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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL CIVIL WEST COURTHOUSE

In re LOS ANGELES COUNTY MUNICIPAL STORMWATER PERMIT LITIGATION.

LEAD CASE NO. BS080548

[Related Cases: BS080573: BS080758: BS080791: BS080792: BS080807]

[Assigned to the Hon. Victoria Chaney]

PETITIONERS' COORDINATED OPENING TRIAL BRIEF ON CERTAIN PHASE I WRIT OF MANDATE ISSUES

Date: May 19. 2004
Time: 8:30 a.m.
Department: 324-Central Civil West

Action filed: January 17. 2003

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I. INTRODUCTION

As set forth in Petitioners' previous pleadings, this case is not about clean water. Los Angeles County and its municipalities spend millions of dollars each year addressing water pollution, more than just about every other metropolitan area in the country. This case is about something other than clean water – it is about whether an unelected body, Respondent Los Angeles Regional Water Quality Control Board ("Regional Board"), may ignore the partnership roles that Congress and the California Legislature created for achieving the goal of clean water. This is why over forty municipalities throughout Los Angeles County have filed these actions.

Clean water will be achieved. But it will be achieved only when all government agencies, federal, state and local, respect their partnership in that endeavor. Through the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et. seq., the California Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), Water Code §§ 13000 et seq., and other federal and state statutes, Congress and the California legislature have carefully defined the roles of federal, state, and local governments in achieving clean water. The United States Environmental Protection Agency has overall responsibility for overseeing the implementation and enforcement of the CWA by the states. The State of California has responsibility for setting water quality standards, issuing permits, and enforcing state programs. Local governments have responsibility for adopting certain programs to reduce pollution, including programs to reduce the discharge of pollutants in storm water discharged to the waters of the United States. Each partner, EPA, the State, and local governments, also has a responsibility to protect the public fisc – to achieve clean water in the most cost-effective way.

Where one party to that partnership, here the Regional Board, whatever its good intentions, in violation of law ignores its role and responsibility as well as the roles and responsibilities of the other partners, that party jeopardizes the partnership. Because Petitioners, and thus the public, are obligated to comply with this storm water permit if it is not modified, Petitioners come to this Court and request it to issue a writ of mandate directing the Regional Board to issue a storm water permit that conforms with the statutes enacted by Congress and the California legislature, as well as the California Constitution.

In this regard, Petitioners are not asking the Court to make public policy decisions: those decisions already have been made by Congress, the California Legislature, and the people of California in federal and state legislation and in the California Constitution. Petitioners are only asking the Court to direct the Regional Board to issue a Permit that complies with those statutes, the California Constitution, and the public policy reflected therein.

To that end, Petitioners have filed Petitions and First Amended Petitions for Writs of Mandate, either seeking to set aside various portions of the storm water permit at issue here, Los Angeles Regional Water Quality Control Board Order No. 01-182 (the "Permit"), or challenging the Permit as a whole. This Coordinated Opening Trial Brief addresses the following three issues:

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

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

(3) Petitioners' allegations that the Permit unlawfully regulates discharges "into," as opposed to only "from," the municipal separate storm sewer system ("MS4") contrary to the CWA and without authority under the Porter-Cologne Act.

II STANDARD OF REVIEW

These petitions are brought pursuant to Water Code § 13330. Water Code § 13330(d) sets forth the applicable standard of review for this Court. This section provides:

> Except as otherwise provided herein, Section 1094.5 of the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section. For the purposes of subdivision (c) of Section 1094.5 of the Code of Civil Procedure, the court shall exercise its *independent judgment* on the evidence. (Emphasis added.)

Section 1094.5(c) provides, in pertinent part:

> Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence . . . ." (Emphasis added.)

In exercising its independent judgment, this court reviews and weighs the evidence, including the credibility of witnesses, and determines "whether the findings of the agency are supported by the weight, or preponderance, of the evidence." *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1174, citing *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 377; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 808, 819-822; 8B Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, §§ 274, 286, pp. 1075, 1090. "[T]he court must exercise its independent judgment on the facts, as well as on the law. . ." *Fukada*, 20 Cal 4th at 811. The court is required to resolve evidentiary conflicts, and to arrive at its own independent findings of fact, not defer to the administrative agency. *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45.

Accordingly, in applying the independent judgment standard here, this Court must review the entire administrative record, the evidence both in support of and in conflict with the Regional Board's findings, in a limited trial de novo to determine (1) whether the Regional Board's findings are supported by the weight of the evidence; and (2) whether the Regional Board committed any errors of law. It is then for this Court, not the Regional Board, to make the binding determinations on any conflicting evidence.

A. <u>Whether the Regional Board's Findings are Supported by the Weight of the Evidence.</u>

In applying the independent judgment standard, this Court reviews the Regional Board's decision, that is, the Permit, to see if it "set[s] forth findings [that] bridge the analytic gap between the raw evidence and ultimate decision or order . . . In doing so, we believe that the Legislature must have contemplated that the agency would reveal this route." *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516.

The ultimate responsibility, however, to make factual determinations is left with this court. No deference is given to the findings of the Regional Board, even as to the credibility of witnesses. *San Dieguito Union High School District v. Comm'n on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180. Instead, this Court simply decides the case as if the Regional Board did not exist (except for the purpose of holding a hearing and making a transcript). *Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1299-1300; *Guymon v. Board of Accountancy* (1976) 55 Cal.App.3d 1010, 1015. However, in applying the independent judgment standard, a trial court cannot cure an agency's failure to make proper findings. *American Funeral Concepts v. Board of Funeral Directors & Embalmers* (1982) 136 Cal.App.3d 303, 310.

B. **Independent Review of Issues of Law.**

This Court, in applying the independent judgment standard, also reviews questions of law. This review is *de novo*. *Duncan*, 77 Cal.App.4th at 1196. Furthermore, this Court cannot defer to the Regional Board's "policies" if those policies were not formally promulgated as a regulation. *Agnew v. State Bd. of Equalization* (1999) 21 Cal. 4th 310, 322. Efforts by an administrative agency to alter or amend the statute or enlarge or impair its scope are void. *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 603.

The Regional Board has consistently contended that the issuance of the Permit was a "quasi-adjudicative act," that is, the application of existing rules to existing facts. *See 20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 275. That being the case, the Regional Board must be able to demonstrate that: (1) the requirements set forth in the Permit can be found in specific rules, regulations or statutes properly adopted by the EPA and or State Board; and (2) each of the findings of fact and each of the requirements set forth in the Permit are supported by specific facts relating to the control of storm water in Los Angeles County.

III. FACTS

A. The Permit

The Permit is a National Pollutant Discharge Elimination System ("NPDES") storm water permit, issued by the Regional Board pursuant to CWA Section 402(p)(3), 33 U.S.C. § 1342(p)(3).

and California Water Code §§ 13370 *et seq.* to the County of Los Angeles. the Los Angeles County Flood Control District (designated as "Principal Permittee"). and 84 incorporated cities within the County of Los Angeles.[1] The Permit purports to address the discharge of municipal storm water and urban runoff from the permittees' flood control system.[2]

The Permit is divided into two sections. "Findings of Fact" and an "Order." The Findings of Fact address that the Permit is a renewal of an existing storm water permit. the nature of storm water discharges. the filing of a report of waste discharge. the geographic scope of the Permit's coverage. the federal. state. and "regional" regulations that underlie the Permit. implementation. and the public hearing prior to Permit's adoption. The Order section of the Permit is divided into six Parts:

(1) Discharge Prohibitions (Permit. p. 16):

(2) Receiving Water Limitations (*Id.* pp. 17-18):

(3) Storm Water Quality Management Program ("SQMP") Implementation (*Id.* pp. 18-23):

(4) Special Provisions. including requirements for a public information and participation program. an industrial and commercial facilities inspection program. regulation of the development planning process. regulation and inspection of construction facilities. regulation of the public agency's own activities. and an illicit connections and illicit discharges elimination program (*Id.*, pp. 23-53):

(5) Definitions (*Id.*, pp. 53-63): and

(6) Standard Provisions (*Id.*, pp. 64-70)

In adopting the Permit. the Regional Board also adopted a monitoring and reporting program in support of the Permit (*Id.*, pp. T-1 – T-20).

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[1] For reasons not relevant here. the City of Long Beach. which has its own NPDES permit. is the only incorporated city in the County of Los Angeles not subject to the Permit.

[2] A true and correct copy of the Permit is attached to Petitioners' Joint Request For Judicial Notice ("RJN"). and marked as "A" thereto. Respondent failed to include a complete copy of the Permit in the Administrative Record supplied to the Court.

The Permit is the third storm water permit issued to the permittees.[3] Neither of the prior permits contained the provisions now in dispute.

