control BMPs are obviously needed to address such significant pollution problems, structural treatment BMPs are necessary as well. The Permit directly addresses the need for implementation of multiple types of BMPs, stating "pollutants can be effectively reduced in urban runoff by the application of a **combination** of pollution prevention, source control, and treatment control BMPs" (emphasis added).[102]

Petitioners' own study also exhibits how source control BMPs alone are inadequate in reducing pollutants in urban runoff from retail gasoline outlets, thereby making their

[101] Center for Watershed Protection, 1994. Hydrocarbon Hotspots in the Urban Landscape. Watershed Protection Techniques. 1(1). A.R. Vol. 1-54. The SDRWQCB requests that the SWRCB take administrative notice of this document.
[102] Finding 11.

supplementation with structural treatment BMPs necessary. The "Geomatrix study," which Petitioners conducted, assessed the runoff from retail gasoline outlets handpicked by Petitioners. The study states that these RGOs utilized "Best Management Practices (BMPs) to minimize the buildup of potential storm water contaminants on exposed areas. These BMPs include regular sweeping of exposed areas, regular site inspections, and standardized spill response procedures." [103] In other words, the RGOs in the study used BMPs identical or similar to the source control BMPs developed by the California Storm Water Quality Task Force. These are the same source control BMPs which Petitioners assert are effective and constitute the maximum limit of MEP for retail gasoline outlets.

However, even a cursory review of the study's data reveals that the **median** event mean concentrations of both aluminum and zinc in runoff from these retail gasoline outlets **exceed the USEPA benchmark values** for those pollutants in storm water discharges from industrial sites.[104] More importantly, the median event mean concentrations calculated in the Geomatrix study exhibit that the subject retail gasoline outlet runoff is also in exceedance of the region's receiving water quality objectives. For example, the median event mean concentrations for copper and zinc in the study **exceed numeric criteria for priority toxic pollutants for the State of California**.[105] This is significant within the San Diego region, due to the identification of copper and zinc through a toxicity identification evaluation (TIE) as pollutants specifically causing impairment of Chollas Creek.

Moreover, even if such analysis is brushed aside, as Petitioners intend, the Geomatrix study's conclusion that pollutants in runoff from retail gasoline outlets are similar to pollutants in runoff from commercial parking lots exhibits the need for structural treatment BMPs at RGOs. The SWRCB has determined that structural treatment BMPs are necessary to meet MEP for runoff from commercial parking lots. Since runoff from retail gasoline outlets contains similar pollutant concentrations, the same level of BMP implementation must be conducted at RGOs for MEP to be met.

Clearly, the source control BMPs which Petitioners profess as constituting MEP are ineffective in addressing pollutants of concern and protecting water quality. However, it is precisely such effectiveness which is the overarching goal of the MEP criterion. Without effectiveness, MEP is not achieved. As the SWRCB states, "to achieve the MEP

[103] Geomatrix, 1994. Results of a Retail Gasoline Outlet and Commercial Parking Lot Storm Water Runoff Study. A.R. Vol. 1-31-RR.

[104] Geomatrix, 1994. Results of a Retail Gasoline Outlet and Commercial Parking Lot Storm Water Runoff Study. Figures 17 and 24. A.R. Vol. 1-31-RR. Reports that median event mean pollutant concentrations of total aluminum and total zinc from retail gasoline outlets exceed USEPA benchmark values for industrial storm water (65 FR 64767).

[105] California Toxics Rule freshwater maximum concentration criteria for dissolved copper and zinc are 13 ug/L and 120 ug/L respectively. Median event mean concentrations of total recoverable copper and zinc in RGO runoff are reported to be approximately 20 ug/L and 188 ug/L by Geomatrix (Figures 20 and 24). Using the California Toxics Rule acute conversion factor to convert these total recoverable concentrations to dissolved concentrations, median event mean concentrations of dissolved copper and zinc in RGO runoff are estimated to be 19 ug/L and 183 ug/L. Assuming the California Toxics Rule conversion factors to be accurate in this case, these concentrations of dissolved copper and zinc in RGO runoff exceed California Toxics Rule freshwater maximum criteria.

standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., **are likely to be effective**) and are not cost prohibitive. The major emphasis is on technical feasibility" (emphasis added).[106] As such, in order for MEP to be achieved, Petitioners must implement other BMPs in addition to source control BMPs. Hence, requirements for implementation of structural treatment BMPs at retail gasoline outlets are included in the Permit as its interpretation of MEP.