B. The Regional Board

Under California's Porter-Cologne Act, the State Water Resources Control Board ("State Board") and nine Regional Water Quality Control Boards are responsible for issuing NPDES permits, including municipal storm water permits. Water Code §13377. These permits are required to apply and be consistent with the CWA. Water Code §§13372 and 13377. At the present time, the Regional Boards have the initial responsibility for issuing municipal storm water permits.

The Arcadia et al. Petitioners do not joint in this statement or similar statements or concepts contained throughout this Coordinated Brief that the Respondent or any other regional Board has the authority to issue an NPDES Permit. Rather, as maintained by the Arcadia et al. Petitioners, language in the Code Federal Regulations, specifically 40 C.F.R. § 123.1(g)(1) and 123.21, and other provisions, makes it clear that only state agencies with statewide jurisdiction over a class of activities or discharges, have the authority to issue an NPDES Permit. See also 40 C.F.R. § 123.22(b) which provides that: "If more than one agency is responsible for the administration of a program, each agency must have statewide jurisdiction over a class of activities." Accordingly, the Arcadia et al. Petitioners do not agree with any of the statements set forth in this Coordinated Brief that the Regional Board has or ever had the authority to issue an NPDES Permit under the Clean Water Act or otherwise.

The Regional Board is not an elected body. It is composed of nine members appointed by the Governor. Water Code §13201(a). Each member is appointed for a term of four years. Water Code § 13202.[4]

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[3] The first permit was issued in 1990, at the commencement of the storm water permit program. Because NPDES permits have a life-span of not greater than five years plus the period while a completed application for a new permit is pending (40 CFR §§ 122.6 and 122.46; 23 CCR § 2235.4), the permit was renewed in July, 1996, and again in December, 2001 (See AR 8043).

[4] The State Board is also not an elected body. The State Board is composed of five members appointed by the Governor for a term of four years. Water Code §§ 174 and 177.

Because Regional Board members are not elected, a Regional Board member does not have to answer to the people of the community. A Regional Board member does not have to vote on the taxes necessary to pay for the programs he or she requires under a municipal permit. A Regional Board member does not have to choose between funding storm water permit implementation or public hospitals, police and firefighters. Yet Regional Board members are given the authority to issue municipal NPDES permits that will require the expenditure of public funds.

Under our system of government, Regional Board members are given that NPDES authority, but only if they exercise that authority consistent with federal and state law.

C. **Municipal Storm Water**

"Storm water" is defined by federal regulation as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). The Permit adopts this definition. (Permit, p. 61).

To manage storm water and prevent flooding, municipalities construct and operate storm drain systems, referred to in the CWA as a "municipal separate storm sewer system" or "MS4". Storm water flows into the MS4 and is thereafter discharged from one or many outfalls into surface waters.[5]

In 1915 the California Legislature created the Los Angeles Flood Control District for the purpose of minimizing flooding and flood damage in Los Angeles County. Water Code, App. § 28-1. *See generally*, AR 50244-49. The Los Angeles County MS4 is one of the largest systems built in a metropolitan area. The MS4 serves a population of approximately 9.5 million people and covers a geographic area of more than 3,100 square miles (Permit, p. 6). The system consists of over *100,000* catch basins, over *4,300 miles* of underground and above ground storm drains, and over *485* miles of open channels covering the Los Angeles basin from the mountains to the ocean. The Los

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[5] In some areas of the country, municipalities have combined sewer and storm drain systems. Combined sewer and storm sewer systems have the defect of causing sanitary sewer overflows when the quantity of storm water is greater than the combined system can handle. In Los Angeles County, the sanitary sewer and storm drain systems are separate.

Angeles County Flood Control District owns and operates the main channels of the MS4, as well as catch basins and drains in the unincorporated areas of the County. Each of the other permittees owns and operates various portions of the MS4 within its jurisdiction (AR 8044).

As rain water or snow melt moves over the land, the runoff collects natural and man-made pollutants and sends them through the MS4. Since weather is the source of storm water, flows into MS4s are intermittent, unpredictable, and uneven in their duration and volume. The permittees have no control over the quantity of the storm water flow and little to no control over the nature and amounts of the pollutants picked up by the runoff (Permit, p 1).

D. The Nature of Municipal Storm Water Permits

A municipal storm water permittee is very different from other NPDES permittees. An industrial permittee, for example, generates the discharge that is being regulated, a municipal permittee does not: storm water will flow regardless of any action taken by the municipality. Whereas industrial or other nonmunicipal permittees can reduce or control the concentrations of pollutants that enter their wastewater stream, municipalities cannot; pollutants are deposited on city streets, curbs, gutters and catch basins (all parts of the storm sewer system) through aerial deposition and other means and are carried by the runoff into the MS4. And, whereas non-municipal permittees may choose between ceasing their activities and obtaining a permit, municipalities cannot: municipalities are required by the CWA to apply for, obtain, and comply with storm water permits, and must provide storm water management and flood control to protect the health and welfare of the community.

Another important distinction exists. Unlike private permittees, municipalities are responsible for the health and welfare of their communities, including the quality of their water. Municipal permittees, therefore, have as much interest in reducing the pollution in storm water as the Regional Board.

E. MEP Standard

Recognizing that municipal storm water is different than other discharges, and that municipal permittees are different from other NPDES permittees, Congress specifically created a

separate statutory scheme to govern municipal storm water discharges. This scheme is found in CWA Section 402(p), 33 U.S.C. § 1342(p). The scheme explicitly distinguishes between industrial and municipal storm water discharges.

For industrial storm water dischargers, Congress required that their discharges comply with all applicable NPDES permit requirements, 33 U.S.C. § 1342, as well as the CWA's "effluent limitations." requirements. CWA Section 301, 33 U.S.C. § 1311. Congress was very specific:

> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section [33 U.S.C. § 1342] and section 1311 of this title.

33 U.S.C. §1342(p)(3)(A). Section 1311 includes the requirements that a permittee employ "best practicable control technology." 33 U.S.C §1311(b)(1)(A). "best available technology economically achievable." 33 U.S.C. § 1311(b)(2)(A), or "best conventional pollutant control technology." 33 U.S.C. § 1311(b)(2)(E). 33 U.S.C. § 1311(b)(1)(C) also requires the permittee to meet "any more stringent limitation, including those necessary to meet water quality standards . . . ." *See generally, Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-65 (9th Cir. 1999).

For municipal storm water dischargers, Congress was also specific. Unlike industrial dischargers, Congress did not require that municipal dischargers comply with all NPDES permit provisions or effluent limitations set forth in 33 U.S.C. § 1311. Instead, Congress specified that a municipal permit "prohibit non-storm water discharges into the storm sewers" and "require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ." 33 U.S.C. §1342(p)(3)(B)(ii) and (iii). Congress said:

> Permits for discharges from municipal storm sewers—
>
> (i) may be issued on a system or jurisdiction-wide basis:
>
> (ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers: and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. §1342(p)(3)(B). This latter requirement, that municipal storm water permits include controls to reduce the discharge of pollutants to the maximum extent practicable, is known as the "maximum extent practicable" or "MEP" standard for storm water permits.

Thus, unlike industrial dischargers, municipal storm water permittees are explicitly *not* required to comply with all provisions of CWA §§ 402 and 301, 33 U.S.C. §§ 1342 and 1311. Congress specifically did not require that municipal storm water permits comply with 33 U.S.C. § 1311's technology-based effluent limitations or Section 1311's requirement that permits include limitations necessary to meet water quality standards. 33 U.S.C. § 1342(p)(3)(B); *See Defenders of Wildlife*, 191 F.3d at 1165-66. Instead, municipal storm water permits shall prohibit non-storm water discharges into the storm sewers and reduce the discharge of pollutants to the MEP. *Id.*[6]

IV. PART 2 OF THE PERMIT (RECEIVING WATER LIMITATIONS), AS WRITTEN IS AMBIGUOUS, ARBITRARY, CAPRICIOUS AND NOT IN CONFORMANCE WITH LAW

A. Permit, Parts 2.1 and 2.2

Petitioners' first issue goes to Part 2 of the Permit, captioned "Receiving Water Limitations."[7] Unlike the majority of the Permit, Part 2 does not address a specific program or dictate specific action. Instead, it contains a general prohibition against discharges that "cause or contribute to" a violation of water quality standards or a condition of nuisance. Parts 2.1 and 2.2 provide:

> 1. Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.
>
> 2. Discharges from the MS4 storm water, or non-storm water, for which a permittee is responsible for (sic), shall not cause or contribute to a condition of nuisance. (Permit, p. 17).

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[6] Other types of discharges are also treated differently under the CWA. For example, agricultural return flows and discharges of storm water from mining operations or oil and gas production are totally exempt from NPDES permitting requirements. 33 U.S.C. § 1342(l).