Petitioners also assert that implementation of structural treatment BMPs at retail gasoline outlets is not practical, and therefore exceeds the MEP standard. However, as discussed in section G.3, the costs of meeting the SUSMP requirements at retail gasoline outlets are not prohibitive. Furthermore, some of Petitioners' constituents already meet requirements similar to those included in the SUSMP. Interestingly, this information was not provided by Petitioners in their argument that the requirements are not practical. Since 1992, retail gasoline outlets within municipalities covered under phase I of the NPDES storm water regulations in the Puget Sound Basin have been required to implement structural treatment BMPs sized to treat runoff from a 6-month, 24-hour storm. Retail gasoline outlets from this area have also been required to implement flow controls as well.[107] That Petitioners' constituents are already meeting structural treatment BMP requirements similar to those of the SUSMP in and of itself exhibits that the requirements are practical.

Structural Treatment BMPs Available for Use at RGOs Are Effective

Petitioners further assert that BMPs available for implementation at retail gasoline outlets are not effective, and therefore should not be required. Specifically, Petitioners claim that catch basin inserts have not been **proven** to be effective. While the SDRWQCB is not required to prove beyond doubt the effectiveness of its Permit requirements, the administrative record includes extensive evidence that catch basin inserts are effective in removing pollutants from urban runoff, including urban runoff from retail gasoline outlets. For example, as discussed in the Draft Response to Comments document, the Rouge River National Wet Weather Demonstration Project found various catch basin inserts to remove up to 6.6 lbs sediment and 9,700 mg/Kg oil per 1,000 gallons of retail gasoline outlet runoff filtered.[108]

The City of Dana Point supports these findings on the effectiveness of catch basin inserts, finding that 508 inserts captured 13.86 tons of debris during the 2000/2001 wet weather season (October, 2000 – March, 2001), or approximately **55 lbs of debris per filter**. Moreover, in analytically testing this debris, the City of Dana Point has found that the debris contains urban runoff and RGO pollutants of concern such as copper, lead,

[106] SWRCB, 1993. Memorandum: Definition of Maximum Extent Practicable.
[107] Washington State Department of Ecology, 1992. Stormwater Management Manual for the Puget Sound Basin – Volume 1. Pg. I-2-1 – I-2-14. The SDRWQCB requests that the SWRCB take administrative notice of this document.
[108] Rouge River National Wet Weather Demonstration Project, 1999. Evaluation of On-Line Media Filters in the Rouge River Watershed. Rpo-NPS-TPM59.00. Pg. 16. A.R. Vol. 1-55.

cadmium, zinc, diesel, and fecal coliform.[109] This exhibits that catch basin inserts' capture of sediment and debris is significant and effective in protecting water quality, since many pollutants of concern at RGOs, such as metals and oils, can be transported to receiving waters on sediment and debris.

While catch basin inserts have been found to be effective in removing pollutants from urban runoff, other BMPs available to RGOs, such as sand filters or media filters, have been proven to be even more effective. The Sacramento Stormwater Management Program study supplied by Petitioners finds such BMPs as being effective and acceptable or conditionally acceptable for use.[110] USEPA finds that sand and other media filters can remove up to 100% of suspended solids, 45% of nitrogen, 80% of phosphorus, and 80% of metals.[111]

Structural Treatment BMPs at RGOs Need Not Pose Safety Concerns

Nor must such filters pose a safety concern, contrary to Petitioners' assertion. This assertion is questionable, at best. It is important to note that no evidence is provided by Petitioners as to how these BMPs pose a risk, or what the level of risk actually is. In fact, for many years similar BMPs (such as oil water separators) have been utilized at RGOs with apparently negligible (if any) adverse safety effects.[112] More importantly, many such filters are **currently** installed or being installed at RGOs within Petitioners' jurisdiction (Western United States, including California).[113] Apparently, these RGOs have not been notified of the dire risk they are subjecting themselves to.

To further alleviate any purported safety concerns, many such filters can be constructed at the surface or aboveground, negating any safety concerns regarding mixture of gasoline vapors with air in enclosed spaces. USEPA exhibits the applicability of sand filters at RGOs: "The surface sand filter was developed […] for sites that could not infiltrate runoff or were too small for effective use of detention systems."[114] Furthermore, there is nothing preventing the use of ventilation in the design of such systems. For example, rather than placing BMPs in an enclosed vault, the vault can be covered with a grate which provides ventilation.