[7] Receiving waters are those waters into which a MS4 discharges. In Los Angeles County, receiving waters include bodies of water such as the Los Angeles and San Gabriel Rivers (parts of which also are considered part of the MS4 system) and the Pacific Ocean.

B. **When the Regional Board Adopted Part 2, It Knew That It Would Consider Municipal Storm Water Discharges To Be Contributing To The Violation Of Water Quality Standards From Day One of the Permit**

When the Regional Board adopted the Permit, it knew that municipal storm water discharges contained pollutants that would contribute to what the Regional Board considered as existing violations of water quality standards.[8] This is so because the Regional Board had recommended, and the State Board had already designated, some of the very water ways considered part of the MS4 system (such as the Los Angeles River and Ballona Creek), as well as other receiving waters, as "impaired water bodies" under CWA § 303(d). Under CWA § 303(d), states are obligated to identify those waters for which imposition of technology-based NPDES controls, i.e. those required pursuant to 33 U.S.C. §1311, has not achieved compliance with water quality standards. 33 U.S.C. §1313(d)(1)(A). The designation of a water body as "impaired" means that it exceeds water quality standards for at least one particular pollutant, as the designation is based on such a finding. Thus, when the Regional Board adopted the Permit, it knew that the Permittees would be discharging storm water into water bodies that already were formally designated as exceeding water quality standards.

Not only had the Regional and the State Board designated these impaired water bodies before the adoption of the Permit, but also, only three months before it adopted the Permit, the Regional Board had adopted Total Maximum Daily Loads ("TMDLs") for trash in the Los Angeles River and Ballona Creek watersheds. (Permit, p. 10: Finding No. 14: AR 8047-8048). Under the CWA, once a state identifies impaired water bodies, it must establish a priority ranking for such waters, and, in accordance with that priority ranking, establish the total maximum daily load for the pollutants causing that impairment. 33 U.S.C. § 1313(d)(1)(A) and (C). TMDLs represent the total

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[8] "Water Quality Standards" consist of the "designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *See* 33 U.S.C. § 1313(c)(2)(A). Generally, "uses" are the types of activities for which the water can be employed (*e.g.*, recreation, aquatic life protection) and "criteria" are the numeric or narrative water quality

amount of a pollutant that can be introduced into a water body without causing an exceedance of a water quality standard, taking into consideration seasonal variations and a margin of safety. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i).

At the time it adopted the Permit, the Regional Board was also contemplating additional TMDLs to address bacteria and other pollutants in receiving waters, which the Regional Board believed were also present in municipal storm water. AR 8047-8048 (Since the adoption of the Permit, the Regional Board has in fact adopted additional TMDLs, although the San Diego Superior Court has struck down the Los Angeles River Trash TMDL on various grounds, including the Regional Board's failure to comply with CEQA and to conduct a cost/benefit analysis and consider economics.)

In adopting the Trash TMDLs for the Los Angeles River and Ballona Creek watersheds, the Regional Board specifically identified municipal storm water as one of the primary sources of that pollutant. This fact, that the Regional Board prior to adoption of the Permit had adopted trash TMDLs to address a violation of an existing water quality standards, along with its stated interests to adopt additional TMDLs (Permit, p. 18-19; *See also*, ER, Ex. 8, AR 8047-8048), proves that, at the time of the Permit's adoption, the Regional Board had already concluded that storm water discharges were contributing to exceedances of water quality standards, and thus that it would be considering the permittees to be in violation of Part 2.1 of the Permit from the day of adoption.

Moreover, the Regional Board knew that these exceedances of water quality standards could not be remedied quickly: the trash TMDL approved by the Regional Board prior to the Permit proposed a *ten-year* program of trash reduction before the Los Angeles River and Ballona Creek watersheds would reach what the Regional Board considered to be the water quality standard for trash. *See* RJN, Exh. "G," L.A. River Trash Basin Plan Amendment.

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levels necessary to support those designated uses. "Water Quality Objectives" is the California term for water quality criteria. *See* Water Code § 13050(h).

C. Permit, Parts 2.3 and 2.4

Recognizing that the MS4 discharges would contribute to what it considered to be exceedances of water quality standards, the Regional Board included in the Permit Parts 2.3 and 2.4 to address the consequences of those exceedances. Part 2.3 provides that, when exceedances exist, the permittees shall comply with Part 2.1 and 2.2 through an "iterative process." Part 2.4 provides that the permittees need to undertake that iterative process only once during the Permit term, unless the Regional Board directs otherwise.

Specifically, Parts 2.3 and 2.4 provide in pertinent part that

> 3. **The Permittees shall comply with Part 2.1 and 2.2 through timely implementation of control measures . . . in accordance with the SQMP** [storm water quality management plan] and its components and other requirements of this order. . . . The SQMP and its components shall be designed to achieve compliance with the receiving water limitations. **If exceedances of Water Quality Objectives or Water Quality Standards (collectively, Water Quality Standards) persist, notwithstanding implementation of the SQMP. . . the Permittee shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure:**
>
> a) Upon a determination . . . the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report. . . that describes BMPs [Best Management Practices] that are currently being implemented and additional BMPs that will be implemented.
>
> b) Submit any modifications to the RWL compliance report required by the Regional Board within 30 days of notification.
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and components and monitoring program to incorporate the approved modified BMPs . . . .
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> 4. So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the

same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs. (Permit. pp.17-18)(emphasis added).

D. Part 2 of the Permit is Ambiguous

The Petitioners contend that Part 2. as written. is ambiguous. arbitrary. capricious and not in conformance with law. This contention arises from the fact that Part 2. as written. is ambiguous as to whether compliance with Parts 2.3 and 2.4 constitutes a mechanism for complying with Parts 2.1 and 2.2.

Preliminarily. it cannot be emphasized enough that the Petitioners are intent on complying with the Permit. The Petitioners. as municipalities. are themselves issuers of permits in other contexts: they recognize the importance of a regime of compliance. rather than tolerated non-compliance. to the success of a regulatory program. Moreover. there is also a very practical reason why the Petitioners desire a permit with which they can comply. The CWA contains substantial penalties for non-compliance with permits. including both criminal penalties. 33 U.S.C. § 1319(c). and civil penalties of up to $27.500 per day per violation. 33 U.S.C. § 1319(d): 40 C.F.R. § 19.4.

The ambiguity of Part 2 arises from the following: First. the language of Parts 2.3 and 2.4 of the Permit implies that by complying with these two parts. the Permittees will be in compliance with the Permit. Part 2.3 provides that the Permittees "*shall comply with Part 2.1 and 2.2* through timely implementation of control measures and other actions to reduce pollutants in the discharges. . . ." Part 2.4 then specifically provides that. so long as a Permittee has complied with the procedure set forth in Part 2.3. "the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs."

Second. construction of the language of the Permit so that compliance with the iterative process of Parts 2.3 and 2.4 constitutes the mechanism for complying with Part 2 of the Permit is consistent with the almost contemporaneous construction of the Permit issued by the Regional Board Chairperson. acting in that capacity. On January 30. 2002. in response to questions raised by

the Permittees, the Chairperson, Francine Diamond, issued a letter to the Permittees addressing various questions they had concerning the Permit. One such question was the construction of Part 2. The Chairperson specifically stated:

> A violation of the permit would occur when a municipality fails to engage in a good faith effort to implement the iterative process to correct the harm. *As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides that the Permittee is in compliance.* As discussed at the Regional Board's July 2001 workshop and the December 2001 board meeting, the presence of the iterative process language makes clear the Permittee's mechanism for compliance with receiving water language. *Even if water quality does not improve as a result of the implementation efforts, there is no violation of the permit's receiving water provision as long as a good faith effort is underway to participate in the iterative process.*

Letter dated January 30, 2003, Question and Answer Enclosure at p. 7 (hereinafter "Diamond Memo") (emphasis added). This letter, and the Question and Answer Enclosure, were also posted on the Regional Board's website, where they remain to the present, clearly stating how the Regional Board interprets its regulations, *i.e.*, the Permit, which that agency administers. *See* www.swrcb.ca.gov/rwqcb4/html/programs/storm water/02_0100_Q&A.pdf.

Third, Part 2 is based on language set forth in prior orders of the State Board. *See* State Board Order No. WQ 99-05. The State Board, in addressing similar receiving water limitation language in an appeal from the storm water permit for the County of San Diego, stated as follows:

> [O]ur language . . . does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. *Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.*

In the Matter of Petitions of Building Industry Association *of San Diego County and Western Petroleum Association.* State Water Board Order No. WQ 2001-15 (November 15. 2001). RJN. Ex. F at p. 7 (emphasis added).

On the other hand. ambiguity exists because Parts 2.3 and 2.4 contain no *explicit* upper limit on the "BMPs" or standard to be complied with. To the extent that the Permit purports to authorize the Regional Board to require BMPs or impose other requirements that go beyond the maximum extent practicable standard specified in CWA Section 402(p). or the "reasonableness" standard under the Porter-Cologne Act. both discussed below. the Permit is in violation of law.