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[109] City of Dana Point, 2001. Presentation: City of Dana Point's Effort to Improve Water Quality by Steve Avila and Cindy Asher, at Storm Drain Retrofits as Structural Controls for Stormwater: What Do We Know? Conference, Irvine, California, April 18, 2001. A.R. Vol. 1-56. The SDRWQCB requests that the SWRCB take administrative notice of this document.

[110] Larry Walker and Associates, Inc., 1999. Investigation of Structural Control Measures for New Development. Prepared for Sacramento Stormwater Management Program. A. R. Vol. 1-31-RR.

[111] USEPA, 1999. Preliminary Data Summary of Urban Storm Water Best Management Practices. EPA-821-R-99-012. Pg. 5-54.

[112] LARWQCB, 2000. Regional Comment on Proposed Order. Pg. 6. LARWQCB Comment on SWRCB Order WQ 2000-11.

[113] Stormwater Management Inc., 2001. Gas Stations List. A.R. Vol. 1-57. Lists retail gasoline outlets where underground storm filter units have been installed. The SDRWQCB requests that the SWRCB take administrative notice of this document.

[114] USEPA, 1999. Preliminary Data Summary of Urban Storm Water Best Management Practices. EPA-821-R-99-012. Pg. 5-18.

Control of Urban Runoff Peak Flow Rates and Velocities at RGOs is Feasible

Moreover, despite Petitioners' assertions, control of peak flow rates and velocities is feasible for RGOs. It is important to note that the Permit only requires control of peak flow rates and velocities as necessary to maintain preexisting downstream erosion conditions. This provides ample flexibility in meeting the requirement. For example, where a downstream receiving water is channelized and there is no potential for erosion, peak flow rates and velocities need not be controlled. In addition, peak flow rates and velocities can be controlled off-site, prior to discharge to receiving waters. Many interested parties have been strong proponents of shared BMPs; the control of peak flow rates and velocities from RGOs may be one situation where application of such BMPs are appropriate. In addition, control of peak flow rates and velocities is wholly feasible on-site at RGOs. Cisterns are a technology which have been used for centuries which can be applied at RGOs to control peak flow rates and velocities. Site design techniques such as small weirs, baffles, and directing roof runoff to pervious areas can also be employed. Due to the relatively small size of most RGOs, such measures can be constructed in an unobtrusive manner.

Summary

Clearly, there are many options for structural treatment BMP implementation at RGOs. There are also many options for how each structural treatment BMP is designed. These options serve to mitigate concerns regarding the effectiveness and applicability of structural treatment BMP implementation at RGOs. The wide range of options available ensures that effective, practical, and safe structural treatment BMPs are available and can be identified and implemented at RGOs.

2. <u>The Permit's Requirements for Structural Treatment BMPs at RGOs Is Consistent with SWRCB Order No. WQ 2000-11</u>

Petitioners argue that the Permit's requirement that RGOs implement structural treatment BMPs contradicts SWRCB Order No. WQ 2000-11. Rather than be in contradiction with the SWRCB Order, the Permit's application of structural treatment BMPs is consistent with the Order. The Order states that it "should not be construed to preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued."[115]

The SDRWQCB has found that there is proper justification for application of structural treatment BMP requirements at RGOs. This finding is supported in the administrative record. Permit Findings 3, 4, and 7 and their corresponding discussions in the Draft Fact Sheet/Technical Report find that vehicles and the pollutants they generate negatively impact receiving water quality.[116] RGOs, like parking lots, are convergence points for

[115] SWRCB, 2000. Order No. WQ 2000-11. Pg. 23.
[116] SDRWQCB, 2000. Draft Fact Sheet/Technical Report. Pg. 35-39. A.R. Vol. 1-25.

such vehicles and pollutants.[117] More importantly, as discussed in more detail in section R.1 above, the administrative record shows that even when source control BMPs are implemented at RGOs, **median** event mean concentrations of pollutants in runoff from these sites exceed USEPA benchmark values and most likely exceed receiving water quality objectives of the California Toxics Rule. Therefore, the SDRWQCB found that it is justified in requiring structural treatment BMPs in addition to source control BMPs at RGOs in order to address this problem.