Further. Part 2 is entirely ambiguous and unintelligible as there is no discerning from the plain language of the text of the Permit what is intended by Part 2. and more importantly. how a permittee is ever to comply. *See e.g.. Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311 where the court found the language of an initiative measure that placed spending and procedural restrictions upon the county board of supervisors was so ambiguous and unintelligible. that it was "unworkable." and thus invalid. *Id.* at 1334-35. In striking down the measure. the Court stated that it was "unconstitutionally vague in its provisions. such that the County and its Board may reasonably be heard to complain that they would not be able to comply with it because of its alleged vagueness." *Id.* at 1324-25.

This ambiguity is fatal to the validity of Part 2. Numerous cases have held statutes or ordinances to be invalid where they are too ambiguous or vague to give a person sufficient notice of what is required of them. (*See. e.g.. Cramp v. Board of Public Instruction* 368 U.S. 278. 287 (1961) (striking down state statute requiring public employees to take an oath because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. violates the first essential of due process of law" (internal citations omitted)): *People v. Carlson* (1996) 45 Cal. App. 4th Supp. 1. 6 (California Department of Fish and Game Regulation on caging reptiles unconstitutionally vague where "one could not reasonably understand" what it required).) This principle is applicable here: Petitioners are subject to severe penalties for violations of the Permit and similarly "would not be

able to comply with [the Permit] because of its alleged vagueness." *Citizens for Jobs*, 94 Cal.App.4th at 1324-25. Thus, because Part 2 of the Permit is so vague and ambiguous as to make it impossible for Petitioners to determine what they are required to do in order to avoid the penalties for violating its terms, it is invalid.

The Arcadia et al. and Monrovia et al. Petitioners assert that the language of Part 2 of the Permit requiring compliance with all water quality standards and objectives through a process of adopting whatever BMPs may be available but without regard to the MEP standard or the Porter-Cologne Act's reasonableness standard, even to the point of having to continuously implement failed BMPs, is hopelessly ambiguous, and inconsistent with the construction provided in the Diamond Memo provided by the Regional Board itself, as well as with State Board Order WQ 2001-15 and the explicit and unambiguous language of CWA Section 402(p)(3) and the Porter-Cologne Act. As such, Part 2 of the Permit is contrary to law, and thus unenforceable and should be stricken or remanded to the Regional Board for correction.

The County, LAEDC and Alhambra Petitioners join in that assertion, and further assert that, if the Court should hold that compliance with Parts 2.3 and 2.4 provides the means for compliance with Parts 2.1 and 2.2 (as implied in the Permit language itself, the Diamond Memo, and State Water Board orders), such a holding would then resolve this issue.

E. The Adoption Of A Permit That is Impossible To Comply With Violates The Clean Water Act And Is Arbitrary and Capricious

The adoption of a permit with which it is impossible to comply is arbitrary and capricious and violates the CWA and the Porter-Cologne Act. In adopting CWA Section 402(p)(3)(B), Congress did not authorize permits that would automatically subject municipalities to penalties under the Act for reasons beyond their control: Congress authorized permits that would contain the requirements set forth in Section 402(p)(3)(B). Neither the CWA nor the Porter-Cologne Act requires permittees to achieve the impossible.

As discussed above, in adopting CWA Section 402(p), Congress specifically distinguished between industrial and municipal storm water permittees. Congress did so in recognition of the fact

that municipal permittees are different than other NPDES permittees and because the discharges from an MS4 are highly variable, with municipalities unable to control the sources of pollutants in it. Indeed, as the Regional Board itself found in the findings in the Permit:

> 1. Storm water discharges consist of surface runoff generated from various land uses and all the hydrologic drainage basins that discharge into water bodies of the State. The quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events. . . .
>
> 2. Certain pollutants present in storm water and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over. (Permit, p.1)

Given the nature of municipal storm water discharges, Congress authorized only one total prohibition to be included in municipal storm water permits: such permits shall "effectively prohibit non-storm water discharges into the storm sewers . . . ." 33 U.S.C. § 1342(p)(3)(B)(ii). All other provisions of the Permit shall only

> require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B)(iii). *See also Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292, 1308 (9th Cir. 1992) ("In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.")

It was arbitrary and capricious for the Regional Board to have adopted a permit that does not reflect the differences between industrial and municipal dischargers. Congress' explicit directions in this regard, and the Findings of Fact in the Permit itself. It was arbitrary and capricious for the Regional Board to have imposed the requirement that the permittees must comply with water quality standards, if there are no means to comply with that requirement, and the permittees had no choice but to accept the Permit.

Indeed, as a matter of law, the CWA does not require permittees to achieve the impossible. In *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir.) *cert. den.*, 519 U.S. 993 (1996), the plaintiff sued JMS Development Corporation ("JMS") for failing to obtain a storm water permit authorizing the discharge of storm water from its construction site. Because construction is considered to be an "industrial activity" within the meaning of CWA Section 402(p)(3), the plaintiff argued that JMS had no authority to discharge any storm water, a "zero discharge standard," until JMS obtained a storm water permit. 78 F.3d at 1527. JMS conceded that storm water had been discharged from its property and that it did not have a NPDES storm water permit. JMS contended, however, that it was not in violation of the Clean Water Act even though the Act required the permit, because the Georgia Environmental Protection Division, the agency responsible for issuing the permit, was not yet prepared to issue a storm water permit. As a result, it was impossible for JMS to meet the permit requirement. *Id.* at 1527.

The United States Court of Appeals for the Eleventh Circuit held that the CWA does not require a permittee to achieve the impossible. The Court commenced its analysis by noting that "Congress is presumed not to have intended an absurd (impossible) result." *Id.* at 1529.

Based on the facts of the case, the Court then held:

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

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

The same rule applies here. The Clean Water Act does not require the permittees to do the impossible. Because municipal permittees, as involuntary permittees, have no choice but to obtain a municipal storm water permit, the Permit must provide a mechanism for compliance. If compliance with Parts 2.3 and 2.4 does not constitute compliance with Parts 2.1 and 2.2, then the Regional

Board has issued a Permit with which it is impossible to comply. Such a permit would violate the CWA: Congress is presumed not to have intended an impossible result.

Petitioners anticipate that the Regional Board or the Intervenors will argue that the Regional Board was required to include Parts 2.1 and 2.2 in the Permit, or alternatively, that the Regional Board had the discretion to do so, and therefore the Permit is not arbitrary, capricious, or in violation of the Clean Water Act. Both arguments would be erroneous.

First, in adopting the Permit, the Regional Board appeared to believe that municipal storm water permits were required to contain a term requiring compliance with 33 U.S.C. § 1311. In the fact sheet adopted in support of the Permit, the Regional Board said, "MS4s are not exempted from compliance with water quality standards. CWA §§ 301(b)(1)(C) requires NPDES Permits to incorporate effluent limitations, including those necessary to meet water quality standards, applies." (ER, Exh. "8," p. 8040.)

This belief that MS4s are not exempted from compliance with water quality standards was clearly erroneous. As discussed above, the CWA specifically omits the requirement that municipal storm water permittees are required to comply with CWA Section 301. 33 U.S.C. § 1342(p); *Defenders of Wildlife*, 193 F.3d at 1165. Therefore the Regional Board was not required to include Parts 2.1 and 2.2 in the Permit.

The Regional Board or Intervenors may also contend that the Regional Board nevertheless had the discretion to require compliance with water quality standards. The Ninth Circuit in *Defenders of Wildlife* said in dicta that EPA had the discretion to place such a requirement in a permit. 191 F.3d at 1166. Including such a discretionary requirement in a municipal permit, however, does not relieve the Regional Board of the obligation to issue a permit with which the permittees could comply. Thus, even assuming *arguendo* that the Regional Board had the discretion to include Parts 2.1 and 2.2 in the Permit, the Regional Board was still required to provide a means for compliance with those provisions. Otherwise the Permit would still be in violation of the Clean Water Act and the rule that the Act does not require permittees to achieve the impossible.

Indeed, the Regional Board took precisely this approach in the prior 1996 Permit. That Permit included an express "safe harbor" when the permittees were implementing the permit's storm water management programs. Like the current permit, the 1996 permit provided that water quality objectives and water quality standards applicable to receiving waters in Los Angeles County would serve as the receiving water limitations for discharges under that permit, but then also provided that "timely and complete implementation by a Permittee of the storm water management programs described in this Order shall satisfy the requirement of this section and constitute compliance with receiving water limitations." (ER, Exh. 7, AR 2867.)