Nor is the Permit inconsistent with the SWRCB Order in terms of its source control requirements. Petitioners assert that the SDRWQCB is at fault because it did not include requirements for the specific RGO source control requirements listed in the SWRCB Order. However, the SWRCB Order is addressing the contents of a model SUSMP, not a permit. Model SUSMPs are to be developed to flesh out permit requirements. As such, they are more detailed, including requirements for specific source control measures. Permits, on the other hand, are less detailed and generally do not include requirements for implementation of particular BMPs. The Permit therefore does not require specific source control BMP requirements, but rather leaves the selection of applicable source control BMPs to the discretion of the Copermittees, as part of their development process for their model SUSMP.

Finally, the Permit is not inconsistent with the SWRCB Order because the SDRWQCB chose not to include a size or other threshold in the Permit with regards to SUSMP applicability to RGOs. The SDRWQCB left the determination of a RGO threshold to the discretion of the Copermittees. There is nothing precluding the Copermittees from adding a RGO threshold to the Copermittees' model SUSMP. Since the model SUSMP is to be approved in the public process by the SDRWQCB, provision for public comment on the addition of such a threshold would be ample. The SDRWQCB and LARWQCB have conjunctively developed guidance for the Copermittees regarding RGO thresholds, should the Copermittees decide to develop such thresholds. This guidance also contains information supporting the application of all SUSMP requirements to RGOs.[118]

Moreover, the SWRCB recommendation for a RGO threshold is just that – a recommendation. It is not a binding requirement, contrary to Petitioners assertions. While the SDRWQCB supports development of a threshold by the Copermittees, the SDRWQCB found an RGO threshold to be extraneous for several reasons. The first of which is that the Permit contains a provision for a waiver from SUSMP requirements (Permit section F.1.b.2.h). This waiver is included in the Permit specifically to address size limitations, in addition to other potential restrictions.[119] Since the SWRCB's primary purpose for recommending a threshold was to address size limitations, the SDRWQCB finds the Permit SUSMP waiver provision to be sufficient to address the issue. Moreover,

[117] Geomatrix, 1994. Results of a Retail Gasoline Outlet and Commercial Parking Lot Storm Water Runoff Study. A.R. Vol. 1-31-RR. Reports high-volume self service RGOs sell over 200,000 gallons of gasoline per month. Assuming an average 8 gallon fill-up per visit, this represents 25,000 vehicle visits per month.
[118] SDRWQCB and LARWQCB, 2001. Retail Gasoline Outlet New Development Design Standards for Mitigation of Storm Water Impacts – Technical Report. A.R. Vol. 1-58. The SDRWQCB requests that the SWRCB take administrative notice of this document.
[119] SDRWQCB, 2001. Draft Response to Comments. Pg. 215. A.R. Vol. 1-14.

the waiver can be utilized to address other factors causing SUSMP implementation to be infeasible at RGOs, such as the potential for groundwater contamination.[120]

Furthermore, the SDRWQCB found concerns regarding SUSMP implementation at RGOs to be minimal. As discussed in section R.1, many structural treatment BMPs are available for use at RGOs. Most of these BMPs require little space. They are required and implemented successfully in other areas of the Western United States. Moreover, RGOs are generally large. The typical modern gas station is between 15,000 and 30,000 square feet.[121] In comparison to SUSMP-regulated restaurants and parking lots, which are required to meet SUSMP requirements if they are larger than 5,000 square feet, RGOs are relatively spacious. It is also worth noting that the automotive repair shop SUSMP priority development project category, as reviewed and upheld by the SWRCB in Order No. WQ 2000-11, does not contain any such threshold in question. Automotive repair shops and RGOs are very similar in their design, use, and generation of pollutants of concern. It is unclear why RGOs purportedly must have a threshold while automotive repair shops need not.

III. CONCLUSION

The requirements of the Permit as adopted by the SDRWQCB are necessary and authorized by state and federal statute. In adopting the Permit the SDRWQCB acted based on the evidence presented before it and the rule of law. Therefore, for all the foregoing reasons stated above, the SDRWQCB requests the SWRCB to find Petitioners' claims invalid and deny the Petitions.

[120] SDRWQCB, 2001. Draft Response to Comments. Pg. 215. A.R. Vol. 1-14.
[121] LARWQCB, 2000. Regional Board Comment on Proposed Order. Pg. 5.