Accordingly, compliance with Parts 2.3 and 2.4 must provide a mechanism for complying with Parts 2.1 and 2.2 of the Permit. Otherwise, the entire Part 2 is arbitrary, capricious, and in violation of law.[9]

V. THE PERMIT MUST COMPLY WITH MEP

A. The Permit is Arbitrary, Capricious, and in Violation of Law, To the Extent It Requires Controls that Go Beyond the MEP Standard

1. The Permit and the MEP Standard

As discussed above, the MEP standard controls municipal storm water permits. In several places throughout the Permit, the Regional Board recognizes that this standard controls. For example, in introducing Part 4, the section containing specific pollution control programs, the Permit states:

> This Permit, and the provisions herein, are intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP from the permitted areas in the County of Los Angeles to the waters of the State. (Permit, p. 23).

Similarly, in Part 3, which sets forth the requirements for the Storm Water Quality Management Program ("SQMP"), the Permit provides:

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[9] The Arcadia et al. Petitioners allege that as Part 2 of the Permit is an integral part of the Permit, and enters "entirely into the scope and design" of the Permit (*see Dulaney v. Municipal Court for the San Francisco Judicial District of the City and County of San Francisco* (1974) 11 Cal.3d 71, 89-90), that Part 2 is invalid, thereby requiring that the entire Permit be overturned.

> The SQMP and its components shall be implemented so as to reduce the discharges of pollutants in storm water to the MEP. . . .
>
> Each Permittee shall implement additional controls. where necessary. to reduce the dischargers of pollutants in storm water to the MEP. (Permit. p. 18.). See also. Permit. Finding D.4 (Permit. p. 7).

Such language stands as an admission by the Regional Board that the MEP standard is the controlling standard for the Permit. Notwithstanding this admitted application of the MEP standard to the Permit. however. there are several important locations in the Permit where the MEP standard is omitted. apparently intentionally. Specifically. Parts 2 and Part 3.C do not explicitly contain the MEP limitation. and the Petitioners herein. except the County Petitioners. contend that these omissions were intentional. and that such omissions have resulted in Permit terms that are contrary to law. Petitioners contend that the failure of the Regional Board to condition compliance with Parts 2 and 3.C on the MEP standard. as it conditioned compliance with numerous other provisions of the Permit. is action contrary to law.

Accordingly. Part 2 of the Permit violates the MEP standard. as no part or portion of Part 2 limits compliance to the MEP standard or any reasonableness standard found in the Porter-Cologne Act. Further. the administrative record is replete with statements that the Regional Board believes it can go beyond the MEP standard in enforcing Part 2 of the Permit in plain violation of the CWA's express requirement that municipal permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." (33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).)

As noted above. Parts 2.1 and 2..2 respectively. prohibit any "[d]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives . . . or contribute to a condition of nuisance." (Permit. Parts 2.1 & 2.2. p. 17.) Part 2.3 requires municipalities to develop and implement "additional best management practices" to "prevent or reduce any pollutants that are causing or contributing to the exceedances." but not to the extent of the MEP standard referenced in other portions of the Permit. (Permit. Part 2.3. p. 17-18.) Finally. Part 2.4 allows the Regional Board. where implemented BMPs are not effective in eliminating the

exceedance or nuisance. to direct the Permittees "to develop additional BMPs" again. without any reference or condition that the need only be consistent with the MEP standard. as set forth in other parts of the Permit. (Permit. Part 2.4. p. 18.)

In addition. Petitioners assert that the Regional Board has exceeded the MEP standard by the inclusion of Part 3.C of the Permit entitled "Revision of the Storm Water Quality Management Program." without the inclusion of the limiting language regarding the MEP standard. Part 3.C of the Permit reads as follows:

> The Permittees shall revise the SQMP at the direction of the Regional Board Executive Officer. to incorporate program implementation amendments so as to comply with regional. watershed specific requirements. and/or waste load allocations developed and improved pursuant to the process for the designation and implementation of Total Maximum Daily Loads (TMDLs) for impaired water bodies. (Permit. Part 3.C. p. 18-19.)

This section lacks any reference to the MEP. Rather. Part 3.C enables the Regional Board to require amendments to the Permittees' SQMP without regard to the outer limit of the MEP standard set forth under the CWA. or the reasonableness standard under the Porter-Cologne Act.

Yet. further evidence that the Regional Board intended the Permit to require compliance efforts beyond the MEP and reasonableness standards can be found in Finding F(2) on page 13 of the Permit There. in referring to the Permit's objective "to protect the beneficial uses of the receiving waters of the Los Angeles." the Regional Board stated that to meet this objective. the Order not only requires that the storm water quality management plans specify BMPs that will be implemented to reduce the discharge of pollutants "in" storm water to the maximum extent practicable. but also that:

> Storm water discharges from the MS4 shall neither cause not contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters . . . . (Permit. p. 13. Finding F(2).)

Also. in response to comments. Regional Board staff stated that the Permit enables them to go beyond MEP in implementing the receiving water limitations provisions in Part 2 of the Permit.

In the Response to Comments document dated October 11. 2001. and distributed in support of the Permit. Regional Board staff stated:

> The RWL [Receiving Water Limitation] provision in the draft Permit requires Permittees to implement programs to reduce the discharge of pollutants in storm water to the maximum extent practicable (MEP). **For those pollutants in storm water discharges that cause or contribute to the exceedances of water quality standards, Permittees will be required to implement additional controls to eliminate these exceedances.** (Excerpt of Record ("ER") "4." emphasis added.)

Similarly. in its staff report. the Regional Board again confirms that the Permit allows it to force requirements that exceed the MEP standard: "Discharges must meet water quality objectives including that they must not cause nuisance (in addition to the statutory requirements to reduce the discharge of pollutants to the maximum extent practicable)." (ER. Exh. "1." R7693: emphasis added.)

Finally. the comments of Regional Board Staff Member Xavier Swamikanu at the hearing on the adoption of the subject Permit are instructive as to the Regional Board's intent: "The basic standard is a performance one to reduce the discharge of pollutants in stormwater to the maximum extent practicable. However. where receiving water objectives are being exceeded or conditions of nuisance are being created. the Permittees will be required to eliminate such exceedances and nuisance conditions through an iterative process of more and better BMPs." (See ER. Exh. "2." R7784.)

The County Petitioners assert that. as with the issue of compliance discussed above. ambiguity exists here. If the Court holds that all of Parts 2 and 3 of the Permit are in fact limited by the MEP standard. and that the Regional Board has no authority to impose requirements that exceed this standard. then based on this holding. this issue would be resolved. On the other hand. based on the evidence cited above. the County anticipates that the Regional Board and the Intervenors will assert that the Regional Board has the authority to order permittees to install controls that go beyond MEP in an effort to reach water quality standards. In that case the Court will have to determine if

the Permit authorizes the Regional Board to order the permittees to install controls that go beyond MEP.

All Petitioners assert that, if the Court finds that the terms of Part 2 and/or Part 3 of the Permit authorize the Regional Board to require controls that go beyond the MEP standard, the Regional Board has acted contrary to law, and the Court should issue a writ of mandate ordering the Regional Board to set aside Part 2 and/or Part 3 of the Permit as being arbitrary, capricious, and in violation of law. Moreover, the Arcadia and Monrovia Petitioners contend that invalidating Parts 2 or 3 of the Permit requires the Court to invalidate the entire Permit, pending a new hearing by the Regional Board. (See discussion, footnote 9, *supra*.)

2. Why This Issue Is Important

The dispute between the parties can best be illustrated by looking at the statute itself. Under CWA Section 402(p)(3)(B)(iii), permits for discharges from municipal storm sewers:

> shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B)(iii).

Petitioners contend that the first phrase of this subsection is the governing phrase, that permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable." The remainder of the statute is an enumeration, by way of example, of such controls. The Regional Board and Intervenors have contended that the final phrase, "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants" is the governing phrase, and authorizes the Regional Board to require controls even if these controls go beyond those that are practicable.

This issue is important because it goes directly to the question of cost and practicability. Congress' use of the word "practicable" incorporates concepts of feasibility, practicality, reasonableness, public acceptance and cost. *See* AR 28351, 28354-55. If storm water discharges

under a municipal permit are governed by MEP. then the steps required of a municipal Permittee to control those storm water discharges must be "practicable." On the other hand. if the Regional Board can order any control that it "determines appropriate." then there are effectively no cost or practicability limits. No standard other than "appropriate" would govern.

There are several reasons why Petitioners' construction of Section 402(p)(3)(B)(iii) is correct:

1. It comports with the plain language of the statute:
2. The Regional Board's and Intervenors construction turns "maximum" into "minimum":
3. Petitioners' construction gives full effect to the statute. whereas the Regional Board's and the Intervenors' construction renders the first portion of Section 402(p)(3)(B)(iii) superfluous:
4. Petitioners' construction is supported by the legislative history:
5. Petitioners' construction is supported by the case law:
6. Congress did not intend to give an unelected body such as the Regional Board unfettered discretion to order the expenditure of public funds.
7. Petitioners' construction comports with the purpose of the statute and Congress' differential treatment of municipal and non-municipal permittees.

3. The Plain Meaning of Section 402(p)(3)(B) Supports Petitioners' Construction That MEP Controls.

In construing a statute. the Court must ascertain the intent of the legislature so as to effectuate the purpose of the law. *People v. Coronado* (1995) 12 Cal.4th 145. 151: *Dyna-Med. Inc. v. Fair Employment & Housing Comm'n* (1987) 43 Cal.3d 1379. 1386. In determining that intent. the Court must first look to the plain meaning of the language itself. *Id.*

Here. the plain language of Section 402(p)(3)(B)(iii) first sets forth that controls must reduce the discharge of pollutants to the MEP. and then enumerates what those controls may include. To reflect the fact that the enumerated list of categories is not exhaustive. the statute includes a catch-

all provision at the end that gives EPA or the State the discretion to identify additional MEP controls. The catch-all provision, however, is dependent, not independent, of the first phrase of the statute.

This construction is consistent with well-established doctrines of statutory construction. The doctrine of *ejusdem generis* ("of the same kind") provides that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. *Dyna-Med*, supra, 43 Cal.3d at 1391 n.12. This doctrine is based on the reasoning that "if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be a surplusage." *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141. The "general term or category is 'restricted to those things that are similar to those which are enumerated specifically.'" *Id.* (citations omitted).

In this case, the list of specific controls in Section 402(p)(3)(B)(iii) ("management practices, control techniques," etc.) is followed by the final, more general phrase "such other provisions as the Administrator or the State determines appropriate." Applying *ejusdem generis*, the latter, more general phrase must be interpreted as referring only to controls within the same nature or class as those enumerated in the more specific preceding phrases. Thus, "other provisions as the Administrator or the State determines appropriate" must still fall within the category of "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods."

A second doctrine of statutory construction, *noscitur a sociis* ("known by its associates"), also is applicable here. Under this doctrine, a statutory clause must be interpreted in light of the other terms included in that clause and the overriding purpose of the clause as a whole. *Dyna-Med* 43 Cal.3d at 1391 n.14; *English v. IKON Business Solutions, Inc.*, (2002) 94 Cal.App.4th 130, 145. Utilizing this doctrine of statutory construction, courts "determine the meaning of a particular

statutory term by reference to the characteristics that it shares with other things of the same kind, class, or nature which are catalogued with it in the enactment." *Coors Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 778. "In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant . . . ." *English*, 94 Cal.App.4th at 145.

Section 402(p)(3)(B)(iii) identifies six different types of controls: (1) management practices; (2) control techniques; (3) system methods; (4) design methods; (5) engineering methods; and (6) "such other provisions as the Administrator of the State determines appropriate for the control of such pollutants." There is no dispute that the first five are examples of controls to reduce the discharge of pollutants to MEP. Applying *noscitur a sociis*, the sixth category must be construed as sharing the same characteristics as the previous five. Thus, the plain meaning of Section 402(p)(3)(B) requires that any "other provisions" that EPA or a State determines is appropriate shall comply with MEP.

4. The Regional Board's and Intervenors' Construction of Section 402(p) Would Turn "Maximum" into "Minimum."

In construing the words of a statute, a reviewing court must give the words their usual, ordinary meaning, according significance, if possible, to every word, phrase and sentence. *Dyna-Med*, 43 Cal.3d at 1386-1387. The Regional Board's and Intervenors' construction of the statute ignores this requirement. According to their construction, while all permits must at least require controls to reduce the discharge of pollutants to the maximum extent practicable, as this is what the first part of Section 402(p)(3)(B) requires, EPA or the State can go beyond that requirement if it determines that additional controls are appropriate. Under this construction, then, controls to reduce the discharge of pollutants to the maximum extent practicable are the *minimum* standard of controls required in a municipal permit. This construction thus turns "maximum" into "minimum."

Such a construction certainly does not give the language in Section 402(p)(3)(B) its usual, ordinary meaning.

5. The Regional Board's and Intervenors' Construction Would Render The First Part of Section 402(p)(3)(B)(iii) Superfluous.

Closely related to the principle that a statute's language is to be given its usual and ordinary meaning is the principle that the statutory construction must, if possible, give meaning to every word, phrase and sentence. Any construction that renders some words surplusage is to be avoided. *Dyna-Med*, 43 Cal.3d at 1387.

The Regional Board's and Intervenors' construction creates just such surplusage. If one construes the last phrase of Section 402(p)(3)(B)(iii) to allow the Regional Board to require any controls that it determines appropriate, regardless of practicability, then the rest of 402(p)(3)(B)(iii), including the MEP standard, is rendered meaningless. There would be no reason to reference controls that reduce pollutants to the MEP, as these controls would be a subset of the universe of controls that the Regional Board could determine to be appropriate in any event. In other words, if the last phrase governed, then the statute could have been just as easily written that MS4 permits "shall require such controls as the Administrator or the State determines appropriate" omitting everything in between.

Petitioners' construction of Section 402(p)(3)(B)(iii) does not render any phrase of this section meaningless. This Court must reject any construction that would render the bulk of Section 402(p)(3)(B)(iii) as surplusage.

6. The Legislative History Demonstrates that "Such Other Provisions" is a Subset of MEP.

During the 1987 debate in the United States Senate on the 1987 CWA amendments that gave rise to the MEP standard, Senator Durenberger, co-sponsor of the amendments, addressed the standard.[10] In an important two-sentence statement placed in the Congressional Record, the Senator

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[10] The Court may rely on testimony from the Senate floor to determine the legislative intent of Congress. *City of Malibu v. Santa Monica Mountains Conservancy* (2002) 98 Cal. App. 4th 1379, 1386 (court relied on floor statements by legislator to determine legislative intent). Petitioners have requested that the Court take judicial notice of this legislative history pursuant to California Evidence Code § 452(c).

in the first sentence established that MEP was the governing standard and in the second sentence described the controls that would constitute MEP:

> In addition, any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 2 years from permit issuance and shall require controls to reduce the discharge of pollutants to the maximum extent practicable. *Such controls* include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge.

Cong. Rec., 100th Cong. Senate Debates, Jan. 14, 1987, at 1280 (testimony of Senator Durenberger) (emphasis added).

Senator Durenberger's first sentence refers to "controls" to reduce the discharge of pollutants to MEP. The second sentence begins with "[s]uch controls" followed by the enumeration of such controls, including "other provisions as the Administrator determines appropriate." As a matter of simple syntax, "such controls," of which "other provisions" is a subset, refers back the MEP controls described in the first sentence. Thus, the Congressional cosponsor of this provision indicated Congress' intent that the list of controls set forth in this subsection, including "such other provisions as the Administrator determines appropriate," be subject to the MEP standard.

7. **Petitioners' Construction is Supported by the Case Law**

As noted above, Congress mandated the existing water-quality based approach for industrial storm water (33 U.S.C. § 1342(p)(3)(A)), but required a lesser standard (MEP) for municipal storm water. In 1999, the United States Court of Appeals for the Ninth Circuit considered the application of the stricter industrial standard versus the municipal MEP standard in connection with a municipal NPDES permit. In *Defenders of Wildlife*, the plaintiffs challenged an EPA decision to issue certain municipal storm water permits which did not include numerical effluent limitations. The plaintiffs contended that such numeric limitations were required under Section 402(p). The plaintiffs also contended that municipal storm water permits must comply with State water-quality standards. 191 F.3d at 1161.

The Court parsed the CWA provisions and found:

> As is apparent, Congress expressly required **industrial** stormwater discharges to comply with the requirements of 33 U.S.C. § 1311. . . . **Congress chose not to include a similar provision for municipal storm-sewer discharges.** *Id.* at 1164-1165 (emphasis supplied).

The Ninth Circuit further found that Section 1342(p)(3)(B) "***is not merely silent*** regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311 with the requirement that municipal discharges reduce the discharge of pollutants to the maximum extent practicable." *Id.* at 1165 (emphasis in original). The Court concluded that the CWA "unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with" such standards. *Id.* at 1164.

Likewise, *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292 (9th Cir. 1992), is consistent with the holding in *Defenders of Wildlife* that municipal discharges of storm water are governed by MEP, and that the MEP standard replaced the strict compliance standard in section 1311. The *NRDC* court acknowledged that Congress required strict compliance for industrial dischargers but "prescribed new controls for municipal stormwater discharge." *Id.* at 1308. The Court held: "Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. . . . Congress could have written a statute requiring stricter standards, and it did not." *Id.*

In the recent case of *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit again addressed the application of the 1987 amendments to the CWA. The Court was reviewing a rule adopted by EPA to address municipal storm water permits for small MS4s. In discussing the application of the 1987 amendments, and specifically the language of Section 1342(p), the Court on several occasions recognized that the appropriate standard to be applied for municipal storm water permits was the requirement that the permittee "***require controls to reduce the discharge of pollutants to the maximum extent practicable.***" *Id.* at 852; also at pp. 854 and 855 ("Reviewing the Phase II Rule under the first step of *Chevron*, we note that the ***plain language*** of § 402(p) of the Clean Water Act. . . . expresses unambiguously Congress intent that EPA issue no permits to discharge from

municipal storm sewers unless those permits 'require controls to reduce the discharge of pollutants *to the maximum extent practicable.*'" (emphasis added).

Nevertheless, Petitioners anticipate that the Regional Board and Intervenors will contend that their construction of Section 402(p)(3)(B) is supported by the Ninth Circuit's decision in *Defenders of Wildlife*, supra. As noted above, the Ninth Circuit specifically held in *Defenders of Wildlife* that municipal storm water permits do not have to require strict compliance with CWA Section 301, and do not have to require strict compliance with water quality standards through numerical effluent limitations or otherwise. 191 F.3d at 1164-66. The Ninth Circuit then went on, at the request of an intervenor, to consider whether EPA had discretion to impose strict compliance with water quality standards. In *dicta*, the Ninth Circuit said that under 33 U.S.C. § 1342(p)(3)(B)(iii), EPA or a State has the discretion to require compliance with water quality standards. *In doing so, however, the Ninth Circuit was not faced with, and did not address, the question of whether EPA or a State could require compliance with water quality standards if such compliance requires programs that exceed the MEP standard.* That issue was not before the Court and was not addressed by it. *Id.*

Thus, there is no reason to believe that the Ninth Circuit construed Section 402(p)(3)(B) as giving the EPA or the State the authority to go beyond the MEP standard with respect to municipal storm water discharges. To do so would have been to render the MEP standard superfluous. As the Ninth Circuit itself said in *Defenders of Wildlife*, "this Court generally refuses to interpret a statute in a way that renders a provision superfluous." 191 F.3d at 1165.

Instead, the proper interpretation of *Defenders of Wildlife* and Section 402(p)(3)(B)(iii) is that *EPA or a State has the discretion to require compliance with water quality standards, if compliance can be met through programs that meet the MEP standard.* The proper construction of Section 402(p)(3)(B)(iii) is that the last phrase of this statute is a subordinate rather than independent clause, being a subset of the controls that reduce the discharge of pollutants to the maximum extent practicable.

8. **Congress Did Not Intend To Give An Unelected Body Unfettered Discretion To Spend Public Funds.**

The Regional Board's and Intervenor's construction of Section 402(p)(3)(B)(iii) would give the Regional Board, an unelected body, the unfettered discretion to order the expenditure of public funds. There is no indication that Congress, in enacting Section 402(p), intended such a result.

As noted above, the Regional Board is not an elected body. Its members do not answer to the people of the community. Its members do not vote on the taxes necessary to pay for the programs required under a municipal permit. Its members are not forced to choose between funding storm water permit implementation activities and funding public hospitals, police, firefighters, or libraries. Under the Regional Board's and the Intervenors' interpretation of Section 402(p)(3)(B(iii), however, the Regional Board, is free to require the expenditure of public funds regardless of cost or practicability.

Under the CWA and the California Water Code, the Regional Board has been given the authority to issue municipal storm water permits. Congress, however, did not intend or allow that authority to be unfettered. The Regional Board can issue permits that require the expenditure of public funds, as long as the controls required are "practicable." There is no indication that Congress intended anything less.

9. **The Construction Urged by Petitioners Comports With The Purpose of Section 402(p)**

As discussed above, Congress recognized that municipalities are in a very different position from industrial or commercial dischargers: municipalities neither create the runoff nor the pollutants that are contained in storm water. It is for this reason that Congress did not require municipalities to ensure that the discharge from municipal storm water sewer systems met all of the technological controls required of private dischargers.

Congress' purpose in enacting Section 402(p)(3)(B)(iii), therefore, was to reduce pollutants in storm water while recognizing the unique circumstances faced by municipalities. The Regional Board's and Intervenor's construction of Section 402(p)(3)(B) would do violence to that purpose. Under the Regional Board's and Intervenor's construction, the Regional Board could treat

municipalities like all other NPDES permittees. This is contrary to the very purpose of Section 402(p)(3).

B. The "Reasonableness" Standard Required by the Porter-Cologne Act

In addition to limitations placed upon Respondent in issuing NPDES permits under the CWA, the Legislature in the Porter-Cologne Act imposed similar limitations through "reasonableness" requirements contained in Water Code § 13000, 13263(a), and 13241(c).

First, pursuant to Water Code § 13263(a), the authorizing section for the issuance of "waste discharge requirements" ("WDRs") under the Porter-Cologne Act, such requirements may only be imposed where they have taken "into consideration the beneficial uses to be protected, the water quality objectives ***reasonably required for that purpose***, other waste discharges, the need to prevent nuisance and the provisions of § 13241." Water Code § 13263(a) (emphasis supplied). As discussed above, the Permit is a WDR.

In Part 2.1 of the Permit, Respondent has absolutely prohibited discharges from the MS4 "that cause or contribute to the violation of water quality standards or water quality objectives . . . ." Respondent's failure to qualify this language to make it apply only to water quality objectives "reasonably required" for purposes of protecting beneficial uses is action contrary to law. The language of Section 13263 could not be more clear; only those water quality objectives that are "reasonably required" for protecting beneficial uses may be imposed. Yet the Permit, which is a WDR, prohibits all discharges from the MS4 that would violate "any" water quality objective, irrespective of whether such objective was "reasonably required" for purposes of the WDRs.

In addition, Water Code § 13263 plainly requires that Respondent "take into consideration . . . the provisions of Section 13241." Water Code § 13241(c) provides that the factors to be considered by the Regional Board include all of the following:

> (c) Water quality conditions that could **reasonably be achieved** through the coordinated control of all factors which affect water quality in the area. (emphasis supplied.)

This "***could reasonably be achieved***" standard is, moreover, entirely consistent with the language in § 13263(a) requiring the consideration of only those water quality objectives that are

"***reasonably required***." Yet, Part 2.1 of the Permit requiring compliance with all "water quality objectives," Part 2.2's prohibition of any discharge that causes or contributes to " a condition of nuisance" and the language of Part 3.C of the Permit, baldly requiring implementation of "regional, watershed specific requirements and/or . . . Total Maximum Daily Loads," without consideration of reasonableness shows that the "***could reasonably be achieved***" standard was, in fact, not complied with.

It is uncontestable that the requirements of Sections 13263 and 13241 apply to the Permit; Respondents admit, in Finding E(25), that they considered these provisions. The inclusion of the above-cited language in Parts 2 and 3, however, belies such finding.

Finally, in Section 13000 of the Water Code, the Legislature determined that:

> The legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is **reasonable**, considering all demands being made and to be made on those waters **and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.** Water Code § 13000 (emphasis supplied).

The Legislature has thus declared the "reasonableness" standard to be a fundamental part of the clean water policy envisioned with the adoption of the Porter-Cologne Act. Respondent's failure to ensure that the above-cited provisions in Parts 2 and 3 of the Permit reflect that standard, is arbitrary and capricious and in violation of law.

VI. THE SUBJECT PERMIT IS CONTRARY TO LAW AS IT IMPROPERLY ATTEMPTS TO REGULATE DISCHARGES "*IN*" OR "*TO*" THE MUNICIPAL STORM DRAIN SYSTEM.[11]

The express terms of the CWA regarding municipal storm water discharges provide that the Regional Board is limited to regulating discharges *from* the MS4 system. Permittees must, for example, obtain "[p]ermits for discharges ***from*** municipal storm sewers . . . ." (33 U.S.C. § 1342(p)(3)(B).) Similar language limiting the permit requirement to discharges "***from***" the MS4

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[11] The County, Alhambra, and LAEDC Petitioners have not raised this argument in their Petition, but support the general principle that municipal storm water permits regulate discharges from an MS4.

exists throughout the federal regulations. See 33 U.S.C. § 1342(p)(3)(B)(iii); 40 CFR 122.26 (a)(3); 122.26(b)(4)(iii); 122.26(b)(7)(iii);122.26(d); 122.26(d)(1)(v); 122.26(d)(2)(iv)(A)& (A)(1), (A)(2) (A)(3) and (A)(6).

The Permit, however, purports unlawfully to regulate discharges into the MS4 system. First, under Parts 3.A.2, 3.A.3 and 3.B, the Permit purports to require Permittees to "reduce the discharge of pollutants ***in*** storm water to the MEP," and to implement "BMPs" intended to result in the reduction of pollutants "***in*** storm water to the MEP." (Permit, p. 18.)

Similarly, in 3.G.2.e, the Permit seeks to require that the Permittees "[r]equire the use of BMPs to prevent or release the discharge of pollutants **to** MS4s to MEP." (Permit, p. 22.) More specifically, the first paragraph of Part 4 of the Permit, entitled "Maximum Extent Practical Standard," states:

> This permit, and the provisions herein, are intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants **in** storm water to the MEP from the permitted areas in the County of Los Angeles to the waters of the State. (Permit, p. 23; emph. added.)

Also, the Permit defines the term "Maximum Extent Practicable (MEP)" to mean "the standard for implementation of storm water management programs to reduce pollutants ***in*** storm water." (Permit, Part 5, p. 57; emphasis added.)

Finally, under Part 4.D entitled "Development Planning Program," the Permit purports to require the Permittees to control the discharge of pollutants from various development and redevelopment projects that result in discharges "***in***" storm water, by requiring Permittees to require all Planning Priority Development and Redevelopment projects to:

> Provide for appropriate permanent measures to reduce storm water pollutant loads **in** storm water from the development site. (Permit, p. 34, emphasis. added.)

As referenced below, the regulations allowing for the imposition of post-construction treatment controls as a part of the management program ***expressly limit*** the requirement of controlling runoff to discharges "***from*** the municipal storm sewer system." *See* 40 CFR §§ 122.26(d)(1)(v)(A) and 122.26(d)(2)(iv)(A). Thus, this attempt, and all of the other attempts by the

Respondent to require the Permittees to impose post-construction treatment controls to reduce the discharge of pollutants "***in***" or "***to***" the storm water, are directly contrary to the plain-language in the CWA, the regulations, and controlling authority.

Under Section 1342(p) of the Act, entitled "Municipal and industrial storm water discharges," the ***general rule*** is that the EPA Administrator or the State, in the case of a state-approved program, "***shall not require a permit*** under this Section for discharges composed entirely of storm water" except in certain settings, such as here, where the discharge is from a large or medium municipal separate storm sewer system ("MS4") serving a population of 250,000 or more (large system) or 100,000 or more (medium system). 33 U.S.C. § 1342(p)(1) and (2)(C) and (D); 40 CFR § 122.26(b)(4) and (7).

CWA Section 1342(p)(3)(B), entitled "Municipal discharge," expressly requires "permits for discharges ***from*** municipal storm sewer systems— . . ." 33 U.S.C. § 1342(p)(3)(B). Accordingly, under the express language of the CWA, ***permits are not required for discharges composed entirely of storm water***, except in certain instances such as here, where such permits are needed only "for discharges ***from*** municipal storm sewers." 33 U.S.C. § 1342(p)(3)(B) (emphasis added). Nowhere in the CWA is there any authorization for the Regional Board to require the permitting of the discharge of storm water "into" the MS4.

Language throughout the CWA's implementing regulations further reinforces the principle that MS4 Permits are permits that are to regulate the discharge of pollutants "***from***" the MS4. *See e.g.*, 40 CFR § 122.26(a)(3), "Permits must be obtained for all discharges ***from*** large and medium municipal separate storm source systems." (emphasis supplied). *See also* 40 CFR § 122.26(b)(4), which defines the term "Large municipal separate storm sewer system" is defined to include an MS4 that is a part of a larger or medium MS4, "due to the interrelationship between the discharges at the designated storm sewer and the discharges ***from*** municipal separate storm sewer . . ." (emphasis supplied). The term "medium municipal separate storm source system" is similarly defined to include interrelated MS4s to "discharges ***from*** municipal separate storm source with populations in excess of 100,000." 40 CFR 122.26(b)(7).

Additional support exists for this principle in 40 C.F.R. § 122.26(d) and the prefatory language therein, which concerns the application requirements for large and medium MS4 discharges. Such applications must be filed by "the operator of a discharge ***from*** a large or medium municipal separate storm separate storm sewer or municipal separate storm sewer . . ." (emphasis supplied). Moreover, the Management Programs that may be imposed under the CWA regulations similarly are defined to be programs "to control pollutants ***from*** the municipal separate storm sewer system" (40 CFR 122.26(d)(1)(v)), including programs to "reduce pollutants from runoff from commercial or residential are that are discharged ***from*** the municipal storm sewer system . . ." 40 CFR 122.26(d)(2)(iv)(A); *see also* 40 CFR 122.26(d)(2)(iv)(A)(1),(A)(2)(A)(3)and(A)(6).

These provisions reflect the overall purpose of the NPDES permit program, which is to prohibit the discharge of pollutants from a "point source" into navigable waters of the United States, except under an NPDES permit. *Defenders of Wildlife,* 191 F.3d at 1163, citing 33 U.S.C. § 1342(a)(1). As the Court noted, EPA initially treated storm water discharges as being exempt from the requirements of the Act until the adverse decision in *Natural Resources Defense Council, Inc. v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977), which held that EPA did not have the authority "to exempt categories of point sources from the permit requirements of § 402 [33 U.S.C. § 1342]." Thereafter, in 1987, Congress enacted the Water Quality Act Amendments to the CWA and amended the Act to include the provisions described above, i.e., exempting entities discharging storm water from the permit requirements of the Act for a period of time, except in regards to those discharges ***from*** a municipal separate storm sewer system serving a population of 100,000 or more. *Defenders of Wildlife,* 191 F. 3d at 1163.

Finally, further support for the fact that the Respondent has no authority to regulate discharges "into" the MS4 is contained in an order issued by the State Board itself, Order No. WQ 2001-15, where the State Board concluded:

> The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

> **We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s.** It is certainly true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters. State Board Order No. WQ 2001-15, p. 9-10.[12]

Accordingly, under the express language of the CWA, the regulations and applicable case authority, where a permit is required for the discharge of storm water, only permits for discharges "***from*** municipal storm sewers" are required. The State Board has itself admitted the limitations in the Act (see State Board Order No. WQ 2001-15, RJN Exh. "F.") In the instant case, to the extent that the Permit contains a number of provisions that exceed the authority granted by the CWA and the EPA's regulations, and seeks to regulate discharges "***from*** municipal storm sewers," the Permit seeks to regulate a series of discharges ***"in"*** or ***"to"*** the municipal storm sewer, such requirements are imposed in violation of law.

As the CWA and the regulations thereunder require permits only for "discharges ***from*** municipal storm sewers," the Regional Board was without authority to impose requirements to require Permittees to reduce the discharge of pollutants "***in,***" or "***to***" its MS4, under Parts 3.A.2, 3.A.3, 3.B, 3.G.2.e, 4, 4.D, and 5 definition of MEP. On those grounds, the permit must be invalidated.

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[12] It is worth noting that while in footnote 2 to WQ 2001-15, the State Board asserts that certain provisions in a municipal permit requiring permittees to demand appropriate controls for discharges "into" their systems are appropriate (citing 40 C.F.R. § 122.26(d)(2)(iv)(D)), the provision quoted by the State Board is expressly limited to discharges from "construction sites." 40 C.F.R. § 122.26(d)(2)(iv)(D). Petitioners do not argue that they have no responsibility to regulate discharges from "construction sites."

VII. CONCLUSION

For the foregoing reasons, and the reasons set forth in Petitioners' additional individual briefs, judgment should be granted in favor of Petitioners and a writ of mandate issue.

Dated: March 22, 2004

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PROOF OF SERVICE

Re: **IN RE L.A. COUNTY MUNICIPAL LITIGATION** *[Cities of Arcadia, et al. v. RWQCB, LASC Case No. BS080548; Angeles v. RWQCB, LASC Case No. BS080753; County of Los Angeles v. RWQCB; LASC Case No. BS080758; City of Alhambra v. RWQCB, LASC Case No. BS080791; Los Angeles County EDC v. RWQCB, LASC Case No. BS080792; City of Monrovia, et al. v. RWQCB, LASC Case No. BS 080807]*

I declare as follows:

I am employed in Los Angeles County. I am over the age of 18 and not a party to the within entitled cause. My business address is 624 S. Grand Avenue, 22nd Floor, Los Angeles, California 90017.

On March 22, 2004, at my place of business, at Los Angeles, California, I served the attached:

PETITIONERS' COORDINATED OPENING TRIAL BRIEF ON CERTAIN PHASE I WRIT OF MANDATE ISSUES

on the interested parties in this action.

☒ **By Verilaw** – a true and correct copy of the document was electronically served to counsel of record by electronic transfer of the document file via the Internet to Verilaw on March 22, 2004 [Pursuant to "Order Authorizing Electronic Service of Court-filed Documents" entered in this litigation on June 18, 2003.

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

Executed on March 22, 2004, at Los Angeles, California.

[Original Signature on File with the Court]
Danette Armstead